BOSNIA AND HERZEGOVINA – MULTI-ETHNIC OR MULTINATIONAL?

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1. Policy on minorities since independence

Whereas the other (former) Yugoslavian republics could and can be regarded without exception as nation states with a leading national element, different social, demographic and structural factors conditioning the protection of minorities prevailed and prevail in Bosnia and Herzegovina. The second, communist Yugoslavia, whose structure was determined from 1945 to 1991/92 by a federal constitution, could be termed a multinational state – albeit with communist overtones. Similarly, Bosnia-Herzegovina was rightly described as a "Yugoslavia in miniature" on account of its demographic structure; in addition to the three largest national groups – the Muslims, Serbs and Croats – members of other nationalities and leading national elements lived in the country and were entitled to equality under the Constitution. Be this at it may, the independence of the Republic of Bosnia and Herzegovina and its recognition in accordance with international law at the beginning of January 1992 after the break-up of Yugoslavia resulted in[1] a worst-case scenario of ethnic conflicts. The free-for-all was ended only by the Dayton/Paris peace agreement. Four years of implementation have revealed the fundamental dilemma inherent in this peace settlement: the issue of how far, after the atrocities of ethnic cleansing during the war, the ensuing ethnic and national structures and segregative institutional mechanisms[2] are accepted as a sign of political realism, or to what extent an attempt is made to restore the multi-ethnic structures of 1991 evidenced by the national census of the same year, for the sake of

[1] *This is to be understood in a purely temporal sense and does not imply any cause and effect relationship. Cf in this connection, Marie-Janine Calic Der Krieg in Bosnien-Hercegovina. Ursachen – Konfliktstrukturen – internationale Lösungsversuche, Frankfurt/Main. 1995*

[2] *What is probably the most comprehensive analysis of the whole nexus of problems was supplied by Edin Sarcevic, Kritika etnickih ustava i postrepublickog ustavotvorsiva u Bosni i Herzegovini (Constitution and Policy. Criticism of the ethnic constitutions and the post-republican constituent in Bosnia and Herzegovina), Sarajevo, 1997.*

"justice" and under varying amounts of pressure from the international community.

2. Demographic situation

A purely quantitative comparison shows that, in 1991, Muslims, Serbs and Croats, the three leading national elements, together made up 92.1% of the population. It is possibly surprising that on the eve of the dismemberment of Yugoslavia, 5.5% declared that they were "Yugoslavs" and so formed the fourth largest ethnic group, while a further 0.3% availed themselves of their right under Article 170 of the Constitution of the Socialist Federal Republic of Yugoslavia not to state their nationality. The members of all other ethnic groups accounted for only 0.74%.

A comparison of these percentages therefore confirms that in 1991 Bosnia-Herzegovina was a multi-ethnic state chiefly comprising three "constituent" peoples and a number of small or very small minorities. Furthermore, in view of the large number of mixed marriages in Bosnia in particular, it is obvious that not only the constitutionally guaranteed possibility of not specifying nationality, but also a declared belief in "Yugoslavianism" served as statistical categories which offered a means of avoiding an unequivocal profession of nationality, and so of preserving a multiple, multicultural identity.

Table 1: Nationality according to the censuses of 1981 and 1991

Nationality	**1981**	%	**1991**	%
Muslim	1,630.033	39,5	1,902.956	43.5
Serbian	1,320.738	37,2	1,366.104	31,2
Croatian	758.140	18,4	760.852	17,4
"Yugoslavian"	326.316	7,9	242.682	5,5
Other	946		24.218	0,5
Unknown	26.576		35.670	0,8
Not stated	17.950	0,4	14.585	0,3
Montenegrin	14.114	0,4	10.048	0,2

Rom	7.251	0,2	8.864	0,2
Ukrainian	4.502	0,1	3.929	0,1
Albanian	4.396	0,1	4.922	0,1
Nationality	**1981**	%	**1991**	%
Regional	3.649	0,1	224	0,0
Slovenian	2.755	0,1	2.100	0,04
Macedonian	1.892	0,04	1.595	0,03
Hungarian	945	0,02	893	0,02
Czech	690	0,01	590	0,01
Italian	616		732	0,01
Polish	609		525	0.01
German	460	0,01	470	0,01
Slovak	350	0,00	297	0,00
Jewish	343		426	0,01
Romanian	302		162	0,00
Russian	295		297	
Turkish	277		257	
Ruthenian	111		133	
TOTAL	**4,124.256**		**4,377.033**	

If we scrutinise the geographical distribution of peoples and nationalities, we find an all-important difference to that in the multi-ethnic states of western Europe. Unlike linguistic groups in Switzerland, Belgium or Spain, who are settled in separate areas, the members of the three peoples were essentially scattered right across the territory of Bosnia-Herzegovina, although they were concentrated in particular regions. For example, the Croats made up from 90 to as much as 99% of the population in West Herzegovina and also formed an absolute majority in two communes of Posavina. The Serbs comprised the absolute majority of the population above all in the communes of West Bosnia, whereas in the communes of East Bosnia, along the Drina, they were in the majority

only in Bijeljina. Muslim majorities were to be found mainly in communes in central Bosnia and in the north-west in and around Bihac. This means that none of the three peoples were settled in a separate, territorially unified area.

Today, the territorial distribution of the population has altered dramatically as a result of the fighting between 1992 and 1995 and the concomitant ethnic cleansing, as is clearly shown by a comparison of the statistically hypothetical population figures from the 1991 census and UNHCR[3] estimates for 1997 for the entities now known after the Dayton Agreement as the Republika Srpska and the Federation of Bosnia and Herzegovina:

Table 2: Comparison of the population structures of the Republika Srpska and the Federation of Bosnia and Herzegovina

	Republika Srpska		**Federation of BiH**	
	1991	**1997**	**1991**	**1997**
Bosniacs	28,77	2,19	52,09	72,61
Serbs	54,32	96,79	17,62	2,32
Croats	9,39	1,02	22,13	22,27
Other	7,53	0,00	8,16	2,38

These figures illustrate the extent of ethnic cleansing in the territory of the Republika Srpska: while in 1991, the Bosniacs constituted almost one third of the population of the then non-existent territory of the Republic, in 1997 they were down to approximately 2%; the Croat population had fallen from about 9% to 1%, and the "others" who, after all, had accounted for 7.5%, had completely disappeared. But even the Serbs, who would have made up an absolute majority of 54% of the population, were not by any means concentrated in one part of the country, so that in 1991 what is now the territory of the Republika Srpska would have been an area with a mixed population.

In the territory of the Federation of Bosnia and Herzegovina, the displacement of Bosniacs and Serbs is striking, while the percentage of Croats – about 22%- has remained exactly the same. In 1991, the Bosniacs would have just formed an absolute majority; in 1997 they

[3] *Source: International Monitoring Group (IMG) on the basis of the 1991 census and UNHCR estimates for 1997.*

accounted for almost two thirds of the population, whereas the Serb percentage had fallen dramatically from 17% to 2%. The exodus of the Serbs from Sarajevo after the signing of the Dayton Agreement was, of all things, primarily a consequence of a policy sometimes executed by force on the orders of Karadzic and the SDS leaders.

As far as population distribution is concerned, the Republika Srpska and the Federation of Bosnia and Herzegovina are now ethnically homogenised "nation states" of the respective "constituent" peoples: the Serbs in the Republic and the Bosniacs and Croats in the Federation. This transformation of what used to be the multi-ethnic Republic of Bosnia-Herzegovina when it was part of the former Yugoslavia, where peoples and ethnic groups were dispersed across the breadth and length of the state's territory, into an ethnically homogeneous area with (multi)national state institutions was a long and violent process spanning the period between the disintegration of Yugoslavia and the conclusion of the Dayton Agreement in December 1995, a process that was reflected in the international community's plans prior to the signing of the Washington Agreements in 1994, which established the Federation of Bosnia and Herzegovina and, before the Dayton Agreement, in the proposals for territorial reorganisation and the restructuring of state institutions[4].

3. Notion of "minorities" and nationality

In the words of the preamble to the Constitution of Bosnia and Herzegovina, which constitutes Annex 4 to the Dayton Agreement, "Bosniacs, Croats and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina" determine the Constitution. Article II.4 of the Constitution, which obviously echoes Article 14 of the European Convention on Human Rights, uses the term "association with a national minority", while Annex 7 to the Dayton Agreement speaks of "ethnic and/or minority populations" and "ethnic or minority groups". In contrast to the other republics of the former Yugoslavia which adhere to the eastern European model of the nation state, where the distinction between majority and minority nations rests on language, Bosnia and Herzegovina displays at least two unusual features.

First, the multi-ethnic demographic structure and multinational legal and constitutional foundations of the Republic mean that in Bosnia and

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[4] *Cf in detail Joseph Marko, The ethno-national effects of territorial delimitation in Bosnia and Herzegovina in Autonomies locales, intégrité territoriale et protection des minorités, edited by the Institut suisse de droit comparé/European Commission for Democracy through Law of the Council of Europe, Zurich 1996, pp. 121-143.*

Herzegovina as a whole there was no and is no sharp division between a majority, or leading national element, on one side and minorities on the other. Secondly, the social construct of ethnic differentiation in Bosnia, especially between Bosniacs, Serbs and Croats, the three largest national groups who have shaped the cultural and political history of Bosnia and Herzegovina, is not linked solely to language, but also to religion, as was already made abundantly clear by the Bosnian Constitution of 1910 after annexation by Austria-Hungary.

This first Bosnian Constitution and the appended election regulations for the State Parliament of Bosnia and Herzegovina[5] took as their example the Moravian settlement of 1905 and introduced a system of proportional political representation of the "three main denominations", to quote Section 5 of the electoral Act. Accordingly, of the 72 seats in the State Parliament, 31 went to Serbian Orthodox members, 24 to Muslims and 16 to Catholics. In addition, one seat in the Second Senate was set aside for a Jew, so that the Jewish population was likewise represented by two deputies in the State Parliament, since the Sephardic Chief Rabbi of Sarajevo had a seat in the Senate, as did the Reis-el-ulema, the Muftis of Sarajevo and Mostar, the four Serbian Orthodox bishops, the Roman Catholic Archbishop, the two diosecan bishops and the two provincials of the Order of St Francis. Moreover, according to Article 39 of the Constitution, the nine-member State Council was to be elected in such a way that "every denomination in the State Parliament shall elect the number of members of the State Council to which they are entitled on the basis of their proportion of the State's population .....". This first "Austrian" Constitution recognised not only proportional representation, but also the system of rotation. The Presidency of the State Parliament, comprising a President and two Vice-Presidents, once again consisted of a representative of each of the three main denominations. Whenever a new member was appointed, a rota was observed among these three denominations (Article 23 of the Constitution). So the Dayton system is not an American invention.

It can therefore be seen that religion and not language[6] was the distinguishing feature of ethnic identity and therefore the basis of the Constitution's recognition of collective rights in the form of proportional

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[5] *Cf Edmund Bernatzik Die österreichischen Verfassungsgesetze, 2. A., Vienna, 1991, pp. 1037-1051.*

[6] *Up until now, even the Serbs in Bosnia and Herzegovina have spoken the iyekavian variant of modern Serbo-Croation and the Cyrillic script was used alongside the Latin alphabet. Provision for this was made in Article 4 of the Constitution of the Republic of 1974. The drawing of linguistic distinctions on a large scale did not start until the establishment of the Republika Srpska and the Washington Agreement of 1994.*

representation and participation in the political decision-making process. Although the Jews were given a kind of minimum safeguard through one out of a total of 72 seats, the Serbs, Muslims and Croats were granted a more prominent status by being called the "three main denominations". This made Bosnia and Herzegovina a multinational entity from the outset.

With this first Constitution of 1910, a fundamental distinction deriving from their legal position could therefore already be drawn between three categories of ethnic groups:

- the "three main denominations" who enjoyed not only autonomy as "a recognised religious association", but also collective rights through proportional representation and participation in the State Parliament and State Council;

- the Jews who were allowed autonomy plus guaranteed minimum representation through one seat in the State Parliament;

- the other ethnic groups ranging from the Ruthenians to the Roma, whose identity was based on language, who were given no collective rights. Their members were, however, protected by liberal fundamental rights. In addition, Article 11 of the Constitution contained a guarantee of protection which was formulated in terms of an individual right, but which definitely referred to groups, in that in wording reminiscent of Article XIX of the 1867 constitutional laws " protection of national individuality and language shall be secured to all members ...".

Despite the fact that Bosnian Muslims were recognised in the Constitution and allowed political representation, even before the end of the Austro-Hungarian Dual Monarchy and the formation of the Kingdom of Serbs, Croats and Slovenes in 1918 (which was accompanied by a swelling Serbian and Croatian nationalist movement), the issue of their nationality had arisen and, with it, the question of whether they were "only" a religious community or a separate national group. The emergence of a "denominational nationality" conducive to a special ethnic national awareness extending beyond religious bonds and loyalties was promoted before 1918 by the problem of religious and educational autonomy and the administration of the assets of pious Muslims. These questions precipitated a politicisation that was reflected in the setting up of networks and the subsequent appearance of cultural and social organisations, newspapers, Muslim banks and, after 1906, political organisations.

Nevertheless, in 1918 the constitutional independence of Bosnia and Herzegovina was abolished when the Kingdom of Serbs, Croats and Slovenes came into existence as a centralised state. Furthermore, the Vidovdan Constitution of 1921, which drew on Yugoslavianism as the integrating ideology, assumed that there was one nation consisting of three "tribes" – the Serbs, Croats and Slovenes – and one language. On the basis of this conception of a national state, Articles 7 to 10 of the St Germain Peace Treaty with the Serb-Croat-Slovene state[7] consequently made it easier for Serbian-Croat-Slovene nationals who belonged to an ethnic, religious or linguistic minority to use their mother tongue in court, laid down safeguards protecting the use of their mother tongue in the educational system and forbad discrimination against them. Article 10 in particular provided that the Muslims as a "religious minority" should enjoy cultural autonomy, officially authorised the application of the sharia and placed mosques, cemeteries and other Islamic religious institutions under government protection. But, as far as "self-definition" was concerned, the Yugoslavian Muslim Organisation, the leading political force in the inter-war years, rejected all "political nationalisation".

Without being able to go into the details of the further historical development of this dual religious and national awareness and the variations and contradictions in it which accompanied the emergence of a Muslim nation tugged this way and that by external pressure from the Yugoslavian Communist Party and the "self-definition" of Muslim intellectuals before the early sixties[8], it must be noted that Bosnia-Herzegovina was more or less regarded as the hinterland of the republics of Serbia and Croatia[9] - even though under the first Federal Constitution of 1946 it had been established as a separate republic[10] within the framework of the federal state of the second, communist Yugoslavia - and the Muslims were therefore more or less obliged to declare themselves as

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[7] *Treaty of Peace between the Principal Allied and Associated Powers and the Serb-Croat-Slovene State, St Germain-en-Laye, 10 September 1919, in Yugoslavia through Documents, ed. Snezana TRIFUNOVSKA et al. Dordrecht, 1994, published by Nijhoff, especially p. 166.*

[8] *Cf Wolfgang HŐPKEN Die jugoslawische Kommunisten und die bosnischen Muslime in Die Muslime in der Sowjetunion und in Jugoslawien, ed. Andreas KAPPELER et al. Cologne, 1989, pp. 181-210.*

[9] *Hőpken, op. cit. p. 199.*

[10] *At the second AVNOJ (Antifasisticko Vjece Narodnog Oslobodejenja Jugoslavije – Antifascist Council of National Liberation of Yugoslavia) conference in 1943, the leaders of the Yugoslavian Communist Party refused to give the Muslims the status of a leading national element but, at the same time, contrary to other plans, promised to grant Bosnia-Herzegovina the status of a republic with the same rights as Serbia, Croatia, Slovenia, Macedonia and Montenegro. Its population would comprise sections of the Serbian and Croatian nation and Bosnian Muslims*

Serbs or Croats in national censuses. Although the first time that someone could declare themselves to be a Muslim in the ethnic sense was in the census of 1961 and the Muslims were first described as a people[11] with equal rights in the Bosnian Constitution of 1963, it was not until the fall of the then Minister of the Interior and head of the secret service, A. Rankovic, and the ensuing political reorganisation which culminated temporarily in the 1974 Constitution of the confederation, that the political context was created in which the "battle for the capital M"[12] , that is to say acceptance as a nation, awakened a response throughout Yugoslavia. The Bosnian Muslim interest in being elevated to the status of a nation clearly coincided with the intentions of the federal party leaders close to Tito to use Bosnia and the Muslims as a kind of stabilising buffer in the intensifying ethnic and national debate taking place within the wider context of discussions about federalisation. The first time that acknowledgement of a Muslim nation was of any benefit in Yugoslavia as a whole was in the 1971 census, when Muslims could declare themselves to be "Muslims in the sense of a nation". The result was not just a jump in the number of Muslims to 1.7 million citizens, but a dramatic change in the composition of the institutions of the Communist Party and state organs, in which Muslims had hitherto been completely under-represented.

The 1974 Constitution of the Republic of Bosnia[13] again specified that Croats, Serbs and Muslims were "the" peoples of Bosnia and Herzegovina who, together with the members of other (Yugoslavian) peoples and nationalities, were equally entitled to substantialise their national interests. Similarly, the 1974 Federal Constitution made provision for collective equality without, however, naming individual peoples/nations. Nothing changed in that respect until the disintegration of Yugoslavia. Even the Constitution which still applied to the independent state of the "Republic of Bosnia and Herzegovina" until, after numerous amendments, it was ultimately republished in 1993[14], again in Article 1 described Muslims, Serbs and Croats as the peoples of Bosnia and Herzegovina, even though in view of the war in Bosnia and Herzegovina, various agreements[15] and peace plans[16] were already

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[11] *In Serbo-Croatian the term "narod" is used for both nation and people.*

[12] *Spelled with a small m, this would be understood to mean Muslims as a religious community.*

[13] *Not only in the preamble, but also in Articles 1 to 3.*

[14] *Cf Sluzbeni list Republike Bosne i Herzegovine, br 5/1993, stav 119.*

[15] *Cf Sporazum o prijatelstvu i suradnji izmedju Republike Bosne Hercegovine i Republike Hrvatske. Zagreb 1. Srpnja 1992, Article 1.*

referring to them as "constituent peoples". Unlike the version published in 1974, the version republished in 1993 spoke only of members of other peoples, but no longer made any mention of "nationalities".

The 1994 Washington Agreements not only ended the war between Croats and Muslims, but, by establishing the Federation of Bosnia and Herzegovina alongside the Republika Srpska which had existed de facto since 1992, it provided a constitutional superstructure. The term "constituent peoples" was used for the first time in a document with legal force in the Constitution of this Federation[17], inasmuch as in Article 1, Bosniacs and Croats along with Others are described as the constituent peoples of the Republic of Bosnia and Herzegovina. Furthermore, Article 6 states that a "Bosniac language" shall be an official language of the Federation as well as Croatian[18]. This terminology was then adopted in the Dayton Agreement of 1995. Thus the Bosnian, Croatian, English and Serbian texts of the General Framework Agreement are equally authentic and according to the preamble to the Constitution contained in Annex 4, Bosniacs, Croats and Serbs are the constituent peoples.

The wheel has therefore come a full circle: both religion and language are criteria for the recognition of ethnic distinctness. The evolution of a special ethnic and national awareness on the part of the Muslims, which goes further than their regarding themsevles as "merely" a religious community, has led after many twists and turns and in the face of political resistance to acceptance of the Muslims as an ethnically perceived nation. This development is contributing to the creation of a separate language, so that the linguistic distinctions separating Bosnian from Serbian and Croatian which became apparent as early as 1990 with the disintegration of communist Yugoslavia, have now ended for the time being with the legal recognition in Bosnia of a separate Bosnian language.

The relationship between the terms Bosnian, Bosniac and Muslim[19] is, however, by no means clear and unambiguous, although it appears that

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[16] Cf Draft Agreement Relating to Bosnia and Herzegovina (Vance/Owen Plan), ICFY/6, 4 January 1993, Article II(4). "The constitution shall recognise three 'constituent peoples', as well as a group of 'others'.

[17] Cf the (authentic) English text in International Legal Materials, Vol. XXXIII, No. 3, 1994, p. 740 et seq.

[18] It is said that in the 1991 census, 90% of Muslims stated that their language was Bosniac, after it had become possible to specify oneself what language one spoke. Cf. Aydin Babuna Zur Entwicklung der nationalen Identität der bosnischen Muslime in Osteuropa 1996, p. 336.

[19] Cf. Wolfgang Libal, Bosnier – Bosniaken – Muslime: Versuch einer Entwirrung in Europäische Rundschau 1998, pp. 79 – 85.

with the Washingon and Dayton Agreements the word "Muslim" has simply been replaced by "Bosniac". Two Muslim parties already took part in the first free elections in 1990. A "Muslimanska bosnjacke organizacija" (MBO Muslim Bosniac Organisation) founded by Adil Zulfikarpasic and subsequently renamed Liberal Bosnian Organisation[20] put up candidates as well as the Stranka demoktratske akcije (SDA – Party of Democratic Action) led by the subsequent President Alija Izetbegovic. The MBO described itself in its manifesto as a political organisation of the Muslims and other "Bosniacs" and interpreted the term "Muslim" as a purely religious epithet. The SDA in contrast stressed the national connotation of the same term.

This debate about "muslimantsvo" or "bosnjastvo" therefore once again turned on the question of the relationship betweeen religious and national identity on the one hand, and on the issue of the exclusive nature of national identification on the other. The term "Bosniac" was coined under Turkish rule to distiguish between "indigenous Muslims" and Turkish Muslims (in Bosnia). Under Austrian rule, an attempt was made to apply this term to the resident Serbs and Croats as well and thus give it a transnational meaning. But even this transnational meaning is not entirely unambiguous. On the one hand, it might refer simply to civil identity along the lines of the French model of citizenship or that of "Jugosloventstvo" and enable a Bosnian or Bosniac to consider themself a Serbian, Croatian or Muslim irrespective of any religious or national affiliation. This would be tantamount to claiming a supranational identity which, however, as an integrating ideology would not be supranational at all, but would function according to the same principle of exclusivity as any other national ideology, as the failed experiment with Jugosloventstvo has shown. On the other hand, the term "Bosniac" might well be a means of arriving at a multicultural identity which is not exclusive, but which rests on multiple identities; an identity which does not force everyone qua Croat, Serb or Muslim to be categorical about their national identity but which, in the multi-ethnic context of Bosnia, offers them an opportunity to identify with something quite special. Many conversations with the descendants of mixed marriages have convinced me that this is not theoretical speculation, but of everyday practical importance, since the only alternative is to profess oneself to be a Serb, Croat or Muslim or simply to be excluded from all of these communities.[21]

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[20] *Cf with regard to relevant references to sources Babuna op. cit. Pp. 334 et seq.*

[21] *This phenomenon of creating an identity because of being excluded from all communities in the vicinity is by no means a Bosnian speciality. For a description of the phenomenon of "identity through not belonging" using the example of the historical area of Trieste, which culturally speaking, was*

Yet at present, four years after the signature of the Dayton Agreement, this identification variant seems to be the least likely to develop and spread, but conceivably it could well find favour among the Croats of central Bosnia and Posavina (the area on the right bank of the Save in north Bosnia) who have always differed from the Croats in Herzegovina. The former were far more accustomed to live alongside Serbs and Muslims, while the Croats in Herzegovina, especially those in the western part, are aggressively nationalistic, far more intolerant and fairly openly pursue a policy of joining up with Croatia. The same is true of the political elites of the Republika Srpska who quite frankly reject a joint state of Bosnia. Dual identities and loyalties are inconceivable for either the Croats or the Serbs of Herzegovina. But even among the Muslims of Bosnia, the SDA's national variant ultimately prevailed in 1993 in and over a "Svebosnjacki sabor". In the media, both names, Muslims or Bosnjaci, or a combination of them "Muslimani Bosnjaci" are still used when indicating the national identity of the Muslims in order to emphasise the Muslim section of the Bosnian population[22]. By making the terms "Muslim" and "Bosniac" synonymous in the Washington and Dayton Agreements, inasmuch as they are called a separate constituent people together with the Serbs and Croats, the nationalisation of this term has been provided with a constitutional basis and is therefore gathering momentum in practice as a standard legal notion.

Although the whole constitutional system of Dayton[23] contains a conceptual differentiation of "constituent" peoples, (just) peoples, ethnic groups and ethnic or national minorities, the actual classification of individual ethnic groups in these legal categories is not at all clear cut. Because of the ethnic cleansing in the war between 1992 and 1995 and the failure to date to implement the Dayton Agreement with respect to "minority returns"[24], the Republika Srpska and the Federation of Bosnia and Herzegovina have turned into the nation states of the Serbs, Muslim-

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neither wholly Slavic nor completely Italian, but somehere in-between, as brought to light in the novels of Fulvio Tomizza and Franco Vegliani, see only Claudio Magris/Angelo Ara, Trieste, Munich 1993, p. 255

[22] *Cf with relevant references to sources Babuna op.cit. p. 337.*

[23] *This comprises Annex 4 as the Constitution of the whole State, the Constitutions of the two entities the Republika Srpska and the Federation of Bosnia and Herzegovina and the Constitutions of the cantons of the Federation.*

[24] *This term is used by the international community to refer not only to the Roma, Romanians or Ruthenians but in particular to the three constituent peoples, namely Serbs, Croats and Bosniacs, who wish to return to the entities in which they do not belong to the majority section of the population. Cf the reports of the Office of the High Representative to the Secretary-General of the UN or to the Peace Implementation Councils (PICs).*

Bosniacs and Croats respectively. This raises the question not only whether Roma, Romanians or Ruthenians should be regarded as minorities vis-à-vis the constituent peoples, but also whether the members of the constituent peoples themselves ought to be treated as minorities in the entities.[25] This topic will be dealt with in detail in the next chapter.

First, however, it is necessary to look briefly at the system of nationality. The constitutional bases are to be found in Article I.7 of Annex 4 to the Dayton Agreement. Under this article, there exists a citizenship of Bosnia and Herzegovina and a citizenship of each entity and all citizens of the entities are declared to be thereby citizens of the state as a whole. All persons who were citizens of the Republic of Bosnia and Herzegovina immediately prior to the entry into force of the Dayton Agreement are by virtue of the Constitution likewise citizens of Bosnia and Herzegovina. In addition to this, citizens of Bosnia may hold the citizenship of another state, provided there is a bilateral agreement governing this matter. Persons with dual citizenship may, however, vote in Bosnia only if it is their country of residence. Furthermore, Annex 1 to the Dayton Constitution lists other international agreements which also contain provisions on citizenship[26].

As the parties in the parliament of Bosnia and Herzegovina were unable to agree on a law of citizenship, the High Representative Carlos Westendorp issued an Act on the subject which came into force provisionally after its publication on 1 January 1998[27]. The regulations cover three areas: acquisition, termination and proof of citizenship; the conditions governing dual citizenship and, lastly, detailed provisions for transferring citizenship of the Republic to that of the whole state of Bosnia and Herzegovina. The Act adhered to the conceptual norms customary in central Europe: jus sanguinis takes priority and jus soli plays a corrective role. Nevertheless, the provisions of Article 38 (3) and (4) tend to sanction ethnic cleansing by means of citizenship law. Thus, all citizens of the Socialist Federal Republic of Yugoslavia who were settled in one of the entities between 6 April 1992 and the entry into force of the Act and who have been continuously resident there for two years since the Act came into force, may acquire citizenship on request. This applies above all to the Krajina Serbs who settled in the Republika Srpska

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[25] This very question forms the subject of an actual case pending before the Constitutional Court of Bosnia and Herzegovina.

[26] Cf in detail Hellmuth Hecker Die Staatsangehörigkeit in Bosnien und Herzegovina seit dem Friedensabkommen von Dayton/Ohio in WGO-MfOR 1996, pp. 105-110.

[27] See Sluzbeni glasnik Bosne i Hercegovine, br. 4/97. Cf in detail Edin Sarcevic Zum neuen bosnisch-herzegowinischen Staatsgehörigkeitsgesetz in WGO-MfOR 1998, pp. 331-348.

after their flight and expulsion from Croatia in the summer of 1995 in the wake of the "Oluja" military operation.

4. Bases of the Constitution

As mentioned above, the constitutional system of Bosnia and Herzegovina has a hierarchy comprising several levels. The top level consists not of the Constitution of the state of Bosnia and Herzegovina to be found in Annex 4 to the Dayton Agreement, but the European Convention on Human Rights which, according to Article II. 2 of the Dayton Constitution not only applies directly, but also has "priority over all other law". Next comes the Constitution and the additional human rights agreements listed in Annex 1 to the Dayton Constitution, which apply in Bosnia. The Convention on the Elimination of All Forms of Racial Discrimination, the two UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the European Charter for Regional or Minority Languages and the Framework Convention for the Protection of National Minorities are of relevance to the law on minorities. The level under this[28] is formed by the Constitutions of the two entities, to wit the Constitution of the Republika Srpska, which was already adopted by a "Narodna skupstina" in 1992[29] and the Constitution of the Federation of Bosnia and Herzegovina which was drawn up under the Washington Agreements of April 1994 with a view to setting up this federation[30]. This Constitution likewise has an Annex enumerating "Human Rights Instruments to be incorporated into the Federation Constitution". In contrast to the Dayton Constitution, the 1990 Document on the Copenhagen Meeting of the Conference on the Human Dimension of the OSCE and the 1990 Council of Europe Parliamentary Assembly Recommendation on the Rights of Minorities, paras 10-13, and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities are also listed as being of relevance to the law on minorities.

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[28] *Because of the "supremacy clause" of Article III.3.b of the Dayton Constitution.*

[29] *Cf the original version in Sluzbeni glasnik Srpskog naroda u Bosni i Hercegovini, br. I/1992, 16 Marta 1992 and the re-issued version in Sluzbeni glasnik Republike Srpska, br. 21/1992, 31 decembra 1992.*

[30] *These Washington Agreements contained not only the Constitution, but also the agreement on a confederation between the Federation of Bosnia and Herzegovina and the Republic of Croatia and agreements granting the Federation access to the Adria through the territory of the Republic of Croatia and the Republic of Croatia the right of transit through the Federation. The Constitution of the Federation was ultimately published in Sluzbene novine Federacije BiH, br. 1/1994, on 21 July 1994.*

The Constitutions of the cantons of the Federation are the bottom level[31]. This level does not exist at all in the Republika Srpska because of its unitary structure.

While in the earlier communist constitutional system, only two groups, that is to say nations (narodi) and nationalities (narodnosti), benefited from collective equality with regard to representation and participation in the organs of the state[32], the legal status of various ethnic groups and their members is much more sophisticated in the constitutional system introduced by the Dayton Agreement. In principle, it is possible to distinguish between three main questions. Into what different categories do ethnic groups fall and what effects do these categories have on their legal status? What are the legal consequences of embodying the ethnic and citizenship principle in the Constitution? The answers to these two queries have a bearing on the question of the assertion of individual and collective rights.

4.1 The principle of equality and the ban on discrimination

The statutory provision central to the protection of the individual by the law is the ban on discrimination laid down in Article II.4 of the Dayton Constitution, which stipulates that there shall be no discrimination on grounds such as " ... language, religion, ... national origin, ... association with a national minority". This clause of the Dayton Constitution is obviously modelled on Article 14 of the European Convention on Human Rights and, like it, not only prohibits the state itself from engaging in any form of discrimination, but makes it incumbent on the state to secure the enjoyment of rights and freedoms without discrimination.

This positive duty of protection is enjoined on the entities in Article III.2.c. "The Entities shall provide a safe and secure environment for all persons in their respective jurisdictions , ... with respect for the internationally recognised human rights and fundamental freedoms referred to in Article II above ...". Furthermore, since this is of political significance for the restoration of a multi-ethnic Bosnia after all the ethnic expulsions during the war, the right to property, freedom of movement and residence is expressly referred to in connection with the return of refugees and displaced persons, and specific measures are outlined in

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[31] *Under Article V.4 of the Federation Constitution, they are subordinate to the latter.*

[32] *According to Amandman LXI to the 1974 Constitution of the Republic, the narodnosti even had proportional representation in the organs of state. See Slubuzbeni list Socijalisticke Republike Bosne i Hercegovine.*

respect of the duties of protection. For example, Article II.5 of the Dayton Constitution lays down that "All refugees and displaced persons have the right freely to return to their homes of origin. They have the right, in accordance with Annex 7 to the General Framework Agreement, to have restored to them property of which they were deprived in the course of hostilities since 1991...". Accordingly, the Parties[33] must, under Article II.1 of Annex 7 "create in their territories, the political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons, without any preference for any particular group." To this end, according to Article I.3 of Annex 7, the following confidence building measures among others had to be taken immediately:

"(a) the repeal of domestic legislation and administrative practices with discriminatory intent or effect;
(b) the prevention and prompt suppression of any written or verbal incitement, though media or otherwise, of ethnic or religious hostility or hatred;
...
(d) the protection of ethnic and/or minority populations wherever they are found ...;
(e) the prosecution, dismissal or transfer, as appropriate, of persons in military, paramilitary, and police forces, and other public servants, responsible for serious violations of the basic rights of persons belonging to ethnic or minority groups."

The reference to Annex 7 in Article II.5 of the Dayton Constitution means, however, that these positive duties of protection are not simply obligations of the Parties under international law, but that they likwise extend to fundamental rights which have been infringed but which can be restored.

In addition to this, the constitutions of both entities include in their catalogues of fundamental rights bans on discrimination on grounds of religion, language or national origin (Article II.A.2.d of the Constitution of the Federation and Article 10 of the Constitution of the Republika Srpska).

Lastly, Article 34 of the Constitution of the Republika Srpska guarantees the freedom to declare or not declare one's nationality, as provided for in

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[33] *When the Dayton Agreement was signed these were the Republic of Bosnia and Herzegovina, the Federation and the Republika Srpska.*

Article 3 (1) of the Council of Europe's Framework Convention for the Protection of National Minorities and Article 31 of the Constitution makes it possible to ban political parties which stir up national, ethnic or religious hatred and intolerance.

4.2 Special rights

Neither the European Convention on Human Rights nor the catalogue of basic rights in the Dayton Constitution contain special individual rights designed to protect or advance the members of national minorities, although of course it must not be forgotten that a number of general basic rights such as freedom of opinion, freedom of religion, respect for privacy and family life or electoral law (can) have the indirect effect of protecting minorities[34]. As the basic rights of the Convention are to be applied directly in Bosnia, the case law of the European Court of Human Rights is of immediate relevance in this connection, as the decisions of the Human Rights Chamber[35] and the Constitutional Court show[36].

On the other hand, in accordance with Article 5 of the Constitution of the Republika Srpska, protection of the rights of "ethnic groups and other minorities" must indeed be regarded as a fundamental principle of the constitutional system of the Republic, but one which is not translated into individual rights in either the organisation of the state or the section on basic rights, despite the fact that the Republic explicitly rests on the principle of the nation state. Thus Article 1 states that the Republic is the "State of the Serbian people and all its citizens" and Article 7 lays down that Serbian in its ekavian and iyekavian variants is the official language. The only exception, in the form of an individual right which counterbalances the establishment of Serbian as the official language, is contained in Article 112 of the Constitution of the Republika Srpska which permits any person to use "his/her language" in dealings with public authorities and to acquaint themselves with the facts of the matter in their own language. Nevertheless, as this is a general human right similar to those set forth in Article 6 of the Convention, but in this instance one which is not confined to the courts, this is not a provision which specifically protects minorities.

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[34] *Cf Christian Hillgruber and Mathias Jestaedt, The European Convention on Human rights and the Protection of National Minorities, Cologne 1994.*

[35] *Cf, for example, Islamic Community in Bosnia and Herzegovina against the Republika Srpska, Case No. CH/96/29, judgment delivered on 11 June 1999.*

[36] *U predmet 5/98.*

The wording of Article II.A.2. (1) (r) of the Constitution of the Federation, which grants everyone an individual right to minority protection, is highly dubious. The only meaningful construction that can be placed on this provision is possibly that, on the one hand, everyone has the right to profess membership of an ethnic group or national minority[37], and that on the other, the state has a constitutional duty to protect minorities. This interpretation is especially cogent, given that the Federation of Bosnia and Herzegovina is constituted according to the principle of a nation state, since Article 1 states that Bosniacs and Croats are "constituent peoples" and Article 6 asserts that Bosnian and Croatian are the official languages of the Federation.

Special rights may be found in the following spheres in the constitutional system of the Federation. They take the form of individual rights the exercise of which depends on the actual existence of groups and of collective rights in the shape of group rights.

4.2.1. Right to an official language and a language of instruction in schools

Although, as stated above, the Constitutions of the two entities provide that the official languages shall be Serbian on the one hand and Bosnian and Croation on the other with the Cyrillic or Latin alphabet as the official script, both Constitutions contain exceptions permitting the official use of minority languages. For example, Article 6 (2) of the Federation Constitution specifies that "other languages" may be used as means of communication and instruction. Moreover, additional official languages may be designated as official by a majority vote of each house of the Federation parliament, but in the House of Peoples a majority of the Bosniac and Croat delegates must vote in favour. The corresponding Article of the Constitution of the Republika Srpska (Article 7) even lays down the use of languages of other linguistic groups as official languages subject, however, to the constitutional requirement of a specific enactment and only in the area in which that group is settled. Lastly, Article 38 of the Constitution of the Republika Srpksa secures to everyone the "right to education on equal conditions".

These constitutional provisions of the entities give rise to two sets of issues which must be analysed separately, although they are interrelated in practice. They likewise form the subject matter of proceedings pending

[37] *The relevant provisions of the Framework Convention of the Council of Europe did not exist when the Constitution of the Federation was adopted.*

before the Constitutional Court to determine the compatibility of the Constitutions with higher ranking instruments. On the one hand, the question is to what extent these provisions conflict with the articles of the European Charter for Regional and Minority Languages (some of which are more far-reaching), as the Charter takes precedence over the Constitutions of the entities and therefore forms a yardstick for the Constitutional Court. The other point is to which of the other languages or linguistic groups these provisions or those of the Charter apply or are supposed to apply. This comes down to the basic problem that the Dayton Constitution itself contains no stipulations regarding the use of languages, while the entities' Constitutions declare only the language of the respective "constituent" peoples to be the official language, in keeping with the concept of the nation state. Does this therefore mean that Serbian in the Federation, and Bosnian and Croation in the Republika Srpska are minority languages and that each of the three constituent peoples forms a national minority in one entity or another, although in the preamble to the Dayton Constitution all three peoples are termed "constituent peoples"? If, however, it is assumed on the basis of this rule in the preamble to the Dayton Constitution that the three constituent peoples have (collective) equality and if the conclusion is drawn from this that they and hence their languages must legally be placed on an absolutely equal footing throughout the territory of Bosnia and Herzegovina, ie also within the entities, as the applicant in the proceedings pending before the Constitutional Court maintains, then the provisions on official languages in the entities' Constitutions would be unconstitutional. Even the provisions of the European Charter for Regional and Minority Languages which, unlike those of the Framework Convention, are relatively far-reaching and which in Article 8 provide for bilingual state education and in Articles 9 and 10 for the use of two languages in courts and by administrative authorities and public services (although they by no means make this obligatory), would be no substitute for this complete legal equality.

If, however, it were to be held that the constitutional requirement regarding (collective) equal treatment did not derive from the term "constituent peoples", it would then be up to the entities' Constitutions to differentiate in the use of language(s) in accordance with the stipulations of the Charter. Article 3 of the latter makes it possible to apply its provisions not only to regional or minority languages, but to an "official language which is less widely used on the whole or part of its territory". Accordingly, the above-mentioned high standard set by Articles 8 to 10 would have to be applied to the languages of the constituent peoples who are in the minority in the entity in question, while the lower standard

could be reserved for the languages of the other minorities, ie schooling provided in the minority languages as required, the use of the minority's mother tongue in dealings with authorities and courts and the employment of interpreters. Nevertheless, because of the the obligations stemming from the Charter, the clauses of Article 6 (2) and (3) of the Federation Constitution would then have to be interpreted as being constitutional imperatives instead of being only optional provisions.

4.2.2. Political representation and participation

The different constitutional levels display significant disparities as regards the political representation and participation of ethnic groups.

In the Dayton Constitution, the notion "constituent peoples" acquires more than just a symbolic function, since special opportunities are open to them for representation and participation in the decision-making process of the organs of the state. For example, under Article V, the Presidency consists of three members: one Bosniac, one Croat and one Serb, each of whom must be directly elected in the respective entity as constituency. The same pattern of representation applies under Aricle IV.1 to the composition of the second chamber of parliament, the House of Peoples. Five Croats and five Bosniacs are to be chosen as Delegates of the Federation by the Bosnian and Croat Delegates to the House of Peoples of the Federation, while the five Serbian Delegates of the Republika Srpska are to be chosen by the National Assembly of the Republic. A quorum of nine Delegates is necessary for decisions in the House of Peoples and at least three Delegates of each of the constituent peoples must be present. In contrast to this, no provision is made for ethnic representation in the first chamber of parliament, the House of Representatives, but the Delegates of the three constituent peoples can impose a joint veto on the parliament's decisions. Under Article IV.3, the majority of the Bosniac, Croat or Serb Delegates may declare that a proposed decision is destructive of a vital interest of the constituent people in question. If a Joint Commission comprising one Delegate from each of the three peoples is then unable to find a compromise, the matter must be referred to the Constitutional Court, which must review it for procedural regularity. Article V.4.b. lays down that, as far as the composition of the government is concerned, no more than two thirds of all ministers may be appointed from the territory of the Federation and that Deputy Ministers may not be of the same constituent people as their Ministers. The arrangement in the Law on the Council of Ministers according to which instead of the Chair provided for in the Constitution, two Co-Chairs and two Deputy Ministers were to be appointed in an

ingenious system of ethnic proportional representation, has recently been declared unconstitutional by the Constitutional Court[38]. Article IX.3 of the Dayton Constitution which states that "Officials appointed to positions in the institutions of Bosnia and Herzegovina shall be generally representative of the peoples of Bosnia and Herzegovina" should therefore probably be understood to refer to the judicial and administrative machinery.

Ethnic representation and participation in the common institutions of the state Bosnia and Herzegovina are therefore confined to the three constituent peoples. Representation and participation of other ethnic groups or minorities in the House of Peoples or Presidency are explicitly ruled out. These provisions naturally give rise to serious misgivings about how far individual rights, especially the right to participate in elections and the ban on discrimination on grounds of ethnic origin or nationality, are being violated. Nevertheless, as these provisions, like the basic rights, have constitutional status, they are as such not subject to review by the Constitutional Court from that angle. The Constitutional Court could note how far these provisions violate specific basic rights set forth in the European Convention on Human Rights and Article 14 thereof (the Convention takes precedence over the Dayton Constitution in the hierarchy of the legal order), but this undoing of the Dayton Agreement through a decision by the Constitutional Court on the compatibility of these clauses with higher ranking instruments, and hence on their validity, would probably have such serious political implications, that parties to proceedings have so far refrained from doing so, even in one case which is pending where this would have been possible.

The two entities' Constitutions in some respects take different paths. Notwithstanding Article 1 relating to legal policy, which states that the Republic is a "State of the Serbian people and its citizens", the Constitution of the Republika Srpska contains no provisions establishing any kind of ethnic representation or participation in the supreme organs of the state or in judicial or administrative machinery. In ordinary Acts and in practice, the end result of this "ethnically indifferent" Constitution based on the citizenship principle is, however, that only Serbs are to be found in the supreme organs, courts and police force.

For example, Amendment LIII, which supplements Article 89, provides for a Senate as an advisory body to the supreme organs of the Republic. It is to consist of 55 members appointed by the President. While this Article

[38] *U predmet 1/99 of 14 August 1999.*

is ethnically neutral, the implementing Act stipulates that these members must be of Serbian nationality[39]. Although about 25% of the Deputies in the National Assembly of the Republic are not Serbs, the ethnic composition of the government is completely homogeneous. All 21 ministers, including the Prime Minister are Serbs.[40] The same national homogeneity is to be found in the judiciary and the police force.

Table 3: Ethnic origin of judges, public prosecutors and the police in the Republika Srpska[41]

	Serbs	Bosniacs	Croats
Judges and Public prosecutors	97,6%	1,6%	0,8%
Police	93,7%	..5,3%	.. 1,0%

In absolute figures, it turns out that of a total of 375 judges and public prosecutors, all nine persons of Bosnian and Croatian origin are to be found in Brcko, where multi-ethnic staffing was achieved through the international regime of the Supervisor.

The Federation Constitution institutionalises the ethnic representation and participation of both constituent peoples, the Bosniacs and Croats but, unlike the Dayton Constitution, it introduces the category of "Others" in Article 1. These "Others" are also included in the system of proportional representation in the legislature and judiciary. Although it has not yet been ascertained who belongs to this category, it may be presumed that, on the one hand, these may be members of the third constituent people, ie Serbs, and on the other, members of different ethnic groups.

The Federation Constitution contains the following provisions on proportional representation.

Article II.B.1 lays down that the three ombudsmen must consist of one Bosniac, one Croat and one Other. Article IV.A.6 states that the second chamber of parliament must comprise 30 Bosniac and 30 Croat Delegates and a proportional number of Other Delegates, yet under Article IV.A.18, the Bosniac and Croat, but not the Other Delegates, may exercise a joint

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[39] *Cf Article 2 of the Zakon o senatu Republike Srpske, Sluzbeni glasnik RS br 8/97.*

[40] *Source: Ministry for Civilian Affairs and Communications of Bosnia and Herzegovina.*

[41] *These figures are based on data supplied by the International Police Task Force (IPTF) as at 17 January 1999.*

veto when a decision of parliament concerns the vital interest of any of the constituent peoples. Participation in the election of the President and Vice President of the Federation is unconditionally reserved for Bosniac and Croat Delegates. For example, only they can nominate candidates and the majority of the Bosniac and Croat Delegates, as well as the absolute majority, is necessary for their election As far as the composition of the government is concerned, Article IV.B. 4 and 5 state that no Deputy Minister may belong to the same constituent people as his Minister and that no fewer than one third of ministerial positions must be occupied by Croats. Article IV.B.6 lays down that government decisions require consensus when the vital interests of the constituent peoples are concerned. With regard to the judiciary, Article IV.C.6 provides that in principle there shall be an equal number of Bosniac and Croat judges in each Court of the Federation, while the Others must be appropriately represented. Article IV.C.18 explicitly states that the Human Rights Court, which has not yet been appointed, shall consist of one Bosniac, one Croat and one Other judge.

On looking at the ethnic composition of the bench, public prosecutors' offices and the police force in the Federation, it is however very plain that Serbs and "Others" are extremely under-represented when compared not only with the estimated population figures for 1997, but also with the census of 1991.[42]

Table 4: Ethnic origin of judges, public prosecutors and police in the Federation of Bosnia and Herzegovina

	Bosniacs	Croats	Serbs	Other
Judges and Public prosecutors	71,72%	23,26%	5,00%	no figures
Police	68,81%	29,89%	1,22%	0,08%

Even if this form of ethnic representation and participation of the constituent peoples has been institutionalised in the Constitution, the obvious aim being to divide power after the war between the Bosniacs and Croats and to set up a democratic political system with proportional representation, from the point of view of constitutional theory the question still arises how far this system infringes individual political rights not secured by the European Convention on Human Rights, the

[42] *These figures are based on data supplied by the IPTF as at 17 January 1999.*

Dayton Constitution and the International Convention on the Elimination of All Forms of Racial Discrimination. For example Article 3 of the First Protocol to the European Convention on Human Rights specifies that "free elections" are to be held "at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature." According to the established precedents of the European Court of Human Rights, a general equal right to elect at least one chamber of parliament must be guaranteed as an individual basic right. Nevertheless Article 5 (c) of the Convention on the Elimination of Racial Discrimination does not restrict franchise to legislative elections, but goes a step further by securing not only "the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage" but also the right "to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service". This raises the question whether the system of ethnic proportional representation (especially that of the constituent peoples) provided for in the Federation Constitution does not violate individual rights and the ban on discrimination on grounds of national origin embodied in the Convention.

According to the decision of the European Court of Human Rights in the case of Mathieu-Mohin and Clairfayt against Belgium, Article 3 of the First Protocol, in contrast to the American Voting Rights Act 1964, does not guarantee the right to elect a member of one's own ethnic group. The majority of the judges held that the French-speaking electorate of the Flemish district Halle-Vilvoorde were "in no way deprived of the right to vote and the right to stand for election on the same legal footing as the Dutch-speaking electors by the mere fact that they must vote either for candidates who will take the parliamentary oath in French and will accordingly join the French-language group in the house of Representatives or the Senate and sit on the French Community Council, or else for candidates who will take the oath in Dutch and so belong to the Dutch-language group in the House of Representatives or the Senate and sit on the Flemish Council." The practical consequence is therefore that the French-speaking electors of this district are represented on the Flemish Council only if they elect a Dutch-speaking candidate.

It could therefore be argued that the right to vote is not infringed if a Croat has to vote for a Serbian or Bosniac candidate. Nevertheless, as mentioned above, the right to participate in elections comprises not only the right to vote but also the right to stand for election and here there is a crucial difference in the legal position of Belgium and that of the Federation of Bosnia and Herzegovina. Belgian electoral law does not

exclude anyone from eligibility for political office solely on language grounds. Any citizen may stand for election but, after the elections, he or she must take the parliamentary oath in Dutch or French and subsequently becomes a member of the Dutch or French language group in Parliament and hence of the Community Council. It is therefore a subjective decision on the part of every candidate in which language he or she takes the oath, whereas the Constitution of the Federation of Bosnia and Herzegovina ethnically defines certain seats, parliamentary parties, government positions and the power to exercise a veto from the outset and thereby excludes anyone not belonging to that specific ethnic group from public office.

It is probably not possible to argue that a system of proportional representation and participation for ethnic groups per se automatically infringes the general and, above all, equal right to participate in elections. It is quite plain from the *travaux préparatoires* to the Washington Agreements, that these elements of a consociational democracy (A.Lijphart) were institutionalised in the Constitution in order to end the war between the Croats and Bosnians and establish a balance of power between them by a division of that power. This can be regarded as a legitimate aim in order to secure the political stability and democracy of state structures. In the context of the principle of proportionality developed by the courts, especially the European Court of Human Rights, it is therefore of much greater importance who is served by these preferences in the form of exceptions to the general, equal right to participate in elections, how far such interference with this right goes and to what extent this may be regarded as reasonable.

The proportional representation of the Bosniacs, Croats and Others and the possibility of Delegates or Ministers of both constituent peoples to impose a joint veto, certainly constitute "preferences based on national or ethnic origin" within the meaning of Article 1 (1) of the Convention on the Elimination of Racial Discrimination, since a distinction is to be made from the outset between Bosniacs, Croats and Others. Article 1 (4) of the Convention provides for the possibility of positive discrimination. "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination ...".

It cannot however be asserted in connection with these special measures, which are supposed to serve the protection of minorities and their

members, that particularly the Bosniacs and Croats as constituent peoples who comprise the majority of the population, need such special protective measures in order to be able to enjoy an equal right to participate in elections at the level of the Federation. For this reason, the special rights for Others contained in the Federation Constitution are probably covered by the provision on exceptions, but this certainly does not apply in respect of the members of both constituent peoples, even when these rights serve what is essentially a legitimate purpose.

It is therefore necessary to examine how far this interference in equal franchise goes in specific areas and whether this may be regarded as reasonable. At all events, the institutional arrangements in favour of Bosniacs and Croats, which completely exclude members of other ethnic groups from actual participation in the legislature, government and judiciary, may be deemed unconstitutional. Accordingly, the provisions on the President and Vice Presidents, which in effect reserve these positions for Bosniacs and Croats, clearly infringe Article 5 of the Convention on the Elimination of Racial Discrimination. As far as the composition of the legislature is concerned, the introduction of a two-chamber system, where the lower chamber is not elected according to ethnic criteria, would not violate the right to vote and the right to stand for election. The element giving rise to doubts is, however, the combination of ethnic representation in the House of Peoples and the possibility of a joint veto, which may be wielded only by the Delegates of the two constituent peoples, who in reality form a parliamentary majority. Such a combination of representation and a power of veto held by the constituent peoples alone undermines the equality of the right to participate in elections to such an extent that "the free expression of the opinion of the people in the choice of the legislature" (Article 3 (1) of the First Protocol to the European Convention on Human Rights) is seriously weakened. It cannot therefore be justified by the basically legitimate purpose of equalising power.

With regard to the ethnic make-up of the organs of the cantons of the Federation, the Federation Constitution itself departs from arrangements based on constituent peoples and others in that Article V.8 and 11 state that the Cantonal Executive and Judiciary should reflect the ethnic composition of the cantonal population as a whole. The individual cantonal constitutions consequently repeat this principle and contain appropriate provisions on the executive, judiciary and above all the police, at both cantonal and municipal level.

4.2.3 Self-administration of minorities and functional co-operation

The form of territorial autonomy is determined solely by the Federation Constitution. Under Article V.2.2 thereof, every canton may delegate functions concerning education, culture, tourism, local business, charitable organisations, radio and television to municipalities whose majority population is other than that of the Canton as a whole. Some cantonal constitutions make this a must rather than a may.[43] On the other hand, under Article V.3 of the Federation Constitution, cantons where Bosniacs or Croats comprise the majority of the population, may establish Councils of Cantons in order to co-ordinate policies on matters of common interest and advise their representatives in the House of Peoples. To that end, commissions and working groups may be set up, but no military or political arrangements may be reached.

5. The foundations of the protection of minorities

Briefly speaking, the constitutional bases may be divided as follows into the foundations of, or obstacles to the protection of minorities.

In accordance with the pattern set by the Washington Agreements and the Constitution for the Establishment of the Federation of Bosnia-Herzegovina contained therein, Annex 4 to the Dayton Agreement, which may be regarded as the Constitution for the whole state of Bosnia and Herzegovina, is characterised by a multi-ethnic concept with three constituent peoples. Unlike the Constitution of the Republika Srpska whose institutional structures, save for the programmatic Article 1, rest on ethnic indifference along the lines of the French model of citizenship, the Dayton and Federation Constitutions recognise ethnicity, which is reflected in collective rights through the representation and participation of the constituent peoples in the system of government, with all the problems of potential infringments of individual rights listed above. Minorities are therefore primarily all the other ethnic groups named in the first chapter. The territorial dissociation of the three constituent people at the level of the entities prompts the question (which must be settled by the Constitutional Court in a case which is pending) of how far the Serbs in the Federation and the Croats and Bosniacs in the Republika Srpksa can be transformed from a constituent people into a minority by elements of the entities' Constitutions which consolidate their character as nation states.

[43] *Cf for example Article 14 of the canton Tuzla-Podrinje.*

As the subdivision of the Federation into cantons also follows the ethnic principle, since apart from in the two "mixed" cantons, it is assumed that in the other eight cantons the majority of the population are either Bosnian or Croatian and provision is accordingly made for the minority in question (who in some communes may form the majority) to practise self-administration in the fields of education, training, culture and the media, a general system of institutional, ethnic segregation arranged according to the territorial principle has thus been introduced. Nevertheless, since the Dayton Agreement places just as much importance on the return of refugees and displaced persons, as is shown in particular by the provisions of Annex 7 (thus, in the final analysis, the ethnic cleansing carried out during and after the war is to be reversed) the whole structure of the state of Bosnia and Herzegovina faces a crucial alternative. Should the premises of Realpolitik be accepted, ie the idea of a nation state and the practice of the organs of both entities, which de facto successfully prevent minority returns[44]? This would signify that the ethno-national homogenisation triggered by ethnic cleansing would now be upheld by political practice and ultimately legitimised by law. Or should the restoration of the multi-ethnic population structure of 1991 be pushed through by courts' decisions, especially those of the Human Rights Chamber and the Constitutional Court?

The chief mechanisms for the protection of minorities are general and specific bans on discrimination and the principle of equality, which figure in every list of basic rights at all constitutional levels. But, of course,

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[44] In international usage, this term is understood to mean the return of Serbs in the Federation and the return of Croats and Bosniacs in the Republika Srpska. By 31 January 1999, a total of 97,966 refugees and internally displaced persons had gone back to the Republika Srpska. Of these, only 751 were Croats and 9,212 Bosniacs, that is to say approximately 10%. In the Federation, by the same date, 474,261 persons had returned, of whom about 4% were Serbs. These figures alone clearly indicate that when refugees return, the authorities in both entities discriminate on ethnic grounds. Numerous reports of the Office of the High Representative, the ombudpersons of the Federation and non-governmental organisations speak of many cases of undisguised violence and threats of violence against persons who wish to return. Some of this violence is even instigated by local authorities. In other instances, the police merely stand and watch without intervening. Such behaviour is a flagrant dereliction of their duty of protection. One of the less obvious administrative measures to prevent refugees returning is, for example, the formula of reciprocity, which is even embodied in the law of the Republic Srpska. For example Section 45 of the Act on Refugees and Displaced Persons (Zakon o izbeglicama is raseljenim licima, Sluzbeni glasnik RS, br 26/97) provides for the protection of national minorities as a part of legal policy but, at the same time, Sections 38 and 40 lay down the completely unconstitutional principle of reciprocity for the return of refugees from the Federation and the restitution of property, or to put it plainly, that no more Croatian and Bosniac refugees are permitted to return than the number of Serbs accepted by the Federation. This reciprocity formula was even suggested in February 1999 by President Izetbegovic for an exchange of populations between Sarajevo, Banja Luka and West Mostar. An extremely instructive study of the motives behind and arguments used to prevent the return of refugees has recently been published by the International Crisis Group. Cf. ICG, Preventing Minority Returns in Bosnia and Hercegovina. The Anatomy of Hate and Fear, 10 August 1999, at http://www.intl.-crisis-group.org/projects/bosnia/reports/bh50rep.htm.

some general basic rights, like freedom of religion, are also of importance for the protection of particular minorities. With respect to special rights which act as guarantees of protection not only for individual members of ethnic groups but for these groups themselves, the Bosnian constitutional system is characterised by the incorporation of a number of international agreements which are to be applied directly as municipal constitutional law. Essentially the most extensive guarantees are offered by the European Charter for Regional or Minority Languages. They could in effect counteract the consequences of ethno-national homogenisation on the basis of territorial segregation, if they were interpreted and applied in that way by the courts. Against this background, note should be taken of the introduction of the institution of territorial self-administration for minorities which, however, exists only in the Federation of Bosnia and Herzegovina.