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**CIVIL STATE AND
CONCEPT OF
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I INTRODUCTORY REMARKS

Wide-ranging support for human rights protection including protection of human rights that fall under the realm of freedom of religion in Bosnia and Herzegovina (BiH) is provided by the *General Framework Agreement for Peace in Bosnia and Herzegovina*.¹ Despite of its outstanding "ceremonial achievements" in the field of human rights protection of individuals, the entire political structure of BiH is based on the principle of exclusive ethnic representation of the three "constituent peoples" which, *de facto*, constitutes efficient disadvantage to functioning of State and Entity institutions, whenever minority of (self) selected feels like obstructing decision-making processes.

It is more than clear that neither individually nor collectively understood "national affiliation" at the BiH political actuality can be exclusively situated in particular part of the BiH territory. The "Bosniakhood", "Croatianhood" and "Serbianhood" cannot be limited to one or just some parts of BiH territory. Presumption of *to be* Bosniak, Croat or Serb does not automatically presume association with specific part of the BiH territory where (used to) live members of that particular ethnicity.

Ethnical, cultural, traditional, habitual as well as other components of complicated BiH social *milieu* is composed of sophisticated net of "Bosnian concord of diversity" so territorial principle taken as a base to form an opinion on somebody's ethnic affiliation has no either theoretical or practical rationalization. Thereby any idea and/or theory of "ethno-cantonisation" or any other "ethno-regionalisation", notwithstanding if it comes from "outside" or "inside", is absolutely incompatible with multiethnic concept of the BiH society and entails latent threat to survival of the State of BiH. Cantonization, of course, might be concept of internal institutional structure of the multi-ethnic state under the condition that it is a civilized state in which any form of diversity cannot be ground for human rights violation whatsoever.

On the other side cantonisation and/or regionalisation based on natural and geographical distinctiveness, as model of "de-entitization" of BiH seems to be the sole constitutional solution for internal state organization of BiH. Denying status of constituent peoples to Bosniaks and Croats in the Republika Srpska and/or to Serbs in the Federation of BiH is both in discord with the BiH Constitution and has no historical justification, as it is well known that BiH was at all times multiethnic society *sui generis* and paradigm of "unity and tolerance".

II CONCEPT OF CONSTITUENT PEOPLES IN THE LIGHT OF THE BIH CONSTITUTION AND DECISION OF THE BIH CONSTITUTIONAL COURT

The very notion "*constitution*" develops from the Latin word "*Constitutio*", meaning "organization", "system", "frame", etc. Accordingly, Latin word "*Constitutus*" means

¹ Signed in USA, Dayton, Ohio, December 15, 1995.

"made", "created". The term "Constituent" might be roughly translated into Bosnian/Croatian/Serbian as "creative" or "the one that creates/makes/does". "Constituent peoples" therefore are those (peoples) that state's social quintessence is composed of.²

The Preamble of the BiH Constitution defines Bosniacs, Croats and Serbs as "constituent peoples" of Bosnia and Herzegovina, while "others" and "citizens" are merely mentioned. It is obvious that individual rights were/are given to three listed BiH ethnic groups, but not to its (individual) citizens.

Normative part of the Federation Constitution (not its Preamble!) contains provision that represents discrimination against Serbs while the Republika Srpska Constitution contains provision that clearly discriminates against Bosniaks and Croats. This unbearable legal situation is *de iure* resolved by the Decision of the Constitutional Court of Bosnia and Herzegovina³, estimated to be historical breakthrough that traditional BiH "togetherness" and "inseparability" underlines and re-affirms.

Why one should use term "re-affirms"? The three BiH peoples were already constituent in all parts of the BiH, so the mentioned Decision, as such, has barely *declaratory effect*, for it confirms and makes public the situation that already existed even before the afore-mentioned Decision was taken. From legal perspective, the Federation Constitution and the BiH Constitution, shaped as result of real-political and practical compromises, by selective approach to concept of constituent peoples, inaugurated official state in which the autochthonous BiH citizens were granted, in some parts of their (own) country, degrading and legally imprecise status of "national minority", "others", "non-constituent". It was an excellent legal path to later processes of political-territorial decomposition of BiH.

If the national homogenization were not explained (and, unfortunately, understood) as sole concept for (biological) survival of the BiH nations, it would not have been necessary to unify something that was, *per se*, unified and single. Therefore, the State of BiH - legally, politically and ethnically torn up - had undergone some sort of artificial institutional reanimation under the patronage of the International Community, and was, just plausibly, re-integrated in a form of bizarre state: one state - two entities - three nations.

"National homogenization will still remain the main obstacle to political and economic reintegration of the BiH society and will be playing significant role in continuing disintegration processes throughout the country while national (ethnic) identity will very likely be almost sole identification model for the BiH citizens".⁴

² Cf. Omer Ibrahimagic, Bosna i Bosnjaci – država i narod koji su trebali nestati, Svjetlost Sarajevo, 1995, article "Nacije nisu konstitutivni već autohtoni element Bosne i Hercegovine", page 71-72. Prof. Ibrahimagic is of the opinion that Bosniaks, Croats and Serbs did not create BiH but BiH was a place where, for few centuries, live those three nations.

³ Constructional Court of Bosnia and Herzegovina, Partial Decision, Case No U 5/98 III, July 1 2000. – "Official Gazette of BiH" No. 23/00)

⁴ Zarije Seizovic, "Human Rights Protection in Bosnia and Herzegovina, within the Framework of the Dayton Peace Accords with Special View to Non-Discrimination Policy", essay written in the course of Summer School "Post-Communist transition and the European Integration Processes", organized

III CONSTITUTIONAL CONCEPT OF PROTECTION OF NATIONAL INTERESTS IN BIH

European human rights standards, including *non-discrimination clause* on any ground are human rights instruments that became binding for judicial and administrative authorities in the Federation of BiH ever since the Federation Constitution entered into force (March 1994). General Framework Agreement for Peace in Bosnia and Herzegovina⁵ had incorporated directly into the Constitution of BiH rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) as well as other 15 international human rights instruments. The BiH Constitution gives to these rights and freedoms "priority over all other (national) laws".⁶

Article 14 of the Convention guarantees that

"The enjoyment of the rights and freedoms set forth in ... (the) Convention shall be secured without discrimination on any ground, such as sex, race, color, language, *religion (...) national* or social *origin, association with national minority...*" (Emphasis added)

The Convention provides protection to individuals not social/religious/ethnic groups as such. Unfortunately, as already stated above, the entire political structure of BiH is based on the principle of exclusive ethnic representation of the three "constituent peoples" only, at the expense of individual's rights. The preamble of the BiH Constitution defines Bosniacs, Croats and Serbs as "constituent peoples" of Bosnia and Herzegovina, while "others" and "citizens" are merely mentioned. It is evident that individual rights are given to three ethnic groups, and not to citizens. The entities' Constitutions ensure that discriminatory concept as such applies throughout the country because Bosniacs and Croats are not considered to be constituent peoples in Republika Srpska, in the same fashion as Serbs are left without that status in the Federation. All three peoples are constituent nations only at the State of Bosnia and Herzegovina. Unfortunately, these rights, therefore, hardly exist at all, as almost all state prerogatives, such as the military, police and the administration of justice, are bestowed in the two Entities. All "others" who do not belong to any of the privileged, constitutionally recognized ethnic groups, are "lost along the road". The principle of "constituent peoples" is

by Istituto per l'Europa Centro-Orientale e Balcanica – International Network Europe and the Balkans and Italian Ministry of Interior in Cervia, Italy, 4-16. September 2000, page 12.

⁵ Colloquially known as "Dayton Peace Accord/s".

⁶ It is known as *hierarchy of norms (legal documents)* which, if looked at from "above", create "chain" that begins with international documents, followed by national Constitution and Laws, Decrees, etc, and ends up with "individual" legal documents (such as, for example, judgements) *In concreto*, in accordance with Article II (2) of the BiH Constitution, as said above, the Convention takes priority over national law. Their provisions have quality of *direct applicability* and are considered to be an integral part of national law. Consequently, all provisions of national law that are not in harmony with the Convention are not legal and are not to be applied.

reinforced in many other provisions of the BiH Constitution, where even an official reference to "others" or "citizens" one cannot come across.⁷

Hence it is clear that members of any of the three distinguishing ethnic groups are protected only as members of collective, ethnic/national characteristics. This concept leaves no place for all those who do not "fit" into the group of either Bosniacs, Croats or Serbs, or who would simply prefer not to belong to any of those groups.⁸

"Nation, being form and essence of the political organizing of the people in a certain society (community) does not look as well known model in the political theory in the countries of " Western Democracies". Particularly, it is completely incompatible (and dangerous!) in the societies composed of two or more national communities"... (So)... "proclaiming democracy while building up society in such manner is a hypocrisy *par excellence*"⁹

On the basis of the above said, it is observable that "principle of constituent peoples" containing exclusive connotation of "non-constituent", *per se*, constitute discriminatory treatment against those who are "non-constituent", and/or others, citizens. As well known, the Convention guarantees the same human rights to all (citizens), which is simply put out of force by concept of constituent peoples. Accordingly, it is necessary to undertake political and constitutional restoration of the human rights protection system in BiH through consequent and systematic review of all provisions of the BiH Constitution as well as Entity/Cantonal Constitution, aiming to affirmation of *civil* as opposed to *national*. It is indispensable to emphasize that it is not a discretionary power of the State of BiH but its international obligation to harmonize its legislation with European standards. Apparently, discussing *civil state* wherein the principle of constituent people is central point of functioning of political system is *contradictio in adjecto*.

IV CONCLUSION

Protection of "national interest" in BiH should assume interest of its all citizens not of particular nation/s. The very idea comes down to establish "Bosnian-Herzegovinian nation". As BiH is far even from that idea, for the time being "national" should presume not less than interest of whole ethnic group but, under no conditions, interest of only some members of that particular ethnic group that reside in one part of the BiH territory.

At the very moment when demagoguery and ideological phrases such as "*we have to stick together to protect ourselves from other/s*" is (hopefully) changed with idea that we are all citizens of one (single) state, and that, solely together, we are able to build up better future for our children, only then we can look forward to reincarnation of BiH as democratic, modern state

⁷ The composition of all "joint institutions" (such as the Parliamentary Assembly, the Presidency, the Council of Ministers, etc.) is set up on the "one state - two entities - three nations" *modus operandi*.

⁸ See International Crisis Group, European vs BiH Human Rights Standards, a Special Publication of the ICG Bosnia Legal Project, Sarajevo, 14 April 2000.

⁹ Zarije Seizović, "Addendum to the Phenomenon of the National Pathology", Hijatus, časopis za društvena pitanja i kulturu demokrat/cije, Zenica, august/ kolovoz 1996, page 51.

founded on the principle of rule of law, a state which would stand by us and help us out as real power that we can lean on when in trouble.

Only fully conscientious that we are all individuals that were not to hide behind "our own" nation, we will be ready to tackle the problem and build up civil society in which all citizens of BiH shall have equal rights and freedoms in every single part of the BiH territory, no matter what nation(ality) they belong to, no matter they are constituent peoples or not.

Summary

It is obvious that by the BiH as well as Entities' Constitutions individual rights are given to three ethnic groups (Bosniaks, Croats and Serbs) and not to its citizens. The entities' Constitutions ensure that discriminatory concept as such applies throughout the country because Bosniacs and Croats are not constituent peoples in Republika Srpska, in the same manner as Serbs are left without that status in the Federation.

The principle of "constituent peoples" is upheld in many provisions of the BiH Constitution, where even an official reference to "others" or "citizens" one cannot come across. The composition of all "joint institutions" is set up on the "one state - two entities - three nations" *modus operandi*.

It is necessary though to undertake political and constitutional restoration of the human rights protection system in BIH through consequent and systematic review of all provisions of the BiH Constitution as well as Entity/Cantonal Constitution, aiming to affirmation of *civil* at the expenses of *national*.

Under the present conditions, it is crystal clear that discussing *civil state* wherein the principle of constituent people is basic premise of political system functioning is *contradictio in adjecto*.

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