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## **Federalism in Bosnia and Herzegovina**

### **1. INTRODUCTION**

The state structure of Bosnia and Herzegovina is not specifically defined by the constitution or by any other legal act. Therefore the key elements of federalism, like the division of the responsibilities of the federal units and the state of Bosnia and Herzegovina, their degree of autonomy and the rights to represent on the international scene, are also the key elements of the main legal and political topics in Bosnia and Herzegovina constitutional reforms. Considering that the suggestions for the constitutional reforms vary from certain amendments to the current constitution to passing a new constitution for Bosnia and Herzegovina, the topic of federalism in Bosnia is involved in every segment of the constitutional law of Bosnia and Herzegovina and goes beyond the frames of this article. The understanding of the considered problems of federalism in Bosnia and Herzegovina shall be alleviated by a short description of the formation of Bosnia and Herzegovina, its territorial, administrative and legal structure and the political climate explained through the scientific attitudes towards the constitutional structure. The biggest challenge of this analysis is the determination of the objective situation based on the current legal situation and the real needs for change, considering that scholarly articles on federalism are extremely rare in Bosnia and Herzegovina. Ethnic division is the main factor of the current situation and, although it is unusual for this kind of legal analysis, it will be of a great importance for the determination of the elements of federalism in Bosnia and Herzegovina.

### **2. HISTORY OF THE FORMATION OF THE CONSTITUTION OF BOSNIA AND HERZEGOVINA**

With the decay of Yugoslavia in 1991 and 1992, five new states which kept the earlier republican borders were established: Slovenia, Croatia, Macedonia, Bosnia and Herzegovina and The Federal Republic of Yugoslavia (consisting of Serbia and Monte Negro). The escalation of the conflict in Bosnia and Herzegovina came with the independence referendum held on 29 February and on 1 March 1991 when 98% of voters voted for independence. After the referendum, on 6 April 1992, the European Community countries recognized Bosnia and Herzegovina as a sovereign and independent state with the existing borders. The Serbian population strongly opposed the referendum, and in the end boycotted it, because they wanted Bosnia and Herzegovina to be a part of what was left of Yugoslavia. Their influence was illustrated by the 1991 population census which found that

Bosnia and Herzegovina consists of 43.47% Bosniaks (Muslims), 31.21% Serbs, 17.38% Croats and 7.94% 'other.' Bosnia and Herzegovina has been called 'Small Yugoslavia' because its majority population consisted and still consists of Serbs, Croats and Bosnian Muslims, unlike other Yugoslavian republics in which only one nationality is a majority. Because of its multi-ethnicity, Bosnia and Herzegovina has at many times been a place of mass manipulation<sup>1</sup>, where the main political groups encouraged religious intolerance hoping to gain confidence of certain population groups, which they hoped would support them in accomplishing their goals. Bad political climate and differing opinions about Bosnia and Herzegovina's future led to war, which lasted from April 1991 until September 1995. During the war, some illegal state formations were made. On 9th and 10th November 1991 a plebiscite for Serbian population was held and they voted for an independent Serbian republic (later known as the Republic of Srpska). Croats formed the 'Croatian community of Posavina' and the 'Croatian community of Herzeg-Bosnia'. Because of the unwillingness of the parties involved to find a solution, the International community tried to propose a solution several times. After a number of unsuccessful attempts in Dayton (Ohio, USA) an agreement finally led to an end of the war. This agreement was reached between five major powers (USA, Russia, England, Germany and France) and Federal Republic of Yugoslavia, Croatia and the representatives of the three nations in Bosnia and Herzegovina. All the documents of this peace agreement, which was accepted in Dayton, were signed on 14 December 1995 in Paris. The Peace agreement for Bosnia and Herzegovina consists of 12 documents, out of which the major are The General Framework Agreement for Peace in Bosnia and Herzegovina and Annex 4, which consists of the Constitution and determines the state structure, organization, responsibilities and functioning of the state institutions and other important issues. With this constitution, which was imposed on Bosnia and Herzegovina<sup>2</sup>, there were some changes in the internal state structure, and as a consequence unitary Bosnia and Herzegovina became a complex state. There was also a change in the name of the country, so instead of former 'Republic of Bosnia and Herzegovina' the name 'Bosnia and Herzegovina' was adopted<sup>3</sup>.

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- 1 The leading political groups base the main part of their politics on the representation of the interests of one ethnic group, inevitably emphasizing the ethnic differences and encouraging the fear of the marginalization of one of the groups. As the further analysis will show, the manipulation is additionally alleviated by the current provisions of the Constitution of Bosnia and Herzegovina, which ensure the preservation of the ethnic division. Consequently, the political discussion is dominated by the ethnic interests instead of the necessary legal reforms, economic prosperity or the solution to unemployment; E.g. Francine Friedmann, *Bosnia and Herzegovina – a Polity on the Brink* London 2004) 120.
  - 2 Edin Šarčević appropriately named his publication on the historical background and its implications on the constitution of Bosnia and Herzegovina 'Constitution as the Result of Exigency'; Edin Šarčević, *Ustav iz nužde* (Sarajevo 2010).
  - 3 The loss of the label 'republic' does not mean that Bosnia and Herzegovina gave up on this form of state organisation; Christian Steiner/Nedim Ademović, *Constitution of Bosnia and Herzegovina-Commentary* (Sarajevo 2010) 89; in German, English and Bosnian at: <http://www.kas.de/rspsoe/de/publications/19629/> (last visit 1.11.2011).

### 3. ADMINISTRATIVE STRUCTURE OF BOSNIA AND HERZEGOVINA ACCORDING TO THE CONSTITUTION

According to Article 1 (1) of the Constitution of Bosnia and Herzegovina, Bosnia and Herzegovina continues its legal existence under international law as a state, with its internal structure modified by the Constitution and with its present internationally recognized borders. Furthermore, Article 1 (3) states that Bosnia and Herzegovina consists of the two 'entities': The Federation of Bosnia and Herzegovina and The Republic of Srpska. The term 'entity' has its roots in the Latin word 'ens, entis' which has the meaning 'the one that is, the one that exists'. In the English language the word 'entity' can mean a legal person, a rights holder, an essence, or a being. The term 'entity' had not been used in the constitutional law, and until the Dayton agreement it was almost unknown to the constitutional legal practice. Since the Federation of Bosnia and Herzegovina<sup>4</sup> (by this it is meant the entity), used the term 'federation' even before the making of the constitution, and the other unit, the Republic of Srpska, uses the term 'republic', where both terms refer to a certain type of state organization, it was important to find a term for the federal units which would be neutral with regards to their legal nature. The term 'entity' leaves enough space for different legal interpretation in regards the organisation of the state, and is rather a value neutral description of the situation as found.<sup>5</sup> Because of the same reason the term federal unit was not usable, since it would create an illogical structure where The Federation of Bosnia and Herzegovina would become a 'federation within the federation'.

The two entities, the Republic of Srpska and the Federation of Bosnia and Herzegovina, as parts of Bosnia and Herzegovina, have, in a constitutional-legal sense, a status of federal units, and not the status of member states. Entities like these are formed with the Constitution of Bosnia and Herzegovina, or they are a result of the transformation of the internal structure of Bosnia and Herzegovina, as defined by Article 1 (1) of the Constitution. Bosnia and Herzegovina with its two entities is a special legal phenomenon, which has not been seen in constitutional practice so far. It is considered that its internal structure is made on the basis of Swiss federalism, but as the following analysis will show, besides some common elements there are also a lot of differences between these two federal structures.<sup>6</sup> A correlation could also be made between Bosnian internal structure and the internal structure of the former Austro-Hungarian Empire, but there is also a basic difference. The Austro-Hungarian Empire consisted of two unitary parts, whereas Bosnia and Herzegovina consists of one unitary (The Republic of Srpska) and one federative (The Federation of Bosnia and Herzegovina) unit. The Federation of Bosnia and Herzegovina consists of ten federal units (cantons), whose number and size were determined by the war consequences, ethnic composition of the population and borders between the entities. Both entities have their own constitution, which has to be in accordance with the Constitution of Bosnia and

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4 By signing the Washington agreement in March 1994 the Croatian community of Herzeg-Bosnia was abolished and the Republic of Srpska was legalized by the peace agreement.

5 Christian Steiner/Nedim Ademović, *Constitution of Bosnia and Herzegovina-Commentary* (Sarajevo 2010) 109.

6 E.g. Nijaz Duraković, *Uporedni politički sistemi* (Sarajevo 2010) 235.

Herzegovina. When determining the division of the competences between the state and entity institutions, a method which is characteristic for the states with federal structure was applied, where the basic assumption is a division of the competences in favour of the entity. Article 3 (1) of the Constitution of Bosnia and Herzegovina determines the matters which fall under the competence of Bosnia and Herzegovina:

- a) Foreign policy
- b) Foreign trade policy
- c) Customs policy
- d) Monetary policy as provided in Article VII
- e) Finances of the institutions and for the international obligations of Bosnia and Herzegovina
- f) Immigration, refugee and asylum policy and regulations
- g) International and inter-entity criminal law enforcement, including relations with Interpol
- h) Establishment and operation of common and international communications facilities
- i) Regulation of inter-Entity transportation
- j) Air traffic control

This quite restrictive way of determining responsibilities of institutions of Bosnia and Herzegovina caused different problems in practice when establishing the basic functions typical for a sovereign state, and disabled the relations between the citizens (citizens of Bosnia and Herzegovina) and the institutions of the government because these citizen-institutions relations practically ended on the entity level.<sup>7</sup> The reason lies in the fact that the institutions of Bosnia and Herzegovina did not have competences in the domain of defense<sup>8</sup> and police<sup>9</sup>, and on the state level the only judicial institutions in a wider sense were the Constitutional Court, the Ombudsman and the Human Rights Chamber. Under the influence of the High Representative and the international community the competences of Bosnia and Herzegovina were expanded in the year 2000, establishing the Court of Bosnia and Herzegovina (competent for criminal and administrative acts without the jurisdiction of the Supreme Court)<sup>10</sup>, the State

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7 Venice Commission, Opinion on the need for a Judicial Institution at the Level of the State of Bosnia and Herzegovina, CDL-INF (98) 17, Strazburg 1998., <http://www.venice.coe.int/docs/1998/CDL-INF%281998%29017-e.asp> (last visited on 10.4.2011).

8 The Law on Defense of Bosnia and Herzegovina was adopted on 28<sup>th</sup> December 2005 and regulates:

- A unique defense system in Bosnia and Herzegovina
- The role of all elements in the defense system
- Unique Armed forces of Bosnia and Herzegovina
- Civil observation of the Armed forces of Bosnia and Herzegovina
- The chain of command over the Armed forces of Bosnia and Herzegovina
- Unique budget of defense
- Transition of the competences in the field of defense from the entities to the state level
- The units in the Armed forces of Bosnia and Herzegovina.

9 The Laws on police reform were adopted on 14th April 2008 and were the crucial precondition for the signing of the Stabilization and Association Agreement between Bosnia and Herzegovina and the European Union on 16th June 2008.

10 Law on Court of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 26/00.

Attorney's Office<sup>11</sup>, and the Commission on Human Rights, which was established temporarily and had to finish cases which were not finished by the Human Rights Chamber. Some very important institutions were also established later, such as the Ministry of Defense, Ministry of Security, Indirect Taxation Authority etc., but despite all these there were still some areas whose functioning is of vital interest for the whole country and which were not covered by the competence of any institution on the state level. For example, there is still no Supreme Court established on the state level, which would take over the competence of harmonizing the jurisdiction on the entity level<sup>12</sup>. While on the Federation level there are matters which belong to the joint competences of the cantons, such joint competences do not exist in relation between the entities and the state. Entities established a structure similar to a state structure, including legislative, executive and judiciary. The same applies to the canton level. Bosnia and Herzegovina has a population of around 4 million, and its complicated state structure is responsible for most of the budget spending, which raises questions of how to reorganize the administrative structure. This situation is further complicated by the Office of the High Representative, whose authorities and functions will be described below.

The administrative structure is further complicated through the establishment of the Brčko District. The Brčko District is an area on the Sava river, with around 80,000 inhabitants and nearly the same population structure as it exists on the state level. It is therefore called the "micro-universe" of Bosnia and Herzegovina.<sup>13</sup> Because of the geographical and strategic importance of Brčko, the political parties were unable to reach an agreement on Brčko during the Dayton negotiations. The parties agreed to binding arbitration on the disputed territory<sup>14</sup> and the Arbitral Tribunal issued a Final Award on March 5<sup>th</sup> in 1999<sup>15</sup>, establishing the Brčko District as a unit of self government under the sovereignty of Bosnia and Herzegovina. According to the Final Award, the District government consists of a District Assembly, an Executive Board selected by the Assembly, an independent judicial system with two courts, trial and appellate, and a unified police force with complete independence from police establishments of the two entities.<sup>16</sup> The introduction of the status of the Brčko District to the Constitution of B&H in

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11 Law on Attorney of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 24/02.

12 In Bosnia and Herzegovina there are the Supreme Court of the Federation of Bosnia and Herzegovina and the Supreme Court of the Republic of Srpska.

13 Ulrich Karpen, 'Nation Building im Kleinen-Erfahrungen beim Aufbau von Bosnien und Herzegovina' (2008) *Verfassungen- Zwischen Recht und Politik* 500, 512.

14 Article 5 of the Annex II of the Dayton Peace Agreement.

15 Final Award of the Arbitration Tribunal for the Dispute over the Inter-Entity Boundary Line in Brcko Area, available at: <http://www.minoritycentre.org/sh/library/arbitration-brcko-area-final-award-annex>; It was complemented by an Annex issued on August 18th, 1999; Based on the Final Award a Statute of the Brcko District of Bosnia and Herzegovina was adopted on December 7th, 1999; available at: [http://www.ohr.int/ohr-offices/brcko/default.asp?content\\_id=5367](http://www.ohr.int/ohr-offices/brcko/default.asp?content_id=5367); For further information, see Christoph Schreuer, 'The Brcko Final Award of 5 March 1999' (1999) *Leiden Journal of International Law* 575.

16 Ulrich Karpen, 'Brčko District-Constitution and Law', in Christian Steiner/Nedim Ademović, *Constitution of Bosnia and Herzegovina-Commentary* (Sarajevo 2010) 877, 882.

Article 6 (4) was the first democratically adopted amendment to the Constitution of B&H on 26 March 2009.<sup>17</sup> The District Brčko is considered to be a *de facto* third entity<sup>18</sup>, which cannot be regarded as a federal unit since it is not afforded the right to participate at the state central level<sup>19</sup>.

#### 4. FEDERALISM IN THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

The term 'federalism' has its roots in the latin word 'foedus' which means alliance or agreement. Generally, the term federalism is used as a rather vague definition of any kind of association of autonomous units.<sup>20</sup> There are several definitions of federalism each having three basic principles in common. These principles illustrate which states could be considered federal states:

1. supremacy of the federal state
2. autonomy of the federal units
3. participation of the federal units in the competences of the federation.<sup>21</sup>

The Constitution of Bosnia and Herzegovina did not determine the form of its state structure. Article 3 (3) of the Constitution determines that Bosnia and Herzegovina consists of two entities, the Federation of Bosnia and Herzegovina and the Republic of Srpska, which implies that it is a complex state, but there are still some discussions whether it is a federation, a confederation or a union. The Dayton Peace Agreement, which contains the Constitution of Bosnia and Herzegovina (Annex 4), was a solution for ending the war and the only compromise that could be achieved in that moment. Because of this, it is one of the shortest constitutions in the world with only twelve articles. The Constitution contains many new concepts unknown in constitutional theory and several unclear issues have, from the day of its signing, led to different interpretations by the leading lawyers in Bosnia and Herzegovina.

The Bosnia and Herzegovina constituent peoples representatives' different interests are reflected in the diverse opinions of the legal experts on state structure. Especially diverse is the legal science in the Republic of Srpska and in the Federation of Bosnia and Herzegovina. The most disagreement was during the first few years after the Constitution entered into force. In 1996, prominent lawyer and later president of the Republic of Srpska, Kuzmanović, stated that Bosnia and Herzegovina was a union. In his opinion, entities got the competences and authorities that are typical for independent states; and therefore, they were stable state-causative subjects of the Union of Bosnia and Herzegovina.<sup>22</sup> This

17 Official Gazette of Bosnia and Herzegovina, No. 25/09.

18 Ulrich Karpen, 'Brčko District-Constitution and Law', in Christian Steiner/Nedim Ademović, *Constitution of Bosnia and Herzegovina-Commentary* (Sarajevo 2010) 877, 885.

19 Goran Marković, *Federalizam u ustavnom sistemu Bosne i Hercegovine* (doctoral thesis, Beograd 2009) 234.

20 E.g. Michael Burgess, *Federalism and European Union: The Building of Europe, 1950-2000* (London 2000) 13.

21 Kasim Trnka, *Ustavno pravo* (2<sup>nd</sup> edn Sarajevo 2006) 238.

22 Rajko Kuzmanović, 'Ustav i ustavno uređenje Unije Bosne i Hercegovine' (1996) 1-4 Srpska pravna misao 7, 12; Goran Marković further develops this argument stating that despite the

argument is directly opposed to Article 1 (1), which states that Bosnia and Herzegovina continues its legal existence under international law as a state with modifications in its internal structure.<sup>23</sup> On the contrary, Kuzmanović further uses the fact that Bosnia and Herzegovina was established under the international, and not the national law, to come to the conclusion that it was a confederation or a union. Considering that Bosnia and Herzegovina had some less important state institutions and did not have courts, the army and the police and many other functions that make a sovereign state, he came to the conclusion that it was a union.<sup>24</sup> He ignored the fact that according to Article 3 (5) of the Constitution of Bosnia and Herzegovina, the institutions of Bosnia and Herzegovina, beside the competences listed in the Constitution, had to take over the competences in the following matters:

- a) Bosnia and Herzegovina shall assume competence for matters agreed by the Entities;
- b) or are provided for in Annex 5–8 to the Peace Agreement (this involves very important matters like human rights, the rights of refugees and displaced persons, a system of arbitration for the solution of disputes);
- c) or are necessary to preserve the sovereignty, territorial integrity, political independence and international personality of Bosnia and Herzegovina.

The same Article states that within six months of the entry into force of this Constitution, the entities should begin negotiations with the aim to include other matters in the competences of Bosnia and Herzegovina. Leaving his first, rather radical opinion, a few years later Kuzmanović regarded Bosnia and Herzegovina as a complex state with the entities as state-causative units without which Bosnia and Herzegovina could not function as a state.<sup>25</sup> In the Constitution of Bosnia and Herzegovina there is defined state structure. Structure can only be determined by examining the division of the entity and state competences. Because the competences of the entities are wider and the state competences are narrower, Kuzmanović came to the conclusion that it is a federal-confederal state.

The change in Kuzmanovic's attitudes can be seen from his current opinion that this is a *sui generis* federation where the entities are federal units with a high level of decentralization and state elements<sup>26</sup>. However, he justifies his

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international recognition of Bosnia and Herzegovina the factual situation was that in 1992 three independent national states were established. He further argues that it is not rare in comparative constitutional law that a fictional state is recognised as independent; Goran Marković, *Federalizam u ustavnom sistemu Bosne i Hercegovine* (doctoral thesis, Beograd 2009) 127, 458.

23 Article 1 (1) is an excellent example of the Dayton Agreement's constitutional compromise. By consenting to the BiH Constitution, the signatory parties gave up their respective international personalities – the Republika Srpska gave up its factual international personality due to the fact that it was not internationally recognised and the Federation gave up its feigned international personality; Christian Steiner/Nedim Ademović, *Constitution of Bosnia and Herzegovina-Commentary* (Sarajevo 2010) 89.

24 Rajko Kuzmanović, 'Ustav i ustavno uređenje Unije Bosne i Hercegovine' (1996) 1-4 Srpska pravna misao 7, 13.

25 Rajko Kuzmanović, *Ustavno pravo* (3<sup>rd</sup> edn Banja Luka 2002) 308.

26 Rajko Kuzmanović, 'Podjela nadležnosti između entiteta i institucija BiH u kontekstu ustavnih promjena' (2009) 18 Pravna riječ 11, 15.

change of opinion with the breach of the constitutional division of the competences between the entity and the institutions of Bosnia and Herzegovina by the illegal competence transfer from the entities to the state institutions without the approval of the National Assembly of the Republic of Srpska. Article 3 (5) states that Bosnia and Herzegovina would take over the responsibility for matters agreed by the entities. In fact, most of the competences were transferred because of the Bonn powers<sup>27</sup> of the High Representative in Bosnia and Herzegovina and because Bosnian politicians were not able to reach an agreement on some crucial matters important for the functioning of Bosnia and Herzegovina as a state and for approaching the Euro-Atlantic integrations. Irrespective of the reasons mentioned above, the changes in the distribution of competences led to the new general understanding of the state structure in the legal science of Bosnia and Herzegovina. Today there are still different, mostly obsolete, understandings of the state structure of Bosnia and Herzegovina. For example, Dmičić, another important legal expert in the Republic of Srpska, considers Bosnia and Herzegovina, by its present constitutional structure, a complex state with distinctive confederal elements or elements of a union. He based his conclusions on Article 3 of the Constitution of Bosnia and Herzegovina, holding that in this article a determined position of the entity goes beyond the federal standards.<sup>28</sup> To support this opinion, he argues that according to the Constitution the entities had a significant level of international subjectivity, and therefore a certain contracting capacity, because of the right of the entity to independently, establish some special parallel relations with the neighbor states (in conformity with the sovereignty and territorial integrity of Bosnia and Herzegovina) and the right to establish resorts and parliamentary institutions for international relations. He also described the possibility of the entity's participation in foreign policy through the Presidency of Bosnia and Herzegovina,<sup>29</sup> which is responsible for the foreign policy decisions reached by consensus. Without consensus two votes of the Presidency members in favor are enough to determine foreign policy decisions. In that event every member of the Presidency may state that the decision is bad for the vital interests of the entity from which he was elected.

For a complete understanding of these constitutional provisions, a historical interpretation of the entity's rights to have special parallel relations with the neighbor states is necessary. Its roots come from the idea of a confederal relation between the Federation of Bosnia and Herzegovina and the Republic of Croatia.<sup>30</sup> With the formation of the Federation of Bosnia and Herzegovina, Croats gave up

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27 The powers of the international community have been amended at periodic Peace Implementation Council Meetings in Florence (June 1996), Paris (November 1996), Sintra (May 1997), Bonn (December 1997) and Luxembourg (June 1998). The new powers of the High Representative were also named "Bonn powers".

28 Mile Dmičić, 'Podjela nadležnosti i opravdanost prenosa sa Republike Srpske na institucije Bosne i Hercegovine' (2009) 18 *Pravna riječ* 49, 50.

29 Presidency of Bosnia and Herzegovina consists of three members: one Bosniak, one Croat, who are elected from the territory of the Federation and one Serb, who is elected from the territory of the Republic of Srpska (Article 5 of the Constitution).

30 Zarije Seizović calls this act a 'relic' of the entity's subjectivity under the international law, which was abolished with the Dayton agreement; 'BH Entiteti: Države u državi i/li pravno teorijska enigma' (2008) *Međunarodno javno pravo – zbirka eseja* 22, 24.

their own territorial unit.<sup>31</sup> However, this idea was never realized. The fact that both Croatian Catholics and Serbian Orthodox Christians live in Bosnia and Herzegovina served as a basis to enforce the special parallel relations with the neighbor states, in order to have undisturbed cooperation important for preserving the national identity.<sup>32</sup> This constitutional provision is considered discriminating by Bosniaks, because they do not have a neighbor state to have such relations with, and because this constitutional provision was misused many times by the political circles that tend to divide Bosnia and Herzegovina and by the neighbor states which took this as a basis for interfering in the internal matters of Bosnia and Herzegovina. However, the Constitution also puts some limits to this right of the entities, so the entities may establish these relations only within their competences, and they have to be in accordance with the sovereignty and territorial integrity of Bosnia and Herzegovina. Additionally, because these relations are 'special relations', it is necessary to establish some 'general relations' between Bosnia and Herzegovina and the neighbor states. International agreements of the entities with other states or international organizations are only possible with the consent of the Parliamentary Assembly.

Dmičić correctly emphasizes that Bosnia and Herzegovina might be considered a protectorate, given the role of the High Representative, who, even though he did not get competences by the Constitution, has some constitutional and legislative functions, based on Article 5 of the Annex 10 of the General Framework Agreement and Article 11 of the so-called 'Bonn powers,' and the presence of the international military forces in Bosnia and Herzegovina. However, it is questionable whether 'protectorate' is the right term, since the international administrator is not a single state but the international community, the foreign affairs are unlike the conventional protectorate in the hands of Bosnia and Herzegovina and numerous internal affairs are under the control of an external administrator.<sup>33</sup> Many constitutional and legislative changes happened as a result of the actions taken by the High Representative. Additionally, members of some institutions of Bosnia and Herzegovina are foreign citizens. This legal situation is unwanted, but probably necessary for Bosnia and Herzegovina, because there is no positive political climate for reaching agreements between the representatives of the three constituent peoples.<sup>34</sup> According to Annex 10 of the Peace Agreement, the High Representative is the final authority regarding interpretation of the Agreement on the Peace Implementation Conference. He also has authority to implement the Peace Agreement, coordinate civilian authorities in Bosnia and Herzegovina

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31 Kasim Trnka, *Ustavno pravo* (2<sup>nd</sup> edn Sarajevo 2006) 263.

32 The names of the nationalities in Bosnia and Herzegovina were also discussed, so the names varied from Bosnian Muslims, Bosnian Catholics and Bosnian Orthodox Christians to Bosniaks, Bosnian Croats and Bosnian Serbs and finally adopted Bosniaks, Croats and Serbs by the constitution.

33 Therefore Steiner/Ademović consider the concept of trusteeship of the UN Charter to be more appropriate; Christian Steiner/Nedim Ademović, *Constitution of Bosnia and Herzegovina-Commentary* (Sarajevo 2010), 791.

34 The High Representative imposed a national anthem, a common flag, common vehicle license plates, a common passport and a common currency. He also imposed almost 90 laws and binding decisions issues like the media, industry, property rights and refugee return; Marcel Stoessel, *The Role of the OSCE in Bosnia and Herzegovina* (Geneva 2001) 3.

and utilize other technical powers, based on the teleological interpretation of Annex 10 of the Dayton Agreement, which partly became a free law making power.

Trnka, an influential expert in the field of constitutional law from the Federation, thinks that the Constitution of Bosnia and Herzegovina created relations and institutions which mostly match the theoretical model of the complex state, which is closest to the federative structure. He gives these facts:

- Two subjects of the federation (citizens and federal units) are represented in the Parliamentary Assembly of Bosnia and Herzegovina.
- The Constitution of Bosnia and Herzegovina is an act which determines the entity's position and competences of the entities and the institutions of Bosnia and Herzegovina. Bosnia and Herzegovina is the carrier of the sovereignty in international and internal relations.
- There are separate institutions on the state and entity level.
- There is supremacy of the Constitution over the laws of Bosnia and Herzegovina, constitutions and laws of the entities.
- Bosnia and Herzegovina is an international subject with full capacity (entities can only make international agreements in the area of their jurisdiction and with the consent of the Parliamentary Assembly of Bosnia and Herzegovina).
- There is a citizenship of Bosnia and Herzegovina (citizenship of the entities has no meaning in international relations).<sup>35</sup>

According to his opinion, which is representative for the most Bosniak legal experts, the basic principles of the federally structured state are present. There is supremacy of the state over the entities, but the entities have a high level of autonomy and participate in the realization of the state competences.

Pobrić, another expert from the Federation of Bosnia, considers the state structure of Bosnia and Herzegovina is, due to its originality, a new phenomenon in the constitutional and political modernity. Indisputable is the fact that the state structure of Bosnia and Herzegovina shows elements of federalism, because these elements are 'ethnic elements', he calls the federalism in Bosnia and Herzegovina an 'ethnic federalism'. Ethnic federalism means that every ethnic community is organized into a federal unit in the federally structured state.<sup>36</sup> This definition is not applicable, because only the Republic of Srpska is structured as an ethnic community and the Federation of Bosnia and Herzegovina is structured as a multi-ethnic community. The Constitution taken as a whole would show that Bosnia and Herzegovina is a political union of the three constituent peoples (Serbs, Croats and Bosniaks) and whose structure is based on elements of the ethnic federalism.<sup>37</sup> Federalism is a way of dealing with the nationality matters in multi-ethnic states, a way for the ethnic communities to achieve their interests, their autonomy and to participate in the political life. The fact is, the internal territorial-political borders determined by the Constitution match the so-called 'ethnic borders' that are the result of the war more than the social circumstances developed through social interaction.<sup>38</sup> Pobrić implies that this situation completely

35 Kasim Trnka, *Ustavno pravo* (2<sup>nd</sup> edn Sarajevo 2006) 254.

36 Nurko Pobric, *Ustavno pravo* (1<sup>st</sup> edn Mostar 2000) 321.

37 Nurko Pobric, *Ustavno pravo* (1<sup>st</sup> edn Mostar 2000) 322.

38 Nurko Pobric, *Ustavno pravo* (1<sup>st</sup> edn Mostar 2000) 318.

marginalizes the citizens of Bosnia and Herzegovina and emphasizes the ethnicity called 'constituent peoples'.<sup>39</sup> The interests of the citizens are no longer discussed, only the interests of the ethnic community and the rest of the citizens who do not belong to three major peoples are discriminated against, as evidenced by a Constitution that does not allow this group to stand for election in the Presidency or the House of Peoples in the Parliamentary Assembly. The conclusion would be that the Constitution of Bosnia and Herzegovina legalized ethnic authoritarianism and disabled functioning of the state in a way that all modern states function no matter if they are multi-ethnic or not.<sup>40</sup>

When studying the state structure of Bosnia and Herzegovina it is necessary to accept that it is a state with the structure yet unknown in constitutional theory, it is a *sui generis* state which consists of two asymmetric entities, the Republic of Srpska that is structured according to the unitary principle and the Federation of Bosnia and Herzegovina that is structured according to the federal principle where all the three constituent peoples live with other nationalities barely mentioned in, and discriminated by the Constitution. When adopting the Constitution, Bosnia and Herzegovina could have been characterized as a confederation or a union, because of the very restrictive competences of the state institutions and very wide competences of the entities, which were functioning completely independently at that time. But the situation has significantly changed as many of the competences have been transferred from the entities to the state institutions and now Bosnia and Herzegovina should be considered a federally structured state.

1. The Constitution of Bosnia and Herzegovina uses the term 'state' only for Bosnia and Herzegovina. There are many federations where the federal units have the status of a state (with a limited capacity of course), but not the entities in Bosnia and Herzegovina that do not have the status of a state, but a federal unit. Bosnia and Herzegovina is the carrier of the sovereignty in international relations. The constitution and the laws of the entities have to be in accordance with the Constitution of Bosnia and Herzegovina.

2. Federal units in the state are not sovereign, but autonomous. This means that the federal units have their competences determined by their federal constitutions and their own legislative, executive and judicial system of institutions.<sup>41</sup> Otherwise, a federation could not be differed from a decentralized unitary state.

3. Article 3 of the Constitution determines the division of the competences between the state institutions and the entities. The competences of Bosnia and Herzegovina are listed exhaustively and are very restrictive. However, these are

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39 The Constitutional Court denies the affiliation to one ethnic group to be essential. The territory or specific institutions of the entities serve as a legal point of reference for the election to B&H institutions; Constitutional Court, 1.7.2000., U 5/98-III, Official Gazette of Bosnia and Herzegovina, No. 23/00, para. 67.

40 The ethnic federalism in Bosnia and Herzegovina is most reflected in the institute of protection of the vital national interest, which is capable of blocking every important reform process in order to fulfill the needs of one ethnicity. The need for reform of this institute is discussed further below.

41 Ferid Otajagic, *Drzavna javna subjektivna prava s posebnim osvrtom na unutrašnja prava drzave* (Sarajevo 2005) 137.

not the only competences of the institutions of Bosnia and Herzegovina as Article 3 (5) contains additional competences of the state institutions and the obligation of the entities to begin negotiations within six months of the entry of the Constitution into force with an aim to include other matters in the competences of the institutions of Bosnia and Herzegovina. Functions and competences of the entities are all the functions and competences that are not explicitly given to the state by the Constitution. One important provision of the Constitution is that the constitutions and laws of the entities have to be in accordance with the Constitution of Bosnia and Herzegovina, controlled by the Constitutional Court of Bosnia and Herzegovina, while the decisions on the state level do not need the consent of the entities.

## 5. FEDERALISM IN THE LIGHT OF CONSTITUTIONAL REFORMS

The Constitution of Bosnia and Herzegovina has many solutions that are different from the democratic standards and result from the compromise made to end the war and establish a basis that could begin the stabilization of Bosnia and Herzegovina. This kind of constitution, with its inevitable flaws from the moment of entry into force, points to the need of some radical amendments or even a new constitution. But considering that the Dayton Peace Agreement legalized the Republic of Srpska, which was formed during the war in Bosnia and Herzegovina, it is not difficult to conclude that the Constitution of Bosnia and Herzegovina is the only guarantee of its survival. This is the fear of the political representatives of the Republic of Srpska, that with a new constitution they would lose their guarantee and the Bosniak politicians would use the opportunity to try to centralize Bosnia and Herzegovina again. When representatives of one nationality are against the change, in this case against a new constitution, change is not only impossible, but also unwanted, because making such an important decision without the consent of the political representatives of any nationality would be fatal for the future of Bosnia and Herzegovina. There is no simple solution for the current situation.

The Constitution of Bosnia and Herzegovina provides the amendment process in Article 10:

### 1. Amendment procedure

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.

### 2. Human Rights and Fundamental Freedoms.

No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article 2 of this Constitution<sup>42</sup> or alter the present paragraph.

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42 The right to live, the right not to be subjected to torture or to inhuman or degrading treatment or punishment, the right not to be held in slavery or servitude or to perform forced or compulsory labor, the rights to liberty and security of person, the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings, the right to private and

Therefore, the Constitution may be amended by a decision of both Houses of the Parliamentary Assembly (the House of Representatives takes care of the interests of all the citizens of Bosnia and Herzegovina and the House of Peoples takes care of national equality of Bosniaks, Serbs and Croats as the constituent peoples of Bosnia and Herzegovina). The Constitution may be amended with the majority of those voting in the House of Peoples (national consensus) and with two-thirds majority of those voting in the House of Representatives, requiring a majority of all the members in both houses individually. Accordingly, to amend the Constitution it is necessary to have votes of the majority of the citizens' representatives and a national consensus of the representatives of all constituent peoples.<sup>43</sup> The Constitution does not determine who initializes the Constitution amendments, but the generally accepted criterion should be applied and the right should be of the Presidency, the Ministry Council and a certain number of the members of the Parliamentary Assembly.<sup>44</sup> This way of amending the Constitution does not amend the Dayton Peace Agreement, so consent of the signers and witnesses is not needed.<sup>45</sup> The Constitution has to be amended, especially the parts about the human rights and the organization of the institutions of Bosnia and Herzegovina. The Constitution made it impossible for national minorities to be elected in the highest institutions of Bosnia and Herzegovina, such as the Presidency and the House of Peoples in the Parliamentary Assembly. This was confirmed as a violation of the European Convention on Human Rights in a December 22, 2009 decision of the European Court of Human Rights. In this case citizens of Roma and Jewish descent sued the state of Bosnia and Herzegovina because they cannot stand for election in the House of Peoples of the Parliamentary Assembly or the Presidency of Bosnia and Herzegovina<sup>46</sup>.

The Venice Commission, in its opinion on the Constitutional situation in Bosnia and Herzegovina, stated that 'the responsibilities of the State of Bosnia and Herzegovina cannot be compared with the powers enjoyed by European federal states such as Switzerland, Belgium, Austria, Germany or Russia. In these countries legislative powers are mainly concentrated at the federal level, there is a strong federal executive, financial resources are mainly controlled by the federal

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family life, home and correspondence, freedom of thought, conscience, religion, freedom of expression, freedom of peaceful assembly and freedom of association with others, the right to marry and to found a family, the right to property, the right to education, the right to liberty of movement and residence.

43 Amendments can be adopted in the House of Peoples contrary to the will of one constituent people if the Constitutional Court does not find that these amendments are destructive to the vital national interest of the respective people; Christian Steiner/Nedim Ademović, *Constitution of Bosnia and Herzegovina-Commentary* (Sarajevo 2010) 978.

44 Rajko Kuzmanović, *Ustavno pravo* (3<sup>rd</sup> edn Banja Luka 2002) 58.

45 Kasim Trnka, *Ustavno pravo* (2<sup>nd</sup> edn Sarajevo 2006) 42.

46 *Sejdic and Finci v. Bosnia and Herzegovina* (App no 27996/06 and 34836/06) ECHR 22 December 2009; The decision requires Bosnia and Herzegovina not only to make appropriate amendments to the Constitution of B&H, but also to the Constitutions of the entities and cantons, as well as several other laws; see in detail in Nedim Kulenović/Inja Hažialić-Bubalo/Mirza Korajlić, 'Presuda Sejdić i Finci protiv Bosne i Hercegovine: Konkretno posljedice-prvi pregled' (2010), 1 *Sveske za javno pravo-Blätter für öffentliches Recht* 18; Goran Marković, 'Ustavno pravni položaj „Ostalih" u Bosni i Hercegovini', 2 *Godišnjak Pravnog fakulteta u Istočnom Sarajevu* 20, 30.

level and federal courts ensure respect for federal law. None of this applies in BiH.<sup>47</sup> It further stated that the option of abolishing one of the entities is not probable, but the federation consisting of two entities will always be problematic.<sup>48</sup> Therefore the Venice Commission concludes that one of the central issues of reform needs to be the transfer of powers from the entities to the state level.<sup>49</sup>

The sections of the Constitution defining the structure of the institutions of Bosnia and Herzegovina and the institutions of the entities should also be amended. Representatives of the Serbian population are still in favor of preserving the current territorial and competence division. They argue for complete compliance with the Dayton Agreement, which is a guarantee for the existence of the Republic of Srpska as an entity, as a federal unit within Bosnia and Herzegovina. They are against a new constitution that could abolish the Republic of Srpska or make it an administrative unit within Bosnia and Herzegovina. However, the Dayton Agreement also implies that the representatives of the international community should stay in the judicial and administrative institutions of Bosnia and Herzegovina, which is explicitly against the interests of the Serbian politicians. So, they endorse the complete autonomy of the Republic of Srpska and maintaining its competences, without objecting to the possibility of giving some competences, by consensus, to the institutions of Bosnia and Herzegovina. There is also a request to preserve the constitutional principle of protecting the entities vital interests as well as the vital national interests of all three constituent peoples, and a request that any further transfer of competences from the entities to the state institutions is made in accordance with the Constitution.<sup>50</sup>

There are also some radical expectations and hopes of establishing a united and state-constituent strategy of the Republic of Srpska within the state of Bosnia and Herzegovina, as a *sui generis* loose state community with the characteristics of the protectorate<sup>51</sup>. These kinds of expectations also imply taking back competences from the state to the entity level, with the explanation that the decisions of the High Representative are opposing the Constitution. When the Constitution entered into force the entities position could characterize Bosnia and Herzegovina was a union with the state institutions not having the usual competences of a federal state. This was also a starting point for the politicians to continue their job and not keep that level of the state structure.

One further problem is the request to keep the institute for protection of vital national interests (regarding the Presidency it is the vital interest of the entities).<sup>52</sup> The equality of the constituent peoples and entities is ensured by doing so, but

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47 Venice Commission, 'Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative', CDL-AD (2005) 004, 11-12 March 2005, para. 25,

48 *Ibid.* para. 47.

49 Maša Alijević, 'Ustav Bosne i Hercegovine (1995.-2010.) sa posebnim osvrtom na reformu Ustava' (2011) Zbornik radova Pravnog fakulteta Univerziteta u Tuzli 420, 432.

50 Rajko Kuzmanović, 'Podjela nadležnosti između entiteta i institucija BiH u kontekstu ustavnih promjena' (2009) 18 *Pravna riječ* 11, 18.

51 Mile Dmičić, 'Podjela nadležnosti i opravdanost prenosa sa Republike Srpske na institucije Bosne i Hercegovine' (2009) 18 *Pravna riječ* 49, 71.

52 Mile Dmičić, 'Ustavnosudska zaštita vitalnog nacionalnog interesa', *Aktuelnosti i značaj ljudskih prava i sloboda*, Zbornik radova Pravnog fakulteta u Istočnom Sarajevu 293, 301.

the lack of political will for the efficient functioning of state institutions, existence of this institute can lead to the delay or even to an obstruction in the decision-making processes in the state institutions. In the constitutions of both entities an identical definition of the vital national interests is given. As stated, it includes the following matters:

- The right of the constituent peoples to be adequately represented in the legislative, judicial and administrative institutions
- The identity of a constituent people
- Constitutional amendments
- Organization of the institutions
- Equal rights of the constituent peoples in the process of decision-making
- Education, religion, language, culture, tradition and cultural heritage
- Territorial organization
- Medias and other matters which should be treated as of vital national interests, if that is an opinion of the two-thirds majority of those voting in the House of Peoples.<sup>53</sup>

Therefore, anything can be marked as a matter of a vital national interest. Consequently, this definition is used as an indication and orientation. This causes legal insecurity and prevents a democratic decision-making as well as a normal functioning of the state institutions.<sup>54</sup> Note, that if one member of the Presidency marks a decision as bad for the vital interests of the entities, the decision will immediately be directed to the National Assembly of the Republic of Srpska. If the decision is marked by their member of the Presidency the Croat or Bosniak member, it is directed to the House of Peoples of the Federation of Bosnia and Herzegovina. If a decision is rejected by two-thirds of the majority, within ten days, it will not enter into force. This is the only situation where the Constitution enables entities to make decisions about the questions decided on the state level, or to make decisions on the state level impossible, which also invades the sovereignty of the state institutions.<sup>55</sup>

The least democratic solution in the Constitution is the election system. The entities are defined as the electing units for the election of the members for the House of Peoples, the House of Representatives in the Parliamentary Assembly, the Presidency of Bosnia and Herzegovina and the members for the Constitutional Court of Bosnia and Herzegovina. Consequently, Bosnia and Herzegovina is not a one electing unit for elections of the state institutions. There is one solution where all the members of the Presidency are not elected by all the citizens of Bosnia and Herzegovina. Bosniak and Croat members of the Presidency are

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53 Definition of the vital national interests was added with the amendment XXXVII.

54 Nedžad Duvnjak, 'Prilog o posebnim odnosima entiteta sa susjednim državama' (1999) XLI Godišnjak Pravnog fakulteta u Sarajevu 99, 109.

55 Edin Šarčević proposes to preserve the institute for protection of vital interests, but suggests that the entity voting is then no longer required since the interests of the constituent peoples are already ensured; *Ustav iz nužde* (Sarajevo 2010). 392; The entity vote based on Article 4 (3d) of the Constitution provides for a veto by two-thirds of the delegation from either Entity. This veto, which in practice seems potentially relevant only for the RS appears redundant having regard to the existence of the vital interest veto; Venice Commission, 'Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative', CDL-AD (2005) 004, 11-12 March 2005, para. 34.

elected on the elections on the territory of the Federation of Bosnia and Herzegovina and a Serbian member on the elections on the territory of the Republic of Srpska (Article 5 of the Constitution). Accordingly, Bosniaks and Croats from the Republic of Srpska do not elect Bosniak or Croat members, nor do Serbs from the Federation elect a Serbian member of the Presidency.<sup>56</sup> Serbs in the Federation of Bosnia and Herzegovina have no influence on the election of members in the House of Peoples of the Parliamentary Assembly who represent the interests of Serbs. Conversely, Croats and Bosniaks from the Republic of Srpska do not have influence on the election of their representatives. The same rule applies to the election of the representatives in the House of Representatives of the Parliamentary Assembly, which should represent interests and political opinions of all the citizens. The mentioned solutions are directly violating the international conventions on human rights,<sup>57</sup> which should, according to the Constitution, be part of the legal system. Precisely speaking, these solutions violate the equal political rights of the peoples and the citizens in the entire territory of Bosnia and Herzegovina guaranteed by the Constitution, concerning the elections, competences and functioning of the state institutions.<sup>58</sup>

In 2006, Serbian politicians offered a proposition to the constitutional reforms which got the title 'April package' of the constitutional amendments. Although it was never presented to the public, it was discussed behind 'closed doors' and every politician publicly gave his opinion that contributed to the confusion regarding the solution offered. The people of Bosnia and Herzegovina never found out if those amendments could have brought something good or bad for them. However, the common attitude was that the April package of the constitutional amendments made a basis for creating good constitutional solutions. According to what is known of the April package, the state should take over all the competences that are necessary for further negotiations with the European Union and all the competences transferred to the state institutions should be determined as constitutional categories. Also, the House of Peoples should not be an equal partner in the Parliamentary Assembly, but should only intervene when vital national interests are in question. Instead of the Presidency with three members, the role of the President of the Presidency was suggested. The President of the Presidency would represent the state on the international scene and only some decisions would be made by all the members of the Presidency. The Presidency would give up several competences in favor of the Council of Ministers.<sup>59</sup>

This would place the Parliamentary Assembly at the center of the political power, and the President of Bosnia and Herzegovina would only be a representative institution.<sup>60</sup> The April package of the constitutional amendments was not adopted

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56 Venice Commission, 'Opinion on Different Proposals for the Election of the Presidency of Bosnia and Herzegovina', No. 374/2006, 17-18 March 2006, para. 2.

57 *Sejdic and Finci v. Bosnia and Herzegovina* (App no 27996/06 and 34836/06) ECHR 22 December 2009.

58 Enver Išerić, 'Bosna i Hercegovina pred ustavnim izborom' (2011) *Anali Pravnog fakulteta Univerziteta u Zenici* 353, 358.

59 Maša Alijević, 'Ustav Bosne i Hercegovine (1995.-2010.) sa posebnim osvrtom na reformu Ustava' (2011) *Zbornik radova Pravnog fakulteta Univerziteta u Tuzli* 420, 435.

60 Kasim Trnka, 'Korak po korak u ustavne promjene' (2009) *Ustavne promjene u BiH* 61, 62.

for one reason; the preservation of entity elections, which the politicians from the Federation of Bosnia and Herzegovina were opposed, stating that the House of Peoples is enough guarantee that the vital national interests of all three constituent peoples would not be violated. But, Serbian politicians were not prepared to make such a change. The maximum they were willing to accept was that representatives of the House of Peoples would be elected from the entire Bosnia and Herzegovina and not from the territory of entities, so the ethnicity would not have the most important role in elections for this institution, even though it would remain very important.<sup>61</sup> Considering that these constitutional amendments would diminish the significance of the House of Peoples, but entity elections for the House of Representatives would remain, they lose their significance. This is important because the politicians on the state level should represent all the citizens of Bosnia and Herzegovina and not only the citizens of the entities. This prevented the Parliament of Bosnia and Herzegovina from efficiently executing its competences and became an 'electing machine' which created a domination of the leading political parties.<sup>28</sup>

After the failure, by two votes, of the April package of the constitutional amendments, politicians did not manage to get close to any solutions better than the ones from this package. The last negotiations, held in Butmir in 2009, were also a failure, showing that in the last four years not even one proposition to the constitutional changes could be characterized as better than the one in the April package.

The attitudes of the Croatian political representatives, unlike those of the Serbian and Bosniak political representatives, were not considered in the analysis of Constitutional reform, because their demands are usually not adopted and they are often forced to accept the opinions of the Serbian or the Bosniak politicians. According to the population census of 1991, Croats made up 17.38% of the Bosnian population (now assumed even less) underscoring the reason their political representatives in the Parliamentary Assembly lack influence. However, most state and entity institutions require an equal number of representatives of each constituent people on their leading positions, creating "overrepresentation" of Croats in the most important institutions. Another important aspect of the Croatian politics in Bosnia and Herzegovina is the right of the (Bosnian) Croats to vote in the Republic of Croatia elections. In the early 1990s many of the (Bosnian) Croats earned dual citizenship (one Bosnia and Herzegovina, the other Croatia), as a result there are about 270,000 registered Bosnian voters in the national Croatian elections. The first international agreement allowing dual citizenship was signed by Bosnia and Herzegovina and Croatia in 2007, for a long period before this the election rights as well as citizenship have been regarded as illegal by Bosniaks and Serbs.<sup>62</sup> Nevertheless, one of the basic demands of the Croats was

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61 Branislav Borenović, 'Sačuvati entitete' (2009) *Ustavne promjene u BiH* 37, 38.

62 Not nearly as many Bosnian Serbs have a citizenship of the Republic of Serbia. There was a fear that this fact was going to change after the 16th December 2009, the date of the cancellation of the visa requirements in the Shengen states for the citizens of Serbia, Montenegro and Macedonia but not for the citizens of Bosnia and Herzegovina. However, there are no precise data on this issue.

adopted in the Constitutional reform process: to keep the Presidency of three members.<sup>63</sup>

## 6. JUDICIAL ACTIVISM AS AN ALTERNATIVE FOR CONSTITUTIONAL REFORMS

The lack of political will for constitutional reforms did not hinder the development of constitutional law in Bosnia and Herzegovina that occurred through the decisions of the High Representative and the Constitutional Court. Different opinions of constitutional law experts, based on their national background, used and abused by different political options, raised the importance of Constitutional Court decisions on fundamental issues where the interpretation of the respective parties and experts was completely opposite. One of the fundamental and very broadly discussed questions is the division of competences between entity and state level, which is critical to the analysis of the federative character of Bosnia and Herzegovina.

Article 3 (1) of the Constitution of Bosnia and Herzegovina determines what falls under the competence of Bosnia and Herzegovina, while in accordance with Article 3 (3a) all powers and functions not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina shall be those of the entities. The wording 'expressly assigned in this Constitution' indicates that there are powers given to the state outside the scope of Article III.<sup>64</sup> The Constitutional Court in its consistent practice made the very stiff division of powers of Article 3 of the Constitution more flexible by introducing the theory of 'implied powers' to the constitutional law of Bosnia and Herzegovina.<sup>65</sup> The Constitutional Court used the implied powers theory in several judgments establishing *inter alia* that 'in these circumstances, Bosnia and Herzegovina, functioning as a democratic State, is authorised to establish, in the areas under its responsibility, other mechanisms, besides those explicitly provided for in the BiH Constitution, and additional institutions as necessary for the exercise of its responsibilities.'<sup>66</sup>

63 However, at the last presidential elections the Croatian member of the Presidency was mostly elected by the Bosniak voters. This can be seen from the fact that the Bosniak and the Croatian member of the Presidency are elected in the Federation of Bosnia and Herzegovina, and the elected candidate, the Croat Željko Komšić, does not belong to a Croatian political party. This fact leads to two different conclusions. On the one hand, the Bosniaks have shown the will to vote for the best candidate, despite his ethnicity. On the other hand this points to the possibility of the outvoting of the Croats in the Federation of Bosnia and Herzegovina, if the Bosniaks show interest for one of the Croatian candidates. Naturally, the Croatian political parties argued that this President cannot represent the interests of the Croats and demanded the cancellation of the election results.

64 E.g. Article 1 (7) of the Constitution gives the state the sole authority over the design of B&H passports (Constitutional Court, 23.3.2001., U 25/00, Official Gazette of Bosnia and Herzegovina, No. 17/01, para. 31), according to Article VI the state is responsible for constitutional judiciary of the state, according to Article 4 (2) and 5 (1) the Parliamentary Assembly shall adopt an election law etc.

65 Zlatan Meškić, 'Četiri osnovne slobode kao ustavni osnov za harmonizaciju entitetskih privatnopravnih propisa' (2011) Zbornik radova Pravnog fakulteta Univerziteta u Tuzli 355, 357.

66 Constitutional Court, 18.2.2000., U 5/98-II, Official Gazette of Bosnia and Herzegovina, No. 17/00, para. 29; Constitutional Court, 28.09.2001., Official Gazette of Bosnia and Herzegovina,

Two responsibilities of the state set out in the Constitution are especially adequate to influence the strict provision on the division of powers in Article 3 of the Constitution: 1. According to Article 2 of the Constitution there is a responsibility of Bosnia and Herzegovina and both entities to ensure the highest level of internationally recognized human rights and fundamental freedoms, where the human rights and fundamental freedoms provided in the European Convention are directly applicable in Bosnia and Herzegovina and have priority over all other law;<sup>67</sup> 2. According to Article 1 (4) Bosnia and Herzegovina and the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia and Herzegovina. Both provisions of the Constitution are giving common responsibilities to the state and the entities. The question is whether on the basis of the implied powers theory is it possible to establish that common responsibilities imply concurrent competences of the state and the entities, which are nowhere explicitly provided in the Constitution of Bosnia and Herzegovina.<sup>68</sup> The newest line of practice of the Constitutional Court goes in this direction,<sup>69</sup> while the Human Rights Commission within the Constitutional Court expressly established concurrent competences much earlier.<sup>70</sup>

With regards to the market freedoms in Bosnia and Herzegovina provided by Article 1 (4) of the Constitution, the Constitutional Court in its consistent practice took the position that the market freedoms need to be interpreted in accordance with the practice of the European Court of Justice.<sup>71</sup> Further on, in the view of the Constitutional Court the provision on market freedoms in Article 1 (4) may serve as a legal basis for the adoption of private law on the state level.<sup>72</sup>

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No. 04/02, para. 29; Constitutional Court, 10.5.2002., U 18/00, Official Gazette of Bosnia and Herzegovina, No. 30/02, para. 47, 51; Constitutional Court, 28.5.2010., U 12/09, Official Gazette of Bosnia and Herzegovina, No. 80/2010, para. 31.

67 Consequently the ECHR decision *Sejdić and Finci*, which declared several constitutional provisions to be contrary to the European Convention on Human Rights, should be implemented by simply directly applying the provisions of the European Convention to all provisions of the Constitution which do not comply with the Convention. However, the Constitutional Court of B&H wrongly took the position in *obiter dictum* in its decision 5/04 that the European Convention of Human Rights cannot have priority over the Constitution of B&H since it entered into force on the basis of the Constitution of B&H (Constitutional Court, 27.1.2006., U 5/04, Official Gazette of Bosnia and Herzegovina, No. 49/06, para. 14). Namely, the wording "priority over all other law" clearly includes the priority over constitutional law, while other opinions confuse the wording "all other law" with „all other laws", that would exclude constitutional law from the supremacy of the European Convention; Also Christian Steiner/Nedim Ademović, *Constitution of Bosnia and Herzegovina-Commentary* (Sarajevo 2010), 155.

68 Zlatan Meškić, 'Četiri osnovne slobode kao ustavni osnov za harmonizaciju entitetskih privatnopravnih propisa' (2011) Zbornik radova Pravnog fakulteta Univerziteta u Tuzli 355, 358.

69 Constitutional Court, 28.5.2010., U 12/09, para. 31: 'Therefore the state and the entities have the common responsibility not only to ensure the highest level of protection of human rights but also to ensure an equal implementation of those rights'.

70 Human Rights Commission within the Constitutional Court, 7.9.2005., CH/02/12468 *et al.*, para. 152; available at: [www.hrc.ba](http://www.hrc.ba).

71 Constitutional Court, 25. 06. 2004., U 68/02, Official Gazette of Bosnia and Herzegovina, No. 38/04, para. 41.

72 Constitutional Court, 18. 2. 2000., U 5/98-II, Official Gazette of Bosnia and Herzegovina, No. 17/00, para. 29.

However, private law is not listed in Article 3 (1) as an exclusive competence of the state, and therefore falls under the exclusive competence of the entities in accordance with Article 3 (3a), what resulted by the adoption was an almost complete codification of private laws at the entity and District Brčko levels in Bosnia and Herzegovina. It is clear the reference to the extensive interpretation of market freedoms in the practice of the European Court of Justice can only widen the competences of the state or the concurrent competences of the state and the entities based on the implied powers to fulfill their obligations given by the Constitution. Consequently, the newest discussions in the constitutional legal science not only consider which provisions of the Constitution need to be amended, but more and more concentrate on the results that could be achieved by the recognized methods of interpretation of the Constitution. For example, even the question of the establishment of a High Court of Bosnia and Herzegovina is discussed as a part of a constitutional reform and as part of the search for a possible legal basis in the current Constitution, such as the democratic principles of rule of law or legal certainty guaranteed by Article 1 (2) of the Constitution,<sup>73</sup> the guarantee of human rights and fundamental freedoms of Article 2 of the Constitution<sup>74</sup> or the market freedoms of Article 1 (4) of the Constitution.<sup>75</sup> Another possibility is the exclusive competence of Bosnia and Herzegovina for international relations which include international obligations of Bosnia and Herzegovina contained in international agreements, currently most important in the Stabilization and Association agreement with the EU and its member states.<sup>76</sup> Here, the motive for constitutional reform is identical with the motive for an extensive interpretation of the Constitution, and that is the goal of full membership to the EU.

## CONCLUSION

Federalism was, from the moment of the creation of the Dayton Peace Agreement until today, the only state structure which ensures the existence of Bosnia and Herzegovina as an independent state. This is also true for the constitutional changes yet to come. The analysis of the state structure, in political and legal debates, has usually reflected the attitudes about the accomplished and unaccomplished goals of the war, and it has differed mostly concerning the starting point. While the Bosniak representatives started their argument from the state structure that existed in 1992 and saw every subsequent change as a result of the unlawful conflicts, the Serbian representatives based their legal view solely on the structure established by the Dayton Peace Agreement in 1995, which defines Bosnia and Herzegovina as a union or a sui generis confederation. Similar

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73 Manfred Dauster, 'Die Verfassung von Bosnien und Herzegowina: Unvollkommener Rechtsstaat-Ein Diskurs' (2010) 1 Sveske za javno pravo-Blätter für öffentliches Recht 3, 16.

74 Nurko Pobrić, 'Trebalo li Bosni i Hercegovini vrhovni sud' (2011) 5 Sveske za javno pravo-Blätter für öffentliches Recht 4, 11.

75 Zlatan Meškić, 'Osnivanje Vrhovnog suda Bosne i Hercegovine kao uslov za članstvo u Evropskoj uniji' (2011) 4 Sveske za javno pravo-Blätter für öffentliches Recht 53, 62.

76 *Ibid.* 53, 56.

attitudes of the legal experts came with the change of facts, namely the transfer of certain competences from the entity to the state level imposed by the High Representative in 2000 and later, which is best reflected by the opinion of the current president of the Republic of Srpska, constitutional law expert, who suggests that the constitutional changes should bring a new state name – 'Federative Republic of Bosnia and Herzegovina'.

While the basic elements of federalism do not seem to be in question any longer, there are still some reforms needed, for example, rights of the minorities to stand for election which are already confirmed as contrary to the European Convention on Human Rights in the ECHR decision *Sejdic and Finci v. Bosnia and Herzegovina*, entity elections and the protection of the vital national interests and/or vital entity interest. Finally, it is not critical whether Bosnia and Herzegovina is a centralized or decentralized state, more important is the rational structure concerning easier decision-making for better functioning of the state so it can accomplish its current goal: membership to the European Union. Conditions for becoming a member, which the European Union has set for Bosnia and Herzegovina, are the basic constitutional reforms, making it unique in the history of the European Union, so far. These changes are only possible by overcoming ethnic goals of the political representatives, which is difficult to expect after the complex results of the 2010 elections.

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