

Projection of the Constitution of Bosnia and Herzegovina

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Sarajevo, 01/06/2012

At the request of the *Nasa stranka*, within the frame of activities of the Public Law centre (further in text CJP), I have written the Projection of a new constitutional model for Bosnia and Herzegovina. The Projection is included in this document. The constitutional solutions have been presented as a set of principles which are yet to be concretised. The model was developed in a form of thirteen theses. Actual solutions are presented from the thesis No. 6, while the first five theses define terminological and legal standards.

The theses are related to the aspects selected beforehand: at first, a detailed explanation of generally accepted reasons for creation of a new constitutional model is provided, followed by the description of public-legal standards, which must be applied in Bosnia and Herzegovina, and listing of specific consequences. Further on, it provides description of the model-based approach to the territorial structure of Bosnia and Herzegovina and organisation of the legislative body, followed by the description of principles in organisation of state authority and the description of solutions for the Bosnia and Herzegovina Presidency, and, finally, the description of the organisation of jurisdiction.

The aim of the “Projection” is not to produce the actual text of the constitution, nor to give the specific proposal for the modification of the existing constitutional document. This is an attempt to sensitise the public in Bosnia and Herzegovina in view of the civil society values, rational organisation of the state authority in its territorial and organisational components, and, finally, this is an attempt to point at the constitutional solutions which link the constitutional model with social development towards a prosperous society.

The proposed solutions must be taken as preceding standardisation of the public-legal approach to the constitutional law in Bosnia and Herzegovina. They present a set of fundamental material values of which a elementary social consensus should be established in Bosnia and Herzegovina. The constitution must not present an obstacle to economic development or an impediment in nearing to the ideal of prosperous society, but it must present a framework offering space and providing safe legal environment to the social forces which are able to react to current challenges and lead the political union towards overall wellbeing of its citizens. This model offers such solutions and they are, at the same time, coincided with political position and long-terms goals of the *Nasa stranka*.

The Public Law Centre considers that it is fruitless to lead the debate on constitutional solutions based on the exact or finalised constitutional texts, and that linking of

¹ Abbreviation for Foundation Public Law Centre, in the local language (Fondacija Centar za javno pravo).

constitutional solutions to political decisions of the parties in power is inappropriate. Thus, the content of all thirteen theses must be understood as an invitation to attainment of political consensus on application of generally accepted public-legal standards within the constitutional law of Bosnia and Herzegovina, and as an invitation for the said to become open towards functional, affordable and responsible state which assures social peace and wellbeing of its own citizens.

The Projection of the constitutional model for Bosnia and Herzegovina contains the following rules:

1. A new constitutional model must bring radical turn towards the state of law, republicanism and secular institutionalisation of the state authority. In parallel, it is necessary to profile new politics oriented towards the state and its citizens (Thesis 1).
2. The existing (Dayton) model is incompatible with the standard of a state of law, inefficient and antinomic, legally and timely exhausted; its weaknesses are particularly emphasised in view of political and territorial organisation and the possibility to establish economic growth (Thesis 2).
3. It is not possible for the existing model to be harmonised with the standards of a state of law, standards of republicanism, secularism, economic optimising and rational regionalisation, without the fundamental replacement of the carrying constitutional principles. Its standardisation understands adoption of a new constitution, into which a new model would be projected (Thesis 3).
4. Modelling of a new constitution understands the exact use of the legal terms. Conceptual pairs: complex/single state, federalism/unitarianism and people/nation, must be used with the meaning given to them by the current constitutional law teaching. This encourages the educational function of the constituent process and ensures the access of the constitutional law of Bosnia and Herzegovina to the regional and universal public-legal communication.
5. Regulation of constitutional issues starts from the deregulation of the existing constitutional law. Maintained are the solutions which favour: efficiency of state authority, territorially rational organisation, establishment of the state of law, institutional protection of human rights and balanced federalism. The solutions which ensure dysfunctional, authoritarian state are eliminated: ethnisation of political procedures and public law, obstruction of legislative procedures, constitutional antinomy, territorial separation and temporal exhaustion (Thesis 5).
6. *Territorial organisation* instead of two entities and ten cantons, establish six, highly independent territorial units: *two districts* (Brcko and Sarajevo) and *four federal units* (entities). The entities must be nominated in accordance of ethnic neutrality. The process understands denomination of Republika Srpska and substitution of the name with an ethnically neutral one. This is the key presumption for establishment of the legal order (Thesis 7).
7. *Establishment of the parliament*: establishment of symmetrically federalised, complex state. This understands bicameral parliament, consisting of a house of representatives and house of entities / districts. This is a plain parliamentarian

model of a complex state with one *unitary* body (house of representatives) and one *federal* body (house of entities) (Thesis 7).

8. *Introduction of a pure federal body within the structure of the parliament*: establishment of the house or council of federal units (house of entities and districts) – equal number of representatives from each federal unit is elected into this parliamentary body. The federal units are politically equal here, regardless on their actual economic or population-based power (Thesis 8).
9. *Reorganised distribution of authorities between the entities and the state*: the aim is to strengthen state competencies in the fields which are necessary for the accession to the European integration, assuring individual positions on the level of the state and provision of equal conditions for work. Decree two types of legislative competences: *exclusive* and *comprehensive*. Ensure the dominating role to the house of representatives in the legislative procedure. Ensure the appropriate position to the people's council in relation to regulation of those issues that are under their exclusive authority (Thesis 9).
10. Introduce explicit *collision standard* to the constitutional text, unambiguously defining the domination of the state law in all legal collisions between the entities and the state (Thesis 10).
11. Ensure protection of *vital interests of the constitutive peoples and others* through: a) precise constitutional definition of the issues which could become the subject of protection during a vital interest procedure; b) protection on the level of clubs of constitutive peoples and others; c) regulating a simple and practicable procedure for protection of collective rights before the constitutional court (Thesis 11);
12. *The president of the state*: solitary body to be elected indirectly (in parliamentary bodies), at the proposal from the clubs of delegates, or at the proposal of a certain number of representatives. Ensure qualified majority from the house of representatives and simple majority at the council of entities. The goal is to: provide broad consensus on the elected president. The selection involves a list of candidate, with no ethnic determinants, which provides the passive electoral rights to all citizens of Bosnia and Herzegovina. The authorities are narrowed to *integrative, representative* and *executive* functions: presentation of the state in international relations, signing of international contracts in terms of ratification, awarding awards and orders of the state, amnesty and commanding authority (Thesis 12).
13. *Judiciary*: uniform organisation of the courts in the entities, establishment of qualified courts for individual legal fields, establishment of one supreme court of Bosnia and Herzegovina and one constitutional court of Bosnia and Herzegovina (Thesis 13).

THESIS 1

Projection of a new constitutional model – reasons?

Summary

§ 1. After the war, the BH society has not used chances for the reform of the constitutional law, as a chance for *civilisation* of one model of government and model of organisation of state authority. Civilisation means elimination of political and mental barriers in development towards a prosperous society, through use of advantages of the constitutional law. The constitutional law must be placed in a narrow, real connection with growing of the multi-national European Union in *sui generis*-statehood, and in connection with the growing of a worldwide community into the community of rights.

§ 2. The process of using the constitutional law to bring Bosnia and Herzegovina to public-legal standards requires establishment of legal basis for establishment of social and psychological ability, *self-control* of the political parties and *elimination* of unconstitutional policies. This is about creation of general juridical presumptions to take the last step towards the accession to the European integrations, and thereby the standardisation in use of the state authority, which civilises the authority in general.

§ 3. The first step in civilising must be the turning point towards establishment of a *state of law*, *radical republicanism* and *secular institutions* of the state. This understands the following elements: institutional assurances that the human rights will not be violated by the constitutional law, constitutionally and legally assuring the justice in the form of effective annulling of ethnical cleansing and war crimes, and establishment of institutional neutrality in religious and ethnical issues.

§ 4. The second step in the civilisation must be radical *reshaping of the political operations*. Political fragmentation is a consequence of the constitutional and legal fragmentation of the state. Political parties are oriented towards the entities and the population of the entities – creation of presumptions for development of overall state politics understands the constitutional frame which links the political success to the state as a whole. Identification of political parties on the state level requires civilisation of the political culture, equal to the ability and will of citizens, political elites and mass media, to produce and reproduce the state will. The constitutional and legal fragmentation of the political space, state territory and economy must be removed to unblock the potentials for creation of the state politics.

THESIS 2

Projection of the new constitutional model – weaknesses of the existing model

Legal weaknesses

§ 5. The existing constitutional model is incompatible in the legal sense with the standard of a state of law, it is ineffective and antinomic. Removal of each of the listed disadvantages requires establishment of the new constitutional order.

§ 6. *Legal statehood* understands material justice and rule of rational laws: material protection of human rights (unquestioningly) and precise distribution of authority. Distribution of authority: (a) on the top of the *judicial branch* there should be professional and politically independent judiciary with one supreme court, for the issues of cassation jurisdiction and one constitutional court, for the issues of appellate jurisdiction; (b) at the top of the legislative power, there should be a procedurally identified legislator, who fully or in its most part, represents abstract citizens/subjects of Bosnia and Herzegovina and brings laws on their behalf; *administrative authority* must be organised in such a way to execute laws and services the needs of the citizens, and not to be a financial burden and obstacle in implementation of the laws, and not to function as an extended arm of the ethnically profiled politics. None of the conditions is fulfilled in the existing organisation:

- (a) The Constitution permanently violates human rights, at least within the standard of protection under the European Convention on Human Rights in view of passive electoral rights of persons who do not declare themselves as members of the “constitutive peoples”,
- (b) The constitution invalidates the position of abstract citizens under the legislative procedures, by protecting collective values (“constitutive peoples) and establishes legislative procedures as irrational compromises on ethnically profiled interests;
- (c) The state administration is huge, expensive and burdened with ethno-political dependency on entity authorities.

§ 7. *Efficiency* understands state authority which quickly and actually reacts to social needs through legislative procedures. This condition is not fulfilled due to *entity-based voting* and legislative veto in the procedure of protecting the *vital national interest*. Together, they prevent efficient legislation. On top of it, there is a massive bureaucratic apparatus and unprofessional legal departments. Entity structure and organisation of entities also bring barriers in the legislative procedures. State competences are challenged and the work of legislative commissions on the state level is blocked.

§ 8. The constitutional solution, in accordance with the model of international contracting (framework peace accord + one of its annexes), establish social and legal antinomies. This means that opposite positions with equal legal power can be drawn from the same constitutional basis (text, constellation, regulation): they mutually exclude themselves, but they are constitutional. Characteristic ones can be seen in:

- (a) relation between propagation of the legal state in form of protecting human rights and equality before the law and continued constitutional violation of non-discrimination rule based on ethnical affiliation;
- (b) relationship between the guaranteed procedural democracy (one man one vote) and ethnically dominant decision making (one people one vote);
- (c) the relationship between the legal state which is antiauthoritarian and affirms the people of the state as the bearer of the authority, and ethnic-authoritarian pillars of the statehood, which affirm cultural-lingual-biological people as the bearer of the authority;

(d) relationship between a complex state, as seen by the text of the Constitution and the union of states, as it is indirectly constituted by the organisational part of the Constitution and the entity competences;

(e) relationship between the material justice (as defined by the Annex 4 – Constitution, Annex 6 – Agreement on Human Rights and Annex 7 – Agreement on Refugees and Displaced Persons) and material injustice which is protected by the territorial structure and distribution of competences.

§ 9. The constitutional model is *legally* exhausted. No political consensus on elementary premise of the organised state authority can be made on its basis: on one supreme court, on budget, on the set of reform laws for the accession to EU integrations, on election and monitoring of the work of the judges.

§ 10. The constitutional model is *timewise* exhausted, because the subject of the contract has been exhausted: establishment of peace. It is unsuitable for the progress towards the prosperous society in a temporal dimension, because it encourages fragmentation of legal spaces and mental blockade in political action. Development of the state on its premises, brings a time loss which can hardly be made up for.

§ 11. The constitutional model is politically exhausted because it does not assure the affirmation of the politics that lead to civilisation of the government and the use of state authority (§§ 2 i 4).

Weaknesses of political and territorial organisation

§ 12. The constitutional model of political and territorial organisation is not in accordance with the regional and geographic structure of Bosnia and Herzegovina. The lines of demarcation are the result of political compromise to end the war. They have legally ensured dissolution of the physiognomic system of Bosnia and Herzegovina, geographic wholeness, geographic structure, self-sustainable nodal and functional regions, subregions and areas, and transformed them into unsustainable and expensive functional units. Cantonal organisation of the Federation of Bosnia and Herzegovina has additionally strengthened the negative impact on the processes of territorial dissolution and destruction of subregional units.

§ 13. Federal units of Bosnia and Herzegovina must be established in accordance with the recognised principles and methods of regionalisation. Methodological concept of EU regional policy must be the main criterion for definition of federal units. The integration process of self-sustainable regions is used, where they gather into large regional cross-border systems of certain functional purpose – NUTS (Nomenclature of Units for Territorial Statistics). Geographic regions must be defined based on several variables: complexity of natural units, nodal functions of cities which have direct impact on their environment, natural landscape, cultural landscape, economic units which, again, include nodal and functional regions.

§ 14. The criterion for establishment of federal units is in functional divisions in accordance with the following factors: complex geographic regionalisation, concept of EU regionalisation, self-sustainable concept of regions and integration of the future

NUTS regions within the neighbouring compatible regions. In this regards, as a rough profile, we can start from the following federal units:

- (a) *western Bosnia or Banja Luka macro-region*: regions of Banja Luka, Bihac, Drvar, Jajce and Prijedor;
- (b) *eastern Bosnia or Tuzla macro-region*: regions of Brcko, Tuzla and Zvornik;
- (c) *central Bosnia or Sarajevo-Zenica macro-region*: regions of Bugojno, Doboj, Gorazde, Livno, Sarajevo, Sokolac, Travnik, Visoko and Zenica;
- (d) *Herzegovina or Mostar macro-region*: regions of Capljina, Konjic, Mostar and Trebinje.

Such regionalisation responds to the nodal and functional reorganisation: Bosnian-Kraina or Banja Luka region, north-eastern Bosnia or Tuzla region, central Bosnia or Sarajevo region and Herzegovina or Mostar region.

§ 15. Territorial structure of the federal units must be defined by geography, economy and ethnography and system science experts. Ethnical criterions must be taken into consideration. They must not be used for exclusion of physiognomic and other entreties, which are established by the relief structure, river basins and roads.

Economic weaknesses

§ 16. Origin of economic problems lies in close connection with the Dayton constitutional model. Entity line of demarcation has assured management of economic resources through two territorially detached systems and, within the Federation of Bosnia and Herzegovina, in a number of detached management systems. Such constitutional model destroyed economic consistency of earlier established regions. Essential economic indicators for Bosnia and Herzegovina as a whole, and the two entities separately, show that the post-war results are inferior to the majority of the transition countries which did not have artificial partition of their regions. The essential economic indicators include GDP *per capita*, budgetary consumption, unemployment rates, emigration of population, structure of economy, relation between export and import. Besides the significant assistance from the international community, these indicators are noticeably inferior to other transition countries.

§ 17. There is a common correlation of constitutional organisation, entity establishment, uncoordinated management structures, which are in common relation of competition with the standstill in economic development. Changed constitutional framework would change the conditions of earning. This would amortise the real dangers: poor competitory position of companies and inner desintegration of the economic space.

THESIS 3

A new constitution

§ 18. The existing model can not be synchronised with the requirements of the public-legal standardisation (civilisation), regionalisation and economic optimising. Each intervention in the Annex 4, in accordance with the given requirements, understands cancellation of its bearing principles and structural elements, i.e. establishment of a new constitutional model.

§ 19. It is necessary to bring a new constitution: at the beginning, a model solutions of tentative type can be offered. They must be related to the organisational part (territorial structure and organisation of the state authority). Modelling of the exact solutions for the territorial organisation, distribution of authority between the state and federal units, and defining the authorities of the state bodies, must be processed with the professional engagement of geographers, economists and jurists from the branch (courts, state administration).

THESIS 4

Terminology

§ 20. Universal legal communication understands the use of universally accepted legal terminology. They give an exact description of state / constitutional phenomenon, and ensure their universal meaning. In public law, it *is not possible* to communicate, or to transfer meaningful messages without the legal terminology with clear semantic coverage. They are used for definition of state models and the establishment of the legal standards. Such terminology are taken as standards describing real constitutional and legal models / types. In the world, legal communication, they must be used responsibly, because rights and obligations result from their use.

§ 21. Political talk on constitutional law does not use legal terminology in semantically correct constructions: legal and social facts are wrongly described by terminology, and they are attributed with negative or positive content, which they, otherwise, do not have. The following terminological pairs are significant for the reform of the constitutional law of Bosnia and Herzegovina: *federalism and Unitarianism, complex and single state, people and nation*.

Federalism / Unitarianism

§ 22. They present *political* principles of social organisation and show the way how to articulate / form *political* will. The conceptual pair understands territorial and political elements and describes a type of political processes which ensure rational coexistence of several hierarchy-based centres. In such was, the Unitarianism is a characteristic of German *federal statehood, confederation* of Swiss *federal statehood*, and on the other hand, *federalism* is a characteristic of Spanish *single state* and an element of *supranational* European Union. The federalism is complementary to federal and complex state, but it is not a synonym for a federal state. We must differ political from constitutional and legal

concept; the first one does not constitute rights and does not create obligations, while the rights and obligations are drawn from the second one.

Complex / single state

§ 23. They represent legal (constitutional and legal) concepts describing the structure of a state established by an actual constitution. Complex states understand parallel existence of two bearers of state authority: *mutual state*, which includes a state as a subject in international relations, and parallel existence of *particular* state authorities, i.e. several territorially independent units which perform the state functions as their own authority. In a singular state, territorial units do not take over state functions as their own authority, but they perform them each time on behalf of the state.

§ 24. The most known type of a complex state is the *federal state*. It is characterised by twofold statehood: the federal state and the members of the federal state are states. Only a federal state is a subject of the international law in full capacity. Member states can own partial international subjectivity. The statehood of the member states is established by the federal constitution; member states dispose with incomplete statehood; proportion and type of their statehood is defined by constitutional or state law.

§ 25. Bosnia and Herzegovina is a complex state (because the constitution establishes highly independent territorial units with own state and quasi-state authorities), but it is not a federal state (because it is not established as such by the constitutional law, and the entities are not constituted as states by the Constitution). It is a complex state of federal type in which the unitary elements are distinguishable in very narrow sphere of authority. In this way, the type of Bosnia and Herzegovina's federalism, points out the domination of confederal elements.

§ 26. Equalisation of federalism with federal state is incorrect, in the same way as when attributing authoritarian connotation to the Unitarianism. Federal and Unitarian tendencies are met in all complex and single states. They are defined in accordance with the exact elements, such as: electoral right and practical policies, system of parliamentary decision-making, distribution of authorities between the state and federal units, and organisation of the state administration and judiciary.

People / nation

§ 27. In the public-legal sense, the people is a cultural / biological union of humans: a community of language, simulated origin, consciousness on mutual destiny, community of culture, religion and a heap of elements which influence self-understanding of one collective as a separate community. In this sense, the following terms are used as synonyms: culturally-biological concept of a people; cultural nation, ethnos. This concept of the people considers international law in the sense of understanding the rights of the people to self-determination (e.g. from both Articles 1, from the both Human Rights Pact (1966 / 1976)). The Dayton Peace Accord speaks exclusively of the "peoples", in other words on "constitutive peoples". The definition of vital interest, from Annex 4, does not mention "*national interest*", but specifically, vital interests of individual peoples: "*in terms of vital interest of Bosniak, Croat, or Serb people*"(Article IV/3 e).

§ 28. In the public-legal sense, the nation is a community of laws / state union: union of citizens, or a state itself as a sum of its citizens. In this sense, the following terms are used as synonyms: state people, state nation, political nation, demos. This concept has in mind the Organisation of United Nations, public-legal terminology on international level and legal terminology of the "western state-legal tradition" (e.g. national gross revenue, national currency, national economy, etc.). Within the constitutional law of Bosnia and Herzegovina, nation marks a sum of citizens of Bosnia and Herzegovina. Interpreters of the constitutional law (constitutional courts and administration) do not differ people and nation, but use both concepts as synonyms.

Use of terms

§ 29. Further in text, we will use the terminology in the sense of universal legal standards and the world communication practice: for the purpose of modelling the constitutional solutions, we use the afore-given terms in their standard meaning (as presented in §§ 22-27).

THESIS 5

Regulation of constitutional issues through deregulation of the existing constitutional law

Rules

§ 30. The following weaknesses are being eliminated:

- maintaining the the solutions which favour: *efficiency* of state authority, *territorially* rational organisation, establishment of the *legal-state* elements, institutional protection of *human rights* and balanced *federalism*.
- eliminating the solutions which nominate weaknesses: ethnisation of political procedures and public law, obstruction of legislative procedures, constitutional antinomy and territorial separation, temporal exhaustion.

In this sense, the new constitution must preserve and include the following:

- solutions which ensure the legal state (dominance of the civic principle in procedural issues of the legislation, complete vertical distribution of power with completed judicial system, effective protection of human rights and controlled state administration within the system of detached authority);
- solutions which establish rational territorial organisation;
- solutions which provide unity within a complex state, through balancing of federal and Unitarian elements;
- solution which provides for material justice (cushioning the consequences of war crimes and ethnic cleansing).

Framework

§ 31. Framework elements of the new constitution are included in the following aspects:

- territorial organisation;
- organisation of state authority; Presidency of Bosnia and Herzegovina; Parliament of Bosnia and Herzegovina;
- organisation of judiciary will be self-positioned on the level of the constitutional principles;

The optimal model of *territorial organisation* will be first presented supported on §§ 12-17.

The position on ethnic nomination of the entities will then be taken.

At the end, the principles and specific rules on the new model of organisation of the legislative power and the Presidency of Bosnia and Herzegovina will be presented.

The word *entity* is used for the federal units. The concept does not denote the current form of the entities, but highly independent territorial units, for which name and exact territory are yet to be found.

THESIS 6

Territorial organisation

Territorial organisation; four entities and two districts

§ 32. In territorial sense, the state will be composed of *six* highly independent territorial and political units – *entities*. Out of those, two will be organised as districts, and four as entities. The two entities would predominantly include the area of current Republika Srpska, and the other two, predominantly the area of the current Federation. One of the districts would cover the territory of the current Brcko District, while the other would be established for the territory of the City of Sarajevo, including the pre-war municipalities from the City of Sarajevo's territory:

2 districts: Brcko and Sarajevo;

4 federal units – entities.

§ 33. Such concept understands *making Republika Srpska more complex and federalising it and integration, i.e. Unitarianising the Federation of Bosnia and Herzegovina*. The exact look and surface area of the entities must be defined by using the criteria listed in §§ 12–15; simply said: except the two districts, we are talking about the western-Bosnia, eastern-Bosnia, eastern-Herzegovina and western-Herzegovina entities. The advantages of the new territorial organisation are the following: recognition of optimal requirements of political and territorial organisation and levelling of ethnical with functional and geographic criteria.

§ 34. *Sarajevo District:* by assuming the format of the district, Sarajevo comes forward to the following:

- advantages which accompanied functioning and economic status of the Brcko District;
- the need for the capital to be profiled as a place all citizens can identify with;
- return of the territories and population which fully corresponds to the singularly administrative area by nodal and geographic presumptions.

§ 35. The state will retain the republican format (body which represents the state in the international affairs is elected), and its complex structure with balanced federal and Unitarian elements. In view of execution of power, the state will be complex, but not constructed as a federal state. The federal units will not have the character of states, the constitution will organise them as autonomous communities, which will regulated their own authorities by constitutions and statutes. There is no citizenship of the entities / federal units..

Therefore, through the project of the new constitution, Bosnia and Herzegovina is:

- (a) *according to the bearer of the state authority:* democracy = the authority rests lies on the concept of a modern Bosnia-Herzegovina's nation, and it is derived from the abstract citizen;
- (b) *according to the mode in which the state summit is organised:* republic = elected / elective solitary and collegial bodies which represent the state abroad;
- (c) *according to the internal structure:* complex state = consisting of more highly independent territorial and political units, which are not states; standardisation of complex statehood in relation to federalism/Unitarianism will be implemented through establishment of practice and by evaluation of political movements, criteria of the type of legislation and administrative authority.

Nomination of entities

§ 36. *Rule:* names of the entities must be ethnically neutral, to avoid association of the nomination of entities with domination of one of the Bosnia-Herzegovina's peoples, as a desired constitutional condition (the constitutional goal).

§ 37. The initial decision on establishment of a complex state structure, by the Washington Agreement can be relevant for nomination of entities: the cantons will be named after the administrative centres of cities, or in based on geographic characteristics. The original text starts from the subsequent solution for the status of territories with the majority Serb population: by this, the requirement of ethnically neutral nomination is not touched. It was relevant for the nomination of entities, too. Ethnicity-based nomination of the entities is inappropriate for the protection of collective rights of the peoples, because there are more practical and efficient constitutional, mechanisms (e.g. protection of the vital people's interest in the form of legislative veto, which leads to obstacles to the parliamentary procedure).

§ 38. *Negative example* of ethnic nomination is the Republika Srpska. Such nomination is legally counterproductive because of the following:

- it establishes a public-legal relation between the state institutions and Serb people, by signalling the rule on behalf of Serbs, in order to legally and politically dispossesses or completely repress the non-Serb element;
- understands that one entity belongs to Serbs as a group, i.e. understands the intention for the entity territory to be institutionally preserved as the ownership of Serbs;
- establishes the entity within the institution for achievement of Serb hegemonial goals,
- establishes the legal framework for practical policies which imitate the decisions of the Constitutional Court and produce political truths which falsify true events, legal and political facts;
- encourages privileging the Serb people, its domination within the structures of power, homogenisation and segregation based on ethnic affiliation;
- offers strong formal support to social psychology which considers ethnical domination to be legitimate result of the ethnical cleansing and national homogenisation;
- provides for political manipulation with the state continuity, by balancing illegal creation which consolidates *de facto* the regime Republika Srpska, and the *Dayton entity* Republika Srpska;
- produces competing nationalisms, directs nationalistic policies of Bosniaks and Croats towards encircling of own territory, and encourages silent ethnical cleansing;
- prevents non-Serb population to identify themselves with the values of the entity organisation, and decomposes the premise of patriotism, oriented towards the constitutional loyalty.

§ 39. Any attempt for permanent and effective de-entitising of the existing constitutional solution, must start with the *denomination* of the smaller entity. Changing of the name Republika Srpska with an ethnically neutral name, is a key presumption for establishment of a needed legal order: this would eliminate the term which, in the memory of the absolute majority of Bosnia and Herzegovina's citizens, associates to the war and suffering, terminologically it would differentiate the Dayton's (constitutional) entity of the pre-Dayton's (non-constitutional) de-facto-regime, it would open the possibility for the non-Serb population to identify with the *constitutional* entity, which they would not perceive as a factual evil, phenomenon of loyalty would gain new contents, disintegrative effect of the nationalistic policies, leaning exactly on the entity organisation, would be amortised. Denomination of this entity would, in the long-term, present the real contribution to the requirements of the Constitutional Court of Bosnia and Herzegovina, from the Third Partial Decision U-5/98, which prohibits any discrimination within the structures of power, i.e. creation of privileges for one or two constitutive peoples.

Organisation of state authority

Plain model for a complex state

§ 40. In complex states, the organisation of the state authority is modelled by establishment of one representative body in the parliament, where the said *represents the state as a whole*, and one representative body which *represents the federal units*, members of the complex state. Therefore, in typical constellation, the state parliament consists of a representative body of *citizens* and a body which represents the *federal units*. The state authority is doubly legitimised: through direct election of representatives of all citizens and the election of representatives of federal units.

§ 41. Therefore, the new model understands the *bicameral parliament*: home / council of representatives (the first parliamentary body) and home / council of entities.

The first body is being elected on the whole territory, following the rule: one person, one vote, and it represents the nation as a whole. Its authorities also include classic legislation.

The second body represents federal units and it is being elected in a way that the federal units send the same number of representatives, regardless of their real size and power (number of inhabitants, structure of economy), to ensure equality of federal units in legislative procedures. The representatives of this council / home, can be elected either directly (one person one vote in each entity) or indirectly (political / parliamentary bodies elect representatives from their own structure, based on the existing parliamentary majorities). The decision on the elective model depends on the authorities this council / home has within the constitutional system (therefore, from its exact significance). Its primary authority includes participation in legislative scope, for issues defined in advance, i.e. for the issues which touch on specific interest, or are of specific interest for the entities.

Such model embodies *symmetric or typical federation*, i.e. pure parliamentary model of a complex state. The home/council of representatives is an *Unitarian* body; home/council of entities is a *federal* body.

§ 42. The Dayton's model is an asymmetric solution on a threefold basis:

- (a) One because the structure of the complex state includes one simple / Unitarian and one complex / federal entity. Different solutions are applied here to the analogue entity situations.
- (b) Two, because the complex state and the type of federalism which is immanent, are not in function of facilitating legislative procedures and bringing the state closer to the interests of the citizens living in the entities, but is in the function of aggravation of legislative procedures and coming forward to the interests (of the constitutive) peoples. Practical policies are referred exclusively to entities and mastering the entity-based political space.
- (c) Three, because the model of legitimisation of the state authority leans on falsification of the political representation: on the state level, in federal bodies, including the Constitutional Court, the representatives of the Republika Srpska area always presenting themselves as the representatives of Serbs, and representatives of the Federation of Bosnia and Herzegovina are in the role of

representatives of Croats and Bosniaks. The identification falsification is seen in the fact that the non-Serbs in Republika Srpska will every time be presented as Serbs and the Serb policy will always be maintained on their behalf, and vice versa, Serbs and others will not be represented in the Federation of Bosnia and Herzegovina and political decisions will not be brought in their name.

§ 43. Such form of a complex state hardens, or fully prevents functioning of the state bodies. The reasons for this are the following:

- (a) ethnic presentation is related to the territorial units;
- (b) connection between peoples and territories is ensured within the legislative procedure of the Parliamentary Assembly, in the form of entity voting, as well (indirectly);
- (c) the House of Peoples is not an expression of a complex / federal organisation of the state, but an additional mechanism for protection of ethnic interests of the constitutive peoples;
- (d) its real function is not to ensure efficient, optimal and successful legislative procedure, but it is reduced to being an additional mechanism to block the legislative procedures in the sense of ensuring feigned ethnical interests (constitutive peoples).

§ 44. The new model must establish *symmetrically federalised complex state* by balancing the complex structure of the state by solving three aspects as follows:

- (a) position of the entities in the system of parallel decision-making and the position of parliamentary bodies (councils / houses) in view of distributing the authorities between the state and the entities;
- (b) defining the authorities of the house / council of entities in the legislative procedure and in other procedures for the election of constitutive bodies (e.g. judges of the constitutional courts, judges of the supreme courts, etc.);
- (c) positioning of the constitutive peoples and non-constitutive Others in the legislative procedures.

THESIS 8

House / council of entities

Rule

§ 45. The first step is to introduce pure parliamentary bodies for the articulation of federal / complex organisation of the state.

Instead of the existing House of Peoples, it is necessary to insist on establishment of *houses or councils of entities* (federal units). Such a project understands the following:

- modification of the current territorial organisation;
- establishment of two or more entities in the area of the current Republika Srpska;

- simplification of the territorial organisation of the Federation of Bosnia and Herzegovina by establishing two or more entities.

The new territorial organisation makes sense if there are institutions on the level of the state in which the *entities* can be politically articulated.

§ 46. *Conclusion: The house / council of entities must be established instead of the existing House of Peoples of the Parliamentary Assembly. Structure (number of representatives) and authorities (legislative, administrative and judicial) are defined by the constitution, but in a way that all entities are fully equal, regardless of the differences in their size and real population-based or economic power.*

THESIS 9

Distribution of authorities

Between the entities and state – recomposing the distribution of authorities

§ 47. Complete recomposing of authorities is necessary for the purpose of the overall *strengthening* of the state. This would assist the following:

- (a) speeding up the accession to European integrations;
- (b) ensuring equal conditions on the single market of Bosnia and Herzegovina;
- (c) efficient work of legislative bodies and state administration;
- (d) equal positioning of all citizens in political and legal system.

§ 48. Legislative authorities are typically regulated in a complex state as exclusive, competitive and broad legislative authorities.

- (a) *Exclusive* authority defines that a certain area/matter can be regulated only by state or entities;
- (b) *Competitive* authority defines that one level of government is authorised to regulate one area/matter, until another level of authority does not decide to regulate the same matter;
- (c) *Broad* authority means that one level of government (state) regulates matter which is common to all levels of the government (state and entities). In this case, the state regulates the basic principles and rules, leaving to the lower levels of authority (entities) regulation of those areas that are conclusively regulated by them (compliance with the given frameworks) in accordance with own needs.

§ 49. Legislative authorities need to be organised by having exact authorities partially specified again, and incorporating the existing decisions of the Constitutional Court in them, in the other part. Matter regulated by state and entities needs to be exactly defined afterwards.

The following rules should be applied as principles:

- (a) Complete ablation of *competitive* authorities and its reduction to an insignificant amount, in order to avoid conflicts;

- (b) Within the framework of the *exclusive* authorities, the state should be ensured with the regulation of large legal areas which are necessary for functioning of the civic trade, maintenance of the state sovereignty and international subjectivity, for the unique protection of human rights and guaranty of the membership in the European integrations;
- (c) It is necessary to include in the *broad* authorities those areas which, in minimum standard, must be regulated singularly, but the entities must be acknowledged that, in accordance with their own specificities, they can also regulated the same area. The area of education, social protection, media and media companies, organisation of state administration, elements of administrative proceedings, executive actions could be considered in this segment.

§ 50. Distribution of authorities must be positioned in the spheres of *state administration and judiciary* in a way to accommodate the standards developed in functional, complex states: organisation of entity administration must be given up to the entities, administrative proceedings and material administrative law should be regulated as a broad authority, organisation of legislative would, on the level of the state, enter into the area of the exclusive authority of the state, and the entity legislation would have to be regulated by the broad authorities.

Between the two parliamentary bodies (houses/councils)

§ 51. The two houses/councils are not equal in the legislative procedure, or in the procedure of electing the constitutional bodies. Focus of the legislative activity is in the house/council of representatives. The house/council of entities *participates* in the legislative procedures only in those areas in which the entities can have legitimate interests. These are the areas that belong to the exclusive legislative authority of the entities, or the broad authority.

§ 52. The house/council of entities gives agreement to a certain round of the law, i.e. it is an equal body in the legislative procedure. Its decisions can have the force of a legislative veto and can lead before the constitutional court.

§ 53. The majority of laws are brought in the house/council of representatives. The agreement of the house/council of entities will be required for those laws which touch on or indirectly grasp the areas which are, in accordance with the legislative competences (usp. § 49) included in the exclusive authority of the entities or are regulated in accordance with the rules of the broad authority.

§ 54. The house/council of entities participates in the following procedures within the legislative procedure:

- (a) legislative initiatives also in the areas of administrative decision-making;
- (b) in the areas of legislation;
- (c) in the areas which are related to the authority over the accession to the European integrations.

§ 55. During the procedure of law enactment, the house/council of entities has the right of legislative initiative and can, at any time, initiate a law enactment procedure for the area

of its competence. In the field of state authority (executive) the house/council of peoples will have to have the authority to issue agreements to all acts which the government will bring to implement the state laws, through entity administration and services.

§ 56. In the field of legislative, the house/council of peoples will be authorised to elect a certain number, a half of the required at most, of the constitutional court judges, and eventually the supreme court judges. In this way, the balance between the house/council of the peoples and the house/council of representatives will be ensured.

The house/council of peoples must be guaranteed the possibility to verify the constitutionality of the laws and the decisions before the constitutional court, in the form of abstract control of the standards, procedures related to dispute between bodies, procedure of interdicting the work of political parties, etc.

§ 57. The constitution must ensure that the house/council of entities gives the agreement to the decision of all state laws which regulate the matters coming from the exclusive authority of the entities. This agreement must be outlined as a compensational reaction to the eventual loss of the regulative areas on the path towards the European integrations, and it must be open for review before the constitutional court.

THESIS 10

Collision standard

§ 58. The new distribution of competences between the state and entities, does not exclude reciprocal collisions of the entity and state law, i.e. disputes of entity and state bodies related to the application of exact regulations. The new model must include the collision rule (*collision standard*), which will unambiguously stipulate the domination of the state, over entity law: in the event of incongruity of entity and state regulations, the state law will have the precedence. In the relation of hierarchy of legal standards, this means that each standard of the state law, by its rank, is superior to any standard of the entity law, and, in the event of collision, the entity law will each time be automatically null and void.

§ 59. Based on this, each state regulation (including laws and decrees) would exclude (null and void) entity regulations (therefore the entity constitutional law), which would be in conflict with it. This would remove the legal void existing in the current model, and would ensure unique implementation of the law, together with the synchronised legal establishment.

THESIS 11

Constitutive peoples and Others

Protection of collective rights: vital interest of constitutive peoples and Others

§ 60. Introducing the constitutive peoples in the category of the constitutional law brought to the permanent violation of human rights and establishment of constitutional

mechanisms for obstruction of the legislative procedure. Considering the fact that these are related to the delicate status of community, which is treated also as a self-explanatory vested right, the new model must take it into consideration and establish mechanism for their political articulation and legal protection. In parallel, it is necessary to resolve the status of Others, who must be made equal in the legal status with the constitutive peoples.

Definition of vital interest

§ 61. The new constitution must define the content of a vital interest as precise as possible. In doing so, it must be insisted to avoid the nomination "national interest" - for the reason of public-legal connotations of the term itself (usp § 26-27). The term "national vital interest" understands the violation of a state interest; the term "vital interest" understands the violation of an interest of the constitutive peoples and Others, i.e. the interest that is within their collective identity, legal and political status. It is necessary to provide a precise definition due to difficulties the constitutional court has had in its practice so far (when determining the content of this concept), as well as for the purpose of excluding, beforehand, the possibility of manipulation with this constitutional institute – arbitrary introduction of most diversified aspects of social life into the concept of vital interest is being excluded.

§ 62. The concept should not include anything more than the elements defined by the cultural and biological concept of the people (usp. § 26). By its content, it must not be identical to the rights of national majorities, and it must be described in a way to provide for the group of Others to refer to its implementation in all elements which affect the status of the Others, and which do not make a part of the concept of national minority.

Significance and solution

§ 63. The vital interest must remain as a constitutional category which, in the procedures of the legislative bodies, takes on the function of the legislative veto, and in the event of obstructing the legislative procedure, leads before the constitutional court. They are the reason of collective frustrations, buried in the political "memory" of the Bosnia and Herzegovina's institutions.

Considering the symmetrically federalised complex state, the protection of vital interest can not have the same institutional base in the new territorial organisation, as it was in the Dayton's system. The entities in the new model are not exclusively ethnical territories and exclusively ethnical identification basis.

§ 64. In this system, the vital interests would be protected as follows:

- (a) at the level of *clubs of constitutive peoples and Others*, in the same way in both houses;
- (b) by introduction of quotas in the house/council of entities;
- (c) by the constitutional assurance of practicable procedure before the constitutional court for the protection of collective rights.

The advantage of this model is disburdening of the legislative procedures from the weight of nationalistic discussions, clearer articulation of local (entity interests), and out-of-entity

protection of collective rights and equal positioning of the constitutive peoples and un-constitutive Others at the level of the state.

THESIS 12

Presidency of Bosnia and Herzegovina

Preliminary issues

§ 65. The principal question: is a stronger identification of the presidency, through direct elections (in terms of *direct* identification), or a weaker identification of the presidency through indirect elections, by interference of one or two parliamentary houses (in terms of *indirect* identification), needed.

The countries of direct identification, in which the president competes with the government and parliament (because, he/she is in the same identification rank, being elected at the general elections) are the following: France, Portugal, Finland, Austria, Ireland, Poland, Romania, Lithuania, Slovenia, and Bulgaria.

The countries of indirect identification are: Germany, Italy, Greece, Czech Republic, Estonia, Albania and Turkey.

It must be stated that the indirect election of the president does not automatically draws weak political position of the head of the state - this can be seen from the position of the president in Italy and Czech Republic.

§ 66. Typical function of the president of the state, relevant for the Bosnia and Herzegovina's presidency, are the following:

- function of *integration* (resulting from its positioning above the three state authorities);
- function of *monitoring and guarantee* (includes control of the constitutionality of state operations, protection in crisis);
- *function of representation* (declaration of war, representing the state in the outside world, ratification of international contracts, award of titles and medals);
- *function of a mediator* (appointing the head of the state, dismissal of ministers, dissolution of parliament);
- *executive functions* (amnesty, nomination of state officials and judges, commanding authority).

There is no unique standard to include all or the majority of countries of the European cultural circle. It is visible that representative and executive functions are integrated in all constitutional solutions (also in the monarchies, as functions which are embodied by the monarch), thus they can be considered as the solutions applicable in Bosnia and Herzegovina.

Rule

§ 67. Should the decision be made over direct or indirect identification, for sole or collective president of the state?

The question cannot be answered without previous definition of the authorities of the state bodies, without defining the distribution of the authorities between the presidency and other bodies, without defining the functions which are desired to be ensured for the president and, finally, without considering legal and political traditions and its compatibility with the projected constitutional goals.

The following rule is useful: the wider the functions and authorities of the member/members of the presidency are, the structure and election must be stronger connected to the indirect election (direct identification) and for the collective president (reciprocal control, prevention of misuse). The narrower its functions are, the more suitable is the indirect election (indirect identification) and sole structure (lesser the possibility of misusing the authority).

§ 68. This means the following: the members of the presidency would have to be elected at the general elections, if they would be left with the possibility to control or to block the legislative procedure (by countersignature or blocking of legislative procedure until the decision of the constitutional court), i.e. if giving of the agreement to nomination of the proposed candidates for any of the state functions (mediators, supervisors and guarantors) is within their authority.

Solution

§ 69. The solution for Bosnia and Herzegovina must be guided by the experiences so far:

- requirements of the Sejdic/Finci decision (passive identification for the citizens of Bosnia and Herzegovina);
- unsynchronised policies and reciprocal confrontation of the members of the presidency (ethnicity oriented politics and ignorance of the state politics);
- complicated procedure of election and decision-making in the presidency are disproportionate to narrowly placed authorities (function of representation and limited executive function);
- complicated legislative procedure leaning on bicameral parliamentary body and additional protection of vital interests of constitutive and un-constitutive peoples.

Protection of the new constitutive model (Thesis 2, § 5. and onwards) and the description of current problems, refer to the following solutions:

- *sole president of the state*, and
- *indirect identification* (election in the parliamentary assembly in both houses and the election of one candidate from a list which is not ethnically determined).

§ 70. Structure and election: one president is proposed, to be elected in the parliamentary body with the agreement of both houses. The president is elected from the list of candidates presented by the clubs of constitutive and un-constitutive peoples; he/she represents the country as a whole (not one ethnic element or federal unit).

§ 71. His/her competences must be positioned in view of integrative and representative function and limited executive function:

- outside of the executive, judicative and legislative function;
- presents the state towards abroad, signs international contracts, by which they are being ratified, awards state acknowledgements, titles, medals, etc.
- grants amnesty and has commanding authority.

§ 72. Therefore, the model for Bosnia and Herzegovina, which assures the listed presumptions, (§ 67-69), is as follows:

- (a) Sole presidency – one president with a mandate somewhat shorter than the mandate of the legislative part, in a way that approximately three presidents are elected in two mandates of the legislative body;
- (b) Indirect election of the president in the parliamentary bodies;
- (c) Proposal for the candidates comes from the clubs of peoples and Others, and a defined number (e.g. one third) of the delegates from the house of representatives (passive electoral right is ensured for all citizens of Bosnia and Herzegovina);
- (d) The election should be related to the qualified majority in the house of representatives and, eventually, for the agreement of the council/house of entities;
- (e) The authority of the sole president would be narrowed and concentrated to formal embodiment of the statehood and representation of the state abroad (§ 71).

THESIS 13

Organisation of courts

Problem

§ 73. The existing structure of the jurisdiction shows systematic weaknesses: The most important are: lack of one supreme court for Bosnia and Herzegovina and asymmetric entity structure of jurisdiction.

§ 74. Practical disadvantages of the model without one supreme court are the following: aggravated jurisprudential communication with the EU courts, existence of the space which is not included by the jurisdiction, real possibilities to connect political and criminal structures on the entity levels with the judiciary, aggravated standardising of court practice and punitive policy, unequal treatment before courts in analogue situations.

Solution

§ 75. The project of the new constitution must ensure the following:

- uniform establishment of courts in the entities;
- establishment of professional courts for individual authorities, introduction of the administrative court on the entity level;

- establishment of one supreme court on the level of the state with the departments for individual branches of the law, and finally,
- cancellation of the entity constitutional courts and establishment of one constitutional court for Bosnia and Herzegovina.

Summary:

Constitutional principles:

- (a) *State of law*
- (b) *Social state*
- (c) *Complex state*
- (d) *Republic*

(a) *State of law*

- Distribution of authority
 - Legislation: bicameral body = house of representatives + house of entities
 - Protection of collective rights in the form of vital interest on the level of clubs, by introducing the quota in the council of entities and procedure before the constitutional court
- Human rights
- Procedural democracy
- Independent judiciary with one supreme court and one constitutional court

(b) *Social state:*

- Assuring of a single standard of social rights on the state level (one state fund for pension insurance, and one for the health insurance)

(c) *Complex state:*

- Six territorially independent units with quasi-state authorities: four entities and two districts
- Distribution of authorities to exclusive and broad with the collision standard in favour of the state authorities.

(d) *Republic*

- Elected sole president of the state
- Indirect election of the president at the proposal of clubs and a number of legates.
- Narrowed presidential authorities within the standard of *integrative, representative and executive* functions.