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Prospect of Abuse of Constitutionalism in Bosnia and Herzegovina: Constitutional Identity and the Constituent Peoples

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Abstract: The Constitution of Bosnia and Herzegovina is primarily notable for being an annex to the Dayton Peace Treaty that ended the 1992–1995 war. A significant aspect of this constitutional framework is its emphasis on the three main ethnic groups – Bosniaks, Croats, and Serbs – designated as constituent peoples, which play a central role in the state's governance and institutions. The recent decision of the European Court of Human Rights (ECtHR) in the case of *Savickis and Others v. Latvia* has indirectly highlighted the (in)compatibility of certain constitutional solutions in Bosnia and Herzegovina with the principle of non-discrimination of the European Convention on Human Rights. In this article, the authors explain how the Constitutional Court of Bosnia and Herzegovina did not seek to implement the rulings issued by the ECtHR, but rather interpreted the constitutional identity of the country as being based precisely on the central role given to the constituent peoples. In so doing, the Constitutional Court, now also supported by the case *Savickis and Others v. Latvia*, created the prospect of abuse of constitutionalism in Bosnia and Herzegovina.

Keywords: Bosnia and Herzegovina; constitutional identity; constitutional court; European Court of Human Rights; *Savickis and Others v. Latvia*

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Introduction

Interest in the concept of constitutional identity, especially in the European debate, has increased significantly over the last two decades (cf. Drinóczi 2020). However, this heightened interest has not resulted in a universally accepted scholarly definition. The challenges surrounding this definition are all the more pronounced when applied to contexts shaped by social pluralism and internal fragmentation. That said, scholars have engaged in a fruitful discussion on this term. What do we know about the concept of constitutional identity so far?

Constitutional identity is not merely a legal term, nor is it solely tied to constitutional texts. It is influenced by political aspirations and historical context, which play significant roles in shaping the constitutional identity of a state. The concept involves a twofold process: on the one hand, a constitution influences the political and legal culture of a state; on the other, the political and legal culture shapes the constitution. Therefore, constitutional identity cannot be viewed as exclusively the result of a constitutional text; rather, it emerges from the interplay between legal frameworks, political dynamics, and historical experiences. That being said, constitutional identity is not synonymous with national identity, as the latter is dependent on a constitutional text (Jacobsohn 2010; Martí 2013). But what constitutional identity means, precisely, is a matter of debate among scholars (Rosenfeld 2012). As Rosenfeld points out, constitutional identity results from the dynamic interaction between projections of sameness and images of selfhood (Rosenfeld 2010). Conversely, some scholars argue that the concept of constitutional identity aligns with the fundamental values underpinning a constitution and, therefore, should not be subject to constitutional amendments (Schmitt 2008; Szente 2022; Polzin 2017). In this sense, constitutional identity should not reflect the specific interests of certain groups in particular situations; rather, it embodies common values that should remain unchanged. As Scholtes (2021) notes, constitutional identity has thus served as a metaconstitutional argument.

Although constitutional identity is based on a constitutional text, constructing constitutional identity may depend on the constitutional courts' jurisprudence of that very constitutional text. There are three main ways of framing constitutional identity in courts. Firstly, constitutional identity can be constructed as the dominance of an imagined majority, or how a majority sees itself represented within a constitution. Secondly, constitutional identity can be constructed based on constitutional history. The third way of constructing constitutional identity is based on the aspirational ideas of a constitutional court (Polzin 2017).

In light of all this, what problems might arise with constitutional identity? In the recent past, constitutional identity has been used as an argument for "protecting" constitutional orders from undesired international interference in domestic law. In a

pluralist constitutional world, international treaties have established standards regarding human rights and the rule of law. Within the framework of these standards, the argument of constitutional identity has been frequently used to avoid having to align with precisely these international standards. This modus operandi of using constitutional identity as an argument to evade international obligations has primarily been observed within the European Union (EU). In the *Lisbon Treaty* case, the German Constitutional Court confirmed that EU member states have the right to invoke the argument of constitutional identity according to the Treaty on European Union (Grimm 2023), in particular Article 4(2), which states that the EU "shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional".[1]

Thus, constitutional identity has been used as an argument for the predominance of domestic legal concepts over established standards in the field of human rights and democratic governments (Bard et al. 2023). Although constitutional identity is not an inherently negative principle (Martinico and Pollicino 2020), it has opened the door for the abuse of constitutionalism (Halmai 2018; Fabbrini and Sajó 2019). It serves as a useful tool for governments to evade their international obligations by invoking the argument of "constitutional identity" (Kelemen and Pech 2018). The problem with this argument, as Yordan points out, is that, in the context of international law, constitutional identity, *stricto sensu*, cannot be a justification for restricting the human rights obligations of a state (Yordan 2023, 142). This is a valid argument. Constitutional identity is the piece of constitutional law that is still not recognized in public international law or in international human rights documents.

On the other hand, the Court of Justice of the European Union (CJEU), in the case of Hungary and Poland, has effectively separated unconstitutional from constitutional identities. Specifically, the CJEU pointed out that

> the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another. Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of "the rule of law" which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.[2]

1 "Consolidated Version of the Treaty of the European Union." Article 4(2). *Official Journal of the European Union* C 326/13. 26 October 2012, https://eur-lex.europa.eu/resource.html?uri=cellar:2bf140bf-a3f8-4ab2-b506-fd71826e6da6.0023.02/DOC_1&format=PDF (accessed 29 June 2025).

2 CJEU, Judgement of 16 February 2022. Hungary v. European Parliament and Council of the European Union. C-156/21. ECLI:EU:C:2022:97, paras. 233-34, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62021CJ0156 (accessed 9 July 2025).

In so doing, the CJEU confirmed that states have the right to establish their own constitutional identities, but that these identities must comply with the general principles of constitutionalism.

Furthermore, the European Court of Human Rights (ECtHR or the Strasbourg Court) has already accepted constitutional identity as a legitimate argument for limiting human rights, which will be elaborated in the following sections of this article. In this sense, the ECtHR has transformed constitutional identity into a valid argument not only in constitutional law but also international human rights law. However, the intention of this study is not to argue that constitutional identity is inherently invalid; rather, it contends that the vagueness of this principle can lead to the abuse of constitutionalism. Our case study is Bosnia and Herzegovina (B&H).

Our study aims to understand the role of constitutional identity within B&H's legal order. Our research was inspired by the recent judgment of the ECtHR in the case of *Savickis and Others v. Latvia*, which raised the issue of constitutional identity as a legitimate tool for limiting human rights. In particular, our article looks at the problems of constitutional identity from a Bosnian-Herzegovinian perspective by asking whether the ECtHR's limitation of rights under the European Convention on Human Rights (ECHR) on the basis of the protection of constitutional identity could strengthen the role of B&H's constituent peoples within the constitutional order of the country. This would result in further strengthening ethnic territorialisation and widening the divisions between the constituent peoples and *Others*.

Furthermore, this article investigates whether the argument of constitutional identity could influence the *corporatisation* of the Bosnian-Herzegovinian consociation arrangement, rather than liberating it from precisely such a process, i.e. from a further deepening of B&H's ethnic division within its consociational arrangement. In other words, this study sheds light on the illiberal turn in the jurisprudence of the Bosnian Constitutional Court, arguing that the ECtHR in the case of *Savickis and Others v. Latvia* has provided arguments for abusing constitutionalism in Bosnia and Herzegovina, which could lead to legal/political arguments for refraining from aligning the Bosnian Constitution with the ECtHR's judgements.

Setting the Scene

The Constitution of B&H is part of the General Framework Agreement for Peace, also known as the Dayton Peace Agreement (DPA), which ended the war in 1995 (Chandler 2006). Bosnia and Herzegovina had been part of the Socialist Federative Republic of Yugoslavia (SFRY) from 1945 until the early 1990s. The wind of change in Eastern Europe, and the wave of democratisation in the Soviet bloc countries also influenced the SFRY where the first democratic elections in 1990 led to the destabilisation of the

country and the rise of nationalist movements. First Slovenia and Croatia, and somewhat later B&H sought independence from the SFRY and this led to the latter's violent dissolution, with wars in Slovenia in 1991, in Croatia from 1991 to 1995, and in B&H from 1992 to 1995. Slovenia became a member of the EU with the first round of Eastern enlargement in 2004; Croatia is the latest addition to the Union, joining in 2013. Bosnia and Herzegovina endured the most violent of all post-Yugoslav wars during the 1990s. This conflict has frequently erroneously been described as an internal ethnic conflict among Bosniaks (Bosnian Muslims), Croats, and Serbs. However, external stakeholders played a decisive role, namely the remainder of Yugoslavia (Serbia and Montenegro, which had at the time decided to remain in one state) (Gray 1996) as well as Croatia (Ribičič 2001).

In this conflict with no winners, the DPA was the culmination of the peace negotiations that ended the brutal war in B&H following the country's declaration of independence in 1992. Peace was negotiated through the DPA where the contact group countries France, Germany, the Russian Federation, the United Kingdom, and the United States (Paczulla 2004-2005), together with representatives of B&H's ethnic groups, Croatia, and Yugoslavia negotiated peace and the future constitutional design of the country. Yehuda points out that the Bosnian Constitution that was a part of the DPA "was negotiated on behalf of B&H's three ethnonational groups (Bosniaks, Bosnian Serbs, and Bosnian Croats)" (Yehuda 2023, 17). The DPA was negotiated in Dayton, Ohio, and signed in Paris. Not only did its entry into force end the conflict, but also fundamentally changed B&H's constitutional landscape. It must be emphasised, however, that the DPA did not create a new state, as Banović et al. (2021) argue (see also Keil and Perry 2015), but rather modified the internal structure of the Republic of Bosnia and Herzegovina's constitutional system.[3]

The Bosnian Constitution was thus not modified by constitutional convention (Steiner and Ademović 2010), but through the pivotal role played by the peace negotiators. In Dayton, it was these negotiators who were the actual makers of the new Bosnian Constitution (Gaeta 1996). The content of the constitution is the result of two international agreements on the basic principles that were to underpin the constitutional system. Specifically, this is, on the one hand, the agreement of the administrative-territorial division of the state, reached in Geneva on 8 September 1995 by the Foreign Ministers of the Republic of Bosnia and Herzegovina, Yugoslavia,

3 Art. I (1) of the Bosnian Constitution (1995) reads: "[t]he Republic of Bosnia and Herzegovina, the official name of which shall henceforth be 'Bosnia and Herzegovina', shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognized borders. It shall remain a Member State of the United Nations and may as Bosnia and Herzegovina maintain or apply for membership in organizations within the United Nations system and other international organizations." Art. I (1) of the Bosnian Constitution, https://www.ustavnisud.ba/en/constitution-of-bosnia-and-hercegovina (accessed 9 July 2025).

and Croatia under the supervision of international mediators. The second agreement, of 26 September 1995, dealt with the form of government to be granted to Bosnia and Herzegovina. Yet, the new constitution accepted in Dayton was not ratified by the very Parliamentary Assembly that the DPA Constitution had established.

As the most significant change in B&H's constitutional landscape, the new constitution established the country's division into two entities (federal units), the Federation of Bosnia and Herzegovina (FB&H) and the *Republika Srpska* (RS).[4] The main objective of the DPA's constitution makers was to create durable constitutional structure and a constitutional order that would guarantee the peaceful coexistence of the country's ethnic groups (Keil 2013; Yee 1996). In order to reach this objective, the new constitution introduced the category of constituent peoples,[5] which entailed the granting of certain privileges to the ethnic groups in conflict. This was part of the peace package, and the US administration's approach, which assumed that granting special rights to Serbs and Croats, together with enduring Bosnian unity and statehood in the interests of the Bosniaks, would convince the warlords to end the conflict. Although the existing Constitution of the Republic of B&H and Bosnia's previous constitutions when it was a part of the SFRY all recognised the major ethnic groups as constitutional elements, the DPA and its constitution was the first to include exclusive rights for the constituent peoples (Trnka 2009). The document's Preamble stipulated that "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".[6]

It has become clear that the new constitution is shaped by the coexistence of the constituent peoples and "Others" as citizens of B&H. With this provision, the constitution makers divided the population into two categories: on the one hand, the constituent peoples, represented by the country's three main ethnic groups. These were the parties involved in the armed conflict that the DPA brought to an end, namely Bosniaks, Croats, and Serbs. On the other hand, there were the "Others", which included other recognised ethnic minorities living in the country as well as those who simply did not wish to identify as belonging to one of the constituent ethnic groups.[7] Such a division of the population into two macro-categories is not

4 Art. I (3) of the Bosnian Constitution (1995).

5 The Preamble of the Bosnian Constitution (1995).

6 The Preamble of the Bosnian Constitution (1995).

7 In 2003, the Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on the Protection of Rights of Members of National Minorities (Official Gazette of Bosnia and Herzegovina, no. 24/03, 1 April 2003, (https://www.mhrr.gov.ba/PDF/LjudskaPrava/56.pdf, accessed 9 July 2025). The law states that Bosnia and Herzegovina will protect the status, equality, and rights of the 17 national minorities living on its territory: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians,

particularly contentious except for the fact that the adjective "constitutive" implies that the three principal ethnic groups have a central, constituent role in society, compared to the "Others". However, the constitution does clarify that the constituent peoples determine its content together with the "Others" as equally constituent citizens of B&H. That said, the subsequent constitutional provisions do not support such an assertion as they do indeed grant the constituent peoples a predominant role in the country's institutional and political scene (Begić and Delić 2013).

Trnka argues that the Bosnian constitutional order that was conceptualised in Dayton suggests that the main source of power is not rooted in the will of the citizens (*demos*), but in the will of the three constituent peoples (Trnka 2009). Moreover, the constitutional order contains a dichotomy between the will of local political actors and that of the Office of the High Representative (OHR), whose task it is to guarantee the civilian implementation of the peace agreement, but also to influence domestic political decisions. The role and competences of the OHR are described in Annex X of the General Framework Agreement for Peace. In 1997, the High Representative's powers of intervention on the political level were further enhanced at the Bonn meeting of the Peace Implementation Council (PIC). Specifically, the PIC granted the OHR the power to make binding decisions when local parties appear unable or unwilling to act and may remove from office public officials who violate the General Framework Agreement of Peace (Banning 2014, 289-293). In other words, the political leaders of each ethnic group do not have the final word in the decision-making process.

The institutions in Bosnia and Herzegovina are largely composed and elected based on ethnic and territorial criteria, with a predominant and exclusive role for the three constituent peoples (Bosniaks, Croats, and Serbs) to the exclusion of the "Others" category. Specifically, the composition of the legislative body is constitutionally prescribed and the Parliamentary Assembly consists of two chambers: the House of Peoples and the House of Representatives. The first has 15 members, two-thirds of whom (five Bosniaks and five Croats) are elected by the Bosniak and Croat delegates from the House of Peoples of the FB&H (one of the two federal entities that make up the state), where these two ethnic groups constitute the majority. Likewise, the remaining five delegates (Serbs) are elected by the National Assembly of the RS, the other federal entity.[8] The House of Peoples was – as evidenced by its name – conceived by the constitution makers as a body representing the exclusive demands of the constituent peoples within a bicameral and asymmetric parliamentary system.

Germans, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks, and Ukrainians.

8 Art. IV, para. 1, a), b) of the Bosnian Constitution (1995).

As for the House of Representatives, however, the constitution does not stipulate equal representation (nor even the obligatory presence) of the three main ethnic groups in terms of the composition of the body. On the contrary, it is simply stipulated that, of the 42 members that make up this body, two-thirds are to be elected from within the constituencies of the FB&H, and the remaining third from those of the RS,[9] thus making no explicit reference to ethnic requirements. Nevertheless, the constituent peoples – bolstered by their numerical majority over the "Others" – ultimately came to occupy, with only rare exceptions, the seats in the House of Representatives in the same proportions as described for the House of Peoples. Two-thirds of the seats held by members elected on the territory of the FB&H are in fact customarily equally divided between Bosniak and Croat political parties with a minor representation of multi-ethnic parties, just as the remaining third, elected in the constituencies of the RS, is made up of Serbs (Keil 2021).

From analysis of the provisions contained in Article IV, it can be deduced that the constitution makers intended for the upper chamber, the House of Peoples, to represent the demands of the constituent peoples, including through the possibility of veto against decisions proposed by the Parliamentary Assembly which may be declared damaging to a vital interest of the Bosniak, Croat, or Serb people.[10] The rationale here was to rebalance the weight of the three peoples within the legislature and guarantee each group an equal opportunity to influence decision-making.[11] However, this central ("constitutive") role of the Bosniaks, Croats, and Serbs has even expanded into those areas where the constitution did not provide for such a predominant role. Indeed, to this day, the House of Representatives is largely divided along ethnic lines, with most ethnic Serb representatives coming from the RS, and most Bosniaks and Croats from the FB&H. This first argument, which will be substantiated in the subsequent provisions to be examined, testifies to how, in reality, the constituent peoples assume a central (if not exclusive) role within the country's legislative structures.

9 Art. IV, para. 12 of the Bosnian Constitution (1995).

10 Art. IV, para. 3, e) of the Bosnian Constitution (1995).

11 This is how Art. IV, para. 3, of the Bosnian Constitution describes this veto procedure: "e) A proposed decision of the Parliamentary Assembly may be declared to be damaging to a vital interest of the Bosniak, Croat, or Serb people by a majority of, as appropriate, the Bosniak, Croat, or Serb delegates selected in accordance with paragraph l(a) above. To be approved, such a decision shall require, in the House of Peoples, a majority of the Bosniak, Croat, and Serb delegates to be present and voting. f) If a majority of the Bosniak, Croat, Serb delegates objects to the invocation of paragraph (e), the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three delegates, one each selected by the Bosniak, Croat, and Serb delegate, to resolve the issue. If the Commission fails to do this within five days, the matter will be referred to the Constitutional Court, which shall, in an expedited process, review it for procedural regularity."

With regard to the executive power, the constitution stipulates that the Presidency of Bosnia and Herzegovina shall consist of three members: one Bosniak and one Croat, elected from within the constituencies of the FB&H, and one Serb, elected from the territory of the RS.[12] The original intention was to create a system of equal representation of the constituent peoples. However, this has once again had the side effect of marginalising the "Others". As for the Council of Ministers, the constitution stipulates that no more than two-thirds of the ministers may come from the FB&H, implicitly guaranteeing the remaining third to members of the RS. Thus, as in the Parliamentary Assembly, here too the constitution makers did not explicitly intend to confer ministries exclusively to the "constituent peoples". However, the presence of a territorial criterion indirectly resulted in the composition of the ministries also reflecting ethnicity and specifically the majoritarian ethnic groups within the entities.

Similarly, regarding the composition of the Constitutional Court of Bosnia and Herzegovina, the constitution makers stipulated that of the court's nine judges, four should be elected by the House of Representatives of the FB&H and two by the Parliamentary Assembly of the RS (Montanari 2020; Grewe and Rigner 2011) (and the remaining three members by the President of the ECHR after consultation with the Presidency of B&H). In practice – even though the constitution contains no provision stipulating the exclusive representation of the constituent peoples – the individuals who have served as Constitutional Court judges have reflected the country's three main ethnic groups (Yee 1996).

The constitution of B&H is not the only document to privilege the constituent peoples. The constitutions of the entities of the FB&H and the RS also grant special status to members of the constituent peoples by stipulating that the president and vice president can only be elected among members of the constituent peoples.[13] It is thus no exaggeration to say that the predominance of the constituent peoples pervades every aspect of B&H's constitutional system. This means that the Bosnian constitutional order seeks to apply the consociative model framed by Lijphart (1977), where "Others" are systemically excluded (Marko 2013).

Given the role that the constituent peoples play within the state system and its institutions, it is reasonable to ask whether the protection afforded to them represents a part of B&H's constitutional identity. After all, the entire institutional framework is based on the equal representation of the constituent peoples, and the

12 Art. V of the Bosnian Constitution (1995).

13 Art. 83(4) of the RS Constitution (1992), and Art. IV.B.1 of the FB&H Constitution (1994). Art. 83(4) of the RS Constitution (1992), http://srpskaenciklopedija.org/doku.php?id=устав_српске_републике_босне_и_херцеговине_1992 (accessed 9 July 2025); Art. IV.B.1 of the FB&H Constitution (1994), https://peacemaker.un.org/sites/default/files/document/files/2024/05/ba940301frameworkagreementonthefederation.pdf (accessed 9 July 2025).

system appears to rely heavily on this principle, albeit often achieving a precarious balance. In other words, since the composition of the state institutions – whether through explicit constitutional provisions or established constitutional practice – exclusively applies the principle of proportional representation of the constituent peoples, it is worth exploring whether, beyond safeguarding fundamental rights and freedoms, the constitution makers also aimed to incorporate the equal representation of the three ethnic groups as an aspect of B&H's constitutional identity. In light of this, the next section looks at how the Constitutional Court defined the position of the constituent of peoples within the Bosnian constitutional order.

The Constituent Peoples and the Constitutional Court

To understand the legal role of the constituent peoples in the constitutional system of B&H, it is useful to start with the jurisprudence of the Bosnian Constitutional Court. In the year 2000, it reviewed the constitutions of the FB&H and the RS, delivering its legal opinion on the role of the constituent peoples within the constitutional system of B&H.[14] Its judgment (U-5/98), for reasons of practicality, primarily because of its sheer volume, was divided by the constitutional judges into four partial decisions.[15] The first of these concerned the interpretation of the term "boundary" with respect to the administrative divisions between the two entities that make up the federal state. In the second partial decision, the judges made an important intervention on the subject of sources, by interpreting a doctrine of implicit state powers as introducing a system of competing competences between the state and federal entities. Moreover, they expressed themselves in favour of the framework legislation, not provided for in the constitution, that the High Representative made extensive use of in the early 2000s. The third partial decision will be covered in detail below. The fourth and final partial decision concerned sensitive issues such as language and common defence.

In the third partial decision of case U-5/98, the judges were to decide on the compatibility of the provisions of the RS Constitution with the Preamble and Article II paragraphs 4 and 6 and Article III paragraph 3 of the B&H Constitution. The RS Constitution enshrined the Serb people's right to self-determination as "inalienable and untransferable, born out of the Serb people's struggle for freedom and

14 On the role of constitutional courts in systems that apply the consociative model, see McCrudden and O'Leary 2013.

15 Constitutional Court of Bosnia and Herzegovina, partial decisions of 30 June and 1 July 2000, case no. U-5/98.

independence",[16] to which the intention to bind the entity "to other states of the Serb people"[17] was added, as well as the definition of the RS as a "state of the Serb people and all its citizens".[18] Likewise, the constitutionality of the provisions of the FB&H Constitution, in which the entity was referred to as consisting of the Bosniak and Croat peoples, together with "Others", was scrutinised with respect to the same parameters.[19]

The applicant, a member of the Presidency, sought to argue that under the Constitution of B&H, all three constituent peoples are constitutive across the entire territory of the country. Therefore, the RS could not declare itself to be the state of only one people (Serbs), nor, similarly, could the FB&H claim to be the state of Bosniaks and Croats (see Palermo 2000). The judges of the Constitutional Court were thus called upon to answer the following questions: What idea of a multinational state does the constitution pursue? Does the DPA, in territorially delimiting the two federal entities, also recognise a territorial separation between the country's constituent peoples?[20]

The Constitutional Court, in a first *obiter dictum*, recalled that any truly democratic system requires an accommodating policy and that, in a multinational state, the compromise between cultures and ethnic groups prohibits both the assimilation and the segregation of groups. For this reason, territorial segregation as envisaged in entity constitutions cannot in any way be permitted. Rather, entities should facilitate ethnic coexistence as an "instrument for the integration of state and society".[21] Entities therefore have a constitutional obligation not to discriminate against those constituent peoples who are in a de facto minority position within their territory. The Constitutional Court declared that the concept of the constituency of peoples "must thus be viewed as an overarching principle of the Constitution of B&H with which the Entities, according to Article III.3 (b) of the Constitution of B&H, must fully comply".[22]

In this decision, the court emphasised how the multi-ethnic state of B&H should operate. It concluded that the concept of the constituency of peoples should be viewed as a democratic principle and that "pluralism, just procedures, [and] peaceful

16 The Preamble of the RS Constitution (1992).
17 The Preamble of the RS Constitution (1992).
18 Article I of the RS Constitution (1992).
19 Article 1 of the FB&H Constitution (1994).
20 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98, para. 53.
21 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98, para. 57.
22 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98, para. 63.

relations […] must serve as a guideline for further elaboration of the issue of the structure of B&H as a multinational state".[23] In addition, the Constitutional Court stated that the concept of the constituency of peoples "prohibits any special privileges for one or two constituent peoples, any domination in governmental structures, and any ethnic homogenisation by segregation based on territorial separation".[24] In this vein, the Constitutional Court intended to define the idea of the constituency of peoples as a democratic concept that stipulated special collective rights to the three major ethnic groups in B&H. By defining B&H as a multinational state where the constituent peoples are equal throughout the country's territory, the Constitutional Court wisely avoided the typical dichotomy between individual and collective rights (Mansfield 2003). Thus, the concept of the constituency of peoples granted each of the three constituent peoples special collective rights, but the same concept prevents them from separating from Bosnia and Herzegovina (Trnka 2000).

However, regarding the definition of the legal role of the constituent peoples and the Constitutional Court's conclusion that this role applies throughout the territory of B&H, Pehar legitimately wonders how the court reached this conclusion or formulated this legal definition of the constituency of peoples, since the constitutional text does not explicitly provide such definition (Pehar 2019). In other words, what in the sentence of the Preamble that "Bosniaks, Croats, and Serbs, as constituent peoples (along with Others) and citizens of Bosnia and Herzegovina hereby determine the Constitution of Bosnia and Herzegovina"[25] implies that the constituent peoples are constituent across the entire territory of B&H? Moreover, if we interpret this Preamble in a purely formalistic manner, there is nothing to suggest that it establishes obligations towards entities and other levels of government to allow for equal recognition of the constituent peoples. Another related question is: Can constitutional provisions be interpreted independently of each other? The judges involved in the interpretation of the constitution and its Preamble deployed a systematic interpretation. In other words, they interpreted the Preamble in conjunction with other constitutional provisions. In particular, they concluded that

> [t]his constitutional commitment, legally binding on all public authorities, cannot be isolated from other elements of the Constitution, in particular the ethnic structures, and must therefore be interpreted by reference to the structure of the constitution as a whole […]. Therefore, the elements of a democratic state and society and the underlying assumptions – pluralism, fair

23 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98, para. 35.

24 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98, para. 35.

25 The Preamble of the Bosnian Constitution (1995).

> procedures, peaceful relations following from the text of the Constitution – must serve as a guideline to further elaborate the question concerning how [Bosnia and Herzegovina] is structured as a democratic multi-ethnic state.[26]

Furthermore, the Constitutional Court pointed out that according to the international instruments included in the constitution, "a government must represent the whole people belonging to the territory without distinction of any kind, thereby prohibiting […] a more or less complete blockage of effective participation in decision-making processes".[27] It emphasised that

> effective participation of ethnic groups is an important element of democratic institutional structures in a multi-ethnic state. Democratic decision-making would be transformed into ethnic domination of one or even more groups if, for instance, absolute and/or unlimited veto power would be granted to them, thereby enabling a numerical minority represented in governmental institutions to forever enforce its will on the majority.[28]

The Constitutional Court concluded that "under the circumstances of a multi-ethnic state […] representation and participation in governmental structures – not only as a right of individuals belonging to certain ethnic groups, but also of ethnic groups as such in terms of collective rights – does not violate the underlying assumptions of a democratic state".[29]

This Constitutional Court decision, in the context of constitutional transition and clarification of the meaning of certain constitutional provisions, delivered two significant aspects regarding constitutionalism in B&H. Firstly, the court defined B&H as a multi-ethnic state in which entities are not sovereign but are considered federal units that must comply with the constitution. Furthermore, in providing the Bosnian constitutional structure with a multi-ethnic character the court emphasised that all three ethnic groups were equal across the entire state territory. To ensure the equality of all three ethnic groups, the judges created the concept of the constituency of peoples, which aims to ensure equal rights for all peoples. This was defined as the constitution's overarching principle and all levels of government had to comply. Thus, with this decision, the Constitutional Court defined the very constitutional identity of B&H.

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26 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98, para. 54.

27 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98, para. 55.

28 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98, para. 55.

29 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98, para. 56.

However, the court positioned the concept of the constituency of peoples in a framework of a liberal understanding of constitutionalism, arguing that nothing in this principle should be interpreted as being in favour of homogenisation or segregation of ethnic groups. As Rosenberg (2007, 387) pointed out, the Constitutional Court

> recognized that a society with collective goals can be liberal and democratic. This can only be maintained, however, if it is also capable of respecting diversity and adequately safeguarding fundamental, individual rights. In other words, the Court recognized collective rights but only to the extent that such collective rights do not infringe upon individual rights across the entire territory of BiH.

It could thus be concluded that with this definition of the position of the constituent peoples, the Constitutional Court in fact advocated the liberalisation of the corporate consociational model that was set out in certain provisions of the entities' constitutions as well as the Bosnian Constitution. In other words, the Constitutional Court argued that the consociational arrangement in B&H must align with the human rights standards mentioned in other constitutional provisions.

However, although the position of the constituent peoples was thus stipulated according to a liberal understanding of constitutionalism, the privileges of the three constituent peoples that were set out in certain constitutional provisions were challenged before the ECtHR. In the next section, we will investigate how the ECtHR has addressed the issue of these privileges. We will then compare this judicial practice with the recent reasoning of the ECtHR in the case of *Savickis and Others v. Latvia*.

Why is it important to investigate this issue? The case of *Savickis and Others v. Latvia* raised the question of constitutional identity as a legitimate aim for restricting human rights before the Strasbourg Court. The following question is therefore crucial: Could the special position of the constituent peoples in the constitutional order of B&H be legally justified as part of Bosnian constitutional identity?

Peace and Constitutional Identity as Legitimate Aims before the European Court of Human Rights

Before we look at the ECtHR judgments related to the Bosnian Constitution, it must be emphasised that B&H ratified the ECHR in 2002, and its Protocol 12 in 2005.[30]

30 On this, see the official website of the Council of Europe Office in Sarajevo, https://www.coe.int/en/web/sarajevo/news/-/asset_publisher/DuKPIRcfHuhP/content/lista-dokumenata-koje-je-bih-potpisala-i-ili-ratifikovala (accessed 9 July 2025).

Moreover, the ECHR is part of the Bosnian Constitution. According to the text of the constitution, the ECHR and its Protocols "shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law."[31] Under these legal circumstances, citizens of B&H who are excluded by certain constitutional provisions from certain institutions, such as the Presidency and the House of Peoples, should be able to seek justice before the ECtHR.

The case of *Sejdić and Finci v. B&H* was the first instance in which the ECtHR considered the status of the constituent peoples in Bosnia and Herzegovina. Subsequently, the ECtHR heard several related cases, including *Zornić v. B&H*, *Pilav v. B&H*, *Šlaku v. B&H*, *Pudarić v. B&H*, and *Kovačević v. B&H*. In all these cases, the ECtHR concluded that the Bosnian Constitution discriminates against individuals who are not members of the constituent peoples. But they are not the only ones. The same applies to members of one of the constituent peoples who live in the "wrong" entity, that is Serbs living in the FB&H and Bosniaks and Croats living in the RS. Specifically, Mr Sejdić and Mr Finci were discriminated against as members of the Roma and Jewish national minorities in B&H; Mr Zornić was discriminated against for not wanting to state his ethnic affiliation; Mr Pilav experienced discrimination as a Bosniak living in the RS; Mr Šlaku was discriminated against as a member of the Albanian ethnic minority; and Mr Pudarić faced discrimination for being a Serb living in the FB&H.[32]

These cases were defined as discrimination under Article 14 in conjunction with Article 3 of Protocol No. 1 of the ECHR and under Article 1 of Protocol No. 12 of the ECHR. These two articles were used to contest the notion that it was impossible for "Others" to be candidates for the Presidency of B&H and the House of Peoples. Put in simple terms, the ECHR articles were applied in conjunction with the articles of the constitution that prohibit discrimination. The ECtHR tested the position through the lens of legitimate aim and proportionality. The representatives of the Bosnian government argued that the preservation of peace is the reason why the constituent peoples are granted the central role within the constitutional legal system. Their argument is that, because peace in Bosnia and Herzegovina is still fragile, it is necessary to maintain the position of the constituent peoples in the constitution. In other words, the Bosnian government argued that the legitimate aim for maintaining the privileges of the constituent peoples is the preservation of peace. However, in the *Sejdić and Finci* ruling, the ECtHR concluded that the provisions prescribing exclusive

31 Article II(2) of the Bosnian Constitution (1995).

32 ECtHR (Grand Chamber), *Sejdić and Finci v. Bosnia and Herzegovina*, judgment of 22 December 2009, nos. 27996/06 and 34836/06, para. 2; ECtHR, *Zornić v. Bosnia and Herzegovina*, judgment of 15 July 2014, no. 3681/06, para. 3; ECtHR, *Pilav v. Bosnia and Herzegovina*, judgment of 9 June 2016, no. 41939/07, para. 3; ECtHR, *Šlaku v. Bosnia and Herzegovina*, judgment of 26 May 2016, no. 56666/12, para. 3; ECtHR, *Pudarić v. Bosnia and Herzegovina*, judgment of 8 December 2020, no. 55799/18, paras. 5-6.

positions for the constituent peoples based on ethnicity are not in line with the ECHR. When it came to the question of the legitimate aim and necessity the ECtHR stated:

> When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and "ethnic cleansing". The nature of the conflict was such that the approval of the "constituent peoples" […] was necessary to ensure peace. This could explain, […], the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants' preoccupation with effective equality between the "constituent peoples" in the post-conflict society. […] The Court does not need to decide whether the upholding of the contested constitutional provisions after ratification of the ECHR could be said to serve a "legitimate aim" since for the reasons set out below the maintenance of the system in any event does not satisfy the requirement of proportionality.[33]

Put in simple terms, the legitimate aim for the privileges of the constituent peoples was peace, and the Strasbourg Court stated that since stable peace had been established, there is no reason to maintain these privileges in the constitutional order of B&H. This was the essence of the court's argument in all the above-mentioned judgments. From the ECtHR's reasoning, it can be concluded that the B&H constitutional order is a temporary solution, until B&H enacts a new democratic constitution (Bardutzky 2010). In other words, the ECtHR's conclusion was that the strict model of corporate consociation implemented in the Bosnian Constitution cannot represent the permanent constitutional solution.

Hodžić argues that the changes to the Bosnian Constitution, as required by the Strasbourg Court, entail the liberalisation of the consociational model (Hodžić 2020). In other words, they would entail a transition from the present rigid corporate consociation model to the liberal consociational model (Banović et al. 2021). Related to this is Yehuda's (2023, 295) argument that "collective equality presents a permissible liberal and legal framework that can legitimately be endorsed by the affected constituencies". Furthermore, as Hodžić (2020, 553) points out, "the *Sejdić and Finci* decision does not contrast individual and collective equality, rendering them mutually exclusive. The decision, and individual human rights perspective, at least as interpreted here, does not outlaw power-sharing, but rather suggests that with more power of separate ethnic groups in the political realm there should come more sharing of that power". In this sense, although the ECtHR found that certain constitutional provisions do not align with the articles of the ECHR, it did not challenge the essence of Bosnian constitutional identity as defined by the Constitutional Court – that is a multi-ethnic state where collective and individual rights are aligned with each other.

33 ECtHR (Grand Chamber), *Sejdić and Finci v. Bosnia and Herzegovina*, judgment of 22 December 2009, nos. 27996/06 and 34836/06, paras. 45-46.

It is here that the recent case of *Savickis and Others v. Latvia* becomes relevant. In this case, constitutional identity together with the protection of the economic system and state continuity, was used as a legitimate aim for different treatment of citizens. More precisely, Mr Savickis and four other applicants challenged provisions of Latvia's legal system that prescribe differential treatment in the calculation of pensions between Latvian citizens and the "permanently resident non-citizens" (*nepilsoņi*) (Yordan 2023, 147). The term *nepilsoņi* refers to individuals who migrated to Latvia following its annexation by the Soviet Union in 1940. After Latvia regained its independence in 1991, citizenship was not reinstated for this group because their migration was deemed a consequence of the unlawful annexation of Latvia (Yordan 2023, 147). As a result, the Latvian transitional provisions of the State Pensions Act of 1996 ruled the different treatment of citizens and *nepilsoņi* regarding the calculation of pensions. The years that Latvian citizens had worked under the Soviet Union before 1991 were considered in the calculation of their pensions, regardless of the location of their employment. For *nepilsoņi*, however, the provisions of this Act did not consider years worked outside Latvia under the Soviet Union before 1991. These individuals were therefore not entitled to claim a pension for this period of their working years.[34] This different treatment was challenged under Article 14 of the ECHR (on discrimination) in conjunction with Article 1 of Protocol No. 1 (on protection of property).

In this case, the ECtHR decided that no violation of the mentioned article of the ECHR had occurred.[35] In the context of this article, it is relevant that the court accepted the protection of constitutional identity as a legitimate aim for the different treatment of citizens, together with the protection of the economic system and state continuity. The Latvian government argued that

> the impugned difference in treatment was directly based on the doctrine of State continuity and, by extension, had its roots in general public international law. It had therefore at least two legitimate aims: protection of Latvia's economic system following the restoration of its independence, and respect for the principle of State continuity and constitutional identity.[36]

Besides accepting the protection of constitutional identity as a legitimate aim, the Strasbourg Court also offered a definition of constitutional identity:

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34 ECtHR (Grand Chamber), *Savickis and Others v. Latvia*, judgment of 9 June 2022, no. 49270/11, paras. 66-68.

35 ECtHR (Grand Chamber), *Savickis and Others v. Latvia*, judgment of 9 June 2022, no. 49270/11, para. 221.

36 ECtHR (Grand Chamber), *Savickis and Others v. Latvia*, judgment of 9 June 2022, no. 49270/11, para. 176.

> [Constitutional identity] is not the doctrine of State continuity *per se* but rather the constitutional foundation of the Republic of Latvia following the restoration of its independence. The underlying arguments for Latvia's doctrine of State continuity stem from the overall historical and demographic background which, as argued by the Government, accordingly, also informed the setting up of the impugned system of retirement pensions following the restoration of Latvia's independence. More specifically, the Court acknowledges that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practiced in the period of unlawful occupation and annexation of the country. In this specific historical context, such an aim, as pursued by the Latvian legislature when establishing the system of retirement pensions, was consistent with the efforts to rebuild the nation's life following the restoration of independence, and the Court accepts this aim as legitimate.[37]

In the context of this judgment, constitutional identity thus represents a unique characteristic of a state constitutional order that was established in a specific historical context. The problem with this legal reasoning is that the Strasbourg Court has effectively given states a legal basis to invoke their constitutional law to justify differential treatment, as long as they can prove that this law is a part of their constitutional identity (Yordan 2023, 143). In addition, however, the principle of constitutional identity was not used on its own, but together with the protection of the economic system and state continuity, thus basing the constitutional identity argument on "the principle of State continuity as set out in the Declaration on the Restoration of Independence and subsequent constitutional provisions and doctrine".[38]

Resulting from this, constitutional identity becomes an argument that can only be based on constitutional text or practice and with reference to a particular constitutional principle. In the case of Latvia, it was based on the Declaration on the Restoration of Independence and other constitutional documents, and on the interpretation of the Constitutional Court of Latvia. Must constitutional identity always be invoked in conjunction with other principles? The answer is "yes", as will be explained in the next section of this article. Latvian constitutional identity refers to the state continuity of Latvia, but this does not prevent other states from establishing constitutional identity in reference to different constitutional principles. The question our study addresses is: What is the role of Bosnian constitutional identity in light of the ECtHR judgments when it comes to the required changes in the Bosnian Constitution that would remove the absolute control over constitutional matters from the constituent peoples? As explained above, the very concept of a constituency of peoples follows the same logic as the ECtHR judgments. Yet, in Bosnia, this concept

37 ECtHR (Grand Chamber), *Savickis and Others v. Latvia*, judgment of 9 June 2022, no. 49270/11, para. 198.

38 ECtHR (Grand Chamber), *Savickis and Others v. Latvia*, judgment of 9 June 2022, no. 49270/11, para. 198.

has not challenged the privileges of the constituent peoples set out in certain provisions in the constitution. To do so would mean to liberalise the consociational arrangement built into the Bosnian Constitution. Instead, as will be elaborated in the following, the Bosnian Constitutional Court has used the constituency of peoples in its constitutional identity argument, expressing itself in favour of the corporatisation of the consociational arrangement in the Bosnian Constitution.

The Constituency of Peoples: From Multi-ethnic State to Legitimate Representation

The constitutional identity does not always reflect the core values of a constitution, but often expresses the aspirations of a state or other stakeholder. Therefore, as Śledzińska-Simon (2015, 125) observes, "it is possible to construe constitutional identity as a real object – an empty vessel that can be filled with any substance, and both the existence of the vessel and the elements of the substance have legal significance".

This vagueness of constitutional identity was used by the Bosnian Constitutional Court in the famous *Ljubić* case of 2016. The request for constitutional review of the respective provisions came to the Constitutional Court after the ECtHR had already established the international obligation to amend the constitution with the purpose of liberalising the consociational arrangement in Bosnia and Herzegovina. The applicant asked the Constitutional Court to review Articles 10.10, 10.12, 10.15, and 10.16 of Subchapter B of the Electoral Law of Bosnia and Herzegovina. The Constitutional Court found that

> the part of Subchapter B, Article 10.12 (2), reading: each of the constituent peoples shall be allocated one seat in every canton, and the provisions of Chapter 20 – Transitional and Final Provisions of Article 20.16A paragraph 2 items a-j of the Election Law are not in conformity with Article I(2) of the Constitution of Bosnia and Herzegovina.[39]

On the other hand, it found that "the remaining part of the provisions of Subchapter B, Articles 10.10 and 10.12, and Articles 10.15 and 10.16 of the Election Law are consistent"[40] with the constitution. In this way, the Constitutional Court effectively established that delegates for the respective caucus in the House of Peoples in the FB&H should be elected by votes of their "own" people. For instance, Bosniak/Croat/

39 Constitutional Court of Bosnia and Herzegovina, decision of 1 December 2014, case no. U-23/14, para. 60.

40 Constitutional Court of Bosnia and Herzegovina, decision of 1 December 2014, case no. U-23/14, para. 61.

Serb delegates should not be elected from cantons where they are not in the majority. In other words, the Constitutional Court established that those delegates who were designated to represent a certain constituent people in the House of Peoples should not be elected by a majority of other constituent people's votes.

According to this reasoning, the Constitutional Court used a principle it had previously established in a case on the constituency of peoples, namely that the latter must be viewed as an overarching principle of the constitution. In this vein, it affirmed that the constituent peoples are not equally represented in the House of Peoples in the FB&H because

> the right [of the constituent peoples] to participate in democratic decision-making exercised through legitimate political representation will not be based on the democratic election of delegates to the House of Peoples of the FB&H by the constituent people that is represented and whose interests are represented by those delegates.[41]

In simpler terms, the Constitutional Court stated that, according to this principle, wherever it is specifically prescribed that the constituent peoples are to be elected for a certain position, they should be elected from the "people" that they are affiliated to. Thus, the Constitutional Court effectively constructed a principle of legitimate political representation.

As mentioned above, the power-sharing arrangements in B&H are not inherently illiberal. It is possible to design constitutional frameworks based on power-sharing principles that do not violate liberal democratic values. However, the principle of legitimate political representation, as conceived by the Constitutional Court, extends beyond power-sharing limitations related to human rights (specifically passive voting rights) and imposes restrictions on active voting rights. The principle as established by the court stipulates that voters should be limited to voting for candidates who belong to their respective constituent people. Thus, this principle necessitates the implementation of illiberal measures to ensure that voters from a specific constituent people are prevented from voting for candidates from a different constituent people. Such measures could involve special ballot boxes designated for each constituent group or an electoral system that employs ethnic gerrymandering to void "wrong" votes (Marko 2022). Consequently, given that this principle promotes illegitimate interference with voters' preferences, it is to be categorised as an illiberal principle rather than a legitimate tool for power-sharing in a constitutional framework. In other words, the court's vision of legitimate political representation argues for the corporatisation of the consociational arrangement instead of its liberalisation.

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41 Constitutional Court of Bosnia and Herzegovina, decision of 1 December 2014, case no. U-23/14, para. 60.

This matter indicates the extent to which the vagueness of constitutional identity can contribute to abuse of constitutionalism. Here, legitimate political representation was constructed based on a sentence in the Constitutional Court's decision that stated that the constituency of peoples is the overarching principle of the constitution. However, in the decision where the constituency of peoples was defined, the term "overarching" was mentioned in the context of territory, stating that the entities as federal units must obey this principle. In the *Ljubić* case, then, the Constitutional Court interpreted the term differently. Here, "overarching" was interpreted as the constituency of peoples being above all provisions of the constitution, including democracy and the rule of law. Therefore, the constitutional principles were adjusted, as the nature of legitimate political representation of the constituency of peoples had changed. Effectively, the Constitutional Court had abused the term "overarching" to construct an illiberal principle that is ostensibly a part of Bosnian constitutional identity.

On the other hand, it could be argued that the Constitutional Court's decision in the *Ljubić* case was strictly in line with its own jurisprudence, and that legitimate representation is only one of the power-sharing compromises to ensure respect for the popular vote. To respond to such an argument, we return to the Constitutional Court's decision establishing the constituency of peoples as part of the Bosnian constitutional identity.[42] From the text of this decision it is clear that when the Constitutional Court refers to the constituency of peoples, it is not only referring to their specific position. It also states that ethnic homogenisation and segregation based on territorial separation of any of the constituent peoples are not allowed. However, legitimate political representation as in the *Ljubić* case does advocate the homogenisation of the constituent peoples, where people from each ethnic group would only be allowed to vote for those candidates who have the same ethnic affiliation as them. In addition, the implementation of such legitimate political representation would indeed lead to the territorialisation of the constituent peoples' rights – only Bosniaks, Croats, and Serbs who are the majority in certain parts of Bosnia and Herzegovina would be considered a legitimate representative since they would only be able to collect a majority of votes from their own constituent people. That *ipso facto* would entail the segregation of those members of the constituent peoples who live among a majority of another constituent people. Therefore, although the decision in the case of *Ljubić* seems to strictly adhere to and respect the constituency of peoples, it in fact undermines the underlying idea of a multinational state with integrated constituent peoples in every corner.

42 Constitutional Court of Bosnia and Herzegovina, partial decision of 30 June and 1 July 2000, case no. U-5/98.

Contrary to the decision in which the constituency of peoples was defined, according to a liberal understanding of constitutionalism, as part of the Bosnian constitutional identity, in the subsequent decision of the *Ljubić* case, the same constituency of peoples was interpreted as a metaconstitutional principle that is also above the requirements of liberal constitutionalism. Thus, the ECtHR requirements regarding the Bosnian Constitution can only be implemented if they align with the legitimate representation of the constituent peoples, as ruled by the Bosnian Constitutional Court.

In light of this, we argue that legitimate representation should not be considered an unchangeable principle that must remain and be implemented in any future constitutional changes in B&H. As explained, the original "constituency of peoples" judgment established the constitutional identity of B&H as a multi-ethnic state that aligns with and respects both the individual and the collective rights of its citizens. Legally speaking, this judgment was based on a systematic interpretation of the constitution and the international documents that are an integral part of that constitution. Thus, with this decision, the Constitutional Court enabled the protection of collective rights and at the same time the prospect of implementing the ECHR requirements.

On the other hand, it remains unclear what the legal basis was for the Constitutional Court to conclude, in the *Ljubić* case, that legitimate representation is part of the concept of the constituency of peoples. This concept of legitimate representation set out in this decision creates a false dichotomy between individual and collective rights within the constitution and diminishes the prospect of the implementation of ECtHR rulings in the future, since a significant limitation of active voting rights is now required. As mentioned above, the CJEU in the case of Hungary and Poland ruled to separate unconstitutional from constitutional identities. Given that, since it does not align with the general principles of constitutionalism such as the rule of law, legitimate representation now constitutes an unconstitutional identity of B&H, it should no longer be deemed the constitutional identity of Bosnia and Herzegovina.

Constitutional Identity as Defined by the Strasbourg Court and the Bosnian Constitutional Court

Analysing the different conceptions developed by the Strasbourg Court and the Bosnian Constitutional Court regarding the position of the constituent peoples is a valuable undertaking in seeking to understand the constitutional identity of Bosnia and Herzegovina. In several judgments, the Strasbourg Court ruled that the exclusive

position of the constituent peoples within the state apparatus is not in line with the provisions of the ECHR. The Constitutional Court chose not to contest this position, as the judges at the time believed that maintaining the exclusive status of the constituent peoples was essential for ensuring the peace and institutional balance achieved by Dayton between the country's three main ethnic groups.[43]

In fact, the Constitutional Court considers differential treatment to be justified when it is attributable to a legitimate public purpose, when the instruments used can achieve the desired effect, when those instruments are necessary to achieve the objective but are less intrusive, and when the deviations from the principle of equality are proportionate to the importance of the purpose. Moreover, the judges' opinion was that such discrimination may originate in the historical genesis of the present constitution, namely to safeguard peace. In so doing, however, the Constitutional Court found grounds to establish the predominant role of the constituent peoples over the "Others" within Bosnia's institutional system. Even after the Strasbourg judgments, the Constitutional Court's jurisprudence regarding the constituent peoples remained unchanged,[44] as according to its judges the time was not ripe to change the system to a liberal-democratic one, thus abandoning the power-sharing model. The ECtHR disagreed, arguing that some corrections could be made to the country's political order, without, however, fully abandoning the consociational model, which could cause a weakening or, worse, the collapse of the system (Hodžić 2020). In light of the opposing arguments of the two courts, we ask how the primacy of the constituent peoples has become so important to Bosnia's institutional order and, importantly, what relationship this has with constitutional identity.

In the above-mentioned decision in the *Ljubić* case, the Constitutional Court implicitly used, for the first time, the argument of constitutional identity to justify the privilege and domination of the constituent peoples. Moreover, it thereby called for the corporatisation of the consociational arrangement in Bosnia and Herzegovina. The different arguments therefore appear to depend on the bodies before which they are defended. The argument of constitutional identity was developed in the Constitutional Court, and this argument has been used to maintain and strengthen the position of the constituent peoples. On the other hand, B&H has used the argument of the maintenance of peace to justify the position of the constituent peoples before the Strasbourg Court. We conclude from this that B&H has never accepted the differing reasoning of the Strasbourg Court. Moreover, the Constitutional Court implicitly constructed an additional argument – constitutional identity – to justify strengthening the position of its constituent peoples. Instead of implementing the ECtHR

43 Constitutional Court of Bosnia and Herzegovina, decision of 26 March 2015, case no. U-14/12, para. 77.

44 See Constitutional Court of Bosnia and Herzegovina, decision of 31 May 2018, case no. AP 3464/18.

judgments in the constitutional system, the Constitutional Court has thereby entrenched the privileges of the constituent peoples in Bosnia's constitutional order.

In lieu of a Conclusion: How Does the *Savickis and Others v. Latvia* Case Affect the Bosnian Obligation to Align Its Constitution with the ECtHR Judgments?

In the light of the above, it becomes clear that the case of *Savickis and Others v. Latvia* impacts the Bosnian international obligation to align its constitution with the ECtHR judgments. Indeed, this case opens a Pandora's box, facilitating the abuse of constitutionalism in Bosnia and Herzegovina, as it seems that now, based on *Savickis and Others v. Latvia*, every state has a certain amount of leeway to use constitutional identity as a legitimate aim for restricting human rights. Certainly, we do not claim that the government of Bosnia and Herzegovina will inevitably try to blueprint the argument of constitutional identity before the ECtHR. What we do argue, however, is that, in the implementation of the ECtHR judgments in the constitutional order, Bosnian political elites or the leaders of the three constituent peoples will try to enforce the ECtHR judgments in accordance with the principle of legitimate representation.

In other words, based on the reasoning employed by the Constitutional Court thus far, with the judges concluding not only that the constituency of peoples also implies their legitimate representation, but also that this principle is unchangeable, overarching, and obligatory for all political actors in Bosnia and Herzegovina, the ECtHR judgments can only be implemented if they are articulated in a way that does not violate the very constitutional identity of Bosnia and Herzegovina. It is this approach that the case of *Savickis and Others v. Latvia* confirms. Admittedly, the Latvian case does not guarantee that the ECtHR would accept the same argument of constitutional identity as a legitimate aim if the government of B&H invoked it to justify the status of constituent peoples in the Bosnian constitutional order. It has, however, become an option, and it remains to be seen what the Bosnian Constitutional Court will make of the Pandora's box that is now open.

In light of all this, we argue that, because of its illiberal character, legitimate representation should not be considered part of Bosnian constitutional identity. To the contrary: It should be considered unconstitutional identity because it does not align with the general principles of constitutionalism. Accordingly, future constitutional changes should strictly prioritize the implementation of ECtHR judgments and

disregard considerations of legitimate representation. Otherwise, all constitutional changes that include legitimate representation will lead to further corporatization rather than liberalization of the consociational arrangement in B&H.

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