

# *Why rights should not be considered (entirely) constricted and why identities are not exactly imagined: A reply to Alma Begicevic and Jennifer Balint*

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*In their recent article “Constricted Rights and Imagined Identities: Peace and Accountability Processes and Constitution-Making in Bosnia and Herzegovina,” Alma Begicevic and Jennifer Balint argue that underlying reasons for the seemingly sudden establishment of the complex constitutional arrangements in Bosnia and Herzegovina (BH) are associated with the abrupt adoption of the Dayton Peace Agreement and its Annex IV (the Constitution of BH) that introduced the ethnoterritorial setup and the lack of accountability of the neighboring countries for the atrocities committed during the Bosnian War. As a consequence, the country cannot effectively (re)construct a nation state and, instead, suffers from a lack of homogeneity. Moreover, post-conflict institutional and procedural arrangements appear to be comparatively uncharted territory. This article scrutinizes and counters these claims with the thesis that territorial accommodation of differences is a rather frequent approach in fragmenting systems with competing identities. To substantiate the thesis, the article draws on the concepts of cohesion and stability linked to adaptiveness and coordination. It then analyzes the role of the power ratio during the Bosnian War and the internal building blocks that contributed to the ethnoterritorial setup. Finally, the article focuses on the concept of equality in complex systems linked to mutual respect, solidarity, and trust to analyze the necessity for plural equality in BH.*

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## 1. Introduction: Arguments and challenges

Begicevic and Balint recently wrote a challenging article titled “Constricted Rights and Imagined Identities: Peace and Accountability Processes and Constitution-Making in Bosnia and Herzegovina.” In the article, one of the arguments that the authors posit is that the new type of constitutional and political framework in BH established since the 1995 General Framework Agreement for Peace in BH (Dayton Peace Agreement) appeared randomly without any theoretical and practical basis. In that sense, the complicated territorial reconfiguration of BH based on federal characteristics is unknown in comparative constitutional law.

Related to this, the second argument Begicevic and Balint make is that the new constitutional and political framework introduced an unprecedented type of citizenship that connects a specific group to a specific territory within a state. According to Begicevic and Balint, this is a new type of territorially and ethnically imposed citizenship linked to (in this case) three constituent peoples. Begicevic and Balint understand this as a contradictory process of making a nation state, especially given that the overarching (national) identification has a secondary role in the Dayton Peace Agreement.<sup>1</sup> Therefore, an inclusive, homogeneous community is not possible.

Begicevic and Balint view the combination of a complex federal structure and a lack of overarching citizenship as the fundamental cause of the incompatibility with the European standards on human rights in BH. That is because, according to Begicevic and Balint, Annex 4 of the Dayton Peace Agreement or the Constitution of BH is a vehicle for making a state without a nation and citizens who are all minorities. According to them, this has resulted in tension between the ethno-territorial setup and the constitutional rights of the Others.

The third argument that Begicevic and Balint propose is that the abovementioned ethnoterritorial division is simply a consequence of a constitutional change. Furthermore, the split based on overlapping territorial and identity differences results in deformed institutional instruments and mechanisms. That has consequences for institutional and procedural arrangements.

Related to this, the fourth argument that Begicevic and Balint posit is that although a new constitution was necessary for the peacebuilding and transition processes, this was hindered by the failed attempts to establish accountability for the atrocities committed during the Bosnian War (1992–95). To explain how the lack of accountability for past atrocities influences institutional and decision-making dynamics in BH, Begicevic and Balint reach out externally to the neighboring countries.

What Begicevic and Balint claim is that the changes in the institutional and procedural setups are associated with the simple act of adopting a new constitution (Annex 4 of the Dayton Peace Agreement). Moreover, the establishment of ethnoterritorial

<sup>1</sup> General Framework Agreement for Peace in BH, Dec. 14, 1995, [www.ohr.int/dayton-peace-agreement/](http://www.ohr.int/dayton-peace-agreement/) [hereinafter Dayton Peace Agreement].

elements from the Constitution is influenced by the lack of accountability (of the neighboring countries) for the past atrocities (and essentially their role in the Bosnian War).

While I agree that overlapping territorial and identity differences result in specific institutional and procedural consequences, it is inadequate to claim that the ethno-territorial structure established after the Dayton Peace Agreement is unknown in comparative constitutional law. While I also agree that the lack of accountability for past atrocities influences institutional and decision-making dynamics in BH, internal circumstances that led to adopting the Dayton Peace Agreement (including Annex 4 or the Constitution of BH) are more important than external ones. Moreover, they are decisive. I explain this in the following sections. Since all the topics are entangled, it is impossible to address each argument neatly, although I strive to structure my observations according to the presented arguments.

## 2. Federal principles and diversity are not dirty words

BH is a so-called “complex state.” The term was coined in BH itself to describe the specificities and, sometimes, unbearable complexities of its constitutional and political system since the Dayton Peace Agreement.<sup>2</sup> Specifically, the term “complex state” refers to a constitutional and political structure based on federal principles, which overlaps with ethnic belonging in BH. However, beyond BH, the phrase “complex state” refers to federal(-like) structures burdened with identity markers. These include, for example, Belgium, Ethiopia, Indonesia, Iraq, Malaysia, Myanmar, Spain, and the United Kingdom, to name only a few.

A major misinterpretation in the article develops from two interconnected claims that Begicevic and Balint propose. In their view, the “new idea of ethnically and territorially imposed construct of citizenship—where separate groups are meant to reside and belong to separate land—was introduced in the name of post-conflict peace building” as well as that “many of the proposed institutional solutions are deformed and unknown in the comparative constitutional law of democratic countries.”<sup>3</sup>

Be that as it may, there is nothing new in embedding identity differences territorially. The contemporary reconfiguration of states with identity differences experiences two important trends. First, unitary nation states shift toward different forms of heterogeneous systems with federal principles.<sup>4</sup> Examples include Belgium and BH

<sup>2</sup> Cf. Lejla Balić, *Pravna priroda i političke refleksije bosansko-hercegovačkog federalizma* [The legal nature and political reflections of federalism in BH], in BOSANSKOHERCEGOVAČKI FEDERALIZAM 11, 17–20 (Edin Šarčević ed., 2020).

<sup>3</sup> Alma Begicevic & Jennifer Balint, *Constricted Rights and Imagined Identities: Peace and Accountability Processes and Constitution-Making in BH*, 21 INT’L J. CONST. L. 1069, 1078 (2023).

<sup>4</sup> John Loughlin, *Reconfiguring the State: Trends in Territorial Governance in European States*, 17 REG. FED. STUD. 385, 387–97 (2007).

(federalism), Italy (regionalism), and the United Kingdom (devolution). More often than not, this is supported by violent territorial conflicts.<sup>5</sup> Examples include Iraq and Myanmar. The Bosnian War that resulted in the territorial reconfiguration of the country, unfortunately, also confirms this tragic theoretical argument.

Quite contrary to what Begicevic and Balint suggest, a number of contemporary systems based on territorially embedded identities (like Belgium, Canada, Indonesia, Iraq, Malaysia, Spain, and the United Kingdom) confirm that the traditional concept of homogeneous unitary states that incorporates territory, population, and an organized political authority<sup>6</sup> has been superseded for some time now.<sup>7</sup> The contemporary concept of state is increasingly based on the combination of territorial entities and identity differences<sup>8</sup> established through federal principles.<sup>9</sup> This is supported by the fact that almost half of the world's population lives in systems with federal arrangements<sup>10</sup> while the majority of these systems have been established as multinational states.<sup>11</sup> Federal principles are a common instrument used in the accommodation of diversity through territorial autonomy<sup>12</sup> in any type of system (federal, unitary, transnational). Indeed, using federal principles certainly has its shortcomings. The shortcomings involve power-sharing based on a compromise, and they also depend very much on the political climate. Because of that, federal principles do have limitations in the sense that they are sometimes seen as partial solutions for any of the groups. Nevertheless, they are designed to hold the system together.<sup>13</sup>

Second, this type of shift (as briefly suggested above) is generally associated with identity markers<sup>14</sup> since identity differences (such as ethnicity, language, religion, and culture) tend to influence changes in territorial delimitation. Groups with distinct identity markers use their distinct identity to claim political autonomy, and if their pressure is strong enough, it will lead to changes in (internal) territorial delimitation.<sup>15</sup> Importantly, federal principles allow groups to preserve their individuality within

<sup>5</sup> Deborah Cowen & Emily Gilbert, *The Politics of War, Citizenship, Territory*, in WAR, CITIZENSHIP, TERRITORY 2, 16 (Deborah Cowen & Emily Gilbert eds., 2008); Francesco Palermo, *Territory and the Law of Ownership: From Misunderstanding to Opportunity*, in LAW, TERRITORY AND CONFLICT RESOLUTION, LAW AS A PROBLEM AND LAW AS A SOLUTION 16, 16–17 (Matteo Nicolini et al. eds., 2016).

<sup>6</sup> See, e.g., MALCOLM N. SHAW, INTERNATIONAL LAW 198 (2008). See also MAJA SAHADŽIĆ, ASYMMETRY, MULTINATIONALISM AND CONSTITUTIONAL LAW, MANAGING LEGITIMACY AND STABILITY IN FEDERALIST STATES 11–16 (2020).

<sup>7</sup> STEPHEN TIERNEY, THE FEDERAL CONTRACT: A CONSTITUTIONAL THEORY OF FEDERALISM 1, 16–19 (2023).

<sup>8</sup> Michael Keating, 29 *Asymmetrical Government: Multinational States in an Integrating Europe*, 71, 71, 75 PUBLIUS (1999).

<sup>9</sup> Alfred Stepan, *Towards a New Comparative Politics of Federalism, Multinationalism, and Democracy: Beyond Rikerian Federalism*, in FEDERALISM AND DEMOCRACY IN LATIN AMERICA 29, 75 (Edward L. Gibson ed., 2004).

<sup>10</sup> *Federal Countries*, FORUM OF FEDERATIONS, [www.forumfed.org/countries/](http://www.forumfed.org/countries/) (last visited 12 Dec. 12, 2022) (“Formally constituted federalism... governs approximately 40 percent of the world's population and 45 percent of the world's landmass”).

<sup>11</sup> See Stepan, *supra* note 9.

<sup>12</sup> Will Kymlicka, *Federalism and Secession: At Home and Abroad*, 13 CAN. J. L. JURIS. 207, 207, 210 (2000).

<sup>13</sup> Cf. Stepan, *supra* note 9, at 33–37.

<sup>14</sup> Matteo Nicolini, *Territorial and Ethnic Divide: A New Legal Geography for Cyprus*, in LAW, TERRITORY AND CONFLICT RESOLUTION, LAW AS A PROBLEM AND LAW AS A SOLUTION 285, 285–7 (Matteo Nicolini et al. eds., 2016).

<sup>15</sup> See MICHAEL BURGESS, COMPARATIVE FEDERALISM, THEORY AND PRACTICE 216 (2006).

several layers of belonging ranging from local, regional, and national to international levels.<sup>16</sup> The examples include the protection of the Flemings and Francophones in Belgium, the Bosniacs, Croats, and Serbs in BH, the Kurds in Iraq, the German- and French-speaking communities in Italy, the Bumiputeras in Malaysia, the Basques and Catalans in Spain, and many more.<sup>17</sup> Under those circumstances, nation or citizenship, understood as an overarching identity, is replaced by belonging to groups with specific identity markers (usually territorially embedded).<sup>18</sup> Because identity features seem to be rather resilient and idiosyncratic,<sup>19</sup> dual or multiple identifications may or may not exist. It has been shown that some groups can manifest plural or hybrid belonging when they are capable of extending their belonging to several different levels, such as the overarching nationality or citizenship together with the identity of their own group.<sup>20</sup> However, some groups manifest only singular belonging or maintain only essential belonging to the identity of their own group, as they are not able to extend their identity beyond the overarching nationality or citizenship.<sup>21</sup> This means that these groups take a relational position toward the state as entities comparable to the state.<sup>22</sup> For example, Catalans, Kurds, Scots, and Quebecois may choose to be regarded only as such, or also as Spanish, Iraqi, British, and Canadian. These are the competing identities. I do not agree that their existence is detrimental to the system as implied by Begicevic and Balint, but the function of those identities is to hold the system together as indicated above. I do acknowledge that they do bring forward the issues linked to normative equality that I discuss later in the text. Importantly, the fact that the constitutional and political system of BH is now arranged around three constituent peoples (Bosniacs, Croats, and Serbs) confirms this theoretical argument as well. While Croats and Serbs insist on their own identity as a primary identity, Bosniacs are the only ones insisting on the overarching (Bosnian and Herzegovinian) identity.

The problematic part of the article is that Begicevic and Balint equate national citizenship (understood as a widely accepted national identity or overarching citizenship) with cohesive and stabilizing elements of the system. This implies that loyalty—understood as essential belonging to the overarching nationality or citizenship—should be a strategic element that would help to overcome the issues that arise from recognized diversity. That is why Begicevic and Balint point out the disintegration of essential belonging as a stumbling block to the survival of BH. They attempt to contrast the present Constitutional provisions to the provisions of the 1974 Constitution. The present constitution states that Bosniacs, Croats, and Serbs, as constituent peoples

<sup>16</sup> Cf. David B. Knight, *Identity and Territory: Geographical Perspectives on Nationalism and Regionalism*, 72 ANNALS ASS'N AM. GEOGRAPHERS 514, 514 (1982).

<sup>17</sup> See SAHADŽIĆ, *supra* note 6, at 136.

<sup>18</sup> SUSAN HENDERS, TERRITORIALITY, ASYMMETRY, AND AUTONOMY, CATALONIA, CORSICA, HONG KONG, AND TIBET 33 (2010). See Burgess *supra* note 13, at 143.

<sup>19</sup> See Kymlicka, *supra* note 12, at 209.

<sup>20</sup> José Oliveira, Zoran Roca, & NunoLeitão, 27 *Territorial Identity and Development: From Topophilia to Terraphilia*, LAND USE POLICY 801, 802 (2010).

<sup>21</sup> Cf. Knight, *supra* note 16, at 515.

<sup>22</sup> STEPHEN TIERNEY, CONSTITUTIONAL LAW AND NATIONAL PLURALISM 4–6 (2006); Ferran Requejo, *Federalism and National Groups*, 53 INT'L. SOC. SCI. J. 41, 42 (2001).

(along with Others), and as citizens of BH, determine the Constitution, while the 1974 Constitution points out people that are Muslims, Serbs, Croats, and other nationalities and ethnicities that live there, based on governance and self-governance of the working class and all working people. For Begicevic and Balint, it is obvious that the difference in the formulation is the destruction of the heterogeneous population, since nationality used to be aligned to citizenship and not ethnicity or hybrid belonging. First, this approach understands diversity as a constitutional and political issue mainly because it contrasts with the simplicity of homogeneous nation states. Second, and for the sake of academic debate, Begicevic and Balint seemingly omit to reflect on the fact that, in the 1974 Constitution, Muslims, Serbs, Croats, and members of other nations and nationalities residing in the BH territory have also been designated as those who determine the Constitution together with the working people and citizens. As such, provisions in both constitutions represent “compromise and harmony between the ethnic and civil modes of the constitutional system, a compromise between ethnocracy and civil society.”<sup>23</sup> Importantly, the approach taken by Begicevic and Balint is rather an outdated one that has been proven unable to deal with contemporary challenges in systems like BH, based on federal principles and diversity. Systems such as BH, but also Belgium, Canada, Indonesia, Iraq, Malaysia, Spain, United Kingdom, etc., prove that contemporary constitutional systems burdened with identity differences show fragmenting features (for whatever specific causes), while only hybrid belonging might promote cohesion and stability, that is if diverse groups choose to embrace it. Suppressing the opportunity to articulate a distinct identity is what challenges the bare existence of the system. That is why, when Begicevic and Balint cite Habermas, for example, they disregard trends in deeply divided societies where diverse identities seek the accommodation of their diversity through several different levels of government. Instead of loyalty and widely accepted national identity or common citizenship, contemporary divided societies embrace new and more pragmatic strategic elements of cohesion and stability, such as adaptiveness and coordination.<sup>24</sup>

### 3. Federal principles and diversity result from the power ratio

One important issue that Begicevic and Balint leave unanswered is whether the ethnoterritorial division is really the consequence of the constitutional changes, as they claim. Indeed, the outcome of the Bosnian War was the Dayton Peace

<sup>23</sup> Nedim Ademović, *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* [Constitutional Court of BH: Critical Consideration of the Position of the So-called Others in the Constitution BH through the Jurisprudence of the Constitutional Court of BH and the European Court of Human Rights in Strasbourg], in *MJESTO I ULOGA OSTALIH U USTAVU BOSNE I HERCEGOVINE I BUDUĆIM USTAVNIM RJEŠENJIMA ZA BOSNU I HERCEGOVINU* 125, 133 (Dino Abazović et al. eds., 2004). Cf. Samir Forić, Francesco Palermo, & Maja Sahadžić, *Others*, in *GRADANI, USTAV, EUROPA, RJEČNIK OSNOVNIH USTAVNIH POJMOVA U BiH*/CITIZENS, CONSTITUTION, EUROPE: GLOSSARY OF ESSENTIAL CONSTITUTIONAL CONCEPTS IN BiH 283, 284–5 (Maja Sahadžić et al., 2023).

<sup>24</sup> See Sahadžić *supra* note 6, at 166.

Agreement that introduced the ethnoterritorial complexities through its Annex 4 or the Constitution of BH. From a unitary state, BH became a federal system that consists of the Federation of BH (FBH) with ten cantons, the Republic of Srpska (RS) organized as a unitary entity (the Entities), and the Brčko District (which emerged only after an arbitration process in 1999). Beyond this, the system is based on the principle of parity of three constituent peoples (Bosniacs, Croats, and Serbs). Two remarks can be made here. First, in explaining the building blocks that led to the Dayton Peace Agreement, Begicevic and Balint take a rather restrictive approach by focusing only on mass atrocities and the 1991 census. Second, because of this, they fail to make the link between the mass atrocities and the current constitutional and political structure based on parity. This is because they fail to recognize that it was the power ratio on the battlefield and in negotiations that dictated the constitutional solutions in Annex 4 to the Dayton Peace Agreement rather than the Dayton Peace Agreement introducing ethnic federalism in the name of peacebuilding.

Mass atrocities (such as torture, rape, mass expulsion, and detention in concentration camps), including the worst of them all, genocide, were indeed a fundamental building block in establishing contemporary BH. Genocide as a planned, large-scale crime was committed in 1995 by the Army of the RS against the Bosniacs in Srebrenica, the enclave protected by the United Nations (UN). However, there were smaller-scale atrocities as well, including the massacre of the Bosniacs in Ahmići by the Croatian Defense Council (CDC) in 1993, the killings of Serbs committed by armed Bosniac forces in Sarajevo in 1992,<sup>25</sup> and the war crimes against Croat civilians and prisoners of war carried out by armed Bosniac forces in Trusina in 1993.<sup>26</sup>

Strikingly, Begicevic and Balint use the 1991 census to provide information about the population composition and to explain the population shift regarding diaspora. Interestingly, they refuse to enter into the discussion on the 2013 census.<sup>27</sup> However, the 2013 census clearly depicts the magnitude of the atrocities that were committed during the Bosnian War when compared to the 1991 census. The ethnic cleansing is easily detectable on the map of BH, since the places that were once populated by one constituent people either became populated by another or have been depopulated. The comparison makes it easy to track the contemporary delimitation between the Serb population in RS and the Bosniac and Croat population in the cantons of the FBH. Importantly, the groups acquired equal power during the conflict that was finally captured in the Dayton Peace Agreement and as such was translated into an intricate ethnoterritorial balance.<sup>28</sup> This is related to two other building blocks that Begicevic and Balint do not consider.

<sup>25</sup> STEVEN L. BURG & PAUL SHOUP, *THE WAR IN BOSNIA-HERZEGOVINA: ETHNIC CONFLICT AND INTERNATIONAL INTERVENTION* 12 (1999).

<sup>26</sup> *Sud Bosne i Hercegovine* [Court of BH], Nov. 7, 2016, S1 1 K 003369 10 Krž Mensur Memić i dr., <https://sudbih.gov.ba/Court/Case/247>.

<sup>27</sup> *See Census*, OFFICIAL GAZETTE OF BH, no. 60/16 (2013).

<sup>28</sup> Maja Sahadžić, *Mild Asymmetry and Ethnoterritorial Overlap in Charge of the Consequences of Multinationalism: A Country Study of Constitutional Asymmetry in BH*, in *CONSTITUTIONAL ASYMMETRY IN MULTINATIONAL FEDERALISM, MANAGING MULTINATIONALISM IN MULTI-TIERED SYSTEMS* 47, 49, 56 (Patricia Popelier & Maja Sahadžić eds., 2019).

Apart from mass atrocities, two other building blocks contributed to establishing the contemporary ethnoterritorial balance in BH. The first building block is the use of direct democracy. Begicevic and Balint briefly mentioned the 1992 BH independence referendum but they did not explain that the Serb representatives in the Parliament boycotted the referendum and urged all the Serbs to do the same, even though they were aware they could not influence the final decision. The logic behind this boycott was that Serbs did not want to legitimize the outcome of the independence referendum for which they expected to receive a positive response. However, a major event took place prior to the referendum. The Assembly of the Serb people of BH established in 1991 had organized a plebiscite asking Bosnian Serbs whether they wanted to remain in the Socialist Federal Republic of Yugoslavia (SFRY).<sup>29</sup> As expected, the votes were in favor of remaining, but the government of BH declared the results unconstitutional and void. In response, the Serbs adopted a Declaration on Proclamation of the Republic of the Serb people of BH and adopted a constitution.<sup>30</sup> This is how the foundations of RS were established. Some authors argue that these two events meant the Serbs were deprived of the capacity to influence decision-making, which in turn incited nationalism and a sharp split along territorial lines.<sup>31</sup>

A second building block of establishing the contemporary ethnoterritorial balance in BH was another conflict—between the Bosniacs and Croats—resulting in a further ethnic fragmentation. While in the beginning, the two sides shared the same vision of BH, the establishment of the CDC and its transformation, in 1992, into a military force further polarized the population. The CDC became linked to the Croatian Community of Herzeg-Bosnia (CCHB), a Croat political entity in BH established in 1991. Although the CCHB proclaimed that it would respect the government of BH, the lack of mutual confidence between the sides prompted the BH government to declare the CDC's formation unconstitutional. This then fueled tensions between Bosniacs and Croats. When the Croat leadership attempted to detach parts of territories under their control from BH,<sup>32</sup> armed conflict between Bosniacs and Croats broke out in 1993, concentrated in central BH and the city of Mostar. The conflict ended with the 1994 American-brokered Washington agreement<sup>33</sup> that established the FBH consisting of ten cantons. Only two out of ten cantons are mixed, while the rest of them are populated by a majority of either Bosniacs or Croats. The Constitution of FBH<sup>34</sup> is part of the Washington Agreement.

<sup>29</sup> *Id.*

<sup>30</sup> Declaration on Proclamation of the Republic of the Serb people of BH, OFFICIAL GAZETTE OF THE SERB PEOPLE IN BH, no. 2/92 (1992); Constitution of the Serb Republic, OFFICIAL GAZETTE OF THE SERB PEOPLE IN BH, no. 3/92 (1992).

<sup>31</sup> Mile Dmičić, *Ustavne promjene u Republici Srpskoj [Constitutional Changes in the Republic of Srpska]*, 34 GODIŠNJAK PRAVNOG FAKULTETA UNIVERZITETA U BANJOJ LUCI 151 (2012). GORAN MARKOVIĆ, BOSANSKOHERCEGOVAČKI FEDERALIZAM 35 (2012).

<sup>32</sup> Thorsten Gromes, *Dejtonski sporazum za Bosnu i Hercegovinu [Dayton Agreement for BH]*, in DRŽAVA, POLITIKA I DRUŠTVO U BOSNI I HERCEGOVINI: ANALIZA POSTDEJTONSKOG POLITIČKOG SISTEMA 45 (Damir Banović & Saša Gavrić eds., 2011).

<sup>33</sup> The Washington Peace Agreement, OFFICIAL GAZETTE OF THE FBH, no. 1/94 (1994).

<sup>34</sup> Constitution of the Federation of BH, OFFICIAL GAZETTE OF THE FEDERATION OF BH, nos. 1/94, 13/97, 16/02, 22/02, 52/02, 63/03, 9/94, 20/04, 33/04, 71/05, 72/05, 88/08, and 79/22.



Added to this, and due to the inability of all sides in the conflict to reach an agreement about the multiethnic city of Brčko, its status was determined in 1999 through international arbitration. Amendment I to the Constitution of BH established the Brčko District as a special administrative unit jointly administered by the two Entities (FBH and RS).

I certainly agree with Begicevic and Balint that the external influence in BH cannot be underestimated. During the conflict, the Serbs reached out and received not only political but also military support from neighboring Serbia. This enabled them to maintain their position on the battlefield and in the negotiations until the very end of the conflict. The Croats, similar to the Serbs, received political and military support from neighboring Croatia, which strengthened their position both on the battlefield and in negotiations, despite their limited presence in BH. However, it is important to consider that Bosniacs, despite being the dominant group in terms of size and leadership, faced internal divisions. In the 1990 general elections, the Bosniac candidate who won the popular vote for the Presidency did not assume office due to an internal party decision. He later proclaimed the Autonomous Province of Western Bosnia in the north-west BH, instigating an armed conflict with the Bosniacs. This internal strife hindered the Bosniacs' effectiveness on the battlefield. Despite these challenges, the balance of power eventually stabilized.

Two additional factors (the effects of direct democracy and the conflict between Bosniacs and Croats) are crucial to recognizing that the contemporary ethnic federalism in BH is not merely a consequence of volatile constitutional changes, as Begicevic and Balint imply. Rather, the contemporary constitutional framework stems from an equilibrium of power shaped by various internal forces which led to acknowledging the specific situation on the battlefield and in the negotiations. Understanding the circumstances surrounding the adoption of the RS Constitution and the signing of the Washington Peace Agreement is essential to grasping how the Dayton Peace Agreement integrated these elements, shaping the ethno-federal landscape of BH. Not only did representatives from the FBH and RS participate in the Dayton peace negotiations, but they also signed all the annexes to the Dayton Peace Agreement.

By focusing only on the external sources of post-conflict accountability (in neighboring Serbia and Croatia), Begicevic and Balint miss the opportunity to explore the rather essential internal factors. These internal factors are complex in the same way that BH is a complex state. But, exploring them does help explain, for example, the power of equilibrium, parity, and consensus-related decision-making. For example, Begicevic and Balint mention that technical failure was the reason why BH failed to submit an Application for Revision of the Judgment of July 11, 1996 in the *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (BH v. Yugoslavia)*. This is a missed opportunity to explain that it was the lack of consensus in the tripartite Presidency of BH that led to the agent representing BH before the International Court of Justice failing to receive the appropriate authorization. It could have been an opportunity to explain how and why the equal power ratio during the war was translated into parity and consensus. For example, the institutional setup of the Presidency is based on the principle of parity of three constituent

peoples while the decision-making is based on consensus. It was mainly because of the opposition of the Serb member of the Presidency (who, more often than not, shows political commitment to neighboring Serbia) that this authorization was not received. This example would clearly show the lack of internal recognition of the need for accountability for the mass atrocities that spills over to external accountability. Another example could have been the repeated blocking of the accession of BH to NATO by the Serb member of the Presidency.

#### 4. Others versus the constituent peoples: (In)equality and justified accommodation

I agree with Begicevic and Balint that the participation of constituent peoples permeates all levels of government, driven by the view that ethnic balance, rooted in the distribution of power, is vital to the system's stability. While the constituent peoples are, indeed, tied to specific territories, the constitutional framework assumes that each constituent people is represented across the whole territory of BH. In 2000, the BH Constitutional Court of adopted four partial decisions in which it discussed the compliance of the FBH and RS constitutions. Importantly, in the third partial decision (the so-called Constituent Peoples decision), the Constitutional Court confirmed the principle of the constituent peoples on the whole territory of BH. The Constitutional Court sought to mitigate the ethnoterritorial separation by ruling that labeling Bosniacs and Croats as constituent peoples in the FBH, and Serbs in the RS, violated the principle of collective equality of constituent peoples.<sup>35</sup> The reality, however, is quite different. Ethnoterritorial representation is evident in the legislative and executive branches, influencing decision-making at all levels. Ethnic parity, though not constitutionally mandated, persists even in the BH Constitutional Court as a constitutional custom, ironically the very Court that issued the ruling. This ethnoterritorial aspect is particularly noticeable in several European Court of Human Rights (ECtHR) cases, including *Sejdić and Finci*,<sup>36</sup> *Zornić*,<sup>37</sup> *Pilav*,<sup>38</sup> and *Pudarić*,<sup>39</sup> which Begicevic and Balint mention as a reference, as well as *Šlaku*<sup>40</sup> and, more recently, *Kovačević and others*.<sup>41</sup> BH is a party to the European Convention on Human Rights (ECHR) and its protocols

<sup>35</sup> NEDIM KULENOVIĆ, SUD KAO KREATOR POLITIKA? ULOGA I EFEKTI USTAVNOG SUDA BiH U DEMOKRATSKOJ TRANZICIJI I KONSOLIDACIJI [THE COURT AS A CREATOR OF POLICIES? THE ROLE AND EFFECTS OF THE CONSTITUTIONAL COURT OF BH IN DEMOCRATIC TRANSITION AND CONSOLIDATION] 39–44 (2016).

<sup>36</sup> *Sejdić and Finci v. BH*, App. Nos. 27996/06 and 34836/06 (Dec. 22, 2009), <https://hudoc.echr.coe.int/fre?i=001-96491>.

<sup>37</sup> *Zornić v. BH*, App. No. 3681/06 (Jul. 15, 2014), <https://hudoc.echr.coe.int/?i=001-145566>.

<sup>38</sup> *Pilav v. BH*, App. No. 41939/07 (Jun. 9, 2016), <https://hudoc.echr.coe.int/?i=001-163437>.

<sup>39</sup> *Pudarić v. BH*, App. No. 55799/18 (Oct. 25, 2018), <https://hudoc.echr.coe.int/?i=001-192525>. See further Joseph Marko & Sergiu Constantin, *Against Marginalisation: The Right to Effective Participation*, in HUMAN AND MINORITIES RIGHTS PROTECTION BY MULTIPLE DIVERSITY GOVERNANCE, HISTORY, LAW, IDEOLOGY AND POLITICS IN EUROPEAN PERSPECTIVE 340, 352, 357 (Joseph Marko & Sergiu Constantin eds., 2019).

<sup>40</sup> *Šlaku v. BH*, App. No. 56666/12 (May 26, 2016), <https://hudoc.echr.coe.int/?i=001-163056>.

<sup>41</sup> *Kovačević & Ors. v. Bosnia and Herzegovina*, App. Nos. 41239/19 and 41280/19 (Aug. 29, 2023), <https://hudoc.echr.coe.int/?i=001-226386>.

which apply a priori in BH. Nevertheless, BH has been struggling to implement several decisions of the ECtHR, which clearly shows that not even a priori commitment to international standards can lessen the impact of ethnoterritorial fault lines.

The wider protection of group rights is naturally related to the concept of equality in systems based on federal arrangements burdened with diversity. Theoretically, the individual approach, based on the support of individual and universal rights, expresses distrust towards the concept of collective rights, implying that it lacks equality for all citizens, while the collective approach, based on the recognition of distinct groups, considers the non-recognition of collective rights as discrimination.<sup>42</sup> Constitutional solutions in complex systems must respect both individual and collective rights. However, the protection of individual and group rights becomes more intricate in complex systems, where groups defined by identity differences tend to receive broader institutional and procedural safeguards than “ordinary” groups.<sup>43</sup> This can lead to a risk of disrupting territorial and ethnic balance in BH, potentially challenging the cohesion established by the Dayton Peace Agreement. The issue hinges on the concept of equality, traditionally linked to individuals; but it also needs to encompass groups. Thus, the approach to individual and collective rights in BH is somewhat justifiable.<sup>44</sup> Significantly, despite the constitutional structure being predominantly grounded in ethnoterritorial attributes, the Constitution does not necessitate the explicit participation of constituent peoples or sub-national entities in the amendment process. This is particularly notable given the approach to collective and individual rights in BH.

Seemingly, the application of the ECtHR judgments would only theoretically alleviate the intolerable status quo that arose as a result of the power ratio during the Bosnian War. The ethnoterritorial split cannot be overcome, either by the guarantee of international standards or by the application of judgments of the ECtHR. However, it can be overcome by disrupting the status quo, which does not necessarily mean disrupting the Dayton power relationship, which neither side wants to renounce. This is connected to trust. As long as Serbs and Croats fear Bosniacs’ aspirations for a unitary system of government and as long as Bosniacs perceive federalism as a means of increasing the autonomy of Croats and Serbs, the application of judgments will not have much significance. In such conditions, BH will not become an effective (some would argue for the term functional<sup>45</sup>) system. That has more to do with the internal sources of accountability based on cohesion strategies. The cohesion strategies in traditional federal systems are based on the elimination of identity differences (ethnicity, language, religion, and culture), thus maintaining social uniformity (Germany, United States). This is because articulating diversity in traditional federal theory has always been seen as antithetical to cohesion. Thus, the “problem” was overcome by building a national identity that is associated with the idea of belonging. However, contemporary systems are based on federal principles that are also based on identity differences (such as BH, Belgium, Indonesia,

<sup>42</sup> See Requejo, *supra* note 22.

<sup>43</sup> *Id.*

<sup>44</sup> See SAHADŽIĆ *supra* note 6, at 125–6.

<sup>45</sup> Jens Woelk, *Forced Together, Never Sustainable? Post-Conflict Federalism in BH*, 71 U. KAN. L. REV. 251, 267, 272 (2022).

Iraq, Italy, Canada, Malaysia, Spain, etc.). Although the construction of a common identity would imply cohesion and thus a stable system, internally differentiated groups usually have difficulties accepting a common identity. This is because groups express their distinctiveness by belonging to their own identity, which goes hand in hand with territorial belonging. This makes the individual identity much stronger than the hybrid one.

To achieve a sense of belonging within a diverse system, mutual recognition and respect for different identities are essential. Without acknowledging specific identity values, groups within the system are unlikely to fully embrace it as their own. Appreciating diversity, therefore, can serve as a legitimizing and unifying force. On the other hand, an overemphasis on national identity alone can lead to instability. Interestingly, solidarity often promotes national identification, as it is linked to group dynamics and their appreciation of state-provided services. Solidarity, therefore, becomes a pathway to shared identification. Additionally, cohesion is intertwined with trust, crucial for system consolidation. Trust in institutions, encompassing confidence in various government levels, reduces competition among territorially and identity-distinct groups. In conclusion, forging a common identity should not rely on enforced loyalty or homogenization. Instead, it should be cultivated through principles that bolster social and territorial connections, such as mutual respect, solidarity, and trust. These principles open avenues for enhanced adaptiveness, coordination, and, ultimately, greater cohesion within the system.<sup>46</sup>

## 5. Conclusion

In BH, territory not only implies physical boundaries—it also incorporates a wide array of identity-related elements.<sup>47</sup> It happened that different forces, driven by identity politics, pushed for the protection of their interests through the territory causing differences. Importantly, practical differences are not something characteristic only of BH, nor should they be found worrisome. They exist in the setup of any system based on federal principles and diversity. That is in the nature of their constitutional and political arrangement. For example, unlike the rest of the United Kingdom, a different legal system that applies in Scotland prevents Scottish residents from accessing the Supreme Court of the United Kingdom. Papua in Indonesia applies the traditional *noken* voting system, which has repeatedly called into question the freedom of the election, even though the Indonesian Constitutional Court has decided that it is about the cultural values of the people of Papua. Differences exist even between the component units in the systems we consider models, such as Germany (education), the United States (ecology, capital punishment), or Switzerland (level of local, cantonal, federal, and church taxes). However, whether the differences are theoretical, practical, or both and what causes them depends on the system itself. Overcoming differences is possible. And constitutional reforms, although desirable, are not always necessary, because equalization is possible through structural instruments and mechanisms based on federal principles.

<sup>46</sup> *Id.* at 167–8, 216–26.

<sup>47</sup> J. Macgregor Wise, *Home: Territory and Identity*, 14 *CULTURAL STUD.* 295, 297, 299 (2000).