Universidade de Brasília

Faculdade de Direito - FD

Programa de Pós-Graduação em Direito

Dayton Agreement and Democracy to Come in Bosnia and Herzegovina

Stefan Trifunović

Brasilia

2016

Stefan Trifunović

Dayton Agreement and Democracy to Come in Bosnia and Herzegovina

Thesis submitted to the Postgraduate Program

of the Law Faculty of the University of

Brasilia, as a partial requirement for obtaining

a master's degree in law.

Research line: Political Philosophy, Constitutional theory and Democracy

Mentor: professor Juliano Zaiden Benvindo

Abstract

Jacques Derrida is one of the most controversial philosophers of late 20th and beginning of 21st century. He earned this title not only because of his views upon the various topics he dealt with in his work, but also due his general approach toward philosophy. Derrida's critical approach developed within deconstruction, ideas which have been both praised and criticized. Some of various critical positions refer to the inability of Derrida's theory to be applied upon concrete problems. These standings have been inspirational. In order to question them, this research is based upon idea of applying Derrida's idea on concrete problems. Therefore, the politico-legal context of Bosnia and Herzegovina is chosen as a case study. This is done due to several factors, including the complexity of the issues, their universality and actuality. Throughout this work, theory is intertwined with concrete problems. In many cases it highlights some deeper issues and it is able to give some deeper inside upon the problems. However, the main characteristic this work is able to show is that ideas and concepts developed by Jacques Derrida are more than useful when they are applied upon the issues existing in Bosnia and Herzegovina's political and legal reality.

Key words: Jacques Derrida, Bosnia and Herzegovina, Dayton Agreement, constitution, democracy, sovereign, heritage, democracy to come, différance.

Resumo

Jacques Derrida tem sido um dos mais controvertidos filósofos do final do século XX e começo do século XXI. Ele foi assim rotulado não só por conta das suas ideias sobre os vários tópicos com os quais tem lidado em seu trabalho, mas também devido a sua abordagem geral face à filosofia. Sua abordagem crítica desenvolvida a partir da desconstrução tem sido tanto aclamada quanto criticada. Nesse sentido, algumas dessas críticas tem feito referência à incapacidade da teoria de Derrida de ser aplicada a problemas concretos. Contudo, essas alegações têm sido instigantes. A fim de confrontá-las, a presente pesquisa se baseou na ideia de aplicar o pensamento de Derrida a problemas concretos. Para esse fim, o contexto jurídico-político da Bósnia e Herzegovina foi escolhido como estudo de caso. Essa escolha se deu em função de diversos fatores, concernentes à complexidade dos temas, sua universalidade e atualidade. Ao longo do presente trabalho, a teoria foi associada a problemas concretos, tendo, em muitos casos, dado ensejo a questionamentos e hipóteses ainda mais profundos no que concerne a essa temática. No entanto, a principal contribuição deste trabalho foi demonstrar que as ideias e conceitos desenvolvidos por Jacques Derrida tem sido mais que úteis quando aplicados em questões relativas ao atual cenário jurídico-político da Bósnia e Herzegovina.

Palavras-chave: Jacques Derrida, Bósnia e Herzegovina, Acordo de Dayton, constituição, democracia, soberania, herança, democracia por vir, différance.

Table of content

Introduction

People claiming that deconstruction doesn't address the issue of justice couldn't be more wrong as the deconstruction is justice (Derrida, 1992a, p.10). In the colloquium *Force of Law: The "Mystical Foundation of Authority"* Derrida dealt with the notion of justice. He deconstructs that concept. This particular sentence shows some of the characteristics of Derrida's philosophical approach. First of all, his theory is greatly based upon deconstruction. Through deconstructive reading he is able to address various areas of human interest. Furthermore, Derrida tackled different firmly established concept and ideas. Derrida refers to them as *logocentrisms*. The problem is that these ideas are taken for granted and they are not questioned. Derrida believes that deconstruction is way to break these established concept and norms, re-think them and come closer to the truth. In the beginning of his career, the father of deconstruction implemented his ideas mostly upon language and literature. Later on, he started to develop his ideas outside of this context. Derrida shows the potential of deconstruction to communicate with legal and political sphere. His approach starts then to be questioned and criticized. Clearly this is usual and even welcome development for any type of thinking**,** because confrontations imply that some ideas have created a certain impact. However, in the case of Derrida's work, there were critics that included disapproval of his work in general, especially his activity outside linguistic and literature. For example, analytical philosophers didn't consider Derrida as one of the philosophers. Also, it is interesting to mention the dispute between Derrida and Jurgen Habermas. Even though in the later days they found a common ground for working together, the peculiarity is that Habermas was questioning Derrida's deconstructive approach in general. All in all, main critics regarding Derrida's oeuvre claim that the Algerian-French philosopher cannot be considered a philosopher and that the deconstructive approach is limited. Deconstructive reading and Derrida's ideas in general are only seen as a way to describe some events or ideas. Those who disapprove of Derrida's philosophy claim that deconstruction is not able to provide any answers or guidance and that it only serves as analytical tool.

Is Derrida's work a proper philosophical path? Even if one classifies Derrida as a philosopher**,** does that mean that his approach offers firm base for dealing with complex legal and political questions? Can they provide solutions?

Consequently, this work is conducted upon several premises. First of all, Derrida's work is capable of giving both analytical and prescriptive solutions to real problems. Secondly, deconstruction is valuable in the legal and political sphere as much as in linguistics. Thirdly, it can be a powerful tool even when one deals with quite complex situations, because it is able to provide certain solutions to real problems. In order to prove these premises and to question the abilities of Derrida's approach, there is a need to confront his theory with a real case. I believe that the present situation in Bosnia and Herzegovina provides more than sufficient material to conduct this research. What is going on in Bosnia and Herzegovina? The best way to illustrate a country's legal and political reality is through legal cases. They represent the instance in which state's legal theory and court praxis collide with the life of citizens. Hence, two cases which maybe reveal the most extreme negative consequence of the way Bosnian legal frame was created, and has been preserved, will be a central topic of this research. These law suits are examples of situations in which people of Bosnia have not been able to exercise their basic rights. Mr. Pilav, on one hand, and Mr. Sejdic and Mr. Finci, on the other, are citizens of Bosnia and Herzegovina who were stripped of their right to be candidates on the country's elections. The paradox is that according to Bosnian legal frame courts' decision, depriving these people from their right was perfectly legal. Here lies the main problem. This is also what makes the situation universally relevant. The way the legal framework does not correspond to the political and legal reality is not only problem which Bosnian society faces. It goes over it. It is a problem of many modern democracies as well. These issues should be looked upon as particular and universal at the same time. These facts make them even more desirable and worthy of an academic research. This thesis will show the ability of Derrida's theory to tackle complex legal issues. In order to do so, this work is divided in three parts.

First of all, we examine the context where Bosnian citizens were prevented from using their passive voting right. Furthermore, in the first chapter, we mention the recent developments and historical background as a frame of reference. Bosnian and Herzegovina legal concept is quite unique. The country's constitution was created as a part of the peace conference. For such

purpose, we refer to The General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Agreement, Dayton Accords, Paris Protocol or Dayton-Paris Agreement, which took place in Dayton, Ohio in 1995. These circumstances influenced Bosnian constitution's content in many ways. For example, the Constitution of Bosnia and Herzegovina is at the same time the Annex IV of the Dayton Agreement. That puts this legal document in specific position regarding the other parts of the Dayton Accords. In certain situations, it is not easy or even possible to determine a clear hierarchical order between Bosnia's constitution and the other provisions. Consequently, in some occasions this creates confusion regarding the question of sovereign and sovereignty. Therefore, when someone is dealing with the legal and legislative framework of Bosnia and Herzegovina, he or she has to include an observation of both the Dayton Agreement and Constitution of Bosnia and Herzegovina. Both are important for this work and they are presented in the first chapter because they are the legal base upon which courts of Bosnia make their decisions.

The first part of this work ends by examining two court cases. Unfortunately, in a country marked by such a complex network of legal and political mechanisms created in order to prevent any potential conflicts among different ethnic groups, there are many citizens who are stripped off their rights. We examine the cases of Mr. Pilav and Mr. Sejdic and Finci from the position of their deliberation in front of the European Court for Human Rights. From this point, it is possible to see all the obstacles these citizens of Bosnia and Herzegovina had to pass in order to force state institutions to approve their passive voting rights. They are mere examples of many others before and after them. Interesting element of these cases is the fact that, in both situations, rulings of the judges of the national courts were made according to the existing legal frame. In other words, courts of a seemingly democratic country banned some citizens from participating as candidates because of their ethnical origin and, despite that, their decision was deemed absolutely legal. This opens two lines of questions, one regarding this particular situation and the legal context of Bosnia and the other, more universal, which can refer to the position of the law within democracies in general. These cases and the legal framework of Bosnia and Herzegovina form together the practical issues through which this work will question different aspects of Derrida's theory.

With the goal of better understanding these situations and their significance in the general context, we'll introduce a more theoretical approach in the second chapter. Therefore, the following chapter is more dedicated to Derrida's thoughts. This part of the work is centered on Derrida's views on sovereignty. We have decided to look upon this concept mainly through ideas Derrida outlines in his seminar *The Beast & the Sovereign volume I and II*. Hence, in the second chapter, we'll highlight three characteristic of sovereign, its feature of force and its abilities to decide and produce. First, we'll tackle Derrida's deconstructive reading of the fable The Wolf and The Lamb. The following parts, regarding the abilities of the sovereign to decide and produce, will discuss not only Derrida's positions, but also reflect on Carl Schmitt's ideas. We'll do it mainly by looking at some of the chapters of his *Political Theology.* We could not enter more profoundly into Schmitt's theory, though. Instead, this work presents some of the basic concepts of the German jurist, mostly those concerning sovereignty. The main purpose of this is to put more light on Derrida's ideas because he developed his positions *inter alia* upon critical reading and reflection on Schmitt's standings. Furthermore, we discuss some ideas from Derrida's book *Rogues Two Essays of Reason*. More precisely, his concept of rogues and rogue states is used to explain more clearly the relation of law and sovereignty. This chapter also deals with the legitimacy of sovereign power. There are more than few reflections upon Derrida's *Force of Law: The Mystical Foundation of Authority*. Derrida's deliberation upon violence of law is also reflected towards other concepts of sovereign. It gives certain conclusion regarding his views on legitimacy of sovereign's power and its ability to produce the law. Moreover, these standings raise questions concerning the legitimacy of founding acts. This issue is primarily analyzed through the ideas Derrida presented in his essay *Declaration of Independence.* The final and maybe the most complex topic in the second chapter regards to the indivisibility of sovereignty. Once again, Derrida places himself as a critical reader of Schmitt. Therefore, some of Schmitt's original ideas in *Concept of Political* will appear in this work as well. Derrida's viewpoint of sovereignty applies to various aspects of his thought. For example, divisibility means more than the simple difference between united and separated. For this purpose, we'll discuss some original ideas which reflect his views such as the concept of différance.

The third and, at the same time, the final chapter of this work concerns two main topics: Derrida's critique of democracy and his concept of *democracy to come.* The Algerian-French philosopher dedicates lot of his thoughts, especially in his later phase, to democracy. This work

will show his main concerns through two democratic paradoxes: the couples freedom-equality and inclusion-exclusion. His views on these topics are certainly marked by the ideas of sovereignty that are presented in the second chapter. However, it is a mistake to look upon Derrida's views on democracy only through these presuppositions. They carry wider concerns within themselves. In *Rogues* and in the *Politics of Friendship* as well, Derrida is not only deconstructing democracy, he is also dealing with logocentrisms, metaphysics of presence as he refers to them. Furthermore, within the pair inclusion-exclusion, the concept of hospitality appears. This idea is quite interesting when we think of Derrida's work. Through hospitality, he is constructing the base upon which the issues of temporality and spatiality arise.

Derrida's view upon the concept of heritage is also subject of analysis. In a way, this notion represents the continuum of ideas surrounding hospitality. *Heritage* deals with thoughts concerning presence and absence which in a way can be seen as both the issue of time and space. Furthermore, through *heritage*, it is possible to critically approach some legal notions, not only that of Bosnian cases but also the position of law in general. With the idea to unite, on one hand, Derrida's critical approaches regarding the understanding of time and space, and, at the same time, to prepare the "terrain" for thinking of *democracy to come*, the next step is to challenge the concept of *différance.* In order to do so, we explore the main concerns regarding this notion which Derrida questions in one of his capital works *Of Grammatology***.** It seems that the idea which he started to develop as a critique to certain linguistic positions became broader and better developed. *Différance* overcame its initial purpose. It is the base upon which deconstruction is developed as well as some other notions such as *democracy to come*.

Toward the end of the chapter, more focus is put on *Specters of Marx.* This book is one of the bases for constructing the notion about *democracy to come***.** This complex concept unites within itself most of Derrida's previous ideas. In this part of the work, we also include some other elements of Derrida's theory. They are central to bring a final touch for truly understanding the concept of *democracy to come*. After having fully understanding this concept, we can address various issues presented since the beginning until the very end of this research. We show whether the ability of *democracy to come* as an analytical and also prescriptive tool is sustainable. For that, the only way is to apply it. Therefore, all the issues regarding Bosnia and Herzegovina are brought as a final challenge. The conclusion shows that not only *democracy to*

come is able to communicate with legal problems, but it goes beyond by showing certain paths upon which specific measures could be taken to tackle these problems.

Chapter I – Constitutional Framework and Praxis in Bosnia and Herzegovina

1. Origin and Structure of the Constitutional Framework

1.1 Historical Background

This chapter will present some historical, political and juridical facts surrounding Bosnia. This information will serve as a tool for determining, in the best possible way, the legal structure, and also the position of Bosnia and Herzegovina on some essential democratic principles. For this purpose, we will introduce its historical background. The events which preceded the construction of country are remarkably important, because they have strongly impacted its present. Also, the idea is to provide a better understanding of the reasons why courts have based their decisions in the way they did in the following cases.

Historically, Balkan Peninsula has been an area of many conflicts. From the tribal time, through Roman and then Ottoman Empire, big forces wanted to control this path of land as one of the main bridges between east and west. Therefore, many cultures and traditions have left their mark upon the Balkan. One of the consequences is that nations in this region have developed complex identities. Frequently national or ethnical identities are really exclusive and rigid, especially toward their neighboring countries. It seems as the only way to define themselves is by negating the other. In many situations they are not sure who they are, but are certain who they are not.

The situation in Bosnia and Herzegovina is even more complex because it seems as it was always a bordering country. Bosnia was the furthest western part of Ottoman Empire and, on the other hand, the most south-eastern part of the Austro-Hungarian kingdom. Today Bosnia is the most west majority-Muslim state. This mixture of identities in a country located in a region of many small but strong national states have historically caused problems. Even if we looked upon

only the last century, we could see that there haven't been long periods of peace in this area. Starting from the beginning of 20th century, when the capital Sarajevo was the place of the assassination of Franz Ferdinand[1], the event which was the initial act of the beginning of the First World War, until the end of 20th century, when the War in Bosnia took place, Bosnia passed through many disturbances.

If we look briefly through the last century, one of the most important years is 1918. It marks the end of the First World War, when the Austro-Hungarian Empire ceased to exist and Bosnia became independent. This is significant because, after this moment, the next time Bosnia was completely autonomous was in the end of the 20th century. Later on, this country followed more or less the same path as all the other Slavic lands in its surrounding, ending up with being one of the constitutive states of Yugoslavia.[2] It is important to point out the fact that Bosnia and Herzegovina was the only true multiethnic unit within this federation.[3] Since the creation of Yugoslavia, it seems that there was always a potential threat of separation due to the differences between the people leaving in this country. The potential disuniting force was also coming from more than a turbulent history of conflicts among the member states. The notion of Yugoslav citizenship was one of the uniting factors. It was really important for the existence of the country in a whole, especially Bosnia. Which were the premises of this kind of citizenship? First of all, to be a good Yugoslavian it meant you had to be a member of Communist party. Diminishing the theological factor to bare rituals was an effective tool to overcome religious differences which

[1] Franz Ferdinand was Archduke of Austria, heir to the Austro–Hungarian throne. He and his wife Sophie were shot dead by Bosnian rebels on 28th of June 1914. This event would later on lead to First World War, when Austria-Hungary subsequently issued an ultimatum to the Kingdom of Serbia, which was partially rejected. Austria-Hungary then declared war.

[2] After the First World War, Bosnia joined the Kingdom of Serbs, Croats and Slovenes, which in 1929 became Kingdom of Yugoslavia. The first time the current borders were made was after Second World War, when Bosnia became part of Federal national republic of Yugoslavia, known as Socialist Federal Republic of Yugoslavia after 1963. The Constitution of Socialist Federal Republic of Yugoslavia from 1974, due to the principle of self-governing, gave to autonomous provinces and republics more competencies, which became one of the factors that, according to many historians from the region of Balkan, later one led to the separation of the country.

[3] According to 1991 census, the population of Bosnia and Herzegovina consisted of Bosniaks (43.5%), Serbs (31.2%), Croats (17.4%), Yugoslavs (5.5%) and Others (2.4%).

could lead to some kind of division within the society. Furthermore, the slogan of Yugoslavian communist party was "Brotherhood and unity". Therefore, the good citizen would be firstly Yugoslavian, and then the member of any other ethnic or religious group. These were some of the ways for the country, which had six republics, five nationalities, four languages, three religions and two alphabets, to keep its unity.[4] Moreover, the country seemed quite stable both politically and economically, even though it was positioned between the Soviet Union and Western bloc. However, after the death of Tito, who was a "president for life"[5], it seems that all the differences between Yugoslavian people had not only come to life, but became even stronger. Everything culminated in the worst case scenario and the former communistic republics became strongly nationalistic states in the end of 20th century.

The Yugoslav wars[6], as they are known nowadays, started after the proclamation of independence of Slovenia and Croatia.[7] In October 1991, during the conflicts, the same idea of re-claiming autonomy emerged in Sarajevo. The Parliament of Bosnia and Herzegovina also made a decision to separate from the federation. However, probably out of concern for the

[4] In the 70s, there was a famous saying within Yugoslavia which showed the nation's spirit. "Yugoslavia has seven frontiers, six republics, five nationalities, four languages, three religions, two alphabets and one boss";

[5] Constitution of Socialist Federal Republic of Yugoslavia, Article 220, Belgrade, 1963;

[6] Yugoslav wars is a term which includes all armed conflicts taken place in the territory of ex-Yugoslavia from 1991 to 2001. It includes four wars (War in Slovenia, Croatian War of Independence, Bosnian War, Kosovo War including the NATO bombing of Yugoslavia) and Insurgencies in the Presevo Valley and in the Republic of Macedonia.

[7] After failed negotiations aimed at achieving either confederal arrangement or independence on June 25th, 1991, the Republic of Croatia and Republic of Slovenia unilaterally proclaimed their independences.

Yugoslavian National Army (JNA) has sent its troops to Slovenia and, after two weeks of armed conflict, the peace agreement was signed on 7th of July. Meanwhile, the units were also sent to parts of Croatia with majority Serbian citizens who proclaimed the so-called "Serbian autonomous areas" within the state and demanded to be connected to the territory of Serbia. The conflict took many lives, vast numbers of people were forced to flee their home and it was marked with high level of violations of the Geneva Convention. On September 7th, 1991, a peace conference under the under the auspices of European Union took place. It was the first of many which led to the signing of a permanent truce on January 3rd, 1992. This ceasefire made possible for UN forces to take control over the zones of conflict. In Belgrade on April 27th, 1992 the New Yugoslavia was created by only two states, Serbia and Montenegro, while Slovenia and Croatia become member of UN on May 22nd of the same year, gaining by that act international recognition as well.

potential escalation of violence, which was already seen in previous two cases, there was a pressure coming from the European Union to confirm Parliament's decision with the citizens. The irony is that this decision, even though it was made with good intents, had exactly opposite consequences and destabilized Bosnian society. Parliament decided to make a referendum. Voting took place at the end of February and beginning of March, 1992. On the question "Are you in favor of a sovereign and independent Bosnia-Herzegovina, a state of equal citizens and nations of Muslims, Serbs, Croats and others who live in it?" 99, 7% of citizens who went on referendum answered positive.[8] The fact that the referendum question was explicitly pointing out three nations within the country and not only referring to voters as citizens shows already that there was some tension among the ethnical groups. Even though the result of the voting was more than clear, there was some legitimacy issues. Bosnian Serbs, which represented approximately 30% of the population at that time, have boycotted voting. They've claimed that independent Bosnia was not in their interest. They would become a minority in Bosnia as an independent country, which hasn't been the case in Yugoslavia. One month later, in April 1992, Bosnia and Herzegovina was recognized as an independent country by the European Union and the USA. In May of the same year, it became a member of the UN.

Although Bosnia and Herzegovina got international approval, inside the country tensions were raising, especially between Serbian and Croatian entities. In May 1992, along with the recognition by the UN, the first fights between the Yugoslavian national army (under Serbian command) and Croatian army started. Positioned in the middle of the two countries, the Bosnian territory became a field of the conflict. All three ethnic groups claimed the same territory, each to protect their own interests. Croats and Serbs had never seen Bosnia and Herzegovina as their homeland, but they wanted to annex the territories where they had lived to their Motherlands. (Gavrić, Banović, Barreiro, 2013, p. 13). Presidents of these countries at the time, Milosević and Tudjman, even made a plan on how to divide Bosnia and Herzegovina between Serbia and Croatia.[9] On the other hand, Muslim entity (Bosniaks) tried to maintain the unity of the country.

[8] Elections in Europe: A Data Handbook. Baden-Baden: Nomos, Nohlen, Dieter; Stover, Philip (2010).

[9] During the trial of General Ratko Mladic in the International Criminal Tribunal for the former Yugoslavia, evidences were presented confirming that Milosević and Tudjman meetings for "stabilization of relation between Yugoslavia and Croatia" were a cover story for negotiations with goal of dividing BIH between their countries.

The united Bosnia was in their best interest because, since they had majority of population, Bosniaks had the most power. In 1992, Republika Srpska[10] proclaimed the independence from Bosnia and Herzegovina, and even though in that moment it wasn´t recognized by the international community as an independent country, this act did influence later on the position during the peace negotiation. The war between Bosniaks and Croats in its full intensity took place between 1993 and 1994. Under pressure from the international community, Bosniaks and Croats signed the Washington Peace Agreement that led to the foundation of the Federation of Bosnia and Herzegovina and partly resolved the conflict in the region (Gavrić, Banović, Barreiro, 2013, p. 16). However, the war did not end in that moment. One of the worst war crimes, the massacres and genocides not only of the 20th century but also of modern times happened in Bosnia until the end of the war. In 1995, international organizations such as the UN, NATO, and some countries individually (the USA, Russia, France etc.) finally got involved and, through a strong military action, pushed all three conflicted parties for considering a truce.

Before the final peace document (Dayton Peace Agreement), there were several unsuccessful peace initiatives. The most famous were the Carrington–Cutileiro, Vance–Owen and Owen–Stoltenberg plan. Those were the product of a joint effort of the international community to put conflict to an end. All these initiatives were based on the ethnic division. Each of them was rejected by one of the parties in conflict, as did not sufficiently take into consideration the position and needs of that group. Finally in Dayton, Ohio, USA, on November 20th, 1995, the General Framework Agreement for Peace was completed. Representatives were the President Izetbegovic, for the Republic of Bosnia and Herzegovina, President Tudjman, for the Republic of Croatia, President Milosević, for the Federal Republic of Yugoslavia and for the Republika Srpska, and President Zubak, for the Federation of Bosnia and Herzegovina. They initialed the Framework Agreement and its Annexes, thus establishing the initialed documents as the definitive one.

The Dayton Peace Agreement was finally approved on December 14th, 1995, in Paris, France. Through its provisions and annexes, it formally ended the war and created the state of Bosnia and Herzegovina. The Dayton Peace Agreement attempted, under the motto “One State, two

[10] Republika Srpska literally means Serbian Republic in local languages.

Entities and three Nations", to create a balance between opposing interests, and to restrain disintegrative political forces (Gavrić, Banović, Barreiro, 2013, p. 16). Despite its complexity, this phrase is far away from being able to show complicity of the state system which was created upon the Dayton agreement.

Even if we look upon the basic question of organization of the state, there will be understandings that Bosnia and Herzegovina is a simple, unitary, decentralized state and those that claim that it is a specific type of real union country with strong confederacy elements, etc. (Sahadžić, 2009, p. 17). The fact is that we can't talk about federation, at least not in a traditional sense, because entities don't have state status. Between them, there is the Inter-Entity Boundary Line, not state borders. Even though citizens have the right of the entity citizenship, it is automatically connected with being citizen of Bosnia and Herzegovina, thereby that entity citizenship is not valid in international relations.[11] Consequently, the territorial organization of the country follows this pattern.

The Constitution of Bosnia and Herzegovina regulates that the country will consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska[12]. The Constitution of Federation of Bosnia and Herzegovina claims that it consists of the federal units (cantons).[13] On the other hand, in the Constitution of Republika Srpska it is clear that it is organized under unitary principle.[14] Also, beside these two entities, there is the district Brčko, which has a special status: it is a neutral, self-governing administrative unit, and formally located at the territory of both entities. The Dayton peace agreement was the product of long-last efforts of the international community to bring the war to the end. However, the political and legal system that was established did not unify or solidify the country. On the contrary, the present political structure in Bosnia and Herzegovina is one of the most complicated systems in the world, presenting a multilayer political system that can be governed only if there is a clear will and a decision by the political elites to work together (Gavrić, Banović, Barreiro, 2013, p. 10).

[11] Dayton agreement, Annex 4 – Constitution of Bosnia and Herzegovina, Article 1 point 7, page 60;

[12] *Ibid*. Article 1 point 3;

[13] Constitution of Federation of Bosnia and Herzegovina, Article 2, page 3;

[14] Constitution of Republika Srpska, General Provisions, Article 1, page 3;

Simplified map of Bosnia and Herzegovina's entities (Source: UNHCR, 1995)

1.3 Dayton Agreement

Dayton Agreement consists of a set of international treaties. Those documents are: the General Framework Agreement for Peace in Bosnia and Herzegovina, twelve Annexes and the Agreement on Initialing, concerning the modalities of conclusion and entry into force of the other agreements. For this work, Annex 4 is the most important since it represents the current Constitution of Bosnia and Herzegovina. However, we will also briefly analyze some aspects of the whole Dayton Agreement in order to present how the moment of its foundation influenced not only the content of the Constitution of Bosnia and Herzegovina, but also the current situation in the country, especially regarding human rights and the distribution of power within and outside the country.

The goal of the General Framework was to legally bind Republic of Bosnia and Herzegovina, Republic of Croatia and the Federative Republic of Yugoslavia, in front of witnesses,[15] to "welcome and endorse" all of the arrangements that have been made[16]. In other words, the Framework stated that all the Annexes of the documents would be accepted by those countries and that they would to be obliged to follow and apply those legal provisions. The Annexes were mostly concluded by Bosnia and Herzegovina and its entities, Republika Srpska and the Federation of Bosnia and Herzegovina. On the other hand, the entities were not signing parties of the General Framework.

Beside the peace agreement, there are other documents. They are: the Agreement on Military Aspects of the Peace Settlement (Annex 1-A) and the Agreement on Inter-Entity Boundary Line and Related Issues (Annex 2), which were signed by the Bosnia and Herzegovina and its entities , additionally endorsed by Yugoslavia and Croatia. It is interesting to mention that these countries also had to officially commit themselves to third parties that they would comply with the rules.[17] This role of guarantor stems, of course, from the *de facto* authority Croatia and the Federal Republic of Yugoslavia exercise over part of the Federation of Bosnia and Herzegovina and the Republika Srpska respectively (Gaeta, 1996, p. 155). Also, there is the Annex X of the Agreement, referring to the Civilian implementation of the peace settlement. This document was signed by both countries and entities as well. It is important because it established the institution of High Representative.

In this intertwined network of the state, interstate and the international guarantees, it is interesting to mention also the Resolution 1022 of UN Security Council. This document was adopted on November 22nd, 1995, during the negotiation of the Dayton agreement. The first point of the Resolution referred to the Federal Republic of Yugoslavia. It stated that, if this country failed to sign the Dayton agreement in the timeframe previously agreed on, and the other

[15] Witnesses were the representatives of international community: European Union, France, Germany, United Kingdom, Russian Federation and US.

[16] Dayton Agreement, Ohio, 1995. General framework, Article I-XI, pages 2-5;

[17] In a case of Military Aspects of Peace Settlement and in instance of Agreement on Inter-Entity Boundary Line and Related Issues they referred to NATO;

parties involved were ready to sign it, Yugoslavia would have to deal with the consequences.[18] In other words, if Yugoslavia did not accept the Dayton agreement or failed to respect it in the future, it would be punished by the UN through reaffirmation of all those Resolutions taken by the Security Council since Yugoslavia had sent its army into the war. There were various resolutions issued in the period since the beginning of the war. The UN positioned Yugoslavia as an aggressor. Therefore, all these documents were aimed at punishing this country and making it change its behavior. The content of these documents were mostly referring to economic embargo and international isolation of Yugoslavia. This country would continue to face the complete political and economic isolation, if it failed to comply with the Dayton agreement. These are just some of the aspects showing the complex nature of the moment in which the Dayton agreement was created and endorsed. There was a complicated juridical and political web, which has since been monitored in order to achieve peace in this region.

Many countries and organizations were involved in the process of reaching peace in Bosnia and Herzegovina. Therefore, if somebody examines the Dayton agreement and its Annexes, it must stress the power of the signature. This instance is at the same time the moment of creation and point of giving legitimacy. Considering the whole document, we can see various representatives

[18] Exact provisions were that if the Security Council members decide that the measures imposed by or reaffirmed in resolutions 757 (1992), 787 (1992), 820 (1993), 942 (1994), 943 (1994), 988 (1995), 992 (1995), 1003 (1995) and 1015 (1995) are suspended indefinitely with immediate effect subject to the provisions of paragraphs 2 to 5 below, and provided that if the Secretary-General reports to the Council that the Federal Republic of Yugoslavia has failed formally to sign the Peace Agreement on the date announced by the Contact Group for such purpose, and that the other parties thereto have expressed their readiness so to sign, the measures described above shall be automatically reimposed from the fifth day following the date of such report; 3. Further decides that if at any time, with regard to a matter within the scope of their respective mandates and after joint consultation if appropriate, either the High Representative described in the Peace Agreement, or the commander of the international force to be deployed in accordance with the Peace Agreement, on the basis of a report transmitted through the appropriate political authorities, informs the Council via the Secretary-General that the Federal Republic of Yugoslavia or the Bosnian Serb authorities are failing significantly to meet their obligations under the Peace Agreement, the suspension referred to in paragraph 1 above shall terminate on the fifth day following the Council's receipt of such a report, unless the Council decides otherwise taking into consideration the nature of the non-compliance; Resolution 1022 of UN Security Council;

that are by power of the signature confirming the approval of the country or the entity they are representing.

However, one aspect stands out as an unusual practice. The President of Yugoslavia at that moment, Slobodan Milosevic, was also the representative of the entity of Republika Srpska on some issues. He can be seen as the legal representative of the Bosnian Serbs. However, there are some people who claim differently. In the article "The Dayton Agreements and International Law", Paola Gaeta has a different interpretation of Milosevic's role in the agreement of August 29, 1995.

She refers to part of the Dayton's Preamble. This part of the Dayton agreement regulated the way the involved parties are going to be presented during the negotiations. At that moment, the government of the Federation of Bosnia and Herzegovina didn't want to negotiate with Bosnian Serbs because Republika Srpska proclaimed independence. Bosnian Muslims and Croats believed that if they negotiated with representatives of Republika Srpska, that would mean that they accept Republika Srpska as an independent country. On the other hand, without the involvement of Bosnia Serbs in the negotiation process there would be a danger that the Serbian part would proclaim the agreement as non-legit and refuse to respect and conduct it. Therefore, the alternative solution was found. Delegation representing the Serbian entity had six members: three from Yugoslavian and three from Republika Srpska, each of them having one vote, with Milosevic's vote as a deciding one in the case of equal voting.

The problem is that at this delicate moment, the people of Republika Srpska did not wish to be represented by somebody else, not even from Yugoslavia, which has been their ally. They wanted to have their own representatives, but that not was possible. International Criminal Tribunal for former Yugoslavia[19] had already issued arrest warrants for crimes committed during the war against two out of three leaders of the Bosnian Serbs. This clearly prevented them from being part of the negotiation despite being selected as representatives earlier. That left Republika

[19] The International Criminal Tribunal for the former Yugoslavia (ICTY) is a United Nations court of law which judges war crimes taken place during the conflicts in the Balkans in the 1990's. It was established by UN Security Council's Resolution 808 in 1993.

Srpska with only one direct delegate. In the end, the creation of multi-member delegation was a solution. Even though the agreement from August 29th 1995 had predicted differently, Milosevic was *de facto* representing Republika Srpska during the negotiations. This not only weakened the negotiation position of Republika Srpska and probably influenced the final arrangements regarding the status of this entity, but also reflected on the perception of the legitimacy of the whole Agreement from the position of the Bosnian Serbs.

If we keep on looking for answers within the questions of legitimacy and sovereignty, there is the need to move further away from the act of endorsing of the Dayton agreement and look upon its content. It is really interesting to observe more closely the Annex 10 of the Agreement on the civilian implementation of the peace settlement. As mentioned, it created a new institution in Bosnia and Herzegovina, the High Representative, together with the Office of High Representative (OHR). It was as such constructed in order to give the support for the establishment of the political and the constitutional institutions, promotion of respect for human rights and the return of displaced persons and refugees. Also, it refers to the holding of free and fair elections according to the timetable in Annex 3 to the General Framework Agreement.[20] This institution is given a wide variety of powers such as: monitoring the implementation of the peace settlement[21], coordinating the activities of the civilian organizations and agencies in Bosnia and Herzegovina, ensuring the efficient implementation of the civilian aspects of the peace settlement[22] and so forth. However, within the original contract, the most efficient tool of this institution is Article V of Annex X proclaiming that The High Representative is the final authority for interpreting this Agreement on the civilian implementation of the peace settlement.[23] This particular Article gave not only authority to High Representative to interpret the civilian part of Dayton, but also binding power to his interpretations.

[20] Dayton agreement, Ohio, 1995; Annex X Agreement on civilian implementation of the peace settlement, page 111.

[21] *Ibid.,* Article II (a), page 112;

[22] *Ibid.,* Article II (c), page 112;

[23] *Ibid.,* Article V, page 114;

Furthermore, in the 1997 meeting of the Peace implementation council[24] in Bonn, the High Representative's powers were expanded in order to include the law enforcement, and the power to remove public officials from office. During this period, the last two authorities were seen by local powers, non-government organizations and intellectuals as the biggest threats to Bosnian sovereignty.

The fact that nobody can dispute is that the High Representative has quite active role in Bosnian society, both in the legal and the political sphere. For example, if we look upon the ten-year period from 1997 to 2007, from 529 drafted laws, 391 were adopted, and almost 30% of them, 112 were imposed by the High Representative.[25] Laws imposed by the High Representative are not permanent, though. Their status from temporary to permanent is changed when Parliament adopts the law without amendments. Hence, these laws have *de facto* permanent character. Regarding its political activity, there is the issue of the power to remove public officials from office. Maybe the best example of negative consequences of this authority is the case of Mr. Nikola Poplasen. In September of 1998, he won presidential elections in Republika Srpska, and in November of the same year, he took office. However, he was removed from the presidential position in March 1999. This withdrawing from the office was not marked by any scandal or a criminal activity. It was conducted by order of Carlos Westendorp, the High Representative at that time. He did not agree with the decision of Mr. Poplasen to dismiss the then Prime Minister of Republika Srpska. Even though Poplasen had jurisdiction over the decision he made, and above all, he had won the elections democratically, he was removed from office. The High Representative saw Poplasen's plan to change the Prime Minister, Mr. Milorad Dodik at that time, as a way of violating the balance of the political system. The High Representative

[24] Peace Implementation Council (PIC) is the international body created in order to implement Dayton agreement in BIH as established in the conference in London in December of 1995. Steering Board of the Peace Implementation Council designated High Representative. Until now, the general rule was that the High Representative comes from EU country and its deputy from US. Peace implementation council includes 55 countries and agencies that support the peace process. The Steering Board members are Canada, France, Germany, Italy, Japan, Russia, United Kingdom, United States, Presidency of the European Union, European Commission, and Organization of Islamic Conference, represented by Turkey. Until now days there were six meetings which were held in order to review the process of implementation of peace in the territory of Bosnia and Herzegovina.

[25] Report of work Parliamentary Assembly of BIH, Sarajevo 2012;

estimated that stability is more important than the electoral, democratic decision of the citizens of Republika Srpska, so he removed Mr. Poplasen from office. This is one of the controversies following the institution of the High Representative.

Moreover, it has even been argued that the form of international transitional administration as exercised by the OHR today obstructs the transformation of BIH into a sovereign State based on the rule of law, democracy, and well governed democratic institutions (Banning, 2014, p. 262). The debate has mostly been centered on the question of a mandate of the High Representative. During the peace conference in 1995, this organ was constructed as a temporary mechanism. It was supposed to help Bosnia and Herzegovina to re-build its institutions after the war. Even 20 years later, this institution has still more than an active role in the political and the legal domains of the country. Furthermore, it seems like its transitory character is becoming a permanent one. The Dayton agreement has certainly fulfilled its mission and maintained peace in the country. On the other hand, sometimes it appears that, at the same time, this document prevents Bosnia and Herzegovina from becoming a sovereign and democratic country as well as reaching its full potentials.

2. Legal Reality within the National and International Courts

2.1 Constitution of Bosnia and Herzegovina

The Constitution of Bosnia and Herzegovina is characterized by the same idea which can be seen in the Dayton Agreement – the concept of peace stands before the one of democracy. There are many points within the legal document where this can be noticed. One of the ways to locate them is to go back to the consideration of the various types of guarantees that different ethnical, state and international actors gave to the documents within the Dayton agreement. Those agreements are marked by an uneven approach. For example, the Agreement on Military Aspects of the Peace Settlement (Annex 1-A) and the Agreement on Inter-Entity Boundary Line and Related Issues (Annex 2) are signed, confirmed and guaranteed by various actors. On the other hand, Annex IV - the Constitution of Bosnia and Herzegovina is signed by Bosnia and Herzegovina and its two entities. Even though this may seem like a logical solution, because the Constitution

of Bosnian and Herzegovina is, in the end, the document that regulates the country's legal framework, the fact is that the other Agreements also enter this zone. It seems that in Dayton the Contact Group States intended to give pride of place to those agreements which are designed to ensure the cessation of hostilities, while perhaps attaching less importance to the future of Bosnia and Herzegovina as a sovereign State within its present international boundaries (Gaeta, 1996, p. 156). What follows from the content of the Constitution of Bosnia and Herzegovina? How does it reflect on the legal practice of the country?

In order to look for answers, we should observe the praxis of the Constitutional Court of Bosnia and Herzegovina. It is the highest court in the country and *de facto* the most important one. First of all, its power does come from the Constitution of the country, but it is created according to the Anglo-American tradition that lends to judicial praxis a broad margin of possibilities to produce the specific legal solutions. In addition, the Constitution didn't foresee the existence of the Supreme Court or any similar court which could take the role of the highest legal instance in the country, thereby allowing this space to be fulfilled by the Constitutional Court. There is the Court of Bosnia and Herzegovina, created by the decision n. 50/00 of the High Representative in 2000. However, legal provisions have characterized this court as a special court hierarchically standing beside, not above the entities.[26] Ergo, the Constitutional Court has to be deemed the highest legal instance in the country. On the other hand, this tribunal has a limited scope of jurisdiction, since it is bounded to the Constitution.[27] Since Bosnia and Herzegovina does not have Supreme Court, there is the risk that the country's legal system will not be unified.

[26] Law on Court of Bosnia and Herzegovina, Articles 13-18, pages 5-6;

[27] "The Constitutional Court shall uphold this Constitution:

(a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to: 1) Whether an Entity's decision to establish a special parallel relationship with a neighboring state is consistent with this Constitution, including provisions concerning the sovereignty and territorial integrity of Bosnia and Herzegovina. 2) Whether any provision of an Entity's constitution or law is consistent with this Constitution. Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.

Article VI of the Constitution of Bosnia and Herzegovina refers to the institution of the Constitutional Court. Its structure holds within itself yet another controversial moment. Concerning the composition of the judges, it sets out that there will be nine members, two of each entity – Bosniak, Croatian and Serbian, therefore six of them and three selected by the President of European Court of Human Rights (ECHR).[28] The idea behind this unusual decision was that, since simple majority is needed for courts' judgment, in order to avoid confrontation based on ethnical affiliation, it is better to assign neutral judges[29] whose decisions would be more impartial. This way of reasoning shows that, from the moment of the creation of norms, it is expected that the judges representing same entities will make a unified decision, rather than being loyal to the ethical request of their profession to be neutral. Even if one agreed with this presumption, could then the same conclusion apply for three judges elected by the ECHR? They come to their position with a goal of representing the international community and its already established way of ruling. Therefore, the only difference between three judges selected by the President of ECHR and those selected by the House of Representatives of the Federation and by the Assembly of the Republika Srpska is that the ones selected by the President of ECHR have

---

(b) The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina.

(c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.", Dayton Agreement, Annex 4 – Constitution of Bosnia and Herzegovina, Article VI (3), page 70;

[28] The Constitutional Court of Bosnia and Herzegovina shall have nine members.

(a) Four members shall be selected by the House of Representatives of the Federation, and two members by the Assembly of the Republika Srpska. The remaining three members shall be selected by the President of the European Court of Human Rights after consultation with the Presidency; Dayton agreement, Ohio, 1995 Annex IV Constitution, Article VI Constitutional Court, page 70.

[29] (b) Judges shall be distinguished jurists of high moral standing. Any eligible voter so qualified may serve as a judge of the Constitutional Court. The judges selected by the President of the European Court of Human Rights shall not be citizens of Bosnia and Herzegovina or of any neighboring state; Dayton agreement, Ohio, 1995 Annex IV Constitution, Article VI Constitutional Court, page 70.

more power.[30] Consequently, we can conclude that, in Bosnia and Herzegovina, the highest judicial power is primarily in the hands of representatives of the international community.

This work will present cases which, in the best way, show a rupture within the Bosnian Constitution, especially vis-à-vis human rights. Also, it will point out the disease of many legal systems that are seen as democratic – the positivistic approach to law. Through these examples, we will show the lack of basic legal principles that are necessary for the development of democracy. This situation is a consequence of the specific conditions under which the Constitution of Bosnia emerged. How does the absence of the Supreme Court influence the legal practice of Bosnia and Herzegovina? Are the ideas of the establishment and conservation of peace, woven into Constitution and into the legal frame of Bosnia and Herzegovina, more than justified in the post-war era, nowadays keeping the country away from becoming a sovereign democracy? In the end, the rulings in these cases will serve as good examples of the complicated legal provisions in Bosnia and Herzegovina.

Two court cases will be presented to reveal the practical issues arising due to the specific nature of the country's legal frame. The first is the case of Mr. Pilav, and second of Mr. Sejdic and Finci v. Bosnia and Herzegovina. These cases will be analyzed from the position of the final instance they have reached, which is the European Court of Human Rights. Outside of their obvious use, as an example of problems of the country, one is to believe that the matter they are treating is important for other purpose as well. They show the lack of constructive deliberation within Bosnia and Herzegovina both in the legal and in the political sphere. Also, their significance is contained in the fact that these problems are responsible for not only blocking the country's normal functioning, but also for disabling the state's development in the future.

These lawsuits demonstrate an absence of a democratic base in the Constitution of Bosnia and Herzegovina, accompanying the legal framework and general provisions of the Dayton

[30] If we look past the idea of legal documents and analyze the other factors which *de facto* determine the way they govern, each two judges representing the entities will have two votes and probably will not support other colleagues representing their entity for political reasons. Therefore, three judges selected by ECHR, with three votes and unified decisions will have the greater power.

Agreement. Also, it will be possible to perceive the problem which emerges around many legal documents. They are taken as a fact, without ever being re-questioned. These cases also uncover how this negative aspect reflects in praxis. One of the Bosnian constitution's main weaknesses is that it was drafted with the purpose to maintain peace while not taking into consideration other aspects needed for building a democracy. These lawsuits open the questions of legitimacy, sovereignty, and the relation of democracy and the Constitution. Does the Constitution of Bosnia and Herzegovina possess the necessary legitimacy? Who has sovereign power and how does this influence the legal reality of the country? What is the relation between national and supranational legal documents? How do constitutional weaknesses influence democracy in Bosnia and Herzegovina and what is their mutual relationship? These are just some of the questions which are to be opened by the end of this chapter. These doubts will prompt further investigation. We are going to reflect on theory again, since solutions can be devised only through communication, re-questioning, and deconstruction.

2.2 Pilav v. Bosnia and Herzegovina

The case of Mr. Ilijaz Pilav and the political party "Party for Bosnia and Herzegovina"[31], hereinafter referred to as *Pilav v. Bosnia and Herzegovina*, is the first of the two legal proceedings which will be presented in this work. As stated before, both of these cases are dealing with issues of human rights, more specifically the area of political rights – the right to vote and the right to public participation in government affairs.[32]

After the Bosnian war, Mr. Pilav actively participated in the social and the political life of his community in the city of Srebrenica, entity of Republika Srpska. He was elected and held several political offices, including the seat in the Council of Peoples in the Parliament of Republika Srpska. In 2006 Pilav announced his candidacy for the member of the Presidency of Bosnia and

[31] Originally "Stranka za Bosnu i Hercegovinu", trans. mine;

[32] Universal Declaration of Human Rights, Article 21;

Herzegovina[33] on general elections which were to be held in October the same year. Therefore, he submitted his application to the Central Election Commission of Bosnia and Herzegovina. However, this institution refused his candidacy, firstly on July 24 (decision number 01-07-1-913-103-1/06) and then on August 1, after he appealed to the previous decision (decision number 01-02-2-1581/06). Consequently, he submitted an appeal to a higher instance, in this case, to the Court of Bosnia and Herzegovina. With this request he was questioning the Electoral Commission's ruling. On August 10 the Court of Bosnia and Herzegovina confirmed that the Commission's decision adhered to the current legal framework. Ergo, his next step was to complain to the highest, and last possible instance, the Constitutional Court of Bosnia and Herzegovina. Mr. Pilav made an appeal against the decisions of both the Central Election Commission and the Court of Bosnia and Herzegovina in front of the Constitutional Court of the country.

Before examining Mr. Pilav's appeal in front of the Constitutional Court, we should briefly review the facts presented in the lower instances. In its decision from July 24, the Central Electoral Commission based its refusal of Pilav's candidacy upon the Electoral Law of Bosnia and Herzegovina. Chapter 8 of the Law refers to the electoral rules for the institution of the Presidency. This document proclaims that members of Presidency, who are directly elected from the territory of Republika Srpska (and are required to be of Serbian nationality), are selected by the voters registered in the Central Voting List of Republika Srpska. Of course, the candidate with the highest number of votes is elected.[34] Based on these provisions, the Central Electoral Commission stated that since Mr. Pilav proclaimed Bosniak ethnicity, he was not eligible to be a presidential candidate elected from the territory of Republika Srpska under the current Election Law of the country.[35] On August 1, when deciding upon Pilav's request for reconsidering the decision, the Central Electoral Commission deliberated and confirmed its previous conclusion. The Commission justified its decision by referring to the fact that the Electoral Law is created in

[33] According to the Constitution of Bosnia and Herzegovina, the institution of President is a collective body formed by three members and therefore, it is referred to as the Presidency of the Republic. This institution is arranged in such a way that every entity has one representative in the Presidency.

[34] Electoral Law of Bosnia and Herzegovina, Chapter 8, Article 8.1, paragraph 2, page. 45, translation mine;

[35] CEC BIH, decision number 01-07-1-913-103-1/06 of July 24, 2006, translation mine;

accordance with the Constitution of Bosnia and Herzegovina.[36] This legal document clearly states that the Presidency of Bosnia and Herzegovina shall consist of three Members: one Bosniak and one Croatian, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of Republika Srpska.[37] Furthermore, Mr. Pilav's complaint against this decision, in front of the Court of Bosnia and Herzegovina, was refused with approximately the same legal arguments. This Court claimed that the Commission has established facts fully and correctly, and made a justified decision to refuse the candidacy taking into consideration that had they ruled differently, it would have been against, not only the Electoral Law but also the Constitution.[38] Beside the two aforementioned legal references, the Court of Bosnia and Herzegovina also rejected Mr. Pilav's claim that the Central Electoral Commission violated the European Convention for the Protection of Human Rights and Fundamental Freedoms[39] (European Convention for Human Rights). He claimed that his candidacy was rejected on the grounds of his ethnicity. On this point, the Court of Bosnia and Herzegovina called upon Electoral Law and decided that his rights were not violated upon the matter of his ethnicity. He wasn't deprived of his rights as per the European Convention for Human Rights.

Here we arrive at an interesting point. According to the Annex 6 of the Dayton Agreement concerning human rights, the signing parties[40] have to secure the highest level of internationally recognized human rights and fundamental freedoms, including those provided by international agreements enlisted in the document itself.[41] Furthermore, the Constitution of Bosnia and

[36] CEC BIH, decision number 01-02-2-1581/06 of August 1, 2006, translation mine;

[37] Dayton Agreement, Annex 4 of the Constitution of Bosnia and Herzegovina, Article V – Presidency, page 67;

[38] Court of BIH, decision Iž-15/06 of 10th of August, 2006, translation mine;

[39] "1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with national minority, property, birth or other status.

2.No one shall be discriminated against any public authority on any ground such as those mentioned in paragraph 1, Protocol 12 of European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 1;

[40] The signing parties were the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and Republika Srpska;

[41] The Parties shall secure to all persons within their jurisdiction the highest level of internationally recognized

Herzegovina clearly states that the European Convention of Human Rights not only has to be directly applied in Bosnia and Herzegovina, but also has precedence over other laws.[42] The supremacy of international documents protecting human rights in comparison with the national legal framework was acknowledged two times. Nonetheless, in its ruling the Court of Bosnia and Herzegovina put the Electoral Law above the European Convention for Human Rights. The fact of the matter is that more than ten years after Dayton, the courts of Bosnia and Herzegovina haven't secured clear principles which could serve as guidance for the future interpretation of the Dayton Agreement. According to the Dayton Agreement, the European Convention is clearly above national laws. Does it possess the same power as the country's Constitution, as it is an integral part of it? Is the European Convention for Human Rights above the Constitution of Bosnian and Herzegovina? What is the relation between all the international documents included in the appendix of Annex 6 and the Constitution of Bosnia and Herzegovina? It is clear that these documents are integral to the Dayton Agreement. However, their relation to the country's Constitution or laws is still not quite straightforward.

When appealing to the Constitutional Court, besides previously stated legal rules which had been part of the lower courts suits, Mr. Pilav and his party also included the violations of human rights originating from the two international declarations included in the Dayton Agreement. More precisely, they called upon the International Covenant on Civil and Political Rights and the Framework Convention for the Protection of National Minorities.[43] The former refers to the right

---

human rights and fundamental freedoms, including the rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols and the other international agreements listed in the Appendix to this Annex, Dayton agreement, Annex 6 – Agreement on Human Rights, Article 1, page 82;

[42] The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other laws, the Dayton Agreement, Annex 4 – Constitution of Bosnia and Herzegovina, Article II/2, page 61;

[43] Article II (7) of the Constitution of Bosnia and Herzegovina states that Bosnia and Herzegovina shall remain or become party to the international agreements stated in Annex I to this Constitution. Therefore, this was the legal base for Pilav to call upon the 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto and 1994 Framework Convention for the Protection of National Minorities.

to take part in conducting of public affairs, right to vote and be elected, and equality in access to public service in the country[44]. The latter regards equality before law and equal protection of the law[45] for members of minorities.

Firstly, the Constitutional Court of Bosnia and Herzegovina found that it had jurisdiction in the presented issue as per the Constitution.[46] Furthermore, the Court determined that all available legal remedies had been used and that this appeal had *prima facie* necessary legal ground upon which it could make further considerations. The Constitutional Court of Bosnia and Herzegovina commenced its review of the appeal by examining the decisions of the Central Electoral Commission and the Court of Bosnia and Herzegovina. The two institutions based their conclusions on the provisions of the Electoral Law and the Constitution of Bosnia and Herzegovina. The Constitutional Court consequently confirmed that these institutions had applied current legal provisions and that their decisions were valid. Secondly, the Constitutional Court examined Mr. Pilav's claim regarding Article II/2 of the Constitution of Bosnia and Herzegovina. In his appeal, Mr. Pilav stated that he had the right to call upon Article II/2 since the European Declaration of Human Rights needed to be directly applied in the country, and furthermore, that it had supremacy over laws. As a consequence, he claimed that his rights were violated since his candidacy was rejected on the grounds of his ethnicity. The Constitutional Court in its reasoning did not refuse that this international document was above the laws of the

[44] Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

International Covenant on Civil and Political Rights, Article 25, page 13;

[45] "The Parties undertake to guarantee to persons belonging to national minorities the right of equality before the law and of equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited", Framework Convention for the Protection of National Minorities and Explanatory Report, Article 4(1), page 4;

[46] "The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina", Dayton Agreement, Annex 4 – Constitution of BIH, Article VI (3b), page 70;

country. However, it discussed the manner in which this legal norm should be interpreted. This court iterated that according to the legal practice of the European Court of Human Rights, which also created the general framework of decision-making for national courts, the difference in treatment didn't *a priori* mean discrimination. The Constitutional Court of Bosnia and Herzegovina stated that we may consider the existence of discrimination only in cases when there were no objective and reasonable excuses for difference in treatment.[47] This institution pointed out that even Article 25 of the International Covenant on Civil and Political Rights proclaimed there could be a restriction to the right to vote and to be elected. More precisely, the Constitutional Court referred to the general provision of this Article which guarantees the universality of rights and opportunities for every citizen "without unreasonable restrictions". Hence, the highest national court suggested that the rejection of Mr. Pilav's application for candidacy could be interpreted as an act within the area of reasonable restriction. Furthermore, in its decision, the Constitutional Court stated that in regard to the interpretation of Article 3 Protocol 1[48], the decisions of ECHR in cases *Mathieu-Mohin and Clerfayt v. Belgium, Gitonas and Others v. Greece, Ždanoka v. Latvia* demonstrated that signatory countries had wide autonomy regarding the manner of conducting elections. According to the Constitutional Courts' reading of the general way of ECHR ruling, European countries developed in different ways over time, which is why there exist many divergent ways for the establishment of democratic systems in the future. As a consequence, the Constitutional Court claimed that Article 8 of the Electoral Law of Bosnia and Herzegovina and Article 5 of its Constitution should be perceived in the context of discretion rights of the country to put forward certain limits on exercise of specific rights of individuals. Therefore, the Decision of the Court clearly states:

> The limitations in this case are justified due the specific internal organization of Bosnia and Herzegovina constituted by the Dayton Agreement, whose ultimate goal was to establish peace and dialog between conflicted parties, taking into account that the legal notion referenced in this case was included in the Constitution bearing in mind that the members of Presidency are of Bosniak, Croatian and Serbian nationality.[49]

[47] Draft of the Decision of the Constitutional Court of Bosnia and Herzegovina, page 7, translation mine;

[48] **"**The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature", Protocol 1 of European Convention for Human Rights, Article 3, page 18;

[49] Decision number AP 2678/06 of Constitutional Court of Bosnia and Herzegovina, page 8, translation mine;

Ergo, the rationale of the Decision of the Constitutional Court of Bosnia and Herzegovina called upon specific conditions under which the country was created. As for claims raised by Mr. Pilav regarding the violation of his rights vis-à-vis the Framework Convention for the Protection of National Minorities, the Constitutional Court simply claimed that Bosniaks in Republika Srpska didn't have a status of a national minority which is why he could not call upon this convention. Also, the Court took into account the present situation, and it continued to claim that established legal restrictions and limitations of Mr. Pilav's rights served a legitimate goal. According to the judges of the Bosnian Constitutional Court, these restrictions had reasonable justification, and they didn't exert overwhelming pressure on an appellant, taking into account that limitations of the appellant's rights conformed to the goal of a wider social community in a way of maintaining established peace and continuity of dialog.[50] Once again, the Court highlighted the importance of preserving peace.

In summation, the Constitutional Court made a decision in a plenary session, by majority vote of seven for and two against, that Mr. Pilav's rights were not violated, taking into consideration that decisions of lower instances were reached under the existing legal system, and that national and international legal documents prescribed restrictions in the exercise of certain rights, and that there was objective and reasonable justification for different treatment. The Constitutional Court of Bosnia and Herzegovina employed the principle of proportionality in making its decision and upheld its validity by calling upon reason. The Constitutional Court rejected each and every allegation of Mr. Pilav's appellation. However this judicial institution continued to have ambiguous relation towards the supremacy of supranational legal norms. On the one hand, the Constitutional Court confirmed the supremacy of the European Convention for Human Rights over national laws by clearly stating so in the beginning of the rationale of the ruling. On the other hand, it also called upon national laws, the Electoral Law to be more precise, and upon the Bosnian legal framework. In the end, Mr. Pilav's candidacy for a member of Presidency of Bosnia and Herzegovina was definitely rejected, and he couldn't exercise his "passive voting

[50] Decision number AP 2678/06 of Constitutional Court of Bosnia and Herzegovina, page 8, translation mine;

right". Hence, on September 24, 2007, he submitted an appeal in front of the European Court of Human Rights against Bosnia and Herzegovina.

On June 9, 2016, after almost nine years, the ECHR finally reached its judgment.[51] It remains unclear why this court needed this much time to reach a final decision. This is fairly peculiar, especially taking into consideration that it ruled upon similar matters in several other cases in the meantime. As a result, the judges based their decision upon this established court practice. Regarding decision of the Constitutional Court of Bosnia and Herzegovina upon Article 1 of Protocol No. 12, the ECHR found this ruling discriminatory. According to the decision of the Constitutional Court, in order to apply for candidacy, Mr. Pilav would have to change his address and move out of Republika Srpska to the Federation of Bosnia and Herzegovina. In its decision, the ECHR claimed that the highest Bosnian court based its ruling on the premise that should Mr. Pilav get elected, he would rule in favor of Bosniaks and not in the name of all the people in the country, as presidents are expected to. Therefore, the Constitutional Court based its opinion on discriminatory reasoning. Hence, by making this kind of ruling and condemning the decision of the Bosnian Constitutional Court, ECHR sent a clear message to judges in Bosnia and Herzegovina that they should try to reconsider their perception of the mechanisms of construction of institutions, but not the mechanisms themselves. In other words, in their reasoning, the national courts of Bosnia and Herzegovina repeated the assumption that every citizen in his/her political action was only driven by his/her ethnicity. Furthermore, in order to maintain peace, the courts would have to protect the political and legal mechanism as they had been doing since the moment of their creation.

2.3 Sejdic and Finci v. Bosnia and Herzegovina

Mr. Dervo Sejdic submitted an appeal in front of the European Court of Human Rights on July 3, followed by Mr. Jakob Finci on August 18, 2006. The ECHR decided to combine appeals number 27996/06 and 34836/06 in a single case. The Court made this decision due to their

[51] ECHR decision number 198 (2016) *Exclusion of Bosniak politician residing in Republika Srpska from election to the Presidency of Bosnia and Herzegovina*

similar nature. Both appellants are citizens of Bosnia and Herzegovina, and members of minority groups – Roma and Jews, respectively. Also, they submitted an appeal due to their ineligibility to stand for election in the Council of Peoples and the Presidency of Bosnia and Herzegovina on the basis of their origin. Before going any further into the details of the case, it would be interesting to review why the cases of Mr. Sejdic and Mr. Finci never even came in front of the Constitutional Court of Bosnia and Herzegovina. In the previous rulings, the Constitutional Court claimed that it didn't have jurisdiction over this area.

The ruling in the *case of Pilav and Party for Bosnia and Herzegovina* is precedent in the Constitutional Court's attitude regarding the interpretation of Article II/2 of the Constitution of Bosnia and Herzegovina. This Article clearly proclaims the supremacy of the European Convention of Human Rights over the national laws of Bosnia and Herzegovina. However, until the ruling during the session held on September 29, 2006, the Constitutional Court applied different interpretations on the decisions it reached. Let's examine decision number U 5/04 from March 31, 2005. In this case, the Constitutional Court of Bosnia and Herzegovina rejected as inadmissible a request made by the chair of Presidency. It was a request for the abstract review of the compatibility of Articles IV and V of the country's Constitution with the European Convention of Human Rights.[52] The Constitutional Court's argument was that this institution didn't possess the jurisdiction to examine the issue of compatibility. This decision was based on the claim it was not possible for the Constitutional Court to make a ruling on the question of compliance of certain provisions of the Constitution of Bosnia and Herzegovina with the European Convention and its Protocols, since the question overcame the constitutional framework and was out of the reach of the Constitutional Court's jurisdiction.[53] Furthermore, the admissibility of the request depended on the relation between national and supranational norms. The Court interpreted this relation in a way that even though Article II/2 stated the supremacy of the European Convention over national legal norms, this supremacy originated from the Constitution itself. Therefore, its power stems from the Constitution of Bosnia and Herzegovina.

[52] Mr. Sulejman Tihic, then Bosnia and Herzegovina's Presidency Chairman, submitted a request regarding the Constitutional Articles regulating the institutions of the Presidency and Parliament. This notion will be examined in more detail subsequently in this work.

[53] Constitutional Court decision number U 5/04, page 5, translation mine;

In other words, the Constitutional Court held that the European Convention on Human Rights didn't have priority over the Constitution.

There was also case number U 13/05 on May 26, 2006, where the Constitutional Court confirmed its attitude toward the interpretation of the relation between national and supranational norms. In this case, the appeal concerned the provisions of the Electoral Law and its compliance with Protocol 1 of the European Convention for Human Rights.[54] The Constitutional Court confirmed its inability to rule on this issue, due to the lack of judicial scope which could provide this institution with the possibility to review the compatibility of national legal norms with the international ones.[55] It also called upon the previous decision U 5/04, and using the same logic, it confirmed that the country's Constitution had supremacy over the international declarations referenced in the Dayton Agreement.

Ergo, in these two cases, the Constitutional Court of Bosnia and Herzegovina claimed that it didn't have jurisdiction to decide in situations of potential conflict between national legislation and international declarations. This fact was the legal base for Mr. Sejdic and Mr. Finci to go directly in front of the European Court of Human Rights. It is interesting to point out a paradox. In some of its interpretations, the Constitutional Court of Bosnia and Herzegovina confirmed the supremacy of the Constitution over international declarations. This was inconsistent with the conclusions the same court reached just a several months later in a case of *Pilav and Party for Bosnia and Herzegovina.* The appeals to previous court decisions submitted by Mr. Sejdic and Mr. Finci were admitted, even though they had not submitted a constitutional appeal prior to their application with the European Court of Human Rights. In other words, in spite of them not using all national legal remedies, their lawsuits were accepted.

[54] As in the case of Mr. *Pilav and Party for Bosnia and Herzegovina*, Mr. Sulejman Tihic, the then member of Presidency pointed out the violations of human rights under Electoral Law of BIH, Article 8 taking into consideration the provisions of Article 3, Protocol 1 of European Convention for Human Rights, which is to be applied in BIH according to the Dayton Agreement.

[55] Decision number U 5/04 of the Constitutional Court of Bosnia and Herzegovina, page 6, translation mine;

Besides the approximately similar national regulations they addressed, another reason these cases were joined in front of the ECHR was that both appellants were politically and socially active in the Bosnian society. At the moment their candidacies were rejected, Mr. Sejdic held a position as the Roma Monitor of the Organization on Security and Cooperation in Europe (OSCE), and Mr. Finci was the Ambassador of Bosnia and Herzegovina to Switzerland. However, since they declared themselves as Roma and Jewish, respectively, which are not perceived as the constituent people of Bosnia and Herzegovina, they were ineligible to stand for election to the Council of Peoples (the second chamber of the State Parliament), and the Presidency (the collective Head of State).

The main issue emerged around the definition of the "constituent people". The Preamble of the Constitution of Bosnia and Herzegovina states that constituent people in the country are Bosniaks, Croats and Serbs.[56] This definition indirectly influenced the whole Constitution of Bosnia and Herzegovina and the country's laws. The Parliamentary assembly has two chambers: The House of Peoples and the House of Representatives. According to the Dayton Agreement, the first one is supposed to have 15 delegates, five representing each entity, ten elected by the House of Peoples of the Federation of Bosnia and Herzegovina and five Serbian delegates, elected by the National Assembly of Republika Srpska.[57] Similarly, the organization of the House of Representatives follows the same "Trinitarian principle". Out of the 42 members of the Chamber, one third is to be elected from the territory of Republika Srpska, and the remaining are

[56] "*Recalling* the Basic Principles agreed in Geneva on September 8, 1995, and in New York on September 26, 1995, Bosniaks, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows…", Dayton Peace Agreement, Annex 4 – Constitution of Bosnia and Herzegovina, Preamble, page 59;

[57] "The House of Peoples shall comprise 15 Delegates, two-thirds from the Federation (including five Croats and five Bosniaks) and one-third from the Republika Srpska (five Serbs).

(a) The designated Croatian and Bosniaks Delegates from the Federation shall be selected, respectively, by the Croatian and

Bosniak Delegates to the House of Peoples of the Federation. Delegates from the Republika Srpska shall be selected by the National Assembly of the Republika Srpska.

(b) Nine members of the House of Peoples shall comprise a quorum, provided that at least three Bosniak, three Croatian, and three Serb Delegates are present", *Ibid.* page 65.

to be elected from the Federation of Bosnia and Herzegovina. The House of Representatives comprises 42 members, two thirds elected from the territory of the Federation, one third from the territory of Republika Srpska. Furthermore, Constitutional provisions are created so that Constituent people possess mechanisms of control in the decision-making process, so they could be assured that the interests of their ethnicity are always respected and protected in the best possible way. Article IV of the Constitution of Bosnia and Herzegovina concerns the Parliamentary Assembly. Perhaps the most important provisions confirming the importance of the notion of Constituent people are within Point 3 of this Article – Procedures. This work will highlight some of them. Firstly, each chamber employs the majority vote in order to adopt its internal rules and select from its members one Serb, one Bosniak, and one Croatian to serve as its Chair and Deputy Chairs, with the position of Chair rotating among the three persons selected[58]. Also there is a provision that "Delegates and Members shall make their best efforts to see that the majority includes at least one third of the votes of Delegates or Members from the territory of each Entity. If a majority vote does not include one third of the votes of Delegates or Members from the territory of each Entity, the Chair and Deputy Chairs shall meet as a commission and attempt to obtain approval within three days of the vote. If those efforts fail, decisions shall be taken by a majority of those present and voting, provided that the dissenting votes do not include two thirds or more of the Delegates or Members elected from either Entity"[59]. Furthermore "A proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of the Bosniak, Croatian, or Serb people by a majority of, as appropriate, the Bosniak, Croatian or Serb Delegates selected in accordance with paragraph 1(a)"[60]. Additionally, "When the majority of the Bosniak, Croatian or Serb delegates object to the invocation of the paragraph, the Chair of the House of Peoples shall immediately convene a Joint Commission comprising three Delegates, each selected by the Bosniak, Croatian and Serb delegates, in order to resolve the issue. If the Commission fails to do so within five days, the matter will be referred to the Constitutional Court, which shall in an expedited process review it for procedural regularity"[61]. Finally, there is the provision that the House of Peoples may be

[58] Dayton Peace Agreement, Annex 4 – Constitution of Bosnia and Herzegovina, page 66

[59] *Ibid*

[60] *Ibid*

[61] Dayton Peace Agreement, Annex 4 – Constitution of Bosnia and Herzegovina, page 66

dissolved by the Presidency or by the House itself, provided that the House's decision to dissolve is approved by a majority that includes the majority of Delegates from at least two of the Bosniak, Croatian or Serb nationals. However, the House of Peoples elected in the first elections after the Constitution enters into force may not be dissolved.

The importance of the provision regarding Constituent peoples is highly visible in the section of the Constitution dealing with the institution of Presidency. The Presidency of Bosnia and Herzegovina is a collective institution which, according to the country's Constitution, has to be formed by representatives of each Constituent people. Also, in order to protect any "vital interest" of each ethnicity, each Presidency member shall be vested with certain veto power[62]. These Constitutional provisions were followed by the construction and adoption of the Electoral Law. The part of Electoral Law concerning "Certification and Candidacy for the Elections" clearly states that every candidate list has to contain declared affiliation with one of the constituent people or *"Others"*, comprising ethnicities other than Bosniak, Croatian or Serb. This information is obligatory for anybody who wants to be a candidate for an elected or appointed position[63]. More precisely, this law states that "The declaration of affiliation with a particular "Constituent people" or the group of "Others" shall be used for the purposes of the exercise of the right to hold an elected or appointed position for which such declaration is required in the election cycle for which the list has been submitted. Also that candidate shall be entitled not to declare his or her affiliation to a "Constituent people" or the group of "Others".[64] However, any such failure to declare affiliation shall be considered as a waiver of the right to hold an elected or appointed position for which such declaration is required.[65] In other words, a

[62] A dissenting Member of the Presidency may declare a Presidency Decision to be destructive of a vital interest of the Entity from the territory from which he was elected, provided that he does so within three days of its adoption. Such a Decision shall be referred immediately to the National Assembly of the Republika Srpska, if the declaration was made by the Member from that territory; to the Bosniak Delegates of the House of Peoples of the Federation, if the declaration was made by the Bosniak Member; or to the Croatian Delegates of that body, if the declaration was made by the Croatian Member. If the declaration is confirmed by a two-thirds vote of those persons within ten days of the referral, the challenged Presidency Decision shall not take effect.

[63] Electoral Law of Bosnia and Herzegovina, Article 4.16 (5, 6), page 28.

[64] *Ibid.*

[65] *Ibid.*

citizen does not have to proclaim Constituent ethnicity if he/she wishes to run for elections. However, if any citizen would like to run for institutions based on the Trinitarian principle, like the Presidency of Republic or House of People, their candidacy will not be approved. Further reading of the Law reveals more about the institution of Presidency and the House of Peoples, which are important for the case of Sejdic and Finci. The law proclaims that there shall be three members of the Presidency, all coming from a Constituent people and therefore being Serbian, Bosniak or Croatian. Following these Constitutional provisions, the Electoral Law confirms that, regarding the members of the House of Peoples, delegates may only be selected among constituent people and only by already selected representatives of the House of Peoples of the Federation in the case of Bosniak and Croatian peoples, and in front of the Parliamentary Assembly of Republika Srpska in the case of Serbs. The law clearly excludes the members of "Others".[66] In conclusion, these national legal provisions made it impossible for anybody not belonging to "Constituent people" to even campaign for a position in the Presidency and the House of Peoples of Bosnia and Herzegovina.

This Trinitarian principle is a direct consequence of the conditions in which the legal framework emerged. Regarding the moment of the creation of the Bosnian Constitution and all other legal provisions, it is interesting to note that, earlier in Bosnia and Herzegovina's history, the members of "Others" were recognized as an important part of Bosnian society through both the law and the organization of political power[67]. However, it seems that the lawmakers were unable to bear in mind the importance of these provisions for the democratic character of the country when the Dayton Agreement was drafted. One is to believe that maybe it would have been better that this existing legal basis was preserved. This system implemented a more inclusive approach to the way the representatives are selected. In this respect, it is possible to note the importance given to

[66] Electoral Law of Bosnia and Herzegovina, subsection B – House of Peoples of Parliamentarian Assembly of Bosnia and Herzegovina, Article 9.12 (a, c, e) page 49;

[67] For example, in 1974 the Constitution of the Socialist Republic of Bosnia and Herzegovina, in the framework of the Socialist Federal Republic of Yugoslavia, established a new institution in the legal and political system, the Presidency of Bosnia and Herzegovina. At that time, the Presidency consisted of 9 members, but after the first multiparty elections in December 1990, it had 7 members – two Bosniaks, two Serbs, two Croats, and one member representing the rest of the peoples.

the principle of preserving peace over everything else. Was the preservation of peace the only reason why the Dayton Agreement oversaw such provisions which could include the "Others"? Could this also be connected to the fact that the Bosnians, whom even their own legal framework fails to recognize as legal subjects in many ways[68], were not granted with more power during the Dayton negotiations?

It is possible to notice how all of this reflected on the life of people in Bosnia and Herzegovina. Based on presented domestic legal provisions, both Mr. Sejdic and Mr. Finci were unable to declare candidacy for positions to the Presidency and the House of Peoples in their country. In January 2007 Mr. Sejdic received an official confirmation from the Central Electoral Commission that his candidacy was declared invalid. He was deemed ineligible to stand for election to the Presidency and the House of Peoples of the Parliamentary Assembly of Bosnia and Herzegovina because he was the member of the "Others", and not "Constituent people". However, he didn't automatically appeal in front of the European Court of Human Rights. According to both appellants in the case of *Sejdic and Finci v. Bosnia and Herzegovina*, their immediate motive in addressing the ECHR was the signing and ratification of Protocol No. 12 of the Convention of Human Rights by Bosnia and Herzegovina (Hodzic and Stojanovic, 2011, p. 27). Even though the Convention is an integral part of the Dayton Agreement, and has supremacy over national laws, the appellants believed that only through the ratification of the Protocol No. 12 they would have sufficient legal grounds to construct their case.

They also called upon other international conventions, starting with the International Convention on the Elimination of All Forms of Racial Discrimination. This legal document referred to the facts that appellants believed that their rights were violated on the grounds of race and

[68] In her case in front of ECHR *Zornic v. Bosnia and Herzegovina*, Mrs. Azra Zornic was ineligible to stand for election to the House of Peoples and the Presidency of Bosnia and Herzegovina because she refused to declare affiliation to any particular ethnic group. She declared herself a citizen of Bosnia and Herzegovina – a Bosnian. However, the Dayton Agreement and the Constitution of the country does not foresee the existence of Bosnian nationality even though through history and nowadays many people from this area defined themselves as Bosnians. In the end, the Court made a decision in her favor in 2014.

ethnicity[69]. Furthermore, they also included the International Covenant on Civil and Political Rights which, as in *case of Pilav and Party for Bosnia and Herzegovina*, guaranteed the right to equal treatment of all citizens regarding their voting and electing rights, and equality in front of the law. Also, they called upon the Convention for the Protection of Human Rights and Fundamental Freedoms. More precisely, they have referred to Articles 3[70], 13[71] and 14[72] of this Convention. Also, they included Article 3[73] of Protocol Number 1 and Article 1 of Protocol number 12 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The first three Articles within the original Convention refer to prohibition of torture, right to effective remedy and prohibition of discrimination. Article 3 of Protocol I is the one regulating

[69] "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life"

"In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

...

(c) Political rights, in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the government as well as in the conduct of public affairs at any level and to have equal access to public service;", The International Convention on the Elimination of All Forms of Racial Discrimination, Articles 1 and 5, page 2;

[70] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment", Convention for the Protection of Human Rights and Fundamental Freedoms, Section I – Rights and Freedoms, Article 3, page 6;

[71] "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity", Convention for the Protection of Human Rights and Fundamental Freedoms, Section I – Rights and Freedoms, Article 13, page 12;

[72] "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status", Convention for the Protection of Human Rights and Fundamental Freedoms, Section I – Rights and Freedoms, Article 14, page 12;

[73] "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature", Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol I, Article 3, page 18;

the right to free election and the Article 1 of Protocol 12 is withholding the general prohibition of discrimination.

Firstly, taking into consideration the notion of admissibility, the ECHR had to establish whether the appellants in these cases should be considered as victims. The Court concluded that, given the appellants' active participation in public life, it would be entirely coherent that they would in fact consider running for the House of Peoples or the Presidency of Republic. Therefore, the court came to the conclusion that the appellants may claim to be the victims of alleged discrimination[74]. In the same section of the judgment, the ECHR had to determine whether Bosnia and Herzegovina could be held responsible for these violations.

This is an interesting point for reflection, taking into account the nature of Bosnia and Herzegovina's constitutional and legal framework. Could this country really be accountable in this case, since its Constitution is part of the Dayton Agreement, an international treaty endorsed by several states and "under the wing" of the international community itself? Could the institution of the High Representative also bear liability? The person heading this institution is a delegate of the international alliance. Taking into consideration that this organ was vested with the power to influence domestic legal order and that it was using it widely and in various occasions, could it be culpable as much as the Bosnian counterpart?

However, the European Court for Human Rights' manner of perceiving these cases didn't head in this direction. This court concluded that Bosnia and Herzegovina may be found responsible because the Parliamentary Assembly had the power to amend the Constitution and it failed to do so. Regarding the High Representative, the opinion of ECHR was that the powers of an international administrator do not encompass the Bosnian Constitution. Hence, even though this institution has a vast specter of powers, including the authority of enforcing laws and dismissal of state authorities, which are legitimately and legally elected by the citizens of Bosnia and Herzegovina, the High Representative wasn't found in any way accountable in this case. On the other hand, Bosnia and Herzegovina was seen as potentially culpable since it maintained the existing constitution in its original form.

[74] Judgment of European Court of Human Rights on Applications nos. 27996/06 and 34836/06, page 27;

After reviewing the case, the ECHR made an assessment. It concluded that Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms had to be taken jointly with Article 3 of Protocol number 1 of the same document in order to be applicable. In other words, prohibition of discrimination should be looked upon together with the notion of voting rights, because the scope of rights taken upon Article 14 refers to all provisions of the Convention and its Protocols.

In Article 3 it was established that, even though this notion refers to elections of legislature, it could be applied in this particular case likewise. The ECHR reasoning was that this Article could be applied since the House of Peoples of Bosnia and Herzegovina had vast influence on law making procedures. The laws in Bosnia cannot be adopted without the approval of this institution, since together with the House of Representatives it creates and approves the budgets of State institutions and the State itself. Finally, the House of Peoples has the last say in the ratification of treaties.

On the provisions of Article 14 referring to discrimination, judges of the ECHR deliberated that discriminatory legal provisions of the State laws *per se* did not oppose international anti-discriminatory norms, but that there had to be strong rational and objective reasoning to do so. They highlighted that this was especially important in the case of minorities and their voting rights. Furthermore, the ECHR concluded that discrimination on the basis of ethnicity, as was the case with Mr. Sejdic and Mr. Finci, represented a form of racial discrimination. However, the Court noted that this exclusive ruling pursued at least a legitimate aim, which was broadly compatible with the general objectives of the Convention for the Protection of Human Rights and Fundamental Freedoms, as reflected in its Preamble, namely the restoration of peace[75].

On the matter of the possible culpability of the country, ECHR judges claimed that over the years Bosnia and Herzegovina made big progress towards being a more independent and democratic country. They added that there were possible solutions that could bring about

[75] Judgment of European Court of Human Rights on Applications nos. 27996/06 and 34836/06, page 33;

changes of the discriminatory state legal provisions, while still withholding the notion of Trinity. Hence, Bosnia could act on it.

The first remark about progress was made upon the inclusion of Bosnia and Herzegovina in the international organizations such as NATO, assignation and ratification of the Stabilization and Association Agreement with the European Union, and the country's election as a temporary member of UN Security Council. Another comment about potential solutions was made referring to the ones proposed to the Court by the Venice Commission, which previously provided its opinion to the ECHR upon this matter as a third party[76]. Thus, the European Court for Human Rights concluded that since there wasn't reasonable and objective justification, the appellants' rights were violated under Article 14 taken in conjunction with Article 3 of Protocol number 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Since it reached this conclusion, the ECHR considered that it was not necessary to examine separately whether there was also a violation of Article 3 of Protocol No. 1, taken alone or with Article 1 of Protocol No. 12 regarding the House of Peoples[77].

Furthermore, regarding Article 12 of Protocol number 1, referring to the general provisions of discrimination and its applicability in the case of the appellants' "ineligibility" to stand for elections to members of the Presidency, the ECHR concluded that the subjects' rights had been violated.

On Article 3 of the Convention, with reference to the prohibition of torture, the judges of the international court established that in this case it was not possible to apply this provision. However, even though in some cases in front of the ECHR, the high level of discrimination was counted as a form of torture, in this situation the intended purpose was not the maltreatment of

[76] The Venice Commission, the Council of Europe's advisory body on constitutional matters, adopted a number of Opinions over the years in connection with the legal norms of Bosnia and Herzegovina, among which the one concerning organization of the Presidency, the House of Peoples and the elections is considered the most relevant in this case. It also offered three solutions regarding the resolution of the issue of the exclusion of "Others" in the Opinion on different proposals for the election of the Presidency of Bosnia and Herzegovina (CDL-AD(2006)004 of March 20, 2006)

[77] Judgment of European Court of Human Rights on Applications nos. 27996/06 and 34836/06, pages 34-35;

the Roma community as "second-class citizens", as Mr. Sejdic claimed. The goal of this notion was the preservation of peace.

Finally, the notion of Article 13 – that there were no effective domestic remedies – also couldn't be applied in this case because this provision is accountable for the situation of challenging primary legislation in front of a national authority when it is contrary to the Convention.

To sum up, ECHR reached several judgments and decisions:

a) Fourteen votes to three that there was violation of Article 14 of the Convention taken in conjunction with Article 3 of Protocol No. 1, as regards the appellants' ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina;
b) Unanimously that there was no need to examine the same complaint under Article 3 of Protocol No. 1 taken alone or under Article 1 of Protocol No. 12;
c) Sixteen votes to one that was a violation of Article 1 of Protocol No. 12 as regards the appellants' ineligibility to stand for election to the Presidency of Bosnia and Herzegovina;
d) Unanimously that the finding of a violation constitutes in itself sufficient self-satisfaction for any non-pecuniary damage sustained by the appellants[78];

This judgment of the European Court of Human Rights is specific and important in many ways. First of all, this was the first time that this court judged on provisions of Article 1 of Protocol number 12. Furthermore, the Decision created a lot of speculations in scholar and political circles both in Bosnia and Herzegovina and internationally. Taking into consideration the existing praxis of the ECHR, this judgment created the guideline for all future decisions regarding same or similar matters. In addition, this was the very first case of its kind in the ECHR's case-law. This judgment might result in serious constitutional turmoil and rearrangements in one of the Council of Europe member states.[79] The judgment insinuated that Bosnia and Herzegovina should consider revising its Constitution and laws. Also, this decision opened possibilities for all

[78] Judgment of the European Court of Human Rights on Applications nos. 27996/06 and 34836/06, page 39;

[79] Partly concurring and partly dissenting opinion of judge Mijović, joined by judge Hajiyev, Judgment of European Court of Human Rights on Applications nos. 27996/06 and 34836/06, page 41;

the "Others" to present their cases in front of the ECHR, which will in turn have to find the country culpable in each of the cases.

Furthermore, the international community started prompting Bosnia and Herzegovina to change its legal notions[80]. Once again, the country is under heavy international pressure to modify its legal framework. Moreover, these changes are precisely the ones the international community deemed necessary. It seems that the international community would make these constitutional changes itself if that were possible.

In any case, it seems that through the *Case of Pilav and Party for Bosnia and Herzegovina* the domestic judiciary already clearly stated its opinion regarding this issue. The Constitutional Court claimed that Bosnia was not yet ready. Judges of the highest national court claimed that there was still no sufficient level of stability in the society, and that maintenance of peace was still a priority. On the other hand, the ECHR held that a lot of time had passed since the Dayton Agreement was reached and that Bosnia made progress and was ready for constitutional change.

Once again, the issue of supremacy and sovereignty arises. Who is the real sovereign? Who has the power to make the changes? Will international legal norms overcome domestic ones? Also, taking into consideration how the country's laws emerged and the organization of its legislative and judiciary powers, one could ask if there is even a clear border between the legal norms of Bosnia and Herzegovina and the international ones.

[80] Besides numerous political meetings with international leaders which addressed the need for constitutional change to Bosnian politicians, the European Union also stated that BIH would not be able to continue its path toward integration in the European Union until it resolved issues, which became visible after the ECHR ruling in the case of Sejdic and Finci. For example, the following conclusion was reached during the 3060th meeting of Council of European Union regarding Bosnia: "Bosnia and Herzegovina needs to align its constitutional framework with the European Convention on Human Rights. The Council stresses the importance of improving and strengthening the efficient functioning of the state and the institutions, including through necessary constitutional changes. In particular, the country will need to be in a position to adopt, implement and enforce the laws and rules of the EU", 3060th General Affairs Council meeting Brussels, December 14, 2010;

The following chapters of this work will not only attempt to answer some of these questions, they will also try to devise possible solutions for the problems. Therefore, we will focus more on work of Jacques Derrida, especially on his work in the areas of sovereignty and democracy.

Chapter II – Concept of Sovereign and Notion of Sovereignty within Work of Derrida

3. Characteristics of Sovereign(ty)

3.1 The Sovereign Force(s)

Definitions and deliberations about sovereignty are marked by a particular historical moment. Every époque has its own sovereign philosopher or/and philosopher of sovereignty. I opted to believe that the contemporary view upon this topic is best reflected in the works of Jacques Derrida. He deals with the notion of sovereign throughout many of his works, lectures and interviews. This chapter will try to establish the path toward reaching the answers to some of the questions presented in the previous part of this research through taking a closer look into the idea of the sovereign. Due to the complexity of the concept only some of Derrida's views on sovereign(ty) are taken into consideration. Traits such as force, power to decide and produce are examined and analyzed. It is interesting to note how at the same time these three features produce, permeate and intertwine one another. They have an important role of being in a certain way an introduction to the more important and challenging premises of Derrida's thoughts on the notion of the sovereign.

Furthermore, we will focus on the relations of the concept of sovereign with ideas outside of the concept. Questioning the sovereign's connection with law will lead to the examination of origin of his power. This is important as a path of analyzing the ways the legitimacy of sovereignty arises. Related to this point, but at the same time acting independently, is the indivisibility of sovereignty. The dominant theoretical base will be the work presenting the later, mature and more political époque of Derrida's thought *The Beast & the Sovereign, Volume I and II.* These editions contain thirteen and ten lectures, respectively, from the seminar Derrida held between December 2001 and March 2003 at the *Ècole des heutes études en sciences sociales* (EHESS) in Paris. Derrida opened his seminar by analyzing or, more precisely, deconstructing the Fontaine's fable of Wolf and the Lamb.

The Wolf and the Lamb, By Jean de La Fontaine
Translation by Eli Siegel [81]

The reason of those best able to have their way is always the best:
We now show how this is true.

A lamb was quenching its thirst
In the water of a pure stream.
A fasting wolf came by, looking for something;
He was attracted by hunger to this place.
—What makes you so bold as to meddle with my drinking?
Said this animal, very angry.
You will be punished for your boldness.
—Sir, answered the lamb, let Your Majesty
Not put himself into a rage;
But rather, let him consider
That I am taking a drink of water
In the stream
More than twenty steps below him;
And that, consequently, in no way,
Am I troubling his supply.
—You do trouble it, answered the cruel beast.
And I know you said bad things of me last year.
—How could I do that when I wasn't born,
Answered the lamb; I am still at my mother's breast.
—If it wasn't you, then it was your brother.
—I haven't a brother.—It was then someone close to you;
For you have no sympathy for me,
You, your shepherds and your dogs.
I have been told of this. I have to make things even.
Saying this, into the woods
The wolf carries the lamb, and then eats him
Without any other why or wherefore.

[81] From *Hail, American Development* (Definition Press) 1968 translation by Eli Siegel

The moral of this story – "*the reason of the strongest is always the best*", is simultaneously the *leitmotif* of the seminar. Many times during the seminar Derrida deliberated about certain issues and kept returning to this perspective. This moral was the anchor which helped Derrida to underline the ma(i)n[82] issue – sovereign(ty). How does he deconstruct this story? First of all, he focuses on strength or force.

Derrida (2009) is quoting Blaise Pascal's "*Reason of effects*" on the relation of justice and force – "*reason of the strongest is always the best"*. Since the wolf is strong, his decisions are always just. The sovereign is always just. This claim doesn't in any way mean that the sovereign's actions are related to justice itself. This "justness" of decision is simply based on the sovereign's possession of force. Derrida claims that justice and force are intertwined, one complements the other. It seems that justice lacks effectiveness when it is without force. Also, as Derrida (2009) puts it, force without justice is simply unjust. In other words, force without justice is violence. Besides emphasizing the importance of the relation of justice and force, the notion of "*reason of the strongest is always the best"* is significant for this work because it shows the first characteristic of sovereign(ty) – the strength or the force itself. Additionally, Derrida (2009) sheds light on the importance of the word *reason*. If we put the emphasis on the word *reason* instead of *strength,* this would imply that the strongest succeed due to their best reasoning. Derrida points out that "(e)verything will turn around the semantic pivot of the word "reason" in

[82] "Feminine ... masculine |La ... le|. Let me recall the title proposed for this year's seminar: the beast |feminine: *la bête*| and the sovereign [masculine: *Le souverain*| La, Le" (Derrida, 2009, p.1). With these words Derrida opened the seminar *The Beast and the Sovereign.*

Even though this is not one of the principle topics of the seminar, in several occasions Derrida refers to the role of the sovereign as anti-feministic. Through deconstructing of *logocentrisms,* as he calls them, Derrida is simultaneously creating a firm position for modern feminism. For example, in some of his other works such as "*Rogues – Two Essays on Reason"*, he gives more focus to the breaking, i.e. the deconstructing of the notion of fraternity. Derrida claims that this is one of the pre-given *logocentrisms* (*phallogocentrism*). It seems that by highlighting the anti-feminist elements in language in the beginning of *The Beast and the Sovereigns* Derrida just wanted to remind students of the importance of feminist approaches to some of the issues he was going to present. Even though in this particular seminar he was not focusing on feminist issues, Derrida had strong beliefs on this topic. He developed his positions more thoroughly in his works such as *The Politics of Friendship, Negotiations, For the Love of Lacan* etc.

the fable: when the fable says "the reason of the strongest is always the best," is it reason itself, the good reason, the most just reason, true reason, or the reason given, alleged by the stronger (Caligula or the sovereign or the wolf in the fable) which is the best" (Derrida, 2009, p. 13). Lastly, *reason* can also be interpreted in the light of the sovereign's reason to act and judge justly and legitimately.

Furthermore, if one would look upon the role of the word *best* in the context of the phrase, it could have two fairly opposite meanings. One refers to reason that prevails in fact and the other holds that this reason is the best because it is just, regardless of the criteria of justice. Derrida (2009) points out the various possibilities of interpretation of the moral of the story *The Wolf and the Lamb*. It seems that he does so in order to highlight the complexity of the relation of the sovereign with others and also to show the ability of deconstruction to help in the thorough analysis and production of certain interpretations.

In the eighth session of *The Beast and the Sovereign* seminar, Derrida went one step further in deconstructing the fable by examining it verse by verse. Analyzing the same line once again "The reason of the strongest is always the best; as we shall shortly show", he examines the relation between force and right. Derrida (2009) points out that right *per se,* in its essence has characteristics which are directly connecting it with force. The right which, Kant reminds us, with good sense itself, already in its concept implies the means, and thereby the coercive force, of its application and its implementation: a right without force is not a right worthy of the name (Derrida, 2009, p 207). It looks like these notions, *right and force*, are inextricably linked since their creation. Derrida (2009) questions the problem which arises due to the forceful character of right. He claims that force is essential for the exercise of right. On the other hand, there is also the assertion that "[t]he sovereign is always representing the most powerful power, the highest, greatest power, all-power, the strongest strength" (Derrida, 2009, p 207). One could produce two conclusions – either that the sovereign is always right or that right is always the sovereign.

In *The Beast and the Sovereign*, Derrida highlights that the sovereign is the highest force. It is a marker of validity for all others and the ultimate instance of questioning. The strength of the sovereign is used as a base upon which Derrida (re)builds the image of this concept. Therefore, this characteristic will continue reappearing throughout this work as it corresponds with the intensity Derrida ascribes to these characteristics of the sovereign.

3.2 The Sovereign Decides

Carl Schmitt is one of the most significant authors of the previous century. This jurist was especially fruitful in the areas of legal and political theory. Even though many have failed to perceive the importance of Schmitt's work, focusing only on some of his books and alleged political involvement, Derrida is certainly not one of them. In the "rethinking" of sovereignty, Derrida puts Schmitt in his center of attention. Therefore, it is inevitable that this work positions itself in the direction of following Derrida's thinking regarding Schmitt's views on sovereign. Also, when necessary, this thesis will try to present a more profound view of Schmitt's ideas. The sovereign's power to decide is the first point of crossing between Derrida's and Schmitt's views we will analyze.

In the beginning of the seminar *The Beast and the Sovereign,* Derrida reflects on Nietzsche's *Zarathustra.* He emphasizes one moment: "[t]he silent voice commands him to command but to command in silence, to become sovereign, to learn how to command, to give orders (*befehlen*), and to learn to command in silence by learning that it is silence, the silent order that commands and leads the world" (Derrida, 2009, p. 4). The sovereign commands, and in order to do that, he has to decide. It is interesting to note that the same situation occurs in *The Wolf and the Lamb,* where the beast is making all decisions.

The sovereign makes choices within the rules he already created. The way he judges on rules is also subjective. As a consequence, all decisions the sovereign makes reflect on his power over others. On the other hand, in *Political Theology* Schmitt gives a clear definition of the *sovereign*. Sovereign is who decides on the exception (Schmitt, 1985, p. 1). During his career, he dedicated a lot of thought to the sovereign, deliberating about various aspects of this notion. Schmitt's phrase quoted above was interpreted many times and read in ways that emphasize the different aspects of the notion. Schmitt builds his ideas of the sovereign through the exception and the state of exception, which will be explained more clearly later on. He considers the power to decide as the most important trait in the notion of the sovereign.

The sovereign's force is visible through decision-making. This element of Schmitt's deliberation regarding the sovereign was examined by many philosophers. For example, in *Homo Sacer* when talking about Schmitt, Agamben clearly states "[t]he essence of State sovereignty, which must therefore be properly juridically defined not as the monopoly to sanction or to rule but as the monopoly to decide"[83]. Therefore, precisely this authority, this trait of the sovereign – the fact that *he decides,* makes the sovereign what he is in Schmitt's theory. This is the first point that connects Derrida's ideas regarding the sovereign with Schmitt's.

Derrida (1992a) reflects on the sovereign's decisive character through the figure of the judge. He points out that every court ruling is subjective, and that it also influences the aspects of justice. Therefore, legal systems are constructed in a way that every law loses objectivity, if it ever had one in the first place. This happens every time when a judge makes a ruling on a certain matter. In that instance, the general norm becomes the particular one.

The judge makes two subjective choices. The first one is deciding on the way the law will be read in some case, and the second is the selection of a certain legal norm which will be applied in the decision. It seems that a judge acts on his personal opinion from the beginning of the decision-making process. Derrida claims that "[e]very time that we placidly apply a good rule to a particular case, to a correctly subsumed example, according to a determinant judgment, we can be sure that law *(droit)* may find itself accounted for, but certainly not justice. Law *(droit)* is not justice. Law is the element of calculation…"[84] Later on in this work, the element of calculability will be considered more thoroughly, but for now it is sufficient to point out that it arises through the sovereign's decision.

[83] *Homo Sacer Sovereign Power and Bare Life*, Giorgio Agamben, 1995, page 9.

[84] In *Deconstruction and the Possibility of Justice* ed. Drucilla Cornell, Michel Rosenfeld and David Gray Carlson, *Force of Law: The "Mystical Foundation of Authority"*, Jacques Derrida, 1992, p.16.

3.3 The Sovereign Produces

We can note how Schmitt influenced Derrida's way of thinking. Schmitt (1985) puts the sovereign inside the state and the legal order. One of the aspects he refers to is the "situation law". This is the fact that legal norms have to be interpreted in order to be used. The truth is there is no legal system able to overcome the subjectivity of the interpretation of law. There is always an unavoidable human factor which is embodied in the institution of a judge. Consequently, the sovereign judges as he decides. The sovereign produces and guarantees the situation in its totality (Schmitt, 1985, p. 13). Therefore, the sovereign is the one having authority over legal matters. In this situation a judge is the sovereign. He has absolute control. The judge produces as a consequence of his power to decide. First of all, he interprets general legal previsions in his own, personal way. However, even if the sovereign would interpret the legal document objectively, there is still the subjective aspect of his decision because he has to give more importance to general values. This feature becomes obvious when a judge has to choose between two values. For example, in situations where there is conflict between the freedom of organized gathering and public safety, a judge has to let one value prevail over the other. Since there is no general or generic guide for such situations, a judge is the one making a decision, which is always a subjective act. That is how the sovereign's power of production arises. Even though his decisions are based on existing norms, the sovereign creates and produces new laws.

Likewise, Derrida comments on the position of a judge, as well. If the judge makes a decision for the ruling to be just, the decision of the judge must not only follow a rule of law but must also assume it, approve it, by a "reinstituting act of interpretation", as if nothing previously existed of the law, as if the judge himself invented the law in every case (Derrida, 1992a, p. 16). Therefore, besides claiming that not all laws are just, and justice doesn't necessarily have to be connected to law, Derrida also points out that creation occurs every time a general provision is implemented in a particular case. Furthermore, one of the manifestations of the sovereign's power is the authority to punish. Ergo, he simultaneously creates rules, norms, and decides on them, as the wolf has done in the "case" against the lamb.

The sovereign has complete power over his subordinates. Derrida highlighted this during the second seminar of *The Beast and the Sovereign* when he presented a metaphor of Robinson Crusoe. Even before becoming the lord of all animals, plants and people on his island, Robinson claimed his sovereignty. An archi-preliminary example: even before arriving at the island, and all the stories about the slave trade, there is an episode of the Moor thrown into the sea and of the young boy Xury, also a Muslim, whom Robinson keeps on board and whom Robinson (his master, then), asks to pledge an oath of fidelity (Derrida, 2010, p. 28). This symbolic way of proving the boy's loyalty, through a pledge, served to further submit the youngster to Robinson's sovereignty.

This example demonstrates two things. It presents the potential subtle ways the sovereign could overpower his subordinates, as well as the symbolic power of the pledge. Even though this work will not go into any profound analysis of power, which is inherent to the symbol of the pledge, it is interesting to point out that the pledge could be viewed as a concept of dual character. Firstly, it can be a symbolic way of assuming the position of the sovereign as in the case of all rulers in the old days. Kings and queens pledged to lead and protect their people. On the other hand, the pledge can serve to position people as subordinates, as is the case when members of parliament pledge that they will serve all citizens.

Furthermore, Derrida points out another characteristic of the sovereign – cruelty. By the end of the fable *The Wolf and the Lamb* La Fontaine demonstrates the true cruelty of the wolf. The beast is changing "laws" so he could achieve a certain level of legality when he overcame the lamb's attempts to defend itself against an inevitable punishment. This is an interesting point displaying how sovereigns legitimize their actions. As Derrida (2009) notes, La Fontaine is even directly calling the wolf "this cruel beast". This issue is even further decomposed by Derrida and he additionally hyperbolizes the motive of cruelty as he provides an alternative ending to the fable. He claims that the wolf is "the sovereign who sets up no tribunal not even an exceptional or military tribunal and who, in the name of his self-defense," his self-protection, his supposed "legitimate defense," annihilates the defenseless enemy, the enemy who doesn't even have the defense given by a defense counsel in a regular trial etc" (Derrida, 2009, p. 211).

It is also evident that one of lines of argumentation Derrida followed was that the sovereign's power doesn't have any value *per se*. This means that his power is visible in its practical use – through actions. This operation is usually directed toward others, not so much others as subjects, but as objects of the sovereign's power. There are several incidents in the fable where the sovereign's power was "visible" – the scenes when the lamb was referring to the wolf as "Sir, Your Majesty". In these instances the lamb displayed unquestioned submission to the wolf's authority. Furthermore, this is also evident later on toward the conclusion of the fable when "prosecution" took place. In this situation the wolf had full control. Also, we could clearly note the sovereign's power in the end, when the wolf carried out the punishment and ate the lamb. Eating can be seen as a final manifestation of negation of existence of the lamb and treating it as an object.

It seems that Derrida sees the wolf's behavior, or his cruelty to be more precise, as expected characteristics for all types of the sovereign, and also as a consequence of sovereignty. Derrida (2009) also gives the example of rogue states with the same idea, putting an emphasis on their cruel nature. For the time being, they will only be presented briefly. Those powerful states that always give and give themselves, reasons to justify themselves, but are not necessarily right, have reason of the less powerful; they then unleash themselves like crude, savage, beast, or beast full of rage (Derrida, 2009, p. 209). This example confirms that, according to Derrida, the sovereign's actions are not solely aimed toward others, but that he can also influence his own reality. Furthermore, one can observe examples of cruelty not only as actions of punishment, but also as a manner of having complete control over the other and of proving the sovereign's power yet again. The sovereign as the producer of the law can give base for legal actions and the legitimacy for its own doings, as was the case in the fable. It is interesting to note that both in the fable and in the cases of rogue states Derrida refers to the moment when sovereigns would instill some kind of legality in their own actions. This happens even when they are so powerful that no one is questioning their actions. To sum up, in the work of Derrida, and within the ideas of some of his predecessors, such as Schmitt, we can find the notion that the sovereign is the one that produces. The concept of production is closely tied to the creation, interpretation and implementation of legal norms.

4. Relation(s) of Sovereign(ty)

4.1 The Sovereign's Position regarding Law

If the sovereign has the power of interpretation and is indirectly creating laws, how is he positioned against law?

The main characteristics of the sovereign were presented above. This rough sketch could be helpful toward the attempt to look upon the sovereign's relation with other notions. Derrida(2009) claims that the beast and the sovereign have the same position within law. Both of them are outside of law. It is as though both of them were situated by definition at a distance from or above the laws, in non-respect for the absolute law, the absolute law that they make or that they are but that they do not have to respect (Derrida, 2009, p. 17). Animals are below the law because they are not taken into account by the law. On the other hand, the sovereign is the one who is above the law, the great creator, interpreter and sometimes the executor of the law. Regarding the position of the sovereign, Schmitt claims that: "Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs to be suspended in its entirety" (Schmitt, 1985, p. 7). In the first instance it seems clear that Schmitt's position is different from Derrida's. However, these claims will require further clarification.

Firstly, Derrida creates the impression that his idea of the relation between the Beast and the Sovereign is not necessarily most clearly articulated in the phrase "*La bête et le souverain*". He claims that maybe the way to look upon it is to think about the maxim "*La bête e(s)t le souverain***"**. Derrida (2009) implies that these two figures are reflected in each other, not only presenting each other's opposites, but also being integral parts of the other one. There is "a sort of hypnotic fascination or irresistible hallucination, which makes us see, project, perceive, as in a X-ray, the face of the beast under the features of the sovereign; or conversely, if you prefer, it is as though, through the maw of the untamable beast, a figure of the sovereign were to appear" (Derrida, 2009 p. 18).

This relationship between the two subjects could also be seen within other spheres. Derrida's vision resembles Orwell's *Animal Farm* where pigs took over the role of the humans, of the masters, until they became as humans[85]. In this story, the pigs are above all other animals, they are the sovereigns. They created and applied the law. They became the law. In this novel it is possible to see the two faces of the sovereign. The sovereign is the supreme power and the beast. Furthermore, it looks like the trait the beast and the sovereign have in common is that they are non-humans, non-citizens and therefore – outlaws. Taking into consideration these traits, Derrida (2009) states that criminals can be included in this group because they are also not included in the legal framework. The three of them, the animal, the criminal and the sovereign, are outside the law, at a distance from or above the laws: criminal, beast and sovereign strangely resemble each other while seeming to be situated at the antipodes at each other's antipodes (Derrida, 2009, p. 17). This brings us to the concept of the criminal in Derrida's work.

Criminal, *voyou* or rogue is an important idea for understanding Derrida's philosophy in general. The Algerian-French philosopher uses it to explain different relations and complex notions. Firstly, there is the question of etymology. Its origin suggests a negative, pejorative connotation either seeing *voyou* as adjective, attribute or a noun. This word is also used to name somebody. It usually has a defining character in a way that the subject is explaining to the other, *always the other* as Derrida points out, as a person outside the norm. Rather, it casts a normative, indeed performative, evaluation, a disdainful or threatening insult, an appellation that initiates an inquiry and prepares a prosecution before the law. It is an appellation that looks already like a virtual interpellation (Derrida, 2005a, p. 64). Furthermore, when it comes to the quantitative values of the notion, there are several possible interpretations. In *Rogues* Derrida mentions the gender aspects of the phrase. "Rogue" is usually attributed to masculine, and even when it is appropriated to woman, it has to be a manly woman that dares to be equal to men. Derrida (2005a) puts the notion of *voyou* in singular. However, he also claims that this is the expression which is close to all of common people to *demos,* and that is why he revives the phrase *voyoucracy* or *voyoucratie,* in the original form. Through this construction he criticizes different

[85] "Twelve voices were shouting in anger, and they were all alike. No question, now, what had happened to the faces of the pigs. The creatures outside looked from pig to man, and from man to pig, and from pig to man again; but already it was impossible to say which was which." George Orwell "Animal Farm", 1946

aspects of democracy and points out the various cases of autoimmunity within the concept of democracy. This will be analyzed later on in more detail. For now, it is interesting to point out that "rogue" can also be an attribute or definition of the state.

Derrida points out that even though the concept of *Etat-voyou* or *Rogue state* existed before, it first became popular in the end of previous century. It was only in the 1980s, and especially after 1990, after the collapse of the communist bloc, that the qualifying expression "rogue state" left the sphere of domestic politics, of internal non-democracy… (Derrida, 2005a, p. 95). In the same passage he states that during the time of Clinton administration (1997–2000) the term was used to describe undesirable states, those whose actions were not in interest of USA's foreign politics. Politicians of Western powers claimed that rogue states were countries opposing the notions of universal and international laws. They are putting themselves outside of law. It seems that through this reasoning the Western powers were placing guilt on others, *always the others* for being rogues. However, Derrida identifies the countries of the Western world, particularly USA and the permanent members of United Nations Security Council (UNSC) as those being "the most roguish". The first and the most violent of rogue states are those that have ignored and continue to violate the very international law they claim to champion, the law in whose name they speak and in whose name they go to war against so-called rogue states each time their interests so dictate (Derrida, 2005a, p. 96). In *Rogues* Derrida gives his opinion on the political and the military actions of the Western world, mainly in the region of the Middle East. In these comments he also includes some of the characteristics of true sovereigns. Derrida focuses on the fact that these states are creating the norms, judging on them and prosecuting in the same matter. It seems that when one is talking about the UNSC, there is a situation just like in the fable from the beginning of the chapter where the wolf had all the power over the lamb. Those states are sovereigns, and once again, the law is in the service of the sovereign. Furthermore, Derrida demonstrates that the figure of the sovereign could also be situated in the state. He shows that the form in which the sovereign exists is not a crucial factor in the definition of this term.

Additionally, Derrida (2009) insists on the importance of the notion of *ipse.* The sovereign, in the broadest sense of the term, is he who has the right and the strength to be and be recognized as himself, the same, properly the same as himself (Derrida, 2009, p. 66). Again he puts emphasis

on the power of the sovereign, as the universal characteristics which are connecting all the sovereigns. Also, Derrida highlights the importance of the "ipseity of its force". This is the characteristic that lets the sovereign create his own power. If one would define this idea, it would mean that the sovereign is the one who gives himself his own power. This also liberates the idea of sovereignty of being attached to some exact figure. And that will be just as much the case for all the "firsts," for the sovereign as a princely person, the monarch or the emperor or the dictator, as for the people in a democracy, or even for the citizen-subject in the exercise of his sovereign liberty (for example when he votes or places his secret ballot in the box, sovereignly) (Derrida, 2009, p. 67). Again, by mentioning *etat-voyou,* Derrida blurred the line between the r*ogue* and the *sovereign.* The Algerian-French philosopher shows that rogues and sovereigns are so close that they pervade each other, one becomes the other.

When thinking about this unity, it is interesting to analyze the symbol of the werewolf as a representation of the collision between the animal and the human. So the werewolf, the "true" werewolf is indeed the one who, like the beast or the sovereign, places himself or finds himself placed "outside the law", outlaw [Eng.] above or at a distance from the normal regime of law and right (Derrida, 2009, p. 64). The werewolf is maybe the best symbol of the dual nature Derrida is assigning to sovereign.

It is interesting to briefly look upon Agamben's view on this concept. In his book *Homo Sacer*, Agamben is also rethinking the notion of the *werewolf*, as a union of a human being and an animal. He is analyzing one of the lais of Marie de France called *Bisclavret*[86]. Here the figure of the werewolf is presented as a bridge. On the one hand, it connects the entities of the human and the animal, and nature and politics and the sovereign's power on the other hand. The idea for this way of thinking stems from the story. Agamben focuses on the important moment when the creature metamorphoses. The transformation into a werewolf corresponds perfectly to the state of exception, during which (necessarily limited) time the city is dissolved and men enter into a zone in which they are no longer distinct from beasts (Agamben, 1995, p. 53). Therefore, the werewolf also becomes the mark of exception. It seems that once again beasts and men are

[86] This is one of the twelve medieval poems written by Marie de France. This one recounts a tale about a man who has been cursed to turn into werewolf every night and become human at dawn.

unified. They are joined not only in the character of the werewolf, but also in the moment of the exception. This brings us back to the Schmitt's sovereign, one who exists in the exception.

When mentioning Schmitt's view of the sovereign, it is important to point out the significance of the exception. The exception is more interesting than the rule. The rule proves nothing; the exception proves everything. In the exception the power of real life breaks through the crust of a mechanism that has become torpid by repetition (Schmitt, 1985, p. 15). This way of deliberating has several implications. First of all, an exception is a way to reflect on the general. A concept, idea or object wouldn't be what they were if there were no exceptions to place certain borders around them. However, general rules are needed, particularly in the state system since it functions according to certain norms, whether they are of legal nature or of another sort. The state system needs to be stable and organized, otherwise juridical order lacks sense. This brings us back to the moment of the *situational law*, in the words of Schmitt, or the moment of sovereign decision.

Furthermore, Schmitt insists on the importance of the exception because "it is precisely the exception that makes relevant the subject of sovereignty, that is, the whole question of sovereignty (Schmitt, 1985, p. 6). The sovereign is the one who is supposed to protect the order, if it is jeopardized in any way, and to recover it back to the previous state. As stated previously, he is the one who decides, makes choices when the usual system is out of order, when the state is out of order, when there is a state of exception. Schmitt (1985) claims that the one who takes actions initially has to be able to proclaim the state of exception and then choose how to overcome the situation in question. Therefore, Schmitt (1985) highlights that there is a parallel between the instant of the state of exception, when sovereign is the one making decisions, and in the moment of exception in the legal sphere when there is need to make a decision, so the general rule is applied in a specific situation. Every concrete juristic decision contains a moment of indifference from the perspective of content, because the juristic deduction is not traceable in the last detail to its premises and because the circumstance that requires a decision remains an independently determining moment (Schmitt, 1985, p. 30).

It looks like the German jurist is seeking certain extreme situations in order to demonstrate the true essence of the notions, as it seems that only in these moments they are at their purest. On the other hand, according to Derrida, this is exactly the paradox of this notion. In this concept, the sovereign is at the same time inside and outside of the legal order. The thing is that the sovereign is the one to whom the juridical system is providing power, the force to decide over a state of exception, be it proclaiming its beginning or ending or making choices within it. However, that means that he suspends order itself. An interesting paradox emerges when considering exceptions. Schmitt (1985) proclaims that exceptions are negatively defining the law, because by putting borders around law, they surround it with a frame and define it in a certain way. Schmitt (1985) believes that the most proper characteristic of the exception is that when it excludes the thing which is excluded, that thing is not absolutely without relation to the rule.

Here again, in order to achieve better understanding of Schmitt's thought, we will refer to Agamben. On the contrary, what is excluded in the exception maintains itself in relation to the rule in the form of the rule's suspension (Agamben, 1995, p. 10). If one could go back to the case of the state of exception, the same path of reasoning could be applied. In other words, the state of exception is a manner in which sovereign wishes to establish a situation in which law can be applied again, and it is not a moment of chaos. This means that the paradox can also be formulated this way: "Law is outside itself," or: "I, the sovereign, who am outside the law, declare that there is nothing outside the law [che non c' e un fuori legge]" (Agamben, 1995, p. 9).

According to Agamben (1995), the sovereign's power lies in his ability to create space, the space of returning to the point where a legal framework can be valid. Therefore, he positions the sovereign between the outside and the inside. Agamben states that an exception "[w]hich does not limit itself to distinguishing what is inside from what is outside but instead traces a threshold (the state of exception) between the two, on the basis of which outside and inside, the normal situation and chaos, enter into those complex topological relations that make the validity of the juridical order possible (Agamben, 1995, p. 11). Therefore, there is a third way of looking upon the sovereign's relation to law, besides the views of Derrida and Schmitt. For Schmitt, sovereign power is always within constitutional order. Although he stands outside the normally valid legal system, he nevertheless belongs to it, for it is he who must decide whether the constitution needs

to be suspended in its entirety (Schmitt, 1985, p. 7). On the other hand, throughout his entire seminar *The Beast and the Sovereign* and *Rogues*, Derrida positions the sovereign outside the state.

This is a fine moment to reflect on the situation in Bosnia and Herzegovina. The identity of the sovereign in Bosnia and Herzegovina is quite an interesting question, because we cannot claim with certainty who or what is sovereign in this country. On the other hand, even if it could be acceptable that there are many sovereigns, there is still the issue of legitimacy. For example, if the institution of the High Representative can be looked upon as sovereign, would it be positioned above or under national laws? It is created from the outside through the Dayton Agreement and its legitimacy originates from this document. On the other hand, it wasn't determined where is the Dayton Agreement standing compared to the constitution of Bosnia and Herzegovina? Following this line of questioning, one can see that many doubts arise and many more could be created when we try to examine the relation of the sovereign and the law in praxis. Their relation is quite complex, and in order to understand it better, we have to try to comprehend its theoretical base.

The origin of the sovereign's power is closely linked with its relation towards law. Schmitt claims that if the sovereign decides on the exception, in the state of exception, he is the one acting in those cases outside the law, but is simultaneously a part of it. Therefore, the sovereign arises through this deed because he is the one [w]ho is competent to act when the legal system fails to act the question of competence (Schmitt, 1985, p. 11). Besides the obvious reference, in order for a sovereign to emerge, a legal framework must exist. It seems that formatted law is an additional precondition. When deliberating about the sovereign's origin, Schmitt uses the example of Article 48 of the Weimar Constitution[87]. In other words, he points out that there is need for the existence of a legal framework. On the other hand, Derrida's position is not quite

[87] This is a reference to Schmitt's reading of Article 48 of the Weimer Constitution: "If, in the German Reich, public security and order are considerably disturbed or endangered, the Reichsprasident may undertake necessary measures to restore public security and order, and if necessary may intervene with the aid of armed forces. For this purpose he may suspend, temporarily, in part or entirely, the basic rights as provided in Articles 114, 115, 117, 118, 123, 124, and 153".

clear. It seems as he doesn't necessarily exclude the possibility that a sovereign could emerge through law, but he surely doesn't consider this as the necessary condition.

Derrida puts emphasis on the idea that a sovereign is self-sufficient. He claims that one of the characteristics of the sovereign is ipseity[88]. Derrida's sovereign is defined by selfhood, the possibility of exercising power. This means that the sovereign has the ability of proclaiming his own power. The sovereign provides power to himself. By *ipseity* I thus wish to suggest a certain "I can," or at the very least the power that *gives itself* its own law, its force of law, its self-representation, the sovereign and reappropriating gathering of self in the simultaneity of an assemblage or assembly, being together, or "living together," as we say (Derrida, 2009, p. 11). Therefore, sovereign power can emerge from a legal basis. Moreover, it should. However, focus ought to be on the fact that the sovereign is the creator of law, not on the legality of his actions. The sovereign is the creator of its own situation, and therefore, maybe the question of legitimacy of his actions is more adequate than the issue of legality.

Furthermore, if one would apply this idea to a practical situation maybe that would produce answers in the search of Bosnia's sovereign. Derrida claims that the sovereign is the one who creates. Hence, he is the creator of law. Taking this idea as a reference, in the case of Bosnia and Herzegovina there are several potential sovereigns. First of all, the Bosnian Parliament serves this function, and even though it hasn't proved to be highly efficient, it still produces laws. There is also the institution of the High Representative with his jurisdiction over imposing legal matters. Furthermore, due to its specific position within the legal framework, the Constitutional Court of Bosnia has proved to be decisive in certain matters. Even though it is not producing laws, it certainly is making patterns through which these legal provisions are interoperable. Finally, there is also the European Court for Human Rights, whose position within the legal

[88] Even though Derrida gives this notion a wider meaning, it originates from Latin. "For the sake of an economy of language, let me simply announce in a word that, from now on, each time I say *ipse*, *metipse*, or *ipseity*, relying at once on their accepted meaning in Latin, their meaning within the philosophical code, and their etymology, I also wish to suggest the self, the one-self, being properly oneself, indeed being in person (even though the notion of "in person" risks introducing an ambiguity with regard to the semblable, the "oneself" not necessarily or originally having the status of a person, no more than that of an I, of an intentional consciousness or a supposedly free subject)." Derrida in *Rogues Two Essays on Reason* page 11.

system of Bosnia and Herzegovina is not quite clear yet. Nevertheless, the fact is that the ECHR provided its own interpretation of Bosnian laws, and additionally, it exerted great pressure in order to compel Bosnia and Herzegovina to amend its constitution. Hence, it is having a more active role within the Bosnian legal framework.

The sovereign within Schmitt's thought is outside the usual legal system, but he is nevertheless always a part of it. As it was pointed out various times throughout this chapter, in the case of Derrida's sovereign, he is above or sometimes below the law, but nonetheless outside of it. The sovereign belongs to the same group as criminals, werewolves, rogues etc. – outside of standard norms. In spite of these separate views on the position of the sovereign within law, that which unites Derrida's and Schmitt's positions is the view of the sovereign's decisive character. Exactly this characteristic seems to play an important role when both philosophers refer to the sovereign. Hence, as the sovereign is the one producing law, one should question the legitimacy of these legal provisions.

4.2 Legitimacy of Sovereign Power

In order to better understand the legitimacy of sovereign power, we shall devote more attention to the root of its force. Also, it is interesting to examine its close relation to law. As was presented previously, Derrida agrees with Schmitt that every application of the law is provisory in some way. It is a decision which originates from a certain sphere of rules, but it nevertheless has to be a decision. Consequently, the sovereign creates his own sovereignty, his own laws. This moment has been thoroughly reviewed during the analysis of the sovereign's force, creation and its relation to the legal framework. What kind of laws are these? What are they representing and what is their importance? It is significant to deliberate more profoundly on this issue, because laws reflect the sovereign's power in a certain way. Moreover, the way Derrida defines them in the future could bring us closer to defining the legitimacy of the sovereign.

Derrida was committed to the question of law and the legitimacy of law especially in his essay *Force of Law: The "Mystical Foundation of Authority"*. In this work he was deconstructing

Walter Benjamin's text *Critique of Violence.* To begin with, we should underline that for Derrida law is always power, an authorized force which is giving authority to itself. Following that path, the philosopher claims that law has the force and that "law is always an authorized force, a force that justifies itself or is justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable" (Derrida, 1992a, p. 5). It seems that Derrida states that law is the force in the same way as a sovereign is the force, because he creates the law – he is the law. However, the fact that it is "authorized" doesn't have to do anything with the law's ability to be just.

Moreover, the word *enforcement* of the law is significant for understanding the concept of law as Derrida sees it. The word "enforceability" reminds us that there is no such thing as law *(droit)* that doesn't imply *in itself, a priori, in the analytic structure of its concept,* the possibility of being "enforced, applied by force (Derrida, 1992a, p. 6). Hence, there are two possibilities: that of the law as a force that can be just or at least legitimate or on the other hand violence which is seen as unjust. Going further, Derrida analyzes the meaning of the German word *Gewalt,* which can be interpreted as illegitimate or legitimate power. Here Derrida (1992a) enters the sphere of analyzing the legality and legitimacy of law. In this chapter we highlighted that the sovereign is the one who decides and produces law. This raises the question of the legitimacy of this law. First of all, Derrida (1992a) is reflecting upon the fact that justice and law are not necessarily mutually dependent. In other words, law doesn't automatically produce justice. Consequently, the relation between force, which is necessarily connected with law and justice, is a complex one.

There is a paradox in the pair force-justice. Derrida (1992a) claims that on the one hand, force without justice is violence and on the other hand, justice without force cannot exist. He states that there are "[t]wo kinds of violence in law, in relation to law *(droit):* the founding violence, the one that institutes and positions law *(die rechtsetzende Gewalt,* "law making violence") and the violence that conserves, the one that maintains, confirms, insures the permanence and enforceability of law *(die rechtserhaltendet,* "law preserving violence")" (Derrida, 1992a, p. 31). Ergo, Derrida locates violence both in the creation and performance of law. Besides this partition, while implementing deeper analysis, Derrida (1992a) makes the distinction within the

foundation of violence by claiming there are two ways of understanding it – as both mythic and divine, the latter being the violence of bad law.

Also, justice is connected with the divine, whereas power is connected to the mythical position of force. Derrida positions his thoughts through reading of Benjamin's text. Derrida (1992a) points out how violence in its symbolic character is to be found in the legal, political and moral spheres. Benjamin looked upon violence not as a concept *per se*, but only through its application. Derrida wholly disagrees with this. Derrida (1992a) states that the defenders of the idea of natural right justify violence by putting emphasis on the results of the application of this notion and not the notion itself. On the other hand, if we would have applied this logic in the previous case when positive law was under consideration, focus would be placed on the means. It suggests that we judge means, that is to say, judge their conformity to a *droit* that is in the process of being instituted, to a new (not natural) *droit* that it evaluates in terms of means, and so by the critique of means (Derrida, 1992a, p. 32).

Furthermore, Benjamin concluded that the legal framework condemns violence not due to any norm, ethical or other. Legal framework condemns violence simply because it is posing danger to the system as a whole. Therefore, it receives monopoly on violence. On the other hand, violence is permitted in situations when its origin is law itself. In this case any other type of violence would be perceived as illegal or disallowed. Therein lays the paradox. Performative tautology or a priori synthesis, which structures any foundation of law upon which one performatively produces the conventions that guarantee the validity of the performative, thanks to which one gives oneself the means to decide between legal and illegal violence (Derrida, 1992a, p. 33). It seems that law is giving itself its legitimacy.

What is the relation between violence and law? Where is violence vis-à-vis law? The father of deconstruction approaches this question through the example of situations when violence is perceived as legal. Derrida (1992a) provides the example of the right to strike, a situation which Benjamin also considered. Workers, by stopping to do their job, indeed express a certain form of violence. Especially if one would look upon this situation in its ultimate form of general strike. In the case of total strike, it would be clearly visible that this form of expression of discontent

truly places itself in opposition to the legal framework. Derrida (1992a) states that if the situation of deadlock would continue, a revolution would emerge eventually. That which threatens law already belongs to it, to the right to law *(droit)*, to the law of the law *(droit)*, to the origin of law *(droit)* (Derrida, 1992a, p. 35). According to Derrida, if violence is within law, it contains the beginning of a revolution which will bring about a new system wherein we can locate the *foundation of violence*. Therefore, law or any kind of law contains violence from the moment of its creation. As a consequence of this trait of law, justice emerges as imposing to the opposing side. This is the case with the founding violence of a constitution which has to establish some general norms and always excludes the singular through them.

Furthermore, Derrida (1992a) states that this founding moment is hard to define, it seems as it is resisting the linear thinking of time. This moment always takes place and never takes place. It is the moment in which the foundation of law remains suspended in the void or over the abyss, suspended by a pure performative act that would not have to answer to or before anyone (Derrida, 1992a, p. 36). This brings us to the conclusion in which the point of encounter between Derrida and Schmitt could be analyzed once again. According to Derrida, it seems that the founding moment of law, besides including a point of violence, is also instance in which law is suspended in order for a new one to emerge. It appears to be fairly similar to the situation Schmitt was referring to when he deliberated about the state of exception.

In *Political Theology*, Schmitt points out the paradox that in order for a sovereign to emerge and proclaim the state of exception, the present legal framework has to be suspended. Therefore, even though the sovereign is inside the state when it comes to legal the situation is not that clear because it is outside, but at the same time within existing law. Schmitt delved into this issue from his very first works. We examined the *State of Exception* by Agamben in order to gain a better understanding. Among others, he also reflected upon Schmitt's views on dictatorship. That is, commissarial dictatorship represents a state of law in which law is not applied, but remains in force. Instead, sovereign dictatorship (in which the old constitution no longer exists and the new one is present in the "minimal" form of constituent power) represents a state of the law in which the law is applied, but is not formally in force (Agamben, 2005, p. 36). Therefore, even when it

is suspended, law nevertheless still exists and, as Derrida points out, it is just put on hold by a mere act, a decision.

Looking back on Derrida's thoughts on founding violence, we cannot overlook his deliberation upon this topic in the deconstructive reading of the *United States Declaration of Independence*. One of the most important premises of this article is rethinking the founding moment. Derrida also finds this sentiment in the sovereign – in *ipseity*, to be more precise. Furthermore, the founding of law was one of the elements through which the Algerian-French philosopher built his theory of legal violence in *Force of Law*. The Declaration of Independence owns its global significance to the fact that it presents one of the first successful proclamations of independence. Of course, this is one of the most valuable documents in the history of the United States of America, since it was the first legal provision officially using this name. In other words, the United States of America were established upon the *validation* of this declaration. The American nation was born.

Precisely this notion, *validation,* is what caught Derrida's attention. He starts the analysis of the document by focusing on the power of the signature. The signature maintains a link with the instituting act, as an act of language and an act of writing, a link that has absolutely nothing of the empirical accident about it (Derrida, 2002, p. 47). This signature which constitutes institutions, in this case a state, differs from other types of signatures. This signature has the distinctive feature of being of high importance to the document. Moreover, scientific works also contain signatures. In this case, the signatory's name is usually not very important or is less important than the paper itself. The author's name usually doesn't have that much importance for the validity of the document. It gets its validation from the facts presented in the document. Additionally, in order to be more impartial, scientific works should be able to be separated from its creators. Context should prevail over the author. In the case of the founding documents, the signature not only exists, but it also plays an important role. There is need for this kind of confirmation. Therefore, the signer in this kind of document has more importance because he provides validity, legality and legitimacy with his signature. Derrida also focuses on the power of the signature.

Who is the signer of the United States Declaration of Independence? The obvious answer would be Thomas Jefferson, one of the founding fathers, whose name is at the end of the document. However, if we would look more deeply on the role Jefferson played in the process of the creation and validation of the document, perhaps the answer wouldn't be so clear. Derrida (2002) precisely analyzes Jefferson's place in all this. He points out that Jefferson was a draftsman. That means that this politician wasn't writing the document, he was drawing it up. This is not a negligible task, but it also raises the following question: "Should Jefferson be seen as a true signer of the Declaration?" Moreover, after having thus drawn up a project or draft, a sketch, Jefferson had to submit it to those whom, for a time, he represented and who are themselves representatives, namely the "representatives of the United States in General Congress assembled" (Derrida, 2002, p. 48). These representatives have the power to deliberate upon or even change the draft. In the end, the fact is that they are the ones voting on the Declaration. Therefore, it seems that they are the ones responsible, since they have the right to sign the document. On the other hand, when representatives approve, they are doing so in the name of others. They are not signing for themselves. They are signing in the name of people they speak for. Therefore, one cannot be sure that representatives are signatories.

Maybe the people, the free citizens of United States who have chosen their representatives are the final instance in Derrida's quest? However, these citizens don't exist, at least not yet. He puts focus on the way people [d]eclare themselves free and independent by the relay of their representatives and of their representatives of representatives. One cannot decide and this is the interesting thing, the force and "coup de force" of such a declarative act-whether independence is stated or produced by this utterance (Derrida, 2002, p. 49).

Here Derrida comes to an interesting point which is one of the core interests of this work. As is the case with other founding documents, there is the creation of a certain structure which didn't exist before. The text is giving power to the newfound structure. In the declaration it is stated that "[t]he Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free…". This document created the USA.

However, the paradox which arises is that it seems that the people of the colonies gave freedom to themselves. Furthermore, how could representatives sign in the name of citizens if they didn't exist as citizens of USA? In order to better understand this occurrence, it appears that the linear concept of time should be challenged. Also, in this situation, an object is creating a subject, because only through validation, through signature, citizens become citizens and representatives assume their role. Here we return to the point that the document gives itself legitimacy. As in the case of the sovereign, a certain document has to exist for this to happen.

The "coup de force" makes right, founds right or law, gives right, *brings the law to the light of day, gives both birth and day to the law [donne le jour á la loi]* (Derrida, 2002, p. 50). Hence, law was produced through an act. However, an act cannot just exist *per se.* There has to be someone behind it, a base of sorts. In the case of the Declaration, this is somebody or something signing the act. Sometimes one is unable to provide an unambiguous answer. This is the case of the situation Derrida deals with. Jefferson drafted the document and cannot be counted as truly responsible for it. It is impossible to grant Jefferson the role of the signer of the Declaration. Representatives have the power to edit, revise and sign in the name of the people, but they are not the ones giving the document its necessary legitimacy. In the end, there are the people, the citizens of the States, yet they simply don't exist as a legal entity because they emerge from the document itself – the Declaration gives them existence. What or who is the highest instance?

The Declaration is also calling upon God as the highest judge. Maybe that could imply that this notion is indeed the highest power guaranteeing for this document. However, Derrida (2002) doesn't see it that way – he claims that mentioning God as a powerful symbol just highlights a proper notion which should be used in these situations. Towards the end of the text, Derrida once again examines the role of Jefferson as a means to explain the absurdity of the situation in a simplified way. He represents the "representatives" who are the representatives of the people in whose name they speak: the people themselves authorizing themselves and authorizing their representatives (in addition to the rectitude of their intentions) in the name of the laws of nature that are inscribed in the name of God, judge and creator (Derrida, 2002, p. 52).

Derrida implies the provisions of the signature. Even though the signer can have a great role, the author of the signature in this case could be seen as a mere object, a symbol of many other symbols. Additionally, a person or the people who act as signers in this case could be seen as sovereigns. They are the true sovereigns that have the power to produce and provide legitimacy and legality to themselves. It seems that all criteria are met to categorize the signer as the sovereign. However, the issue of the identity of the signer persists. Is it Jefferson, the people, the Founding Fathers or God himself? It seems that even if an answer could be produced, even with a firm base of arguments which would support the claim of one of the "candidates" being true sovereigns, there would always be the opposing side. Therefore, giving the answer to the question of the sovereign's true identity is not always possible or even necessary, especially within Derrida's ideas. In his opinion, more important than identifying the sovereign would be to rethink this notion, to analyze the situation in question and all its aspects as much as possible, i.e. to deconstruct it.

4.3 Indivisibility of Sovereignty

Before directly approaching the issue of the indivisibility of sovereignty, we should briefly examine the path Derrida took before addressing this question. First of all, in the third chapter of *The Beast and the Sovereign*, Derrida deals with sovereignty from a different perspective than he used to in his previous works. He contemplates the origin of the traditional view on a sovereign's power. He starts by taking under consideration the linguistic side. The father of deconstruction points out the machismo within the way the language is constructed. Derrida (2009) gives examples how in French and English different characteristics are attached to the male and female gender. There is *the beast*, a female which should be tamed, housed and put under a kind of rational control. On the other hand, there is the *sovereign*, king, leader. Whether he is the head of state or only of a household, he governs nonetheless. The male is the one in power.

The sovereign, in the broadest sense of the term, is he who has the right and the strength to be and be recognized *as himself, the same, properly the same as himself* (Derrida, 2009, p. 66). Therefore, the self-positioning of the sovereign is once again understood as its central characteristic, i.e. his ability to position everything and everybody, including himself. Derrida (2009) perceives a seemingly controversial connection between the idea of the sovereign's ability of positioning and dictatorship. However, one shouldn't be fooled by this. He uses dictatorship as a metaphor of the sovereign's power, his ability to dictate and make commandments. Derrida (2009) claims that from Roman to modern times, a sovereign could be located on a broad spectrum, from magistrates and state leaders all up to modern dictators, which could befound in the Soviet Union or the Third Reich. All of them are perceived as ultimate powers, the highest ones which cannot be questioned. The sovereign unifies all the powers of a certain group in one point, in one institution. Maybe the best way to describe this sentiment would be to examine the quote attributed to the famous *Le Roi Soleil*, Louis XIV king of France who allegedly said: "*L'État, c'est moi!*" Exactly this concentration of power in the sovereign is one of the characteristics that brought to appointing him with the notion of indivisibility.

The opinions of Schmitt and Derrida regarding the relation of law and the sovereign overlap in certain points. Derrida follows the ideas of the German jurist, and through them he elaborates on his own thinking. For example, in chapter six of *The Concept of Political*, Schmitt discusses the notion of the sovereign through rethinking the importance of the idea of the enemy. It is interesting to note how these ideas influenced Derrida's way of thinking. A long ago, before Derrida, Schmitt pointed out the ridicule of actions of all those who called upon humanity when they aimed their actions against the enemy. Schmitt (2007) states that since our foes are also humans, the claim that we are harming our fellows in name of human rights is a paradox in itself.

Schmitt (2007) also demonstrates a more practical aspect of his thoughts when he refers to the ways the states use these principles. When a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent (Schmitt, 2007, p. 54). He lays emphasis on how the idea of humanity is being used as a tool. The German jurist detects how humanity is used to manipulate and give legitimacy to one's actions. Schmitt (2007) claims that universal

humanity and the concept of enemy exclude one another. There is no possibility for them to exist simultaneously. Universal humanity could only exist on the condition that there is no differentiation in the world and no divisions in any sense. It seems that Schmitt (2007) suggests that universal humanity is practically impossible to achieve. It can only be an idea, nothing more than a symbolical notion. Otherwise, if this concept would be realized, it would put an end to the political. Universal humanity would bring about complete *depoliticization*.

Throughout *The Beast and the Sovereign,* the father of deconstruction takes into consideration Schmitt's views on sovereignty, or more precisely, its position and role within the nation-state. Derrida (2009) continues to question the human in the sovereignty. Sovereignty is absolutely the construction of people. Therefore, it doesn't exist outside of that which is proper to man. Derrida (2009) claims that consequently, sovereignty is the integral characteristic of men. Furthermore, calling upon universal humanity is an undermining of the state. Whether there is a fight for rights, human rights as they are called nowadays, or one is evoking them as he prepares for a war operation, the state is injured when there is mention of human rights. This subversion happens because these actions are calling upon the human, the notion of humanity outside of any social constructions, state included. These subjects [m]ight well be invoking another sovereignty, the sovereignty of man himself of the very being of man himself (*ipse, ipsissimus*) above and beyond and before state or nation-state sovereignty (Derrida, 2009, p. 71). This gives rise to doubt. Is there sovereignty outside the state? Also, if there is sovereignty outside the state, where exactly is it positioned?

Once again, there is Schmitt's position. Universality at any price would necessarily have to mean total depoliticization and with it, particularly, the nonexistence of states (Schmitt, 2007, p. 55). Furthermore, Schmitt claims that the way the League of Nations is calling upon the universal is absurd. The existence of this organization is presupposing states. After all, the countries are the entities which were making alliances in the first place in order to create the League of Nations. However, there is another paradox. The organization resorted to universalism, without any borders and division. The League of Nations called upon universality, especially when it was seeking legitimacy for its actions. On the other hand, calling upon the universal would mean the organization is negating its own base. The fact is that the foundation of an organization's structure is built upon the state system which prepossesses division lines, borders etc. The

following point of criticism would be that Schmitt (2007) perceives the League of Nation as unable to prevent wars, but also doing quite the opposite, by giving legitimacy to certain conflicts. In order to achieve the universal, it would have to overcome the idea of *just war*. The League of Nations as a concrete existing universal human organization would, on the contrary, have to accomplish the difficult task of, first, effectively taking away the *jus belli* from all the still existing human groupings, and, second, simultaneously not assuming the *jus belli* itself (Schmitt, 2007, p. 57). According to Schmitt, even if this would somehow be possible, the existence of a world state would cancel the political sphere. Due to the cancelling of differences, there would be hard to find a political entity in its true form, and therefore, one cannot talk about concept of the state *per se*. In other words, Schmitt (2007) states that depoliticization would cancel the state or any other form of societal political organization. Schmitt claims that sovereignty outside the state is highly unlikely.

Even though Derrida's opinion about international institutions is quite similar to Schmitt's view, it takes a different turn when it comes to the idea of sovereignty. As Schmitt was criticizing the *League of Nations*, Derrida looks upon its modern day equivalent – the *United Nations.* Derrida claims that the permanent members of the *Security Council (SC)* are "the most roguish." One of the characteristics these states share with the sovereign is that they are also outside the law. The permanent members of the SC create the rules under which all states have to conduct their actions. They draft laws for themselves and the others. This is the exact point where Derrida sees eye to eye with Schmitt. Derrida claims that these powerful countries are led only by their own interest. The only permanent members of the council are thus those states that were and remain (in the precarious, critical, and ever-changing situation we are examining) great world powers in possession of nuclear weapons. This is a diktat or dictatorship that no universal law can in principle justify (Derrida, 2005a, p. 99).

Additionally, he points out the importance of the veto mechanism. Derrida (2009) reminds us of Articles 41 and 42[89] of the Charter of the UN. These provisions are the ones which regulate the

89 **Article 41** The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such

notion of punishing countries, which the Permanent Members of the Security Council perceive as acting against established norms. It is important to highlight that these Articles prescribe peaceful remedies for dealing with "problematic" states. However, in the UN Charter there is a departure from this general rule. Article 51[90] legitimizes the use of armed force. In this instance, Derrida (2009) takes his stand upon Schmitt's. He agrees with the position that when there is exception there is a sovereign. Then comes the exception, as if to confirm that the exception is always what determines or decides sovereignty or, inversely, to paraphrase or parody Schmitt, that the sovereign is the one who determines the exception and decides with regard to the exception (Derrida, 2005a, p. 99).

Derrida explains his position further. It seems that *states* are progressively starting to behave less *like sovereigns* and are instead *becoming sovereigns*. He continues by pointing out the power of the Permanent Members of the SC. Derrida (2005a) states that their nuclear power is giving them the upper hand. The concept of "Reason of the strongest…" reappears again. Why is Derrida returning to this notion? The UN is built on premises favoring those with the most power. The organization is constructed in a way that the strongest can seize legitimacy for their actions from the institutions they constructed. Sometimes it seems that the permanent members of the Security Council created the United Nations not only by themselves, but also for themselves.

---

measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42 Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

[90] **Article 51** Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Derrida (2005a) indicates paradoxes arising in the pair democracy-sovereignty. Within the UN, both of these concepts are constructive parts of this international institution. The democratic element in the United Nations is visible within the majority rule and the voting system within the UN General Assembly. Sovereignty becomes apparent through the independence of every nation-state member. However, sometimes reality is contradicting theory. Like in Orwell's *Animal Farm* where: "All animals are equal, but some animals are more equal than others", it seems that in the United Nations all countries are sovereign, but some are more sovereign than others. Besides the problems within the UN, this statement also exemplifies one of the paradoxes of the relation between sovereignty and democracy in general. For democracy to be effective, for it to give rise to a system of law that can carry the day, which is to say, for it to give rise to an effective power, the *cracy* of the *demos* of the world *demos* in this case-is required. What is required is thus sovereignty, a force that is stronger than all the other forces in the world (Derrida, 2005a, p. 100). This creates inconsistency and autoimmunity within the system itself. The problem is that it is impossible to create an organization, which simultaneously has strong sovereignty and is based on truly democratic principles.

Furthermore, Derrida is analyzing and rethinking the "classical" position regarding the temporality of sovereignty. It appears that in widespread views, sovereignty exists only in one moment and in one instance. Derrida (2005a) reviles the double problem of purity, indivisibility of sovereignty. This indivisibility excludes it in principle from being shared, from time and from language (Derrida, 2005a, p. 101). It is interesting to distance ourselves from his view on this topic and re-examine it.

Is sovereignty indivisible in time? Derrida deliberates about this during the Eleventh Session of *The Beast and the Sovereign* seminar. The sentence which represents the sentiment Derrida was trying to relate in the best manner is: *"The King is dead, long live the king!"* Even though at first sight this phrase seems quite simple, it has deeper meaning. It represents the theory of the "two bodies of the king". Derrida (2005a) looks upon the works of Ernst Kantorowicz and Marc Bloch. Both of these philosophers elaborated on the king's two forms, the mortal body and the eternal one. These two persons and these two bodies are united during life but separated after death, as are the "dignity" of the king during his lifetime and the "sovereignty" or the "majesty" of the king that survives him and is inherited from one king to another (Derrida, 2009, p. 286).

The king draws legitimacy of his power from history. He rises to power with legitimacy already included. On the other hand, sovereignty expresses itself in the present moment. Furthermore, one king goes away and disappears and the other just comes in his place. This means that the former king was just a symbol of eternal, continual sovereignty. However, this is not all there is to it.

We should examine more carefully the exact moment of transfer from one party to another. The act of giving power and transferring sovereignty is fairly complex. It seems that there is never true difference, true transfer because when one person withdraws from his position at a sovereign institution, another will come in his place. Power goes from one place to another. However, sovereignty shall stay, perhaps not in the same form, but shall continue with the same characteristics. Regarding the French Revolution, Derrida (2009) claims that the event of killing of Louis XVI was just a mere act of transferring power from one sovereign to another, from the king to the people. As a metaphor of his claim, he takes the case of the zoo that was created in Versailles to entertain the king and other aristocrats. During the revolution, it was destroyed as a way of fighting sovereign repression, but some time later, it was reopened under the ruling of the citizens and not the king. The point is that the zoo continued its life, maybe in a different physical form, but with the same concept. Even though the new sovereigns claimed that it was no longer a symbol of luxury and had a different, educational purpose, the point is that the zoo continued to exist. As Derrida (2009) notes, this way of captivating animals and keeping them restrained spread out across borders to other countries. It appears that this metaphor served for underlining how not only zoos, but also revolution, spread from 19th century France all around Europe. Maybe it was changing its shape, but as sovereignty it still had the same internal structure. As a consequence of seeing this pattern of continuity, Derrida (2009) approves the existence of a third body, one which Louis Marvin called semiotic. For my part, I would suggest that this sacred or sacramental body, sworn in and legitimated by God himself, by divine sovereignty itself, is indeed the place of exchange, the pact or alliance between the politico-juridical sovereignty of terrestrial all-powerfulness and the celestial sovereignty of the all-powerful God (Derrida, 2009, p. 295).

The sovereign's power is divided. There are points of discontinuity, moments in which power is transferred from one to another. Does this transformation of sovereignty imply its separation

from the temporal? According to Derrida (2009), sovereignty is out of history in a certain way. It is the contract contracted with a history that retracts in the instantaneous event of the deciding exception, an event that is without any temporal or historical thickness (Derrida, 2005a, p. 101).

Derrida claims that this relation between sovereignty and language is quite unstable, due to one of the main characteristics of language – its "shareability". When one speaks to another, he is dividing. Subjects are exchanging and sharing with each other. In one corner, there is the sovereign, the strongest and indivisible, and in the other, language, whose existence is impossible without division. Within language, if one side doesn't come in some kind of concordance with the other, its main purpose of creating communication between two sides would possibly be lost. Basically, sovereignty stands against universality. Since it is unable to overcome the universal, sovereignty is in risk of losing its sense. To confer sense or meaning on sovereignty, to justify it, to find a reason for it, is already to compromise its deciding exceptionality, to subject it to rules, to a code of law, to some general law, to concepts. It is thus to divide it, to subject it to partitioning, to participation, to being shared (Derrida, 2005a, p. 101). In this passage, Derrida implies that sovereignty cannot have meaning if it is understood as indissoluble. In other words, every time somebody or something questions sovereignty, they are transferring this concept to the sphere of communication. They are dividing and sharing sovereignty, and therefore it is losing its undivided, pure form.

According to Derrida (2005a), that shape of sovereignty as wholesome and indivisible simply doesn't exist. This view is created in the same manner as his concept of *Democracy to come* in a way that it has same mobility. Derrida states that sovereignty is in constant movement. Sovereignty is cancelling, reaffirming, and questioning itself. It exists and doesn't exist at the same time. Also, it seems that sovereignty stands against and besides democracy. Derrida (2005a) insists that sovereignty overgrows the national state in order to reach universal democracy. However, at the same time, since in that case it would have to be "super sovereignty", the basic concept of sovereignty is destroyed. Derrida (2005a) gives examples of the permanent members of the Security Council as the dominant states on a global level, as symbols of sovereignty outside of nation-states. Even in this case sovereignty has to be shared. More precisely, since it never succeeds in doing this except in a critical, precarious, and unstable fashion, sovereignty can only *tend*, for a limited time, to reign without sharing. It can only tend

toward imperial hegemony (Derrida, 2005a, p. 102). Derrida points out the historical fact that there was shared hegemony after WWII between USA and Soviet Union, which was succeeded by US leading alone after the Cold War. After this period, the expression "rogue states" emerged, as a way to legitimize US hegemonic tendencies.

Derrida (2005a) noticed two interesting moments. The first one is that when there are only outlaw states, there aren't any more states which are outside of law. In other words, he claims that states which deem other countries as rogues are by that act alone becoming rogues themselves. The second observation concerns the tragic moment of 9/11. This event was a point in which it was possible to perceive that threats don't arise from states any more. This overwhelming and all-too-obvious fact: after the Cold War, the absolute threat no longer took the state form. If such a threat had been held in check by two state superpowers in a balance of terror during the Cold War, the spread of nuclear capabilities outside the United States and its allies could no longer be controlled by any state (Derrida, 2005a, p. 104). By commenting these political events, Derrida wants to highlight the fact that nowadays rogue states are no more rogue states, because threats originate from different, non-country entities. There are new forces emerging on the global sphere. One is to believe that he refers to terrorists and different ideological or religious groups which are organized in such a way that they are not limited by state borders. It seems that Derrida (2005a) underlines that the dispersion of power and sovereignty, as well as the appearance of new out of state entities, has marked the last decades of global history.

Even though this work is not able to devote more room to the development of non-state entities, it is interesting to note that many countries had quite a strong response to the terrorist attack of 9/11. This is the moment in which the power of the non-state entities became visible. For example, there is the famous *Patriot Act* in USA which is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001". Similar documents can be found in other countries as well. It seems that all these documents are based on the idea that in order to deal with potential threats, countries need new legal tools which will help them legitimize their actions. However, it seems that, while these sovereigns are arming themselves with more power against the outside enemy, they are being more and more dangerous to their own citizens. They create provisions within new documents which legalize the

cancelation of certain basic rights. Where is the true threat though? Is there more danger for a citizen within or outside his own state?

When one analyzes the cases of people against Bosnia and Herzegovina under Derrida's view of the sovereign, a certain question arises. The Dayton Agreement is the base of the whole legal system of the country. Even though it contains various political premises, the judicial ones are those of our greater interest. Different annexes of this contract are signed by representatives of different countries, international groups and also ethnic groups, as was the case of delegates of Serbs from Republika Srpska, for example. Moreover, besides countries directly involved in the conflict, various outside states were guarantors and signers of certain parts of this quite complex agreement. Furthermore, with the goal of preserving peace, different provisions of the Dayton Agreement presuppose the existence of mechanisms of control which includes a wide involvement of the international community. These are the facts which open the first group of questions regarding sovereignty in Bosnia. Who is the real signer of the documents? Who has the force to make laws? It is quite confusing, because sometimes the production of law does come from the Parliament of Bosnia and Herzegovina, but other times it is vested in the High Representative, who represents the international community and not the people of Bosnia and Herzegovina. What about the highest power? Who is "above the law" in this country? Who has the final word? Again, it seems quite hard to locate that subject. Is one of the national or international courts the "highest power"? Maybe it is one of the institutions of executive power? Furthermore, the cases which were presented are examples of harsh breaking with the basic institutes of democracy. Is Bosnia and Herzegovina a democracy at all?

What about representation? It is under strict control. Representation is organized in that way that the will of citizens is being directed toward thinking in ethnicities. Furthermore, there are moments when representatives of the international community act according to their own rules. For example, this was the case when the legally elected president of Republika Srpska, Mr. Poplasen was removed from power by the High Representative. Maybe even more extraordinary than the fact that a democratically elected person was ousted from his position is the fact that this decision came from an institution which was created outside the country. Perhaps one should seek the true sovereign of Bosnia and Herzegovina in this direction. Derrida mentions the idea of above state sovereignty as well? Maybe his ideas came to life.

This work will not try to locate the "true" sovereign in Bosnia. Rather, it will focus on the problems this country is facing. Some of these issues are a lack of sovereignty of the people, and democratic principles in Bosnian society, as well as the immobility of its constitutional norms. The Bosnian constitution was made by others. The representatives of citizens are conducting their duties within narrow borders of possibilities. These are the same borders that the international community imposed on Bosnian people to protect them from themselves. Finally, maybe the most serious issue regarding the political and the legal reality in Bosnia is the lack of views which question the country's present legal framework. Deconstruction is the only way any space for change could be accomplished.

What is the path which could point out problems, and more importantly, also create some potential areas where solutions could be found? It is certainly toward further rediscovery of Derrida's thought, especially his ideas of différance, the relation of democracy and sovereignty and democracy to come.

Chapter III – Democracy and *Democracy to Come*

5. Autoimmunity within the Notion of Democracy

5.1 Introduction

The previous chapter was dedicated to Derrida's thoughts regarding the concept of sovereign and ideas around it. Understanding these concepts help us gain a more thorough comprehension of his views about democracy. In this chapter, we will devote more attention to *Rogues: Two Essays on Reason,* which was mentioned previously in the context of the idea of "bandit states" and *The Politics of Friendship*, one of Derrida's final works.

The title of the first chapter of *Rogues* features a play on words. By naming it "free wheel", Derrida is connecting this part of the book with the expression "free will". The link between these two syntagms is not just in their visual and auditory appearance. It seems that Derrida also wants to point out the two characteristics of democracy – its connection to human rights and its moving nature.

The fact that people use the adjective "democratic" and the phrase "respect of human rights" as synonyms demonstrates how similar these concepts are. Secondly, the reference to movement implies the existence of a dialog and deliberation within democracy. From the discussions in the *agora* to modern parliamentarism, these communicational aspects were perceived as fairly important elements of the democratic political system. However, Derrida (2005a) claims that even though this discussion exists, which is a positive side of democracy it can also be counterproductive, because it could lead to endless discussions. Therefore, because of this potential issue there has to be some kind of mechanism to put an end to discussions? Derrida (2005a) points out the need for the presence of the sovereign figure in this system. This figure

will be able to make the final call, in situations when an issue arises and deliberation prolongs endlessly.

Furthermore, Derrida (2005a) claims that there is circular movement in democracy and it is directed towards the self, in the direction of self-sufficiency – *ipse*. Once again, this notion connects sovereignty with democracy, by pointing out the sovereign's ability to create himself and produce his own legitimacy. Now, democracy would be precisely this, a force *(kratos)* in the form of a sovereign authority (sovereign, that is, *kurios* or *kuros,* having the power to decide, to be decisive, to prevail, to have reason over or win out over *[avoir raison de]* and to give the force of law, *kuroa),* and thus the power and ipseity of the people *(demos)* (Derrida, 2005a, p. 12). When we examine this quote, we can note that Derrida states that through the *ipse* the sovereign is creating legitimacy for his own power.

Again, regarding the idea of circular motion, of the wheel (*free wheel* as it was stated), Derrida is deliberating upon the turn – a return of democracy which is closing the full circle of meaning. Derrida (2005a) reflected on views Tocqueville presented in his *Democracy in America*. The Algerian-French philosopher is particularly highlighting his notion about the creation of democracy. In his book, Tocqueville reflects how, in a certain way, democracy comes from itself and for itself, in other words, from the people and for the people. By using these reflections, Tocqueville emphasizes circularity in the democratic process. Derrida is looking up to him, but also adding his own reflection. He claims that since the old Greek model up to the modern theories of 20th century, democracy was marked by the presence of sovereignty. In both cases, it seems that Derrida is simply confirming the presence of the sovereign notion. He claims there is a "centrism" of democracy, one which was established long time ago and still exists. *Ipsocentric* could even be replaced by *ipsocratic*, were that not a pleonasm, for the idea of force *(kratos),* of power, and of mastery, is analytically included in the concept of ipseity (Derrida, 2005a, p. 17).

Regardless of whether he calls it *ipso* or *phallocentric*, as a way of pointing out the machismo of the symbol, Derrida notices certain logocentrisms surrounding the idea of democracy. It seems that logocentrisms are not only circling around and influencing the general idea of democracy, but that they represent an integral part of this notion. In order to be able to deliberate about democracy, we should study its inner and external structure, origin and the present ideas surrounding it.

5.2 Freedom – Equality

It has always been very difficult, and for essential reasons, to distinguish rigorously between the goods and the evils of democracy (and that is why I will later speak of autoimmunity). It has always been *hard* to distinguish, with regard to free will, between the good of democratic freedom or liberty and the evil of democratic license (Derrida, 2005a, p. 21). The pair freedom-equality is one of the first examples of contradictions within democracy we will analyze in more depth in this work.

First of all, we should examine the notion Derrida refers to as *autoimmunity*, especially taking into account that it will have an important role in this chapter. There are several positions which shed more light on this concept. *Autoimmunity* refers to cases when the essence of a concept or its constructive part is simultaneously building and destroying it. Furthermore, Derrida (2005a) claims that autoimmunity [c]onsists not only in harming or ruining oneself, indeed in destroying one's own protections, and in doing so oneself, committing suicide or threatening to do so, but, more seriously still, and through this, in threatening the I *[mol]* or the self *[soi]*, the *ego* or the *autos*, ipseity itself[91]. In other words, this notion destroys the defense of the concept. Through that act, the autoimmune process leaves the concept vulnerable, making it prone to destruction, while also being an active factor contributing to the process of destruction.

Another understanding of autoimmunity is visible in the paradox when there is an idea of applying a certain measure in order to prevent something else from happening, and that measure actually provokes consequences. For example, in the previous chapter, we mentioned idea of *jus belli*, a situation when UN members approved an armed conflict as a way to prevent or end a war.

In addition, one could think of autoimmunity as a form of self-negation. As we know, an autoimmunitary process is that strange behavior where a living being, in quasi-suicidal fashion,

[91] Rogues Two Essays on Reason, 2005, page 11.

"itself" works to destroy its own protection, to immunize itself against its "own" immunity (Derrida, 2003, p. 94). Secondly, in this part of the book[92], Derrida refers and studies Plato's thought as a manner of proving that this idea hadn't changed that much over time. This phenomenon of blindly following and implementing given norms and notions, without any assessment, is one of the problems which Derrida criticizes in his work fairly often. We will discuss these positions in more detail later on in the chapter. For now, it is important to observe Derrida's general disapproval of the lack of a critical approach toward many ideas and concepts which are taken as axioms.

For Derrida, it seems that there are two views on democracy. One would be that of freedom or in other words – liberties and rights, and the other, consequently, that which is limiting citizens in their actions. Derrida (2005a) locates these contradictions within democracy. There are two pairs, the first *demos* and *kratos,* and the second freedom and limitation. Once more we approach the notion of the sovereign as it is simultaneously the counterpart and the complementing piece of democracy.

There is autoimmunity within democracy. From one point of view, freedom can be understood as the ability to do as one pleases, and in this situation, one is his own sovereign self. On the other hand, if this would be applied inside the "bigger picture" or, more precisely, democracy, it would certainly create a stir. Clearly, it would be impossible for democracy to exist if every person would do as they please. Furthermore, if we would examine the issue of the divisibility of sovereignty, a literal application of sovereignty would eventually jeopardize the freedom of others. Therefore, even in a hypothetical situation in which anyone could do whatever they want, rules would have to emerge in the end. Of course, this situation is highly conspicuous in any political society, but nevertheless it represents a paradox. Consequently, this puts focus back on one of the issues within any democracy – the complex relation between freedom and limitation.

Firstly, there is the notion of freedom in democracy as *kratos,* from antics to modern times. It seems that this established itself as the leading opinion, i.e. that there is strong, powerful, forceful freedom within democracy which is creating its own sovereign space within the notion. Indeed, this point is firmly integrated in the views of democracy. Consequently, it seems almost

[92] Rogues Two Essays on Reason, 2005, pages 6–19.

impossible to imagine one without the other. On the other hand, Derrida perceives this as a problem because this manner of reasoning is static. It prevents the movement of ideas and it blocks any further development of the concept. Hence, it seems there is need not only to critically approach the understanding of freedom within contemporary democracy, but we should also try to re-imagine it completely in order to achieve the idea of freedom that is not similar to any other. This is unthinkable, up to the moment before it is created. Even if one would accept democracy with freedom as its integral part and their present relation – unchanged and uncritically adopted from the past, it still remains a mystery whether this relation is going to transform in the future. Also, the question of the scope of freedom could arise. Is it truly unconditional, without any established borders? In this moment it is interesting to turn back and review Derrida's views of not sharing sovereignty.

If sovereignty is a part of freedom or in other words, if sovereignty is freedom, then it could be concluded that it is possible to apply the same rules on both of them. It seems that in that case we could question freedom's indivisibility the same way sovereignty's was deliberated on earlier. There are two paths for going through this. The first one would be through language. In the previous chapter, we deliberated on the relation of sovereignty and language in order to present Derrida's criticism of the idea of indivisibility of sovereignty. Therefore, if we would equalize freedom and democracy, as they are equalized in praxis, the same way of reasoning could be applied in this situation too. It seems that if freedom as a notion is questioned and communicated, it wouldn't be able to stay unlimited because it would be shared through the act of communication. The existence of complete and undivided freedom out of the sphere of ideas is impossible. We could confirm this when thinking about the characteristics of freedom.

It seems there is one feature which appears to be universal for all types of freedoms. That would be its characteristic of being dependent. This concept of dependency refers to the idea that freedom is a symbol which always needs an object. This becomes obvious when examining the different meanings of this notion. The first one could be thinking about freedom as a way of not being restricted by somebody from doing something. An example of this interpretation would be that of political autonomy. Also, there is the interpretation of freedom connected with movement, where freedom implies being unconstrained in terms of space. In this situation, free men are those who could move in any direction as much as they please without being hindered.

Furthermore, in order to demonstrate the dependent character of freedom, one could point out the construction "to be free". This phrase could be useful and imply several conclusions. For instance, "to be free" means being free of charge in the context of material goods or monetary value. Moreover, "to be free" may be understood as having no obligation toward other persons or things, or in other words, doing as one pleases. En sum, all of these interpretations of "being free" and "freedom" are marked by their relation toward others. They are not to be defined without their link, be it a coalition with freedom, defining better freedom, or an opposition. Here we arrive at the same conclusion as Derrida. There is no ultimate, undivided and pure freedom in the politico-legal habitat.

Could democracy call upon freedom without any restrictions of that idea? Could the fact that freedom is usually perceived as an indivisible notion (even though Derridian thinking could prove differently) also influence one's view on democracy?

Derrida (2005a) considers Aristotle's views on equality[93] as a way of pointing out the contradiction in understanding demos, and through it democracy, as well. Therefore, in the beginning it is important to make a distinction between the two types of equalities according to Aristotle. One refers to number and the other to value. For example, when there is a certain group of people of the same size as another one, this is equality in number. On the other hand, when considering the value of demos, we refer to the situation where all citizens have the same rights in the country on the basis of being citizens, since they are equal. Regarding the creation of demos, Aristotle points out that people tend to think and believe that if they are equal in one aspect they are equal in general. Derrida (2005a) highlights the word "believe" as he would like to highlight the fact that these ideas of equality are not based on rational premises. Aristotle claims that exactly because of this sometimes there is confusion of understanding notions of equality and freedom as identical. However, Derrida doesn't consider important this overlapping of ideas regarding the pair equality-freedom or the tension between quantity and quality of following. In his opinion, it is highly remarkable that equality is not always an opposing or rival term *beside*, *facing*, or *around* freedom, like a calculable measure (according to number or according to *logos)* beside, facing, or around an incommensurable, incalculable, and universal freedom (Derrida, 1992a, p. 49). In other words, he implicates that equality loses it measurable

[93] Rogues Two Essays on Reason, 2005, page 34.

characteristics in the exact moment when it becomes universal. That happens in the moment when people become equally free. At this point, according to Derrida (2005), there is no need or even reason to try to quantitatively determine freedom. This would be another way of showing the alternative course of rethinking this notion, which would represent a different path of thinking as opposed to the idea of pure, undivided freedom. Furthermore, Derrida claims that this contradiction doesn't even have to be seen through the relation of democracy and freedom and that the mere fact that there are different, non-same equalities presenting those which are equal is sufficient to point out the paradox.

Moreover, when analyzing the relationship between democracy and freedom, it is interesting to present some of Derrida's ideas in the third chapter of *Rogues.* Here he starts by highlighting quite intriguing fact that apart from countries founded on Islam and its cultural heritage, all others proclaim themselves democratic. For example, one could question the democratic nature of the Chinese one-party system, constant invasion of citizen's privacy in United States or the Russian Federation's laws regarding the rights of the LGBT minority, but nevertheless, these major countries, global super-powers and permanent members of the UN Security Council will still continue calling themselves democratic. This raises the question of how democracy is defined. Is it enough for a country just to proclaim itself democratic and attain this quality through this act?

Finally, we have to explore the issue of borders. How far can democracy go in order to protect itself? Derrida provides an example of a situation which happened in Algeria during the second round of Parliamentary elections during December 1992. The Government supported by some factions and out of state forces suspended the electoral process in the name of democracy. There were rumors that the Islamic party was going to gain the majority of voices and through them obtain a position of power which they would use to create a state based on Sharia law. However, this only produced more conflicts[94] with dreadful consequences[95]. Of course this has shaken all

[94] "As of this moment, a rapid escalation of violence occurred and the conflict became an intra- state war.8 The main parties in the conflict were the state on the one hand and several armed Islamist groups on the other", *Oil and the Eruption of the Algerian Civil War: A Context-sensitive Analysis of the Ambivalent Impact of Resource Abundance,* Miriam Shabafrouz, p.11

the bases of statehood and through it influenced the country's democratic capacity not only in that moment, but in the future as well. However, one is to believe that the mere act of stopping the election, which is one of the bases of democracy, seemed to be "the beginning of an end". In any case, the hypothesis here is that taking power or rather transferring power *(kratos)* to the people *(demos)* who in their electoral majority and following democratic procedures would not have been able to avoid the destruction of democracy itself. Hence a certain suicide of democracy (Derrida, 1992a, p. 33). Here yet again it is apparent how freedom and democracy are at the same time negating each other and being complementary to one another. It seems that people had the freedom of voting on elections but just up to certain point – only until democracy, or better say those in power, were not feeling threatened.

Furthermore in *Rogues*, Derrida returns to the initial problem he perceived, the pair freedom-democracy being influenced by the two interpretations of equality. In the name of one pair, the one consisting of freedom and equality, one agrees to a law of number or to the law of numbers (equality according to number) that ends up destroying both pairs: both the pair made up of the two equalities (equality according to worth and equality according to number) and the pair equality-freedom (Derrida, 1992a, p. 34). Here he points out one of the basic contradictions within democracy – that of the majority rule. Even though democracy is defined as a system of those who are equals and free, the fact is that decisions are made through the prevailing vote of the majority and therefore it is indeed quite impossible to rule in the interest of all. This raises the question of the limit which cannot be crossed when democracy defends itself. Maybe this would lead us to reconsider the American *Patriot Act*. Again we reach the issue of how democratic democracy really is, in the context of equality of chances of identical freedoms. In this moment we have to re-examine one of the ruptures in the democratic system of Bosnia and Herzegovina. Besides the obvious reference to the presented court cases in which citizens were deprived of their passive voting rights in the name of equality of representation in national institutions, reference could also be made to the case of Mr. Poplasen. Just as a reminder, he was a legitimately elected candidate for the Presidency of Republika Srpska who has been removed

[95] The official death toll of the entire conflict is now estimated at 200,000 and refers to those killed both by radical Islamists and security forces; it does not include the many wounded, tortured, and traumatized people. The military detained thousands of suspects without trial in secret camps. Many of those arrested "disappeared" and are still missing today—estimates put the number at 6,000 persons, *Ibid.*

from office by the institution of the High Commissioner in order to maintain the balance of power and preserve democracy. This is a clear example of the paradox of democracy, which Derrida noticed when he deliberated on preventive wars as a UN measure or the case of Algerian elections. These are the situations when democracy destroys itself in order to preserve itself.

However, one shouldn't only judge on equality within democracy without exploring its positive tendencies. Like the search for a calculable unit of measure, equality is not simply some necessary evil or stopgap measure; it is also the chance to neutralize all sorts of differences of force, of properties (natural and otherwise) and hegemonies, so as to gain access precisely to the *whoever* or the *no matter who* of singularity in its very immeasurability (Derrida, 1992a, p. 52). Nevertheless, we shouldn't just take information for granted without questioning implications. In other words, even though Derrida highlighted that the principle of equality is implemented in democracy in order to neutralize differences, the notion itself is not neutral. It makes changes in the system because any formation of certain rules and borders necessarily implies the existence of a counterpart, one which is outside of rules as a way of negatively defining the notion. Consequently, it is possible to observe another paradox which is producing autoimmunity within democracy. It is the paradox of inclusion and exclusion which can be linked to the pair equality-freedom but in the end, it is a separate entity.

5.3 Inclusion – Exclusion

In order to gain a more profound understanding of the issues of inclusion and exclusion, one should examine them from a different, more practical perspective. Therefore, we will reflect on how this pair influenced the sphere of law.

Not only have principles of inclusion-exclusion dominated the theoretical and legal sphere in ancient times, but it seems that they are prevalent even nowadays. This is obvious when one examines one of the most important international legal documents – the Universal Declaration of Human Rights. Article 1 in the Preamble of Declaration clearly states: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and

should act towards one another in a spirit of brotherhood."[96] We analyzed the initial phrases of freedom and equality and their relation in the beginning of this chapter. However, the latter notion – brotherhood, also provoked Derrida's thought.

Initially it seems that in this context the word "brotherhood" has the same sentiment as the phrase "human rights" which we examined earlier in this work. It is similar in a way that it is universal, the same for all humans who are in the title of these rights by mere birth as *Homo sapiens*. However, this notion is quite complex and it contains within itself other premises as well. First of all, Derrida (2005b) claims that this concept has a strong Greek and Judeo-Christian connotation from Atreus and Thyestes, from Cain and Abel up to the present day. These brothers became symbols of an inimical relationship between siblings. We will be more focused on the notion of brotherhood or, more precisely, the consequence which is visible through the pair exclusion – inclusion.

For example, in his book *The Politics of Friendship,* Derrida questioned the symbol of brotherhood among other aspects and noted a lack of the female element in both Aristotle's and Schmitt's approaches. This demonstrates a clear tendency of excluding one half of the population from the political and legal sphere of society throughout history. One could say that the dismissal of women from these spheres would also make them less human, as evidenced in Aristotle's famous idea of *zoon politikon*. Not a woman in sight. An inhabited desert, to be sure, an absolutely full absolute desert, some might even say a desert teeming with people. Yes, but men, men and more men, over centuries of war, and costumes, hats, uniforms, soutanes, warriors…(Derrida, 2005, p. 155/156). Besides noticing the obvious machismo in both language and the spheres of politico-philosophical and standing up for feminist ideals by questioning this established logocentrisms, Derrida also examined another important question, the concept of the "other". In this example, the other would be sister or female, but what about the "others" in the political sphere? Who are non-brothers? Are they friends or foes?

This also brings us to the second aporia of democracy, inclusion-exclusion. When deliberating on hospitality, Derrida noticed how "[d]emocracy has always wanted by turns and at the same time two incompatible things: it has wanted, on the one hand, to welcome only men, and on the

[96] Universal Declaration of Human Rights, 2015, p. 4

condition that they be citizens, brothers, and compeers *[semblables]*, excluding all the others… at the same time or by turns, it has wanted to open itself up, to offer hospitality, to all those excluded".[97] This contradiction reaffirms this tightness of democracy which is supposed to be open by its nature. This openness is a consequence of the idea of equality, because if everybody is equal, this would mean that they have equal opportunities to participate in a democracy which is supposed to be accessible without any constraints in this case. Equality and inclusion have one common characteristic, as they are standing for universal in a way that they are directed toward the universal. The indicated point of reference examines the difference between the ideal of this concept and democracy in practice. This is the point where theory and reality collide and negate each other. On the one hand, democracy is open to everybody and everyone, but that is only up to a certain point. In Ancient Greek society, only the free and in certain states, only rich men were deemed equal. Of course, throughout centuries these borders expanded in a way that democratic societies have become more inclusive but even nowadays "the biggest democracies of our time", such as the prominent members of the UN, do not include everybody and not everyone has the same rights.

This leads us to the symbol Derrida developed in order to efficiently explain this trait of democracy being open and closed at the same time – the notion of hospitality. This concept can be a good introduction to the further deliberation on Derrida's ideas, especially the one of being present and absent at the same time. We will examine it from two different sources for the purposes of comprehension. Once again, the position will be presented by using a lecture from the seminar of *Beast and Sovereign.* In the Ninth Session Derrida analyzed a poem called *Snake* written by D. H. Lawrence. These ideas will be followed by those from Derrida's *Of Hospitalit*y, a seminar he gave in Paris in 1996, which was created as a kind of dialogue between him and Anne Dufourmantelle.

[97] Rogues: Two Essays on Reason, 2005, p. 63

Snake

A snake came to my water-trough
On a hot, hot day, and I in pajamas for the heat,
To drink there.
In the deep, strange-scented shade of the great dark carob-tree
I came down the steps with my pitcher
And must wait, must stand and wait, for there he was at the trough before
me.
He reached down from a fissure in the earth-wall in the gloom
And trailed his yellow-brown slackness soft-bellied down, over the edge of
the stone trough
And rested his throat upon the stone bottom,
And where the water had dripped from the tap, in a small clearness,
He sipped with his straight mouth,
Softly drank through his straight gums, into his slack long body,
Silently.
Someone was before me at my water-trough,
And I, like a second comer, waiting.
He lifted his head from his drinking, as cattle do,
And looked at me vaguely, as drinking cattle do,
And flickered his two-forked tongue from his lips, and mused a moment,
And stooped and drank a little more,
Being earth-brown, earth-golden from the burning bowels of the earth
On the day of Sicilian July, with Etna smoking.
The voice of my education said to me
He must be killed,
For in Sicily the black, black snakes are innocent, the gold are venomous.
And voices in me said, If you were a man
You would take a stick and break him now, and finish him off.
But must I confess how I liked him,
How glad I was he had come like a guest in quiet, to drink at my water-trough
And depart peaceful, pacified, and thankless,
Into the burning bowels of this earth?
Was it cowardice, that I dared not kill him?
Was it perversity, that I longed to talk to him?
Was it humility, to feel so honored?
I felt so honored.
And yet those voices:
If you were not afraid, you would kill him!

And truly I was afraid, I was most afraid,
But even so, honored still more
That he should seek my hospitality
From out the dark door of the secret earth.
He drank enough
And lifted his head, dreamily, as one who has drunken,
And flickered his tongue like a forked night on the air, so black,
Seeming to lick his lips,
And looked around like a god, unseeing, into the air,
And slowly turned his head,
And slowly, very slowly, as if thrice a dream,
Proceeded to draw his slow length curving round
And climb again the broken bank of my wall-face.
And as he put his head into that dreadful hole,
And as he slowly drew up, snake-easing his shoulders, and entered farther,
A sort of horror, a sort of protest against his withdrawing into that horrid black hole,
Deliberately going into the blackness, and slowly drawing himself after,
Overcame me now his back was turned.
I looked round, I put down my pitcher,
I picked up a clumsy log
And threw it at the water-trough with a clatter.
I think it did not hit him,
But suddenly that part of him that was left behind convulsed in undignified haste.
Writhed like lightning, and was gone
Into the black hole, the earth-lipped fissure in the wall-front,
At which, in the intense still noon, I stared with fascination.
And immediately I regretted it.
I thought how paltry, how vulgar, what a mean act!
I despised myself and the voices of my accursed human education.
And I thought of the albatross
And I wished he would come back, my snake.
For he seemed to me again like a king,
Like a king in exile, uncrowned in the underworld,
Now due to be crowned again.
And so, I missed my chance with one of the lords
Of life.
And I have something to expiate:
A pettiness.

Taormina, 1923

Going through the first several verses of the poem, Derrida (2009) focuses on the idea of the other, the one who was here before us, as the snake was before the poet. He claims that not only do we have to relate to the one who came first, but we also have to accept him without even knowing who he is. However, this doesn't mean that we have to approve our predecessors or that we have to approve and accept all their acts. It seems that Derrida suggest that there has to be awareness of the other. He appears to be sending a message that tolerance emerges through this acknowledgement of the other's mere existence, in a way of a permission to exist and noting more than that. [T]he relation to the other is not only coming after the other, helping oneself after the other, but after the other *whoever it be*, before even knowing who he is or what is his dignity, his price, his social standing, in other words, the first comer. I must respect the first comer, whoever it be (Derrida, 2009, p. 239). Here he lays emphasis not only on the fact that following is acceptance of the previous as a logical consequence of the order of things, but he also points out the incapability of the successor to influence his predecessors in any way. Besides having a philosophical and deliberative value, this argument is quite applicable in the practical sphere as it refers to the subject of heritage. This notion has truly complex meaning and Derrida is using it as a metaphor and example of logocentrisms regarding the lack of criticism, linear understanding of time etc. However, for now we will note that one is to accept the other "whoever he may be" without further questioning.

Furthermore, the poet, the main character of the narrative, is facing difficulty when he reaches the dilemma of a possible threat in front of him. He concluded that since the snake is "earth-brown, earth-golden" and not black there is high possibility it is poisonous. It is interesting that his knowledge comes from belief, probably a saying from Sicily. It is intriguing because at the same time when Derrida was focusing on the symbol of inheritance, the poem itself provided an example of one. The protagonist's knowledge about the snake is not based on any personal experience, scientific fact or his own friendly or hostile relation with the particular snake. Nevertheless, he found himself facing a dilemma of whether he should eliminate the potential threat or let it be, making it possible for the snake to go free and unharmed. Should he respect the snake who was the first to arrive at the water-trough, even though it is potentially dangerous, or should he strike? This situation Derrida analyzed also hides within itself a paradox, i.e. if the

man is to attack the beast, he will do that spurred by inherited knowledge of the threat of the snake, but simultaneously, his previous knowledge instructs him he that has to respect the one who came first. Furthermore, the other, the snake in this case, is also a visitor, a guest of sorts. Nevertheless, he comprehends the snake as the other and foreign. He is therefore a guest: this is a classic scene, classic biblical scene, a classic Middle Eastern scene: it happens near a source of water, the scene of hospitality takes place near a source of water, in an oasis or near a well, and the question of hospitality is posed as to water, as to the disposition of the water source (Derrida, 2009, p. 240/241). It seems that the snake is the guest and therefore due to the ancient laws of hospitality, it has to be respected. Moreover, as the poet points out, the snake is god. Therefore, the snake has various identities. At the same time, it is the beast and the sovereign, ultimate power and god but also the other; it is the foreigner who is to be accepted or refused. Nevertheless, it is outside the law in all three of its roles.

Toward the end of the Ninth Session, Derrida highlighted two interesting observations regarding the actions and thoughts of the man in the poem, which are quite indicative of the understanding of law in general. The first of them refers to the origin of moral law. The poem made it clear that the man went through inner deliberation of whether he should or shouldn't kill the snake and even though he initially chose not to harm the animal, in the end he changed his mind and threw a stick in the beast's direction. He was choosing between the two pieces of knowledge he had, which were transferred to him through heritage, not only by the people living in his region, but also by all the people who came before them. It is also interesting to highlight in this scene how the man decided to follow through, but also broke both heritages, that of respecting the guest and that of danger. In addition, as a consequence of his actions, the main character of the poem felt remorse for what he had done. In this moment, Derrida notices an intriguing paradox within the legal. This is why, as you will have noticed, I pointed out, however difficult this may seem, two moments in this epiphany of the moral law, this appearing of the moral law: there is a first moment in which the moral law is there, already there but virtual, potential, always already there, then, and then it is actualized as such, it appears as such after the murder (Derrida, 2009, p. 245). With these remarks he highlights the paradox of understanding time, because it seems that moral law is simultaneously actualized in the present and was already there. This would suggest that it is both present and absent in the same time. On the one hand, this idea seems impossible, but on the other hand, it is *de facto* how moral law exists. When the protagonist, who is simultaneously

the antagonist, feels remorse, he makes moral law appear at that instance, but to be able to summon it, this order already needs to exist.

Derrida's second observation refers to the status of refugees, a notion which is more closely related to the idea of hospitality than the previous one. The man is admiring the snake. He perceived it as a god, but also as a king. However, this ruler is "like a king, like a king in exile, uncrowned in the underworld". Derrida offers several arguments while explaining why the snake is like a king and not a king. First of all that [b]ecause he is in exile, he's a king not exercising power a king without power, a king dethroned in a sense - and the scene of exile obviously, is consonant with the scene: of hospitality…"(Derrida, 2009, p. 146). Therefore, according to Derrida, the snake is not a king because it has no real power. This idea reaffirms the concepts presented in the previous chapter of this work, those of the sovereign's need for force in order to be sovereign. Furthermore, Derrida (2009) highlights the connection between exile and hospitality. The person in exile, the refugee, seeks a safe zone. He or she completely depends on the hospitality of the other. On the other hand, even when the others offer them hospitality, this doesn't mean they will in any moment be identical to the others. They will never have the same status as the ones offering them hospitality, because this gift is not without restrictions. Hospitality in this case is not unconditional[98].

This brings us to the second basis upon which this work will shed light on Derrida's notion of hospitality. The final part of his book *Of Hospitality* named "Step of Hospitality/No Hospitality" discusses the issue of the restriction of this concept. Furthermore, it reflects the issues which emerge in democracy, especially the one of inclusion and exclusion. In the beginning of this chapter, Derrida points out the relation between unconditional hospitality and restrictions required by law. Furthermore, Derrida (2000) highlights an axiom within the notion. On the one

[98] In other moments, Derrida or one interpreting his thoughts would perceive hospitality as a purely open notion. "Ascesis strips the messianic hope of all biblical forms, and even all determinable figures of the wait or expectation; it thus denudes itself in view of responding to that which must be absolute hospitality, the "yes" to the arrivant(e), the "come" to the future that cannot be anticipated-which must not be the "anything whatsoever" that harbors behind it those too familiar ghosts, the very ones we must practice recognizing. Open, waiting for the event as justice, this hospitality is absolute only if its keeps watch over its own universality. The messianic, including its revolutionary forms (and the messianic is always revolutionary' it has to be), would be urgency, imminence but, irreducible paradox, a waiting without horizon of expectation." *Specters of Marx* p.211

hand, in order for hospitality to be open, to be what it is in its essence, it is supposed to be unconditionally affirming toward who or whatever may come. On the other hand, it would lose its purpose if it weren't regulated by law. Derrida claims that this contradiction doesn't emerge between law, on the one hand and nature, on the other. He says that this dispute is between the two types of laws. The antonymy of hospitality irreconcilably opposes *the* law, in its universal singularity, to a plurality that is not only a dispersal (laws in the plural), but a structured multiplicity, determined by a process of division and differentiation: by a number of laws that distribute their history and their anthropological geography differently (Derrida 2000, p. 79). He also focuses on the abnormality of the hierarchy of law in this example. As was mentioned previously, the paradox emerges because unconditional hospitality as a rule or law stands like a sovereign above all other laws, outside the comprehension of the legal system. However, in order to be applied, to be *effective* as Derrida says, hospitality needs regulations because otherwise it would end up as an idea, an abstract thought. In other words, it seems that in order to exist, hospitality needs laws which are at the same time negating its nature, as it needs to be unconditional.

6. Features and Implications of Democracy to Come

6.1 Heritage

Furthermore, thinking about hospitality can lead us to deliberate about the notion of inheritance and heritage within law. Even though we mentioned these concepts earlier in this chapter while discussing the reasoning behind the man's actions in *Snake*, these concepts should be examined in more detail.

Derrida sees the clash of the *law* and *the laws* as a certain paradox which produces the situation in which these notions are being inclusive and exclusive at the same time. They incorporate one another at the moment of excluding one another, they are dissociated at the moment of

enveloping one another, *at the moment* (simultaneity without simultaneity, instant of impossible synchrony, moment without moment) when, exhibiting themselves to each other, one to the others, the others to the other, they show they are both more and less hospitable, hospitable and inhospitable, hospitable *inasmuch as* inhospitable (Derrida, 2000, p. 79). First of all, here we see a situation similar to the one explained previously in this work. When we discussed the relation of the Beast and the Sovereign, in one moment Derrida claimed that "*La bête est le souverain"* and that these notions are opposites, but also a unity, that they exclude but also include each other. This could also be applied to the pair of unconditional and conditional hospitality.

In order to better explain the concept of unconditional hospitality, Derrida (2000) provides the example of the concept of duty. If this notion would contain no restrictions, this would mean that people would offer hospitality without any feeling of moral pressure to do so. As stated earlier, one is to perform the duty of the host regardless of the guest. For if I practice hospitality *"out of* duty" [and not only *"in conforming with* duty"]' this hospitality of paying up is no longer an absolute hospitality, it is no longer graciously offered beyond debt and economy, offered to the other, a hospitality invented for the singularity of the new arrival, of the unexpected visitor (Derrida, 2000, p. 83). This is important as a way of keeping the idea open and unrestrained by the present, past of future. Otherwise, if one would offer hospitality out of feeling of duty, this would mean that the person does so due to external pressure. It doesn't matter if this burden originates from heritage or a rule created before one was even born, or whether it was created in the light of current circumstances. Both of them would have the same influence. This would put the concept of hospitality in a certain mold. This mold would create a new shape and deprive hospitality of its unconditional character, both in the present and in the future.

Furthermore, in his rethinking of the notion of hospitality, Derrida examines the concept of the foreigner. Who is a foreigner? Who asks for hospitality? Usually, the foreigner, the foreign citizen, the foreigner to the family or the nation, is defined on the basis of birth: whether citizenship is given or refused on the basis of territorial law or the law of blood relationship, the foreigner is a foreigner by birth, is a born foreigner (Derrida, 2000, p. 87). Here we can note that the idea is defined through an element which cannot be influenced by a subject on which it is applied, therefore the subject becomes an object. In this case, the place of birth plays a crucial role in defining the identity of a person. This characteristic is by no means influenced by

somebody's will. Therefore, our identity and our rights are defined by something beyond our control. Firstly, this refers to the fact that the notion of the citizen is exactly one which is inclusive and exclusive at the same time. It differentiates between citizens and non-citizens by giving one group all the rights and restricting or denying rights to the other. The fact that a person is of certain nationality reflects not only on second and third-generation rights, but also on fundamental rights. For example, a foreigner cannot vote no matter how long he has lived in a particular country until he becomes its national. On the other hand, a criminal or a voyou in Derrida's words, has full voting rights even though has broken the rules of society and in spite of being isolated from the rest of the group and being below the law.

Furthermore, this is an opportune time to reflect on the cases presented in this work. Mr. Sejdic and Mr. Finci were born in Bosnia and Herzegovina and even though they were outstanding citizens and represented their country in the international community, their native country deemed them unfit for presidential candidates. Their Jewish and Roma ethnicity also prohibited them from candidacy. However, the example of Mr. Pilav showed that being born as a member of one of the constitutive peoples (Serb, Bosniak or Croat) was not nearly enough. In his case, Mr. Pilav's ethnic origin *per se* was not the problem. Complication resulted from the fact that he was born, raised and lived in the "wrong" place his entire life. Even though it is quite easy to change, one's place of residence shouldn't be a crucial factor when judging about somebody's rights. The irony of the situation is that these laws which prohibited Mr. Pilav from practicing his rights in their totality were not opposed to the Constitution. They are perfectly legal. On account of these cases, it seems there is a paradox in the legal system of Bosnia and Herzegovina as a whole or more precisely, in the Dayton Agreement and the Bosnian Constitution as its integral part. How is this even possible in a seemingly modern constitutional democracy? This anomaly emerged from two grounds. The first of them has to do with the origin of the constitutional base and the latter is a rigid way of implementing the law. Both cases seem to be connected with the concept of heritage. Therefore, we will examine this notion in more detail.

When deliberating about hospitality, Derrida reflects on [s]ituations where not only is hospitality coextensive with ethics itself, but where it can seem that some people, as it has been said, place the law of hospitality above a "morality" or a certain "ethics" (Derrida, 2000, p. 150). He provided an example of the biblical story of Sodom. However, the motif of hospitality is not only

found in the Old Testament and in the Judeo-Christian tradition that followed. This concept is also present in Greek, Slavic and Celtic mythology. It seems that these groups nourished the same idea which was transferred through generations.

Furthermore, Derrida notes that this produced a situation suggesting that in order for hospitality to remain, it has to exist and not exist at the same time. The fact that this concept existed well before this time provokes certain consequences. The first one is contradiction within the notion itself. It comes from the fact that it is supposed to be able to emerge in the present moment, to aim and open to the future, even though it originated in the past. Not only does it stem from the past, but it also draws its force from that truth and becomes a tradition or heritage. This idea is unifying certain concerns. For example, when there is this kind of collision of time, people tend not to question their heritage in any way, they simply accept this unwritten or sometimes written law as it is. Perhaps sometimes they would adapt it to the current situation in a society or group, but most probably they will not try to question its bare existence. This can potentially have malicious consequences.

In the Eight Session of the seminar *The Beast and the Sovereign*, he analyzed the fable about the wolf and the lamb which we presented in more detail in the previous chapter. Within Derrida's thoughts there was also one briefly reflecting on inheritance. In the story, during the "trial" of the lamb, the wolf claimed that the young sheep was guilty no matter what, even for crimes committed before its time. The wolf pointed out that even if the lamb weren't able to pollute the stream a year ago since it wasn't even born in that time, surely its brother must have done it. This moment shows the strength of the idea of brotherhood, but also through it a concept of collective guilt and culpability by birth. You are therefore guilty at birth, by your birth, guilty for being born what you were born (Derrida, 2009, p. 209). This motif was also repeated in the beginning of the book *Specters of Marx*. In this book which will be under more detailed analysis later on in this chapter, Derrida is using the famous Shakespeare's play *Hamlet* as a base upon which he has been constructing his theoretical positions. One of the most important thoughts from this example was that of time which is "out of joint", but he also dedicated his deliberation toward the role of Hamlet who was supposed to put things back in order. Hamlet is "out of joint" because he curses his own mission, the punishment that consists in having to punish, avenge, exercise justice and right in the form of reprisals; and what he curses in his mission is this

expiation of expiation itself; it is first of all that it is inborn in him, given by his birth as much as at his birth. Thus, it is assigned by who (what) came before him (Derrida, 1994, p. 23/24). In this quotation, especially in the last sentence we can grasp the essence of Derrida's view on this type of heritage. This type of heritage prescribes one's actions and paths by putting the person in a certain position, meaning that one's fate is predestined. In this case, the subject becomes an object of the previous times which constructed his life for him. This creation is not absolutely exact, but it is accurate enough to limit one's options. The problem becomes even more serious when some of these unwritten laws, such as cultural heritage, turn into written and practiced law of a country or community. Of course, as stated before, it is inevitable that law has to exist before application, so its application has a certain legal and legitimate base, however, problems arise if it doesn't correspond to the present or the reality of a certain situation.

The three citizens of Bosnia and Herzegovina whose cases were presented in this work are suffering exactly because of this characteristic of the law. It seems that Mr. Pilav, Sejdic and Finci are found guilty by their birth. The Courts of Bosnia and Herzegovina maybe haven't condemned these people, but nevertheless, they were deprived of their basic rights. Courts did make legal decisions and judges followed the country's established law practice, yet it seems that their verdicts were not just. These examples clearly display one of the main weaknesses of the modern legal system and democracy and that is uncritical approach toward already established norms and institutions.

So far in chapter three, we have presented and analyzed Derrida's critical views of democracy. The first dealt with the pair freedom-equality, followed by that of exclusion and inclusion, and finally, we discussed the concept of heritage and how it influences modern democracies. These were accompanied by symbols of brotherhood and hospitality. All of these ideas have proven to be quite complex issues within the core of every democracy. The court cases presented in the beginning of this work demonstrate how deep problems can emerge due to these congenital anomalies of democracy. However, they are also the clear parameters of the specific situation in Bosnia and Herzegovina. It seems that in this country extremes inherent to democracy are highly visible and that they represent a system which is simultaneously possible and impossible. It is possible due to its *de facto* existence, whereas impossibility is reflected through the difficult position of its citizens. As we examine the present situation in Bosnia and Herzegovina, we are

also touching upon its future. Is the current legal and political system stable enough to survive in the days to come? Even if it does survive all the turbulence, does this mean that the price for keeping peace should be a violation of basic democratic principles, such as passive voting right? What is the future of Bosnia and Herzegovina? Where is the future of democracy to come? It seems that some of the answers to these questions can be found in Derrida's latest deliberations. They primarily refer to his concepts of *différance*, future to come and democracy to come. Therefore, we will take on this task and try to present and analyze these issues in the best possible manner in the following part of the chapter.

6.2 *Différance*

Derrida's complex and wide theoretical thinking is based on a deconstructive approach. Even though this notion unifies many Derrida's thoughts presented through various interviews, lectures and books, in the beginning I will try to present and analyze *différance* as much as possible in order to identify the basic idea of deconstruction. All of this will be conducted with the purpose of creating a solid base through which is possible to understand the ideas of future/democracy to come.

Deconstruction as such presents a fairly efficient tool in questioning, criticizing and rethinking of various concepts. First of all, we should point out that deconstruction doesn't in any way imply demolition or annihilation. Although Derrida deconstructs the concept of text, his idea was to present a way of exploring a new approach of understanding, of finding an alternative meaning. Hence deconstruction is a force of creation. As a critical approach, it carries the purpose of questioning and combating the hegemonic metaphysics that is present in the grounds of Western philosophy (Benvindo, 2010. p. 162). Of course, all these questionings provoke some answers, some new ideas and creation of different concepts.

Furthermore, we shouldn't refer to deconstruction as a method because this would be a wrong presupposition. Among other criteria, for deconstruction to be a method, it would need to have

universal rules which could be applied to all cases. However, Derrida is unlikely to support this. After going through the main ideas of his theoretical approach in general, one is to believe that Derrida would condemn the creation of a universal method or further understanding of deconstruction as such, because that would greatly restrict this notion. There are only contexts, and this is why deconstructive negotiation cannot produce general rules, "methods" (Derrida, 2002, p. 17). Deconstruction as an analytical philosophical and linguistic formation will help us clarify more aspects important for questioning our main concerns. Moreover, Derrida is once again in this sentence referring to the general paradigm of judging on things outside of the presented context. This is one of the characteristics which are most visible in law, in a way that many times verdicts are more based on a general legal framework and praxis which precedes the present case, rather than on the case itself. In order to further grasp Derrida's view on democracy and relations within it, we will have to introduce the philosophical background of his work, starting from the basic principles and ideas upon which the more complex notions such as *democracy to come* were constructed.

First and foremost, we will deal with one of Derrida's most important concepts – *différance,* which is deeply rooted in his deconstructive approach and also presents a foundation stone for many of his creations. Significant help in better understanding of this term comes from the analysis of Simon Critchley. In his book *The Ethics of Deconstruction: Derrida and Levinas*, the first chapter which shares a similar title as the book itself[99] is devoted to the concept of différance, among other things. Origin, structure and critical positions toward this term will be presented and analyzed throughout this section, so we can gain a more comprehensive insight on this deconstructive tool. To begin with, we shall look upon the etymological roots of this notion. They originate from the French language. *Différer* in the sense of "to differ" means that something is different from something else; it has a spatial sense, and refers to the non-identical relations pertaining between phenomena. *Différer* in the sense of "to defer" means to postpone the completion of an act; it thus has a temporal meaning, conveyed by the verbs "to temporize", "to delay", or "to put off" (Critchley, 1999, p. 35). Therefore, a mere glimpse of this intriguing idea provides us insight into its double nature. This duality does not contain any internal opposition, as was the case with some previous pairs which were presented in this work. Quite

[99] Precise name of the first out of five parts of this work is: "The Ethics of Deconstruction: The Argument".

the opposite, they are complementing each other and together are creating unity. Therefore, Critchley (1999) claimed that *différance* is simultaneously put in two dimensions – that of *space* and of *time*. Also, if we would examine further the foundations of these concepts, toward the theoretic, we could say that one of Derrida's basic symbols had emerged through his interest in the work of Saussure. So, Derrida looked upon his ideas, mainly as an example of the Western tradition's view on language. After deconstructing those positions, we can see how Derrida (1997) separated two important features of language which he chose to analyze further. They are temporality – metaphysics of presence and spatiality, the inside-outside relation between speech and writing which provided him a base for further deliberation.

In one of the most fundamental books of deconstruction, *On Grammatology* it is possible to see how ideas surrounding difference are emerging. In the first part of this work, "Writing before the letter", he analyzes how writing was perceived throughout the history of philosophical thought and its relation with speech. Derrida elaborates that throughout history, from the pre-Socratic epoch to the post-Hegelian time, writing was subordinated to speech and he sees that as a logocentrism. For example, if Aristotle considered "spoken words (ta en tē phonē) are the symbols of mental experience (pathēmata tes psychēs) and written words are the symbols of spoken words" (De interpretatione, 1, 16a 3), it is because the voice, producer of the first symbols, has a relationship of essential and immediate proximity with the mind (Derrida, p. 11, 1997). Derrida claims that writing was seen just as *graphie*, a technical means of preserving speech. He wants to show how writing has been understood as one-dimensional, not being able to produce another meaning outside the already existing one. He continued by pointing out that in this context the ideal situation is one when we have an overlap of the producer of sound and its receiver. That would mean that when one hears himself speaking, this would be the only true presence. The epoch of the logos thus debases writing considered as mediation of mediation and as a fall in to the exteriority of meaning (Derrida, p. 12, 1997). Therefore, according to Derrida, it seems that an issue arises because the sign, with its constituents signifier and signified, was created in this period – the history of philosophy marked by the logos, metaphysics and presence.

Also, we could argue that the creation of the sign at that moment and the way it was produced are quite straightforward, but perhaps the greatest difficulty would be that this notion was not re-

imagined since its creation. This brings us to the position of signs themselves which presently substitute some ideas or notions and present them even though they differ from these ideas and notions. Now Derrida simply wants to put into question the secondariness of the sign, which is the secondariness of deferral, and to postulate in its place an 'originary' différance that is constitutive of presence (Critchley, p. 36, 1999). Therefore by implementing *différance* in this case, Derrida is questioning the presence itself.

Critchley (1999) claims that through defining the two types of writing (ideographic and phonetic system) as the means of representing oral language, Saussure reestablishes the deeply rooted relation of writing being secondary to speaking. Furthermore, it seems that he limits his deliberation of language only on phonetic writing. An innovative notion which is in disagreement with the former understanding of language is Saussure's proclamation of arbitrariness of the sign.[100] He claims there is no natural relation between writing and the thing which is represented by writing signs. According to him, this bond is more of a symbolic nature. If the sign is arbitrary, then the manner of its signification is differential; that is, signs do not signify through their intrinsic plenitude (the sign 'dog' does not refer to the fully present entity of the 'dog-in-itself'). Rather, signs signify through their relative position in a chain of differences (Critchley, p. 36, 1999).

Continuing his analysis of Saussure's *The Course in General Linguistic*, Derrida (1997) puts the focus on the notion of "natural". It seems that in Western metaphysical philosophy, as a consequence of established natural relation between speech and writing, there was also the relation of inside and outside between them. Therefore, writing is seen as going away from the natural separation of the original, of the logos and presence. Derrida supports Saussure's

[100] "Above, we had to accept the theoretical possibility of change; further reflection suggests that the arbitrary nature of the sign is really what protects language from any attempt to modify it. Even if people were more conscious of language than they are, they would still not know how to discuss it. The reason is simply that any subject in order to be discussed must have a reasonable basis. It is possible, for instance, to discuss whether the monogamous form of marriage is more reasonable than the polygamous form and to advance arguments to support either side. One could also argue about a system of symbols, for the symbol has a rational relationship with the thing signified (see p. 68)) but language is a system of arbitrary signs and lacks the necessary basis, the solid ground for discussion. There is no reason for preferring *soeur* to sister, Ochs to *boeuf* etc." Saussure, *Course in General linguistic*, p. 73

criticism of this view, but only up to a certain point. He claims that by limiting his *General Linguistic* only to an internal system in general, excluding the whole field outside of writing, Saussure makes the same mistake as his predecessors. Self-proclaimed language but actually speech, deluded into believing itself completely alive, and violent, for it is not "capable of protect[ing] or defend[ing] [itself]" (dunatōs mēn amūnai éauto) except through expelling the other, and especially its own other throwing it outside and below, under the name of writing (Derrida, p. 39, 1997). Now we came to the moment in which we should give our attention to analyze of the questions of time and space.

Going through Saussure's theory[101], we can conclude that the thing which is signified is never truly present, it exists through representation. Furthermore, language is a play of differences within the system and that "play" is difference itself. Différance is the playful movement that produces the differences constitutive of words and conceptuality. There is no presence outside or before semiological difference. Retaining the framework of the Saussurian problematic, Derrida sees all languages or codes as constituted as and by a weave of differences (Critchley, p. 37, 1999). Hence, there is movement inside the system. This is a fluctuation of meaning that is possible through différance because signification of every component within the system is defined by what it is not, it is defined by the other which is never present. We cannot completely comprehend this idea without referring to Derrida's concept of *arché-writing*. It explains this mobility, fluctuation which unifies the element of time and the connection with the *other*, and at the same time cannot belong to the language system.

The presence of the present is constituted by a network of traces whereby the interval between elements is described as spacing (espacement) and the temporal relation among elements is one of irreducible temporization (temporisation) (Critchley, p. 37, 1999). Through *arché-writing,* Derrida deconstructs writing and by doing so, he examines the concept of experience. He perceives this notion as metaphysical and anchored in the present. Derrida (1997) claims the way to overcome the problem of experience always being influenced by the "regions" of knowledge is to look upon transcendental experience, the transcendental origin of the system itself. That brings us back to the notion of *trace*. The *trace* is not only the disappearance of origin-within the

[101] These findings are based on the overall experience of analyzing Saussure's classic *Course in General Linguistic.*

discourse that we sustain and according to the path that we follow it means that the origin did not even disappear, that it was never constituted except reciprocally by a non-origin, the trace, which thus becomes the origin of the origin (Derrida, p. 61, 1997). Here we can see again the interplay of presence-absence which was mentioned before as one of characteristic of différance.

Derrida continues by focusing on the transition, movement of trace seen as a way of constructing différance. Furthermore, he continues by equalizing trace and différance. Derrida (1997) states that if we interpret the source of time and space as différance or trace, then it is possible that their difference is joined as the same experience. Considering the position of trace in time, Derrida remarks, that a trace cannot be within the present. However, he also claims that this concept cannot be localized in the past as well. Derrida (1997) places it in an *absolute past* as a perception of time-space which differs from the past connected with this present. It is one which preserved trace within itself. The point is that these concepts of the past, present or future are marked by the metaphysical and as such, they do not explain the notion of trace which overgrows the sphere of monism or logocentrism.

Also, it is interesting to note how with ideas such as trace, différance etc., Derrida was trying not only to question logocentrisms, but also to produce ideas influenced by other theoreticians. For example, he was aware how Levinas, Heidegger, Nietzsche, Freud have influenced his creation of idea of trace.[102] All in all, mainly through deconstructing Saussure's *General Linguistics* in the

[102] "The word trace must refer to itself to a certain number of contemporary discourses whose force I intend to take into account. Not that I accept them totally. But the word trace establishes the clearest connections with them and thus permits me to dispense with certain developments which have already demonstrated their effectiveness in those fields. Thus, I relate this concept of trace to what is at the center of the latest work of Emmanuel Levinas and his critique of ontology relationship to the illeity as to the alterity of a past that never was and can never be lived in the originary or modified form of presence. Reconciled here to a Heideggerian intention,-as it is not in Levinas's thought-this notion signifies, sometimes beyond Heideggerian discourse, the undermining of an ontology which, in its innermost course, has determined the meaning of being as presence and the meaning of language as the full continuity of speech. To make enigmatic what one thinks one understands by the words "proximity," "immediacy," "presence" (the proximate [proche], the own [propre], and the pre- of presence), is my final intention in this book. This deconstruction of presence accomplishes itself through the deconstruction of consciousness, and therefore through the irreducible notion of the trace (Spur), as it appears in both Nietzschean and Freudian discourse.", Derrida, *Of Grammatology*, p.70

first part of *Grammatology,* it is possible to notice how Derrida was challenging the firmly established linguistic concepts as a means to question metaphysics itself. Through différance he is breaking the logocentrism while cracking the metaphysics of the presence. Having analyzed its origin, we can examine with a high degree of certainty the structure of différance, double nature, unity of space and time outside of metaphysical perceptions.

6.3 *Democracy to Come*

In the previous part of this work, we examined how Derrida managed through the notion of différance to re-think, deconstruct the ideas of time and space which were firmly established throughout centuries. Within his work, he was not only challenging these concepts, he was also providing alternatives to them and to the way they are created. This has helped construct a firm basis upon which it was possible to create more complex ideas, such as *Democracy to Come.* This idea now managed to emerge without being pulled down into logocentrism of the already existing systems because it was built upon different premises. How did this concept come to fruition?

During this chapter, we discussed Derrida's understanding of past in great detail. The notion of heritage was mostly marked with the thoughts of how past was haunting the present. Furthermore, while we deliberated about the idea of différance, the concept of *absolute past* emerged. Haunting is an interesting verb which perfectly marks the sentiment of the past coming to influence the present. Derrida used it to create a symbol of returning in his book *Specters of Marx - The State of the Debt, the Work of Morning and the New International*. Undoubtedly, this work discussed many topics; however in order not to lose sight of the main focus of this research, we will emphasize only certain notions.

Even though Derrida focused on rethinking Marx in the present as a main motif of this work, in order to do so he had to deconstruct other ideas, such as the perception of time. Since the future, then, since the past as absolute future, since the non-knowledge and the non-advent of an event, of what remains to be: to do and to decide (which is first of all, no doubt, the sense of the "to be or not to be" of Hamlet-and of any inheritor who, let us say, comes to swear before a ghost)

(Derrida, 1994, p. 19). Hence, he started with analyzing the word *since*, which according to him has the special characteristics of holding within itself all three known times: the past, the present and the future. Derrida claims that this doesn't necessarily imply a negation of the existence of something or someone, but that it only suggests a different understanding of temporality. He expresses his agreement with the words of Hamlet, the fictional character from the eponymous drama – that time is out of its position. "The time is out of joint": time is disarticulated, dislocated, dislodged, time is run down, on the run and run down [traque et detraque], deranged, both out of order and mad. Time is off its hinges, time is off course, beside itself, disadjusted (Derrida, 1993, p. 20). Within these ideas he points out that this notion is integrated and dissolved at the same time. Derrida sees plurality even within the meaning of time when it is interpreted as a notion. According to Derrida (1993), if one would attempt to define time, that person would come up with several definitions, that there are three interpretations of time. One is the interpretation of time as a temporality, followed by its consequence of shaping reality into types, such as today, tomorrow etc. and finally comprehending and using idea of time to refer to the world as it is in the present moment. Hence, through these ideas it is possible to highlight the plurality of time within its inner structure. This gives rise to the question of how the outer composition looks like. Can we discuss plurality in this context?

It seems that the way to attempt to deliberate about the outside formation of time would include trying to locate the ways this notion communicates with its surroundings. As stated previously, Derrida explained his idea regarding time in *Specters* by analyzing certain parts of *Hamlet*. Whether he knows it or not, Hamlet is speaking in the space opened up by this question-the appeal of the gift, singularity, the coming of the event, the excessive or exceeded relation to the other-when he declares "The time is out of joint" (Derrida, 1993, p. 26). Therefore, the time the present is communicating with the past and the future in actually the same time. It is not and cannot be understood as a static and indivisible formation. Throughout Derrida's work, there are some examples of how he sees this relation of present towards other realities, the near past and future. In the Eight and Tenth Session of *The Beast and The Sovereign*, Derrida reconsidered the position of the present towards the future through poetry. In the first case, he examined Celan's

Speech[103] and deliberated about poetry. As these thoughts are coming as a continuum of his ideas regarding sovereignty, it is easy to draw a parallel. Derrida concluded that sovereignty and poetry are equal in one feature, and that is the quality of being permanent in time. As the king is still a king when one king dies, poetry also continues to exist throughout time as an institution of a symbol. Furthermore, it ceases to exist in several times as well. Derrida claims that Celan [s]pecifics that this now-present of the poem, *my* now-present, the punctual now-present of a punctual *I*, my now-present must *allow* the now present of the other, the lime of the other, *to speak*. It must *leave* time *give* time to the other (Derrida, 2009, p. 292). He claims there are two moments in the present, one that is mine and the present of the other. In other words, Derrida points out there is no universal present which is the same for every subject, there is always a need for others with whom we share this time. Also, by naming this notion now-presence, he implies an interesting thought of the division of present into now-presence and future-presence. This is why the example of the poem is fairly useful in this situation. When one is writing a poem, he or she is doing so in this moment; however, a reader shall read the poem in the future. The reader will not claim that he read a poem in the past and the writer will certainly not claim that he wrote it in the future, they are all going to do so in the present – their present, which is *now-presence*. Where is the poem located, being an object of this story? It seems that it is always in the present. Also, within Derrida's thought, there is the idea of the transitional nature of the present. The present is what passes, the present comes to pass *[se passe]*, it lingers in this transitory passage (Weile), in the coming-and-going, between what *goes* and what comes, in the middle of what leaves and what arrives, at the articulation between what absents itself and what presents itself (Derrida, 2006, p. 29). In this passage, we can perceive how he highlights the concept of presence and absence and the existence of the other, besides movement.

Therefore, the poem proves it is possible to exist in more than one moment and demonstrates the importance of the relation with the other. The presence of another is necessary. It is not a matter of speaking time but of letting the other, and thus of giving the other, without there being any act of generosity, effacing oneself absolutely, of giving the other its time… it is the matter of leaving the other not only speech, but of letting time speak, the other's time, what its time, the time of

[103] In 1960 while receiving the literary award Georg Büchner Prize, Paul Celan gave a speech entitled "The Meridian". The main topics of this speech were the current positions of poetry and art in general.

the other, has as most proper to it (Derrida, 2009, p. 234). In this passage, Derrida suggests that the present has to be open to the other, to the one who will come. This brings us back to the idea of hospitality where one has to be open to the guest whoever he or she may be.

Derrida also presented the interesting concept of the *gift*, which is perhaps an even more illustrative explanation of the openness toward the future. He deliberated on this idea in the first chapter of *Specters*. Derrida starts by trying to define the present by claiming that this notion was always in between of what it was and what it is going to become. In a way, this demonstrates the true nature of Derridian future, that which is going to exist in a way that is not yet defined. There is first of all a gift without restitution, without calculation, without accountability (Derrida, 2006, p. 30). He talks about the present which is given without any expectations. This is quite similar to the explanation of *gift* he gave in the beginning of the book *Given time – Counterfeit money.* It must not circulate, it must not be exchanged, it must not in any case be exhausted, as a gift, by the process of exchange, by the movement of circulation of the circle in the form of return to the point of departure. If the figure of the circle is essential to economics, the gift must remain *uneconomic* (Derrida, 1992b, p. 7). Therefore, he claims that the motif of the *gift*, similarly as the notion of *hospitality*, shouldn't be limited in any way. The one who presents the gift does so without expectations. He is not supposed to feel the need to be thanked for the gift because that would imply getting something in return. Hence, the question of possibility of the gift appears. It is thus necessary, at the limit, that he not *recognize* the gift as gift. If he recognizes it as gift, if the gift *appears to him as such*, if the present is present to him *as present*, this simple recognition suffices to annul the gift (Derrida, 1992b, p. 13). This seems to be the same anomaly inherent to other concepts such as democracy. It is similar in a way that existence of an idea outside the theoretical or above the phenomenological would lead to its destruction. There is certainly a paradox. It seems in order for a gift to exist it shouldn't appear.

If the gift does show up, that would mean there is a transaction between the giver and the receiver, which would negate the true nature of this notion and destroy it. Furthermore, there is the double implication of time in a way that this notion is supposed to simultaneously exist in the present and future. Therefore, could a *gift* exist as such? This is where deconstruction would always begin to take shape as the thinking of the gift and of undeconstructible justice, the

undeconstructible condition of any deconstruction, to be sure, but a condition that is itself in deconstruction and remains, and must remain (that is the injunction) in the disjointure of the Un-Fug (Derrida, 1994, p. 33). Here he emphasizes that in order for a *gift* to be possible and has a future, it needs to be open towards any possibility that might come.

Perhaps the best way to highlight Derrida's idea is to examine the way he explained the concept of friendship in his *Politics of Friendship.* What is going to come, perhaps, is not only this or that; It is at last the thought of the *perhaps*, the *perhaps* itself. The *arrivant* will arrive *perhaps*, for one must never be sure when it comes to arrivance; but the *arrivant* could also be the *perhaps* itself, the unheard-of, totally new experience of the *perhaps* (Derrida, 2005, p. 29). The last words send an important message which adds significant information to the deliberation about the notion of future up to the present moment. In Derridian terms, the future to come needs to be completely new, without precedent and most importantly, unthinkable. We cannot predict its final shape simply because it is not a future based on the present moment we are familiar with. Therefore, since one is not able to comprehend its features, he will not be able to predict how the future is going to look like based on this information. On the other hand, even though this future is at an undefined place, a space we are not able to imagine, it nevertheless exists. Consequently, it exists and doesn't exist at the same time. It is marked by trace, by *différance*. If one would draw a line, he could claim that the concept of *future to come* refers to that kind of future which is not just unpredictable and unthinkable. In order for the future to arise, it is also necessary that one is ready to accept it without any condition.

It seems that Derrida's idea of *future to come* can be understood as a basis for a better understanding of *democracy to come*. Furthermore, one could say that this democracy doesn't exist outside of the future as perceived by Derrida. Derrida evolved this concept throughout many of his works. Sometimes, the evolution of *democracy to come* seems so natural. From the concepts of trace and différance developed as a consequence of the deconstructive approach, towards the ideas of the sovereign and democracy, everything was leading to the creation of a more complex and wider notion which could not only include some previous ideas, but also provide answers to the questions raised by them. Even though this work recognizes the immense importance of *democracy to come*, only certain aspects of this concept will be included in the

text to follow. These points are certainly chosen according to the criteria of their importance for understanding the basic principles of the idea, but they also correspond to the issues recognized as important so far in this work. Firstly, as stated earlier in this chapter in the first half of *Specters of Marx*, among other things Derrida has been deconstructing the logocentrisms of linear understanding of time, but through this questioning he was also able to emphasize the notions referring to the interpretation of space. Derrida provided a clear explanation why there is need to talk about *democracy to come* instead of democracy in the future.

Derrida highlighted the importance of the idea of *out of joint*. That is why we always propose to speak of a democracy to come, not of a future democracy in the future present, not even of a regulating idea, in the Kantian sense, or of a utopia-at least to the extent that their inaccessibility would still retain the temporal form of a future present, of a future modality of the living present (Derrida, 1994, p. 81). In this passage we can see how this idea of temporality is important for Derrida, the idea of time as inconstancy, as something changeable and unstable. Also, one shouldn't forget in any moment that Derrida included the idea of context without borders in the very beginning of *Specters*[104]. Furthermore, he pointed out that *democracy to come* shouldn't be seen in its extremes, that it is neither a regulatory nor a utopian idea[105]. One is to believe that he protects this concept of being perceived in this way because in the first case scenario, if it would be interpreted as a regulatory idea, it would also need to be a certain method of doing things, in this case evaluating a democratic system, making it universal. Universality as such, as a manner of interpretation, is one of the main critical points of Derrida's work and therefore he wouldn't support it. On the other hand, if we would label *democracy to come* as a utopian idea means, as for any other concept that it is unrealistic and impossible to happen.

Furthermore, despite the fact that Derrida constructed this idea as one which is unthinkable, that doesn't in any way mean that it is not feasible. [Even beyond the regulating idea in its classic

[104] "Maintaining now the specters of Marx. (But maintaining now [maintenant] without conjuncture. A disjointed or disadjusted now, "out of joint," a disjointed now that always risks maintaining nothing together in the assured conjunction of some context whose border would still be determinable.)", first paragraph of *Specters of Marx – The state of Debt, the Work of Morning and the New International;*

[105] *Ibid* p.81

form, the idea, if that is still what it is, of democracy to come, its "idea" as event of a pledged injunction that orders one to summon the very thing that will never present itself in the form of full presence, is the opening of this gap between an infinite promise … and the determined, necessary, but also necessarily inadequate forms of what has to be measured against this promise (Derrida, 1994, p. 81). This quotation clarifies that it is not possible to locate this concept in any existing referential system. However it is possible to define it, as it is not only a promise – it is an event bound to happen.

Also, as stated previously with the ideas of hospitality and future to come, it is the same with this notion – one has to be open towards its possibility or it will not come. Nevertheless, another issue, plurality will arise to question the chance that Derrida's *democracy to come* should come to exist. Even if a traditional approach to philosophy would be able to understand and accept the existence of a notion which does not exist yet, and there is no certainty it will exist in the future, it would still have issues understanding the plurality of this idea. That is why one has to explore this feature of an event to come on the basis of Derrida's views. Awaiting without horizon of the … messianic opening to what is coming, that is, to the event that cannot be awaited as such, or recognized in advance therefore, to the event as the foreigner itself, to her or to him for whom one must leave an empty place, always, in memory of the hope-and this is the very place of spectrality (Derrida, 1994, p. 82). This inserts another element into *democracy to come* – spectrality. This idea is closely connected with différance and its element of space in the ability to exist and doesn't exist at the same time, or, if examined from another perspective, this would mean that *democracy to come* exists in more than one space. The element of spectrality implies the moving nature of this concept and maybe this could help us fully comprehend Derrida's concept of democracy as a *free wheel*, idea from the beginning of this chapter.

Also, there is another important feature which should be examined when discussing Derrida's vision of democracy, the notion of iterability. This idea was illustrated through the example of relation of constitution and democracy. Derrida points out the iterability of this term. This iterability and the gap between constitutionalism and democracy – is required for its functioning (Thomassen, 2006, p. 179). It seems that for Derrida reconciliation of democracy and constitutionalism, harmonized relation between them which would be stable and unchangeable

would make this system collapse. That atmosphere would make impossible for the mere practices of constitutional democracy to exist at all. In these terms there wouldn't be any space for praxis such as deliberation or interpretation of constitution which are the essence of constitutional democracy. The irreducibility of relation between these concepts is keeping them at optimal distance, far enough not to let one overcome the other and close enough to let them support each other (Thomassen, 2006, p. 183). For example, if somebody gives priority to democracy over constitutionalism, the latter will lose its core and vice versa, because they are the concepts which oppose but in same time presuppose each other. Democracy, as a consequence, cannot be confounded with constitutionalism and vice-versa, because this would stop the play and even interrupt the dialectical movement towards the other's otherness (Benvindo, 2010 p. 183). Irreducibility is also a crucial factor for giving the constitutional democracy the character of the *future to come*. The *future to come* cannot be mapped, not because it lies in a beyond, but because it is simultaneously constituted and deferred through our contingent and imperfect action here and now (Benvindo, 2010, p. 167).

6.4 *Future to come* in Bosnia and Herzegovina

All in all, we were able to perceive the various critical points regarding democracy in the different segments of Derrida's theory. The main ones are referring to the two pairs, freedom-equality and inclusion-exclusion. The notion of heritage is also an important element which was highlighted separately. Finally, this work also presented the main characteristics of Derrida's vision of democracy – *democracy to come*. Firstly, the two pairs we examined demonstrated the paradoxes within democracy. Each and every one of these critical views and ideas was created as a general vision of democracy; however they are also quite applicable in the particular case of Bosnia and Herzegovina. These issues are inseparable components of democracy since its beginnings, from Ancient Greece up to the present moment. It seems that various philosophers approached them over time. Many were able to see the flaws of democracy, explain their origin and maybe even criticize them. Furthermore, they were able to produce potential solutions to the arising issues. However, even though democracy changed over centuries, its essence persisted

and some main ideas were surrounding it. More importantly, its critics didn't move outside the way it was established and consequently their ideas were trapped inside the same logocentrical premises, in the same molds upon which this concept emerged. Hence, democracy essentially didn't change. Its problems remained the same and solutions for those issues were being found within the same sphere of understanding.

Bosnia and Herzegovina is a democracy. It is not only that it perceives itself as a sovereign democratic society built upon democratic principles and constructed within a legal and legitimate constitutional framework, it is also externally perceived as such. The international community is supporting this vision of Bosnia as modern, integrated democracy. Hence, from the inside and outside, the country appears to be democratic. However, reality is showing something different. We presented and analyzed some, out of many legal cases, which demonstrate there is a big rupture between theoretical and practical aspects of reality in Bosnia and Herzegovina. How is that possible? In the second chapter of this work we questioned the notion of the sovereign, its implications and relations, particularly with democracy. We arrived at the conclusion that the bond between the two is quite strong and that they need each other in order to survive. They need to give freedom and control one another in the same time, to be separated and unified. However, while analyzing Bosnia we came to conclusion various sovereigns have emerged since the beginning of the construction of the country in its latest form. Even more dangerous than the fact that it is not quite clear who or what is sovereign is that the citizens of this country are definitely not performing this role. This produces the situation in which there is uneven distribution of power within the pair sovereignty-democracy.

There are several circumstances which lead us to believe the citizens of Bosnia cannot be considered as sovereigns. First of all, there is the Dayton Agreement. This document emerged on foreign territory. It is written in English which is neither official nor unofficial language of the country. It is signed by various signees. As stated in the beginning of this work, some parts of this document were affirmed by countries which claimed they were going to guarantee its compliance and enforcement. Consequently, one could ask whether Russia, Turkey, USA, etc. could really guarantee compliance with this agreement. If they are able to do so, how would they do it? Would they simply resort to pure military force to defend peace and the democratic future

of Bosnia? These countries produced and gave themselves legitimacy and they have a force, but does that make them sovereign?

Also, what about the representatives of the countries who signed this document? Was Slobodan Milosevic, president of Yugoslavia at the moment, really representing the interests of the Bosnian Serbs? Maybe in the end this group of people thought that their concerns are not the same as the ones of Serbs from Yugoslavia. Bosnian Serbs chose their own representatives who would negotiate and sign the treaty in their name, however these people were unable to take part in negotiation process[106]. Perhaps they should have been given a chance to elect other representatives instead and not having, Milosevic representing them as somebody who *de facto* defended the best interest of Serbs. Hence, we can conclude that not only the countries and organizations from outside were sovereignly taking part in the negotiation of the Dayton Agreement, but that the citizens of Bosnia in some cases didn't even have enough direct representative of their own.

Furthermore, even after the agreement was confirmed and accepted, the path of taking force out of the hands of Bosnian people didn't stop. Besides the Dayton agreement and everything surrounding it I would also like to remind to the institution of High Representative and its role in Bosnian society. There are three elements which give this institution the character of the power which opposes the sovereign position of Bosnian citizens. These are the creation of this institution, the way the High Representative is chosen and its powers and jurisdictions.

There are 55 members of the Peace Implementation Council, an international body created in order to implement the Dayton Agreement in Bosnia and Herzegovina. According to the Dayton

[106] As stated in the first chapter, before the conference started, two out of three elected delegates of Bosnian Serbs were accused by the International Criminal Tribunal for the Former Yugoslavia of the crimes they committed during war and their showing up at Ohio would automatically lead to their imprisonment. This work will not comment on these cases or their outcomes. They are just mentioned as a historical fact and way to address matter of representation.

Agreement, these countries and agencies[107], among other things, have the power to choose a High Representative and his deputy. This institution has wide powers and jurisdictions. Maybe the most visible powers are those enabling it to enact laws, going above the decisions of the Bosnian Parliament and the appointment and dismissal of people on elected political positions. Hence, there is a person, who by law cannot be the citizen of Bosnia and Herzegovina or any of the neighboring states taking part in the conflict[108], who has the power over decisions made by citizens of Bosnia and Herzegovina. For example, these decisions could be direct ones in the case of voting for Presidency or indirect, in the case of the Parliament where members were elected by citizens.

Also, it is interesting to examine the idea that the citizens of neighboring countries involved in the conflict cannot be elected to be High Commissioners of Bosnia and Herzegovina. This notion of the Dayton Agreement refers to the Republic of Serbia and Republic of Croatia as states which were involved in the Bosnian War. Many citizens of Bosnia and Herzegovina identify with these countries, some of them more than with Bosnia. Therefore, the reason for not including citizens of these countries as potential High Representative is not only because these countries were part of the conflict and their active role in the politics of Bosnia would be viewed as dangerous, but also because Bosnian citizens would perceive them as representatives who would take care of interest of their group. In the case of Republika Srpska, that would be a person from Serbia and in the case of a part of the Federation, this would be somebody from Croatia. Only one person can be High Representative and therefore the idea of trinity would be destroyed. Therefore, institution of High Representative is created in a way that it gives vast power to a single person. Moreover, this person must not be a citizen of Bosnia or a person the citizens could identify as a defender of their rights.

Lastly, praxis has shown that this institution is actively using its powers and that its corpus of jurisdiction has got widen over time. In this work we gave the example of the elected president of Republika Srpska who was dismissed from his position and also numerous laws which were passed, ignoring the vote of the Parliament. Therefore, maybe true force in Bosnia is the institution of the High Representative?

[107] Peace Implementation Council comprises 55 countries and agencies that are supporting the peace process.

However, if one would follow Derrida's way of thinking, he would have to agree that the sovereign must have supreme power and stand above the law. This is not exactly true in this case, because even though the Representative is obviously above the laws of Bosnia, he is not above the Peace Implementation Council, since he is appointed and controlled by it. Consequently, the Council seems to be the last instance of control over Bosnia. On the other hand, this body is very heterogeneous and as stated previously, it was constructed by countries such as Japan, Canada, etc., but its members are organizations such as the European Commission or the Organization of Islamic Conference. In sum, in order to locate the sovereign or sovereigns within this organization, we would need to perform a deep and complex analysis. Therefore, this path of looking for the sovereign would probably never yield clear results.

What about the court system in Bosnia and Herzegovina? Can the true sovereign of Bosnia be found in the legal institutions? The first chapter of this work described the country's courts in more detail. Among other things, we highlighted the position of the Constitutional Court. It was taken as an example because this institution is *de facto* the highest legal instance within the country. Its composition is quite interesting. There are nine members of the Grand Chamber and even though the principle of trinity is highly prevalent in most of the country's institutions, such as the National Parliament and Presidency, this is not the case with the Constitutional Court. There are representatives of all three constitutive peoples, two of each, but most power is in the hands of three judges who are not even Bosnian citizens. They are selected by the President of the European Court of Human Rights. Therefore, in the highest court of Bosnia, the most powerful and the most represented subject, as per the number of judges, is the international community or, more preciously, the European Community. They have the strength, they produce and it seems they are the highest instance of legal power. However, are they Bosnia's true sovereigns?

This situation creates various paradoxes, besides the obvious one that non-citizens have vast power in deciding on the rights of people of a country. If the goal was, as in the case of the High Representative, to grant power to the people who are not citizens of Bosnia, one could ask why it is limited only to citizens of Europe. Looking upon this situation hypothetically, since Bosnia signed the European Convention on Human Rights and through this document it has judges in

the European Court of Human Rights that could potentially mean that a Bosnian can be elected to be president of this institution. According to the Dayton Agreement the President of ECHR elects three judges of Constitutional Court of Bosnia and Herzegovina. In that case a Bosnian judge would have to select three non-Bosnian citizens to be judges of the Constitutional Court of Bosnia. Maybe at least in this absurd, but not impossible situation, the Bosnian citizen would finally have the upper hand in the selections of country's highest jurists?

Lastly, since the ECHR is supra-national, it seems that it is the last instance for Bosnian citizens to which they can complain about the treatment they received from their national institutions. Besides that, as we showed in the first chapter, in some cases the highest court in Bosnia doesn't find itself capable on judging on the matter since there isn't still a clear position regarding the supremacy between some national and international legal documents. Does that mean that the ECHR is the final instance, force and sovereign of Bosnia and Herzegovina? In theory, this could be the answer if one would be led by the idea of sovereign as the force, but on the other hand, following the same idea, this court could be dismissed as sovereign, because even though it made decisions in both cases presented in this work, that judging didn't change anything in reality.

Throughout all these examples there is a common motif – one way or another, the citizens of Bosnia and Herzegovina were forced out of the positions of sovereign power. A counterpart exists even in those cases where the legal framework was constructed to enable the participation of citizens. For example, the legal documents that created the Constitution and laws of Bosnia and Herzegovina imply a firm position of trinity. This principle is applied in order that three constitutive peoples are equally represented in all institutions of national character. All ethnicities should have the same freedoms and obligations to the state. This way of reasoning seems fair. However, it appears to be fair only upon superficial inspection or better to say in theory. Mathematically, this premise implies that that Bosniaks, Croats and Serbs constitute 33.3% of the population, respectively, which is certainly not the case[109]. This means that the

[109] According to unofficial data from the 2013 census, in Bosnia and Herzegovina there is 54% of Bosniaks, 32.5% Serbs, 11.5% Croats and 2% of others. Data is still unofficial since all three ethnicities took issue with the manner in which the surveys were conducted. However we could claim that these numbers certainly represent the approximate ratio.

method of equal representation is not quite just. Also, this principle is influencing the efficiency of Bosnian institutions. In order to be equal, to have the same amount of power every ethnicity has veto power over the decision of the remaining two, both in executive and legislature powers. This has only produced low efficiency in those institutions. For example, as stated previously, most of the laws are confirmed through the institution of High Representative because representatives of the Constituent people are (ab)using their veto power and blocking the affirmation of laws and other legal decisions. The fact that vast majority of Bosnia and Herzegovina's laws and bylaws are confirmed through High Representative and not country's legislative is making the state even more dependent of influence of international community.

Furthermore, the cases presented in the first chapter of this work demonstrated two additional problems that could still emerge. Mr. Pilav was born as a member of one of constitutive peoples, which is the first condition required for potential Presidency candidates, however his issue was his place of birth and current location of living. Since he is a Bosniak in a majority Serbian ethnicity, Bosnian institutions and courts claimed that it was not possible for him to announce candidacy for the presidential elections. This means that the Constitutions itself is promoting separation of the ethnicities. Also, it seems as the concept of Bosnian citizen is highly unwelcomed by legal frame because legal provisions are created in that way that they presuppose that every citizen of Bosnian who would come to some position of power would only work in the interest of his or her own ethnicity. In the second case Mr. Sejdic and Mr. Finci have been "disqualified" from the race for a position in the House of Peoples and the Presidency of Bosnia and Herzegovina on the grounds of their ethnicity. They are both members of the "Others", the non-constitutive people. In other words, Mr. Sejdic is of Roma origin, whereas Mr. Finci is Jewish. Even though they were both politically active and representing their country in the international political sphere, they were deemed ineligible. They were quite literally marked as the *others* and stripped off their full citizens' rights as if they were foreign nationals.

Here we can notice one of the democratic paradoxes we mentioned earlier, inclusion-exclusion. While constructing the Bosnian legal system in order to include all ethnic groups, in some situations everybody else was excluded. This legal system prevents a group of people who were born in the country to exercise their full citizen rights. While attempting to create equality, it failed to protect freedom. Furthermore, even though it was inspired by the idea of unity and

brotherhood, it condemned some citizens to be the *others* in a country they were born in, which they worked for and whose interests they represented for quite some time within the international political sphere. Also, there is the case of Mrs. Zornic which was just mentioned, but wasn't analyzed in more detail. She was denied her passive voting right upon her decision to define herself as Bosnian. Even though this is both culturally accepted and the official name for all citizens of the country, the national courts decided not to let her run for Presidency. All of these court decisions were completely legitimate. The judges' rulings were conducted according to the existing legal framework and the previous praxis, which was also confirmed in front of the European Court for Human Rights. Hence, one has to raise the question – how is it that the citizens of a country are stripped off their basic rights and that is completely in accordance with the legal system?

The first answer lies within the idea of heritage. As stated previously, Bosnia and Herzegovina unified many differences regarding culture, religion and ethnicity for a long period of time. Throughout history, it was under the control of various other countries, such as the Austro-Hungarian or Ottoman Empire. Partially, it received independence through being a member state of Yugoslavia. Within this system, Bosnian laws were created as per the state's position in the federation. The idea of three parties being equally represented emerged inside these conditions. The country's features at that moment and its position were far from being independent but the state was stable. However, one could claim that this system wasn't of any help when tension between ethnicities rose and finally developed into conflict.

Secondly, we should reiterate that the current constitution and legal framework of Bosnia and Herzegovina were created within the Dayton Peace Agreement. Therefore, it is marked by many legal mechanisms constructed in order to produce, maintain and protect peace in the country. Even though this motivation was quite logical taking into consideration all the facts surrounding the approving of this Constitution, it also caused quite negative consequences. As presented earlier, this principle of "maintaining peace no matter what" was the main argument of the Bosnian Court judges when they were ruling in the cases of Mr. Pilav and Mr. Sejdic and Finci[110]. One cannot judge them on making such decisions. They were simply following the

[110] For example, in the ruling on the case of Mr. Pilav, the Constitutional Court stated that: "The limitation in this case has justification due to the specific internal organization of Bosnia and Herzegovina constituted by the Dayton

provisions of the Constitution and not only this document, but all the others connected to it, all the annexes of the Dayton Agreement and the laws drafted later to accompany them. It is not just that the said idea of trinity or territorial representation is in question, the problem is that the idea of maintaining peace in the first place, no matter what, was affirmed yet again. For example, the institution of the High Representative didn't have all the powers it has today when it was created in 1995 by the Dayton Agreement. As we stated earlier, its jurisdiction was widened during the 1997 meeting of the Peace Implementation Council in Bonn. This is important because it proves that not only Bosnia, but also the international community, which has the *de facto* a lot of power in this country, in one way or another, are finding the ways to implement the same rules, the same laws again and again without taking into consideration the current context. This is why Derrida's views are quite important in this context, especially those regarding movement and logocentrisms. Problems of democracy are more or less the same since the first critics of this system told their opinion. The solutions for these problems were being found within the existing and present spheres of thinking and therefore, they could never imagine something which is outside of existing way of thinking and democracy was, on the other hand, always changing.

The problems which Bosnia and Herzegovina is facing are similar to present in many other democracies. However, in this case, they are pushed to the extreme, which makes them quite visible. Equality is creating inequality, which is in complete contradiction. Freedom is present, but only to a certain level. Legal inclusive mechanisms are not quite inclusive as they are supposed to be and they produce a lot of exclusion. There isn't the necessary balance within Bosnia and Herzegovina. Democracy is being self-destructive. While there are so many sovereigns, none is a citizen of Bosnia, but they have all the power without leaving a gap between them and democracy. All of this is covered by the notion of heritage, by the need to reiterate the obligation to preserve peace. The end result is a country full of paradoxes. A sovereign country with foreign judges within the Constitutional Court defending constitutional ideas, because it seems that Bosnian people are not to be trusted on this issue. It is also a country where the citizens' will and their voting decision can be overthrown by an institution created and led by others who cannot be citizens of Bosnia and Herzegovina under any circumstances.

Agreement, whose final goal was to establish peace and dialog between the conflicted parties, taking into account that the legal notion mentioned in this case was included in the Constitution with awareness and purpose so the members of the Presidency come from Bosniak, Croatian and Serbian people."

Finally, Bosnia is a democracy which tends to equally include different groups and at the same time, not all citizens have passive voting rights. Does this country have a future?

Perhaps. Perhaps, in the sense Derrida interpreted this word. There is still future to come in this country. *Democracy to come* is always im(possible), even in Bosnia and Herzegovina. Maybe there should be deconstruction. Some firm positions and logocentrisms should be re-imagined in order to enable Bosnia to be open for *democracy to come*, but also for the sake of all other democracies facing these problems that have become universal. Possibly, the European Court for Human Rights perceived this need for change when they ruled twice against Bosnia and supported its citizens fighting for their rights. In both cases, their argument opposed those made by the Bosnian judges. The ECHR claims that it's high time to dethrone the supreme notion of preserving peace, to negate this heritage and rethink the legal situation in Bosnia and Herzegovina within the current concept and reality[111]. However, this new concept also distanced Bosnian citizens further away from the positions of power in their own country, so certain questions remain. Can Bosnian people reach sovereignty? What if the only way for this to happen is an intervention of foreign powers? Would that create a vicious circle in which citizens would lose their power again or could it be the only way out of the current chaos?

[111] In explaining their judgment, the Court concludes that "…the applicants' continued ineligibility to stand for election to the House of Peoples of Bosnia and Herzegovina lacks an objective and reasonable justification…" This "reasonable justification" referred to the fact that the Constitutional Court of Bosnia and Herzegovina made a decision based upon the principle of maintaining peace.

Conclusions

Maybe one of the most prominent ruptures within 20th century philosophy was that of continental and analytical approaches. One of the main participants in this dispute was Derrida, or, more precisely, his dispute with John Searle. Both of them provided a critical analysis of J. L. Austin's work *How to Do Things with Words*. Derrida wrote an essay "Signature, Event, Context" addressing both positive and negative aspects of this work and also offering his own ideas regarding language and its position between writing and speech. The dispute emerged upon Searle's publishing of "Reiterating the Differences: A Reply to Derrida" where he sharply criticized Derrida's reading of the book. Searle analyzed Derrida's ideas and disputed them in several steps. However, Searle also condemned his work in general. Derrida has a distressing penchant for saying things that are obviously false (Searle, 1977, p. 203). Even though it seems extreme, this sentence is probably the most relevant example of how Derrida's work has been disputed so far. Some critics focused on the notion of deconstruction. They criticized Derrida for failing to define this notion. What is deconstruction? This is the question Derrida has been answering over and over again. However, it seems that his answers have never been definitive, the same as essence of deconstruction couldn't be defined.

As mentioned earlier, deconstruction does not constitute a method or technique. Maybe it is best to refer to it as a process or a manner of a deconstructive reading of a text. Even though the beginnings of deconstruction were only related to the sphere of communication, over time this notion grew. Since Derrida primarily deconstructed texts of legal and political nature, such as the Declaration of Independence, the products of this process were developed in these spheres. Additionally, Derrida devised certain concepts, such as *Democracy to Come*, in order to reach the full circle of questioning toward giving possible ideas for resolving problems. However, it seems that his work hasn't been any less disputed. This fact has provided a main basis for discussion for this research as well. Therefore, in order to question this hypothesis regarding the

application of Derrida's thoughts as a means of analyzing and answering complex political and legal issues, they had to be examined and applied. Therefore, this work is divided in three parts involving both theoretical and practical aspects, which are examined individually in certain parts, but are in general converging and communicating with each other throughout the entire work.

First of all, in order for premises to be questioned, we presented practical problems – issues which are relevant, complex and contemporary. Hence, the analyzed court cases meet all the required conditions. If they would be examined outside the context of their true legal framework, they would probably seem even more absurd than they actually are, practically impossible. The reason for including all the resulting, or in the context of this work, preceding information, before presenting cases was to show not only how these situations became possible, but also what made them conceivable. Additionally, going through the historical background and the moment of creating the current legal framework, provided another aspect to this research. This is the element which refers to the general provisions of this situation and can be located in many other contexts, which makes them more general and thereby more valuable. Hence, the problems faced by Mr. Pilav, Sejdic and Finci, citizens of Bosnia and Herzegovina, reflect not only the particular situation in their country, but also certain more universal problems regarding modern day's democracies and their legal bases. Their complexity made it possible to question different aspects, such as sovereignty, equality, freedom, divisibility of democracy etc. In order to provide an answer for these issues, this research utilized Derrida's theory.

In the second chapter, the main idea was to go deeper into Derrida's thoughts regarding the notion of the sovereign. This work implemented deliberation upon different features of the sovereign and later on regarding its relation with other concepts. The concept of the sovereign was selected for several reasons. The ideas surrounding it are an important parameter of understanding Derrida's way of thinking. They also provide a solid base for understanding Derrida's more complex concepts. Finally, this concept gave rise to critical background making it suitable for application to Bosnian issues. In short, we demonstrated that the sovereign has force, produces and gives legitimacy to his own actions. Also, we highlighted the paradox of the indivisibility of sovereignty. Therefore, it seems that it would at least be possible to locate the sovereign in the reality of Bosnia and Herzegovina. I singled out several candidates, such as the institution of High Representative, judges of the Constitutional Court, various state and

international groups creating the legal framework etc. However, it seems that for each one of them there are reasons for and against. Therefore, it isn't possible to determine the true sovereign with certainty. Nevertheless, the analysis produced some indications. This work has deduced that the position of sovereign power, divided among all subjects of the Bosnian situation or owned by one of them, regardless of the point of view, is distant from the citizens of Bosnia and Herzegovina. This is the true problem and the paradox of Bosnian democracy. Even though we have been able to reach a certain diagnosis of the situation and pinpoint the main issues of Bosnian democracy, the problems still persists. This analysis has merely raised more questions. Hence, in the third chapter we focused on democracy and its aspects.

The ultimate part of this work is divided into two sections. The first one highlights the autoimmunity of democracy and later on, Derrida's idea of *différance, democracy to come* and their consequences. It is organized with the idea of starting with Derrida's analysis of the problems of democracy and ending with some potential solutions within his theoretical scope. Analysis based in his ideas proved to be quite helpful, because it pointed out certain paradoxes present in democracies in general and specifically in Bosnia and Herzegovina. Also, through implications presented in the beginning of the chapter, we have been able to understand Derrida's thoughts on *différance* and *democracy to come* with more clarity. Through this work we can concluded that these ideas have both theoretical and practical importance. The first one referred to Derrida's critic of logocentrisms of temporality and spatiality, as well as more practical aspects, such as democratic paradoxes of freedom-equality and inclusion-exclusion. More practical aspects emerged upon the analysis of Bosnian issues through these perspectives. We highlighted several problematic elements in the concept of Bosnia and Herzegovina, which demonstrated the absurdity of the situation in which citizens had found themselves.

Furthermore, we highlighted the problem of heritage. It is mostly connected with the creation and application of law, but it is also influencing citizens' life through these provisions. The presented cases have unambiguously demonstrated how this path of reasoning could be dangerous. En sum, through this work I made visible democracy's weakness, as seen by Derrida, in the cases which have been chosen to demonstrate the main legal and political issues in Bosnia and Herzegovina. Therefore, we resorted to Derrida's theory in our attempts to devise a solution.

The concept of *democracy to come* faced these challenges with its basic premises. Ergo, in order for *democracy to come* in Bosnia and Herzegovina, there have to be some changes which would imply a shift from the theoretical towards the practical. The ideas implied by this concept refer to the problems which detected throughout this work. This notion proves that the idea of sovereignty doesn't necessarily have to be connected with one sovereign, and that there is a need to question it, which can only bring about benefits. Also, it has dealt with the problems of exclusion and inequality by rethinking them and making them more flexible. Finally, this concept tackled the element of heritage present in the legal framework of the country, which is creating a democratic paradox in Bosnia and Herzegovina. As stated earlier, democracy has to be open to the future, *the future to come*. Moreover, it has to be in constant motion and needs to be re-imagined. More or less, this is the same conclusion the European Court for Human Rights has come to and provided as an official recommendation for the cases of Mr. Pilav, Sejdic and Finci that Bosnia and Herzegovina maybe should not totally discard, but should perhaps consider changing its current constitutional and legal provisions regarding the elections of representatives. The only way for democracy to come in Bosnia and Herzegovina is to expose it to deconstruction. The flexibility of this approach can make possible that the true interests of Bosnian people be respected when the decisions are made. Also, if we think about the future of democracy of Bosnia and Herzegovina as *Democracy to Come* in this way it will be possible to fight all existing logocentrisms which are producing all the paradoxical situations which were mentioned throughout this work. This will guarantee that the Bosnian society doesn't stop its movement and re-questioning as only way the preservation of democracy is possible.

Even though we haven't given more space to critics of Derrida's work, as we focused mostly on proving its applicability in spheres outside of literature analyze, we should be aware that some of their positions have valuable elements. Of course we are not going to agree with Rorty's position that Derrida is "world disclosing ironist" and claim that his work doesn't have true political or practical importance. However, we have to be aware that even though not defining nature of Derrida's ideas are quite useful in some moments in the other this can be a problem because we cannot call upon them. Also, we should be aware that within deconstructive approach there are different concepts of democracies which are based on Derridian parameters but emerged in different ways. Maybe some of them can provide more help when Derrida's concepts fail. For example, Chantal Mouffe developed Agonistic model

of democracy. It is based on deconstruction, in opposition with deliberative democracy and points out that there is no possibility of final and rational solution. On the other hand, it focuses on questions of power and antagonisms. For Mouffe power is product of social relations exerted through praxis and language games. She implies that any social objectivity is ultimately political and that it has to show the traces of exclusion, which governs its constitution (Mouffe, 2000, 13-14). She highlights hegemonistic nature of political conflict which fundamentally gives context to decision-making power which is counted as legitimate. Agonistic model doesn't try to eliminate power, hereupon that power is inevitable and constitutive part of everyone's identity. Goal of this kind of politics is to mobilize power in democratic way, to enable democratic voices to enter combat for hegemony.

Also, it is interesting to mention those kinds of situations where even critical approaches can be used as a complementary tool of Derridian ways. Derrida's deconstructive approach on the questions of constitutional democracy disputes Habermas's reconstructive theory which is based in reconciliation of democracy and constitutionalism. Derrida has developed term *différance* as a neologism that is the antithesis of logocentrism and on the other hand Habermas puts subjective rights into objective principles embracing the totality of the legal order. However, some of the authors such as Benvindo in his *On the Limits of Constitutional Adjudication* inspired by Milovic's *Comunidade da Diferença* see there is possibility of dialogue between theories of Habermas and Derrida. In this situation we can claim that once again not defining character and flexibility of Derrida's theory are at the same time its weakness, but also its strongest suit.

Finally, this character of Derrida's approach made it possible to analyze unique context of Bosnia and Herzegovina. In all its extremes Bosnia gives us clearer insights into all those negative aspects of modern democracies. On the other hand, capabilities of Derrida's approach to replay to issues which emerge in complex and complicated Bosnian context show at the same time its strength to be used in any other situation where democracy is in the focus.

References

Agamben, Giorgio. (1995) *Homo Sacer Sovereign Power and Bare Life.* Giulio Einaudi editore s.p.a.

Agamben, Giorgio. (2005) *State of Exception*. The University of Chicago Press Originally published as *Stato di eccezione,* © 2003 Bollati Boringhieri editore s.r.l., Torino.

Banning, Tim. (2014) *The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment*. in Goettingen Journal of International Law 6

Borradori, Giovanna. (2003) *Philosophy in a time of terror – Dialogues with Jurgen Habermas and Jacques Derrida.* The University of Chicago Press, Chicago.

Benvindo, Juliano Zaiden. (2010) *On the Limits of Constitutional Adjudication Deconstructing Balancing and Judicial Activism.* Springer-Verlag Berlin Heidelberg 2010

Chantal Mouffe, The return of the political, New York, 1997.

Critchley, Simon. (1999) *The Ethics of Deconstruction: Derrida and Levinas.* Edinburgh University Press

Derrida, Jacques. (1992a) *Force of Law: The "Mystical Foundation of Authority"*. In: Cornell, D., Rosenfeld, M., Carlson Gray, D. ed. *Deconstruction and Possibility of Justice.* Routledge, Chapman and Hall, Inc, pp. 3–68.

Derrida, Jacques. (1992b) *Given Time Counterfeit Money.* The University of Chicago Press.

Derrida, Jacques. (2002) *Negotiations and Declaration of Independence*. In Negotiations Interventions and Interviews, 1971–2001. Ed. Elizabeth Rottenberg. Stanford University Press Stanford, California.

Derrida, Jacques. (2000) *Of Hospitality. Stanford University Press, Stanford, California.*

Derrida, Jacques. (2005) *Rogues: Two Essays on Reason.* Stanford University, Press Stanford, California.

Derrida, Jacques. (1994) *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*. TJ International Ltd, Padstow, Cornwall.

Derrida, Jacques. (2009) *The Beast and the Sovereign Volume I*. The University of Chicago Press.

Derrida, Jacques. (2011) *The Beast and the Sovereign Volume II.* The University of Chicago Press.

Derrida, Jacques. (2005b) *The Politics of Friendship*. Verso

Gavrić Saša, Banović Damir, Barreiro Marina. (2013) *The Political System of Bosnia and Herzegovina: Institutions – Actors – Processes.* Sarajevski Otvoreni Centar.

Gaeta, Paola. (1996) *The Dayton Agreements and International Law*. European Journal of International Law Issue Vol. 7 No. 2.

Lasse, Thomassen. (2006*) A Bizarre, Even Opaque Practice: Habermas on Constitutionalism and Democracy.* Edinburgh press.

Nohlen, Dieter, Stover, Philip. (2010) *Elections in Europe: A Data Handbook*. Baden-Baden: Nomos.

Orwell, George. (1946) *Animal Farm.* The University of Adelaide Library.

Sahadžič, Maja. (2009) *Priroda političkog sistema u Bosni i Hercegovini.* In *Država, politika i društvou Bosni i Hercegovini Analiza postdejtonskog političkog sistema.* Ed. Damir Banović and Saša Gavrić. Translation mine. University Press, Magistrat Sarajevo.

Saussure, Ferdinand de. (1959) *Course in General Linguistic.* The Philosophical Library Inc. New York

Schmitt, Carl. (1985) *Political Theology*. MIT Press, Cambridge, Massachusetts, and London, England

Schmitt, Carl. (2007) *Concept of Political.* The University of Chicago Press

Searle, John. (1977) *Reiterating the Differences: A Reply to Derrida*. In Glyph Vol. 1 pp. 198–208. Baltimore: Johns Hopkins University Press.

Shabafrouz, Miriam. (2010) *Oil and the Eruption of the Algerian Civil War: A Context-sensitive Analysis of the Ambivalent Impact of Resource Abundance.* GIGA German Institute of Global and Area Studies, Leibniz, Institut für Globale und Regionale Studien. Working paper 118/2010 Hamburg

Legal Documents

Constitution of the Socialist Federal Republic of Yugoslavia. (1963) Belgrade.

Constitution of the Socialist Federal Republic of Yugoslavia. (1963) Belgrade.

Constitution of the Federation of Bosnia and Herzegovina. (1994) Sarajevo.

Constitution of Bosnia and Herzegovina. (1995) Sarajevo.

Constitution of Republika Srpska. (1992) Banja Luka.

Dayton Peace Agreement. (1995) Ohio.

Pilav v. Bosnia and Herzegovina. (2016) ECHR 198

Sejdic and Finci v. Bosnia and Herzegovina. (2006) ECHR 27996 and 34836

UN Security Council. (1995). *Resolution 1022:* O*n suspension of measures imposed by or reaffirmed in Security Council resolutions related to the situation in the former Yugoslavia*