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Issues of Constitutional Identity in a Candidate State: Bosnia and Herzegovina

ABSTRACT: *The concept of constitutional identity has been a focal point of extensive scholarly debate in legal and constitutional theory in recent decades. While elements of this concept can be traced back to antiquity, its more developed conceptualisation emerged in German legal thought during the Weimar Republic. In recent years, the notion of constitutional identity has gained prominence in the context of the relationship between the European Union (EU) and its Member States. The constitutional courts of EU Member States have increasingly invoked the concept of constitutional identity – whose protection is enshrined in the Lisbon Treaty, which "constitutionalized" national identity – as a means of delineating "red lines" against the implementation of certain EU measures and legal acts (such invocations have at times faced criticism, with opponents arguing that they reflect illiberal and undemocratic tendencies).*

Conversely, the European Court of Justice (ECJ) has progressively developed the concept of EU constitutional identity, using it to challenge specific legal provisions and measures adopted by Member States. Both interpretations of constitutional identity have the potential to play a significant role in the EU accession process. Pre-accession conditionality imposed on candidate states is often designed to safeguard values that are closely associated with EU constitutional identity. At the same time, invoking the constitutional identity of a candidate country may serve as a legal basis for resisting the implementation of these conditions. These dual dimensions are particularly significant in Bosnia and Herzegovina's (BiH) EU accession process. The priorities outlined in the European Commission's Opinion require amendments to the BiH constitution, which may be perceived as conflicting with the country's constitutional identity. This paper examines the constitutional reforms that may be required for BiH's EU accession, as articulated both explicitly and implicitly in the European Commission's conditions, while analysing the legal and political controversies surrounding their implementation.

KEYWORDS: *Constitutional Identity, European Union, Member States, Pre-accession Conditionality, Bosnia and Herzegovina.*

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https://doi.org/10.62733/2025.2.67-87

1.
Introduction

The concept of constitutional identity is widely employed in contemporary legal and constitutional theory, where it has been the subject of growing scholarly debate and of jurisprudence across regional and national courts. In the context of relations between the institutions of the EU and its Member States, constitutional identity manifests in two primary senses: (1) the constitutional identity of individual Member States, increasingly invoked as a basis for challenging the implementation of EU measures and legal acts, and (2) the distinct identity of the EU itself, which may serve as a counterbalance to constitutional identity arguments advanced by Member States.

Both interpretations are highly relevant to accession processes for prospective EU Member States. On the one hand, a country's constitutional identity may pose a challenge to the implementation of reforms mandated by pre-accession conditionality. On the other hand, the EU's constitutional identity may serve as the rationale for enforcing such reforms. This dual application of the concept is especially significant in Bosnia and Herzegovina's (BiH) pre-accession process, particularly concerning the legal and institutional reforms required for BiH's successful integration into the EU.

The first part of the paper provides a concise analysis of the concept of constitutional identity, together with an overview of its application in the case law of national constitutional courts and the ECJ. The paper then examines the priorities outlined by the European Commission as conditions for BiH's EU accession, with emphasis on potential tensions between these requirements and BiH's constitutional identity (elements of which are explored within this discussion).

2.
The Concept of Constitutional Identity

Constitutional identity has become one of the most important and contested concepts in contemporary constitutional theory and practice, yet its foundational principles, precise meaning, scope, and the dynamics of its continuity and evolution remain insufficiently clarified.[1] Although constitutional identity is sometimes described as "a relatively recent and enigmatic notion in constitutional law and theory"[2], its origins are much older. The roots of the concept can be traced back to Aristotle, who argued that the identity of a state is determined not by its physical characteristics but by

1 See Hirschl, Roznai, 2024.
2 Polzin, 2017, p. 1596.

its constitution.[3] In Book III of *Politics*, he examined what defines the identity of a city – understood as its essence and the distinguishing element that sets it apart from other cities. According to Aristotle, a city's identity is not determined by its physical features, such as walls, but by its political structure as established through its constitution. He therefore asserted:

> *'If a city is a form of association, and if this form of association is an association of citizens in a constitution, it would seem to follow inevitably that when the constitution undergoes a change in form, and becomes a different constitution, the city will likewise cease to be the same city.'*[4]

In German constitutional theory, the concept of constitutional identity was first introduced by Carl Bilfinger and Carl Schmitt. During the Weimar period, these authors developed the notion to justify material constitutional limits on constitutional amendments. According to Bilfinger, the legislator must respect the fundamental core of the constitution.[5] Schmitt grounded his understanding of material limits in the idea of constituent power as "the comprehensive foundation of all other powers".[6] He distinguished between two kinds of constitutional provisions: those representing fundamental decisions (the "true" constitution) and other, less important provisions described as "constitutional laws".[7] Provisions representing the "true" constitution could be amended only by the constituent power, whereas the constituted powers, established by the constitution, could modify only "constitutional laws". As Schmitt observed: '*That 'the constitution' can be changed should not be taken to mean that the fundamental political decisions that constitute the substance of the constitution can be eliminated at any time by parliament and be replaced through some other decision*'.[8] He therefore denied constituted authorities the power to amend the substantive core of the constitution – a concept he deliberately left undefined – significantly constraining their ability to shape its content.[9]

The concept of constitutional identity has been subject to diverse interpretations. Rosenfeld identifies three broad meanings of constitutional identity.[10] First, constitutional identity may stem from the mere existence of a constitution, since polities with constitutions differ from those without one. Second, the contents of a constitution

3 Rosenfeld, 2012, p. 756.
4 Aristotle, 1995, p. 90.
5 Bilfinger 1931, p. 86 quoted in Polzin 2016, p. 418.
6 Schmitt, 2008, pp. 125–130, quoted in Polzin, 2016, p. 419.
7 Schmitt, 2008, pp. 74–89, 125, 151 quoted in Polzin, 2016, p. 419.
8 Schmitt, 2008, p. 79.
9 Polzin, 2016, p. 421.
10 Rosenfeld, 2012, p. 757.

provides defining elements of identity – for example, a federal constitution establishes a different polity from a unitary state. Third, the context in which a constitution operates can play a significant role, as different cultures may understand fundamental rights in contrasting or even contradictory way. Polzin identifies five largely independent discourses concerning constitutional identity.[11] Marti differentiates between the identity of the constitution – its essential, unamendable elements, the alteration of which would amount to a "constitutional revolution" – and the identity of the people or political community governed by that constitution.[12] According to Núñez Poblete, constitutional identity: '*expresses some sort of meta-constitution, understood as a set of norms or pre-constitutional principles that define the meaning of other constitutional norms, eventually coinciding, at a textual level, with other norms of different political communities*'.[13]

Kabat-Rudnicka further elaborates the distinction between constitutional identity and national identity. She argues that '*constitutional identity is a narrower concept than national identity, since it refers to the constitutional values and state structures, whereas national identity comprises original, one can say pre-constitutional values and/or elements, such as common language, customs, history, etc*'.[14] Thus, one concerns the civic, the other the ethnic dimension of the nation.[15] Kabat-Rudnicka's study highlights the increasing relevance of constitutional identity in European constitutional

11 The first and most widely discussed discourse, according to Polzin, arises within European legal scholarship, focusing on Article 4 paragraph 2 of the Treaty on European Union. This provision mandates that the EU respect the national identities of its Member States, particularly their fundamental political and constitutional structures. The second discourse, which is related to the first, examines the relationship between constitutional identity and public international law. This discussion considers whether core constitutional values can legitimize violations of international legal obligations and the extent to which international courts must account for national constitutional norms. The third discourse consists of various national interpretations of constitutional identity, particularly in Germany, where it is predominantly understood as the identity of the constitution itself – a purely normative concept. The German Federal Constitutional Court has reinforced this interpretation since the *Lisbon Judgment*, defining constitutional identity as the core of the German constitution that is impervious to amendment. The key issue in this discourse is whether a constitution remains fundamentally the same despite amendments or whether certain changes alter its essence, effectively creating a new constitution. The fourth discourse views constitutional identity as a reflection of a people's or nation's collective identity, which is both shaped by and expressed through the constitution. This perspective explores the abstract relationship between a nation's cultural heritage and its constitutional framework. The fifth discourse explores the relationship between constitutional identity and immigration policies, emphasizing that a nation's self-definition is influenced not only by its constitutional framework but also by policies that regulate membership within the national community. (Polzin, 2017, pp. 1597–1599)

12 Marti, 2013.

13 Núñez Poblete, 2008, p. 338 quoted in Amaiquema, 2015, p. 25.

14 Kabat-Rudnicka, 2018, p. 145.

15 Ibid.

discourse, illustrating its role both as a protective mechanism for national legal orders and as a point of contention in the ongoing development of EU integration.[16] The following section examines how constitutional identity has been interpreted in the jurisprudence of the constitutional courts of Member States and the European Court of Justice (ECJ).

3.
Constitutional Identity in the Jurisprudence of the European Court of Justice and National Constitutional Courts

The principle of respect for the national identities of Member States was first introduced in the Maastricht Treaty (the Treaty on the EU) as a means of addressing national constitutional concerns.[17] Article F(1) of the Maastricht Treaty stated: '*The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy*'. This provision was later revised in the Amsterdam Treaty of 1997, where Article 6(3) retained the commitment to respecting national identities but omitted the explicit reference to democratic principles, stating instead: "The Union shall respect the national identities of its Member States." For the first decade after its introduction, the national identity clause played a relatively marginal role in both ECJ case law and academic scholarship. During this period, "the link between 'national identity' and 'constitutional identity', that appeared later, had not yet been made".[18]

The Lisbon Treaty redefined the national identity clause, emphasising its legal and constitutional dimensions. Article 4(2) states:

> '*The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the state, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.*'

In the Lisbon version of the national identity clause, "the political and constitutional aspect is much enhanced".[19] As Besselink observes, the Lisbon Treaty's focuses

16 Ibid.
17 Faraguna, 2017, p. 1619.
18 Reestman, 2009, p. 376.
19 Besselink, 2010, p. 44.

on state structures marks a shift from national identity as such to constitutional identity.[20] The "constitutionalization" of the concept of national identity was noted by other authors as well. Faraguna, for instance, argues that '*the Treaty of Lisbon gave a remarkable contribution for the enrichment of the legal, and more precisely, constitutional, meaning of the identity clause, by weakening sociological and historical reference of the clause*'.[21]

This change in the meaning of the identity has had a significant impact on ECJ case-law. Following the Lisbon Treaty, the "constitutionalisation" of national identity transformed the identity clause into "the battleground or the meeting point, where the limits of the authority of EU law lie".[22] It has emerged as an increasingly significant component of ECJ legal reasoning.

Even before the Lisbon Treaty, the ECJ acknowledged the significance of specific constitutional arrangements within Member States as a basis for justifying exceptions or distinctions that would otherwise be impermissible. The most significant pre-Lisbon case, as highlighted by Besselink, is the *Omega* judgment.[23] This case involved a prohibition imposed by the Mayor of Bonn on the operation of laser-gun games, in which participants simulated killing others for entertainment. The ban was justified on the grounds that such games violated human dignity, as protected under Article 1 of the German Basic Law. The ban was challenged as an infringement of the free movement of goods and services by the laser-game provider. The ECJ concluded that it is not indispensable for a restrictive measure issued by a Member States regarding the precise manner in which a fundamental right or legitimate interest should be safeguarded.[24] Since the entry into force of the Lisbon Treaty, the ECJ has, in several judgments, expressed its view on the meaning of national identity as protected under the identity clause. According to the Court, the national identities of the Member States include, among other things, "the status of the State as a Republic"[25] and "protection of a State's official national language".[26]

National constitutional courts have invoked national constitutional identity to draw "red lines" against deeper European integration.[27] As Besselink notes, although

20 Ibid.
21 Faraguna, 2017, p. 1620.
22 Chalmers, Davis, Monty, 2010, p. 202, quoted in Faraguna, 2017, p. 1621.
23 Besselink, 2010, p. 45.
24 Ibid.
25 Judgment Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien issued 22.12.2010 by the Second Chamber of the Court of Justice of European Union in No. C.208/09
26 Cloots, 2016, p. 83.; Judgment Malgožata Runevič-Vardyn and Lukasz Pawel v Vilniaus miesto savivaldybés administracija issued 12.5.2011 by the Second Chamber of the Court of Justice of European Union in No. C.381/09; Judgment Anton Las v PSA Antwerp NV issued 16.4.2013 by the Grand Chamber of the Court of Justice of European Union in No. C.202/11.
27 Theil, 2014.

the highest and constitutional courts across all EU Member States acknowledge the primacy of EU law over conflicting national legislation, most do not recognise its supremacy over national constitutions.[28] The Italian Constitutional Court set an early precedent in *Fragd*, establishing that the refusal to grant priority to EU law should be limited to cases involving fundamental constitutional principles.[29] The French Constitutional Court, in its July 2006 decision, ruled that an EU Directive may be deemed contrary to the French Constitution only when it infringes rules and principles inherent to France's constitutional identity.[30] In the *Lisbon Judgment*, the German Constitutional Court *'recognized the mutuality in the duty to respect the constitutional identity of Member States as both a national constitutional obligation as well as an EU obligation, albeit that the latter was founded on the Member States' constitutions'*.[31]

In recent years, some Eastern and Central European constitutional courts have shifted their interpretation of constitutional identity. According to Kovács, the recent trend in the region's jurisprudence is that these courts *'apply an ethnocultural understanding of identity, thereby putting European integration in peril'*.[32]

Conversely, some scholars argue that although constitutional identity has traditionally been invoked by Member States to resist EU obligations, the EU itself possesses a constitutional identity that functions as a counterbalance when national claims diverge from the fundamental values enshrined in the EU's legal order. Drinóczi and Faraguna contend that this identity is rooted in Article 2 TEU, which defines the Union's fundamental values, including democracy, the rule of law, and human rights.[33] Recent rulings by the CJE reinforce the idea that these values constitute the "untouchable core" of the European legal order. As evidence, the authors cite two CJE rulings (*Case C-156/21, Republic of Poland v European Parliament and Council of the European Union*, 16 February 2022; *Case C-157/21, Hungary v European Parliament and Council of the European Union*, 16 February 2022), in which the Court explicitly referred to Article 2 TEU as encompassing the fundamental values that "define the very identity of the European Union as a common legal order."[34]

28 Besselink, 2010, p. 46.
29 Ibid.
30 Decision issued 27.7.2006 by the French Conseil Constitutionnel No. 2006/540.
31 Besselink, 2010, p. 47 fn. 28.
32 Kovács, 2017, p. 1703. The author examines the jurisprudence of East Central European constitutional courts, with a particular focus on the Visegrád Group (comprising the Czech Republic, Hungary, Poland, and Slovakia). She argues that these courts employ the concept of constitutional identity as a mechanism to constrain European integration, frequently interpreting national identity in exclusionary, ethnocultural terms.
33 Drinóczi, Faraguna, 2022, p. 77.
34 Ibid.

4.
BiH's Accession Process and the Issue of Constitutional Identity

As highlighted in the introduction, the conditions imposed on candidate states during the EU accession process, as part of pre-accession conditionality, have the potential to conflict with principles forming the state's constitutional identity. The conditions identified by the European Commission as priority requirements for BiH's accession to EU will therefore be analysed regarding their (in)compatibility with the core principles of the country's Constitution, while also seeking to outline BiH's constitutional identity.

BiH has pursued full EU membership since the late 1990s, formally articulating this aspiration only a few years after the end of the armed conflict. In 1998, the Council of the EU issued a "Declaration on Special Relations between the EU and BiH", expressing its commitment to strengthening relations, contingent on BiH fulfilling the conditions outlined in the Regional Approach.[35] Subsequently, on 28 January 1999, the BiH Council of Ministers adopted the "Decision on Launching the Initiative for BiH's EU Accession"[36], followed on 27 July 1999 by the Parliamentary Assembly's adoption of the "Resolution on European Integration and the Stability Pact for South-East Europe."[37]

In 2005, negotiations for the Stabilisation and Association Agreement (SAA) between the EU and BiH were formally initiated. At that time, the European Commission acknowledged BiH's substantial progress in implementing the reforms necessary for advancing its European integration process. The negotiations concluded successfully in 2006, leading to the signing of the SAA in 2008, alongside an Interim Agreement on Trade and Trade-Related Affairs. The SAA established a free trade framework and aimed to support BiH's legal, administrative, institutional, and economic reforms in preparation for future EU membership negotiations. Although provisionally applied upon signing, the agreement did not fully enter into force

35 "The European Union in Bosnia and Herzegovina: Repairing, reconstructing, reconnecting", European Commission, p. 16. [Online], Available at: https://aei.pitt.edu/33628/4/A527.pdf (Accessed: 4 September 2024)

36 "Decision on Launching the Initiative for BiH's EU Accession", Council of Ministers of BiH (1999), *Official Gazette of BiH*, No. 3/99.

37 "Resolution on European Integration and Stability Pact for South-East Europe", Parliamentary Assembly of BiH (1999), *Official Gazette of BiH*, No. 12/99.

until 2015, as the EU suspended its implementation pending significant political reforms.[38]

On 28 January 2016, the BiH Presidency ratified the "Decision on the Submission of BiH's EU Membership Application",[39] authorising its formal submission. The application was presented to the EU on 15 February 2016, eight years after the SAA was signed, reaffirming BiH's commitment to implementing reforms in line with Article 49 of the EU Treaty. Following its submission, the Council of the EU acknowledged the application, and on 9 December 2016, the European Commission issued a comprehensive questionnaire comprising 3,242 questions. After a 14-month review, BiH responded on 28 February 2018, prompting an additional 655 questions from the Commission on 20 June 2018, to which BiH replied on 4 March 2019. These materials formed the basis for the EU's formal opinion (*Avis*) on BiH's membership application.

In 2019, the European Commission issued its "Opinion on BiH's application for membership of the European Union", which set out concrete indications and priorities for BiH's path toward EU accession. The key priorities cover the areas of democracy/functionality, the rule of law, fundamental rights, and public administration reform. Among the 14 priorities, several explicitly require constitutional change. This affect at least six key areas (Criteria IV):

1. Ensuring legal certainty in the distribution of competences across all levels of government;
2. Introducing a substitution clause enabling the state, upon accession, to temporarily exercise the competences of other levels of government to prevent and remedy breaches of EU law;
3. Guaranteeing the independence of the judiciary, including its self-governance institution, the High Judicial and Prosecutorial Council (HJPC);
4. Reforming the Constitutional Court, including addressing the presence of international judges and ensuring the enforcement of its decisions;
5. Guaranteeing legal certainty, including the establishment of a judicial body responsible for ensuring consistent interpretation of the law throughout BiH;

38 Nielsen, 2022, p. 7. The EU delayed the entry into force of the SAA due to BiH's failure to comply with the *Sejdić-Finci* ruling of the European Court of Human Rights (ECtHR). One of the factors contributing to the final entry into force of the SAA was the German-British initiative, which prioritized the implementation of the Reform Agenda without requiring the execution of the aforementioned ECtHR's decision (Galić, Barbarić, Bošnjak, 2022, p. 267).

39 "Decision on BiH's EU Membership Application Submission", 28 January 2016, BiH Presidency, 2015, Document No. 01–50–1-227–29/16.

6. Guaranteeing equality and non-discrimination of citizens, particularly by incorporating relevant jurisprudence from the European Court of Human Rights (ECtHR).[40]

The implementation of certain requirements and priorities outlined in the Opinion presents significant challenges within BiH's existing constitutional framework. One of the priorities identified by the European Commission requires ensuring equality and non-discrimination of citizens, by taking into account the ECtHR's case-law. Given that the changes mandated by the ECtHR's rulings affect fundamental aspects of the constitutional structure, the proposed amendments may be contested on the grounds that they conflict with BiH's constitutional identity (understood as the set of core constitutional principles).

Several ECtHR judgments have determined that the exclusion of citizens from certain political offices, as prescribed by the BiH Constitution itself, constitutes a violation of the European Convention on Human Rights (ECHR). In a series of cases, the ECtHR adjudicated complaints filed by citizens of BiH who alleged discrimination and the denial of their right to stand for election to specific institutions. These individuals were either not members of one of the three constituent peoples, had chosen not to declare their affiliation, or were excluded based on their place of residence. The Court's jurisprudence on this issue began with the *Sejdić and Finci v. BiH* (2009) and was subsequently reaffirmed in *Zornić v. BiH* (2014), *Pilav v. BiH* (2016), *Šlaku v. BiH* (2016), and *Pudarić v. BiH* (2020). Each ruling underscored the need to amend the Constitution to eliminate discriminatory provisions and ensure full electoral rights for all citizens. However, none of these decisions has yet been implemented.

The most recent ECtHR decision concerned the active rather than the passive right to vote. The applicant, Slaven Kovačević, a citizen of Sarajevo in the Federation of Bosnia and Herzegovina (FBiH), and an adviser to a Croat member of the BiH Presidency, does not identify with any of the constituent peoples or any other ethnic group. In his complaint, Kovačević asserted that he was unable to vote for candidates of his choice in the 2022 general elections due to legal provisions imposing territorial and ethnic requirements on candidates for the BiH Presidency and the House of Peoples. He argued that his preferred candidates were ineligible because they did not belong to the "correct" entity or ethnic group. Kovačević's alleged violations of Articles 13, 14, and 17 of the ECHR, as well as Article 3 of Protocol No. 1 and Article 1 of Protocol No. 12 of the Convention. In its Chamber judgment of 29 August 2023, the ECtHR found a violation of Article 1 of Protocol No. 12 (general prohibition of discrimination) relating to his inability to vote for all candidates for the Presidency and for delegates to the House of People under BiH's constitutional and electoral regime. However, following

40 Woelk, Galić, Sekulić, 2023, p. 460.

a request for referral to the Grand Chamber by the Agent of the Government of BiH, the ECtHR, in its Grand Chamber judgment, declared Mr. Kovačević's application inadmissible, finding that the applicant had abused the right of application within the meaning of Article 35(3a) of the Convention and that he lacked victim status. Accordingly, the Court ruled that BiH had not violated the Convention in the circumstances alleged.[41]

The issues raised by these applications and the related ECtHR jurisprudence call for a comprehensive, multidimensional analysis. First, they must be examined through the framework of consociational democracy, which forms the foundation of BiH's constitutional and political system and can be regarded as an element of the country's constitutional identity. Second, the analysis must account for the principles of federalism, as BiH functions as a federal state with a complex power-sharing structure.[42]

The institutional structure of BiH, established through the Dayton Peace Agreement, is based on a model of consociational democracy (the BiH "constitutional text

41 *Kovačević v. Bosnia and Herzegovina*, ECtHR (2025), [Online], Available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-245359%22]} (Accessed: 21 September 2025)

42 Marković, 2023, p. 3. BiH is a complex state, described in the literature as a federation with distinct confederal elements (Stankovic, 2019, p. 4). It consists of two entities (federal units): the Republic of Srpska (RS) and the Federation of Bosnia and Herzegovina (FBiH). Some authors argue that BiH is an example of an asymmetric federation ("a mildly asymmetrical constitutional system"; Sahadžić, Woelk, 2023, p. 371). The RS is a unitary entity, while the FBiH is federally structured (it consists of 10 cantons). The third subnational unit in BiH is the Brčko District (BD) of BiH, a special administrative unit of local self-government (according to Article 1.1 of the BD Statute).

suggests a classic corporate consociation")[43], ensuring representation of the constituent peoples across state institutions. The designation "constitutional people" refers to the three primary ethnic groups: Bosniacs, Serbs, and Croats. This designation is enshrined in the Preamble of the BiH Constitution, which recognises these groups, alongside "Others", as the foundation of the constitutional order.[44] The institutional framework of BiH, as set out in its constitutional provisions, is structured on ethnic and territorial criteria, with the constituent peoples playing a dominant role in its composition.

The application of these criteria is evident in the structure and organisation of the Parliamentary Assembly of BiH, the bicameral legislative body at the state level. The Assembly comprises two chambers: the House of Representatives and the House of Peoples. The House of Representatives is composed of 42 directly elected deputies,

43 McCrudden, O'Leary, 2013, p. 21. Consociational democracy represents a political model designed for deeply divided or post-conflict societies, characterized by institutionalized cooperation among distinct social segments, most often ethnic, linguistic, or religious groups. This model rests on a grand coalition of representatives from all major social segments, parity (numerically equal) or proportional representation in political institutions, and decision-making procedures based on consensus, qualified majorities, or mutual vetoes. The electoral system follows the principle of proportional representation to guarantee fair participation of each group, while a degree of segmental autonomy, often expressed through territorially organized federal units, allows distinct communities to exercise legislative, executive, and judicial authority within their domains. Bosnia and Herzegovina (BiH) represents one of the few contemporary examples of this model, alongside Belgium, Switzerland, and Lebanon. In BiH, the principle of the grand coalition is manifested through the participation of political parties representing each of the three constituent peoples within the ruling majority. This arrangement was evident after the 1996 elections, when the government was composed of the three major ethnic parties, each corresponding to one constituent group (however, it should be noted that the constitutions in BiH do not formally require that such grand coalitions include parties enjoying a simple or absolute majority of support among their respective constituent peoples). The veto mechanisms, including consensus, qualified majorities, and the protection of vital national interests, are constitutionally guaranteed to prevent the domination of one group. Representation within the institutional framework of BiH, both at state and entity level, is structured according to two complementary principles: proportional representation, applied in collective bodies such as the House of Representatives of the Parliamentary Assembly of BiH, where seats are distributed according to territorial/entity criteria, as well as in entity governments, and parity-based representation, used, for example, in several state-level institutions, such as the BiH's Presidency and the House of Peoples of the Parliamentary Assembly of BiH, to guarantee equal participation of all three constituent peoples (Marković, Milinković, 2023, pp. 403-408). The following sections of the paper will provide a more detailed analysis of these institutional arrangements.

44 The Constitution of BiH explicitly stipulates, in its Preamble, that it has been adopted by "the Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina" (Constitution of Bosnia and Herzegovina. [online], Available at: https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf (Accessed: 24 January 2025)). Through this formulation, the Constitution accords to the constituent peoples the status of bearers of sovereignty, together with the citizens (Marković, Milinković, 2023, p. 403).

with 28 elected from the FBiH and 14 from the RS. A quorum is reached a majority of its members (22 of 42) is present. Deputies serve four-year terms. Owing to their direct election, they ostensibly represent the citizens, or at minimum the citizens of their respective entities. However, the constitutionalization of "entity voting" as a mechanism to safeguard entity interests challenges the conventional understanding of citizen representation.[45] According to Article IV.3(d), decisions in the House of Representatives are adopted by a majority of members present and voting. Members must make every effort to ensure that this majority includes at least one-third of representatives from each entity. If this threshold is not achieved, a decision may still be adopted by a simple majority of those present and voting, provided the opposing votes do not constitute two-thirds or more of the representatives elected from either entity.

The House of Peoples, in contrast, functions primarily serves as a representative body for the constituent peoples, reflecting the societal segmentation embedded in BiH's political structure. It consists of fifteen delegates, two-thirds (ten) elected from the FBiH, five Bosniaks and five Croats, and one-third (five members) from the RS, all of whom are Serbs. The Bosniak and Croat delegates from FBiH are selected by their respective caucuses in the FBiH House of Peoples, while the Serb delegates from the RS are elected by the RS National Assembly. A quorum requires nine delegates, including at least three from each constituent people (Article IV.1(b) of the BiH Constitution)[46]. Delegates serve four-year terms. The House of Peoples is organised into three constituent people's clubs (Bosniak, Croat, and Serb), which play a central role in the legislative process. The House may be dissolved either by decision of the BiH Presidency or by its own resolution, with dissolution requiring a majority of delegates, including a majority from at least two constituent peoples. The BiH Presidency must decide by consensus; however, if consensus is not reached, the decision may proceed with the support of two out of three Presidency members.

As in the House of Representatives, decisions are made by majority vote of those present and voting, provided that the quorum requirements are met and subject to the entity voting mechanisms under Article IV(3)(d) of the Constitution. The Constitution also prescribes the procedure for protecting the vital interests of the constituent peoples in the House of Peoples. Article IV.3(e) stipulates that a proposed decision may be declared destructive of a vital interest of the Bosniac, Croat, or Serb people by a majority of their respective delegates. Such a decision then requires, for approval, a majority of the Bosniac, of the Croat, and of the Serb Delegates present and voting.

45 Marković, 2023, p. 4.

46 Constitution of BiH, [online], Available at: https://www.ohr.int/ohr-dept/legal/laws-of-bih/pdf/001%20-%20Constitutions/BH/BH%20CONSTITUTION%20.pdf (Accessed: 14 December 2024)

The House of Representatives and the House of Peoples hold equal legislative authority, requiring the approval of both chambers for the enactment of laws. This bicameral system ensures that all legislative decisions reflect consensus between the two houses, reinforcing BiH's power-sharing institutional framework.[47]

The executive power in BiH is structured along ethnic and territorial lines, reflecting the country's consociational model of governance. The Presidency of BiH consists of three members: one Bosniac and one Croat (both elected from the FBiH), and one Serb (elected from the RS). This arrangement is designed to ensure equal representation among the three constituent peoples. However, it excludes individuals who do not belong to one of these groups ("Others") from eligibility, a model that, as previously noted, has been deemed discriminatory by the ECtHR. The BiH Presidency functions as a collegial body, with a Chairperson who serves as *primus inter pares*. The Chairpersonship rotates every eight months among the three members. Decision-making follows a collective approach, with certain decisions requiring consensus as explicitly stipulated in the BiH Constitution. Where consensus is not reached, decisions may be adopted by majority vote, although a dissenting member retains the right to invoke a veto, thereby suspending implementation.

In addition to the Presidency, the executive power in BiH is exercised by the Council of Ministers. Although the Constitution does not explicitly define this body as a government, it has been entrusted with traditional governmental functions and responsibilities.[48] Article V(4) of the BiH Constitution stipulates that the Council is "responsible for carrying out the policies and decisions of Bosnia and Herzegovina", implying that it cannot be regarded as an executive body subordinate to either the Parliamentary Assembly or the Presidency.[49] The number of ministries in the Council of Ministers has increased significantly over time (its expansion from three to nine ministries illustrates the progressive strengthening of state competences). The requirement that no more than two-thirds of ministers come from the FBiH ensures representation for the RS, preventing dominance by one entity. The appointment of ministers and deputy ministers is also determined by the ethnic principle. Article 6 of the Council of Ministers Act[50] prescribes that the constituent peoples must be equally represented (Article 6 (1). The Chairperson of the Council of Ministers and Deputy Chairpersons must come from different constituent peoples (Article 6 (2)). The Act further requires that each minister have one deputy minister, who must belong to a constituent people different from that of the minister they assist (Article 7

47 McCrudden and O'Leary describe „the rules governing the passage of legislation" in BiH as "strongly consociational" (McCrudden, O'Leary, 2013, p. 21).
48 Marković, Davidović. 2023, pp. 300–301.
49 Ibid., p. 301.
50 *Official Gazette of BiH*, no. 38/02, 22/03, 42/03, 12/04, 43/09, and 103/09.

(1) and (2)). At least one position must be allocated to Others, or the Secretary General of the Council must belong to this group.

Regarding its decision-making procedure, the Council of Ministers Act provides that the Council shall decide by majority vote of members present and voting only in cases where its decision is not final and the matter will subsequently be determined by another institution (e.g., adoption of the draft state budget). Where the Council has final decision-making authority, it shall decide by consensus of members present and voting, particularly with respect to regulations, appointments and nominations within its competence, and its Rules of Procedure and their interpretation. If consensus cannot be achieved, the Chairperson convenes the member or members who opposed the proposal in an effort to reach agreement. Should consensus still not be reached within seven days, the Council adopts a decision in accordance with the majority voting rule, provided that such a majority includes the vote of at least one member from each constituent people (Article 18 of the Council of Ministers Act).

5.
The Constitutional Court of BiH: Issues of BiH's Constitutional Identity

As previously noted, one of the priorities outlined in the European Commission's Opinion concerns the reform of the Constitutional Court of BiH, particularly the resolution of the contentious issue surrounding the participation of foreign judges. This matter has been a longstanding subject of constitutional and legal debate in BiH, carrying significant implications for both preserving and defining the country's constitutional identity. Moreover, it may have substantial consequences for future reforms of BiH's constitutional framework and institutional organisation. Constitutional courts play a pivotal role not only in identifying and safeguarding a state's constitutional identity but also in shaping its substantive content. Accordingly, it is essential to examine the organisation and jurisdiction of the BiH Constitutional Court, the controversies relating to the institution, and the impact of its rulings on the interpretation of BiH's constitutional identity.

The constitutional judiciary in BiH operates under a centralised (concentrated) model,[51] whereby the BiH Constitutional Court exercises jurisdiction across the entire state territory, while the entity constitutional courts hold jurisdiction within their

51 The centralized model of constitutional review grants specialized constitutional courts exclusive authority to determine the constitutionality of legislation. This model emerged in Europe following World War I, with Hans Kelsen playing a pivotal role in its development and popularization. Today, the centralized model remains the predominant approach to constitutional review across Europe (Comella, 2004, p. 461).

respective territories. The origins of constitutional adjudication in BiH can be traced to the Socialist Federal Republic of Yugoslavia (SFRY). The 1963 Constitution established a dual-tier system comprising the Constitutional Court of the SFRY at the federal level and constitutional courts in the federal republics. This structure remained until the dissolution of the Yugoslav federation. Within this system, the Constitutional Court of BiH was formally constituted on 15 February 1964. Its organisation, jurisdiction, and procedural matters were governed by the Law on the Constitutional Court, which defined its role within the broader constitutional framework of the republic.[52]

The Constitutional Court of BiH was constituted under Article VI of the BiH Constitution. Article VI(3) grants the Court exclusive jurisdiction to adjudicate disputes arising under the Constitution in cases involving conflicts between entities, between BiH and one or more entities, or between BiH institutions. The Court also exercises appellate jurisdiction over constitutional issues arising from the judgments of any other court in BiH. Lower courts may refer a law to the Constitutional Court if that law's validity is essential to the resolution of a pending case. One of the Court's competencies regarding the protection of vital national interests is explicitly established in Article IV of the Constitution.

The Constitution of BiH defines the Court's composition, quorum, the public nature of proceedings, jurisdiction, and the final and binding nature of its decisions. Procedure matters, financial and administrative autonomy, organisational foundations, and other significant issues are regulated by the Rules of the Constitutional Court of BiH[53]. This arrangement deviates from comparative constitutional law standards, under which such matters are usually regulated by the constitution or legislation, in BiH the Rules were drafted by the newly appointed judges themselves before the Court commenced operations in 1997.

Pursuant to Article VI(1)(a) of the BiH Constitution, the Court consists of nine members. Four judges are appointed by the House of Representatives of the FBiH, while two are appointed by the National Assembly of the RS. The remaining three judges are selected by the President of the ECtHR after consultation with the BiH Presidency, following the 4-2-3 composition formula. From the elected judges, one president and three vice-presidents are elected by secret ballot with a majority of all judges (Article 83 of the Rules of the BiH Constitutional Court). The president, who serves a three-year term, is elected by rotation among judges from the constituent peoples, ensuring that no two consecutive presidents belong to the same group. The president and vice presidents may not be elected from the same ethnic group simultaneously. Article VI(1)(b) requires Constitutional court judges to be legal

52 Vlaški, Marko, 2023, p. 326.

53 Rules of the Constitutional Court, Constitutional Court of BiH. [online] Available at: https://www.ustavnisud.ba/en/rules-of-court?force_locale=true (Accessed: 18 December 2024).

professionals of high moral standing; any person meeting these criteria and possessing voting rights may be appointed. Judges appointed by the President of the ECtHR must not be citizens of BiH or any neighboring country.

The Constitution authorises the Parliamentary Assembly of BiH to prescribe by law an alternative method for selecting the three judges appointed by the President of the ECHR. The Court's composition, which includes foreign judges, is atypical from a comparative federalism perspective. In this context, the European Commission's 2019 Opinion on BiH's application for European Union membership states that "it is necessary to reform the Constitutional Court, including resolving the issue of international judges" (key priority 4.d).[54]

The BiH Constitutional Court has not explicitly invoked the concept of constitutional identity in its rulings. However, several of its decisions have been undeniably significant in identifying BiH's constitutional identity, particularly in defining the core principles upon which the Constitution is based. One such decisions is the Court's Third Partial Decision on Judgment U-5/98, which affirmed the principle of the constitutiveness of peoples as a fundamental constitutional principle. Although the BiH Constitution formally recognised Bosniaks, Croats, and Serbs as constituent peoples, this status was not uniformly acknowledged across both entities. In practice, only Bosniaks and Croats were recognised as constituent peoples in the FBiH, while only Serbs held this status in the RS. Responding to this disparity, the Constitutional Court ruled that all three constituent peoples must be recognised as such throughout the entire territory of BiH, irrespective of demographic distribution within individual entities.

Through this decision, the Court established the constituency of peoples as a core democratic principle, ensuring the equal protection of all ethnic groups across BiH. Within the constitutional framework, this principle was positioned as an overarching constitutional norm with which the entities must comply. This ruling effectively framed the constituency of peoples as a *sui generis* concept designed to preserve ethnic balance within BiH's governance structure. Consequently, the Court implicitly identified the constituency of peoples as a fundamental component of the country's constitutional identity. This principle was further reaffirmed in the Ljubić case, where the Constitutional Court found that the constituent peoples were not equally represented in state institutions. The Court held that the right of the constituent peoples to participate in democratic decision-making, exercised through legitimate political representation, must be based on the democratic election of delegates to the

54 Previous efforts to legislate the composition and selection process of judges in the Constitutional Court have thus far been unsuccessful. Beyond the explicit recommendation outlined in the European Commission's Opinion, which calls for reforming the Constitutional Court, the urgency of enacting such legislation is further accentuated by the fact that the Court is currently functioning without representation from one of the entities (RS).

House of Peoples of the FBiH by the constituent peoples themselves, whose interests those delegates represent. Once again, the Court underscored that the constituency of peoples represents the overarching principle of the BiH Constitution, with which all other constitutional provisions must align.[55]

The recognition of the constituency of peoples as a core principle of BiH's constitutional order, and thus as a fundamental element of its constitutional identity, justifies the existence of the consociational model of power-sharing within the country. However, this acknowledgment also highlights the complexity of implementing the previously mentioned ECtHR's rulings, which advocate reforms to eliminate discriminatory elements within BiH's constitutional framework. These rulings may, in turn, be perceived as intrusive to BiH's constitutional identity, raising challenges in balancing international legal obligations with the existing constitutional structure.

6.
Conclusion

Pre-accession conditionality may necessitate substantial modifications to the constitutional order and institutional framework of candidate states. Some of required reforms may potentially conflict with the core principles underpinning a candidate state's constitutional system. In such instances, the argument for safeguarding constitutional identity may emerge as a barrier to the implementation of required reforms, thereby obstructing progress in the EU accession process. Conversely, the constitutional identity of the EU itself may be invoked to justify pre-accession conditionality, further complicating the legal and political dynamics of accession.

This issue is particularly pronounced in the case of BiH, where the constitutional framework is founded on a consociational model of power-sharing among the three constituent peoples. Implementing the ECtHR's rulings, identifying certain aspects of this ethnically-based power-sharing model as discriminatory, would require extensive modifications to the existing constitutional structure. However, the current political landscape in BiH does not reflect a willingness to undertake such profound constitutional changes. Moreover, any significant alteration or abandonment of the consociational model would not only contradict with the country's political realities and historical traditions but could also interfere with principles regarded as fundamental elements of BiH's constitutional identity. Consequently, striking an appropriate balance between the consociational framework established by the BiH Constitution and the imperative of ensuring compliance with the ECtHR's jurisprudence will remain a key challenge in all future constitutional reforms.

55 Muharemović, Nurkić, 2024, pp. 140–141.

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