

## BALANCING DEMOCRACY AND HUMAN RIGHTS: THE ROLE OF CONSTITUTIONAL IDENTITY IN THE EUROPEAN COURT OF HUMAN RIGHTS' RECENT JURISPRUDENCE / Mahir Muharemović, Benjamin Nurkic

Mahir Muharemović  
Assistant Professor  
University of Tuzla, Faculty of Law,  
Muhameda Hevajje Uskufije 7,  
Tuzla, Bosnia and Herzegovina.  
mahir85@gmail.com  
ORCID: 0000-0001-9338-7512

Benjamin Nurkic  
Ph.D. Candidate  
University of Tuzla, Faculty of Law,  
Muhameda Hevajje Uskufije 7,  
Tuzla, Bosnia and Herzegovina.  
bnurkic@bih.net.ba  
ORCID: 0000-0002-8906-2288

**Abstract:** *The paper examines the tension between democracy, human rights, and power-sharing constitutional arrangements in multi-ethnic states, focusing on the Kovačević v. Bosnia and Herzegovina case and contrasting it with recent Latvian cases before the European Court of Human Rights (ECtHR). It analyses the significance of the Kovačević judgement, which found Bosnia's ethnic-based power-sharing system discriminatory, and the Latvian cases, where the ECtHR accepted 'constitutional identity' as a legitimate aim for differential treatment. The paper discusses the concept of constitutional identity, its recognition by the ECtHR, and the potential challenges it poses to the protection of human rights. It explores the balance between respecting democratic choices, constitutional identities, and upholding individual rights under the European Convention on Human Rights.*

**Key words:** *Power-sharing; Constitutional Identity; Democracy v. Human Rights; Multi-ethnic States; European Court of Human Rights; Margin of Appreciation*

### **Suggested citation:**

Muharemović, M., Nurkic, B. (2024). Balancing Democracy and Human Rights: The Role of Constitutional Identity in the European Court of Human Rights' Recent Jurisprudence. *Bratislava Law Review*, 8(2), 131-146. <https://doi.org/10.46282/blr.2024.8.2.854>

**Submitted:** 2 April 2024

**Accepted:** 6 September 2024

**Published:** 31 December 2024

## 1. INTRODUCTION

The article delves into a critical and contemporary issue in international law and human rights by investigating the intricate and often contentious relationship between democratic governance, human rights, and constitutional identity as interpreted by the European Court of Human Rights (ECtHR). Central to this inquiry is the complex question of how the ECtHR reconciles the democratic principles of national sovereignty with the universal standards of human rights, especially within the context of multi-ethnic states. The article poses essential questions: Can the concept of constitutional identity be a legitimate aim and justify differential treatment of particular groups within a society? If so, what are the ground rules to identify and classify the concept of 'constitutional identity'? Is every constitutional identity legitimate? This is examined through key ECtHR cases, particularly *Kovačević v. Bosnia and Herzegovina*, alongside several recent Latvian cases, which highlight the court's inconsistent approaches. In this regard, a comparative legal analysis is deployed to explore the ECtHR's judgements and their broader

implications. By focusing on the court's interpretive principles, such as dynamic or evolutionary interpretation and the margin of appreciation, the analysis seeks to understand how human rights standards are adapted to national contexts while striving to maintain a cohesive human rights framework.

In the first part of the article, a brief overview of the democracy versus human rights debate is presented, delving into the theoretical and practical tensions between national sovereignty and the universality of human rights, questioning how these principles can coexist without compromising each other. In exploring the notion of constitutional identity, the article examines its legal recognition and implications within the ECtHR's framework. It scrutinises how constitutional identity is defined and utilised in legal arguments, raising questions about whether it serves to protect or undermine human rights. The discussion section broadens the analysis, examining the implications of the aforementioned cases for the balance between democracy, human rights, and constitutional identity. It critically assesses whether the ECtHR's deference to national constitutional identities compromises human rights protections and what this means for future jurisprudence.

## 2. THE DEMOCRACY VS. HUMAN RIGHTS DEBATE: IN BRIEF

The debate between democracy and human rights is one of the most compelling and contentious issues in contemporary political discourse. At the heart of this debate is the inherent tension between the principles of national sovereignty, which is foundational to democratic governance, and the universality of human rights, which seeks to establish a common standard for the treatment of individuals regardless of national boundaries. This tension is particularly pronounced in the context of international human rights enforcement mechanisms, such as the European Court of Human Rights (ECtHR), which often find themselves at the crossroads of respecting state sovereignty and upholding universal human rights standards (Donnelly, 2020).

Integral to this discourse is the concept of constitutional identity, which serves as an expression of a nation's democratic legitimacy and sovereignty. Constitutional identity encompasses the core values, principles, and norms that define a state's constitutional order. It reflects the unique historical, cultural, and social context of a nation and represents the collective self-understanding of its people. Constitutional identity plays a crucial role in shaping a nation's approach to human rights. It provides the framework within which human rights are understood, interpreted, and implemented.

The ECtHR is a key player in this debate, as it is tasked with enforcing the European Convention on Human Rights (ECHR) among its member states. The court's interpretive principles, such as dynamic or evolutionary interpretation and the margin of appreciation, are designed to navigate the complex relationship between universal human rights and national sovereignty. Dynamic interpretation allows the court to adapt human rights standards to evolving societal norms and conditions, while the margin of appreciation grants states some discretion in how they implement these rights, recognising the diversity of cultural and legal traditions across Europe. However, these principles can also lead to significant friction. Dynamic interpretation can be perceived as judicial overreach, where the court is seen as imposing its own evolving standards on sovereign states. This is particularly contentious when these standards conflict with the democratic decisions made by national governments. The margin of appreciation, while intended to respect national differences, often becomes a battleground over how much discretion states should have in implementing human rights obligations. This tension is especially visible in highly political cases, particularly as they pertain to the organisation

of a state's political system. Graziadei argues that these tensions are often exacerbated in cases involving consociational democracies, or power-sharing systems, which are designed to prevent or overcome inter-community violence (Graziadei, 2016).

On the other side, the ECtHR has recognised that democracy requires not only the holding of regular and free elections but also the existence of a pluralistic political system that allows for the expression of diverse opinions and the participation of all individuals in the decision-making process. The ECtHR has especially highlighted the importance of protecting the rights and freedoms of individuals and minority groups in a democratic society. It has emphasised that democratic governance should be based on the rule of law, respect for human rights, and the principle of non-discrimination (Zand, 2017).

### 3. THE SIGNIFICANCE OF THE RECENT JURISPRUDENCE OF THE ECtHR

#### 3.1 *The Kovačević Case*

In *Kovačević v. Bosnia and Herzegovina*,<sup>1</sup> the ECtHR ruled that the country's constitutional framework, which established an ethnically based power-sharing system, violated the ECHR's Protocol No. 12. The Court held that the system discriminated against non-constituent peoples,<sup>2</sup> as it gives preferential treatment to the three constituent peoples (Bosniaks, Croats, and Serbs).<sup>3</sup> The ECtHR emphasised that such discrimination undermined the democratic character of elections and amplified ethnic divisions within the country.<sup>4</sup> The judgement has highlighted the need for constitutional reform to reduce the institutional relevance of ethnicity and promote genuine democracy.<sup>5</sup>

#### 3.1.1 The Problematic Power-Sharing Arrangements of the Bosnian Constitutional System

Bosnia and Herzegovina has a power-sharing system known as *consociational democracy*. Some authors (see Merdzanovic, 2017) also use the term 'imposed consociationalism' since this system was imposed by international intervention aimed to create a stable and inclusive political system in Bosnia and Herzegovina after the war.<sup>6</sup> In general, consociational democracy is a political system that aims to prevent the 'tyranny of the majority' over smaller groups in divided societies. It has been implemented in Bosnia and Herzegovina as a means of maintaining peace and democracy in a post-conflict society (Simovic, 2022).

The consociational approach in Bosnia and Herzegovina combines federalism and shared-rule and self-rule to address the demands of ethnic groups for autonomy while preserving the integrity of the state (Aras, 2020). The Bosnian system aims to balance the autonomy of the three major ethnocultural groups while fostering a national community and common civic identity (Yehuda, 2023). The post-Dayton political organisation of Bosnia has faced difficulties in implementing the pluralist model of consociational democracy due to the lack of electoral or political incentives for

---

<sup>1</sup> ECtHR, *Kovačević v. Bosnia and Herzegovina*, app. no. 43651/22, 29 August 2023.

<sup>2</sup> *Ibid.*, para. 56.

<sup>3</sup> *Ibid.*, para. 61.

<sup>4</sup> *Ibid.*, para. 56.

<sup>5</sup> *Ibid.*, para. 74.

<sup>6</sup> *Ibid.*

cooperation among the ethnic groups. The inclusion of partition elements in the Dayton Accords 'has allowed ethnic leaders to maintain their nationalistic programs and exploit power-sharing arrangements' (Tzifakis, 2007, p. 85).

Therefore, the implementation of power-sharing mechanisms in Bosnia and Herzegovina has led to the dominance of ethnocracy and ethnopolitics, compromising an inclusive democracy untied from ethnonational issues. The power-sharing arrangements in Bosnia and Herzegovina have been criticised for violating the principles of equality and non-discrimination, as highlighted already by the European Court of Human Rights (ECtHR) ruling in the case of *Sejdić and Finci v. Bosnia & Herzegovina* (Piacentini, 2020; Woelk, 2023).

It is clear that consociationalism is often used as a transitional arrangement to resolve conflicts in divided societies, but it can also hinder long-term democracy and social peace (Boldt, 2012), as the example of Bosnia and Herzegovina shows. But one should also recall that the institutional choices made in the power-sharing systems have had different effects in Bosnia and Herzegovina, North Macedonia, and Kosovo. The more corporate consociational structures in Bosnia and Kosovo make it difficult for real change, while North Macedonia's more liberal consociational institutions allow for change within ethnic parties and across groups (Hulsey and Keil, 2021).

### 3.1.2 Implications for the Democracy v. Human Rights Debate

The *Kovačević* judgement has significant implications for the debate on democracy versus human rights. By prioritising human rights over the preservation of a power-sharing system designed to ensure ethno-democratic representation, the ECtHR signalled a further shift in its approach to balancing these competing interests. The ruling suggests that the ECtHR is increasingly willing to scrutinise and potentially overturn power-sharing arrangements that it deems to be discriminatory, even if such arrangements were established to promote peace and stability. As ECtHR explains regarding this 'peace and dialogue are best maintained by an effective political democracy... Therefore, no one should be forced to vote only according to prescribed ethnic lines, irrespective of their political viewpoint'.<sup>7</sup> Somehow the ECtHR with this statement has delegitimised power-sharing arrangements that are justified only by the preservation of peace and stability. Thus, this judgement can be seen as activist as the findings of the ECtHR not only emphasise why Bosnia and Herzegovina must find a more inclusive alternative for non-constituent peoples, but also provides an instruction set of principles on how to achieve this. Furthermore, the ECtHR expects and advocates for a transition from the consociational model to a future with no (or less) consociation in Bosnia and Herzegovina (Istrefi, 2023).

In the context of the case, the Bosnian Government argued that this electoral system was necessary to maintain peace and power-sharing in a nation deeply divided along ethnic lines following a brutal conflict.<sup>8</sup> Essentially, the Bosnian Government claimed that its very survival as a nation depended on this specific arrangement, and that protecting this system was more important than a strict interpretation of individual voting rights. The ECtHR acknowledged the complex situation in Bosnia and Herzegovina and the need to balance minority and individual rights within a post-conflict power-sharing framework.<sup>9</sup> However, the ECtHR found the existing system to be fundamentally discriminatory and in breach of the ECHR's protections against discrimination and the

---

<sup>7</sup> *Ibid.*, para. 74.

<sup>8</sup> *Ibid.*, para. 46.

<sup>9</sup> *Ibid.*, para. 55.

right to free elections. The ECtHR emphasised that even if a system of ethnic representation might remain in place,<sup>10</sup> it needed to also protect the rights of citizens like Kovačević, who did not belong to these dominant groups. The case highlights the fact that, indirectly, the constitutional identity argument cannot offer a blanket excuse for human rights violations. The ECtHR was sensitive to Bosnia and Herzegovina's specific national context but did not consider overriding it. It showcases the Court's use of proportionality analysis. One should also note the Court's decision, while substantially rejecting the legitimate aim argument in this case, does not explicitly center on this aspect. Instead, it primarily addresses the fundamental disproportionality of the electoral system itself. The Court did not fully dismantle Bosnia and Herzegovina's system but insisted on the need for reform to bring it closer in line with human rights standards. It demonstrates that the ECtHR sees democracy as broader than just ethnic representation, encompassing principles of inclusivity and individual political rights for all citizens.

### 3.2 The Latvian Cases: Contrasting Perspectives

However, the *Kovačević* judgement has also faced criticism, particularly in light of recent rulings by the ECtHR in three Latvian cases. In *Savickis and Others v. Latvia*<sup>11</sup>, *Valiullina and Others v. Latvia*<sup>12</sup>, and *Džibuti and Others v. Latvia*<sup>13</sup>, the Court upheld Latvia's differential treatment of Russian-speaking minorities regarding pensions, education, and language rights. The judgement in the case of *Savickis and Others v. Latvia* has established that the protection of *constitutional identity* can be considered a legitimate aim for differential treatment in certain circumstances. The Court balanced the right to non-discrimination under Article 14 of the ECHR to protect constitutional identity and ultimately found no violation of these provisions in the case. It provides a precedent for states to argue that differential treatment is justified if it is aimed at protecting their constitutional identity (Nugraha, 2023, p. 141). However, these judgements have raised concerns that the ECtHR is adopting a more deferential approach towards national constitutional identities, potentially undermining the protection of human rights for minorities.

These cases are part of the concept of *constitutional identity*. This refers to the core values and principles enshrined in a state's constitution. Some states have argued that their constitutional identity should allow them to limit certain ECHR rights in the name of national values or traditions.

## 4. THE NOTION OF 'CONSTITUTIONAL IDENTITY'

The ECtHR's recent practice has brought the attention of scholars and practitioners of human rights law to the term 'constitutional identity' (Son, 2017). Although there is no consensus on the unique definition of constitutional identity, the basic consensus on the definition of constitutional identity is that it represents fundamental and unchangeable values of a constitution (Scholtes, 2021; Baudoin, 2022). Indian Supreme Court in 1974 ruled, for example, that the power to amend does not entail the power to alter the basic structure of the Constitution. Similarly, the Italian Constitutional Court came up with the same conclusion that higher values of the

---

<sup>10</sup> *Ibid.*

<sup>11</sup> ECtHR, *Savickis and Others v. Latvia* [GC], app. no. 49270/11, 9 June 2022.

<sup>12</sup> ECtHR, *Valiullina and Others v. Latvia*, app. nos. 56928/19, 7306/20 and 11937/20, 14 September 2023.

<sup>13</sup> ECtHR, *Džibuti and Others v. Latvia*, app. nos. 225/20 and 2 others, 16 November 2023.

Constitution cannot be amended even through constitutional amendments (Scholtes, 2023). Constitutional identity shall constitute the constitutional originality of each state, regardless of 'does it establish a presidential or parliamentary system, a unitary or federal state - to the relation between the constitution and the culture in which it operates, and to the relation between the identity of the constitution and other relevant identities, such as national, religious, or ideological identity' (Rosenfeld, 2012, pp. 756–757). As Drinóczi points out, 'the identity of the constitution is found among provisions of constitutional texts and related jurisprudence that specifically and exclusively feature a status that was constituted during the constitution-making process and shaped by either formal or informal constitutional amendments' (Drinóczi, 2020, p.129). Constitutional identity, thus, makes a difference between states in the sense of constitutional orders. Somehow, constitutional identity aims to bring plurality to the globalised world where constitutions are, more or less, unified by the same constitutional standard such as the rule of law, human rights, parliamentarianism, checks and balances, federalism, etc.

However, in the globalised world, and in the era of international obligations of states regarding human rights, many states found constitutional identity as the answer to the internationalisation of domestic legal orders. In particular, this trend of circumventing international obligations by employing constitutional identity as an argument, so far, could be seen in the EU. Since respecting 'national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government'<sup>14</sup> is the foundation of the EU, member states have been utilising their constitutional identities to reduce the penetration of international (EU) law in domestic legal orders. Accordingly, the German Constitutional Court in the *Lisbon Treaty* case,<sup>15</sup> found the power to invoke the constitutional identity argument based on the mentioned provision of the TEU (Grimm, 2023, pp. 13–15). This prospect for invoking constitutional identity by member states has created space for abusing constitutionalism. For example, the Visegrád countries have defined and employed constitutional identity in rejecting migrant relocation quotas in the EU (Kovács, 2017). In this sense, constitutional identity has been found to be a suitable argument for 'endorsing illiberal measures in the EU member states' (Körtvélyesi and Majtényi, 2017, p. 1743). In endorsing illiberal measures by employing the argument of constitutional identity, authoritarian or semi-authoritarian regimes argue that they have their original version of protecting human rights, the rule of law, and democracy, for example, regardless that their 'original version' does not meet the fundamental criteria of these principles (Bard, Chronowski, and Fleck, 2023, p. 34). What was the response of the European Court of Justice (CJEU) regarding the abuse of constitutional identity? The CJEU in the landmark judgement in the case of Hungary and Poland<sup>16</sup> for the first time in such clear terms defined constitutional identity and at the same time, it responded to the increasing trend of abusing the constitutional identity argument for promoting illiberal and autocratic measures. However, the CJEU did not abandon constitutional identity *per se*, but it detached constitutional identities from unconstitutional identities (Faraguna and Drinóczi, 2022). More precisely, the CJEU states that 'the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from

---

<sup>14</sup> Article 4(2) of the TEU.

<sup>15</sup> Germany, Federal Constitutional Court, 2 BvE 2/08 (30 June 2009).

<sup>16</sup> CJEU, judgement of 16 February 2022, Hungary v. European Parliament and Council of the European Union, C-156/21, ECLI:EU:C:2022:97; and CJEU, judgment of 16 February 2022, Republic of Poland v. European Parliament and Council of the European Union, C-157/21, ECLI:EU:C:2022:98.

one Member State to another. Whilst they have separate national identities, inherent in their fundamental structures, political and constitutional, which the European Union respects, the Member States adhere to a concept of "the rule of law" which they share, as a value common to their own constitutional traditions, and which they have undertaken to respect at all times.<sup>17</sup> In that manner, the CJEU pointed out that although member states have sovereign power in establishing their own constitutional identities, those identities must adhere to the basic concept of the rule of law in the EU. This perspective of the CJEU could also be placed in the context of public international law and the provision of the Vienna Convention from 1969 which states that states 'may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.<sup>18</sup>

The argument of constitutional identity has been spreading to ECtHR as seen in the recent Latvian cases. These cases have invoked the question if constitutional identity is a legitimate aim in limiting human rights under ECHR. Unlike the TEU, the ECHR does not recognise constitutional identity in the text, but within the ECHR's framework, constitutional identity is recognised through the 'margin of appreciation' which creates room for invoking constitutional identity as a legitimate aim (Halmaj and Scholtes, 2024, p.273). In this sense, three Latvian cases have been icebreaking for successfully utilising constitutional identity to legitimise the unequal treatment of citizens before the ECtHR. In other words, the ECtHR in *Savickis and Others v. Latvia*; *Valiullina and Others v. Latvia*; and *Džibuti and Others v. Latvia*; has accepted the Latvian argument of constitutional identity for differential treatment of citizens. These cases delivered the important question of how the ECtHR will deal with future cases where states will employ constitutional identity as a legitimate aim for unequal treatment. To answer this question, firstly, we will compare *Bosnian and Latvian* cases before the ECtHR because both were about constitutional matters and unequal treatments and at the same time, they invoked different legitimate aims, with different outcomes in the context of ECtHR judgements in these cases.

## 5. COMPARISON OF BOSNIAN AND LATVIAN CASES BEFORE THE ECtHR - INVOKING PEACE AND CONSTITUTIONAL IDENTITY AS LEGITIMATE AIMS

Bosnia and Herzegovina became famous for *Sejdić and Finci v. B&H* case which brought two novelties to the ECtHR's jurisprudence. First, the ECtHR challenged the provisions of a constitution, and on top of that Protocol 12 of the ECHR was for the first time invoked in such a case. What was it about? The Bosnian Constitution was established as a part of the Dayton Peace Agreement in 1995. Because the Constitution was the outcome of peace-making negotiations, it prescribes exclusive seats for the constituent peoples (three major ethnic groups: Bosniaks, Serbs, and Croats) regarding the Presidency of B&H and the House of Peoples of B&H (Articles IV and V). Therefore, citizens of Bosnia and Herzegovina, including members of national minorities, who are not affiliated with any of the constituent peoples, cannot be candidates for these institutions. *Sejdić and Finci v. B&H* was the first case before the ECtHR where the position of the constituent peoples was contested before the ECtHR. Subsequently, *Zornić v. B&H*, *Pilav v. B&H*, *Šlaku v. B&H*, *Pudarić v. B&H*, and *Kovačević v. B&H* came up to the ECtHR challenging the same provisions of the Bosnian Constitutions. The ECtHR in all mentioned cases, followed the same argument, that the Bosnian Constitution

---

<sup>17</sup> CJEU, judgement of 16 February 2022, *Hungary v. European Parliament and Council of the European Union*, C-156/21, ECLI:EU:C:2022:97, paras. 233-234.

<sup>18</sup> Article 27 of the Vienna Convention on the Law of Treaties 1969.

discriminates against all people in B&H who are not the constituent peoples including national minorities, and the constituent peoples who dwell in a 'wrong' entity.<sup>19</sup>

The ECtHR found discrimination under Article 14 along with Article 3 of Protocol No. 1 of the ECHR and under Article 1 of Protocol No. 12. The Bosnian Government argued that the preservation of peace is the reason why the constituent peoples enjoy privileges within the Constitution and since peace is still fragile in Bosnia and Herzegovina, there is still the necessity to maintain the position of the constituent peoples within the Bosnian Constitution. However, the ECtHR in contesting provisions in the context of the legitimate aim and necessity stated:

When the impugned constitutional provisions were put in place a very fragile ceasefire was in effect on the ground. The provisions were designed to end a brutal conflict marked by genocide and 'ethnic cleansing'. The nature of the conflict was such that the approval of the "constituent peoples" ... was necessary to ensure peace. This could explain, without necessarily justifying, the absence of representatives of the other communities (such as local Roma and Jewish communities) at the peace negotiations and the participants' preoccupation with effective equality between the "constituent peoples" in the post-conflict society. The Court does not need to decide whether the upholding of the contested constitutional provisions after the ratification of the ECHR could be said to serve a "legitimate aim" since for the reasons set out below the maintenance of the system in any event does not satisfy the requirement of proportionality.<sup>20</sup>

In other words, the Bosnian Government has invoked peace as the legitimate aim for the privileges of the constituent peoples. The ECtHR ruled that since stable peace was established, there is no reason to maintain these privileges in the constitutional order of Bosnia and Herzegovina. This is the core of all Bosnian judgements before the ECtHR. Following the argumentations of the ECtHR judgements, it can be concluded that in the eyes of the ECtHR, the B&H constitutional order is just a temporary solution (emphasised on contested constitutional provisions), till B&H enacts a new democratic constitution (Bardutzky, 2010, p. 328). In addition, regarding the proportionality of the contested constitutional provisions, the ECtHR stated that there was no 'need to decide whether the upholding of the contested constitutional provisions after the ratification of the Convention could be said to serve a "legitimate aim" since for the reasons set out below the maintenance of the system, in any event, does not satisfy the requirement of proportionality.<sup>21</sup> The reasons are the progress that was made by Bosnia and Herzegovina after the conflict, and thus constitutional provisions that serve to maintain peace have no reasons to be maintained in force.

On the other hand, in the recent case of *Savickis and Others v. Latvia*, constitutional identity was utilised as a legitimate aim for different treatment of citizens. More precisely, Savickis and four other applicants challenged provisions of Latvia's legal system that prescribe differential treatment in the calculation of pension between Latvian citizens and the 'permanently resident non-citizens' (*nepilsoņi*) (Nugraha, 2023). In fact, *nepilsoņi* are the people who moved to Latvia after the Soviet Union annexed it. Still, after Latvia regained its full independence, Latvian citizenship was not restored for the mentioned category of peoples, because their migration to Latvia was considered as the

---

<sup>19</sup> ECtHR, *Sejdić and Finci v. B&H* [GC], app. nos. 27996/06 and 34836/06, 22 December 2009, para. 2; ECtHR, *Zornić v. B&H*, app. no. 3681/06, 15 July 2014, para. 3; ECtHR, *Pilav v. B&H*, app. no. 41939/07, 9 June 2016, para. 3; ECtHR, *Šlaku v. B&H*, app. no. 56666/12, 26 May 2016, para. 3; ECtHR, *Pudarić v. B&H*, app. no. 55799/18, 8 December 2020, paras. 5-6.

<sup>20</sup> ECtHR, *Sejdić and Finci v. B&H* [GC], app. nos. 27996/06 and 34836/06, 22 December 2009, paras. 45-46.

<sup>21</sup> *Ibid.*, para. 46.



aftermath of the unlawful annexation of Latvia.<sup>22</sup> In other words, for non-citizens of Latvia (*nepilsoni*), employment in former USSR republics outside the Latvian SSR is excluded from pension calculations, whereas for Latvian citizens with ancestral ties predating Soviet occupation, such employment is always included, making nationality the sole basis for this distinction.<sup>23</sup> This different treatment was challenged under Article 14 of the ECHR taken along with Article 1 of Protocol No. 1. The ECtHR, in this case, has ruled that there is no violation of the mentioned Article of the ECHR.<sup>24</sup> Interestingly, the ECtHR has accepted the protection of *constitutional identity* as a legitimate aim for the different treatment of citizens. More precisely, the Latvian government argued that 'the impugned difference in treatment was directly based on the doctrine of State continuity and, by extension, had its roots in public international law. It had at least two legitimate aims: protection of Latvia's economic system following the restoration of its independence and respect for the principle of State continuity and constitutional identity'.<sup>25</sup> Apart from accepting the protection of constitutional identity as a legitimate aim, the ECtHR also defined constitutional identity in this particular case, which is not of course the universal definition of constitutional identity. Therefore, for the ECtHR, the protection of constitutional identity is not the doctrine of State continuity *per se* but [rather relies on] the constitutional foundation of the Republic of Latvia following the restoration of its independence. The underlying arguments for Latvia's doctrine of State continuity stem from the overall historical and demographic background, which, as argued by the Government, accordingly, also informed the setting up of the impugned system of retirement pensions following the restoration of Latvia's independence. More specifically, the Court acknowledges that the aim in that context was to avoid retrospective approbation of the consequences of the immigration policy practised in the period of unlawful occupation and annexation of the country. In this specific historical context, such an aim, as pursued by the Latvian legislature when establishing the system of retirement pensions, was consistent with the efforts to rebuild the nation's life following the restoration of independence, and the Court accepts this aim as legitimate.<sup>26</sup>

This definition of constitutional identity delivered by ECtHR, in the context of the ECHR and constitutional identity as a legitimate aim, is unclear and leaves room for different interpretations in the future. Namely, the ECtHR accepted the emergence of the Latvian constitutional identity based on the state continuity of Latvia, which indeed appears as a vague concept. The state continuity doctrine in Latvia is found on historical occasions of Latvia regaining independence from the Soviet Union. Accepting historical occasions as constitutional identity, the ECtHR has given a wide margin of appreciation to Latvia (Nugraha, 2023).<sup>27</sup>

Constitutional identity as a legitimate aim has also been confirmed in the *Valiullina and Others v. Latvia* case, where the ECtHR ruled about reforms in public schools that partly prevented Latvian children from minority groups from obtaining education in their mother tongue. The ECtHR, by accepting constitutional identity as a legitimate aim has approved further restrictions on Russian-language teaching in public schools, depriving a large part of the Latvian population of education in their mother tongue

---

<sup>22</sup> *Ibid.*

<sup>23</sup> ECtHR, *Savickis and Others v. Latvia* [GC], app. no. 49270/11, 9 June 2022, paras. 66-68.

<sup>24</sup> *Ibid.*

<sup>25</sup> *Ibid.*, para 176.

<sup>26</sup> *Ibid.*, paras 214-219

<sup>27</sup> ECtHR, *Savickis and Others v. Latvia* [GC], app. no. 49270/11, 9 June 2022, Dissenting Opinion, paras. 12-13.

(Ganty, Kochenov and Nugraha, 2023). In this context, the ECtHR stated that 'the questions pertaining to the need to protect and strengthen the State language go to the heart of the constitutional identity of the State, and it is not the Court's role to question the assessment made by the Constitutional Court in that regard unless it was arbitrary, which the Court does not find in the present case'.<sup>28</sup>

So, there are some correlations between Bosnian and Latvian cases before the ECtHR. Firstly, both have been on constitutional matters and unequal treatment of citizens in these states. Both states have invoked historical occasions as legitimate aims for different treatment, Bosnia and Herzegovina has invoked the war occasions, and Latvia has invoked gaining independence from the Soviet Union as specific historical occasions. But these states have done it differently - Bosnia and Herzegovina has invoked preservation of peace as a legitimate aim, and Latvia has invoked constitutional identity as a legitimate aim. Latvia was significantly more successful before the ECtHR since its legitimate aim has been accepted by the ECtHR as appropriate in restricting human rights, and Bosnian legitimate aim was not since the ECtHR stated that there is no reason and necessity to maintain provisions whose aim is to preserve peace in Bosnia and Herzegovina.

Regarding the unequal treatment, Latvian cases were contested under Article 14 along with other Articles. Bosnian cases, including the mentioned Article, were contested under Article 1 of Protocol 12. Accordingly, this comparison raises the important question - is constitutional identity more of a suitable argument (legitimate aim) for justification of unequal treatment than the preservation of peace? Constitutional identity, so far, has not been contested as a legitimate aim under Protocol 12, and the pending<sup>29</sup> *Kovačević v. B&H* case before the Grand Chamber does not indicate that the question of the privileges of the constituent peoples, as the core of the constitutional identity of B&H, will be resolved.

## 6. IS THE KOVAČEVIĆ CASE CHALLENGING THE BOSNIAN CONSTITUTIONAL IDENTITY?

As explained, the ECtHR in the case *Kovačević v. B&H*, has ruled that provisions of the Bosnian Constitution regarding domination of the constituent peoples are not in line with the ECHR's standards regarding prohibition of discrimination. The Court has followed the reasoning of the *Zornić* case, reiterating that since stable peace was established, there is no reason to maintain these provisions. However, this judgment is not final, as the case is currently pending before the ECtHR Grand Chamber following an appeal lodged by the Bosnian Government against the initial ruling. According to the ECtHR jurisprudence in the Latvian cases we mentioned, this pending case raises a question: *Can the Bosnian Government invoke constitutional identity as a legitimate aim instead of preservation of peace?* We consider it relevant since this argument of constitutional identity has already been developed and established in the jurisprudence of the Bosnian Constitutional Court.

In that context, the Bosnian Constitutional Court developed, in two cases, a constitutional identity called the *constituency of peoples*. In its third partial decision on judgement U-5/98, the Bosnian Constitutional Court was tasked with determining

---

<sup>28</sup> ECtHR, *Valiullina and Others v. Latvia*, app. nos. 56928/19, 7306/20 and 11937/20, 14 September 2023, para. 208.

<sup>29</sup> See the status of the case here: <https://ks.echr.coe.int/web/echr-ks/w/referral-of-kovacevic-v.-bosnia-and-herzegovina-to-the-grand-chamber>

whether the constitutions of the entities conformed to the national Constitution. More precisely, although the Bosnian Constitution prescribed Bosniaks, Serbs, and Croats are constituent peoples, at that time, only Bosniaks and Croats were constituent in the Federation of Bosnia and Herzegovina, and only Serbs were constituent in the Republika Srpska. To solve this problem, the Bosnian Constitutional Court has established the concept of the constituency of peoples which guarantees that all constituent peoples are constituents in all territory of Bosnia and Herzegovina regardless of whether they are a *de facto* minority in any of the entities. Thus, the Constitutional Court defined the constituency of peoples as the democratic principle that guarantees equal protection of all ethnic groups in the multi-ethnic state that enjoys the special position within the Bosnian constitutional framework as the overarching principle with which Entities must fully comply.<sup>30</sup> The Bosnian Constitutional Court, intentionally or not, defined the constituency of peoples as the *sui generis* concept which can bring balance to the multi-ethnic state and implicitly defined the constituency of peoples as the constitutional identity of Bosnia and Herzegovina

The constitutional identity argument was again repeated by the Bosnian Constitutional Court in the *Ljubić* case, where the Court ruled that the constituent peoples are not equally represented in the state institutions because 'the right [of the constituent peoples] to participate in democratic decision-making exercised through legitimate political representation will not be based on democratic election of delegates to the House of Peoples of the Federation of Bosnia and Herzegovina by the constituent people that are represented and whose interests are represented by those delegates'.<sup>31</sup> The Bosnian Constitutional Court again reiterated that the constituency of people is overcharging the principle of the Bosnian Constitution, and all other provisions must comply with it.<sup>32</sup>

However, this notion of constitutional identity has been developed within the constitutional framework of Bosnia and Herzegovina, but it has never been explicitly invoked by the Bosnian government and challenged before international human rights tribunals such as the ECtHR.<sup>33</sup> But one can argue that this Bosnian constitutional identity entails the argument of 'preserving peace and stability' since this constitutional framework based on the constituent peoples was primarily created to enable power-sharing to stabilise the functioning of the institutions of Bosnia and Herzegovina. Only functioning and stable institutions can guarantee peace and stability. There is no doubt that the power-sharing constitutional model of Bosnia and Herzegovina is part of its constitutional identity. The question remains, of course, if this sort of constitutional identity is permanent or only temporary, as implicitly suggested in the previous jurisprudence of the ECtHR.<sup>34</sup>

---

<sup>30</sup> The partial decision Constitutional Court of Bosnia and Herzegovina, U-5/98 (30 June and 1 July 2000), paras. 53, 57, 63.

<sup>31</sup> Constitutional Court of Bosnia and Herzegovina, U-23/14 (1 December 2016), para. 60.

<sup>32</sup> *Ibid.*, para. 49.

<sup>33</sup> Although the Bosnian Government invoked in the *Kovačević v. B&H* case (fn1, para. 46) the case of ECtHR, *Ždanoka v. Latvia* [GC], app. no. 58278/00, 17 June 2004, in which the Court had reaffirmed that 'the Contracting Parties enjoyed considerable latitude in establishing rules within their constitutional order to govern parliamentary elections and the composition of the parliament, and that the relevant criteria could vary according to the historical and political factors peculiar to each State'.

<sup>34</sup> See footnote no. 19.

## 7. QUO VADIS CONSTITUTIONAL IDENTITY?

The ECtHR must strike a balance between the legitimate role of democratic self-governance in member states and the legitimate demands of human rights. The ECtHR has sometimes been too willing to intervene in the internal affairs of member states, and this has led to a backlash against the Court in some countries (Pildes, 2018). International courts face a legitimacy dilemma when called upon to rule on the human rights compatibility of these power-sharing systems, as they may be seen as overstepping their authority by interfering in the domestic affairs of a sovereign state (Graziadei, 2016). The ECtHR must walk a fine line between protecting human rights and respecting the democratic process. It must also be careful not to overreach in its decisions, as this could undermine its legitimacy. In her dissenting opinion<sup>35</sup> in the *Kovačević* case, Judge Kucsko-Stadlmayer raised, *inter alia*, the question of discrimination based on representation. The judge stated that the ECtHR in this case '(...) insinuates an unprecedented concept in which every voter has an individual right to candidates by whom he or she is "represented". Although the ECtHR intended to enable all segments of society, to have a chance to be represented in public institutions where decisions are made that bind all members of this society, it is another question of how far the ECtHR can intervene in the very structure of a political system (especially fragile as consociational democracies) without risking to break it.

The only viable path for the ECtHR seems to be granting a greater 'margin of appreciation'<sup>36</sup> to states regarding the legitimate aim of protecting the 'constitutional identity', especially in cases of consociational democracies.

As the Latvian cases indicate, the ECtHR is accepting the argument of 'protecting the constitutional identity' as a legitimate aim and is potentially giving countries more leeway (margin of appreciation) in how they define and protect their identity, even if it restricts rights. But it becomes harder to predict where the line will be drawn between a state's legitimate right to protect its core values and the ECHR's mandate to protect individual rights universally. The ECtHR has acknowledged the concept of constitutional identity, but it has not offered a strictly defined set of what can constitute it. Constitutional identity may encompass aspects beyond written constitutional text, potentially including historical narratives, deeply rooted values, and cultural traditions (like in the Latvian cases). Member states' courts have significant influence in defining the content of their constitutional identity. The flexibility in the concept creates the risk that a government could justify almost anything under the guise of constitutional identity, including measures that undermine core human rights. In the Latvian cases, the ECtHR made the 'constitutional identity' a 'magic spell to transubstantiate violations of the ECHR' (Ganty, Kočenov and Nugraha, 2023).

On the other hand, the *Kovačević* case raises some questions to the ECtHR that will need to be answered in its evolving jurisprudence. First, what predictable methodology the ECtHR will be using to identify and recognise a country's constitutional identity? It is evident that the ECtHR has not afforded Bosnian constitutional identity the same weight or status as it has granted to Latvia's constitutional identity. The ECtHR, unlike the Latvian cases, should have a more insightful approach regarding the recognition of constitutional identity. As Halmai and Scholtes point out, 'constitutional

---

<sup>35</sup> ECtHR, *Kovačević v. Bosnia and Herzegovina*, app. no. 43651/22, 29 August 2023, Dissenting Opinion, para. 20.

<sup>36</sup> The 'margin of appreciation' is a doctrine that the ECtHR uses to allow member states some flexibility in interpreting and applying the ECHR. The margin of appreciation reflects the Court's recognition that not all human rights are interpreted in the same way in all countries. See more in: Pildes (2018).

identity should be seen as an unconditional source of value - it only deserves recognition to the extent that it serves the ideals of constitutionalism' (Halmai and Scholtes, 2024, p. 273).

Following the question of recognition, there is the second challenge for the ECtHR, and that is the classification of constitutional identities. As Faraguna points out, 'constitutional identity is an extremely dangerous tool, not fully compatible with basic principles of constitutionalism' (Faraguna, 2017, p. 1640). Accordingly, this paper argues that the ECtHR ought to look up to the recent practice of the CJEU regarding constitutional identities and detaching the 'legitimate' from the 'non-legitimate' constitutional identities. To do this, we assume that there are abusive and non-abusive constitutional identities. The main differentiating factor between these two categories should be whether constitutional identities adhere, in general, to the rule of law and democratic principles (non-abusive constitutional identities) or serve exclusively the particular interests of certain groups within the constitutional order (abusive constitutional identities). To further clarify things, the ECtHR would also have to take into account if there is a 'European consensus'<sup>37</sup> on that matter.

So, we argue that constitutional identity can be a legitimate argument in human rights (case) law, but not under every circumstance. International (regional) human rights bodies to save their legitimacy among states by respecting constitutional identities as a valid argument from constitutional (domestic) law, and at the same time protection of human rights, must distinguish abusive from non-abusive constitutional identities. In that manner, the ECtHR (and other international human rights bodies) would create space for states to protect their constitutional identities, but at the same time, it would prevent states from abusing constitutional identities for breaching human rights. In this regard, coming back to the *Kovačević* case, if the ECtHR recognises the constituency of peoples as the Bosnian constitutional identity, the ECtHR could still rule that the constituency of peoples is an abusive constitutional identity since it does not serve the ideals of constitutionalism - more precisely - does not serve the rule of law and human rights which are also defined in the Bosnian Constitution.<sup>38</sup> However, that would only be the first step since the Bosnian constitutional provisions have to pass through the test of proportionality and necessity.

## 8. CONCLUSION

Based on the comprehensive examination of recent jurisprudence, it is clear that the European Court of Human Rights (ECtHR) faces a complex task in balancing democracy, human rights, and constitutional identity. The *Kovačević* case against Bosnia and Herzegovina underscores the Court's commitment to upholding human rights even when it challenges entrenched power-sharing arrangements designed to maintain peace in post-conflict societies. In contrast, the Latvian cases reveal a more deferential stance towards national constitutional identities, allowing for differential treatment in the name of protecting these identities.

The core challenge lies in the ECtHR's need to navigate between respecting national sovereignty and ensuring that human rights are universally protected. This

---

<sup>37</sup> The European Court of Human Rights (ECtHR) frequently relies on the concept of European consensus in its jurisprudence when interpreting the European Convention on Human Rights (ECHR). This consensus is crucial for aligning the Court's interpretation of Convention rights with common values among member states. See more in: Lewis (2023).

<sup>38</sup> Article I(2) and Article II of the Bosnian Constitution. Also, see Marko (2023).

requires a nuanced approach where the Court must distinguish between legitimate and abusive uses of constitutional identity. A legitimate constitutional identity should align with the rule of law and democratic principles, whereas an abusive constitutional identity serves narrow interests and undermines fundamental human rights. But how wide this 'margin of appreciation' of member states is in these cases depends on the context of each individual case, especially which human rights are at stake and if there is an existing 'European consensus' regarding concrete human rights standards. Nevertheless, bearing in mind the fragility of power-sharing constitutional orders, it is probably more appropriate for the Court to constrain itself by granting more leeway to states, especially in decisions regarding political and voting arrangements in (consociational) democracies. In these cases, also the principle of subsidiarity must be taken into account. The credo here is: do not cause greater harm even if this means not to intervene.

Moving forward, it is crucial for the ECtHR to establish clearer guidelines and methodologies for recognising and evaluating constitutional identities. By doing so, the Court can better manage the delicate balance between national particularities and universal human rights standards, ensuring that the protection of human rights is not compromised by the invocation of constitutional identity. This balanced approach will not only enhance the legitimacy of the ECtHR but also contribute to the broader goal of harmonising democracy and human rights within the diverse constitutional landscapes of its member states.

#### BIBLIOGRAPHY:

- Aras, F. I. (2020). Una constitución para la paz: Federalismo y consociativismo en Bosnia y Herzegovina. *Revista Electrónica De Derecho Internacional Contemporáneo*, 3(3), 127-134.
- Bardutzky, S. (2010). The Strasbourg Court on the Dayton Constitution: Judgment in the case of Sejdić and Finci v. Bosnia and Herzegovina, 22 December 2009. *European Constitutional Law Review*, 6(2), 309-333, <https://doi.org/10.1017/S1574019610200081>
- Bard, P., Chronowski, N. and Fleck, Z. (2023). Use, misuse, and abuse of constitutional identity in Europe. *CEU DI Working Papers*, 6, 1–45.
- Baudoin, M. É. (2022). Constitutional identity, a new legal Babel in Europe. *Hungarian Journal of Legal Studies*, 63(1), 21-37, <https://doi.org/10.1556/2052.2022.00398>
- Boldt, H. (2012). Ending consociational power-sharing. The Sejdić and Finci case and the prospects for constitutional reform in Bosnia and Herzegovina. *ICL Journal*, 6(3-4), 489-547, <https://doi.org/10.1515/icl-2012-3-408>
- Donnelly, M. P. (2020). Democracy and sovereignty vs international human rights: reconciling the irreconcilable? *The International Journal of Human Rights*, 24(10), 1429-1450, <https://doi.org/10.1080/13642987.2018.1454904>
- Drinóczi, T. (2020). Constitutional identity in Europe: The identity of the constitution. A regional approach. *German Law Journal*, 21(2), 105–129, <https://doi.org/10.1017/glj.2020.1>
- Faraguna, P. (2017). Constitutional identity in the EU—A shield or a sword? *German Law Journal*, 18(7), 1617-1640, <https://doi.org/10.1017/S207183220002246X>
- Faraguna, P. and Drinóczi, T. (2022). Constitutional identity in and on EU terms. *Verfassungsblog*. Available at: <https://verfassungsblog.de/constitutional-identity-in-and-on-eu-terms/> (accessed on 05.04.2024). DOI: <https://dx.doi.org/10.17176/20220222-001059-0>

- Ganty, S., Kochenov, D. V. and Nugraha, I. Y. (2023). Constitutional identity vs. human rights: The ECtHR's bizarre turn in three Latvian cases. *Verfassungsblog*. Available at: <https://verfassungsblog.de/constitutional-identity-vs-human-rights/> (accessed on 14.10.2024). DOI: <https://dx.doi.org/10.59704/55184a96adabe0b0>
- Graziadei, S. (2016). Democracy v human rights? The Strasbourg Court and the challenge of power-sharing. *European Constitutional Law Review*, 12(1), 54-84, <https://doi.org/10.1017/S1574019616000043>
- Grimm, D. (2023). Three meanings of constitutional identity and their prospects in the European Union. In: de Poorter, J., van der Schyff, G., Stremmer, M., De Visser, M., Leijten, I. and van Oirsouw, C. (Eds.), *European Yearbook of Constitutional Law 2022: A constitutional identity for the EU?* (vol. 4, pp. 13–15). T.M.C. Asser Press. DOI: <https://doi.org/10.1007/978-94-6265-595-9>
- Halmaj, G. and Scholtes, J. (2024). Illiberal constitutionalism and the abuse of constitutional identity. In: Hirschl, R. and Roznai, Y. (Eds.), *Deciphering the genome of constitutionalism: The foundations and future of constitutional identity* (pp. 272–273). Cambridge University Press.
- Hulsey, J. and Keil, S. (2021). Power-sharing and party politics in the Western Balkans. In: Keil, S. and McCulloch, A. (Eds.), *Power-sharing in Europe. Federalism and internal conflicts* (pp. 115–139). Palgrave Macmillan.
- Istrefi, K. (2023). Kovačević v Bosnia and Herzegovina, and the saga of the Dayton Peace Agreement's incompatibility with the European Convention on Human Rights. *EJIL:Talk!*. Available at: <https://www.ejiltalk.org/kovacevic-v-bosnia-and-herzegovina-and-the-saga-of-the-dayton-peace-agreements-incompatibility-with-the-european-convention-on-human-rights/> (accessed on 02.04.2024).
- Kovács, K. (2017). The rise of an ethnocultural constitutional identity in the jurisprudence of the East Central European Courts. *German Law Journal*, 18(7), 1703–1720, <https://doi.org/10.1017/S2071832200022501>
- Körtvélyesi, Z. and Majtényi, B. (2017). Game of values: The threat of exclusive constitutional identity, the EU and Hungary. *German Law Journal*, 18(7), 1721–1743, <https://doi.org/10.1017/S2071832200022513>
- Lewis, C. E. (2023). The European Court of Human Rights and its search for common values. *European Convention on Human Rights Law Review*, 4(2), 179–220.
- Marko, J. (2023). The Kovačević case revisited: The ECtHR Grand Chamber may de-block the constitutional impasse in Bosnia and Herzegovina. *Verfassungsblog*. Available at: <https://verfassungsblog.de/the-kovacevic-case-revisited/> (accessed on 14.10.2024).
- Merdzanovic, A. (2017). Imposed consociationalism: External intervention and power-sharing in Bosnia and Herzegovina. *Peacebuilding*, 5(1), 22-35, <https://doi.org/10.1080/21647259.2016.1264918>
- Nugraha, I. Y. (2023). Protection of constitutional identity as a legitimate aim for differential treatment. *European Constitutional Law Review*, 19(1), 141-162, <https://doi.org/10.1017/S1574019622000463>
- Piacentini, A. (2020). Nonaligned citizens: Ethnic power-sharing and nonethnic identities in Bosnia Herzegovina – The case of Sarajevo. *Nationalities Papers*, 48(4), 707-720, <https://doi.org/10.1017/nps.2019.61>
- Pildes, R. H. (2018). Supranational courts and the law of democracy: The European Court of Human Rights. *Journal of International Dispute Settlement*, 9(2), 154-179, <https://doi.org/10.1093/jnlids/idx007>

- Rosenfeld, M. (2012). Constitutional identity. In: Rosenfeld, M. and Sajó, A. (Eds.), *The Oxford handbook of comparative constitutional law* (pp. 756–757). Oxford University Press. DOI: <https://doi.org/10.1093/law/9780199578610.001.0001>
- Scholtes, J. (2021). Abusing constitutional identity. *German Law Journal*, 22(4), 534-556, <https://doi.org/10.1017/glj.2021.21>
- Scholtes, J. (2023). *The abuse of constitutional identity in the European Union*. Oxford University Press. DOI: <https://doi.org/10.1093/oso/9780198883173.003.0001>
- Simovic, V. (2022). Evropske integracije Bosne i Hercegovine i logika konsocijalizma [European Integration of Bosnia and Herzegovina and the Logic of Consociationalism]. *Socioloski godisnjak* [Sociological Yearbook], 17, 49-64, <https://doi.org/10.5937/socgod17-42077>
- Son, B. N. (2017). Globalization of constitutional identity. *Washington International Law Journal*, 26(3), 463-533.
- Tzifakis, N. (2007). The Bosnian peace process: The power-sharing approach revisited. *Perspectives*, No. 28, 85-102.
- Woelk, J. (2023). Opening Pandora's box? On the Kovačević case and the European Court of Human Rights' fundamental criticism of the electoral system in Bosnia and Herzegovina. *Verfassungsblog*. Available at: <https://verfassungsblog.de/opening-pandoras-box/> (accessed on 15.04.2024). DOI: <https://doi.org/10.17176/20230901-183000-0>
- Yehuda, L. (2023). *Collective equality: Human rights and democracy in ethno-national conflicts*. Cambridge University Press. DOI: <https://doi.org/10.1017/9781009090988>
- Zand, J. (2017). The concept of democracy and the European Convention on Human Rights. *Indiana International and Comparative Law Review*, 27(1), 15-42, <https://doi.org/10.18060/7909.0045>
- CJEU, judgement of 16 February 2022, Hungary v. European Parliament and Council of the European Union, C-156/21, ECLI:EU:C:2022:97.
- CJEU, judgment of 16 February 2022, Republic of Poland v. European Parliament and Council of the European Union, C-157/21, ECLI:EU:C:2022:98.
- Constitutional Court of Bosnia and Herzegovina, U-5/98 (30 June and 1 July 2000).
- Constitutional Court of Bosnia and Herzegovina, U-23/14 (1 December 2016).
- ECtHR, Ždanoka v. Latvia [GC], app. no. 58278/00, 17 June 2004.
- ECtHR, Sejdić and Finci v. B&H [GC], app. nos. 27996/06 and 34836/06, 22 December 2009.
- ECtHR, Zornić v. B&H, app. no. 3681/06, 15 July 2014.
- ECtHR, Šlaku v. B&H, app. no. 56666/12, 26 May 2016.
- ECtHR, Pilav v. B&H, app. no. 41939/07, 9 June 2016.
- ECtHR, Pudarić v. B&H, app. no. 55799/18, 8 December 2020.
- ECtHR, Savickis and Others v. Latvia [GC], app. no. 49270/11, 9 June 2022.
- ECtHR, Kovačević v. Bosnia and Herzegovina, app. no. 43651/22, 29 August 2023.
- ECtHR, Valiullina and Others v. Latvia, app. nos. 56928/19, 7306/20 and 11937/20, 14 September 2023.
- ECtHR, Džibuti and Others v. Latvia, app. nos. 225/20 and 2 others, 16 November 2023.
- Germany, Federal Constitutional Court, 2 BvE 2/08 (30 June 2009)