

“UNITED IN DIVERSITY”?:

PROBLEMS OF STATE- AND NATION-BUILDING IN POST- CONFLICT SITUATIONS: THE CASE OF BOSNIA- HERZEGOVINA

Joseph Marko*

I. UNITED IN DIVERSITY? EUROPEAN CHALLENGES

A. Two Models of the European Nation–State

The motto of “United in Diversity,”¹ coined for the United States, is now also prominently featured in the preamble of the Treaty Establishing a Constitution for Europe.² Currently, globalization and economic and cultural homogenization affect the European Union and her member states. At the same time, European integration has set in motion market liberalization and its accompanying legal homogenization. As such, is this motto only a hollow phrase?

When comparing U.S. federalism to EU integration, one must initially account for an important aspect—the American colonies, before and after winning a war of independence, never became nation–states in the sense of modern ethnonationalism.³ Quite the contrary, the process of European integration after 1945 was based on processes of state formation and nation-building spanning several centuries. For example, nation-building in Western Europe, dating back to the Medieval Ages, left Europe politically fragmented. This fragmentation is thus not only due to the East–West divide of the Cold War between the Soviet empire and Western democratic states, but also due to the different state structures that these nation–states have adopted. Despite the breakdown of communism in 1989, this political situation continues to affect south East Europe today.

* Professor of Public Law and Political Sciences, University of Graz, Austria; Director of the Minority Rights Institute, European Academy Bozen-Bolzano, Italy. From 1997 to 2002, Joseph Marko was one of the three international judges on the Constitutional Court of Bosnia-Herzegovina appointed under the Dayton Agreement by the President of the European Court of Human Rights.

1. As suggested in 1776 by the first Great Seal Committee, the Latin motto “*E pluribus unum*” (united in diversity) is a clear reference to the thirteen colonies united into one nation.

2. Treaty Establishing a Constitution for Europe, Dec. 16, 2004, pmbl., 2004 O.J. (C 310) 3, available at <http://digbig.com/4qxks>.

3. See LIAH GREENFELD, NATIONALISM: FIVE ROADS TO MODERNITY 3–4 (1992) (defining nationalism).

We can thereby distinguish two fundamentally different models of the nation-state in Europe based on two different, even opposing, concepts of what is seen as a "nation."⁴

The first model is a legacy of principles from the French Revolution—the "French model" of a *state-nation*. Three basic normative principles frame this concept.

First, the idea of "popular sovereignty," which became politically entrenched in the 1789 French Revolution, is "the" normative principle legitimizing the exercise of all state powers. This contrasts with the principle of divine grace, on which all absolutist powers of monarchic systems in Europe had previously been based. The notion of a "people" in this normative concept is therefore nothing but an abstract category; a legal fiction that does not describe any particular individuals or groups.⁵

The second normative principle of the *state-nation* is that of strict individual equality before the law regardless of any criteria such as race, sex, economic status, or ethnic or national origin. Taken together, these two principles form the normative basis of the modern liberal democratic state. However, the "individual," who is equal before the law, is also considered an "abstract" person and the particular members of this type of nation—as a community, the "citizens"—are conceived to be ethnically indifferent in terms of religion or language.⁶

But does language really not matter in the formation of a state and the exercise of its executive and judicial powers? As Deutsch, Gellner, or Hobsbawm have explained, language as a means of communication was and is essential for the formation of modern nation-states.⁷ In contrast to the U.S. development of a nearly homogenous White, Anglo-Saxon, Protestant (WASP) culture based only on English, the problem in European state formation and nation-building is the following: how can you transform

4. For an outline of historic events, see generally ROGERS BRUBAKER, *CITIZENSHIP AND NATIONHOOD IN FRANCE AND GERMANY* (1992) (contrasting the histories of the French understanding of nationhood, which is one of "[p]olitical inclusion" and "cultural assimilation," and the German understanding of nationhood, which is "ethnocultural").

5. The same holds true for the famous phrase "We the People" from the preamble of the U.S. Constitution. U.S. CONST. pmbl.

6. "Ethnicity," according to my use of the term here, is thus not a particular "quality" or "substance" inherent in persons or territory but a collective name for descriptive markers such as language, religion, or the belief in a "common" history or culture.

7. See generally KARL W. DEUTSCH, *NATIONALISM AND SOCIAL COMMUNICATION* 70 (1953) ("The communicative facilities of a society include a socially standardized system of symbols which is a language . . ."); ERNEST GELLNER, *NATIONS AND NATIONALISM* (1983); E. J. HOBBSBAWM, *NATIONS AND NATIONALISM SINCE 1780: PROGRAMME, MYTH, REALITY* 5 (2d ed. 1990) ("Attempts to establish objective criteria for nationhood . . . have often been made, based on single criteria such as language or ethnicity . . .").

"[p]easants into Frenchmen," to paraphrase a famous book title?⁸ The process of state centralization undertaken by French absolutist kings before the revolution was already accompanied by a process of standardization of the French language and its imposition from above. Nonetheless, an empirical survey undertaken by Abbé Grégoire and commissioned by the French National Assembly revealed that more than fifty percent of French "citizens" were not able to communicate in standard French in 1794.⁹ In reaction, dictionaries for Breton-French, Dutch-French, and others were created. Then, in a sudden move, the National Assembly decided to impose the French language as the "official language" for all French citizens, enforced by a uniform educational process.¹⁰ Henceforth, only standard French could be used in the public sphere, including the legislature, the administrative authorities, and the judiciary. Thus, a cultural entity did not "exist" before the creation of the state, but the state power "created" and formed the collective identity of "French" citizenship.

Third, the "French" concept was shaped by the specific history of the imperialistic Napoleonic Wars and the subsequent defense against the Great Powers, as well as the fight against counter-revolutionary upheavals. Thereby the concept of territorial indivisibility, which had been established under monarchic rule in previous times as a principle of monarchic succession to avoid division of the country among a monarch's heirs, was transformed into the "indivisibility" of the nation as a uniform cultural and political entity under the notion of "national sovereignty." Consequently, this principle suppressed all forms of "pluralism," such as socioeconomic and ethnic pluralism.¹¹ Thus, the formation of associations or parties that stand for national self-determination is prohibited in France.¹² In fact, in 1991, the French Conseil constitutionnel declared unconstitutional the notion articulated in article 1 of the Draft Autonomy Statute of Corsica of a

8. EUGEN WEBER, *PEASANTS INTO FRENCHMEN: THE MODERNIZATION OF RURAL FRANCE, 1870–1914*, at 114 (1976) ("[T]hey had no uniform conception of patriotism at the Revolution or at any other time in our period, and that patriotic feelings on the national level, far from instinctive, had to be learned.").

9. Abbé Grégoire, *Sur la nécessité et les moyens d'anéantir les patois et d'universaliser l'usage de la langue française*, in *UNE POLITIQUE DE LA LANGUE: LA RÉVOLUTION FRANÇAISE ET LES PATOIS: L'ENQUÊTE DE GRÉGOIRE* 300, 300–17 (Michel de Certeau et al. eds., 1975).

10. CARLTON J. H. HAYES, *NATIONALISM: A RELIGION* 52–53 (1960).

11. Through the *Loi le Chapelier*, not only feudal, but all "pouvoirs intermédiaires" were made illegitimate. See JOSEPH MARKO, *AUTONOMIE UND INTEGRATION: RECHTSINSTITUTE DES NATIONALITÄTENRECHTS IM FUNKTIONALEN VERGLEICH* 248 (1995).

12. Hence, any political expression of this idea is prohibited by criminal law and not protected by freedom of speech. See Jörg Polakiewicz, *Die rechtliche Stellung der Minderheiten in Frankreich* [*The Legal Status of Minorities in France*], in *1 DAS MINDERHEITENRECHT EUROPÄISCHER STAATEN* 126, 155 (Max Planck Inst. for Comparative Pub. Law and Int'l Law, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht No. 108, Jochen A. Frowein et al. eds., 1993).

“peuple corse, composante de peuple français.”¹³ For the same reason, in 1999, the Conseil constitutionnel declared unconstitutional the ratification of the Council of Europe’s European Charter of Regional and Minority Languages.¹⁴

The constitutionally entrenched doctrine of *laïcité* creates a strict separation between church and state and prohibits all forms of public religious manifestations.¹⁵ Similarly, the French concept of the state–nation bans all forms of recognition of ethnic difference in the public sphere and renders them a strictly private affair. In effect, both concepts are—through their inherent prohibitions—antipluralist and assimilationist. Based on this interplay of strict individual equality before the law and “national” sovereignty, there simply cannot be any legally recognized “ethnic” groups or minorities. For this reason, France consistently refuses to recognize the existence of national minorities on her territory and hinders minority protection under EU law.

In stark contrast to this “French” concept of the state–nation, German history provides the model for the opposing concept of the *nation–state*, constituted by various elements.

First, a “pre-existing” cultural community is the basis of the nation–state concept. Philosophers of German idealism, such as Herder and Fichte, conceived the “existence” of a German people based on an idea that all persons who spoke the German language form a German “people.”¹⁶ However, in contrast to a territorially unified French nation–state, the Holy Roman Empire splintered the lands with German-speaking inhabitants into dozens of different political entities ranging from tiny city–states, such as Cologne, and principalities, like Nassau, to the large kingdoms of Prussia and Bavaria.¹⁷ Moreover, since medieval times, German-speaking inhabitants formed the majority of the Swiss Republic in the center of Europe.¹⁸ Also, the majority population of the western and central parts of the Habsburg Empire was German speaking.¹⁹ Hence, these philosophers

13. CC decision no. 91-290DC, May 9, 1991, Rec. 50.

14. CC decision no. 99-412DC, June 15, 1999, Rec. 71.

15. 1958 Const. art. 1.

16. See generally JOHANN GOTTLIEB FICHTE, *REDEN AN DIE DEUTSCHE NATION* (1878); JOHANN GOTTFRIED HERDER, *IDEEN ZUR PHILOSOPHIE DER GESCHICHTE DER MENSCHHEIT* (1790). For a scholarly modern edition of these sources, see generally JOHANN GOTTLIEB FICHTE, *REDEN AN DIE DEUTSCHE NATION* (F. Meiner 1955); JOHANN GOTTFRIED HERDER, *IDEEN ZUR PHILOSOPHIE DER GESCHICHTE DER MENSCHHEIT* (Aufbau-Verlag 1965).

17. R.R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD* 144–45 (6th ed. 1984).

18. KARL W. DEUTSCH, *DIE SCHWEIZ ALS EIN PARADIGMATISCHER FALL POLITISCHER INTEGRATION* (1976).

19. See ROBERT A. KANN, *A HISTORY OF THE HABSBURG EMPIRE 1526–1918*, at 440 (1974).

concluded that all who speak a German dialect form one cultural community called the German “people,” and that such a “unified” people have a right to their own state. This conclusion gave birth to the normative “nationality principle,” which became the formative principle for the creation of new states throughout central, eastern, and southeast Europe in the nineteenth and twentieth centuries.

However, the first attempt at unification of the “German” lands failed in the German and Austrian bourgeois revolutions of 1848.²⁰ Finally, in 1871, only a year after the Italian unification, Chancellor Bismark formed the “Second” German Empire.²¹ However, this Empire did not include the Habsburg lands. At the same time, the Ottoman Empire in southeast Europe was weakening.²² Soon after the “Second” German Empire formed in 1878, the Berlin Congress recognized Montenegro, Serbia, Romania, and Bulgaria.²³ Greece had been previously recognized internationally in 1829.²⁴ These new states, based on “ethnic” criteria for collective identity such as language and religion, had been forming since the beginning of the nineteenth century.

The end of World War I and the collapse of the three great multi-ethnic empires that had dominated central, eastern, and southeast European history—the Russian Empire, the Habsburg Empire, and the Ottoman Empire—helped to form a ring of states based on the cultural, or “ethnic,” concept of the nation-state. These included Czechoslovakia, Poland, Hungary, the Kingdom of Serbs, Croats, and Slovenes (which was renamed Yugoslavia in 1929), and the Baltic states of Estonia, Latvia, and Lithuania.²⁵ Therefore, the dissolution of the communist federal states of Yugoslavia, Czechoslovakia, and the Union of Soviet Socialist Republics (USSR) after 1989 was almost the last link in the chain of disintegration following from the “nationality” principle.²⁶

(explaining the conflict over languages in the central and western parts of the Habsburg Empire and how the German language prevailed in these areas).

20. The German National Assembly met in Frankfurt to deliberate a constitution. Frantisek Palacky, invited as a Czech representative, responded in a letter to the Paulskirche to explain why he was not willing to accept the invitation. His prophetic response was as follows: “Wahrlich, existierte der österreichische Kaiserstaat nicht schon längst, man müßte im Interesse Europa’s, im Interesse der Humanität selbst sich beeilen, ihn zu schaffen.” FRANZ PALACKÝ, *ÖSTERREICHS STAATSIDEE* 83 (1972) (If the Austrian empire did not yet exist, one would have to hurry to create it in the interest of Europe, even in the interest of humanity itself).

21. PALMER & COLTON, *supra* note 17, at 580, 583.

22. See generally DONALD QUATAERT, *THE OTTOMAN EMPIRE 1700–1922*, at 54–74 (2d ed. 2005) (describing the Ottoman Empire during the nineteenth century).

23. PALMER & COLTON, *supra* note 17, at 511–13, 624.

24. *Id.* at 456.

25. *Id.* at 691.

26. With the referendum on independence for Montenegro in early 2006 and the possible

As a consequence, the “individual” is no longer the ethnically indifferent citizen, but is defined by membership in a specific ethnic group along linguistic or religious lines. Such linguistic or religious differences of groups are perceived as majority or minority positions. The ethnic majority identifies itself after the nationality principle. As such, the majority puts others not belonging to its “constituency” into a minority position. This has to be taken literally. The members of the ethnic majority usually occupy all positions in the state machinery of a nation-state and thereby exercise state power over all the “others.” Thus, the democratic majority principle is thereby transformed into a “tyranny of the majority” perceived as “foreign domination.”²⁷

Following from these propositions of the “identity fiction” underlying the nation-state concept, the equality principle also takes on a different meaning. Since the nineteenth century, all continental European constitutions have included a guarantee for individual equality before the law and its corollary “negative” side, the nondiscrimination principle. However, equality before the law does not have the same meaning for everyone, as evidenced by language rights. For example, if a state’s official language, in which all communication with state authorities must be conducted, is German, all speakers of the “constituent people” with German as their native tongue can communicate with state bodies on a seemingly “natural” basis.²⁸ All others having different native languages, such as Slovene, Croat, Hungarian, or Romani, seem to need a “privilege” to be put into the same position as the majority speakers; a seemingly “additional” right to use their “different” minority language in communication with state bodies. Therefore, the nationality principle provides another basis for comparison in the application of individual equality. But is the “privilege” or “affirmative action” needed to put the member of the minority group into the same factual position as the member of the “naturalized” majority really an “exemption” from the principle of individual equality before the law that warrants special justification?

Seen in light of European history, the nationality principle did not serve the democratic legitimization of already existing states but rather the function of political unification through state formation. The political

formation of an “independent” state of Kosovo, resulting from “final status” talks that began in November 2005 under the auspices of the United Nations, the history of disintegration of political unity through the nationality principle in Europe may come to a final end.

27. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 2–4 (1994) (discussing the “tyranny of the majority” in the American context).

28. I call this ideological presumption, which camouflages normative decisions as seemingly “natural facts,” the “naturalization of difference.”

effects of this model in central and eastern Europe in the twentieth century were exclusion in various forms. For instance, almost all European countries have discriminated, and continue to discriminate, against Roma by excluding them from state and societal institutions.²⁹ Other examples of ethnic cleansing range from Northern Ireland³⁰ to Bosnia-Herzegovina³¹ or, in the worst case, the extinction of Jews through the racist Nazi regime in the Holocaust. Yet another example is the attempts of genocide in Bosnia-Herzegovina and Kosovo during the Balkan Wars in the 1990s.³²

II. THE EPISTEMOLOGICAL TRAP OF THE IDEOLOGY OF ETHNONATIONALISM AND THE NEED FOR A POLITICAL THEORY OF CULTURAL PLURALISM

The ideology of ethnonationalism stemming from the “German” model of the nation–state is derived from three basic elements.³³

First, as suggested by Anthony Smith and others, all primordial theories of nation-building are based on the axiomatic assumption that “ethnicity” is an *essential* trait of people so that “ethnic groups” form the everlasting “kernel and basis of states.”³⁴ Smith asserts that “successive generations of a *given* cultural unit of population” “must be set against the more instrumentalist or phenomenological accounts . . . that set periodic

29. This is evident from state reports and the opinions of the Advisory Committee under the Framework Convention for the Protection of National Minorities. *E.g.*, ADVISORY COMM. ON THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NAT'L MINORITIES, SECOND OPINION ON ITALY 5 (2005), available at <http://digbig.com/4qxkw> (describing how the Roma still face “widespread discrimination” in many fields).

30. I refer here to the so-called Shankhill incident reported in the state report of the United Kingdom of Great Britain and Northern Ireland under the Framework Convention on the Protection of National Minorities. *See* Eur. Consult. Ass., *Report Submitted by the United Kingdom, Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities*, para. 10, ACFC/SR(1999)013 (July 26, 1999), <http://digbig.com/4qxx> (follow “State Reports” hyperlink under “Framework Convention (Monitoring)”; then follow “First cycle” hyperlink; then follow “List of State Reports” hyperlink; then follow “ACFC/SR(1999)013” hyperlink under “United Kingdom”) (referring to the racist murder of Stephen Lawrence).

31. *See infra* note 57.

32. *See generally* MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING* 382–86 (2005) (discussing the dangers of nationalism and majority support for ethnic cleansing and how it existed in the Balkans).

33. *Id.* at 63. Mann does not only trace back the Austrian version of the ideal of the “organic nation–state” from its roots to the philosophers of German idealism, particularly Fichte’s exclusivist nationalism against Herder’s overarching universalism, but also to the development of “classic” (i.e., biological) racism in the writings of Count Gobineau and Houston Stewart Chamberlain.

34. ANTHONY D. SMITH, *NATIONAL IDENTITY* 20 (1991) [hereinafter SMITH, *NATIONAL IDENTITY*]. *See generally* ANTHONY D. SMITH, *THE ETHNIC ORIGIN OF NATIONS* 4 (1986) (discussing “the nature and role of ethnic communities” and “the formation and characteristics of nations”).

limits to the redefinitions of ethnic identities.”³⁵ Hence, “‘primordial’ quality,” in the extreme, “exists in nature, outside time. It is one of the ‘givens’ of human existence”³⁶ What is the consequence of such a presumption? A person is seemingly naturally “born” into such a “given” ethnic community and “belongs” to an “ethnic” group or ethnically perceived territory. Thus, social and political relations are—via a sense of “belonging”—reified into the “natural” existence of a people conceived like the “natural being” of a person. Of course, such reifications in analogy to living persons have a long tradition in the normative-ontological approach to the philosophy of state and law, dating back to Plato.

Second, the ethnic “identity” of persons, groups, or a territory is always conceived of as one-dimensional, based on one factor—in particular, language or religion, or an alleged “common” history or culture. This conception excludes other factors and, most importantly, supersedes competing values or interests. “Right or wrong, my country” is the famous saying that indicates absolute loyalty to the nation as a priority over all law. In addition, this form of ethnicity becomes all-encompassing, affecting all spheres of life. Children of “mixed-marriages,” therefore, will have great difficulties in such societies not only in developing their individual identity but also in gaining acceptance in societal institutions.

Third, the alleged “natural” given of “togetherness” on the basis of common characteristics serves the function of inclusion and exclusion. Those persons with the same characteristics “belong” together and, as such, seem to deserve solidarity. In contrast, those persons who do not “belong” to the group because of their “difference” must be excluded in order to create “ethnic homogeneity” as the basis for social and political cohesion. The political consequences of the idea that only ethnically “homogenous” societies and states can survive are obvious—any form of “mixing” of peoples must be prohibited, resulting in segregation and/or ethnic cleansing, or even genocide.

However, whenever one tries to define terms such as nation, people, or ethnicity by so-called objective criteria, such as a “common” language, history, culture, or religion, one will always find examples of “different” peoples in spite of the same language. For example, compare the “common” language of English and U.S. people to the multilingual people of the single nation of Switzerland. What is a nation then, but the will of the people to live together, as Ernest Renan pointed out in his famous phrase “un plébiscite de tous les jours”?³⁷ This so-called subjective

35. SMITH, NATIONAL IDENTITY, *supra* note 34, at 25.

36. *Id.* at 20.

37. Ernest Renan, Qu'est-ce que c'est qu'une nation?, Lecture at the Sorbonne (March 11,

definition of a nation makes it quite obvious that a nation or people are not a collective "being" living on a certain territory but terms that characterize a certain way of behavior.

Consequently, cooperation and conflict are the basic patterns of behavior everyone has to choose between in various situations almost daily. Nevertheless, many ideologies try to place human behavior, especially group behavior, onto one side of this divide. Such a one-dimensional reductionism can be seen in the Marxist "class struggle." And long before Samuel Huntington, it was the German Staatsrechtslehrer Carl Schmitt who wanted to fix the "essence of politics," as he called it, in an "anthropological" dichotomy of "Freund und Feind" (friend and foe).³⁸ However, one must not forget that various anarchist-socialist theoreticians also employ one-dimensional reductionism when they "naturalize" the other ideal type of behavior—cooperation or solidarity—as the "natural order" of society.

All of these examples show that the "naturalization of difference" almost inevitably leads to the notion of biologically or culturally determined social and political behavior. However, a deconstructivist-neoinstitutional approach, based on the analysis of political functions instead of the intuitive understanding of "ontological essence," can provide a more rational understanding of these phenomena, revealing the ideological "nature" of ethnonationalism.

The deconstruction of the ideology of ethnonationalism requires analysis of a chain of decisions that must be individually examined to reveal the "naturalization of difference."

1882), available at <http://digbig.com/4rdfj> (follow "chapitre 3" hyperlink for the quote).

38. See CARL SCHMITT, *DER BEGRIFF DES POLITISCHEN: TEXT VON 1932 MIT EINEM VORWORT UND DREI COROLLARIEN 27–29* (Duncker & Humblot 1991) (1963).

Der politische Feind braucht nicht moralisch böse, er braucht nicht ästhetisch häßlich zu sein; . . . Er ist eben der andere, der Fremde, und es genügt zu seinem Wesen, daß er in einem besonders intensiven Sinne existenziell etwas anderes und Fremdes ist . . .

. . . .

Die Begriffe Freund und Feind sind in ihrem konkreten, existenziellen Sinn zu nehmen, nicht als Metaphern oder Symbole . . . Ob man es aber für verwerflich hält oder nicht und vielleicht einen atavistischen Rest barbarischer Zeiten darin findet, daß die Völker sich immer noch wirklich nach Freund und Feind gruppieren, oder hofft, die Unterscheidung werde eines Tages von der Erde verschwinden, ob es vielleicht gut und richtig ist, aus erzieherischen Gründen zu fingieren, daß es überhaupt keine Feinde mehr gibt, alles das kommt hier nicht in Betracht. Hier handelt es sich nicht um Fiktionen und Normativitäten, sondern um die seinsmäßige Wirklichkeit und die reale Möglichkeit der Unterscheidung.

Id.

First, at the epistemological level, we classify all experience according to the binary code of identity/difference. In doing so, we create abstract “categories.” In the example discussed above, Herder constructed his German “people” based on the observation that there are a number of persons who speak German. However, this does not yet constitute a “people.” The missing link is the decision that exactly those people who have the “same” characteristics *should* form the German “people.” This decision therefore needs a normative element where the epistemological binary code of identity/difference is linked with the normative binary code of equality/inequality, resulting in the empirical consequence of inclusion or exclusion.

It follows that the structure of the ideology of ethnonationalism is therefore based on the equation, identity = equality = inclusion, or the converse, difference = inequality = exclusion. The ideological underpinning of the “naturalization of difference” lies in its decision making process that denies a normative approach by treating difference as a “natural given.”

Second, the formation of in-groups and out-groups is also identified with the binary code of conflict/cooperation. Again, empirical evidence shows that this seemingly “natural” behavior, favoring relatives and friends and fighting aliens and enemies, is not “natural” at all. Police statistics worldwide show that most murders happen between relatives or even within the family.³⁹ And in the second half of the twentieth century, most violent conflicts occurred between people who had knowledge about each other and were by no means “alien” to one another.⁴⁰

Moreover, skin color or language is an objective, even “natural,” factor in itself. But it is a normative decision to give exactly these factors relevance in social and political behavior. Defining people or a nation by so-called objective, cultural markers, such as language or religious denomination, requires an initial decision as to which of these factors should be the “common” characteristic. Once decided, this constitutes an abstract “entity,” a category, and not a group in the sociological sense. Thus, it is a normative, not positive, notion that common characteristics do constitute a nation or “Volk” in the binary scheme of identity/difference.

39. See, e.g., MATTHEW R. DUROSE ET AL., U.S. DEP’T OF JUSTICE, FAMILY VIOLENCE STATISTICS: INCLUDING STATISTICS ON STRANGERS AND ACQUAINTANCES 17 (2005), available at <http://digbig.com/4rdhh> (explaining that approximately twenty percent of murders were committed by family members and over forty-five percent committed by friends or acquaintances); Janine Jackson & Jim Naureckas, *Crime Contradictions: U.S. News Illustrates Flaws in Crime Coverage*, EXTRA!, May/June 1994, at 10, 12, available at <http://digbig.com/4rdhe> (mentioning that over the past few decades most violent crimes have been committed by relatives or acquaintances of the victim).

40. Jackson & Naureckas, *supra* note 39, at 12.

The alleged identity of “common” characteristics is nothing more than the normative concept of equality, demanding the equal treatment of people with the “same” characteristics, such as “common” language, religion, or citizenship. Therefore, “ethnicity” is not an inherent, natural trait of people(s) or territories but a social construction of reality with the political function of exclusion or inclusion.

Furthermore, it is exactly the political function of nationalism as an ideology to transcend these normative prerequisites of the social construction of political order. By pretending natural characteristics—the social and political construction of an “entity”—define a nation, the normative decision of inclusion or exclusion is concealed. In turn, this legitimizes state power and immunizes the normative process from critique.

Hence, as long as the dichotomy of identity/difference is not transformed into the triadic structure of identity–equality–difference, the binary code legitimizes treating “different” people unequally. Only when we no longer “believe” in the essentialist or naturalized determination of social and political behavior and do not confuse identity with equality, do we have the theoretical opportunity to recognize institutional arrangements of equality based on difference as the “essential” task of constructive constitution engineering.

Finally, these considerations provide the basis for a typology constructed with two binary codes in order to assess the legal and institutional possibilities of group relations.

	Equality	Inequality
Unity	Integration	Assimilation
Diversity	Autonomy	Segregation

A. Segregation Within a Given State or Society by Exclusion from a Community

Although the U.S. Supreme Court established the doctrine of “separate but equal” in *Plessy v. Ferguson*,⁴¹ equality as a value cannot be separated from open social structures and institutions. Rather, segregation is based on the notion that the identity of the in-group can be maintained only by the organizational exclusion of the members of the “different” out-group. However, this implies a value judgment that “others” are unequal and therefore need not be included. Even a “paternalistic pluralism,” which seeks to preserve the culture of minorities because of their “essential”

41. *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

difference,⁴² expresses an underlying value judgment of tolerance that implies inferiority assessments.

Segregation based on power relations, however, is not only a problem of dominant majorities. If the quest for autonomy is based on some sort of "opposition nationalism," it may lead to a ghettoization and segregation of minorities with all the associated problems of "reverse discrimination" and the protection of minorities within minorities. For instance, this is seen with the First Nations and third language groups in Quebec, and with the Roma in Eastern Europe.

Segregation may also lead to exclusion from a given state or society by expulsion from its territory, or "ethnic cleansing" as it is sometimes called with an obvious racist undertone. This is not a social invention of the twentieth century. Ethnic cleansing has a long historical record evidenced by pogroms against Jews and the forcible transfer of Protestants, as well as Catholics, in accordance with the principle "*cuius regio, eius religio*," established by the Augsburg Religious Peace of 1555.⁴³

Assimilation is just another way to negate the "other"; members of ethnic groups have to give up their different cultural and/or political behavior in order to be treated equally. Very often the cultural norms of the dominant majority are declared to be "neutral" and "universal" standards. As Martha Minow has stated:

If to be equal one must be the same, then to be different is to be unequal or even deviant. But any assignment of deviance must be made from the vantage point of some claimed normality: a position of equality implies a contrasting position used to draw the relationship—and it is a relationship not of equality and inequality but of superiority and inferiority.⁴⁴

Hence, the price for political and legal equality is the loss of cultural

42. See Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 NOTRE DAME L. REV. 1219, 1224 (1991) ("Under [the paternalistic pluralism] model, the minority group cannot engage, and is not regarded as capable of engaging, the majority in . . . dialogue. . . . [R]esources that will enable such a dialogue are denied this group.").

43. The Religious Peace of Augsburg, Sept. 25, 1555, in SELECT DOCUMENTS ILLUSTRATING MEDIEVAL AND MODERN HISTORY 230 (Emil Reich ed., 1905).

44. MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 50 (1990) (footnotes omitted) (citing CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32, 33–34 (1987); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005–06 (1986); Carol Gilligan, *In a Different Voice: Women's Conceptions of Self and of Morality*, 47 HARV. EDUC. REV. 481, 482 (1977); AUDRE LORDE, *Age, Race, Class, and Sex: Women Redefining Difference*, in SISTER OUTSIDER: ESSAYS AND SPEECHES 114, 116 (1984)).

identity. The separate existence of an ethnic group in terms of a specific collective identity is dissolved. And the boundary of racism may even be transgressed when assimilation, the functional equivalent of "baptism," is refused by the dominant majority.

Only autonomy *and* integration, therefore, allow for the institutional organization of equality based on the recognition of difference and thus a "real" pluralist approach. Martha Minow has pointed out that as a rule of the ethnic majority, different cultures and different behavior need not be perceived as "deviant" from an unstated norm, but do constitute legitimate aims.⁴⁵ Therefore, the recognition of difference is a necessary precondition for group formation and requires at the same time the institutionalization of some autonomy. The politics of autonomy and integration, however, have to be kept in a careful equilibrium, as there is a constant danger of assimilation or ghettoization of ethnic groups.

Thus, autonomy *and* integration are functional prerequisites for the maintenance of different ethnic groups as well as an ethnically pluralist social and political system. This approach has to be differentiated from pluralist melting-pot theories as well as from hegemonic and/or imperialist theories. In theory, it cannot be said which of these models best serves the function of conflict resolution. The painful experiences of the renaissance of ethnonationalism throughout Eastern Europe and in the Celtic fringe of Western Europe provide striking evidence that the oppression of national feelings, in the name of either proletarian internationalism or of majority rule, served to enhance conflict.

What is left, therefore, is the U.S. way of forging immigrants into the dominant WASP pattern on national and political levels, while allowing immigrants to maintain their folk-cultures and group behavior at the communal level. Thus, Little Italy and Chinatown are not deemed contradictions for the "[f]irst [n]ew [n]ation."⁴⁶ However, as Justice O'Connor noted in *Shaw v. Reno*, U.S. society perceives benign or reverse gerrymandering, or positive discrimination by state and local politics to foster minority groups, as a threat that might result in the "balkanization" of the country.⁴⁷

45. See *id.* at 50–51 ("Second, we typically adopt an unstated point of reference when assessing others. It is from the point of reference of this norm that we determine who is different and who is normal. The hearing-impaired student is different in comparison to the norm of the hearing student—yet the hearing student differs from the hearing-impaired student as much as she differs from him Unstated points of reference may express the experience of a majority or may express the perspective of those who have had greater access to the power used in naming and assessing others.").

46. See generally SEYMOUR MARTIN LIPSET, *THE FIRST NEW NATION: THE UNITED STATES IN HISTORICAL AND COMPARATIVE PERSPECTIVE* (Transaction Publishers 2003) (1963).

47. *Shaw v. Reno*, 509 U.S. 630, 657 (1993); see also T. Alexander Aleinikoff & Samuel

On the other hand, the *institutionalization of ethnic conflict by law* based on the concept of consociational democracy might serve as another model for conflict management or even resolution. Hence, the implication of this concept for the problems of reconstruction and reconciliation after a horrible war with massive ethnic cleansing and genocide in Bosnia and Herzegovina, after the adoption of the Dayton-Paris General Framework Agreement for Peace (GFAP) on December 14, 1995,⁴⁸ can serve as a case study for the ongoing problems of how to reconcile political unity with ethnic diversity.

Moreover, I have a personal reason for choosing Bosnia and Herzegovina for this case study. My experience as one of the three international judges of the Constitutional Court of Bosnia and Herzegovina for the period from 1997 to 2002 afforded me a unique insight into the problems posed not only to the jurisprudence of the Constitutional Court, but also to the effects this jurisprudence had on the constitutional and political system.

How is it that an Austrian law professor became a judge on a constitutional court of a foreign country? Article VI, paragraph 1, subsection a, of Annex 4 of the GFAP (commonly referred to as the "Dayton Constitution") prescribes that the Constitutional Court be composed of nine members.⁴⁹ Six of the nine, what were then called, in

Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 650 (1993) (showing that *Shaw* legitimizes consideration of race within the political process but limits the degree to which such consideration can control in political districting); Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 587 (1993) (offering a quantitative method to guide political districting in a manner that satisfies the *Shaw* standard and sustains political legitimacy while ensuring minority representation); Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652, 682 (1993) (arguing that racially-conscious districting undermines political legitimacy). See generally Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1410–12 (1993) (examining the diverse interests of the U.S. voting population and different approaches for insuring that those interests are accounted for in the democratic electoral process such as the "right to a relationship of representation with an elected official"); James F. Blumstein, *Voting Rights After Shaw v. Reno*, 26 RUTGERS L.J. 517 (1995) (commenting on *Shaw v. Reno* and its impact on congressional redistricting and elections in the United States); Scot A. Reader, *One Person, One Vote Revisited: Choosing a Population Basis to Form Political Districts*, 17 HARV. J.L. & PUB. POL'Y 521, 524 (1994) (reviewing "constitutional jurisprudence to determine whether the *Garza* court adhered to *stare decisis* when it abandoned equally-weighted voting in favor of a rule of equal numbers of representatives for equal numbers of people").

48. General Framework Agreement for Peace in Bosnia and Herzegovina, Dec. 14, 1995, 35 I.L.M. 75, 89, available at <http://digbig.com/4rdhj> [hereinafter GFAP or the Dayton Constitution].

49. *Id.* annex 4, art. VI. The GFAP consists of the Framework Agreement and eleven annexes that further explain the Agreement. See generally Joseph Marko, *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance*, 7 EUR. DIVERSITY & AUTONOMY PAPERS 5 (2004), <http://digbig.com/4rdhp> (discussing the agreement and its framework) [hereinafter Marko,

actual practice, “domestic judges,” were elected by the Parliaments of the Entities of Bosnia and Herzegovina (the Republika Srpska and the Federation of Bosnia and Herzegovina), whereas the “remaining three members” had to “be selected by the President of the European Court of Human Rights after consultation with the Presidency.”⁵⁰ In this selection procedure, the member states of the Council of Europe were asked to nominate appropriate candidates in 1996. Within the given time limit, twenty-two candidates—one from each nominating member state—were nominated. After consultation with the Presidency of Bosnia and Herzegovina, the President of the European Court of Human Rights (ECHR) appointed three of the candidates as members of the Constitutional Court. One of these three international members of the Constitutional Court was Hans Danelius, a judge of the Swedish Supreme Court and a member of the European Commission of Human Rights, which was established under the European Convention of Human Rights.⁵¹ Another was Louis Favoreu, a Professor of Constitutional Law at the University at Aix-en-Provence, France. At the time I was chosen as the final member, I was an Associate Professor of Comparative Constitutional Law and Political Sciences at the University of Graz, Austria.⁵²

In the following Part, I will analyze the Dayton Constitution and the effects of its implementation in light of the jurisprudence of the Constitutional Court. I will also reflect on my role as judge, as well as the role of a constitutional court in times of transition from a communist to a democratic system. A horrible war, the need for the reconstruction of a state and its economy, and reconciliation of the warring factions exaggerated the effects of this transition.

Constitutional Jurisprudence].

50. GFAP, *supra* note 48, annex 4, art. VI.

51. European Convention on Human Rights and Fundamental Freedoms, art. 19, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5.

52. In Austria itself, there was an “internal” selection procedure carried out by the Ministry of Foreign Affairs. Two factors may have given me the advantage over other Austrian and international candidates: (1) I had already served as a constitutional expert for the Council of Europe’s Commission for Democracy Through Law (commonly called the “Venice Commission” due to its seat) several times after 1994 and thereby earned a reputation in the Council of Europe as a comparative lawyer; and (2) I was probably the only candidate who spoke—due to my choice at the age of fourteen to study Serbo-Croatian as a second language in high school—the “domestic” Bosnian-Croat-Serbian language. An express provision of the Dayton Constitution states that “the judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state.” *Id.*

III. BOSNIA AND HERZEGOVINA: A "MODEL" FOR "UNITED IN DIVERSITY"?

A. *The Dayton Constitution and Its Effects*

With the adoption of the GFAP, the war in Bosnia and Herzegovina was stopped and the political compromise underlying the Agreement was legally institutionalized.

A cursory investigation of the territorial and institutional structures created by the GFAP reveals the obvious political "compromise."⁵³ The Dayton Constitution prescribes the legal continuity of the former "Republic of Bosnia and Herzegovina" under the new name "Bosnia and Herzegovina" thereby "downgrading" the secessionist Republika Srpska and the newly formed "Federation of Bosnia and Herzegovina" under the Washington Agreement of April 1994 into the "Entities" of Bosnia and Herzegovina.⁵⁴ The price for the negative peace—i.e., the simple absence of war—and the legal fiction entrenched in article I of the Dayton Constitution was the constitutional recognition of the existence of the Republika Srpska, as well as the Federation Bosnia-Herzegovina, and thereby the territorial delimitation of the former centralist Republic Bosnia-Herzegovina along ethnic lines.⁵⁵ Previously, in its secessionist constitution of 1992, the Republika Srpska had declared herself the "nation state of the Serb people."⁵⁶ The main political purpose of the war waged under the political leadership of Radovan Karadžić and the Republika Srpska military command of General Ratko Mladic was to make the Republika Srpska a

53. See *id.* art. I, paras. 1–3 (creating the Republic of Bosnia and Herzegovina as a democratic state comprised of two entities, the Federation of Bosnia and Herzegovina and the Republika Srpska). I refer to the Republic of Bosnia and Herzegovina as "the state" and the Federation of Bosnia and Herzegovina and the Republika Srpska collectively as "the Entities."

54. *Id.*; see Joseph Marko, *The Ethno-National Effects of Territorial Delimitation in Bosnia and Herzegovina*, in LOCAL SELF-GOVERNMENT, TERRITORIAL INTEGRITY AND PROTECTION OF MINORITIES 189, 207–08 (European Comm'n for Democracy Through Law ed., 1996) [hereinafter Marko, *Ethno-National Effects*] (discussing the constitutional and political developments from 1991 to 1995).

55. GFAP, *supra* note 48, annex 4, art. I, paras. 1–3; Marko, *Ethno-National Effects*, *supra* note 54, at 207–08.

56. *Republic of Srpska Constitution*, in CONSTITUTIONS OF DEPENDENCIES AND SPECIAL SOVEREIGNTIES (Albert P. Blaustein & Eric B. Blaustein eds., 1994) [hereinafter *Srpska Constitution*]; see Marko, *Ethno-National Effects*, *supra* note 54, at 194–95 (detailing how the Republika Srpska formed and the events surrounding its formation). For an updated Constitution of the Republic of Srpska, see Constitution of the Republic of Srpska, in 2 CONSTITUTIONS OF DEPENDENCIES AND TERRITORIES (Philip Raworth ed., 2002).

state composed only of Serb people through massive ethnic cleansing.⁵⁷ To a lesser extent, the same was true for the territory of the Federation Bosnia-Herzegovina. The Washington Agreement of 1994 had only stopped a war between Croats and Muslims by creating ten cantons with either Croat or Muslim majority populations.⁵⁸ Despite the massive cleansing in this part of the country during the war, this segregation was not entirely successful. Two cantons remained “mixed” because neither Croats nor Bosniacs—as the Muslims had been renamed in the Washington Agreement—formed an absolute majority on the ground.⁵⁹ Consequently, the first element of the Dayton Constitution was the recognition of a “need,” based on security reasons, for territorial separation along ethnic lines to separate the warring parties.

Based on this constitutionally recognized ethnic “pillarization” of state and society, state institutions were obviously formed according to the concept of consensus democracy.⁶⁰ Proportional ethnic representation and mutual veto powers exemplify ethnic power-sharing between the three “constituent peoples” identified in the preamble of the Constitution, i.e., Bosniacs, Croats, and Serbs.⁶¹ Hence, in the legal tradition of communist Yugoslavia, there is not a President of the state, but a collective Presidency, literally composed of one Bosniak, one Croat, and one Serb member.⁶² In addition, a bicameral parliamentary system was established with a House of Representatives to be elected in general elections and a House of Peoples to be composed of five Bosniak, five Croat, and five Serb members elected by

57. JOSEPH ROTHSCHILD & NANCY M. WINGFIELD, *RETURN TO DIVERSITY: A POLITICAL HISTORY OF EAST CENTRAL EUROPE SINCE WORLD WAR II* 293–94 (3d ed. 2000). About half of the four million inhabitants lost their homes and properties and were dispersed either as refugees all over the world or as displaced persons within Bosnia-Herzegovina. *Id.* at 295. According to new estimates, approximately one hundred thousand people lost their lives. Reuters, *Research Halves Bosnia War Death Toll*, N.Z. HERALD, Nov. 24, 2005, available at <http://digbig.com/4rdsg>. The worst massacre among the civilian population happened in Srebrenica under the eyes of UN “blue helmets” from the Netherlands. About seven thousand Bosniak men, who had fled with their families into the U.N.-declared “safe haven,” were killed by Republika Srpska troops, under the personal leadership of Ratko Mladic, when they conquered the village. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *THE STATE OF THE WORLD’S REFUGEES 2000: FIFTY YEARS OF HUMANITARIAN ACTION* 224 (2000). It was only a year ago that the Republika Srpska authorities recognized that the massacre had happened at all. *Serbs Admit Srebrenica Death Toll*, BBC NEWS, Oct. 14, 2004, available at <http://digbig.com/4rdsh>.

58. Marko, *Ethno-National Effects*, *supra* note 54, at 202–03.

59. *Id.* at 203 n.38 (citing Marie-Janine Calic, *DER KRIEG IN BOSNIEN-HERZEGOVINA: URSACHEN - KONFLIKTSTRUKTUREN - INTERNATIONALE LÖSUNGSVERSUCHE* 197 (1995)).

60. See AREND LJPHART, *PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES* 31–47 (1999) (detailing ten elements of a consensus democracy that make this model more responsive than a majoritarian democracy to a pluralistic society).

61. GFAP, *supra* note 48, annex 4, pmbl., art. IV.

62. *Id.* art. V.

the respective Entity parliaments.⁶³ Even the Council of Ministers had to be formed according to an ethnic key.⁶⁴ According to the text of the constitution, the Constitutional Court was the only institution whose composition was not based on ethnic criteria; the Parliament of the Federation elected four judges and the parliament of Republika Srpska elected two.⁶⁵ In actual practice, however, due to the territorial delimitation along ethnic lines, two Bosniacs, two Croats, and two Serbs were elected as members of the Constitutional Court. In addition, mutual veto powers are in the respective decision making processes of the Presidency and the Parliament.⁶⁶ Hence, the Bosniak, Croat, or Serb delegates in the House of Peoples can declare a proposed decision of the Parliamentary Assembly "destructive of a vital interest" of the respective constituent peoples.⁶⁷ Also, each member of the Presidency can declare a proposed decision "destructive of a vital interest of the Entity from the territory from which he was elected."⁶⁸

In addition, the allocation of powers between the "state" and the Entities reveals where the real centers of power were situated. The Entities retained almost all of the powers they had before the Dayton Constitution. According to article III of annex 4, the institutions at the state level received the absolutely necessary powers to uphold the legal fiction of an internationally recognized state.⁶⁹ In contrast, defense and thereby the preservation of the two armies that had fought each other, the police, the judiciary, the economy (with the exception of customs policy and monetary policy), education, and culture remained in the domain of the Entities. The Dayton Constitution requires that the Entities, in a two-to-one ratio, raise sufficient revenues to implement the "state" budget, thereby evidencing the absolute financial dependency of the "state."⁷⁰ In conclusion, the State of Bosnia-Herzegovina is one of the weakest federations in the world—if it can be considered a federation at all.⁷¹

63. *Id.* art. IV, paras. 1–2.

64. *See id.* art. V, para. 4 (providing that up to two-thirds of the ministers could be appointed from the territory of the Federation and all deputy ministers had to be of different ethnic origin than the ministers).

65. *Id.* art. VI, para. 1a.

66. *Id.* art. V, para. 2d, art. VI, para. 3e–f.

67. *Id.* art. IV, para. 3e.

68. *Id.* art. V, para. 2d.

69. *Id.* art. III, paras. 2–3.

70. *Id.* art. VIII, para. 3.

71. In particular, Serb constitutional lawyers call it a confederation, a "complex state," or a "union" in order to deny the federative character of Bosnia-Herzegovina.

However, the territorial delimitation and institutional power-sharing mechanisms along ethnic lines were contrasted by several mechanisms for the protection of human and minority rights, guarantees for the return of refugees and displaced persons (including the restoration of their property), and provisions resembling EU regulations for the establishment of a "common market." Both annexes 4 and 6 of the GFAP contain a bill of liberal rights.⁷² In addition, the appendix of annex 6 enumerates a list of fourteen additional human rights instruments to be applied in Bosnia-Herzegovina, which includes all relevant U.N. conventions and the two instruments of the Council of Europe concerning the protection of minority rights (the Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages).⁷³ According to a decision of the Constitutional Court, these instruments enjoy the same constitutional rank in the legal hierarchy as "the" constitution in annex 4, whereas the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols have "priority over all other law."⁷⁴ As a judicial enforcement mechanism, annex 6 provided for the creation of a Human Rights Commission composed of an Ombudsperson and the Human Rights Chamber, which sits as an appellate tribunal that decides claims made under the bill of rights articulated in annex 6.⁷⁵ Article VI of annex 4 gave the Constitutional Court "appellate jurisdiction" over all issues under the constitution, including the same bill of rights articulated in article II of annex 4, arising out of a judgment of any other court in Bosnia and Herzegovina.⁷⁶

Moreover, article II of annex 4 guarantees all refugees and displaced persons the right to return freely to their home of origin and to have property lost in the course of the hostilities since 1991 restored to them.⁷⁷ Annex 7 of the GFAP details this general provision and established the

72. *Id.* art. II, para. 3, annex 6, art. I.

73. *Id.* annex 6, art. I, app.

74. *Id.* annex 4, art. II, para. 2. Due to judicial self-restraint, the Constitutional Court never explicitly declared in an obiter dictum that the other annexes of the GFAP or the annexes to annex 4 do have constitutional rank. Rather, the Constitutional Court used them as a standard of review of subconstitutional norms and for the systematic interpretation of vague language of the GFAP or annex 4. By doing so, the Constitutional Court implicitly recognized their constitutional rank.

75. *Id.* annex 6, arts. II.

76. *Id.* annex 4, art. VI, para. 3b. In practice, this "two-tier system of human rights protection" led to institutional jealousies between the Human Rights Chamber, composed of fourteen judges, a majority of whom are international judges, and the Constitutional Court. See Marko, *Constitutional Jurisprudence*, *supra* note 49, at 13–15 (discussing "[t]he [p]osition of the Court in [r]elation to the Human Rights Chamber of Annex 6").

77. GFAP, *supra* note 48, annex 4, art. II, para. 5.

Commission for Displaced Persons and Refugees.⁷⁸ Finally, article I of annex 4 prescribes that “the Entities shall not impede full freedom of movement of persons, goods, services, and capital throughout Bosnia-Herzegovina,” and that “[n]either Entity shall establish controls at the boundary between the Entities.”⁷⁹

In conclusion, the constitutional structures of Bosnia-Herzegovina contain both static and dynamic elements.⁸⁰ The territorial delimitation and power-sharing, institutional mechanisms clearly reflect the military and political power relations of 1995. The provisions on the protection of human rights and the return of refugees and displaced persons should allow for reconstruction and reconciliation of state and society by effectively tackling all effects of ethnic cleansing. At the same time, the drafters of the constitution must have been aware of the segregationist and disintegrative tendencies resulting from territorial delimitation and power-sharing defined along ethnic lines. Hence, by providing for mechanisms of a transfer of responsibilities from Entity to state level and the establishment of a complex institutional structure of civilian bodies with international composition or leadership, the framers obviously looked for institutions and mechanisms for state reconstruction and reconciliation; in other words, for integrative forces to strengthen the state and to provide for societal cohesion.⁸¹ Civilian bodies, namely the Constitutional Court, the Central Bank, the Human Rights Commission, the Real Property Claims Commission, the High Representative (who was made responsible by annex 10 for coordinating all civilian efforts to implement the GFAP), and the International Police Task Force under annex 11, are clear evidence of this intent.⁸²

78. *Id.* annex 7, art. VII.

79. *Id.* annex 4, art. I, para. 4.

80. However, since there are no publicly available records of the negotiations in Dayton, Ohio, the legislative history must be based on hypotheses of the allegedly “intended” effects of the constitutional structures.

81. *Id.* art. III, para. 5.

82. *Id.* annex 4, arts. VI–VII, annex 6, art. II, annex 7, art. VII, annex 10, art. I, annex 11, arts. I–II.

*B. Effects of Theoretical, Constitutional, and Institutional Compromises in the Phase of Reconstruction of State and Society After 1995*⁸³

On the state level, power-sharing in the ethnically representative institutions did not work. Instead of a positive elite consensus for cooperation, a negative consensus under the principle of *divide et impera* (divide and rule) prevailed. Thus, the Presidency and the Parliamentary Assembly were blocked along ethnic lines and were unable to adopt the necessary decisions and laws for the reconstruction of the state and the war-torn economy. In this situation, from the very beginning, the High Representative (HR) was a “toothless tiger” against the obstruction of the ethnonationalist parties and politicians in the Bosnia-Herzegovina institutions due to the weak coordination competencies given to him under annex 10 of the GFAP.⁸⁴ Thus, in 1997, the mandate of the HR was extended by the Peace Implementation Council (PIC) meeting in Bonn so that he could intervene in the legislative process and dismiss obstructionist public officials.⁸⁵ Based on these new “Bonn Powers,” the HR immediately enacted integrationist legislation decreeing laws on citizenship, a new flag, the national anthem, the new currency, ethnically neutral license plates, and passports—all laws on which the nationalist parties could not agree in the Parliamentary Assembly.⁸⁶ Additionally, HR Wolfgang Petritsch from Austria and then-HR Paddy Ashdown from Great Britain started to dismiss more and more public officials, from mayors to members of the collective State Presidency, for obstructing the implementation of the GFAP.⁸⁷

83. For the most comprehensive analyses, see generally SUMANTRA BOSE, *BOSNIA AFTER DAYTON: NATIONALIST PARTITION AND INTERNATIONAL INTERVENTION* (2002) (detailing the various stages of democratization in Bosnia and the influence of an international presence within this process); DAVID CHANDLER, *BOSNIA: FAKING DEMOCRACY AFTER DAYTON* (1999) (providing a comprehensive analysis of the various challenges posed by the international supervision of the Bosnian democratization process); DAYTON AND BEYOND: PERSPECTIVES ON THE FUTURE OF BOSNIA AND HERZEGOVINA (Democracy, Security, Peace No. 171, Christophe Solioz & Tobias K. Vogel eds., 2004) (same).

84. GFAP, *supra* note 48, annex 10, art. II; see Christian J. Ebner, *The Bonn Powers—Still Necessary?*, in FROM PEACE MAKING TO SELF SUSTAINING PEACE—INTERNATIONAL PRESENCE IN SOUTH EAST EUROPE AT A CROSSROADS? 118, 120–22, 146 (Predrag Jurekovic & Frederic Labarre eds., 2004) (discussing how the HR needed to take “a more vigorous - and more interventionist - approach”).

85. Ebner, *supra* note 84, at 122–24. For a critical analysis of these powers and the relation between the HR and the Constitutional Court of Bosnia-Herzegovina, see Joseph Marko, *Challenging the Authority of the UN High Representative Before the Constitutional Court of Bosnia and Herzegovina*, in REVIEW OF THE SECURITY COUNCIL BY MEMBER STATES 113, 113–117 (Erika de Wet & André Nollkaemper eds., 2003).

86. Ebner, *supra* note 84, at 124–25.

87. *Id.* at 125–27, 131.

However, the Bonn Powers proved to be a double-edged sword. The political parties, unwilling to reach a compromise, could point in the direction of the HR and excuse themselves vis-à-vis their electorate, claiming that they had to bend to “imperial power” and had defended “their national interest” as best as possible. At the same time, they could blame the “undemocratic” behavior of the HR and the international community in general and criticize “double standards.” Hence, the ethnonationalist parties created a vicious cycle—the more they created obstructions, the more the HR intervened so that they could ethnically mobilize and reinforce their grip on the already ethnically pillarized electorate.⁸⁸

Despite repeated elections on all levels and election-engineering by the Organization for Security and Co-operation in Europe (OSCE), which was responsible for the organization of elections according to annex 3 of the GFAP,⁸⁹ all efforts to establish a multi-ethnic party system failed.⁹⁰ The three nationalist parties, the (Bosniak) Party of Democratic Action (SDA), the Serb Democratic Party (SDS), and the Croatian Democratic Union (HDZ), which represent most of the Bosniak, Serb, and Croat electorate, had dominated the political system before the war.⁹¹ The three nationalist parties were, with the exception of 2000, repeatedly re-elected and thereby democratically legitimized.⁹²

Even after the adoption of the GFAP, ethnic cleansing and homogenization continued on the Entity level. For example, until 2000 there were no substantive “minority” returns, i.e., Serbs returning to the Federation, and Bosniacs and Croats to the Republika Srpska.⁹³ Moreover, schools remained segregated based on the right to “mother-tongue” instruction, despite only minor differences between the Bosnian-Croatian-Serbian (B-C-S) languages.⁹⁴ Homogenization is also shown by figures on

88. A comprehensive empirical study examining how much the political elites have gained economically from this system has not been performed.

89. GFAP, *supra* note 48, annex 3, art. II.

90. See INT’L CRISIS GROUP [ICG], EUROPE (BALKANS) REPORT NO. 146, BOSNIA’S NATIONALIST GOVERNMENTS: PADDY ASHDOWN AND THE PARADOXES OF STATE BUILDING I (2003), available at <http://digbig.com/4rdsq> (documenting the continued political support for the prewar nationalist parties in postwar elections).

91. *Id.*

92. See *id.* (providing an update of the 2002 elections and how it had been since 1998 since the three ethnonationalist parties had swept to power).

93. See UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, *supra* note 57, at 232 (noting that “the total number of returns to areas dominated by another ethnic group remained low,” but there was “a substantial increase in the number of ‘minority returns’ in both Croatia and Bosnia and Herzegovina during the first few months of 2000” (citing ICG, EUROPE (BALKANS) REPORT NO. 95, BOSNIA’S REFUGEE LOGJAM BREAKS: IS THE INTERNATIONAL COMMUNITY READY? 2–5 (2000), available at <http://digbig.com/4rdsq>)).

94. Constitutional Court of Bosnia and Herzegovina, Request for Evaluation of

the ethnic composition of the executive and judiciary in the Entities. The landmark decision published by the Constitutional Court, known as the “constituent peoples” decision, showed there were virtually no non-Serbs represented in the government, judiciary, and police of Republika Srpska and almost no Serbs in the respective institutions of the Federation in 1997.⁹⁵ Additionally, the Entities enacted legislation to enforce the already existing legal fragmentation, creating more and more barriers to the free movement of people, goods, services, and capital in violation of the guarantee of a common market required under article I of annex 4.⁹⁶ Moreover, the Entities were not ready to make use of the constitutionally authorized transfer of powers to the state level by negotiations.

Nationalist exclusiveness is not the only cause of a lack of elite cooperation. According to opinion polls in 2002, only fifty-three percent of the Bosniak electorate supported a common and strong state.⁹⁷ Fully fifty-three percent of Serbs want independence and/or the annexation of Republika Srpska to Serbia, in contrast to just thirteen percent who are for a common state for Bosnia-Herzegovina.⁹⁸ Similarly, only nineteen percent of Croats support the current state of Bosnia-Herzegovina, whereas thirty-one percent opt for a third, separate Croat entity and eighteen percent for an independent Herceg-Bosna.⁹⁹ These figures clearly show that the majorities of two of the three constituent peoples do not really want the common state Bosnia-Herzegovina. This indicates a desperate lack of a civic concept of Bosnia-Herzegovina statehood and an “overarching” Bosnian identity.

Due to the failures of elite cooperation and the ethnic “pillarization” of the society, the reconstruction of the war-torn economy failed.¹⁰⁰ Consequently, the transition from a socialist to a market economy was also

Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia-Herzegovina, Case U 5/98, Partial Decision IV, Službeni Glasnik Bosne i Hercegovine, No. 36/00, Dec. 31, 2000, para. 26 (Aug. 19, 2000), available at <http://digbig.com/4qwjp> (search case no. “U 5/98”; then follow link for decision of “Aug. 18, 2000”) [hereinafter Partial Decision IV] (citing Law on the Official Use of Languages and Scripts, Službeni glasnik Republike Srbije, No. 15/96).

95. Constitutional Court of Bosnia and Herzegovina, Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia-Herzegovina, Case U 5/98, Partial Decision III, Službeni Glasnik Bosne i Hercegovine, No. 23/00, Sept. 14, 2000, (July 1, 2000), paras. 91–93, <http://digbig.com/4qwjp> (search case no. “U 5/98”; then follow link for decision of “July 1, 2000”) [hereinafter Partial Decision III].

96. GFAP, *supra* note 48, annex 4, art. I, para. 4; Partial Decision IV, *supra* note 86, paras. 31–32.

97. UNITED NATIONS DEV. PROGRAMME, EARLY WARNING SYSTEM: BOSNIA AND HERCEGOVINA, ANNUAL REPORT (2002).

98. *Id.*

99. *Id.*

100. ROTHSCHILD & WINGFIELD, *supra* note 57, at 301–02.

very slow.¹⁰¹ This was camouflaged in the years after Dayton by massive foreign aid. Only after 2000 did it become visible that the economy of Bosnia-Herzegovina is totally aid-dependent, instead of investment-driven, due to the lack of foreign investment caused by the lack of effective rule of law.¹⁰²

On the other hand, the decentralization of power to the Entities and cantons created a huge state apparatus with thirteen Prime Ministers, more than one hundred ministers, approximately seven-hundred and fifty elected representatives, and twelve hundred judges and prosecutors, serving a population of only four million.¹⁰³ However, this massive state apparatus is not able to secure effective, legal security and basic public services such as pensions and social security.

In conclusion, the institutionalization of ethnic power-sharing at the state level failed. Territorial strongholds of nationalist forces in the Entities prevailed over the civic principle of statehood such that almost every aspect of state and society came to be seen through the ethnic lens. This change, however, did not contribute to the establishment of mutual trust and interethnic cooperation, nor did it foster reconciliation and the formation of a common state identity. Instead, it prevented effective state reconstruction and nation-building. At the same time, recognition of the Entities and their strong powers, which the Entities did not want to give up, enforced the disintegrative factors and tendencies of the ethnonational divide.

C. The Role of a Constitutional Court in State Formation and Nation-building

What is the role of the Constitutional Court in such a political system? The eternal problem of all constitutional adjudication—with particular regard to the judicial review of legislative acts, both in the U.S. system as well as in the civil law systems—is the question of how and to what extent judges can interfere in the legislative realm without being accused of transgressing the boundaries between the principle of democracy organized in the institution of a parliament which makes the law, based on the will of

101. *Id.*

102. UNITED NATIONS DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT; BOSNIA AND HERZEGOVINA 11 (2002), available at <http://digbig.com/4rdwk>.

103. ICG, EUROPE (BALKANS) REPORT NO. 127, COURTING DISASTER: THE MISRULE OF LAW IN BOSNIA & HERZEGOVINA 12–13 (2002), available at <http://digbig.com/4rdwr>; see ICG, EUROPE (BALKANS) REPORT NO. 84, RULE OF LAW IN PUBLIC ADMINISTRATION: CONFUSION AND DISCRIMINATION IN A POST-COMMUNIST BUREAUCRACY I, 5–7 (1999), available at <http://digbig.com/4rdws> (“Public administration in BiH is a labyrinth of pre-war, wartime and post-war institutions, often exercising overlapping administrative authority.”).

the people, and the principle of the rule of law institutionalized through a supreme or constitutional court. Such transgression violates the separation of powers, and according to the theory of legal positivism, a court must simply apply the democratically adopted laws and the constitution. In particular, if the constitution itself has to serve as a standard of review for ordinary legislation, the frequently raised question is: how can it be justified that judges can transgress the boundary between law and politics?

This is, however, a frequent misunderstanding of the functioning of constitutional adjudication. Every review of ordinary legislation in light of the text of the constitution has a political effect that is caused either by declaring a law or its provisions unconstitutional or, conversely, by upholding it. In this respect, the respective government or opposition will be positively or negatively affected, and accordingly, acclaim or criticize the decision of the court. This is simply in the nature of the institution of judicial review of legislative acts, where judicial review is incorporated into a legal system.¹⁰⁴ But if judicial review is entrenched in a constitution, the real problem begins with the question of what “scope for legitimate political discretion” exists for the legislator under the given constitution, which the reviewing court has to respect. Indeed, in this respect a borderline between law and politics exists and leads invariably to the eternal swing of the pendulum between judicial self-restraint and judicial activism. The legislature’s “sphere of absence of judicial control” is again very often defined by the courts in interpreting the respective constitutional provisions.¹⁰⁵ In this regard, courts are accused or praised either for their

104. It is therefore no surprise that there are legal systems which, for different reasons, do not recognize the institution of judicial review of legislation. In Great Britain, due to the constitutional doctrine of parliamentary sovereignty, the differentiation between ordinary laws and parliamentary acts forming a constitution superior in rank was never made. Switzerland even prohibits, through an express provision in its constitution, the review of federal law by the Swiss Federal Supreme Court according to the doctrine of the democratic supremacy. Bundesverfassung der Schweizerischen Eidgenossenschaft [BV], Constitution fédérale de la Confédération suisse [Cst] [Constitution] April 18, 1999, SR 101, art. 191 (Switz.).

105. In Poland, the Parliament was given the power to “overrule” a decision of its Constitutional Court with a qualified majority under the “Little Constitution,” in effect until 1997. O wzajemnych stosunkach między władzą ustawodawczą Rzeczypospolitej Polskiej oraz o samorządzie terytorialnym [Constitutional Act of 17th October 1992 on mutual relations between the legislative and executive authority in the Republic of Poland and on local government], Oct. 17, 1992, Dziennik Ustaw Rzeczypospolitej Polskiej, Nov. 23, 1992, p. 1477. For a comprehensive study of constitutional courts in postcommunist states of Central and Eastern Europe, see generally WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2005). In Austria, under the system of “grand coalitions” of the conservative People’s Party and the Socialist Party, as long as they had a two-thirds majority in parliament, these two parties started to “overrule” the Austrian Constitutional Court’s decisions by elevating the same provisions of laws declared unconstitutional to constitutional rank and thereby preempting the responsibility of the court to review legislation. Víctor Ferreres Comella, *Una defensa de la rigidez*

activism or their self-restraint depending on the respective ideological presuppositions of the observer or analyst.¹⁰⁶

However, looking into the constitutional jurisprudence of supreme or constitutional courts from a comparative perspective, it becomes clear that the standard of review varies, even within a national legal system, depending on the areas of law under scrutiny. Hence, with regard to the protection of human rights against state interference by legislation, it makes a big difference to a legislator whether the U.S. Supreme Court applies the rational basis test or the strict scrutiny test to what the legislator does in a case of suspect classifications such as race or gender. Similarly big differences can be seen in the development of the constitutional jurisprudence of the German and Austrian constitutional courts. In the 1950s and 1960s, these courts protected constitutionally guaranteed fundamental rights only insofar as the legislative authority did not "impair the very essence of the right" (theory of the Wesengehaltssperre). Thus, they left a "weiter rechtspolitischer Gestaltungsspielraum" (broad scope of political discretion) to the legislature, comparable to the rational basis test. In the following decades, these two courts, following the jurisprudence of the ECHR, developed the proportionality principle as a standard of review for the protection of almost all fundamental rights; narrowing the "legislative discretion" in a similar manner as the strict scrutiny doctrine of the U.S. Supreme Court.¹⁰⁷

constitucional, 23 DOXA: CUADERNOS DE FILOSOFÍA DEL DERECHO 29, 32 (2000) (citing Heinz Schäffer, *Austria: La relación entre el Tribunal Constitucional y el legislador*, in *LAS TENSIONES ENTRE EL TRIBUNAL CONSTITUCIONAL Y EL LEGISLADOR EN LA EUROPA ACTUAL* (Eliseo Aja ed., 1998) 1, 40–42). Therefore, in the mid-1980s the Austrian Constitutional Court issued a warning in two cases that such a "practice" of the constitutional majority could infringe upon the "guiding constitutional principle" of the rule of law (*Rechtsstaatsprinzip*) despite the fact that the Austrian Constitution nowhere explicitly mentions this principle. *Verfassungsgerichtshof [VfGH] [Constitutional Court] June 13, 1984, 49 Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes [VfSlg] No. 9950; VfGH May 23, 1985, 50 VfSlg No. 10394*. It took until 2001, however, for the Austrian Constitutional Court to declare a constitutional provision unconstitutional and establish a doctrine recognizing a "core element" or "essence" of the constitution that cannot be amended even by a two-thirds majority in parliament, which is the "ordinary" constitution-maker. *VfGH Oct. 11, 2001, 66 VfSlg No. 16327*. Nevertheless, this leaves open the question of whether the "guiding principles" themselves, namely representative democracy, rule of law, federalism, and a republican form of government, could be abolished by the procedure under article 44, paragraph 3, of the Austrian Constitution, which requires a referendum in addition to a qualified majority in parliament. *Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, art. 44, para. 3*.

106. From a comparative perspective, this cannot, however, be equated with liberal or conservative attitudes.

107. See, e.g., DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 300–01 (1994) (describing a German case "which established varying degrees of judicial review . . . according to the severity of the intrusion") (citing *Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 11, 1958, 7 Entscheidungen des Bundesverfassungsgerichts*

In the legal tradition of Austria and Germany, a strong constitutional doctrine was developed in light of a philosophical dispute between Carl Schmitt and Hans Kelsen after World War I: whether a powerful president of the republic (Schmitt's position) or the constitutional court (Kelsen's position) should be the "Hüter der Verfassung" (Guardian of the Constitution).¹⁰⁸ After the breakdown of the Weimar Republic due to the *democratic* takeover by the Nazi Party (before eventually abolishing democracy), Kelsen's position prevailed, particularly after World War II, when the German Basic Law (Grundgesetz) of 1949 established a Federal Constitutional Court.¹⁰⁹ After the breakdown of communism in central and south East Europe in 1989, all newly formed democracies established specialized constitutional courts. In conclusion, the doctrine of a "guardian of the constitution" does not allow for lacunae in the legal protection afforded by the constitution, and thus makes the constitutional court the supreme arbiter of all possible conflicts.

But even under the theory of legal positivism, that all judicial decision making must be based on and legitimized through the text of the constitution, the question arises as to which method of interpretation will prevail in the end. Hence, despite the rule that the judge must apply the rule contained in the text of the constitution, in practice, the problem of interpretation starts when there is no consensus about the meaning of the language of the text. In that case, additional methods of interpretation must be taken into consideration in order to establish a hypothesis about the meaning of the text. These methods are the interpretation of the text in the context of the entire legal document or even the legal system, the exploration of legislative history in order to find the implicit "will" of the legislative authority, or the respective teleological, functional interpretation. It goes without saying that different methods can lead to different results. As a rule, interpretation in light of the legislative history will have the effect of "freezing" a given legal, institutional, political, or social state of affairs. By contrast, the functional interpretation will open doors for a dynamic

[BVerfGE] 377 (F.R.G.)). There are three respective criteria of review the legislative acts must meet: (1) they must be adapted (*geeignet*) to the attainment of a legitimate purpose; (2) necessary (*erforderlich*) to that end; and (3) not excessive (*unzumutbar*) or disproportionate in comparison to the benefits to be achieved. BVerfG June 11, 1958, 7 BVerfGE 377. Necessity is narrowly defined. As in certain cases of strict scrutiny in the United States, the legislature must select the least burdensome means of achieving its goal. *Grutter v. Bollinger*, 539 U.S. 306, 326–27 (2003). Proportionality in the narrow sense requires a balancing of the state interest and the burden imposed.

108. Compare CARL SCHMITT, *DER HÜTER DER VERFASSUNG* (1931) (proposing a powerful presidency and reform of the Weimar Republic), with HANS KELSEN, *WER SOLL DER HÜTER DER VERFASSUNG SEIN?* (1931) (responding to Schmitt in support of Austria's first-of-its-kind constitutional court, established in 1920 with a monopoly for judicial review of legislation).

109. Grundgesetz für die Bundesrepublik Deutschland [Basic Law], May 23, 1949 BGBl. I at 1.

development of the given situation, most probably with consequences the legislators never had intended or were even aware of at the time of the adoption of the constitutional text. However, is a judge then imposing his values or attitudes on the parties, or society in general, against the will of the democratically elected parliament or constitutional assembly? This is the eternal fear expressed against the danger of a "gouvernement des juges," since there is no universal, theoretical guideline defining when a judge must follow the legislative history or is allowed to interpret functionally. This will, in the final analysis, always be a political question resolved by applying the majority principle in the decision making process of the court.¹¹⁰

1. Interethnic Relations

In the following analysis of the jurisprudence of the Constitutional Court of Bosnia-Herzegovina with regard to interethnic relations, this Essay will demonstrate how these obviously general considerations were applied under the special political circumstances of the Bosnian political system.¹¹¹

In 1999, the Constitutional Court had already declared the Law on Government of Bosnia-Herzegovina unconstitutional because the Constitutional Court had envisioned a system of ethnically apportioned co-chairs for the Council of Ministers who could effectively appoint ministers.¹¹² Since these legal provisions were obviously in conflict with the text of the Dayton Constitution, they did not raise any particular

110. In this regard, I agree with Sadurski, that constitutional interpretation is "a constructive and creative task of infusing the abstract constitutional clauses with political values in order to render them operative in specific cases," but I strongly disagree that this can be done without specific, technical, legal qualifications. SADURSKI, *supra* note 105, at 294. However, I also disagree—based on my experience as a constitutional court judge and legal council for a parliament—with his positive reference to Alec Stone Sweet that parliamentary adjudication of rights would be basically the same as the deliberations of a constitutional court and that "balancing offers the illusion of a 'scientific' assessment." *Id.* at 276, 294 (citing Alec Stone Sweet, *Constitutional Dialogues: Protecting Human Rights in France, Germany, Italy and Spain*, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 8, 26 (Sally J. Kenney et al. eds., 1999)). Every judge is aware that applying the historical (as opposed to the teleological) interpretation is a "political" decision, however justified by the existence of a court and by its responsibility to render "authoritative" decisions based on the majority principle. Otherwise, even a fundamental right, namely access to a court as an important element of the rule of law principle, might be violated.

111. For an overview, see generally Marko, *Constitutional Jurisprudence*, *supra* note 49.

112. Constitutional Court of Bosnia and Herzegovina, Request for Evaluation of Constitutionality of Certain Provisions of the Law on the Council of Ministers of Bosnia and Herzegovina and the Ministries of Bosnia and Herzegovina, Case U 1/99, at 4 (Aug. 14, 1999), available at <http://digbig.com/4qwjp> (search case no. "U 1/99"; then follow link for decision of "Aug. 14, 2000").

problem of interpretation.¹¹³ The Constitutional Court's landmark decision, however, became the case U 5/98, which was decided and published in 2000 in four partial decisions.¹¹⁴ Partial Decision III, in particular, is known as the "Constituent Peoples" decision. The chairman of the Collective Presidency at that time, Alija Izetbegovic, brought a request for "abstract review" before the Constitutional Court pursuant to article VI, paragraph 3(a), of annex 4.¹¹⁵ Chairman Izetbegovic brought the request because the Entities' constitutions, despite an express provision in the Dayton Constitution with a time limit of three months, had not been brought into conformity with the Dayton Constitution by the beginning of 1998.¹¹⁶ The chairman therefore requested a review of more than twenty provisions in the Entity constitutions, most importantly, the provisions on official languages, the status of the Orthodox Church, the "civilian command authority" of the Entities' presidents over armed forces, the institution of socially owned property as a communist legacy, and the position of constituent peoples as being contrary to the Dayton Constitution.¹¹⁷ In particular, the claim that constituent peoples must be constituent "on the entire territory of [Bosnia-Herzegovina]" aimed at the breakup of nationalist exclusiveness, discrimination, and segregation at the Entity level.¹¹⁸

It immediately became clear that due to the vague language of the constitutional text, there was not an obvious solution despite all of the arguments in the written statements of the parties—the legal representatives of the National Assembly of Republika Srpska on the one hand and the legal representatives of both Houses of the Federation parliament and the

113. *Id.*

114. Constitutional Court of Bosnia and Herzegovina, Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia-Herzegovina, Case U 5/98, Partial Decision I, SLUŽBENI GLASNIK BiH, No. 11/00, Apr. 17, 2000 (Jan. 30, 2000), Partial Decision II, SLUŽBENI GLASNIK BiH, No. 17/00, June 30, 2000 (Feb. 19, 2000), Partial Decision III (July 1, 2000), Partial Decision IV (Aug. 19, 2000), <http://digbig.com/4qwjp> (search case no. "U 5/98"; then follow appropriate link).

115. GFAP, *supra* note 48, annex 4, art. VI, para. 3a; Partial Decision III, *supra* note 95, para. 1. The U.S. system, called "concrete review" in continental Europe, requires a contested "case" before a regular civil, criminal, or administrative court raising a constitutional question or the court will dismiss the current case—in particular, whether the law applied in the "concrete" case is unconstitutional. The "abstract review" procedure, found only in Europe, does not require litigation before a court. Usually, only the president of the republic, a parliamentary minority, the federal government (in federal states), or the government of a subnational entity may raise the question of constitutionality of a statute, or even a sub-national constitution, in an "abstract fashion" before a constitutional court.

116. GFAP, *supra* note 48, annex 4, art. XII, para. 2; Partial Decision III, *supra* note 95, paras. 1, 10, 34, 99; Partial Decision IV, *supra* note 86, paras. 20, 35, 50, 59, 66.

117. Partial Decision III, *supra* note 95, para. 1.

118. *Id.* paras. 35–36.

legal council of President Izetbegovic on the other. This is particularly true with regard to the meaning of the term “constituent peoples” used in the last line of the preamble to the constitution.¹¹⁹ There was no clear answer as to what normative consequences this phrase should have, but there was a big alternative depending on the seemingly “political” consequences of the applied method of interpretation.

The Constitutional Court had two options. The first was to uphold the “historic” compromise at Dayton in 1995, with its territorial separation along ethnic lines through recognition of the Republika Srpska as the national “[s]tate of the Serb people.”¹²⁰ At the same time, according to article 1 of the constitution of the binational Federation, only Bosniacs and Croats were declared constituent peoples.¹²¹ This was the price for a negative peace with the consequence of legitimizing the ethnic cleansing that had happened during and immediately after the war. This option would continue the ongoing national homogenization, thereby “freezing” the institutional structures at the Entity level. The Constitutional Court’s second option was to rely on the other constitutionally entrenched and dynamic goal of the GFAP, namely, the return of refugees and displaced persons in order to reestablish a multiethnic society as it had existed before the war.¹²²

This scholarly Essay is not the place to discuss all the procedural details of the case. However, it soon became clear in the deliberations of the Constitutional Court (after the presentation of a report with all of the legal and factual problems raised in this case by me as judge rapporteur) that there was strong disagreement among the judges. Even the international judges disagreed about which methods of interpretation and analysis to apply.

The legal problems raised in the written request were twofold. First, the determination of Republika Srpska as the national “[s]tate of the Serb people” and the designation of only Bosniacs and Croats in the Federation of Bosnia-Herzegovina Constitution were allegedly violating the express, preambulatory provision of the Dayton Constitution, which designated all three peoples as “constituent peoples.”¹²³ Secondly, these provisions provided the basis for factual discrimination on the ground of ethnic belonging, which was prohibited by the nondiscrimination provision in

119. GFAP, *supra* note 48, annex 4, pmbi.

120. *Srpska Constitution*, *supra* note 56, art. 1; Partial Decision III, *supra* note 95, at 11.

121. FEDERATION OF BOSN. AND HERZ. CONST., art. 1, Službene novine Federacije Bosne i Hercegovine No. 1/94, 33 I.L.M. 740, 743; Partial Decision III, *supra* note 95, at 25.

122. GFAP, *supra* note 48, annex 4, art. II, para. 5.

123. *Id.* annex 4, pmbi.; Partial Decision III, *supra* note 95, at 11, 25.

article 2, paragraph 4 of the Dayton Constitution.¹²⁴

These arguments for the violation of the Dayton Constitution required both a normative and a positive analysis: first, to establish the normative content of the phrase “constituent peoples” through an exploration of the legislative history and a contextual analysis of the GFAP and related documents; and second, to establish the factual situation of interethnic relations in the Entities in order to assess the allegation of *de jure* and/or *de facto* discrimination on the basis of the contested Entities’ constitutional provisions.

When I reported, as judge rapporteur, in the monthly deliberations of the court on the progress made by establishing the factual situation, four judges vehemently objected to this analysis. These judges argued that an “abstract” review procedure does not require any factual analysis and must be restricted to the analysis of the verbal meaning of the texts of the Entities’ constitutions. This obviously absurd argument remained, however, a minority opinion in a narrow 5–4 “pretrial” procedural decision.

As far as the normative analysis was concerned, the first problem in interpreting the “meaning” of the term “constituent peoples” was, of course, whether the constitutional basis for the request could provide a basis for reviewing the Entities’ constitutions at all since it was only included in the preamble of the Dayton Constitution. The argument of the representatives of the National Assembly of Republika Srpska, concluding that the preamble cannot be invoked, was twofold.¹²⁵ First, they declared that the preamble is not part of the text of the constitution itself.¹²⁶ Second, they argued that a preamble has, in either case, no normative content at all, referring to the writings of the prominent Austrian lawyer Hans Kelsen.¹²⁷

The first part of the argument was, in the majority opinion, in opposition to the wording of article 31 of the Vienna Convention of the Law on Treaties.¹²⁸ Article 31 contains general rules on interpretation of international treaties such as the GFAP and its annex 4, the Dayton Constitution.¹²⁹ This provision simply says that a (normative) text includes its preamble.¹³⁰

124. GFAP, *supra* note 48, annex 4, art. II, para. 4.

125. Partial Decision III, *supra* note 95, para. 11.

126. *Id.*

127. *Id.*; Kelsen, *supra* note 108.

128. Partial Decision III, *supra* note 95, para. 19 (July 1, 2000).

129. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331, 340, 8 I.L.M. 679.

130. *Id.* art. 31.2.

The second part of the Republika Srpska representatives' argument was much more difficult to deal with due to conventional wisdom spread in textbooks of constitutional law based on the authority of Hans Kelsen. Instead of referring to a "scientific authority," the majority of the judges preferred a comparative constitutional analysis of the case law of other courts. This allowed the judges to consider not only continental European legal systems but also those from North America. We found two striking examples where the preamble of a constitution was declared to have normative force: the preamble of the French Constitution, which incorporates the 1789 Declaration on the Universal Rights of Men into still valid law; and the interpretations of the Canadian Supreme Court in *Reference re Secession of Quebec* and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.¹³¹ The Canadian Supreme Court declared:

As such, the preamble is not only a key to construing the express provisions of the *Constitution Act, 1867*, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme. It is the means by which the underlying logic of the Act can be given the force of law.¹³²

In conclusion, the majority opinion of the Bosnian court argued that the text of the preamble has a normative character insofar as it contains:

constitutional principles delineating . . . spheres of jurisdiction, the scope of rights or obligations, or the role of the political institutions. The provisions of the preamble are therefore not merely descriptive, but are also invested with a powerful normative force thereby serving as a sound standard of judicial review for the Constitutional Court.¹³³

The process of concretization or specification of "very vague, indeterminate constitutional ideals and values,"¹³⁴ which are very often found in preambles, is based on the differentiation of the normative contents of legal texts in both common and civil law systems. This

131. La Constitution, 1958 CONST. pmbl. (Fr.); *In re Secession of Quebec*, [1998] 2 S.C.R. 217, paras. 51, 53 (citing Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.), as reprinted in R.S.C., No. 5 (Appendix 1985); *In re Remuneration of Judges of the Prov. Ct. of P.E.I.*, [1997] 3 S.C.R. 3, paras. 93, 95, 104; *Fraser v. Pub. Serv. Staff Relations Bd.*, [1985] 2 S.C.R. 455, 462–63).

132. *Remuneration of Judges of the Prov. Ct. of P.E.I.*, [1997] S.C.R. para. 95.

133. Partial Decision III, *supra* note 95, para. 26.

134. SADURSKI, *supra* note 105, at 105.

specification leads to the rationalization of judicial decision making in the sense that the parties and the public can follow the arguments on which the decision was based. Hence, the supposed dichotomy of normative content when there are specific rights and obligations, but no normative content if the text does not explicitly spell out rights and obligations, is simply wrong. There are much more normative variations to be found in the constitutional doctrines of various countries.

Courts in continental European constitutional systems that exercise the task of legislative review differentiate at least four types of norms. First, courts recognize "programmatic norms," which, for instance, refer to the historic development of the country, but do not have any normative power at all (with the exception that they can be used for interpretation of other normative texts). Second, "state goals" ("Staatsziele" in German constitutional doctrine) serve as directives for government policy such as the protection of the environment. They have binding force for state authorities only insofar as they have to take into consideration this "compelling," constitutionally entrenched "state interest" in rule application or adjudication. It is, however, contested whether such "state goals" also have binding force for the legislature to become active in this field. The third type of norm is "institutional guarantees" such as "family" or "private property." This is meant in the sense that the wording of the rule does not constitutionally guarantee the right, but is seen as a limit for ordinary legislation that attempts to abolish these legal institutions. Finally, there are "constitutionally guaranteed fundamental rights" in the sense that these rights are judicially enforceable. On the contrary, according to the underlying doctrine in civil law systems of a separation of "objective" and "subjective" law, neither state goals nor institutional guarantees contain judicially enforceable rights since they are seen as "objective" law. Any claim made before a court based on such "state goals" would, therefore, be declared inadmissible outright.

Hence, the next problem raised for the Constitutional Court was to determine whether there is a "substantive," normative principle that follows from the declaration that Bosniacs, Serbs, and Croats are "constituent peoples."

The first conclusion drawn by the majority opinion was that using the phrase "constituent peoples" served the purpose of "affirming the continuity of Bosnia and Herzegovina as a democratic multi-ethnic state."¹³⁵ This conclusion was based on an interpretation of the preamble with the institutional structures laid down in the organizational parts of the

135. Partial Decision III, *supra* note 95, para. 53.

constitution, hence, following from a contextual analysis and not an isolated analysis of the last line of the preamble itself.¹³⁶ Moreover, this conclusion follows from the terms “democratic state” in article I and “pluralist society” in the preamble of the constitution.¹³⁷ The question was, thus, whether the parties of the Dayton Treaty and framers of the constitution had “recognized” the territorial delimitation along ethnic lines, with the consequences elaborated above, when they agreed on the transformation of Republika Srpska and the Federation of Bosnia-Herzegovina into “Entities” of Bosnia-Herzegovina.¹³⁸

By referring to the texts of the international human and minority rights treaties in annex 1 to the Dayton Constitution, the majority opinion established several rules for reviewing the Entities’ constitutions in order to answer this question.¹³⁹

First, without making explicit reference to the model of consensus democracy, it is clear from the reasoning of the majority opinion that the Constitutional Court had to give an “answer” to the specific circumstances of Bosnia-Herzegovina when it ruled out the idea that “effective participation of ethnic groups is an important element of democratic institutional structures in a multi-ethnic state.”¹⁴⁰ It ruled that this principle “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.”¹⁴¹ Moreover, representation and participation in governmental structures must be seen as “collective rights” of groups.¹⁴²

Second, following from this conceptualization and the Explanatory Report of the European Charter of Regional and Minority Languages, which is directly applicable law in Bosnia-Herzegovina, the majority opinion goes on to argue that this conceptualization includes a notion of “collective equality,” which follows from the designation of Bosniacs, Serbs, and Croats as “constituent peoples.”¹⁴³ The majority opinion further

136. *Id.* paras. 51–54. *But see id.* pt. II (Danelius, J., concurring) (finding that article 1 of the Republika Srpska Constitution did not violate the preamble of the Dayton Constitution but did violate other provisions).

137. GFAP, *supra* note 48, annex 4, pmbi., art. 1, para. 2; Partial Decision III, *supra* note 95, paras. 53–54.

138. Partial Decision III, *supra* note 95, para. 53.

139. *Id.* para. 55.

140. *Id.*

141. *Id.*

142. *Id.* para. 56.

143. *Id.* para. 57.

reasons that article II, paragraphs 3 and 4 of the constitution must also be read as a constitutional obligation of nondiscrimination in terms of group rights, if, for instance, one or two of the constituent peoples were given special preferential treatment through the legal systems of the Entities.¹⁴⁴

Third, following from the texts of the above-mentioned treaties, the majority opinion also concluded that, "in the context of a multi-ethnic state such as [Bosnia-Herzegovina], the accommodation of cultures and ethnic groups prohibits not only their assimilation but also their segregation," so that territorial delimitation must not serve the aim of ethnic separation.¹⁴⁵

From all of the above-mentioned specifications, the majority opinion finally concludes that "the constitutional principle of collective equality of constituent peoples following from the designation of Bosniacs, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, any domination in governmental structures, or any ethnic homogenisation through segregation based on territorial separation."¹⁴⁶

Moreover, with regard to the question of individual discrimination on the ground of "ethnic origin," the majority opinion elaborated on (in context of annex 7 of the GFAP) the nondiscrimination "standard."¹⁴⁷ It concluded that the respective provision not only includes a "negative" right not to be discriminated against by the authorities, but also a "positive obligation" or "affirmative duty" to protect against the discriminatory acts of private individuals and to create the necessary political, social, and economic conditions for a harmonious reintegration of society.¹⁴⁸

Finally, the court, with a narrow 5–4 vote (Serb and Croat judges dissenting and the Swedish judge concurring) declared unconstitutional the provisions in both articles I of the Entities' constitutions.¹⁴⁹ The holding was based on: (1) the finding that the text of the Federation Constitution reserved veto powers to Croats and Bosniacs only; (2) that the governmental structures of the Federation and the Republika Srpska, including the judiciary and the police, were almost monoethnically composed of Bosniacs, Croats, and Serbs; and (3) that the lack of "minority returns" into the Federation and Republika Srpska could be explained only through ongoing de facto discrimination against individuals solely on the ground of "ethnic origin."¹⁵⁰

144. *Id.* para. 59.

145. *Id.* para. 57.

146. *Id.* para. 60.

147. *Id.* para. 80.

148. *Id.* paras. 80–81.

149. *Id.* paras. 98, 140, 141.

150. *Id.* paras. 92–95, 124, 136–38.

Hence, the Constitutional Court decided, in effect, that all of the three constituent peoples must also be constituent peoples on the Entity level in order to break up the national homogenization of the Entities. However, the Constitutional Court did not give clear directives for the necessary constitutional amendments and consequential institutional changes, except for a warning to introduce the same institutional mechanisms of the Bosnia-Herzegovina Constitution—veto powers on the Entity level.¹⁵¹ Moreover, despite relying on the notion of “collective equality,” the Constitutional Court tried to shift the balance from collective rights and ethnic power-sharing of constituent peoples to the protection of minorities and the rights of individual citizens, with a strong emphasis on the nondiscrimination principle, thus breaking the ground for the reintegration of a multiethnic society.

The second most important integrative step in this decision was to allow for “framework legislation” of the state in those fields that were deemed the exclusive competence of the Entities. The Dayton Constitution itself, however, contains no reference to the term “framework legislation.” This type of law was used for the first time in a decision by the High Representative, Carlos Westendorp, in the context of privatization.¹⁵² However, it was taken over by the Constitutional Court in order to establish a clear constitutional basis for economic integration and, thereby, the integration of the state as such. This appears in partial decisions II and IV.¹⁵³ Contrary to the opinion of the Republika Srpska representatives, that all matters not expressly enumerated in article III, paragraph 1 of the Bosnia-Herzegovina Constitution automatically fall into the exclusive competence of the Entities, the Constitutional Court determined through a systematic, contextual interpretation of the constitution that the state

151. Exactly this was done, however, by the constitutional amendments of the Entity constitutions in 2002, enforced again by the HR in order to implement the Constitutional Court's decision against the obstructionism of the political parties. Ebner, *supra* note 84, at 129–30. For further legislative, judicial, and political history from 2002 to 2005, see generally JOSEPH MARKO, POST-CONFLICT RECONSTRUCTION THROUGH STATE- AND NATION-BUILDING: THE CASE OF BOSNIA AND HERZEGOVINA 12–17 (EURAC Research, European Diversity and Autonomy Papers No. 4/2005, 2005) (unpublished manuscript), available at <http://digbig.com/4rebj> [hereinafter MARKO, RECONSTRUCTION].

152. See Framework Law on Privatisation of Enterprises and Banks in Bosnia and Herzegovina, Službeni glasnik Bosne i Hercegovine br. 14/98 (stating that “[t]he purpose of law is to establish a secure legal environment for the privatisation process of enterprises and banks”).

153. Partial Decision IV, *supra* note 94, para. 34; Constitutional Court of Bosnia and Herzegovina, Request for Evaluation of Constitutionality of Certain Provisions of the Constitution of Republika Srpska and the Constitution of the Federation of Bosnia-Herzegovina, Case U 5/98, Partial Decision II, SLUŽBENI GLASNIK BOSNE I HERCEGOVINE, No. 17/00, June 30, 2000, paras. 28–29 (Feb. 19, 2000), <http://digbig.com/4qwjp> (search case no. “U 5/98”; then follow link for decision of “Feb. 18, 2000”) [hereinafter Partial Decision II].

institutions enjoy responsibilities not enumerated in article III.¹⁵⁴

The Constitutional Court further determined that the Entities enjoy responsibilities that would—if article III were interpreted in isolation—fall into the exclusive competence of the state institutions. Based on this understanding of an “open” list of responsibilities, the majority opinion argued that, in particular, the catalogue of human rights did provide the constitutional basis for a general competence of the state institutions to regulate all those matters through framework legislation because their protection has to be guaranteed to all persons within the territory of Bosnia-Herzegovina.¹⁵⁵ The same conclusion was drawn from the provisions of article I, paragraph 4 of the Dayton Constitution.¹⁵⁶ This provision establishes the “four freedoms.” These are freedoms of movement of persons, goods, services, and capital.¹⁵⁷ The Constitutional Court argued that it is necessary for a functioning market economy, based on these four fundamental freedoms and an “institutional guarantee” of private property,¹⁵⁸ that not only the state as a whole, but also the Entities, have to follow such constitutional duties so that the national parliament of the state is entitled to establish (through means of framework legislation) the minimum standards for a unified “private law.”¹⁵⁹ This “private law,” such as contracts and torts, established through framework legislation, works towards abolishing legal barriers to the free movement that had been established by the Entities’ legislatures so far.

With regard to the question of whether the prescription of “official languages” in the Entities’ constitutions was discriminatory, in partial decision IV, the majority went so far as to prescribe in detail how the different levels of language protection provided by the European Charter of Regional and Minority Languages had to be incorporated into suitable framework legislation.¹⁶⁰

154. See, e.g., Partial Decision IV, *supra* note 94, paras. 24, 34 (describing the Republika Srpska representatives’ argument and finding an implied power “of the State of [Bosnia and Herzegovina] to provide for minimum standards for the use of languages”).

155. See *id.* para. 34 (discussing how the Constitution of Bosnia-Herzegovina allows for the state through framework legislation to protect the basic normative principles and institutional safeguards).

156. *Id.* para. 31.

157. GFAP, *supra* note 48, annex 4, para. 3.

158. Partial Decision IV, *supra* note 94, paras. 31, 34. The Swedish judge, however, dissented. This judge did not follow the doctrine of “institutional guarantees” of human rights though firmly established, for instance, in the jurisprudence of the German and Austrian constitutional courts, but not in the caselaw of the European Court of Human Rights.

159. *Id.* para. 34.

160. *Id.*

Based on the preparation of the draft decision of the judge rapporteur, the majority opinion of the Constitutional Court provided the grounds for counteracting the segregationist tendencies and disintegrative forces in Bosnia and Herzegovina by the following elements of the decision.

As far as interethnic relations are concerned, firstly, through the breakup of the ethnic homogenization and discrimination at the Entity level, which was analyzed above as the "ethnic pillarization" of the model of consensus democracy applied in Bosnia and Herzegovina, and, secondly, by shifting the "balance" of ethnic and civil elements from "ethnocracy" toward democracy. This prohibits upholding a closed, exclusive "ethnic" system of proportional representation and veto powers, as well as a stronger emphasis on behalf of individual rights, which cannot be limited by collective rights.

The second ground is fighting economic separation and thereby state disintegration. The type of "framework legislation" implicitly following from the new interpretation of the allocation of powers served the function of strengthening the powers of the state institutions, the lack of which has been analyzed above for the failure of economic reconstruction.

In conclusion, the majority opinion of the Constitutional Court, despite all the "rationalization" by interpretative methods, was based on a strong conviction of at least four judges that it is the duty of the Constitutional Court to serve the function of integration of state, economy, and a multiethnic society, and not the other way round. This conviction is particularly strong with regard to an endangered or "failing state." How can this be legitimized?

It will come as no surprise that the majority of the Constitutional Court was criticized in strong personal language by the dissenting opinions of the two Croat and two Serb judges. These criticisms asserted that the majority had transgressed the boundary between law and politics and put themselves into the position of positive constitution makers in place of the politically responsible legislatures.¹⁶¹

However, there are counterarguments to this criticism. First, it was elaborated above that both positions, the majority opinion and the dissenting opinions, are "political" in the sense that they have political consequences for the structure of state, economy, and society. However, the clear "political" alternative was either to preserve the structures allowing for ethnic discrimination and disintegration, thereby legitimizing the ethnic cleansing that had happened, or to break up these structures and

161. Partial Decision III, *supra* note 95, concl. (Popović, J., dissenting); *id.* pt. 3 (Zovko, J., dissenting).

give room for political forces interested in the restoration of a multiethnic society and the reconstruction of a functioning state and economy. I think the arguments based on a strict application of interpretative methods by the majority opinion have illustrated that there was a sound textual basis in the Dayton Constitution, in conjunction with the international human and minority rights instruments, to “construct” the underlying normative principles on the basis of which the majority decision was made.

In this way, the four judges following the above-elaborated reasoning certainly did not replace, according to all accepted interpretative techniques in common and civil law systems, positive law through their personal political and moral values.¹⁶² Moreover, as elaborated above, the Parliament of Bosnia-Herzegovina was blocked along ethnic lines. The Parliament was, therefore, becoming more and more substituted by the HR in the legislative function. The parliaments of the Entities, “occupied” by an obstructionist political elite, obstructed the Parliament so that a viable “domestic” political force for the transformation from a “negative” to a “positive” peace was not in place in order to establish political stability and efficiency of state institutions based on the “constitutional” principles of democracy and rule of law. Hence, the judicial activism applied here, even if “inventing” framework legislation and prescribing the choices to be made in the incorporation of the European Charter of Regional and Minority Languages, was not a “rhetoric of exceptionalism” for the process of transformation from communism to a market economy or for the longing for “judicial supremacy.”¹⁶³ On the contrary, it was a must under the given circumstances.

In the final analysis, I am still firmly convinced that the task of a constitutional court as a “guardian” of the constitution cannot be seen as a contribution to disintegration of the state as long as there is no peacefully and democratically expressed will of a “constituent people” to leave the common state. This is the crucial point of comparison with either the situation of Quebec or Kosovo. In Quebec, the Canadian Supreme Court expressed the opinion, *In re Secession of Quebec*, that there can be only a negotiated, but not unilateral secession.¹⁶⁴ In Kosovo, the Yugoslav/Serb government was certainly not “representative” in the language of the

162. On the contrary, the reasoning of the dissenting opinions do not elaborate any substantive argument against the majority but exhaust themselves in personal accusations of having violated procedural rules of the Court. *Id.* pts. e, f (Popović, J., dissenting); *id.* pt. 3 (Zovko, J., dissenting).

163. SADURSKI, *supra* note 105, at 294, 297. For an outspoken criticism of the jurisprudence of the constitutional courts in Eastern Europe, see *id.* at 293–99.

164. *In re Secession of Québec*, [1998] 2 S.C.R. 217, paras. 83–92.

Friendly Relations Declaration of the United Nations General Assembly¹⁶⁵ for the Kosovo Albanian population, at least since 1987. The Yugoslav/Serb government thereby triggered the Albanian's unilateral declaration of independence in 1991.¹⁶⁶ The declaration was expressed in a peaceful and democratic way through a referendum that could not be suppressed by the Serb police.¹⁶⁷ To remember, in stark contrast to Canada or Kosovo, the Republika Srpska was created neither peacefully nor democratically but through a violent insurrection and war with massive ethnic cleansing.¹⁶⁸

IV. SOME REFLECTIONS ON POST-CONFLICT STATE FORMATION AND NATION-BUILDING IN EUROPE

A. The Problems of the Multinational State Concept

There are several lessons to be learned from the experience of implementing the Dayton Constitution in Bosnia-Herzegovina.

First, territorial delimitation along ethnically conceived lines has two effects. In a first step, territorial delimitation encourages the strengthening of the majority ethnonational identities and thereby leads to ethnic homogenization of state institutions and society at the regional and local level. In a second step, there is no need to look for compromises—the “essence” of democratic decision making. This then ends up in ethnic hierarchies and ethnic dominance.

Secondly, “pillarization” through institutional segregation leads to a “cementing” of ethnonational identities in two ways, thereby closing all channels of possible interethnic cooperation. Contrary to all presuppositions of conflict-management theories—that separation gives people a feeling of security thereby enabling the creation of mutual trust—there are reverse effects to be seen in Bosnia-Herzegovina. Institutional segregation fuels mistrust between the ethnic groups due to the mutual “inferiority” assessments “inherent” in any form of institutional segregation.¹⁶⁹ Hence, segregation mechanisms adopted only for a short

165. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082 (Oct. 24, 1970).

166. G. Richard Jansen, *Albanians and Serbs in Kosovo: An Abbreviated History* (Nov. 12, 2002) (unpublished manuscript, available at <http://digbig.com/4refe>).

167. *Id.*

168. MARKO, RECONSTRUCTION, *supra* note 151, at 5.

169. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that “[s]eparate educational

time after a conflict, and for security reasons, tend to remain permanently institutionalized. Any discussion to abolish the territorial delimitation along ethnic lines, and/or the principle of ethnic quotas for state institutions, meets fierce resistance from the dominating ethnonationalist political elites. Moreover, there is some sort of an ethnic “King Midas effect.” If such institutional mechanisms are accepted, they tend to affect all spheres of life. This can be seen from the recently discussed phenomenon of “two schools under one roof” in the Federation of Bosnia-Herzegovina, where Croat and Bosniak pupils are again segregated in elementary schools.¹⁷⁰ As I observed in Bosnia-Herzegovina, even in private conversations, pressure is created either to justify an argument with the fact that an individual is a Bosniak, Croat, or Serb, or to justify why such an ethnic declaration is refused. Identity formation, thus, is no longer relational and flexible but fixed on the ethnonational identity in all situations. In such a situation, any attempt to construct and foster multiple identities, combined with an overarching state loyalty, remains futile.

Thirdly, subnational, ethnic homogenization and domination, in the multinational state concept, inevitably lead to a “discrimination of minorities within the minority.” This is exactly the situation of more than twenty national minorities living in Bosnia and Herzegovina, such as Hungarians, Italians, Czechs, Albanians, Roma, and Sinti. As reports show, these minorities are even more affected by the overall severe economic situation in the market for labor or housing.¹⁷¹

The alternative, in order to establish democracy, rule of law, and a high living standard, may be simply to replace the institutional mechanisms of consensus democracy—in particular, effective ethnic representation in the political sphere—with the ethnically neutral-civic-state–nation concept. However, there are problems with this concept as well.

B. The Inadequacy of the Civic-State–Nation Concept

Under the conditions of a deeply ethnically divided society, the proposal to abolish all ethnic differences in the public sphere by nonrecognition, or even prohibitions, and to replace the model of consensus democracy through a “civic,” i.e., ethnically “neutral” institutional system,

facilities are inherently unequal”).

170. EUROPEAN COMM’N AGAINST RACISM AND INTOLERANCE, REPORT ON BOSN. & HERZ. 17–18 (2004), available at <http://digbig.com/4refd>.

171. I am a team leader of a study commissioned by the European Training Foundation in Torino, Italy on Access of Minorities to Education, Training, and the Labor Market in the Western Balkan Countries (forthcoming).

is simply not feasible. This is true both from a theoretical and a practical point of view. Will Kymlicka has recently elaborated in great detail on the notion that a “neutral” state or “color-blind” constitution is simply a fiction even for “old” liberal democracies such as France or the United States.¹⁷² He argues that every modern state is engaged in a form of nation-building that can never be ethnically neutral insofar it requires “adaptation” to the linguistic and cultural standards of the majority in the public sphere, and/or it creates ghettos based on parallel societies.¹⁷³ This phenomenon could recently be seen on television in the violent uprising of second or third generation immigrant youth in the suburbs of French cities. Hence, lack of access to education, the labor market, and political representation leads to marginalization through the politics of “benign neglect” against claims of recognition of different ethnic identities.¹⁷⁴ This is a phenomenon common to “old” and “new” minorities stemming from immigration in almost all European countries.

But is it feasible in a country where ethnic identities have played such a strong role over the last century to allow individuals to express and manifest their identity only in the private, but no longer in the public, sphere? Is this not in itself an illiberal position? The ECHR has elaborated a “normative principle,” in a series of judgments over the last five years, regarding the right to freedom of religion codified in article 9 of the European Convention on Human Rights and Fundamental Freedoms. The ECHR specified the meaning of the phrase “necessary in a democratic society,” as it is used in articles 8 through 11 of the Convention.¹⁷⁵ The ECHR ruled that “[t]he role of the authorities in a situation of conflict between or within religious groups is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.”¹⁷⁶ It thus becomes clear from the jurisprudence of the ECHR that

172. WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 344–45 (2d ed. 2002).

173. *Id.* at 344.

174. *Id.* at 344–45 (“This notion of benign neglect is different from . . . the idea of liberal neutrality State neutrality . . . simply rules out certain kinds of arguments or justifications for public policy—namely, those which appeal to a ranking of the intrinsic merits of conceptions of the good life. It does not rule out policies which promote a particular language, culture, or religion so long as ‘neutral’ reasons are offered for these policies. . . . [L]iberals have firmly endorsed the principle that states should not only avoid promoting religion for non-neutral reasons relating to controversial conceptions of the good, they should avoid promoting it *at all*, even for neutral reasons of efficiency or social harmony. There should be a firm ‘separation of church and state’. . . . This is the model which many people have assumed should apply also to ethnocultural diversity.”).

175. European Convention on Human Rights and Fundamental Freedoms, arts. 8–11, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5; *Supreme Holy Council of the Muslim Cmty. v. Bulgaria*, App. No. 39023/97, slip op. para. 96 (Mar. 16, 2005), <http://digbig.com/4rebn>.

176. *Supreme Holy Council of the Muslim Cmty.*, slip op. para. 96.

the model of “benign neglect,” which is explicitly entrenched as the constitutional principle of *laïcité* in the constitutions of France and Turkey,¹⁷⁷ can be justified only under specific circumstances. It is therefore an “affirmative duty” for state authorities to uphold ethnocultural pluralism as a prerequisite of a “democratic society” for the state parties of the Convention, including France.

Moreover, is it feasible at all to try to erase the social and political relevance of ethnic identities? I am firmly convinced that all concepts of a “withering away” of ethnicity, after the Marxist model of a “withering away” of state and law, are as utopian as the communist ideal. The modern world—even perceived through the lens of postmodern concepts—will remain characterized by the “reality” of ethnocultural pluralism through the processes of globalization. This is not to herald a new “end of history,” but quite the opposite; history will go on. This is a call for all democratic- and liberal-minded intellectuals to take “[t]he [d]ark [s]ide of [d]emocracy” more seriously.¹⁷⁸ We must recognize that the ideology of ethnonationalism, elaborated in Part I, *infra*, cannot be overcome simply by a strict separation of the political and cultural identities and the spheres of society and state—thereby uprooting pluralism through legal bans. It would simply be impossible in Bosnia and Herzegovina, and also Austria, Switzerland, and France, to start telling people in a campaign: “Forget your national identity, you are simply a citizen and will be treated like any other citizen!” People know from deep-rooted, collective experience that not every citizen is the same. There are, in fact, status hierarchies following not only socioeconomic criteria, but also ethnic association to either old or new minorities thereby creating “second-class citizens.”¹⁷⁹ Hence, any campaign to entrench only the “civic” model into the constitution would

177. *Leyla Sahin v. Turkey*, App. No. 44774/98, slip op. para. 30 (Grand Chamber Decision Nov. 10, 2005), available at <http://digbig.com/4rebq>. The court upheld a judgment of the Turkish Constitutional Court that banned the wearing of the Islamic headscarf in institutions of higher education. *Id.* para. 98. The court used the Turkish constitutional principle of *laïcité* to justify its opinion. *Id.* paras. 29–30, 95. But the court specifically referred to the “Turkish context,” and thereby the impact such a symbol must have on those who choose not to wear it. *See id.* para. 109 (discussing the deference that is given to states in these situations); *Leyla Sahin v. Turkey*, App. No. 44774/98, slip op. para. 108 (Chamber Judgment, June 29, 2004). Hence, this judgment can certainly not establish a precedent for the situation in France.

178. *See generally* MANN, *supra* note 32 (explaining how ethnic cleansing is a problem of our civilization).

179. *See, e.g.*, Joseph Marko, *The Referendum on Decentralization in Macedonia in 2004: A Litmus Test for Macedonia's Interethnic Relations*, in EUR. Y.B. ON MINORITY ISSUES (forthcoming 2006) (manuscript at 2, on file with author) (analyzing the claims of Albanian Macedonians and the fact that the Slav Macedonians assumed that the Albanian Macedonians would also be minorities in the new state as well). This is the most frequently raised accusation of minorities in the Balkans. *See, e.g., id.* at 1–2 (expressing the feelings of the Albanian Macedonians).

fuel mistrust at best. Each side would accuse the other of wanting to gain ethnic dominance over the legitimate claim of each "constituent people," or even minority, to be "at home" in their state, i.e., to be accepted as "co-owner" of this state.

So what if neither the multinational state model nor the "civic" state-nation concept can be role models for postconflict reconstruction and reconciliation in south East Europe?

C. The Need for Reconceptualizing "Unity in Diversity"

It seems worthwhile to repeat the four models of how to "construct" interethnic relations discussed in this Essay:

(1) The model of "*cuius regio, eius religio*" enforced in Central Europe with the Augsburg Treaty of 1555 after decades of religious civil wars between Protestants and Catholics;

(2) the model of "separation of state and church," i.e., of private and public, firmly entrenched by the First Amendment of the U.S. Constitution and the French revolutionary principle of "*laïcité*," to be applied to matters of ethnic diversity other than religion;

(3) the model of "withering away of ethnicity" following the Anarchist-Marxist concept of a withering away of state and law; and

(4) the model of legal-institutional accommodation of equality and difference.¹⁸⁰

It should be clear from the arguments elaborated in the course of this Essay, that, in my opinion, none of the first three models can provide the basis for the necessary accommodation of political unity and legal equality on the one hand and cultural diversity on the other. This is true in either legal or moral terms, or as seen from the perspective of conflict resolution.

However, taking up the motto of our symposium, "Accommodating Differences," I see—from the experience in Bosnia and Herzegovina—a strong need to reconceptualize the dichotomy of "civic" versus "ethnic," as well as the concept of a "multinational" state, in order to create ways and means to put our motto into practice.

First, as far as legal theory is concerned, we must question the conventional wisdom of public international law: that there is a mutually exclusive dichotomy of individual versus group rights or an "inevitable" preference of collectives over individuals when group rights are recognized at all. Liberal political and legal theory has to learn from empirical evidence that a concept of strict individual and formal equality before the

180. See *supra* Parts II, IV.B.

law, and a respective ban of nondiscrimination of individuals, is not sufficient to prevent societal discrimination in all spheres of life. It is particularly insufficient in the fields of housing and the labor market, which, in fixed parallel societies, end up endangering social cohesion, rule of law, and political stability.

A careful comparative analysis of the legal structures of rights, however, will reveal that there are at least three levels of group references. First, even in provisions on individual rights such as article 27 of the International Covenant on Civil and Political Rights (ICCPR),¹⁸¹ one will find that an individual right makes sense only if the factual existence of a group is recognized as a prerequisite to enjoy this individual right. There is evident proof of this notion in the caselaw on language rights by the Canadian, Swiss, and Austrian Supreme Courts. Hence, the Canadian Supreme Court in *Société des Acadiens v. Association of Parents* pointed out in a "communitarian spirit" that "[t]hough couched in individualistic terms, language rights, by their very nature, are intimately and profoundly social."¹⁸² By analogy, the equal protection of the laws can no longer be interpreted by the intermediating principle of individual nondiscrimination alone. Rather, equal protection has to take ethnic differences "seriously"—to paraphrase Ronald Dworkin—by taking the group perspective into account. Equality between men and women, or members of different ethnic groups, cannot be assessed only on an individual basis, but must take into account the relative position of the respective groups as a starting point for comparison.¹⁸³

181. International Covenant on Civil and Political Rights (ICCPR), art. 27, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171, *available at* <http://digbig.com/4rebr> ("In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.").

182. *Société des Acadiens du Nouveau-Brunswick Inc. v. Ass'n of Parents for Fairness in Education*, Grand Falls District 50 Branch, [1986] 1 S.C.R. 549, 566 (Dickson, C.J., concurring in the judgment).

183. This is evident from the caselaw of the U.S. Supreme Court, which uses the idea of "compensatory justice" against past de jure discrimination as justification for "affirmative action." It is also evident from the caselaw of the European Court of Justice on the equality between men and women, where the court ruled that "equal opportunities," but not "equal results," must be the standard of review for national quota regulations. *See* Case C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*, 1997 E.C.R. I-6363, I-6392 (holding that the law "may counteract the prejudicial effects on female candidates"); Case C-450/93, *Eckhard Kalanke v. Freie Hansestadt Bremen*, 1995 E.C.R. I-3051, I-3075 (holding that women can only have priority when "women do not make up at least half of the staff . . . in the relevant personnel group" when promotions are being considered). In this sense, a comparison of groups' respective statistical categories is necessary as a starting point, but cannot be the end of discussion since this would result in "equal results."

In conclusion, any state action must, therefore, refrain from perpetuating past discrimination by segregation or assimilation and, moreover, has an affirmative duty to protect against all forms of societal discrimination.

The second level of group reference can be seen in constitutional provisions that recognize the protection of groups as a legal value per se. An example is again the "state goal," or government directive, incorporated by article 8, paragraph 2 of the Austrian Constitution in 2000:

The Republic (the Federation, Laender and municipalities) is committed to its linguistic and cultural diversity which has evolved in the course of time and finds its expression in the autochthonous ethnic groups. The language and culture, continued existence and protection of these ethnic groups shall be respected, safeguarded and promoted.¹⁸⁴

However, as elaborated above, this provision does not include either an individual or collective "subjective" right so that nobody has legal standing before a court in order to base a claim on this provision. In this paternalistic conception, the groups remain an "object" of state activity. The state must care for them, but they cannot enforce any state action if the state is unwilling to do so.

The third level of group reference is achieved when groups are no longer conceived as "objects" of protection, but when they become bearers of subjective rights or entitlements themselves. A good example of a possible accumulation of individual and group rights is given by article 64 of the Slovene Constitution. According to this provision, the autochthonous Italian and Hungarian communities, as well as their individual members, are entitled to establish organizations for the preservation of their national identity and to develop activities in the field of public information and publishing.¹⁸⁵ The right to establish organizations is further specified by the right to establish self-governing bodies and the state's obligation to devolve respective administrative responsibilities of special concern to these minorities and to finance their activities.¹⁸⁶ The establishment of a public school system, as well as a press and information system on such a self-governing basis, working bilingually or in the language of the minority, is called personal or cultural autonomy, in contrast to territorial autonomy.

184. Bundes-Verfassungsgesetz [B-VG] [Constitution] BGBl No. 1/1930, as amended by Bundesgesetz [BG] BGBl I No. 68/2000, art. 8, para. 2.

185. SLOVN. CONST. art. 64.

186. *Id.*

The advantage of the concept of personal autonomy lies in working not only under the condition of a “discrete and insular minorit[y]”—to use the famous language of the *United States v. Carolene Products Co.* footnote¹⁸⁷—but also when a minority is dispersed throughout the country. Such dispersion is very often the case in central and south East Europe, in stark contrast to Switzerland or Belgium.¹⁸⁸

In conclusion, individual rights and group rights do not necessarily exclude each other in the sense that each group right does not automatically infringe on an individual right, as the strict individualistic philosophy pretends when arguing that every right with a group reference is a “special right.” Individual group rights must be used cumulatively when organizing equality on the basis of difference. Only then is it possible to achieve both formal and “effective equality” that upholds differences.

Secondly, as far as the level of basic values is concerned, the one-dimensional reduction of identity formation to mere national identity, combined with an absolute loyalty to this ethnic nation as the “essence” of the ideology of ethnonationalism, must be replaced. This can only occur through the assertion that “cultural diversity” is a basic value, enriching not only the respective political community but also individual choices through interethnic communication and cooperation. Hence, identity formation must be seen not as substantive, fixed, and exclusive, but as relational, flexible, and inclusive, allowing for multiple identities.

This requires, however, a new perception of “minority protection” that need not be defensive any longer. If cultural diversity and bilingualism are perceived as positive values, there is no longer a need for territorial and/or institutional exclusion. Accordingly, territorial and institutional arrangements must be redesigned so that ethnic representation remains possible but will no longer be exclusive. Hence, everybody can get into a “minority position” one way or the other. The dichotomy of the civic and ethnic nation is therefore a wrong ideological construct that has to be replaced—as was the case with individual and collective rights—with a mix of both elements, avoiding, however, the traps of the multinational-state concept analyzed in the case of Bosnia-Herzegovina above.

187. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

188. This concept of cultural autonomy as an alternative to territorial autonomy was invented by the Austro-Marxist thinkers Karl Renner and Otto Bauer under the conditions of the Habsburg Monarchy. Rainer Bauböck, *Political Autonomy or Cultural Minority Rights?: A Conceptual Critique of Renner's Model*, in NATIONAL CULTURAL AUTONOMY AND ITS CONTEMPORARY CRITICS 97, 97 (Ephraim Nimni ed., 2005). However, this concept was not widely used in Europe after WWI. See STAAT UND NATION IN MULTI-ETHNISCHEN GESELLSCHAFTEN [STATE AND NATION IN MULTI-ETHNIC SOCIETIES] (Erich Fröschl et al. eds., 1991).

In conclusion, this requires, on the one hand, institution-engineering with the effect of fostering multiethnic cooperation on all territorial levels from the municipalities to the European level. Monoethnic regions—the pillars of multinational states in Western Europe—can therefore be dehomogenized through the concept of cultural autonomy in a first step. Multiple identities, including an “overarching” state loyalty, must then be enforced through desegregation of housing, the labor market, and the educational system. This requires, of course, not only a top-down approach through institutional engineering, but also a bottom-up approach by supporting respective nongovernmental organizations (NGOs) and civil society and by triggering learning processes in secondary socialization and the media. If absolute loyalty to the nation is no longer the ultimate goal of identity formation, then the European fears against dual citizenship could also be overcome.

When talking to most “ordinary” people in Bosnia-Herzegovina, European integration with the prospect of EU membership is the only perspective for them, as it is for all other countries in the western Balkans. Yet the European Union must be able to prove that a “Union in diversity” works for the benefit of all members of society. It is thus a European challenge for the Common Foreign and Security Policy of the European Union in the next two years in the Balkans to demonstrate that sovereignty and independence of smaller and smaller ethnically divided territories is not the way to cope with the challenges of the common market and globalization. Only multilevel and good governance through autonomy and integration will succeed. Hence, plural-ethnic integration based on multiple identities, rather than territorial separation based on ethnic homogeneity, must be the guideline for state- and nation-building in postconflict societies—not only those in Europe.