

The Others

The Others are a constitutional and social category whose numerous and often disputed meanings are the result of the vaguely defined content and scope of the concept of “Others”. The controversy and contradiction that characterize the definition of the term “Others” in BiH (BiH) are manifested through various dichotomies that are at the basis of essential disagreements regarding the nature of BiH society: autonomy/integration, ethnic/civil, collective/individual rights, and form/substance. These dichotomies are resolved within two principal discourses: (1) the legal (judicial) discourse, which is based on the jurisprudence of the Constitutional Court of BiH (CC BiH) and of the European Court of Human Rights (ECtHR), and (2) the socio-political discourse, which is dominated by two opposing approaches, conservative (ethnopolitical) and progressive (liberal-democratic). It is important to keep in mind that these discourses represent a frame of reference for understanding the term “Others” in BiH’s constitutional and socio-political context.

Before presenting the above-mentioned discourses, it is important to recall some more general *meanings of the term “Others”* and explain the mechanisms through which they have been incorporated into the institutional system of BiH. Given that the method of exercising collective rights depends on the individual declaring their identity (primarily in the sense of belonging to the constituent peoples), the Others are all citizens of BiH who do not declare themselves as members of one of the three constituent peoples. According to the 2013 population census, Others make up 3.7% of the BiH population (130,054 people).

As for *institutional representation and participation*, two key principles stand out: the principle of proportional representation and the prohibition of discrimination. At the *state level* (which refers to the highest level of government in BiH) the Others are guaranteed one seat in the Council of Ministers or, alternatively, the position of Secretary General of this government body. At the *level of the Entities*, the Constitutions of Republika Srpska (RS) and the Federation of BiH (FBiH) guarantee institutional representation to all citizens of BiH including members of the constituent peoples and the Others based on the principles of proportional representation and without discrimination. Both Constitutions provide that a maximum of two out of six key functions may be filled by representatives of constituent peoples and the Others but their positioning within the system remains under construction.

The People’s Council of the National Assembly of the RS is composed of eight representatives of each of the three constituent peoples and four representatives of the Others who have the right to equal participation in the majority voting process. The Others are also guaranteed

one seat in the government of the RS and one (out of seven) in the Council for the Protection of Vital Interests at the Constitutional Court of the RS. The Constitution of the RS defines the principle of equal representation of constituent peoples and the Others in the public institutions of this entity.

The House of Peoples of FBiH is made up of 23 representatives of each of the constituent peoples and 11 representatives of the Others, whereby at least one representative of the Others is delegated from those cantons that have at least one representative of the Others in their legislative bodies. The Others do not have a guaranteed place in the government of the FBiH, but the principle of proportional representation in the public institutions of this entity is generally standardized, including the entity government, cantonal ministries, cantonal and municipal courts, municipal authorities, and city administrations. The Others are guaranteed one seat (out of seven) in the Council for the Protection of Vital Interests at the FBiH Constitutional Court.

The Others enjoy *broader collective rights in the matter of institutional representation than in the matter of protection of vital interests*. The representation of the Others in the councils for the protection of vital interests at the Entity's constitutional courts meets the minimum standard, which is, however, too narrow to be able to speak of effective protection. The only exception is the Canton of Sarajevo, whose Constitution foresees a mechanism for the protection of vital interests within the clubs of constituent peoples and the club of Others in the cantonal Assembly.

The effective predominance of collective over individual rights, along with the problem of the extension of the collective rights of Others (especially regarding the protection of vital interests), and in general the place of the "citizen" (see: Citizenship) as a constitutional category in the constitutional system of BiH, is at the basis of numerous discussions within the academic community and public opinion. As previously mentioned, these discussions concern some essential dichotomies that are resolved in different ways in *different discourses*, among which the legal discourse and the socio-political one stand out as the most important.

In the *legal (judicial) discourse*, the Others represent a constitutional category that derives its formal and legal existence from the so-called "compromise formula" (see: Constituent Peoples) contained in the Preamble of the Constitution of BiH (paragraph 10) which reads: "Bosniacs, Serbs, and Croats (along with Others), and citizens of BiH hereby establish the Constitution of BiH." This wording represents an exception to the European standard of naming subjects with a constitution-making function and leaves open the possibility of interpreting the constituent peoples as exclusive subjects with a state-law attribute, and the Others and citizens as subjects without this attribute.

Ademović believes that the term "citizens" in the above-mentioned sentence should be interpreted in the context of general constitutional inclusion typical of modern constitutions, i.e., as an expression of a fictitious constitution-maker that includes all citizens of BiH, regardless of

their willingness or lack of willingness to declare their identity. Ademović points out that such a formulation is not new and compares it with the definition present in the Constitution of the Federal Republic of BiH from 1974, which lists “working people and citizens” as fictitious constitution-makers, and “the people of BiH - Muslims, Serbs and Croats and members of other nations and nationalities who live there” as real constitution-makers. Both definitions are an expression of the basic “compromise formula” that expresses the “multi-identity of BiH citizens”, that is, “compromise and harmony between the ethnic and civil modes of the constitutional system, a compromise between ethnocracy and civil society.”

Harmony and compromise also form the *ratio iuris* of the third partial decision of the CC BiH from 2000 in case U 5/98, better known to the public as the “constituent peoples” decision, which is based on the functionalist method of interpreting the constitutional text. The fundamental constitutive principles shaped by constitutional jurisprudence in case U 5/98 are: multiethnicity, equality of the constituent peoples, and prohibition of discrimination.

Essentially, the stated principles define BiH as a democratic state and a pluralistic society, setting as a constitutional goal the construction of a multi-ethnic society like the one that existed in BiH before the 1992-1995 war. Furthermore, they oblige the Entities to respect the prohibition of discrimination against members of any of the constituent peoples, especially if the latter are *de facto* in the position of a minority (as repeatedly stated in the opinions on BiH issued by the Advisory Committee on the Framework Convention for the Protection of National Minorities), and prohibit the privileging of one group through the recognition of special rights to the detriment of the rights of other groups and individuals; introduce the principle of pluralism in terms of participation in government bodies and prohibit ethnic homogenization through assimilation or territorial segregation; introduce territorial versus ethnic federalism, make ethnic parity in state institutions an exception, and indicate the introduction of Others into the system of representation in order to prevent the complete exclusion of the individual right to participate in government, thus guaranteeing a balance between collective and individual rights, that is, between ethnic and civil concepts. While this was the aim, the reality proved to be different. For example, ethno-territorial representation is still visible in legislative and executive branches, and it reflects on decision-making, especially at the state level, while ethnic parity (although not constitutionally defined) continues to exist even in the CC BiH as constitutional custom - in the very Court that introduced the decision itself.

The balance of collective and individual rights is fundamentally linked to the principle of prohibition of discrimination established in Article II/2 of the Constitution of BiH. This principle is particularly important for the ruling of the ECtHR in the case “Sejdić and Finci v. BiH” from 2009. This ruling, as well as the aforementioned partial decision of the CC BiH, concerns the rights of the Others, more precisely the right to be elected to the House of Peoples of the Parliamentary Assembly of BiH and the Presidency of BiH. However, it also has wider implications regarding the balance between collective and individual rights. The ruling established that the Constitution of BiH is discriminatory towards the Others,

considering that depriving the Others of the passive right to vote cannot be justified by arguments about the balance of power between the three dominant social groups in the wider social community, i.e., the constituent peoples bearing in mind that the country has progressed since the adoption of the Dayton Peace Accords in 1995. Although the assumption of obligations from Protocol III of the European Convention on Human Rights and Fundamental Freedoms (ECHR) is stated as a formal indicator of progress, the application of the teleological interpretation of law and *ratio iuris* characterizes the constitutional jurisprudence of the ECtHR in a way that makes it close to the practice of the CC BiH itself. In this sense, Joseph Marko points out that the aforementioned constitutional jurisprudence aims to end the strict ethnic proportionalization of the entire state organization. Furthermore, this practice tends to establish a balance within the “compromise formula” defined in paragraph 10 of the Preamble to the Constitution of BiH. Namely, this formula incorporates, on the one hand, the ethnic principle, which is expressed through the category of constituent peoples and the category of the Others (defined “*a contrario*” from ethnic categories), and on the other hand, the principle of individual equality of all citizens. Marko also discussed the wider implications of the constitutional jurisprudence of the ECtHR, and pointed out that the above-mentioned ruling contains two key minimum standards: a) multiculturalism, as the essence of democracy, which implies the necessity of establishing diversity within the authorities; and b) the right to identity, which includes the decision to belong or not to belong to a certain social group, and must not have legal consequences regarding the prohibition of discrimination. In other words, combining these standards and transferring them into institutional engineering “means combining, on the one hand, the organizational structure of the state and its institutions in accordance with the stated standards, and the rights and freedoms of individuals, on the other hand,” which should lead to the creation of a unique and comprehensive system in which the dichotomy between autonomy and integration will be resolved.

As mentioned above, the *socio-political discourse* treats the issue of the Others on two key premises: conservative or ethno-political and progressive or liberal-democratic. The most important differences between the two approaches concern the internal identity composition of the Others, their instrumental role in the political-legal and socio-cultural systems, and the positioning of citizens as a special constitutional category in relation to the category of the Others.

In a conservative or ethno-political perspective, the Others are defined primarily on the basis of the ethnic criterion according to which the internal identity composition of the Others group is made up of 17 legally recognized minorities in BiH (Law on the Protection of Rights of Members of National Minorities from 2003). The supplementary criterion concerns the subjective declaration, which represents the general way of realizing collective rights, thus including all those who, for any reason, declare themselves as Others. This approach was adopted in Sarajevo Canton, where it is stipulated that the caucus of the Others forms on the condition that there is at least one representative who declares himself as Other or a member of a national minority.

In the instrumental sense, the Others are seen as a fourth or supplementary element of the existing ethnic structure made up of three constituent peoples, which ultimately legitimizes but also reproduces a multi-ethnic and plural society made up of segments or collectivities. Citizens are viewed as an all-inclusive but also nominal constitutional category (fictitious constitution-maker) which is interpellated by socio-legal mechanisms in the form of one of two real constitutional categories: constituent peoples and Others. Hence, Šarčević claims that the “abstract citizen is only a supplementary element of the constitutional system that corrects the empty spaces of ethnically oriented management of state affairs.” The consequence of the application of this model is the predominance of collective over individual rights if not even an arrangement according to which the realization of basic political individual rights is conditioned by the prior realization of collective rights.

The progressive or liberal-democratic perspective is alternative and critical to the conservative one. The Others are defined on the basis of a broader cultural criterion - which includes all social groups that are culturally different from ethnonational groups (subcultural groups) - or on the basis of the broadest political and class criterion, which includes all non-privileged members of society, i.e., all those who are not part of “acquisition ethno-entrepreneurial classes” as Mujkić discusses. In this sense, the Others are all those who are marginalized or instrumentalized by the current ethno-political order to realize their particularistic interests. In this perspective, the Others and citizens are seen, often erasing the boundary between the two categories, as agents of emancipation and struggle against the existing ethno-political order.

Therefore, the Others and citizens are not perceived as separate constitutional and social categories, but as a unique group that includes all those who are forced by the existing ethno-political system to declare or not declare their affiliation. It is precisely the exclusion of the Others and citizens from the (power-sharing) system and their external definition as a heterogeneous category that confers internal unity to this group.

The group of Others and citizens articulates its interests primarily as a desire for change, referring to the following values: individual human rights and freedoms, human dignity, a democratic form of government based on individual political subjectivity, and civil society as the institutional framework of a plural or multicultural society. The principle of collective representation and protection of collective interests, in this sense, is considered secondary to the prohibition of discrimination and the principle of equality. In this context, Ždralović points out that “the qualitatively different way of grouping the Others in relation to the constitutive peoples can also be interpreted as an emancipatory potential which, precisely thanks to the pluralism of interests and attitudes it brings together, recognizes individual rights and freedoms as a fundamental political value whose significance has been diminished and even denied in the spirit of the hitherto dominant ethno-political collectivist forces”. From the above considerations, it follows that the Others do not represent the fourth or supplementary element. Instead, (together with the citizens) they are the second element of the constitutional order that strives to change the existing order to a radically different one.

The legal (judicial) and the socio-political discourses presented here are the starting point for understanding the Others as an essential constitutional and social category, but at the same time, they thematize the Others in relation to the essential dichotomies of BiH society and the state. The implementation of the ECtHR ruling in the case *Sejdić-Finci v. BiH* has political and (international) legal significance both for the collective rights of the Others and individual rights of citizens. This is also related to the BiH's eventual path toward Euro-Atlantic alliances. In addition, it also has symbolic significance in terms of broader social changes and the concrete resolution of some of the fundamental dichotomies around which the BiH society continues to be ideologically polarized.

References:

Ademović, Nedim. „Ustavni sud Bosne i Hercegovine: Kritički osvrt na poziciju tzv. Ostalih u Ustavu BiH kroz sudsku praksu Ustavnog suda BiH i Evropskog suda za ljudska prava u Strazburu.” U *Mjesto i uloga „Ostalih” u Ustavu Bosne i Hercegovine i budućim ustavnim rješenjima za Bosnu i Hercegovinu*. Urednici: Abazović, Dino, Mujkić, Asim, Vehabović, Faris, and Vajzović, Emir. Sarajevo: Institut za društvena istraživanja Fakulteta političkih nauka Univerziteta u Sarajevu, 2010.

Djelimična odluka III u predmetu u 5/98. *Ustavni sud Bosne i Hercegovine*. http://www.ustavnisud.ba/dokumenti/_bs/u-5-98-12209.pdf (pristupljeno 17. 3. 2023).

Evropski sud za ljudska prava. *Presuda u slučaju „Sejdić i Finci protiv Bosne i Hercegovine.”* <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%7B%22001-96491%22%7D%7D> (pristupljeno 17. 3. 2023).

Marko, Joseph. „Doprinos presude Evropskog suda za ljudska prava u predmetu Sejdić i Finci protiv Bosne i Hercegovine daljem razumijevanju sistema zaštite kolektivnih i individualnih prava.” U *Mjesto i uloga „Ostalih” u Ustavu Bosne i Hercegovine i budućim ustavnim rješenjima za Bosnu i Hercegovinu*. Urednici: Abazović, Dino, Mujkić, Asim, Vehabović, Faris, and Vajzović, Emir. Sarajevo: Institut za društvena istraživanja Fakulteta političkih nauka Univerziteta u Sarajevu, 2010.

Marko, Joseph. „Komentar prof. dr. Josepha Marka, sudije izvjestioca u predmetu broj U 5/98 (10. alineja).” U *Ustav Bosne i Hercegovine – Komentar*. Urednici: Steiner, Christian, i Ademović, Nedim. Sarajevo: Fondacija Konrad Adenauer, 2010.

Marković, Goran. „Učešće 'Ostalih' u političkim institucijama u BiH.” U *Mjesto i uloga „Ostalih” u Ustavu Bosne i Hercegovine i budućim ustavnim rješenjima za Bosnu i Hercegovinu*. Urednici: Abazović, Dino, Mujkić, Asim, Vehabović, Faris, and Vajzović, Emir. Sarajevo: Institut za društvena istraživanja Fakulteta političkih nauka Univerziteta u Sarajevu, 2010.

Mujkić, Asim. „Ostali – Četvrti konstitutivni element ili strategija demokratske transformacije?” U *Mjesto i uloga „Ostalih” u Ustavu Bosne i Hercegovine i budućim ustavnim rješenjima za Bosnu i Hercegovinu*. Urednici: Abazović, Dino, Mujkić, Asim, Vehabović, Faris, and Vajzović, Emir, 75-90. Sarajevo: Institut za društvena istraživanja Fakulteta političkih nauka Univerziteta u Sarajevu, 2010.

Sitnić, Admir, i Ždralović, Amila. *Građani/ke u kolektivističkoj ideologiji: Sociološko-pravna analiza „Ostalih” u Bosni i Hercegovini*. Sarajevo: Centar za političke studije, 2010.

Steiner, Christian, i Ademović, Nedim. „Preambula.” U *Ustav Bosne i Hercegovine – Komentar*. Urednici: Steiner, Christian, i Ademović, Nedim. Sarajevo: Fondacija Konrad Adenauer, 2010.

Šarčević, Edin. *Ustav iz nužde*. Sarajevo: Rabic, 2010.

Ustav Federacije Bosne i Hercegovine. *Službene novine Federacije Bosne i Hercegovine*, br. 1/1994 – Amandman I, 13/1997 – Amandmani II–XXIV, 13/1997 – Amandmani XXV i XXVI, 16/2002 – Amandmani XXVII–LIV, 22/2002 – Amandmani LVI–LXIII, 52/2002 – Amandmani LXIV–LXXXVII, 60/2002 – ispr. Amandmana LXXXI, 18/2003 – Amandman LXXXVIII, 63/2003 – Amandmani LXXXIX–XCIV, 9/2004 – Amandmani XCV–CII, 32/2007 – ispr., 20/2004 – Amandmani CIII i CIV, 33/2004 – Amandman CV, 71/2005 – Amandmani CVI–CVIII, 72/2005 – Amandman CVI, 88/2008 – Amandman CIX i 79/2022 – Amandmani CX–CXXX.

Ustav Kantona Sarajevo. *Službene novine Kantona Sarajevo*, br. 1/1996, 2/1996 – ispr., 3/1996 – ispr., 16/1997 – Amandmani I–XIII, 14/2000 – Amandmani XIV i XV, 4/2001 – Amandmani XVI–XVIII, 28/2004 – Amandmani XIX–XLII, 6/2013 – Amandmani XLIII–XLIX i 31/2017 – Amandmani L–LVII.

Ustav Republike Srpske. *Službeni glasnik Republike Srpske*, br. 21/1992 – prečišćen tekst, 28/1994 – Amandmani XXVI–XLIII, 8/1996 – Amandmani XLIV–LI, 13/1996 – Amandman LII, 15/1996 – ispr., 16/1996 – Amandman LIII, 21/1996 – Amandmani LIV–LXV, 21/2002 – Amandmani LXVI–XCII, 26/2002 – ispr., 30/2002 – ispr., 31/2002 – Amandmani XCIII–XCVIII, 69/2002 – Amandmani XCIX–CIII, 31/2003 – Amandmani CIV i CV, 98/2003 – Amandmani CVI–CXII, 115/2005 – Amandman CXIV, 117/2005 – Amandmani CXV–CXXI i 48/2011 – Amandman CXXII i Sl. glasnik BiH, br. 73/2019 – odluka US BiH.

Vehabović, Faris. „Odnos konstitutivnih naroda, ostalih i manjina, odnosno pitanje zaštite kolektivnih prava.” U *Mjesto i uloga „Ostalih” u Ustavu Bosne i Hercegovine i budućim ustavnim rješenjima za Bosnu i Hercegovinu*. Urednici: Abazović, Dino, Mujkić, Asim, Vehabović, Faris, and Vajzović, Emir. Sarajevo: Institut za društvena istraživanja Fakulteta političkih nauka Univerziteta u Sarajevu, 2010.

Zakon o zaštiti prava pripadnika nacionalnih manjina. *Službeni glasnik BiH*, br. 12/03, 76/05 i 93/08.