I. The Dayton Constitutional Framework

The Dayton Framework of Peace Agreement (DFPA)\(^1\) of December 1995 brought an end to the war in Bosnia and Herzegovina (BiH). Its Annex 4, as part of the international agreement, contained ‘the’ Constitution for BiH, providing for the institutional mechanisms of the legislative, executive and judicial powers of the state of BiH and a human rights catalogue. Other annexes, in particular Annexes 3, 6, 7 and 10, established special institutions such as the Human Rights Commission, the Real Property Claims Commission and the position and Office of the High Representative (OHR) as an “international supervisory body” responsible for the coordination of all civilian mechanisms for the implementation of the DFPA. Moreover, Annex 4 itself includes an appendix enumerating 15 international human rights instruments and declaring them directly applicable in BiH.

So from the very beginning the question of what legal status the other annexes and these international human rights instruments have in the legal hierarchy of BiH was raised. This was clarified by the Constitutional Court in case U-5/1998\(^2\) by attributing “constitutional rank” not only to Annex 4, but also to the other annexes and the international instruments in the annex to Annex 4. Interestingly, Article II.2 of ‘the’ Dayton

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2 This case was published in the official languages in 2000 in four so-called ‘partial decisions’: see Službeni glasnik BiH (Official Journal), No. 11/00, 17 April 2000; Službeni glasnik BiH, No. 17/00, 30 June 2000; Službeni glasnik BiH, No. 23/00, 14 September 2000; Službeni glasnik BiH, No. 36/00, 31 December 2000. The English versions of the judgments of the Constitutional Court are also available at <http://www.ustavnisud.ba/eng/odluke/>.
The Constitution also declares the European Convention on Human Rights (ECHR) and its Protocols directly applicable and, in addition, states that they “shall have priority over all other law”. The meaning of the last sentence of this provision, however, caused a great deal of confusion, since it was literally translated into the domestic languages as “priority over all other laws” or “statutes”, thereby giving the ECHR a rank between the constitution and the statutes of parliament, known in Central European constitutional doctrine as the ‘mezzanine theory’. This question only became decisive in 2006, when then President Sulejman Tihić brought a case before the Constitutional Court to review Article V of the Dayton Constitution in light of the provisions of the ECHR because the membership in the BiH presidency is literally restricted by the Dayton Constitution to persons who declare themselves Bosniaks,3 Serb or Croat before the elections. This is, of course, a restriction on the right to stand as candidate in elections for all other citizens who do not ‘belong’ to one of the three so-called ‘constituent peoples’ in BiH. However, in two successive decisions,4 the Constitutional Court declared the case inadmissible, circumventing the decisive question of ‘supremacy’ of the ECHR over the Dayton Constitution by referring to general observations of transposition of international law into the Bosnian legal system. Only the dissenting opinion of Judge Constance Grewe in the second case correctly addresses the decisive legal question.

In conclusion, the entire constitutional framework in BiH is made up of 13 constitutions. However, as part of the political compromise in Dayton/Ohio, the state Constitution did not interfere with the constitutional framework of the Entities, thereby leaving the territorial and institutional set-up of the former warring parties unchanged. The entire constitutional framework was therefore written primarily as an instrument to stop the war, and by no means for the creation of a functioning state. The territorial delimitation into Entities and cantons along ethnic lines, the ethnic composition of the state institutions—namely the presidency, the House of Peoples, the council

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3 Muslims were renamed as Bosniaks in the Constitution of the Federation of Bosnia and Herzegovina as part of the Washington Agreement in 1994, published in Službene novine Federacije Bosne i Hercegovine (Official Gazette of FBiH), No. 1/94, 30 March 1994.

4 Constitutional Court of Bosnia and Herzegovina, Case U-5/04, 27 January 2006; and Case U-13/05, 26 May 2006.