

Constitutional reforms of Bosnia and Herzegovina in the context of EU integrations

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Abstract

This thesis examines whether Bosnia and Herzegovina's current constitutional framework, characterized by an international presence and the federal system based ethnically based decision-making mechanism, aligns with EU integration demands. The current state system relies heavily on the Office of the High Representative which was crucial for post-conflict stability. This institution conflicts with the sovereignty and democratic principles required for EU membership. If Bosnia and Herzegovina is to become a member of the European Union, fundamental reforms must be implemented in order to ensure the stable functioning of institutions that do not have to rely on the help of international factors. By comparing constitutional systems in Belgium and Spain, which manage similar complexities within the EU, this study explores whether such models can be adapted to Bosnia and Herzegovina or if other solutions are necessary for constitutional reforms. The thesis argues for innovative constitutional designs that could maintain governance and uphold the rule of law, ensuring internal stability, and reduce discrimination while aligning with EU norms. By offering specific solutions and ideas in which direction this constitutional reform of the legislative, executive, and judiciary powers, this paper provides potential answers to the ongoing struggles that Bosnia and Herzegovina will face in the process of the EU integration.

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Introduction

Due to its distinct political past and institutional structure, Bosnia and Herzegovina's road to European Union (EU) membership is both complex and important. Central to this framework is the institution of the High Representative, established by the Dayton Peace Agreement in 1995 to oversee the implementation of the peace accords and maintain stability. This institution, coupled with a complex federal system, presents both challenges and opportunities for Bosnia and Herzegovina as it seeks to meet EU membership criteria.

The primary question confronting Bosnia and Herzegovina is whether its current constitutional setup, characterized by deep international presence and ethnically based institutional arrangements in the decision-making process strengthened by numerous veto mechanisms is compatible with the demands of EU integration. The High Representative's role, while crucial for post-conflict stability, may conflict with the sovereignty and democratic principles expected of EU member states. Therefore, the crux of the matter lies in determining whether limited constitutional amendments can suffice for EU accession or if more extensive reforms, including the potential abolition of the High Representative's office, are necessary.

To address this, it is essential to explore how similar constitutional systems have managed to address similar problems within the EU framework, particularly in Belgium and Spain. Both countries exhibit intricate federal structures and regional autonomies, offering valuable insights into balancing internal diversity with EU integration. Belgium, with its linguistic and regional divisions, and Spain, with its autonomous communities, have navigated their complexities while adhering to EU standards. Studying their approaches can reveal whether such models can be adapted to Bosnia and Herzegovina's context or if other solutions are required.

The core issue extends beyond institutional adjustments to ensuring the stability of Bosnia and Herzegovina's legislative, executive, and judiciary systems. If the High Representative's role is diminished or terminated, state institutions must be structured in a way to maintain governance and uphold the rule of law. This necessitates innovative thinking and possibly novel constitutional designs that can secure internal stability while aligning with EU norms.

In conclusion, Bosnia and Herzegovina's EU integration is a multifaceted challenge that demands a delicate balance between retaining necessary post-conflict safeguards and adopting democratic principles suitable for EU membership. By examining comparative examples and considering both limited and extensive constitutional reforms, this essay highlights the need for a comprehensive approach to ensure that Bosnia and Herzegovina can meet EU criteria while preserving its internal stability and sovereignty. The path forward requires careful deliberation, innovative solutions, and a commitment to the principles that underpin the European Union.

Chapter I

1. EU and Western Balkans

Since 2000, the European Union acknowledged that Western Balkan countries that are part of the Stabilisation and Association Process can be potential Candidates for EU membership^{1 2}. The EU has seen the strategic importance of being more actively involved in working with countries that have opened or are about to open negotiations for joining the EU, especially after Russia's aggression against Ukraine^{3 4}. Although the role of the EU in the integration of the region towards full membership has been criticized, especially due to the “slowness” and “unwillingness” of the EU in the whole process over the past decade, it is an indisputable fact that the aspiration of the countries of the Western Balkans for membership in the EU is a key factor for the implementation of crucial reforms of the state systems^{5 6}. This specific context of the EU enlargement has accelerated the accession process of Bosnia and Herzegovina which resulted in gaining candidate status for joining the EU in 2022 and after that the opening of the accession negotiations with Bosnia and Herzegovina on the 21st of May 2024⁷.

¹ European Commission. "Stabilisation and Association Agreement." Accessed June 15, 2024. https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/stabilisation-and-association-agreement_en.

² Harald Schenker, "The Stabilization and Association Process: An Engine of European Integration in Need of Tuning." *Journal on Ethnopolitics and Minority Issues in Europe* 7, no. 1 (2008): 2-13

³ *European Council Conclusions on Ukraine Enlargement and Reforms*, December 14, 2023, <https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/european-council-conclusions-on-ukraine-enlargement-and-reforms/>.

⁴ Sabina De Silva, "Perspectives on Staged Accession: A New Path to Enlargement for the Western Balkans?" Policy Brief. Foundation for European Progressive Studies and Centro Studi di Politica Internazionale (2023): 3-11

⁵ Elena Basheska, "EU Enlargement in Disregard of the Rule of Law: A Way Forward Following the Unsuccessful Dispute Settlement Between Croatia and Slovenia and the Name Change of Macedonia," *Hague Journal on the Rule of Law* 14 (2022): 225-227

⁶ Iordan Gheorghe Barbulescu; Miruna Troncota, "The Ambivalent Role of the EU in the Western Balkans - "Limited Europeanisation" between Formal Promises and Practical Constraints. The Case of Bosnia-Herzegovina," *Romanian Journal of European Affairs* 12, no. 1 (March 2012): 21-23

⁷ Mared Gwyn Jones & Euronews, "European Union leaders approve opening accession talks with Bosnia and Herzegovina," Euronews.

March 7th, 2024, [European Union leaders approve opening accession talks with Bosnia and Herzegovina | Euronews](https://www.euronews.com/en/europe/2024/03/07/european-union-leaders-approve-opening-accession-talks-with-bosnia-and-herzegovina).

2. The accession procedural steps of Bosnia and Herzegovina before the opening of the accession negotiations with the EU

Bosnia and Herzegovina's path to membership in the European Union has been going on for a while. On February 15, 2016, Bosnia and Herzegovina submitted its application to become a member of the European Union. As the procedure for submitting the application for membership dictates, the European Council forwarded the application for membership to the European Commission. In February 2018 Bosnia and Herzegovina delivered answers to the Questionnaire that were necessary to kick off the initial process of the country's EU integration. After that, the European Commission adopted a strategy for the process of EU enlargement in the region of Western Balkans, including Bosnia and Herzegovina where it was stated that “Bosnia and Herzegovina could become a candidate for accession with sustained effort and engagement”⁸ which gave an important signal to the government in Bosnia and Herzegovina to be prepared for significant reforms in the future.

The European Commission published its final Opinion to the EU Council regarding the membership application of Bosnia and Herzegovina in May 2019 ⁹. It contained essential guidelines for future reforms in Bosnia and Herzegovina organized around criteria the country should meet to become part of the European Union.

⁸ European Commission, "Bosnia and Herzegovina - Enlargement Policy," Neighborhood and Enlargement, Accessed 30 March 2024, https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/bosnia-and-herzegovina_en#key-documents.

⁹ European Commission, "Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union," COM(2019) 261 final, SWD (2019), Brussels, May 29, 2019. [Opinion on Bosnia and Herzegovina's application for membership of the European Union - European Commission \(europa.eu\)](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_1111)

3. Copenhagen Criteria

The EC 2019 final opinion elaborates on the criteria and necessary reforms that Bosnia and Herzegovina must fulfil to become a member of the European Union in the future. The criteria stated in the opinion are divided into two segments, namely political and economic criteria. The commission based its opinion on the standards established by the Copenhagen criteria concerning accession negotiations and general accession criteria¹⁰, which are quite clear and straightforward. First, the candidate state needs to fulfil political criteria in the sense of having stable democratic institutions that can guarantee stable democracy, uphold the rule of law principles, human rights, and protection of minorities. Second, it needs to meet the economic criteria, namely a functioning market economy and the capacity to endure the competitive pressure of the market inside the European Union. Third, the candidate state needs to ensure the ability to fulfil its obligations towards EU membership, which includes the capacity to effectively implement all EU rules and standards usually called “*acquis communautaire*” as well as the enforcement of the goals of political, economic, and monetary policies of the EU¹¹. In the political aspect, Copenhagen criteria from 1993 states that “the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights, and respect for the protection of minorities”. Copenhagen Criteria significantly influence applicant states by incorporating political requirements, evaluating candidate countries through EU documents, and providing conditional financial assistance, thereby shaping their behavior¹².

¹⁰ European Commission, "Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union."

¹¹ EUR-Lex. "Accession Criteria (Copenhagen Criteria)." Accessed March 30, 2024. <https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html>.

¹² Tanja Marktlr, "The Power of the Copenhagen Criteria." *Croatian Yearbook of European Law and Policy* 2, no. 2 (2006): 346-348.

4. The Commission's Final Opinion on Bosnia and Herzegovina and General Overview of all Political Criteria Necessary to Reform

Analysing the structure of the final opinion of the European Commission, we can see that it points out several issues regarding the structural problems embedded inside the constitutional system of Bosnia and Herzegovina. The assessment was based on the criteria that relate to the stability of the institutions, the possibility of ensuring democracy, the rule of law, the protection of human rights, and the protection of minorities' rights. These include several areas that will be summarised before we focus on the elements that are directly related to constitutional reforms.

First, the opinion points out that ethnically based institutional arrangement and decision-making based on belonging to ethnic groups listed in the constitution of Bosnia and Herzegovina poses a problem for the effective governance and implementation of the EU standards. The Constitution contains provisions based on ethnicity which means that several state bodies and voting/veto mechanisms are based on ethnic criteria. This is in direct correlation with the distribution of powers with frequent disputes and conflicts over the competencies between the federal level of the government and the entities (regional) level, which renders governance ineffective and affects legislative alignment with the EU acquis. In the past three decades, this system has revealed numerous flaws regarding decision-making and the implementation of certain laws and policies. The European Commission sees this as a potential risk in implementing EU laws if Bosnia and Herzegovina were to become a member state¹³.

Second, it characterizes the electoral system as inadequate, with political rights which are based more on ethnicity and residence in each part of the country than on citizenship of the citizen. This

¹³ European Commission, "Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union," 7-8

means that the state is not ensuring equal political rights for all citizens by prioritizing specific dominant ethnic groups through the constitution itself ¹⁴.

Third, it signals as problematic the lack of coordination of governmental powers due to the decentralized structure of Bosnia and Herzegovina which is directly affecting capabilities of more effective coordination and governmental capacities in relation to the implementation of state policies ¹⁵.

Fourth, it is concerned with the inefficient public administration, which requires reforms to ensure the effective implementation of state (and therefore also EU) policies and a higher level of professionalism on all levels of government ¹⁶.

Fifth, it refers to problems with the judiciary, which are directly related to the rule of law doctrine. Currently, judicial institutions are having difficulty maintaining their independence, reliability, and effectiveness. This has a direct connection to problems of organized crime and corruption, which have a negative effect on law enforcement and erode public confidence in government institutions ¹⁷.

The sixth problem that is burdening Bosnia and Herzegovina is related to the general relation towards the collective memory and the reconciliation of ethnic groups that were in conflict during the war in Bosnia. This makes it harder when it comes to acknowledging events like genocide in Bosnia, cooperation with international tribunals, or local support for trying war criminals ¹⁸.

¹⁴ Ibid, 7

¹⁵ Ibid, 8

¹⁶ Ibid, 8

¹⁷ Ibid, 8

¹⁸ Ibid, 10

4.1. Pinpointing crucial elements of the Commission's final opinion that are in relation to the constitutional reforms in Bosnia and Herzegovina

To be able to adequately contextualize the reforms of the constitution of Bosnia and Herzegovina in connection with EU integration, it is important to distinguish which parts of the opinion are directly related to the decision-making process within the state, which is of course related to the entire organizational structure of the state. In Bosnia and Herzegovina's existing state structure and organization, some parts of the political criteria have been noted as problematic. The Commission's opinion clearly recognizes the functional issues that the state is experiencing, and as such, any significant reforms that must be done in the state will eventually have to lead to constitutional adjustments in the state. Following this opinion, the authorities in Bosnia and Herzegovina could have a political basis for starting the future reorganization of the state.

4.2. The Issue of Executive Powers and Decision-making

The opinion emphasizes the problem of ethnic-based provisions and ethnic-based representation that is embedded inside the constitutional framework of the country. Due to its specific constitutional arrangement, Bosnia and Herzegovina is currently a federally organized state with a strong emphasis on ethnic determinants. This ethnic-based system is embedded in the organization of state bodies and voting mechanisms, particularly affecting the Presidency and the House of Peoples of the Parliamentary Assembly. Only members of the three constituent ethnic groups—Bosniaks, Croats, and Serbs—can be elected to these institutions, excluding other citizens from participation. This setup contravenes the European Convention on Human Rights by discriminating against citizens not identifying with these three groups¹⁹.

¹⁹ Ibid, 7

The European Commission views this as a potential obstacle to Bosnia and Herzegovina's EU membership, creating risks in the adoption and implementation of EU laws due to the rigid ethnic criteria. The European Court of Human Rights has repeatedly confirmed the discriminatory nature of Bosnia and Herzegovina's constitutional system, most notably in the *Sejdić-Finci v. Bosnia and Herzegovina* case. In response, the EU demands constitutional reforms to safeguard the political rights of all citizens, which is a prerequisite for Bosnia and Herzegovina's EU accession.

4.3. The Need for changes in the Judicial Branch of Government

The judiciary in Bosnia and Herzegovina faces significant challenges in terms of independence and efficiency, which are critical for meeting the European Union's political criteria. Despite substantial reforms, including the establishment of the Court of Bosnia and Herzegovina and the High Judicial and Prosecutorial Council, further changes are needed. A major issue is the absence of a supreme court at the state level, which the European Commission recommends establishing to harmonize entity and state laws, prevent jurisdictional conflicts, and ensure legal certainty.

The Constitutional Court of Bosnia and Herzegovina, a focal point of judicial reform, faces scrutiny regarding its composition, integrity, professionalism, independence, and effectiveness in resolving state and entity jurisdictional conflicts. A distinctive feature of Bosnia and Herzegovina's judicial system is the inclusion of three international judges appointed by the European Court of Human Rights to the nine-member Constitutional Court. This arrangement, unique globally, aims to ensure the court's functionality in an ethnically divided context, reducing the risk of institutional deadlock. However, the European Commission's opinion highlights the need to address the role of these international judges, though it is unclear if this poses a barrier to EU accession²⁰.

²⁰ Ibid, 7-8

4.4. The Institution of the High Representative for Bosnia and Herzegovina

The Office of the High Representative for Bosnia and Herzegovina (OHR) is a unique institution established under the Dayton Peace Agreement, holding extensive powers to oversee and support the country's institutions. The OHR acts as the ultimate interpreter of the civilian aspects of the peace agreement's implementation and can enact laws and remove public officials, a power set known as the "Bonn powers."

The European Commission's stance on the OHR is that such extensive international supervision is fundamentally incompatible with Bosnia and Herzegovina's sovereignty and its EU membership aspirations. Although there has been an ongoing effort since 2008 to phase out the OHR, its continued existence depends on various conditions. This position underscores the significant role the OHR has played in ensuring the functionality of Bosnia and Herzegovina's state institutions²¹.

For Bosnia and Herzegovina to progress towards EU membership, it must eventually phase out the OHR. This transition requires comprehensive constitutional reforms to ensure the independent and efficient functioning of state institutions. Key reforms include restructuring the Parliamentary Assembly's upper and lower houses, revising the delegation of executive powers within the Council of Ministers and the Presidency, and reorganizing the Constitutional Court. These steps aim to establish a self-sufficient governance system, ultimately enabling the closure of the OHR and aligning Bosnia and Herzegovina with EU standards of sovereignty and democratic governance.

²¹ Ibid, 7

4.5. Importance of the Criteria

The European integration of Bosnia and Herzegovina is a significant step for the progress of the state and society, and there is a consensus within society about the very idea of integration. This integration can initiate historically significant processes that have not happened since the 1990s. The opinion of the European Commission gives a good diagnosis of the systemic problem that Bosnia and Herzegovina has been struggling with for a long time. But fulfilling the political criteria for joining the European Union from the Opinion of the European Commission in the context of Bosnia and Herzegovina will require a great deal of effort and energy, mostly due to the specific circumstances of political and social life and the constitutional structure of the state, as well as the turbulence that are happening in Europe and which have a direct impact on Bosnia and Herzegovina^{22 23 24}. Certain progress has been achieved in the past few years²⁵, but to ensure that the state runs effectively, considerable adjustments to the executive, legislative, and judicial branches of government will eventually be necessary in order to close the Office of the High Representative for Bosnia and Herzegovina. Potential solutions for these constitutional reforms can be found in the examples of other states with federal organisation which are already part of the European Union so we will try to explore if these solutions can work out in the Bosnian case.

²² Berta López Domènech. "Leaving Dayton for Brussels: Reviving Bosnia's Constitutional Reform." *European Politics and Institutions Programme* (2023): 8

²³ Sofía Sebastián, "Breaking the Impasse: Constitutional Reform in Bosnia." *Policy Brief, FRIDE - Foundation for International Relations and Foreign Dialogue*, March 2011): 2-5

²⁴ Valery Perry, "Constitutional Reform in Bosnia and Herzegovina: Does the Road to Confederation go through the EU?" *International Peacekeeping* 22 (2015): 9-14

²⁵ European Commission. "Report on Progress in Bosnia and Herzegovina – March 2024". COM(2024) 129 final. Brussels, 2024.

Chapter II

1. Solution Through the Comparative Constitutional Legal Approach

It is necessary to understand several legal systems and how they function in order to analyze and compare constitutional documents. The examination of this is difficult since, on occasion, the constitutions may lead us in a different way because the general practices follow other guidelines than those specified in the Constitution, so identifying the function of legal rules and institutions across different legal systems and understanding them in the context of that specific country or society can contribute to a functionalist approach²⁶. This method assumes that similar sociolegal problems regardless of different legal contexts can lead to similar solutions²⁷. Although this approach of comparative constitutional law is challenging, it can provide valuable answers for the reform of the constitution of Bosnia and Herzegovina. In that sense, the functionalist method of comparative analysis suits the best for our case best, or more specifically functional case studies. The idea behind this type of analysis is to analyze the constitutional systems, state models, and specific institutions of nations that have the most comparable arrangements. Furthermore, the concept of examining the functional implications and relationship segments of our comparators and how this might be effectively represented in Bosnia and Herzegovina's instance²⁸. The goal of this comparative analysis is to identify the similarities and differences between the legislative, executive, and judicial branches of different governments using the examples of European federal countries. Finding a suitable comparator in the field of comparative constitutional law today is challenging since Bosnia and Herzegovina represents a highly particular kind of constitutionality

²⁶ Pierre Legrand, Roderick Munday, *Comparative Legal Studies: Traditions and Transitions*. (Cambridge: Cambridge University Press, 2003), 105-106

²⁷ Vicki C Jackson, „Comparative Constitutional Law: Methodologies“, In *The Oxford Handbook of Comparative Constitutional Law*, (Oxford University Press: 2012), 5.

²⁸ Ibid, 6

based on the sui generis federal model²⁹. Our analysis's primary comparators are Belgium and Spain, two nations with federal models of government and parliamentary regimes that are comparable to Bosnia's on multiple levels. Even though they are federal states, there are a number of reasons why these countries share similar problems and the way they are addressing them. To preserve the identities and languages of particular regions within the states, Belgium and Spain attempted to strike a balance between regional autonomy and national unity^{30 31}. Thus, we have Belgium with its regions of Wallonia and Flanders, which geographically almost exactly match with the Dutch, French, and German linguistic groups, or Spain with its regions like Catalonia, Basque Country, or Galicia^{32 33}. This example is comparable to Bosnia and Herzegovina in that all three states work to ensure that their federal systems balance and satisfy all groups, regardless of how similar or different they are in terms of ethnicity, language, or religion. Comparing the legislative powers of these countries we will notice that they are organized as bicameral parliaments, with lower and upper houses, and have certain veto mechanisms incorporated inside them. When it comes to the executive powers, the head of the government is the Prime Minister ahead of the Council of Ministers in all three cases. The head of the State in the case of Belgium and Spain is the King, and in the case of Bosnia is the Tripartite Presidency, but in all three cases,

²⁹ Maja Sahadžić, "Mild Asymmetry and Ethnoterritorial Overlap in Charge of the Consequences of Multinationalism: A Country Study of Constitutional Asymmetry in Bosnia and Herzegovina." In *Constitutional Asymmetry in Multinational Federalism*, ed. by Patricia Popelier and Maja Sahadžić. Federalism and Internal Conflicts. (Cham: Palgrave Macmillan, 2019): 47-60

³⁰ Patricia Popelier. "Asymmetry and Complexity as a Device for Multinational Conflict Management: A Country Study of Constitutional Asymmetry in Belgium." In *Constitutional Asymmetry in Multinational Federalism*, edited by Patricia Popelier and Maja Sahadžić. Federalism and Internal Conflicts. (Cham: Palgrave Macmillan, 2019): 17-69

³¹ Bossacoma Busquets, Pau, and Mireia Sanjaume-Calvet. "Asymmetry as a Device for Equal Recognition and Reasonable Accommodation of Majority and Minority Nations: A Country Study on Constitutional Asymmetry in Spain." In *Constitutional Asymmetry in Multinational Federalism*, edited by Patricia Popelier and Maja Sahadžić. Federalism and Internal Conflicts. (Cham: Palgrave Macmillan, 2019): 429-456

³² André Lecours, "Belgium (Kingdom of Belgium): Holding Together Federalism." In *The Forum of Federations Handbook of Federal Countries 2020*. (Springer International Publishing, 2020), 53-60

³³ Tudela Aranda, José, and Kölling, Mario, "Spain (Kingdom of Spain): A Union of Autonomous Communities." In *The Forum of Federations Handbook of Federal Countries 2020*. (Springer International Publishing, 2020), 329-333

the powers that these institutions have are somewhat similar and are based on the ideas that the head of the state usually must perform duties based on the advice of the government. Judiciary and the functioning of the Constitutional Court, the case of Bosnia and Herzegovina is quite unique in its own sense, but the similarities can be drawn in the sense of adjudicating federalism and regional autonomy, where they ensure that regional laws comply with the constitution.

1.1. Federal Structure

1.1.1. Bosnia and Herzegovina

The federal system of Bosnia and Herzegovina is frequently cited as an example of ethnofederalism, contributing to internal strife and weakening the efficiency of the state³⁴. The federal system can also be considered a consociational federation³⁵. Emerging from the Bosnian War in the 1990s, the country's complex constitutional structure was established by the Dayton Agreement in 1995, which serves as the constitution through Annex IV³⁶. This agreement designated Bosniaks, Croats, and Serbs, along with "Others," as constituent nations. Bosnia and Herzegovina is divided into two entities, the Federation of Bosnia and Herzegovina (FBiH) and Republika Srpska (RS)³⁷, plus the Brčko District under central government supervision³⁸.

The organizational structure is asymmetric: RS comprises only municipalities, while FBiH is divided into ten cantons and then municipalities. This complexity extends to the legislative,

³⁴ Liam Anderson, "Ethnofederalism: The Worst Form of Institutional Arrangement...?" *International Security* 39, no. 1 (2014): 172-185

³⁵ Damir Banović, Saša Gavrić, and Mariña Barreiro Mariño. *The Political System of Bosnia and Herzegovina: Institutions – Actors – Processes*. (Springer Nature Switzerland AG, 2021), 9

³⁶ Sahadžić, "Mild Asymmetry and Ethnoterritorial Overlap in Charge of the Consequences of Multinationalism.", 47-48

³⁷ Bosnia and Herzegovina's Constitution, Art. 1. para 2. Accessed June 15, 2024.

https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009.

³⁸ Nedim Ademović, Joseph Marko, and Goran Marković. *Ustavno pravo Bosne i Hercegovine [Constitutional Law of Bosnia and Herzegovina]*. (Sarajevo: Fondacija Konrad Adenauer e. V., Predstavništvo u Bosni i Hercegovini, 2012), 99

executive, and judicial branches, where a consensual democracy model forms the government. The state's competencies are split across state, entity, cantonal, and district levels, with legislative authority formation dependent on ethnic quotas and proportional systems.

Despite the Dayton Agreement's success in ending conflict, the resulting federal structure has led to inefficiencies and institutionalized ethnic divisions. RS is predominantly Serb, while FBiH is primarily Bosniak and Croat. Ethnic quotas ensure political representation but often elect nationalist leaders who prioritize ethnic interests over national unity, causing state institutional paralysis and inefficiency ³⁹. This raises concerns about the compatibility of Bosnian federalism with European Union integration.

1.1.2. Federal Structure of Belgium

Belgium's federal structure is shaped by its multilingual and cultural diversity. The country consists of three main linguistic regions: Dutch-speaking Flanders in the north, French-speaking Wallonia in the south, and a small German-speaking community in the southeast. Initially a unitary state established in 1831, Belgium faced linguistic tensions that led to the Flemish Movement advocating for bilingual status for the Dutch-speaking region. Post-World War II tensions led to the creation of four linguistic regions—Flanders, Wallonia, Brussels, and the German-speaking area—initiating federalization and devolution supported by language-based political parties. The latest significant state reform in 2012 adjusted decision-making structures.

Belgium's federal system comprises three communities (Flemish, French, and German-speaking) and three regions (Flanders, Wallonia, and Brussels), each with distinct competencies. Regional

³⁹ Sahadžić, "Mild Asymmetry and Ethnoterritorial Overlap in Charge of the Consequences of Multinationalism", 56-65

competencies cover economic and development policies, while community competencies focus on cultural and language matters. Federal competencies include justice, national defense, monetary policy, and foreign affairs.

The federal structure accommodates Belgium's linguistic and cultural diversity but results in administrative complexity, with each region and community having its own government and parliament. This fragmentation leads to inefficiencies and redundancies, especially in policy areas like healthcare and education. Deep-rooted regional and linguistic divisions often cause political deadlocks, as coalition governments from different linguistic communities can be difficult to form and maintain, sometimes resulting in prolonged periods without stable governance.^{40 41}

Comparatively, Belgium shares similarities with Bosnia and Herzegovina in managing deep regional, linguistic, or ethnic divisions through complex administrative structures. Both countries have experienced political deadlocks, but Belgium, an EU member since its founding, manages its divisions more stably due to its unique historical context. This stability and EU membership suggest that Belgium's practices could provide useful guidelines for Bosnia and Herzegovina, especially given its complex federal system and recent conflict legacy.

1.3. Federal Structure of Spain

The development of federalism in Spain evolved gradually, beginning in the 19th century. The First Republic in 1873 initiated attempts at decentralization, with federal states represented in a draft constitution granting limited autonomy. The Second Republic (1931-1936) further promoted decentralization, introducing the right to autonomy, enabling regions like the Basque Country,

⁴⁰ Popelier, "Asymmetry and Complexity as a Device for Multinational Conflict Management", 17-22

⁴¹ Lecours, "Belgium (Kingdom of Belgium): Holding Together Federalism.", 53-56

Galicia, and Catalonia to achieve regional autonomy. However, skepticism towards federalism persisted due to ineffective implementation. A significant shift occurred post-1975, following the end of Francisco Franco's dictatorship, leading to substantial decentralization and the formation of numerous autonomous communities with their own laws and jurisdictions, defining Spain's current territorial organization.⁴²

Spain is structured into three levels: autonomous communities (17 regions and two autonomous cities), 50 provinces, and 8,124 municipalities. The central government handles foreign policy, defense, finance, and basic human rights, while autonomous communities manage health, education, and possess a degree of fiscal autonomy. There are asymmetries in fiscal autonomy, with the Basque Country and Navarre enjoying greater fiscal independence compared to other regions. This asymmetrical federalism focuses on fiscal autonomy but does not effectively integrate autonomous communities into central government decision-making, evident in the federal parliamentary function. Spain's federalism, influenced by its unique historical context, incorporates elements of both federalism and a unitary system⁴³. Similar to Bosnia and Belgium, it faces economic inequalities intertwined with regional nationalism, cultural, and linguistic issues. This dynamic creates legal and judicial challenges, where the boundaries of regional autonomy and central authority are often unclear. The judiciary plays a crucial role, as seen in the Constitutional Court's intervention in Catalonia's attempted independence referendum⁴⁴.

Spanish and Bosnian federal systems both aim to balance regional autonomy with national unity, encountering specific challenges. Bosnia's federalism is marred by ethnic divisions, causing

⁴² Bossacoma Busquets, and Sanjaume-Calvet, "Asymmetry as a Device for Equal Recognition and Reasonable Accommodation of Majority and Minority Nations.", 429-433

⁴³ Aranda and Kölling. "Spain (Kingdom of Spain).", 332-334

⁴⁴ Busquets and Sanjaume-Calvet "Asymmetry as a Device for Equal Recognition", 442-443

political deadlock and inefficiencies in policy implementation. Spain faces economic disparities and regional nationalism, particularly from wealthier regions like Catalonia and Madrid, leading to tensions with less affluent regions. Administrative inefficiencies and constitutional disputes further complicate governance. However, since the Franco era, Spain has managed to utilize federal arrangements to balance differences and adhere to EU criteria, offering a contrast to Bosnia's ongoing struggles with political and administrative inefficiencies.

Chapter III

1. Legislative Branch of Bower – Comparative Analysis of the Parliaments

Parliaments play a vital role in democratic governance by representing the electorate, ensuring government actions align with the people's will, and maintaining checks and balances. This is achieved through law-making and executive oversight. The legislative frameworks in Bosnia and Herzegovina, Belgium, and Spain provide comparative insights into how different systems address representation and governance challenges.

Bosnia and Herzegovina's Parliamentary Assembly operates with a dual structure: the House of Representatives uses proportional representation (Sainte-Laguë method), while the House of Peoples incorporates ethnic quotas for Bosniaks, Croats, and Serbs, ensuring balanced ethnic representation⁴⁵. This system, while fostering cooperation, can also lead to legislative deadlocks due to its rigid ethnic divisions.

Belgium's bicameral parliament employs proportional representation (D'Hondt method) in the House of Representatives, promoting political diversity and coalition-building. The Senate, with

⁴⁵ Banović et al., *The Political System of Bosnia and Herzegovina: Institutions – Actors*, 32

members appointed by community and regional parliaments, reflects the country's federal structure and linguistic diversity, balancing national legislative needs with regional autonomy⁴⁶.

Spain's Cortes Generales also features a bicameral system with the Congress of Deputies elected via proportional representation (D'Hondt method), which favors larger parties and stable coalitions. The Senate combines elected and appointed members, balancing regional and national interests⁴⁷.

When comparing these systems, Bosnia and Herzegovina's focus on ethnic quotas stands out, as it directly addresses the need for ethnic balance in governance. Belgium and Spain prioritize proportional representation and regional autonomy, ensuring regional voices are integral to the national legislative process. The D'Hondt method used in Belgium and Spain encourages political diversity and coalition governments because in general, it favors larger political parties. In contrast, Bosnia's combination of proportional representation offers more proportionality and ethnic quotas underscores its dedication to ethnic inclusivity⁴⁸. Top of Form The character of the parliaments of the comparators and is reflected through the fact that they are bicameral parliaments, which means that they consist of a lower and an upper house. The functionalities and powers of the lower and upper houses of the parliaments in the comparator countries show the disparities between them. Our examination of how parliaments operate will mostly center on the structure of the parliaments

⁴⁶ Jean-Benoit Pilet, "Electoral System Change in Europe since 1945: Belgium.", Université Libre de Bruxelles and University of Reading. Accessed June 15, 2024. <https://www.electoralsystemchanges.eu/Public/DatasPage.php?ID=6>.

⁴⁷ Núñez, Lidia. "Electoral System Change in Europe since 1945: Spain." Université Libre de Bruxelles and University of Reading. Accessed June 15, 2024. https://www.electoralsystemchanges.eu/Files/media/MEDIA_219/FILE/Spain_summary.pdf.

⁴⁸ Lijphart, Arend. "Degrees of Proportionality of Proportional Representation Formulas." In *Electoral Laws and Their Political Consequences*, edited by Bernard Grofman and Arend Lijphart, Agathon Series on Representation, vol. 1. (New York: Algora Publishing, 2003): 171-175

and veto powers that are present in both the lower and upper houses, and how they are applied—or in some cases, misused.

1.1. Parliament of Bosnia and Herzegovina

The Parliamentary Assembly of Bosnia and Herzegovina is a bicameral legislature reflecting the country's ethnic divisions. It comprises the House of Representatives (lower house) and the House of Peoples (upper house), aligned with Bosnia and Herzegovina's complex state structure. The House of Representatives has 42 members, with two-thirds elected from the Federation of Bosnia and Herzegovina (FBiH) and one-third from Republika Srpska (RS). Although representatives are directly elected, this election method results in regional rather than exclusive citizen representation, with entity-specific voting rights and a veto mechanism to block laws lacking majority support within each entity. The House of Peoples represents the constituent ethnic groups—Bosniaks, Croats, and Serbs—through 15 delegates indirectly elected from their respective ethnic clubs in the FBiH and the RS. This structure excludes representation for Serbs in FBiH and Bosniaks and Croats in RS, as well as national minorities and those not identifying with the three main ethnic groups^{49 50}. Thus, the ethnic-based system seeks to maintain ethnic balance but limits broader citizen representation and inclusivity in the legislative process ⁵¹.

1.2. The Parliament of Belgium

The federal Parliament of Belgium consists of two houses: the Chamber of Representatives and the Senate. The Chamber of Representatives, the lower house, includes 150 directly elected

⁴⁹ Bosnia and Herzegovina's Constitution, Art. 4, Accessed June 15, 2024.
https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009.

⁵⁰ Ademović et al., *Ustavno pravo Bosne i Hercegovine*, 175-177

⁵¹ Davor Trlin. "Limitations of the Democratic Capacity of the Constitutional System of Bosnia and Herzegovina." *Beijing Law Review* 8 (2017): 85.

members, with 88 Dutch-speaking and 62 French-speaking members, reflecting the linguistic divide and regulated by Article 63 of the Belgian Constitution^{52 53}.

The Senate primarily serves as a house of subnational units, composed of 60 members⁵⁴. Of these, 29 senators are delegated by the Flemish Parliament/Flanders or the Flemish Community in Brussels (one must reside in Brussels), 10 by the parliament of the French community (three from Brussels), nine by the Walloon parliament (two from Brussels), and one by the German-speaking community's parliament. Additionally, 10 senators are elected at the federal level. Brussels itself does not directly delegate a representative through its parliament but is represented by the two linguistic community commissions. The Senate, a non-permanent body with limited powers, serves as the upper house. According to Articles 77 and 78 of the Constitution⁵⁵, the Senate shares certain competencies with the House of Representatives but generally lacks binding authority over the lower house's decisions.^{56 57}

1.3. Parliament of Spain

The Spanish parliament is also composed of two houses or chambers, the Congress and the Senate. Article 68 of the Spanish constitution regulates the minimum and maximum number of Congress members which has to be between 300 to 400 members on the basis of the proportional representation.⁵⁸ The Senate is a chamber of territorial representation as described by the

⁵² Belgium's Constitution, Art. 63. Accessed June 15, 2024.

⁵³ https://www.constituteproject.org/constitution/Belgium_2014.

⁵⁴ Lecours, "Belgium (Kingdom of Belgium): Holding Together Federalism.", 53-58

⁵⁵ Belgium's Constitution, Art. 63.

⁵⁶ Belgium's Constitution, Art. 77, 78.

⁵⁷ Popelier, "Asymmetry and Complexity as a Device for Multinational Conflict Management", 30

⁵⁸ Francis Delpérée, The Constitution, the Parliament and the Concerted Decision Processes: Observations Based on the Belgian Experience (EU and UNDP Project, Rada for Europe: Capacity-Building in Support of the Verkhovna Rada of Ukraine, 2018), 10 <https://www.undp.org/ukraine/publications/constitution-parliament-and-concerted-decision-processes>.

⁵⁸ Spanish Constitution, Art. 68. Accessed June 15, 2024. https://www.constituteproject.org/constitution/Spain_2011.

constitution, according to the constitution (Article 69).⁵⁹ Its 266 members, of which 208 are chosen by public vote, have limited legislative authority; the remaining 58 are appointed by the regional legislatures. As a result, the Senate is unable to fulfill its duties as a chamber of representation and a venue for the ACs to participate in state legislation at the federal level.

2. Competences of the Lower House of Parliaments

2.1. Lower House of the Parliament in Bosnia and Herzegovina

The House of Representatives of Bosnia and Herzegovina, as the lower house of the parliament, performs standard parliamentary functions such as passing laws, approving the budget, and overseeing the executive branch.⁶⁰ However, its decision-making process is uniquely influenced by the "entity vote" mechanism, which complicates the adoption of decisions. With 42 delegates, a simple majority of 22 is typically required for decisions. However, a decision must also gain the support of at least one-third of the present deputies from both entities (FBiH and RS). If all deputies are present, this means at least 10 deputies from FBiH and 5 from RS must support the decision. If the initial vote fails due to insufficient entity support, a second round of negotiations is initiated by the chairman and a designated committee, seeking consensus within three days. If consensus is not reached, a re-vote occurs. In the re-vote, if less than two-thirds of the deputies from each entity vote against the decision, a simple majority of those present and voting can pass the decision.^{61 62}

This decision-making process has proven problematic, as the entity vote acts as an informal veto mechanism, frequently abused to block legislation. This has led to legislative gridlocks, hampering

⁵⁹ Spanish Constitution, Art. 69.

⁶⁰ Kasim Trnka et al., *Proces odlučivanja u Parlamentarnoj skupštini Bosne i Hercegovine [Decision-Making Process in the Parliamentary Assembly of Bosnia and Herzegovina]*. (Sarajevo: Fondacija Konrad Adenauer e.V., Predstavništvo u Bosni i Hercegovini, 2009), 41-42

⁶¹ Ademović et al, *Ustavno pravo Bosne i Hercegovine*, 179

⁶² Ric Bainter, and Edouard d'Aoust. *Constitution of Bosnia and Herzegovina Commentary*. Edited by Nedim Ademović and Christian Steiner. Konrad-Adenauer-Stiftung e.V., Rule of Law Program, South East Europe, 2010), 624-627

effective governance and the implementation of necessary laws, thereby complicating Bosnia and Herzegovina's efforts to align with EU standards and requirements^{63 64}.

2.2. Lower House of the Parliament in Belgium

The House of Representatives, the lower house of the Belgian Parliament, plays a pivotal role within Belgium's federal legislative framework. It holds comprehensive legislative powers, including the authority to introduce and approve laws, particularly those related to financial, budgetary, and social security matters. The House debates, amends, and votes on bills, requiring a majority for approval. It also has the exclusive right to legislate on taxes, public spending, economic policies, and adopt laws necessitating a special majority, such as constitutional revisions and significant institutional reforms.^{65 66} A fundamental function of the House of Representatives is to oversee the executive branch's actions. This includes asking questions, seeking interpellations, conducting inquiries, and potentially causing the government's resignation through a vote of no confidence.⁶⁷ Although both chambers of parliament initially consider constitutional amendments and institutional reforms, the House holds the final decision-making power in most legislative matters. The House of Representatives in Belgium does not have a formal veto mechanism. Bills are passed based on majority voting. However, the necessity for coalition building and majority consensus, coupled with the Senate's consultative role, provides an informal check on legislation, ensuring balanced and negotiated legislative outcomes⁶⁸.

⁶³ Maja Sahadžić, "Veto mehanizmi u parlamentima na državnoj i entitetskoj razini u BiH [Veto Mechanisms in the State and Entity Parliaments in Bosnia and Herzegovina]." In *Parlamentarizam u Bosni i Hercegovini [Parliamentarism in Bosnia and Herzegovina]*, edited by Saša Gavrić and Damir Banović. (Sarajevo: Sarajevski otvoreni centar, Fondacija Friedrich Ebert, 2012), 312-315

⁶⁴ Sahadžić, "Mild Asymmetry and Ethnoterritorial Overlap in Charge of the Consequences of Multinationalism.", 62-63

⁶⁵ Belgium's Constitution, Art. 77

⁶⁶ Popelier, "Asymmetry and Complexity as a Device for Multinational Conflict Management", 31

⁶⁷ Belgium's Constitution, Art. 96

⁶⁸ Delpérée, The Constitution, the Parliament and the Concerted Decision Processes, 12-13.

The Senate's role is primarily consultative, reviewing and suggesting amendments to legislation proposed by the House. In cases of disagreement, a conciliation committee with members from both chambers may be formed to reach a consensus. The House of Representatives also influences the judiciary through legislative oversight, passing laws that shape the judicial framework, including the organization and functioning of courts. It appoints members to the High Council of Justice, an independent body that oversees the judiciary and ensures its independence. Additionally, the House can initiate impeachment proceedings against members of the executive or judiciary for serious misconduct. It is involved in the informal selection of judges for the Constitutional Court, ensuring representation of major language communities⁶⁹.

2.3. Lower House of the Parliament in Spain

The Spanish Congress of Deputies, the lower house of the Parliament, wields extensive legislative and oversight powers. It holds the authority to draft, debate, amend, and approve laws, including exclusive initiation rights for financial legislation related to the budget, taxation, and public expenditure, which must be proposed by the executive but are scrutinized and approved by Congress. This highlights the Congress's control over national fiscal policies and economic management^{70,71}.

In its interactions with the Senate, the Congress of Deputies often holds a superior position. While both chambers must approve legislative proposals, Congress has the final say in case of

⁶⁹ Popelier, "Asymmetry and Complexity as a Device for Multinational Conflict Management", 33-34

⁷⁰ Spanish Constitution, Art. 134.

⁷¹ Cláudia Ribeiro, Mercedes Araújo, and Sónia Rodrigues. "The Legislative Role of Iberian Parliaments." In *The Iberian Legislatures in Comparative Perspective*, ed. Jorge M. Fernandes and Cristina Leston-Bandeira, (Routledge, 2020), 171-180.

disagreements. If the Senate amends or vetoes a bill, Congress can override the decision with an absolute majority vote, maintaining its legislative primacy⁷².

Regarding constitutional amendments, the Congress of Deputies, alongside the Spanish Nation, has the sole power to amend the Constitution, reflecting its significant role in shaping the nation's fundamental laws⁷³. Additionally, the Congress exercises substantial oversight over the executive branch. It can hold the Prime Minister and other government officials accountable through parliamentary questions, interpellations, and commissions of inquiry. Congress can pass motions of censure to force the government's resignation or express support through motions of confidence, ensuring executive accountability to the legislature.

The Congress also plays a key role in appointing high-ranking state officials, including proposing candidates for the Government and other top officials, who are then appointed by the King. Congress, along with the Senate, participates in appointing members to various constitutional bodies, such as the Constitutional Court and the General Council of the Judiciary, ensuring these bodies reflect diverse political and social interests⁷⁴.

Regarding the judiciary, Congress influences the judicial framework through its legislative powers, shaping laws governing the organization and functioning of the courts. It oversees the judiciary by appointing members to the General Council of the Judiciary, ensuring the independence and proper functioning of the judiciary⁷⁵.

⁷² Busquets, and Sanjaume-Calvet "Asymmetry as a Device for Equal Recognition and Reasonable Accommodation of Majority and Minority Nations", 445

⁷³ Ibid, 445

⁷⁴ Spanish Constitution, Art.99.

⁷⁵ Nuno Garoupa, Joan Solanes Mullor, and Teresa Violante. "Constitutional Courts and National Parliaments in Spain and Portugal." In *The Iberian Legislatures in Comparative Perspective*, ed. Jorge M. Fernandes and Cristina Leston-Bandeira, (Routledge, 2020), 241-242.

Like the Belgian lower house, the Spanish Congress of Deputies does not have a formal veto system. It relies on majority voting to pass bills, which are then sent to the Senate for review. Although the Senate can propose amendments or veto a bill, Congress can override the Senate's veto with an absolute majority vote or a simple majority vote after two months. This process ensures that the Congress of Deputies holds ultimate legislative authority, effectively neutralizing any formal veto power from the Senate.

2.4. Concluding Remarks

Ethnic-based provisions and representation in Bosnia and Herzegovina's constitutional system pose significant challenges to decision-making and future EU integration, particularly regarding the political criteria outlined in the Copenhagen criteria. These provisions are problematic for the European Commission because they can lead to decision-making deadlocks and impede the implementation of EU policies, potentially causing governance issues within the EU.

Possible solutions and inspiration for the solution to this problem can be found in our two comparators. Compared to Belgium and Spain, observing the number of representatives in the lower house of the Bosnian parliament we can see that is rather a small parliament consisting of only 42 parliament members so discussing the idea of raising the number of seats in the parliament could provide more diverse representation. This would affect the composition of the Lower House and would mirror similar structures seen in the lower houses of Spain and Belgium. Increased representation would aim to address underrepresentation and provide a more robust platform for diverse voices within the parliamentary system mostly those who do not consider themselves as part of the three constituent ethnic groups. Even with the increase in the number of representatives, it is crucial to maintain the existing balance between entities achieved by delegating one-third of the representatives from the entity of RS and two-thirds from the FBiH. This structure ensures that

both entities have a proportionate influence in legislative processes, reflecting their respective populations and maintaining a delicate equilibrium that is essential for national unity.

The most important part of the constitutional reforms would be related to the abolition of entity voting. Currently, entity voting requires a specific majority from both entities to pass legislation with an intent to protect regional interests, which has often resulted in legislative gridlock and the blocking of important laws. The practices of Spain and Belgium provide a compelling argument for abolishing this requirement, showing that a simple majority of those present or a two-thirds majority, depending on the type of decision, is sufficient for effective governance. This would certainly enhance legislative efficiency and the lower house can streamline its legislative processes and reduce the potential for legislative deadlock. The new voting structure would require only a majority of those present regardless of which entity to pass most decisions, with a higher threshold reserved for more significant legislative changes like constitutional amendments, thus ensuring both flexibility and stability.

Keeping representation of the entities, adding additional seats in the parliament, and removing entity voting is a balanced approach that could also be a potential solution for the problem that was emphasized in the European Commission's opinion on ethnic-based representation and voting and could satisfy the Copenhagen criteria.

3. Competencies of the Upper House of Parliaments

3.1. Upper House of the Parliament in Bosnia and Herzegovina

The upper house of the parliament or the House of Peoples of Bosnia and Herzegovina is a legislative body with a structure designed to ensure equal representation and participation from the country's main ethnic groups. The House of Peoples along with the House of Representatives,

holds full legislative power, requiring the confirmation of decisions by both houses in order for a certain law to be enacted..⁷⁶ Each delegate has the right to propose, amend, or add to laws and other legislative acts. One of the notable aspects of the House of Peoples is its autonomy.⁷⁷ This autonomy allows the House of Peoples to regulate its organization and procedures independently, choosing its leadership from among its members. The chairmanship rotates among one Serb, one Bosniak, and one Croat delegate, ensuring fair representation in leadership roles. The House of Peoples operates free from the control or instruction of any external authority, except for constitutional review by the Constitutional Court of BiH, which evaluates the constitutionality of laws enacted by the Parliamentary Assembly. The House of Peoples is responsible for preparing its budget proposal, which is included in the overall budget proposal for the institutions of Bosnia and Herzegovina. Since the House of People specifically exists to protect the national interests of the three constituent people it can invoke a veto mechanism called vital national interest. This represents a relatively strong and unique ethnic veto mechanism because it can be used to block any law practically if the majority within any of three ethnic group representatives, and that is three out of five, declares that the proposed law is endangering vital national interest.⁷⁸ In this situation, the Joint Commission consists of three delegates, each of whom is elected from among Bosniak, Croat, and Serb delegates. If they don't manage to find a compromise and resolve a dispute in five days, the law goes directly to the Constitutional Court⁷⁹. This mechanism is supposed to ensure that no ethnic group can be marginalized by the other, but unfortunately, it has been misused on a lot of occasions.

⁷⁶ Damir Banovic, "Parliamentary System of Bosnia and Herzegovina as an Application of Multicultural Concept of Political Representation of the Collectives," *Yearbook of the Law Faculty in Sarajevo* 58 [Godisnjak Pravnog Fakulteta u Sarajevu] (2015): 251

⁷⁷ Ademović et al, *Ustavno pravo Bosne i Hercegovine*, 175

⁷⁸ Trnka et al, *Proces odlučivanja u Parlamentarnoj skupštini Bosne i Hercegovine*, 47-52

⁷⁹ Sahadžić, "Veto mehanizmi u parlamentima na državnoj i entitetskoj razini u BiH": 310-311

This veto mechanism, along with the entity vote that exists in the lower house of the parliament, actually represents a system of connected vessels that can be abused constantly if one of the ethnic groups believes that it threatens their national interest⁸⁰. But apart from the contentious veto mechanism—which was mentioned in passing in the Commission's opinion when discussing ethnic vote-based decision-making—the House of People's very structure is discriminatory since, in addition to the three constituent peoples, it excludes citizens of other groups who are also citizens of Bosnia and Herzegovina. The European Court of Human Rights has issued numerous judgments confirming the need for structural changes within the House of Peoples of Bosnia and Herzegovina to address discrimination and incorporate citizens who are not members of the three constituent nations (Bosniaks, Croats, and Serbs)^{81 82}. These judgments highlight two primary issues: the exclusionary nature of the House of Peoples and discrimination based on residence. The House of Peoples, as currently structured, only includes members of the three constituent peoples, thereby excluding other citizens who do not identify with these groups⁸³. This exclusivity violates principles of equality and non-discrimination, as affirmed by the European Court of Human Rights. Additionally, the system discriminates based on residence, preventing Bosniaks, Croats, and "Others" from being delegated from the territory of RS, and similarly preventing Serbs and "Others" from being delegated from the territory of the FBiH⁸⁴. The European Commission's opinion on Bosnia and Herzegovina's EU integration also emphasizes the need to reform the House of Peoples to address these issues. The reforms must aim to eliminate discrimination based on

⁸⁰ Bainter et al., *Constitution of Bosnia and Herzegovina Commentary*: 628-630

⁸¹ European Court of Human Rights, *Sejdić and Finci v. Bosnia and Herzegovina*, judgment of December 22, 2009, application nos. 27996/06 and 34836/06.

⁸² European Court of Human Rights, *Zorić v. Bosnia and Herzegovina*, judgment of July 15, 2014, application no. 3681/06.

⁸³ Banovic, "Parliamentary System of Bosnia and Herzegovina as an Application of Multicultural Concept of Political Representation of the Collectives", 251

⁸⁴ Bainter et al., *Constitution of Bosnia and Herzegovina Commentary*.2010: 622-623

ethnicity and residence, ensuring broader and more inclusive representation within the upper house.

3.2. Upper House of the Parliament in Belgium

Belgian upper house of the Parliament or The Senate, is composed of deputies holding mandates in the different parliaments of communities and regions. This composition allows the Senate to function as a platform for federated entities to participate in the formulation of federal policies. However, the Senate's influence has waned over time, particularly following the 2012-2013 reforms, which transformed it into a chamber of sub-national entities, aimed at ensuring proportional representation of the major linguistic communities ⁸⁵.

The Senate itself has certain limited legislative functions which are rather minimal. It does not participate in budgetary votes or exert political control over the government and its services. Its legislative involvement is restricted to specific categories of laws, like mandatory bicameral laws like approving international agreements and setting up tribunals and courts that usually require the agreement of both parliament chambers and certain optional bicameral laws where the Senate had the possibility to propose or amend laws if there is a majority to support them.⁸⁶ Ordinarily, the House passes laws on its own, without consulting the Senate. The Senate may debate and alter laws passed by the House under the areas specified in Article 78 ⁸⁷ of the Constitution, but this authority is advisory only; the House has the final word. The Senate and the House share the same authority in the areas specified in Article 77 ⁸⁸ of the Constitution. Both lists, however, are short and largely consist of constitutional amendments and institutional issues that impact the federal-

⁸⁵ Régis Dandoy, Jérémy Dodeigne, Min Reuchamps, and Audrey Vandeleene. "The New Belgian Senate: A (Dis)Continued Evolution of Federalism in Belgium?" *Representation* 51 (3): 327–39.

⁸⁶ *Ibid*, 329

⁸⁷ Belgium's Constitution, Art. 78.

⁸⁸ Belgium's Constitution, Art. 77.

state structure. The Senate is not included in the legislative process, not even in shared matters like consumer protection or the uncommon concurrent power for tax measures.

The special feature of the Belgian Senate is the alarm bell procedure, which is the veto mechanism of the Senate. In the House of Representatives, there are both Dutch and French-speaking language groups. Each language group has the power to veto the adoption of institutional laws that require a special majority⁸⁹. For most other laws, they can use the alarm-bell procedure to suspend the process if they believe the measure will harm their interests. These language groups do not necessarily match the majority of the sub-national entities. However, language interests are primarily located in the French Community, the Walloon Region, and the Flemish Community and Flanders region, except for the Brussels Region and the German-speaking Community without representation.⁹⁰. Any subnational entity can participate directly in the legislative process by raising concerns about how a proposal might affect its interests. This may end the conversation and begin negotiations. Advice from the Senate is discussed in the Conciliation Committee, which is made up of six federal ministers (including the prime minister) and six ministers from sub-national entities, which stand in for the governments of the Walloon Region, the Flemish Community, the French Community, and the Brussels Region. In cases where the issue impacts the interests of the German-speaking Community, a Minister from that Community is added. Within thirty days of receiving the motion, the Council of Ministers will provide its well-reasoned opinion⁹¹. The House will then be invited to comment on the Council's recommendation or, if necessary, on the amended Government or Private Member's bill.

⁸⁹ Popelier, "Asymmetry and Complexity as a Device for Multinational Conflict Management", 32

⁹⁰ Delpérée, "The Constitution, the Parliament and the Concerted Decision Process.": 14

⁹¹ Legal Affairs and Parliamentary Documentation Department, Belgian House of Representatives. *The Rules of Procedure of the Belgian House of Representatives*, SECTION IX, Alarm-bell procedure, Rule 104. Belgian House of Representatives, 2020.

3.3. Upper House of the Parliament in Spain

The Spanish Senate is composed of two categories of senators: those appointed by autonomous community parliaments and those elected by popular vote in regional seats. To balance regional and national interests, there are two levels to this framework. However, because the Senate is structured more along party lines than territorial representation, its ability to effectively represent regional concerns is frequently called into doubt ⁹². The Senate's legislative functions include reviewing and proposing amendments to legislation passed by the Congress of Deputies, the lower house of Parliament. Its veto power is temporary, as the Congress can override a Senate veto with an absolute majority or by waiting two months, limiting the Senate's influence in legislative processes⁹³. The most significant veto power involves statutes of autonomy, which can only be amended with the consent of both the central and autonomous community parliaments. Each statute of autonomy includes an amending procedure, requiring approval by both the central and regional legislatures. However, this sub-state veto power should be viewed in the broader context of central authority. The Spanish Parliament ultimately establishes the amending procedure for each statute of autonomy. Central authorities can amend the Constitution to repeal or alter provisions of statutes of autonomy, and these provisions are subject to judicial review by the Spanish Constitutional Court⁹⁴. Thus, while autonomous communities have some veto power over their basic laws, the central government retains significant control. In practice, the Senate of the Spanish Parliament is constrained to specific limitations like reviewing and proposing amendments and doesn't have significant role in the decision-making process of the Parliament.

⁹² Busquets, and Sanjaume-Calvet "Asymmetry as a Device for Equal Recognition and Reasonable Accommodation of Majority and Minority Nations", 444

⁹³ Busquets, and Sanjaume-Calvet "Asymmetry as a Device for Equal Recognition and Reasonable Accommodation of Majority and Minority Nations", 445

⁹⁴ Ibid, 446-447

3.4. Concluding Remarks

Analyzing the structure of the upper house in the case of Bosnia and Herzegovina compared to Belgium and Spain, it is obvious that the Upper House of the Parliament of Bosnia and Herzegovina is small when it comes to the number of representatives and it is exclusive only to the three constituent nations. We can also see this in the case of Belgium and Spain since this house is intended to reflect groupings in society. When it comes to the method of election to the upper house, Bosnia and Herzegovina and Belgium elect people from the regional level, while in the case of Spain, one part of the representatives is elected directly and the other by the regional parliaments. In the case of veto mechanisms, it is clear that the veto mechanism in the case of Bosnia and Herzegovina is significantly stronger and has a greater influence on the decision-making process compared to the other two examples in which the power of the veto mechanism is diluted. Future reforms of the Upper House of the Parliament of Bosnia and Herzegovina could go in a couple of different directions.

Regarding the structure of the Upper House, the solution could be to raise the number of delegates from the current 15 to 21 delegates, of which 14 would be elected from the FBiH, including five Bosniaks, five Croats, two Serbs, two representatives of nationally undetermined/national minorities, and 7 from RS, including four Serbs, one Bosniak, one Croat, and one national representative undetermined/national minorities). In this way, they would have a ratio of two-thirds from the entities of the FBiH and one-third from the RS, as is the situation in the lower house. Structuring the future Upper House in this manner would secure ethical representation but also the representation of other citizens regardless of their ethnic identity and place of residence to participate in the work of this institution. This would also enable the implementation of the judgments of the European Court of Human Rights related to the ethnicity of the delegates and

their residency. This raises the question of quorum and decision-making inside the Upper House, so the practice of having the majority of the representatives of all groups will be important provided that at least four Bosniaks, four Croats, four Serbs, and one delegate from among national minorities or nationally undetermined individuals are present, and in that sense decision-making mechanism would be adjusted to prevent over-voting on national basis.

The issue of delegation of representatives to the Upper House is extremely important. The practice of delegating representatives to the Upper House from the entity/regional level is not disputed, as is clear from the Belgian example, but also partly from the Spanish example. However, another option when it comes to the delegation of representatives to the Upper House could be adopted in such a way that these representatives are delegated from the lower house of the parliament while taking into account the groupings of representatives based on ethnic and other determinants and making sure that two-thirds of the delegates come from the entity FBiH and one third from the entity RS.

The most important question is related to the Veto mechanism in the Upper House. To comply with the opinion of the EU Commission, the current purely ethical veto mechanism must be reduced to a specific and well-defined list of issues. This list of issues could be related to the identity of the constituent people, language, culture, religion, education, national symbols, preserving the integrity of the state, public information systems, and the amendments to the Constitution. But as in the case of the Belgian alarm-bell procedure where the law is suspended for a certain amount of time, or in the case of Spain where the veto of the upper house can be over-voted by the lower house if has more than two-thirds of support for certain law, mechanism of striking down this veto should be introduced in Bosnia and Herzegovina. Suppose one of the groups in the Upper House of the Bosnian Parliament wants to veto a certain decision that is not from the above-mentioned

list of issues, in that case, a Commission should be formed out of the representatives of the Upper House, the Prime minister as an executive, and eventually, representatives of the Lower House of the federal parliament or the representatives of the regional parliaments in effort to find a compromise. In case a compromise cannot be made, the lawmaking procedure should continue in the Lower House with the requirement of having a majority in the Lower House. This could provide an adequate solution with the aim of securing representation and maintaining ethnical and regional balance on the one side, and enhancing legislative efficiency and European Union demands on the other side.

Chapter IV

1. Head of the State – Comparative Analysis of the Executive

1.1. Tripartite Presidency of Bosnia and Herzegovina

The presidency of Bosnia and Herzegovina, as the executive authority, is a specific constitutional arrangement and it is presented as a collective head of state because it consists of three representatives, each of whom must come from one of the constituent peoples, one Bosniak, one Croat, and one Serb. Candidates for the presidency are chosen by direct elections⁹⁵. The candidate for president from Bosniaks and Croats is elected directly from the territory of the FBiH, while the candidate from Serbs is directly elected from the territory of RS. In this way, there is multiple discrimination. Citizens who are not members of one of the three constituent nations cannot be candidates for the presidency of Bosnia and Herzegovina. Also, Bosniaks and Croats living in the territory of RS cannot run for the presidency, while Serbs living in the territory of the FBiH cannot

⁹⁵ Ademović et al, *Ustavno pravo Bosne i Hercegovine*, 183-184

run for the Presidency of Bosnia and Herzegovina.^{96 97}. This arrangement of the Presidency of Bosnia and Herzegovina was the reason for multiple processes conducted before the European Court of Human Rights in Strasbourg for endangering the political rights of citizens⁹⁸. The Bosnian Presidency wields significant executive powers, combining elements of both semi-parliamentary and semi-presidential systems⁹⁹. Its responsibilities include conducting foreign policy, appointing ambassadors, representing the country in international organizations, and negotiating and ratifying treaties. The Presidency also nominates the Chairman of the Council of Ministers, proposes the annual budget to the Parliamentary Assembly, and exercises civilian command over the armed forces. The Presidency meets twice a month for decision-making, but if a member overrules, they can declare the decision detrimental to their entity's vital interests¹⁰⁰. The decision is then referred to an authorized entity-body for final revision. A two-thirds majority is required to prevent the decision from taking effect. The Presidency has the power to dismiss the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina, in response to changes in parliamentary majorities at the entity level. All members of the Presidency have the ex officio right to submit petitions to the Constitutional Court of Bosnia and Herzegovina¹⁰¹. The Presidency's effectiveness is often hampered by political divisions among its members and their parties. Limited institutional infrastructure and differing political agendas frequently obstruct decision-making.¹⁰² The Presidency's significant and inappropriate powers, given the discriminatory nature of its election, include leading foreign policy and participating in proposing the Bosnia and Herzegovina budget.

⁹⁶ Trlin, "Limitations of the Democratic Capacity", 85-86

⁹⁷ Bainter, *Constitution of Bosnia and Herzegovina Commentary*, 624-627

⁹⁸ European Court of Human Rights, *Sejdić and Finci v. Bosnia and Herzegovina*, 2009.

⁹⁹ Banovic, "Parliamentary System of Bosnia and Herzegovina", 265

¹⁰⁰ Bainter, *Constitution of Bosnia and Herzegovina Commentary*, 643-644

¹⁰¹ Ademović et al, *Ustavno pravo Bosne i Hercegovine*, 184-185

¹⁰² Banović et al., *The Political System of Bosnia and Herzegovina: Institutions – Actors*, 28-29

These responsibilities should belong to the Council of Ministers. Additionally, the constitutional solution in Article 4, which requires the Parliamentary Assembly to pass laws necessary to implement the Presidency's decisions, inappropriately subordinates the Assembly to the Presidency, forcing it to pass laws it might not otherwise adopt.

1.2. King of Belgium

The King of Belgium functions as the head of state within a constitutional framework, holding symbolic and ceremonial roles that underscore the unity and continuity of the nation. His responsibilities include attending official events and representing Belgium in international relations. Formally, the King sanctions and promulgates laws passed by the Federal Parliament, requiring his signature for these laws to be enacted. He has the authority to convene and dissolve Parliament under certain conditions, as outlined in Article 46, which allows him to dissolve the House of Representatives if it rejects a confidence motion without proposing a new prime minister within three days or passes a no-confidence motion without a successor¹⁰³.

A critical duty of the King is appointing the Prime Minister after federal elections. He consults with political leaders to designate a formateur responsible for forming a government, subsequently appointing the Prime Minister based on these consultations. The King issues royal decrees and executive orders, often advised by the government, to ensure the implementation of laws. Article 96 gives the King the power to appoint and dismiss ministers¹⁰⁴. If the House of Representatives passes a no-confidence motion or proposes a new prime minister, the government must resign, and the King appoints the proposed successor.

¹⁰³ Belgium's Constitution, Art. 46.

¹⁰⁴ Belgium's Constitution, Art. 96.

The King can preside over the Council of Ministers during significant events or crises, though this role is largely ceremonial. He also engages in numerous ceremonial and representative activities, such as attending state functions and national ceremonies. As the Commander-in-Chief of the Armed Forces, he holds supreme command, with operational control exercised by the government. Diplomatically, the King accredits Belgian ambassadors and receives foreign diplomats, playing a key role in maintaining diplomatic relations. While the King does not possess legislative powers in a conventional sense, he influences legislation through consultations with political leaders, fostering consensus and compromise, especially during political crises, thus contributing to the stability of Belgium¹⁰⁵.

1.3. King of Spain

The King of Spain holds primarily ceremonial yet significant powers that symbolize Spain's unity and continuity as outlined in the Spanish Constitution. Among his duties are sanctioning and promulgating laws,¹⁰⁶ issuing decrees approved by the Council of Ministers,¹⁰⁷ and appointing key government officials, including the President and other government members,¹⁰⁸ the President of the Constitutional Court, and the President of the Supreme Court. Additionally, he appoints the heads of the Executive Councils of the Autonomous Communities. In judicial matters, the King appoints members of the Constitutional Court, the President of the Supreme Court, and the State's Public Prosecutor, based on recommendations from relevant bodies.¹⁰⁹ The King confers civil and military positions, awards honors, exercises supreme command of the Armed Forces and presides over the Royal Academies¹¹⁰.

¹⁰⁵ Brigitte Balfourt and Eddy Van Paemel (Eds.), *The Belgian Monarchy* (Chancellerie du Premier Ministre- FPS Chancellery of the Prime Minister - General Directorate for External Communication, in cooperation with the Press Service of the Royal Palace, n.d), 10, accessed June 15, 2024 [10](#).

¹⁰⁶ Spanish Constitution, Art. 62

¹⁰⁷ Spanish Constitution, Art.62

¹⁰⁸ Spanish Constitution, Art 99, Art 100

¹⁰⁹ Spanish Constitution, Art.123, 159, 160

¹¹⁰ Spanish Constitution, Art.62

Internationally, the King represents the Spanish State, accrediting ambassadors, expressing assent to international commitments through treaties, and declaring war and peace. By law, he appoints the President of the Court of Auditors, the Public Prosecutor General, and the Governor of the Bank of Spain. These duties underline the King's essential role in both national governance and international diplomacy¹¹¹.

1.4. Concluding Remarks

Historically, the King and the Presidency have had distinct traits. Apart from the presidency, which has a somewhat better position in terms of power, most of these two institutions' powers are comparable or the same when we examine them in the context of these three states. In the sense of structure and election process for the Presidency we cannot compare these three countries but what could be taken as an example is the reduction of the power of the Presidency, as was done in the case of the kings of Belgium and Spain, and the transfer of more important powers to the Council of Ministers.

A solution related to what would be the character of this executive body is the primary question. The debate intensified following the European Court of Human Rights ruling in the *Sejdić and Finci v. Bosnia and Herzegovina* case, which confirmed that the constitutional norms regarding the composition and election method of the Presidency are discriminatory. Addressing this discrimination raises several questions. Should the head of state remain a collegial body or become a singular executive body and what are the solutions if it still remains collegial? Should the presidency be elected directly or indirectly and what should be the scope of its powers?

The new solution could be made in a few different ways and all of them could accomplish the idea of removing discrimination and in that sense fulfilling the criteria from the Commission's opinion. If we are going to follow the logic of moving towards a singular executive body, then Bosnia and

¹¹¹ Spanish Constitution, Art.63

Herzegovina should transition to having a President and three Vice Presidents. The Vice Presidents would rotate annually, performing presidential duties when they are not President and handling tasks assigned by the President, including ceremonial obligations. The President and Vice Presidents would serve four-year terms, aligning with the parliamentary mandates, and they would represent different constituent peoples, national minorities, and nationally undetermined individuals. The election process in this case would be conducted indirectly in the Upper House of the Parliament of Bosnia and Herzegovina, with each club proposing one candidate, and the Lower House confirming the list of four candidates. In this scenario, certain powers would be granted specifically to the President like representation of the country, the promulgation of laws that are adopted in the parliament, signing of international contracts, appointment of diplomatic representatives proposed by the Council of Ministers, the proposal of the Prime Minister and giving honorary awards and pardons. The shared powers among the President and Vice-presidents would be the exercise of the civilian command of the Armed forces and powers related to dissolving the Upper House of the Parliament because they represent a more sensitive role. The exercise of these powers would be based on consensus among them.

Another solution could be for the Presidency to continue to exist as a collective executive organ, being directly elected by the citizens, but in this scenario, the ethnic prefix would have to be deleted in order to comply with the judgments of the European Court of Human Rights. Two presidents would be elected from the entity FBiH, one from the entity RS. However, although discrimination would formally be eliminated, informally it would mean nothing for citizens who do not belong to the constituent nations. On the other hand, if we are going to reduce the power of the upper house of the Parliament in parallel with this, reducing the role and power of the presidency is also necessary.

2. Head of the Government – Comparative Analysis of the Executive

2.1. Council of Ministers in Bosnia and Herzegovina

The Council of Ministers of Bosnia and Herzegovina is tasked with executing governmental functions at the national level. As stipulated in Article 5 of the Constitution of BiH, the Council of Ministers is comprised of the Chairman of the Council of Ministers and the nine appointed ministers¹¹². The Chair of the Council of Ministers will be designated by the Presidency and confirmed by the House of Representatives of the Parliament. To enhance the efficiency of the government's functions, the chairman has the authority to appoint two ministers as deputy chairmen of the Council of Ministers, ensuring that they represent different constituent peoples. In practice, these nine ministerial positions are divided by three among three constituent peoples. As a collegial body, the Council of Ministers adopts decisions, conclusions, solutions, drafts, proposals of laws, analyses, information, strategic documents, programs, agreements, protocols, and other acts. The voting procedure within the Council of Ministers depends on the nature of the decisions¹¹³. Decisions that need the Parliamentary Assembly's final approval must be approved by a majority of the voting members who are present. The Council of Ministers usually makes decisions by consensus on other matters. If an agreement cannot be reached, the chairman calls a meeting to settle the dispute. If, after seven days, a consensus cannot be reached, the decision is taken by a majority vote, which necessitates the participation of at least one vote from each member, including the chairman and deputy chairman¹¹⁴. A crucial part of fiscal policy is also played by the Council of Ministers, which drafts institution-specific budgets before sending them to the President for approval. The Council of Ministers now has more authority over budgetary

¹¹² Bosnia and Herzegovina's Constitution, Art. 5, para 4 Accessed June 15, 2024.

https://www.constituteproject.org/constitution/Bosnia_Herzegovina_2009.

¹¹³ Ademović et al, *Ustavno pravo Bosne i Hercegovine*, 186

¹¹⁴ Ademović et al, *Ustavno pravo Bosne i Hercegovine*, 187-190

problems because of the passing of the Law on the State Fiscal Council, which establishes upper limits on indebtedness and fiscal goals and coordinates fiscal strategies between state and entity administrations. This statute streamlines fiscal governance by subtly pressuring the President to support the budget recommendations made by the Council of Ministers. Despite reforms, the Council of Ministers is too fragmented, with the representations of the ministers often on a party rather than state level or used as an entity's means of conflicting with the federal level¹¹⁵. However, this fragmentation left its stamp on the practical work of the Council, which is reflected in the low productivity and low legislative output of the Council during recent mandates. Still missing is good cooperation between various government levels; for example, the RS does not support statewide initiatives, such as the Framework Strategy on implementing the Istanbul Convention¹¹⁶. The Council of Ministers which is aimed to balance ethnic representation, faces enormous governance and coordination challenges negatively affecting its overall effectiveness and productivity.

2.2. Council of Ministers in Belgium

For discussing the role of the Council of Ministers of Belgium, it is important to understand the role and the composition of the Council. Observing the composition of the Council, we will notice the importance of the representation of language groups through language parity. According to Article 99 of the Belgian Constitution, the Council of Ministers is composed of the same number of French and Dutch speakers except for the Prime minister¹¹⁷. This parity exists to ensure that one language group cannot dominate another through the executive power. Currently, there are 15 ministers headed by the Prime Minister. The prime minister is considered linguistically neutral, often from Flanders due to the larger size of the Flemish population and the dominance of Flemish

¹¹⁵ Edouard d'Aoust. *Constitution of Bosnia and Herzegovina Commentary*. Edited by Nedim Ademović and Christian Steiner. (Konrad-Adenauer-Stiftung e.V., Rule of Law Program South East Europe, 2010), 659

¹¹⁶ Banović et al., *The Political System of Bosnia and Herzegovina: Institutions – Actors*, 38-41

¹¹⁷ Belgium's Constitution, Art. 99.

political parties. Secretaries of state may also be appointed, but the rule of linguistic parity does not apply to them, usually resulting in more Dutch-speaking secretaries. Since the Council of Ministers represents the Government it is the one that implements legislation and also has the right to initiate certain legislation because it holds certain legislative power along with the executive. The right to propose modifications and to submit bills to Parliament belongs to the Government. This implies that it has the authority to offer amendments to both its own and other lawmakers' measures. A bill agreed by Parliament does not become enforceable until it is signed into law by the King and Ministers. An unwritten rule mandates that government decisions be made by consensus rather than voting. If the majority parties from both language groups can collaborate, the government can function. If one party refuses to accept a proposal, negotiations must continue until a consensus is reached. Because of Belgium's federalism, Regions and Communities have significant competencies, and that leads often to clashes of the competencies at the federal level. When these disputes arise, a Conciliation Committee is formed¹¹⁸, comprising the federal prime minister, five federal ministers, and six regional and community government members. This linguistically balanced committee can suspend disputed decisions for up to 60 days to seek a consensus¹¹⁹. Despite this official avenue, conflicts of interest are often preempted informally by the presidents of the governing parties, who regularly engage with the prime minister. One notable cooperative agreement between the federal state and lower levels is Belgium's representation in the European Union. Although Belgium is a member state represented in the Council of Ministers, many EU-regulated matters fall under regional and community jurisdiction. This agreement allows a regional or community minister, rather than a federal minister, to represent Belgium in EU

¹¹⁸ Jean-François Husson, Céline Mahieu, and Caroline Sägeser. "Federalism and Decentralisation in Belgium." In *The Palgrave Handbook of Decentralisation in Europe*, ed. José Manuel Ruano and Marius Proftiroiu, Cham, (Switzerland: Palgrave Macmillan, 2016), 54

¹¹⁹ Popelier, "Asymmetry and Complexity as a Device for Multinational Conflict Management", 32

decision-making. The regions and communities alternate in this role and must agree on the stance to be taken. If consensus is not reached, Belgium abstains from voting^{120 121}, This cooperative mechanism usually works, with regions and communities generally agreeing on their positions.

2.3. Council of Ministers in Spain

When we speak about the context of the role of the Executive in the Spanish case it is clear that there is a centralized executive branch of power, represented through The Council of Ministers, headed by the Prime Minister and comprising of 22 ministers responsible for different departments. Section 97 of the Spanish Constitution establishes the Government's responsibility for conducting domestic and foreign policy, civil and military administration, and the defense of the State.¹²² The Government exercises executive authority and statutory regulation power in alignment with the Constitution and the laws, highlighting its central role in national governance. Since it is a centralized system, central power reflected through the Council of Ministers has significant powers. One of the best illustrations of the authority vested in the Council of Ministers comes from their use of Article 155¹²³ of the Spanish Constitution in reaction to the Catalan crisis, which followed the Constitutional Court's decision regarding Catalonia's Declaration of Independence¹²⁴. This article provides the central government with a coercive instrument to make Autonomous Communities obey the law in the event that their actions violate the Spanish Constitution, as was the situation with Catalonia. This shows that besides fiscal policies and budget, the Council of

¹²⁰ Deschouwer, Kris. "Kingdom of Belgium." In *Constitutional Origins, Structure, and Change in Federal Countries*, ed. J. Kincaid, A. Tarr (McGill-Queen's Press - MQUP, 2005), 48-75

¹²¹ Xavier Vanden Bosch, "The Belgian Parliaments and EU Affairs: The Reasons Behind Their Limited Involvement." *European Policy Brief*, No. 28 (March 2014), 1-8

¹²² Spanish Constitution, Art. 97

¹²³ Ibid, Art. 155

¹²⁴ Asier Garrido Muñoz, "Catalan Independence in the Spanish Constitution and Courts." OUP Blog. Accessed June 15, 2024. <https://oxcon.oup.com/page/675>.

Ministers has an important role in national security, managing coordination with the Autonomous Communities. In that sense, the Council of Ministers is a key institution for the coherence and stability of the Spanish state.

2.4. Concluding Remarks

The Council of Ministers in the case of Bosnia and Herzegovina has to have a more strengthened constitutional role. Analyzing the cases of Belgium and Spain we can notice that all of the competencies and details related to the functioning of the Council of Ministers are embedded in the Constitution, which is not the case with Bosnia and Herzegovina. Besides the basic list of competencies, the Constitution of Bosnia and Herzegovina does not regulate in detail the role of the Council of Ministers, but it is regulated by a special law. Regarding that, the first step is to explicitly establish the Council of Ministers as a primary executive authority and clearly define its competencies in the Constitution. Such a clear constitutional mandate is crucial for effective governance and ensures that the Council of Ministers is not merely a subordinate entity but a robust executive body. As in the case of Belgium where we have divided position among language groups, Bosnia should also introduce this practice of parity including constituent peoples but with the inclusion of national minorities and ethnically undetermined individuals. Such a structure not only promotes inclusiveness but also prevents any single constituent people from having a majority in the Council, fostering a balanced and cooperative governance environment.

A crucial element of the proposed amendments is clarifying the relationship between the Council of Ministers and the Assembly of Bosnia and Herzegovina. The Council must be accountable to the Assembly, providing regular reports on its activities and policy implementation. This accountability ensures transparency and enables legislative oversight. Additionally, the Assembly should have the power to pass a vote of no confidence against the Council or any of its members,

reinforcing the checks and balances principle. Furthermore, the Council of Ministers must maintain a cooperative relationship with the Presidency. The Council needs clear and defined areas of competence, particularly in foreign policy execution and the procedure with the adoption of the state budget. The process of appointing the Chairman and members of the Council must be transparent and democratic. The Chairman, appointed by the President of Bosnia and Herzegovina, should be confirmed by both houses of the Parliament. This dual confirmation process legitimizes the appointment and ensures that the Council's leadership reflects the will of the representatives of the citizens and social groups represented in the Upper House but also ensures that these appointments are the subject of democratic scrutiny. It is important to point out that these reforms go together in a package with the reforms related to the Presidency, and it represents that Bosnia would move even more towards the classical parliamentary system.

These solutions in comparison with the Belgium and Spain cases are relatively similar in the sense of the importance of executive accountability and legislative oversight. However, Belgium prioritizes linguistic balance and Spain has a more centralized and politically motivated executive structure, so to contextualize this it is important to know that Bosnia and Herzegovina in this case should place a strong emphasis on ethnic parity representation, taking into consideration its distinct socio-political setting.

Chapter V

1. Judicial branch of power – Comparative Analysis of the Constitutional Courts

1.1. Constitutional Court of Bosnia and Herzegovina

Constitutional Court of Bosnia and Herzegovina, is responsible for resolving conflicts between entity jurisdictions and the state level. The composition of the Constitutional Court of Bosnia and Herzegovina is specific for the following reasons. Out of a total of nine judges who make up the

Constitutional Court, two judges must come from the territory of the entity RS, four judges come from the territory of the entity FBiH, and these judges are delegated directly from the Upper Houses of the entity parliaments that sense securing federal representation¹²⁵. The remaining three judges are delegated by the European Court of Human Rights, and they are by nature international judges. International judges can be appointed from any country except the neighboring countries of Bosnia and Herzegovina. This kind of structure of the Constitutional Court is a stumbling block in Bosnia and Herzegovina for a while. The competencies of the Constitutional Court are protection of vital national interests, organic disputes that typically arise between different entities within Bosnia and Herzegovina, or between the state and one or both entities, the abstract review of constitutionality, assessment of the constitutionality of the entities unique parallel links with their neighboring nations, and appellate jurisdiction¹²⁶.

The recent issue of the new judges not being appointed by one of the entities has affected the Constitutional Court's ability to operate effectively¹²⁷. In that context, this issue has also become relevant in the context of EU integration, as the opinion of the European Commission refers to in its opinion. There is also a legitimate question, of when international judges will sit in the Constitutional Court of Bosnia and Herzegovina and whether the Constitutional Court can establish normal work without the presence of international judges.

¹²⁵ Steiner, Christian and Ademović, Nedim, *Constitution of Bosnia and Herzegovina Commentary*. Edited by Nedim Ademović and Christian Steiner. (Konrad-Adenauer-Stiftung e.V., Rule of Law Program South East Europe, 2010), 675

¹²⁶ Nedžad Smailagić, "Constitutional Court of Bosnia and Herzegovina (Ustavni sud Bosne i Hercegovine)." In *Max Planck Encyclopedia of Comparative Constitutional Law*. (Oxford: Oxford University Press, 2020), 3-8

¹²⁷ Paulina Wankiewicz, "Dispute over the Justice System in Bosnia and Herzegovina." OSW Centre for Eastern Studies, Accessed June 15, 2024. <https://www.osw.waw.pl/en/publikacje/analyses/2024-02-12/dispute-over-justice-system-bosnia-and-herzegovina>.

1.2. Constitutional Court of Belgium

The Constitutional Court of Belgium is composed of twelve judges, appointed for life by the King from a list of candidates proposed alternately by the House of Representatives and the Senate of the Federal Parliament, each requiring a two-thirds majority approval. The judges are evenly divided into two linguistic groups, six belong to the Dutch language group and six to the French language group. Additionally, one judge must possess adequate knowledge of German. This bilingual structure ensures representation and balance between Belgium's major linguistic communities^{128 129}. The competencies of the Constitution Court are defined by the types of regulations it can review and the standards against which these regulations are measured. The Court exercises both a priori which is mostly related to the organization of referendums, and a posteriori jurisdiction which encompasses the review of legislative acts, which include substantive and formal rules adopted by the federal parliament (statutes) and by the parliaments of the communities and regions ¹³⁰.

1.3. Constitutional Court of Spain

The Constitutional Court of Spain consists of twelve judges, that are appointed by the King of Spain and nominated by different state institutions. Four on the proposal of the Congress by a three-fifths majority, four on the proposal of the Senate by the same majority, two on the proposal of the Government, and two on the proposal of the General Council of the Judicial Power. Judges are appointed as Spanish citizens and there is no specific requirement for the judges based on regional affiliation, language, or ethnic group. The Constitutional Court has specific powers and

¹²⁸ Popelier, "Asymmetry and Complexity as a Device for Multinational Conflict Management", 33

¹²⁹¹²⁹ Lecours, "Belgium (Kingdom of Belgium)", 58-59

¹³⁰ The Constitutional Court of Belgium. 2014. Accessed June 15, 2024. <https://www.const-court.be/en/court/publications/brochures>.

the role of serving as an organic legislator. This means that the Court's competencies are dealing with the constitutional challenges against laws of the State or Autonomous Communities, constitutional questions against laws raised by ordinary judges, individual appeals for protection against violations of rights and freedoms, conflicts of jurisdiction between the State and Autonomous Communities or among Autonomous Communities, government appeals against provisions and resolutions adopted by Autonomous Communities, and preventive review of international treaties. By its structure and organization, it is separated from the rest of the judiciary mostly because it deals in resolving largely politically relevant disputes and has an important role in safeguarding the specific constitutional framework of Spain ^{131 132}.

1.4. Concluding Remarks

As the focus of this part is related to the judiciary, we compare the structure of the court, the method of nomination of judges of the constitutional court, and the powers that the court has, without discussing how courts adjudicate. Analyzing the competencies of the court, in all three cases they are extremely similar with a focus on resolving conflicts of competencies between the regional and federal levels. Following this logic, we believe that in future reforms of the Constitutional Court of Bosnia and Herzegovina, the competencies should remain the same.

When it comes to the structure of the court, in the case of Belgium, the affiliation of judges to a certain language group is considered. Although Bosnia and Herzegovina formally does not have ethnic representation in the court, it is implemented informally so that four judges from the entity

¹³¹ Covadonga Ferrer Martin de Vidales, "The Spanish Constitutional Court: An Overview." *Przegląd Konstytucyjny* 14, no. 2 (2020): 7-16

¹³² "The Composition and Organization of the Constitutional Court." Accessed June 15, 2024. <https://www.tribunalconstitucional.es/en/tribunal/Composicion-Organizacion/Paginas/default.aspx>.

of the FBiH are two Bosniaks and two Croats, and two judges from the entity of the RS are two Serbs. This practice of parity inside the Court creates an ethnic balance within the court.

What is indicative from the analysis is that in the case of Belgium and Spain, the judges of the constitutional court are nominated on the proposal of the federal level by both houses of the Parliament in the case of Belgium, or by several institutions in the case of Spain. This is not the case with Bosnia and Herzegovina, where judges of the Constitutional Court are proposed by the entity parliaments. In practice, this has proven to be extremely problematic, given that there is a practice of entities not wanting to submit proposals for judges, thereby preventing the effective functioning of the constitutional court. Therefore, future reforms related to the constitutional court should move in the direction of transferring the duty of nominating judges of the constitutional court from the regional to the federal level, which is confirmed by the practice in the case of Spain and Belgium.

There are several possibilities for the composition and organizational structure of Bosnia and Herzegovina's Constitutional Court, taking into account the current system of nominations for justices and its current structure. The envisaged structure for the Constitutional Court of Bosnia and Herzegovina would include either ten or thirteen judges, with judges from the constituent peoples Bosniaks, Croats, and Serbs, one judge from national minorities, and judges who are foreigners appointed by the President of the European Court of Human Rights. Ten judges would mean just the introduction of the additional judge for the minorities, and thirteen judges would mean also one additional judge for every constituent people. Selection of the judges would be conducted by the High Judicial and Prosecutorial Council, with appointments decided by the Lower House or by both houses of the Parliament of Bosnia and Herzegovina. By moving the possibility of nomination from the regional to federal level, the current problem would be solved

and it would not pose an obvious risk to the functions of the Constitutional Court. Formalizing ethnic parity that is already established as practice and introducing additional judges from national minorities and nationally undetermined would provide further inclusivity in the whole process. Although it is not common in the aspect of state sovereignty, the existence of international judges within the Constitutional Court does not represent a problem for the functioning of the court. It would even improve the work of the court and create better practices that follow the practice of the European Court of Human Rights. Given that these practices are also practices that the European Union promotes in its policies, we believe that this does not conflict with Bosnia and Herzegovina's potential membership in the European Union. It is also important to point out that foreign judges within the Constitutional Court are part of the Dayton Peace Agreement and the Constitution, as its the case with the Office of the High Representative, so the mere expulsion of foreign judges would mean violating one of the terms of the peace agreement, which in a certain way violates the peace agreement itself. The existence of international judges within the Constitutional Court and their eventual removal from the Courts structure could be implemented in the event of Bosnia and Herzegovina joining the European Union.

Chapter VI

1. High representative of Bosnia and Herzegovina

Supervisor of the international community, the High Representative of Bosnia and Herzegovina has a very important role in the constitutional and legal system of Bosnia and Herzegovina, but it also represents a stumbling block for the internal political actors of Bosnia and Herzegovina. The Office of the International High Representative (OHR) was designated in Annex X of the Dayton Peace Agreement as the ultimate interpreter of the civilian aspects of the peace agreement's

implementation¹³³. Since then, the OHR has been given broad authority to impose laws and remove public officials; these are known as "Bonn powers,"¹³⁴. On the other hand, it is important to briefly highlight the positive role of this institution, which is directly responsible for many positive reforms and changes within the state itself and is currently one of the few institutions in the state that manages to oppose the negative trends of separatism and attacks on the constitutional and legal order within the state. From the very beginning, the OHR was conceived as a provisional transitional measure for the successful transformation and development of the state institutions of Bosnia and Herzegovina in the post-war period. As such, 30 years later, it still exists as a transitional solution in case of deadlock of other state institutions¹³⁵.

The question is whether Bosnia and Herzegovina can join the European Union or if only minor constitutional amendments are necessary to meet the requirements for admission, given the country's numerous veto mechanisms and OHR as a form of deep international presence and what steps can be taken to guarantee the stability of Bosnia and Herzegovina's system of state authority over the legislative, executive, and judicial branches if the final condition for EU membership requires the institution of the high representative to be abolished. Also, the nation is dealing with a protracted constitutional crisis brought on by the separatist ideas that are becoming more prevalent in political discourse. This contributes to the perception of the state system's dysfunctionality, which is aided by the misuse of the veto powers granted by the constitutional

¹³³ United States Central Intelligence Agency. *Dayton Agreement, 24 November: Bosnia and Herzegovina*. Washington, D.C.: Central Intelligence Agency, 1995. Map. Annex 10: Agreement on Civilian Implementation.

¹³⁴ Tim Banning, "The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment." *Goettingen Journal of International Law* 6, no. 2 (2014): 265-268

¹³⁵ Gerrit S.A Dijkstra and Jos C.N. Raadschelders. "The High Representative in Bosnia-Herzegovina: The Unusual Institutional Arrangement of a Non-Authoritarian, Yet Controlled, Democracy." *World Affairs* 185, no. 2 (Summer 2022): 297-305.

legal system. The organizational structure makes it evident that this obstructs efficient state-level decision-making.

It is necessary to understand the order in which future reforms of the constitution of Bosnia and Herzegovina should go, given that the fate of the OHR is directly linked to them. If we consider the previous analysis, it is obvious that it is necessary to carry out fundamental reforms of the constitutional and legal structure of Bosnia and Herzegovina, which is within the framework of the current Constitution and the Framework of the Dayton Peace Agreement. Examples of potential reforms in the legislative, executive, and judicial authorities would enable a more stable and more efficient functioning of institutions at the federal level of the state and they would satisfy the political part of the Copenhagen criteria necessary for membership in the European Union.

However, what steps should be taken concerning the status of the OHR if these reforms are implemented?

The Office of the High Representative is part of the Dayton Peace Agreement, and it operates within the already established constitutional framework, just as is the case with foreign judges in the Constitutional Court of Bosnia and Herzegovina. Terminating the Office of the High Representative would also mean violating the peace agreement, which puts Bosnia and Herzegovina in a very uncertain position. If a completely new Constitution of Bosnia and Herzegovina were to be adopted, then there is the possibility to terminate the OHR, however, in the current legal framework, it is not possible to remove it.

Analysing the opinion of the European Commission, we can interpret that the termination of the OHR is not mandatory. The European Commission's opinion states that the extensive interference of the international supervisor is incompatible with the concept of sovereignty and therefore EU

membership. This is crucial to the analysis since it does not say clearly that the OHR can no longer operate within Bosnia and Herzegovina's constitutional-legal framework, but that it cannot have the powers it currently has. Following this opinion, it is possible to conclude the following, if the reforms we explained previously are implemented to the end and successfully in such a way that they prove to be effective and ensure the stability of state institutions, the powers of the OHR could be reduced. By reducing its powers, it could evolve into a new role that would be more directed towards moderating negotiations between political actors, and in that way, the political dialogue within Bosnia and Herzegovina could potentially be improved. In such a scenario, the existence of the OHR as a mediation body would not stand in the way of fulfilling the Copenhagen criteria and the potential membership of Bosnia and Herzegovina in the European Union.

Conclusion

The integration of Bosnia and Herzegovina into the European Union is a very important process. In the past, this process resulted in positive reform processes for Bosnia and Herzegovina. However, so far there has not been a favorable moment to start thorough constitutional reforms and start a more serious restructuring of the institutions of Bosnia and Herzegovina. The current constitutional arrangement of Bosnia and Herzegovina has proven to be suitable for systemic discrimination of many citizens, precisely because of the ethnically organized federal model. It is also clear that due to the built-in mechanisms for protecting collective or ethnic rights and many veto mechanisms, the effective functioning of institutions is prevented. Precisely because of this, the Office of the High Representative, as a reflection of the international presence and interventionism in the country, continues to exist in the current scope of authority. From the point of view of the European Union, this current situation is not acceptable, given that the entry of Bosnia and Herzegovina into the European Union in this format may cause difficulties for the entire Union. The opening of negotiations with the European Union can be the trigger for the beginning of serious constitutional reforms. The entire process of joining the European Union, together with the potential constitutional reforms of Bosnia and Herzegovina, will enable stable and efficient institutions, greater security, promotion of the rule of law and the fight against discrimination of all citizens. Comparative constitutional law can provide concrete solutions and models that could lead the constitutional reforms of Bosnia and Herzegovina in the right direction. The complex models of Belgium and Spain function relatively well within the European Union. If these models are compatible with the standards of the European Union, they can give us significant inspiration in which direction the potential constitutional reforms of Bosnia and Herzegovina can happen.

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