The Application of International and EU Law in Bosnia and Herzegovina

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1 Introduction

The application of international law in national legal systems is a well-established question in legal literature.[1] Both the globalisation and internationalisation of legal systems have given rise to questions that need to be answered legally, by laws and jurisprudence, and in legal literature.[2] The question of the enforcement of inter- or supranational obligations is directly linked to this application.[3] The goal of Bosnia and Herzegovina (BiH) to become a member of the EU has raised the question of the application of supranational law (EU law) in BiH, both in terms of preparing for membership and the country's status after entering the EU.[4] The Europeanisation of the national constitutions is already taking place.[5] For BiH, this is evident in the signing of the SAA and confirmed by the jurisprudence and literature oriented towards EU law. Formally, the EU is not a state and the treaties are not a constitution.[6] Nevertheless, the European treaties deal with constitutional questions and provide answers in a legally binding way.[7] At the same time, international law

[1] Denza (2006), p. 423; Keller (2003); Menzel (2011); Amrhein-Hofman (2003), p. 146; Pfeffer (2009).

[2] Emmerich-Fritsche (2007), pp. 41–50, 62–89; Payandeh (2010).

[3] Frowein (1987a), pp. 54–68; Meron (2008), pp. 247–301; Geiger (2010), Art. 4 EUV recital 37–48; Kaczorowska (2011), pp. 385–421, 924–960.

[4] Chalmers et al. (2010), p. 184; Menzel (2011), p. 352.

[5] Frowein (1987b), pp. 469–485.

[6] Kaczorowska (2011), pp. 198–234; Ullerich (2011), pp. 52, 69, 173; Streinz (2007), p. 395.

[7] Frowein (1987c), pp. 451–468; Bieber (1991), pp. 393–414; Pernice (2000), pp. 205–232.

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has taken on the characteristics of constitutional law.[8] Hence, we have to clarify the relationships between international, supranational and constitutional competences, particularly the competences of the courts, the ECtHR (European Court of Human Rights), the ECJ (European Court of Justice) and national constitutional courts.[9] The need for such clarification is also based on the principle of the effectiveness of legal protection as an integral part of the principle of the rule of law.[10] The complexity of jurisdiction at the multi-system level can be described as 'conflicts among courts of different levels in networking legal systems'.[11] Other Member States of the EU and their constitutional courts likewise struggle with the hierarchy of norms and clarification of competences, both in terms of EU law[12] and international law.[13] It is remarkable that the *Solange* decision[14] of the German Constitutional Court of 1974–1986 is used as a model both in jurisprudence and legislation.[15] The key idea here is the 'model of co-operation' (*Kooperationsverhältnis*) instead of extremely divided competences creating a strict hierarchy among different legal systems.[16] Articles 52 and 53 of the Charter of Fundamental Rights of the EU guarantee a minimum standard of protection and acknowledge the guarantees provided by the ECHR.[17] The Charter of Fundamental Rights of the EU aims to achieve coherence in the protection of human rights at the different national, supra- and international levels.[18] To this end, the ECJ and ECtHR respect each other's decisions to ensure the greatest possible coherence of human rights standards by respecting other courts that are responsible for the protection of human rights.[19]

The application of international law is of particular interest for BiH, as the Constitution itself is part of an international agreement: Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina (The Dayton Peace Agreement or DPA).[20] The Constitution entered into force in December 1995 with

[8] Kleinlein (2011); Klabbers et al. (2009); Geiger (2010), Art. 6 EUV recital 19–22.

[9] Ekardt and Lessmann (2006), pp. 381 f.; Nunner (2009); Sauer (2008), in particular pp. 261–344; Stender (2004).

[10] Munding (2010).

[11] Sauer (2008).

[12] Kaczorowska (2011), pp. 296–364; Geiger (2010), Art. 4 EUV recital 29–35.

[13] Frowein (1987d), pp. 407–431.

[14] Bleckmann (2011), pp. 149–219; Geiger (2010), Art. 4 EUV recital 29, 34, 35.

[15] Geiger (2010), Art. 4 EUV recital 29, 34, 35; Nunner (2009), pp. 159–164.

[16] Nunner (2009), pp. 50–408.

[17] Borowsky (2011), pp. 628–641, 667–715; Jarras (2010), Art. 52 recital 23–25, 34, 60–65, Art. 53; Stender (2004), pp. 82–85.

[18] Schneiders (2009), pp. 145–265; Brummund (2010).

[19] Stender (2004), pp. 69–85; Jarras (2010), Art. 52 recital 65; Nunner (2009), pp. 227–242, 249–258; Borowsky (2011), pp. 667–704.

[20] The General Framework Agreement for Peace in Bosnia and Herzegovina was signed between the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia on 14 December 1995.

the signing of the DPA, which was never ratified by the Parliament of BiH. The Constitution was written in English without an official translation into the official languages of BiH (Bosnian, Croatian and Serbian). Therefore, only unofficial translations are in use, which leads to different understandings of certain provisions or terms.[21] BiH is characterised by a complex state structure, as defined in the Constitution, with two entities (the Federation of BiH and Republika Srpska) and the District of Brčko. Republika Srpska is more centralised while the Federation of BiH is more decentralised and consists of ten cantons. Hence, altogether 13 constitutions exist within BiH: one for each entity and each canton in addition to the constitution at the state level. Due to this complex state structure, it is not easy to provide a comprehensive overview of the application of international legal sources in BiH.

The work in this book raises various crucial questions yet to be solved, such as the incorporation of international legal sources into the national legal system, the question of their direct effect, the position of international agreements within the national hierarchy of laws, which level of authority is competent for adopting legislative measures on the basis of the Stabilisation and Association Agreement (SAA), the need for a supreme court at the state level to become a member of the EU, etc. All these questions are classical issues of international and EU law. The additional complexity is caused by the constitutional structure of BiH itself. Nevertheless, the Constitution of BiH is open to development, and the goal of becoming a full member of the EU has advanced the application of international legal sources in BiH. The Constitutional Court of BiH (CC) does not always provide consistent conclusions or argumentation patterns, but it deals with crucial questions concerning the application of international law in the national legal systems. At the very least, the jurisprudence of the CC and the ECtHR has encouraged legal literature to become involved in these discussions.

2 Monistic and Dualistic Approaches in the Legal System of BiH

The incorporation of international law in national law is characterised by the two classical theories of monism and dualism.[22] In the theory of monism, only a single legal system of international and national law exists, with international law at the top of the hierarchy.[23] A transformation into the national legal system is not required and international law has precedence. From the dualistic perspective, international and national law represent two separate levels. Hence, an act

[21] Trnka (2006), p. 41.

[22] Amrhein-Hofman (2003); Emmerich-Fritsche (2007), pp. 90–103.

[23] Pfeffer (2009), pp. 85, 90; Amrhein-Hofman (2003), pp. 146–295.

transforming international law into the national legal system is needed.[24] The practical impact of these theories can be put aside, in that moderate dualistic and monistic approaches give rise to the same results.[25] From both perspectives, the effect within the national legal system has to be clarified. The Constitution of BiH does not explicitly provide for a monistic or dualistic approach towards international law. The non-ratification of the DPA formally speaks in favour of a monistic method.[26] However, ratification is only one indicator. With regard to other international legal sources, the conclusion depends on the interpretation of several provisions of the Constitution.

The Constitution of BiH explicitly qualifies the incorporation of international legal sources within the national legal system in Article III/3(b) with regard to general principles: 'general legal principles are an integral part of the legal system of Bosnia and Herzegovina and its entities'. Besides general principles, the Constitution explicitly mentions international agreements only with reference to human rights. All other international agreements need to be interpreted. According to Article II/2 of the Constitution of BiH, the rights and freedoms foreseen in the ECHR and its protocols have to be applied directly. These legal sources overrule other laws. Pursuant to Article II/4 of the Constitution of BiH, the rights and freedoms foreseen in the international agreements in Annex I of the Constitution are guaranteed to all people in BiH without discrimination. The title of Annex I is Additional Human Rights Agreements to be applied in Bosnia and Herzegovina. Articles II and III seem to follow a monistic approach of a unified legal system consisting of international and national law which apply directly within the national legal system.[27]

The question is whether the Constitution of BiH allows a general decision in favour of the monistic theory or if *argumentum e contrario* it is reasonable that the legislator has limited this understanding to the legal sources explicitly named. Thus, all other provisions are dedicated to the dualistic theory. An analogous application to all other legal sources could be explained by Article VI/3(c) of the Constitution of BiH. This provision enables the CC of BiH to judge if a 'law which is the basis for a decision is in line with the constitution, the ECHR and its protocols or with the laws of Bosnia and Herzegovina or with a general rule of public international law crucial for the decision of the court.'

The question arises as to whether the general rules of public international law, Article VI/3(c), and the general principles of international law, Article III/3(b), can be treated equally. On the one hand, the question is whether international law and public international law both comprise only public law, and on the other hand, whether the rules and principles are comparable in terms of their nature.

[24] Amrhein-Hofman (2003), pp. 80–144; Pfeffer (2009), p. 82.

[25] Denza (2006), p. 429;Ademović et al. (2012), p. 37; Stein et al. (2012), p. 58.

[26] Ademović et al. (2012), p. 39.

[27] Pobrić (2000), p. 20.

The dualistic system is dealt with in Article IV/4(d) of the Constitution of BiH, which requires ratification by the Parliamentary Assembly, whereupon the Presidency of Bosnia and Herzegovina, upon obtaining the formal consent of the BiH Parliamentary Assembly, decides on the ratification of an international treaty (Article V/3(d)). Once a decision is made, it is signed by the Presidency of BiH and published in the Official Gazette of BiH (the section on international treaties). This understanding is supported by Article 17 of the Procedure for the Conclusion and Execution of International Treaties Act.[28] According to this, the Presidency needs the ratification of the Parliamentary Assembly before acting.[29] Pursuant to Article 22 of the aforementioned law, an agreement comes into full force and effect if it complies with the provisions of the agreement, the law and the ratification.

Jointly and severally, the Constitution of BiH is based on a combination of monistic and dualistic approaches. The monistic approach relates to legal sources of international law with direct effect specified in the Constitution, while other legal sources of international law are covered by a moderate dualistic understanding.[30]

3 International Law in the Hierarchy of Laws in BiH

3.1 The ECHR and Its Protocols as Part of the DPA

A remarkable internationalisation of human rights has taken place and has given rise to questions such as direct effect and supremacy in a world of multilevel legal systems.[31] The protection of human rights has been implemented and intensified by legislation and jurisprudence at all these levels, with the consequence of an overlapping of legal protection. Meanwhile, we can speak about universal rights[32] and the individual being partly acknowledged as a subject of international law.[33] Without any doubt this triple dimension of protection (national, supra- and international) is positive, although we have to clarify the questions that arise. The application of the ECHR and its protocols in national legal systems is not answered in the ECHR itself, which gives rise to the need for interpretation.[34] The Member States of the EU and their constitutional courts try to give answers to this question.[35] One of the guides here is the German Constitutional Court with its

[28] Official Gazette BiH, No. 29/2000.

[29] The decision on the giving of consent by the Parliamentary Assembly for the signing of the SAA is published in OG BiH, No. 11/08, international agreements supplement.

[30] Degan (2000), p. 15.

[31] Schilling (2010), pp. 2–15; Steiner et al. (2007), pp. 3–456; Addo (2010), pp. 83–152.

[32] Kälin and Künzli (2005), pp. 22–35; Schilling (2010), p. 16.

[33] Steiner et al. (2007), pp. 475–668; Kälin and Künzli (2005), pp. 17–22.

[34] Pfeffer (2009), p. 147; Steiner (2006), p. 753; Addo (2010), in particular pp. 287–342.

[35] Borowsky (2011), pp. 628–641, 667–715; Frowein (1987d), pp. 407–431.

well-known *Solange* decision and implementation of the co-operation model (*Kooperationsverhältnis*). Such innovative decisions have supported the development of human rights protection and guarantees. Legislators have now acknowledged this with multilevel guarantees, as provided for in Article 6 TEU.[36]

The Constitution of BiH explicitly gives direct effect to the ECHR and its protocols. Article VI/3(c) enables the CC to examine if a law is in line with the general rules of international law, which indicates the primacy of the general rules of international law over national law. This leads to the conclusion of the precedence of international law, given the Constitution declares the direct effect of international law. According to Article II/2 of the Constitution of BiH: '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 . . . and have priority over all other law.' International conventions listed in Annex I to the Constitution of BiH that provide protection to human rights are considered to be at constitutional level due to their formal inclusion in the Constitution.[37] However, the wording of Article II/2, 'whereby the rights and freedoms set forth in the ECHR shall have priority over all other law', does not clarify if the ECHR has priority over the Constitution itself. Some authors argue in favour of the supremacy of the ECHR over the Constitution.[38]

This question was the issue in Case No. U 5/04 before the CC of BiH. The Court had to decide if it was competent to judge on the compatibility of the Constitution with the ECHR. According to Article II/2 of the Constitution of BiH, the ECHR is directly applicable.[39] However, the Court restricted its competence to the interpretation of the Constitution and not an examination of the ECHR itself. In an *obiter dictum*, it concluded that the ECHR cannot have priority over the Constitution of BiH, because it entered into force by means of the Constitution itself. This *obiter dictum* creates a formal hierarchy limiting the power of the Parliament. The Parliament has the legitimacy to change the Constitution to declare an integration of international law in national legislation.

The question of the relationship between the ECHR and the Constitution is of great importance for BiH, especially in the light of the recent *Sejdić and Finci* judgment of the ECtHR.[40] The conclusion of this decision is that the provisions of the Constitution of BiH violate Article 14 ECHR together with Article 3 Protocol No. 1, as well as Article 1 Protocol No. 12, because of the ineligibility of the applicants to stand for election to the House of Peoples and the Presidency of BiH due to their Roma and Jewish origins. The compliance of electoral rights with this

[36] Schneiders (2009); Geiger (2010), Art. 6 EUV; Kaczorowska (2011), pp. 235–255; Munding (2010).

[37] Ademović et al. (2012), p. 38.

[38] Steiner and Ademović (2010), p. 154, with further references.

[39] Dougan (2007), p. 934.

[40] European Court of Human Rights, 22.12.2009, Applications Nos. 27996/06 and 34836/06 (Sejdić and Finci); Kulenović et al. (2010), p. 18.

decision is a *condition sine qua non* required by the EU for the SAA[41] with BiH to enter into full force and effect. This precondition set by the EU requires amendments to the Constitution which are difficult to achieve in legislation. The CC could have supported the legislative process by declaring the supremacy of the ECHR. Therefore, the supremacy of the ECHR over the Constitution combined with the direct effect expressly provided for in Article II/2 of the Constitution of BiH would eliminate such discrimination in a more effective way. In addition, the CC has to recognise the supremacy of EU law as the result of its direct effect at the latest when BiH becomes a full member of the EU.[42] The protection of human rights on the basis of the ECHR was recognised as a general principle of EU law and as part of the rule of law by the ECJ as far back as the 1960s and subsequently in countless decisions.[43]

3.2 *Other International Agreements in the Annexes of the DPA*

For other sources of international law in the legal system of BiH, there is no explicit provision regulating the hierarchy of laws. Since the Constitution of BiH is contained in an international agreement (the DPA), the question has arisen whether other Annexes of the DPA are at the same legal level as the Constitution itself. In decisions U 7/97,[44] U 7/98[45] and U 40/00,[46] the CC decided the Annexes of the DPA supplement each other and cannot be examined in terms of their inconsistency with the Constitution, confirming the other Annexes of the DPA and general legal principles of international law to be at a constitutional level.[47] This opinion is supported by the Constitution in Article III/3(b), acknowledging general principles of international law to be an integral part of the law of BiH and its entities.

[41] SAA signed on 16.6.2008; *OJ of Bosnia and Herzegovina* No. 5/08, international agreements.

[42] Dougan (2007), p. 934.

[43] The development of the practice of the ECJ slowly began with the decision of 12 November 1969, 29/69 - *Stauder* [1969] ECR 419, para 7; now provided for under Art. 6(3) TEU; Samardžić and Meškić (2012), pp. 11–35.

[44] CC, U 7/97 of 22.12.1997.

[45] CC, U 7/98 of 26.2.1999.

[46] CC, U 40/00, of 2.2.2001.

[47] CC, U 5/09 of 25.9.2009, 30.

3.3 Other International Agreements Not Contained in the DPA

For other international agreements, besides those listed in Annex I of the Constitution of BiH, the CC decided (Decision U 5/09):

> there is no constitutional provision regulating the introduction of international treaties in domestic law as condition for their applicability; in particular, the constitution does not prescribe to 'transform' international rules in domestic law through a law. If consequently international treaties on human rights have a quasi-constitutional rank, there is no indication of a simply ordinary legislative rank for the other treaties in the constitution.

Thereby the CC excluded the *argumentum a contrario* that international treaties on human rights explicitly enjoy constitutional rank and therefore all other treaties are at the level of regular laws. It seems that the court presumes international agreements to be below constitutional rank but above regular laws, although there is no deeper argumentation or any legislative basis provided to support this view.[48]

3.4 The SAA for BiH

The SAA for BiH does not give rise to any doubt as to its direct effect. The Parliament approved this agreement in accordance with the internal provisions of BiH. Hence, it can immediately enter into full force and effect. Individual provisions of this agreement as well as the Interim Agreement have already entered into force and effect with the signing of the SAA.[49] The EU usually ratifies 'mixed agreements' directly after the Member States have done so, so that there is no partial application of the agreement on the territory of the EU.[50] France was the last Member State to ratify the SAA with BiH on 10 February 2011.[51] However, the EU will not ratify the SAA until BiH implements the ECtHR *Sejdić-Finci* decision, because without its implementation BiH violates Article 1 of the Interim Agreement.

The position of the SAA within the hierarchy of laws is not regulated. Thus, it has to be determined by interpretation. The first indicator is the direct effect of the SAA as acknowledged by the Parliament. Secondly, Article 28 of the Procedure for the Conclusion and Execution of International Treaties Act provides that 'international agreements which establish direct obligations for Bosnia and Herzegovina are executed by the competent institutions of the state administration whose

[48] Ibid; Ademović et al. (2012), p. 38.

[49] The Interim Agreement was published in the OG BiH international agreements supplement, No. 5/08 and entered into force on 30 June 2008.

[50] Vöneky (2009), para. 27.

[51] Http://www.consilium.europa.eu/App/accords/Default.aspx?command=details&id=297&lang=EN&aid=2008023&doclang=EN. Accessed 1 March 2011.

competence covers areas regulated by those agreements'. According to the subsequent Article: 'International agreements which are concluded by Bosnia and Herzegovina, and which establish obligations for domestic legal persons, are directly executed by those legal persons'. It is clear that the legal system of BiH recognises the direct effect of international agreements outside of the system of protection of human rights and general principles of international law that establish obligations which nationals of BiH may directly refer to domestic institutions. However, neither the Constitution nor other provisions in the legal system of BiH explicitly solve the problem of which law is applicable in the case of a conflict between national law and the provisions of international treaties which do not regulate human rights. Generally, the direct effect of an international treaty would be annulled in the event of a conflict of its provisions with national law, and the latter would be applicable. This argument may be supported by Article 32 of the Procedure for the Conclusion and Execution of International Treaties Act, according to which an 'international treaty will temporarily or permanently cease in its application in accordance with its provisions or the general rules of the international law of treaties'. However, a conflicting national law cannot eliminate the application of international agreements. Finally, the Constitution of BiH consistently gives the provisions of international agreements which are directly applicable the power of supremacy over national laws. Therefore, there is no reason for international agreements which gain direct effect through the internal procedure of ratification to have the same legal power as regular laws, as then they could be derogated by the latter.

Secondary association law, according to the jurisprudence of the ECJ established in *Sevince*,[52] is an integral part of EU law and can have direct effect under the same conditions as the provisions of the SAA. The ECJ has explained that the decisions of the Association Council (in the case of BiH, the Stabilisation and Association Council) are based on the Agreement, as the Association Council is an authority established by it with the responsibility for its implementation.[53] The decisions of the institutions established by the SAA fulfil the goal of the Agreement,[54] and consequently do not require any implementing act in order to have effect.[55] In addition, the direct effect of secondary association law cannot be denied either because the provisions of the SAA do not have direct effect[56] or because the decision of the Association Council was not published.[57] In legal science, such a view of the ECJ is justified by the fact that the decisions of the institutions which adopted secondary association law are part of the international agreement by their

[52] Case C-192/89 *S. Z. Sevince v. Staatssecretaris van Justitie* [1990] I-3461, 9.

[53] Ibid.

[54] Case C-277/94 *Z. Taflan-Met v. Bestuur van de Sociale Verzekeringsbank* [1996] I-4085, 18.

[55] Case 30/88 *Greece v. Commission* [1989] I-3711, 16.

[56] Schmalenbach (2007).

[57] Case C-192/89 *S. Z. Sevince v. Staatssecretaris van Justitie* [1990] I-3461, 24.

nature, and therefore they have the same direct effect as primary association law.[58] Consequently, secondary association law in the hierarchy of law within EU law is below primary association law, but at the same level as the SAA in relation to the national law of BiH.

The specific content, nature and purpose of the SAA, together with its direct effect and supremacy, give rise to complex legal questions with regard to its application and execution. As an example, Article 71(2) of the SAA provides that:

> Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the EC Treaty and interpretative instruments adopted by the Community institutions.

The direct effect of Article 72(2) would mean that BiH, when applying national competition law (which is harmonised with EU law), needs to apply the decisions of the Commission and ECJ adopted on the basis of its provisions. This does not only cause practical problems, bearing in mind that there is no official translation of these decisions in any of the three official languages in BiH and nor are people who finished law school more than 3 years ago educated in any EU Law, but this obligation also requires a transition of legislative powers to the EU, stating that BiH is obliged to directly apply all competition rules, not only from primary but also from secondary EU law, as well as future provisions and interpretations adopted by the Commission and the ECJ. Such a conclusion is based on the wording 'in particular', which shows that a whole set of competition rules from EU law is meant by Article 71(2) SAA, comprising those becoming applicable on the basis of the SAA at the moment of ratification, as well as those which are going to be adopted by the EU legislature in the future.[59]

The confirmation of such an interpretation can also be found in the 'harmonisation clause' in Article 70 of the SAA, which obliges BiH to 'ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*. Bosnia and Herzegovina shall ensure that existing and future legislation will be properly implemented and enforced'. When speaking about the *acquis*, it is clear that it also includes provisions at the EU level which are adopted after the ratification of the SAA, as in the contrary case, BiH would by the time it became a full member of the EU (which could take several years) have the legal status it had in 2008. An additional confirmation may be found in Article 43 of the Competition Act of BiH,[60] which provides that 'For the purpose of the assessment of a specific case, the Council of Competition may use the case law of the European Court of Justice and decisions of the European Commission'. While this provision proves that national institutions are going to harmonise the domestic legal order with current and future EU law, it is noticeable that the formulation of Article 43 of the Competition Act leads to the conclusion that the Council of

[58] Vöneky (2009); K. Schmalenbach, u Ch. Calliess/M. Ruffert, Art. 310, para 34.

[59] Vukadinović (2010).

[60] OG BiH, No. 48/05; amendments OG BiH Nos. 76/07 and 80/09.

Competition may, but does not have to, take into consideration the jurisprudence of the ECJ and the Commission. Such a solution is reminiscent of the practice of the CC of Hungary when it was a candidate country and ratified an Association Agreement with the Member States and the EU. At that time, the CC decided that Article 62(2) of the Association Agreement signed between Hungary and the EU, which in its formulation corresponds to Article 71(2) of the SAA signed between BiH and the EU, represented an 'unconstitutional transfer of legislative powers as a part of state sovereignty to another sovereign body', and therefore the criteria listed in the Article could not be applied directly, but might be 'taken into consideration'.[61] One solution for the relationship of the Constitution of BiH to the SAA can be found in the *Kupferberg*[62] decision, where the ECJ pointed out that according to international law the parties needed to execute the agreement *bona fide*. Therefore, every party may choose the legal means which are appropriate to fulfil the commitments made, unless through interpretation of the agreement in terms of its nature or purpose it arises that measures listed in the agreement need to be conducted. The obligation specified in the harmonisation clause of Article 70 SAA demand harmonisation at two levels for BiH:

1. harmonisation of entity provisions in order to create the preconditions for the full freedom of movement of goods, persons, services and capital according to Article I/4 of the Constitution of BiH;
2. harmonisation of entity legislation with EU law with the goal of entry into the new market.[63]

As the example from competition law shows, certain provisions of the SAA have direct effect in the legal system of BiH, but the whole national law when implemented and applied also needs to be interpreted in line with EU law.[64] It needs to be remembered that the harmonisation clause became obligatory with the signing of the SAA, regardless of the entry into force of the complete SAA.

4 Direct Application of International Agreements Listed in Annex I of the Constitution

A further interesting question the CC has had to clarify is whether the international agreements listed in Annex I of the Constitution of BiH are applicable independently or only in combination with the prohibition of discrimination contained in Article II/4 of the Constitution of BiH. Article II does not expressly give an answer to this question. According to Article II/1 'the highest level of internationally

[61] Vukadinović (2010).

[62] Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A* [1982] 3641, 4.

[63] Popović (2010).

[64] Rodin (2003).

recognized human rights and fundamental freedoms' shall be ensured, while according to Article II/7, 'BiH shall remain or become party to the international agreements listed in Annex I to this Constitution'. Consequently, Article II/4 on 'Non-discrimination' is the only paragraph expressly regulating the applicability of the international agreements listed in Annex I: 'the enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to this Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination'.

The CC in its most recent decisions denies the independent application of the international agreements listed in Annex I.[65] In the view of the Court, the international agreements, unlike the ECHR, which is directly applicable under Article II/2, are only applicable if the applicant claims that he has been discriminated against in the enjoyment of the rights and freedoms guaranteed in the international agreements. Steiner and Ademović give some convincing arguments against this view. Firstly, Article II/2 on 'Non-discrimination' does not exclusively refer to Annex I, but to Article II as a whole. It is unclear why the right of refugees to freely return to their home guaranteed by Article II/5 applies independently of the prohibition of discrimination, and the rights and freedoms contained in the international agreements do not.[66] In addition, the application of certain rights and freedoms only in combination with the prohibition of discrimination makes no sense. For example, bearing in mind Article 2 of the Optional Protocol No. 2 to the International Covenant on Civil and Political Rights, which in principle prohibits the imposition of the death penalty in a time of peace, we could come to the absurd conclusion that the violation of this right might be established only if the death penalty was imposed on individuals in a selective and discriminatory manner.[67]

5 The Application of ECJ and ECHR Judgments by the Constitutional Court: The Example of the Adoption of Private Law

Constitutional rights are deemed as a guarantee ensured by the state authorities, and human rights are no longer only the protection of rights against breaches by state authorities. In addition, the direct and horizontal effects of international law on national and private law are increasing. This is evident in private law relations, bearing in mind that the state needs to ensure constitutional rights but is not competent in the adoption of private law. The Constitution of BiH in Article III/1 lists exclusive competences and in Article III/5 provides certain additional

[65] CC, 20.03.2007., AP-379/07, MPA "Posavina promet" d.o.o, para 17; CC, 9.5.2007, AP-813/06, Rahman Selimović, para 17.

[66] Steiner and Ademović (2010), p. 165.

[67] Ibid, p. 163; See also Marković (2011), p. 344.

competences of the authorities. All state competences not expressly assigned to the state level are the responsibility of the entities in accordance with Article III/3(a). Thus, BiH has four Labour Acts (three established by the entities and the District of Brčko, and one at the state level)[68] and also three company acts (one for each entity).[69] In addition, private law acts assumed in the basis of succession from Yugoslavia are considered to be entity acts, such as the acts on obligations.[70]

Altogether the division of competences between the state and entity levels in Article III is not clear and has to be interpreted.[71] Interpretation is also needed for competences established outside of Article III. A further question is which level is responsible for the enforcement of international obligations established by the Constitution at the state level. The focus here is on the guarantee of human rights and fundamental freedoms in accordance with Article II, as well as market freedoms in accordance with Article I/4.

According to Article I/4, neither the state nor the entities shall impede the full freedom of the movement of persons, goods, services, and capital throughout BiH. This provision on the one hand requires the creation of a 'free area' in the territory of BiH (negative integration), and on the other hand the adoption of all necessary measures in order to establish market freedoms throughout BiH (positive integration). The CC has not specified the requirements of Article I/4. Thus, it considers that an interpretation in line with EU law and jurisprudence is needed.[72]

To handle constitutional competences, the CC uses the theory of 'implied powers'.[73] The implied powers theory does not allow intervention in the existing division of powers, but supplements the execution of explicitly listed competences.[74] There is a weakness in the theory of implied powers if there is no common understanding, which was made clear by the CC in its statement:

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[68] OG BiH, Nos. 26/04, 7/05, 48/05 and 60/10; OG FBiH, Nos. 43/99, 32/00 and 29/03; OG RS, Nos. 38/00, 40/00, 47/02, 38/03, 66/03, 66/03 and 20/07; OG DB, Nos. 19/06, 19/07 and 25/08.

[69] OG FBiH, Nos. 23/99, 45/00, 2/02, 6/02, 29/03, 68/05, 91/07, 84/08, 88/08, 7/09 i 63/10; OG RS, Nos. 127/08, 58/09, 100/11; OG DB, Nos. 11/01, 10/02, 14/02, 1/03, 8/03, 4/04, 19/07, 34/07.

[70] Since the break-up of Yugoslavia, this Act (Official Journal of the Socialist Federal Republic of Yugoslavia, Nos. 29/78, 39/85, 46/85, 45/89, 57/89) by virtue of succession has remained applicable in two slightly different versions in each entity of Bosnia and Herzegovina: the Obligations Act of Republika Srpska (OJ of Republika Srpska, Nos. 17/93, 57/98, 39/03, 74/04) and the Obligations Act of the Federation of Bosnia and Herzegovina (OJ of the Republic of Bosnia and Herzegovina, Nos. 2/29, 13/93, 13/94 and Official Journal of the Federation of Bosnia and Herzegovina, No. 29/03).

[71] See in more detail, Steiner and Ademović (2010), p. 577; Meškić (2011a), p. 355; Trnka (2006), p. 274; Begić (1997), p. 300.

[72] CC BiH, 25.06.2004, U 68/02, para 41.

[73] The theory of 'implied powers' seeks to make the restrictive interpretation of listed competences more flexible. For the EU, this theory means that institutions have the necessary powers to execute the powers listed in the Treaties; Joint cases 281, 283, 285 and 287/85 *Germany v. Commission* [1987] I-3203.

[74] Case 165/87 *Commission v. Council* [1988] I-5545; Nettesheim (2003), pp. 389–441.

> Bosnia and Herzegovina, functioning as a democratic state, was authorised to establish, in the areas under its responsibility, other mechanisms, besides those provided in the constitution of Bosnia and Herzegovina, and additional institutions that were necessary for the exercise of its responsibilities.[75]

The question is whether common responsibility means shared competence for the regulation of the matter. The more recent practice of the CC supports the model having joint obligations.[76] Previously, the Human Rights Commission of the CC expressly established shared competences.[77] The Constitution does not contain an exhaustive list of shared competences, as is the case with exclusive competences. The Constitution provides shared competences for co-operation between the entities and the state, e.g. Article III/2(b) or Article III/2(d). With shared competences, more flexible and dynamic solutions between the state and entities can be achieved.[78] Therefore, the transformation of common responsibilities into shared competences has been accepted in jurisprudence and the literature.[79] The criteria of the necessity of adopting acts in order to fulfil constitutional obligations has been introduced and examined on the basis of the principles of subsidiarity and proportionality.[80]

The CC points out in Decision U 68/02 that the general clause on the internal market in BiH needs to be interpreted in line with EU law and the ECJ.[81] Here, the Court relies on the ECJ *Schul*[82] judgment, stating that the substantive notion of a 'single market' implies that the internal market of Bosnia and Herzegovina 'should be created by repealing all technical, administrative and other measures'. By means of a grammatical interpretation of Article I/4, the Court firstly concludes:

> entities are obliged not to prevent the accomplishment of this principle (second sentence, Article I/4), and that this does not prevent the State from acting positively so as to fulfil its goal (first sentence, Article I/4), and thus confirms the principles of negative and positive integration with regards to Article I/4.

Secondly, in the same decision, the Court established a connection between Articles I/4 and II/4 on the prohibition of discrimination. The notion of prohibition

[75] CC BiH, 18.2.2000, U 5/98-II, para 29; CC BiH, 28.09.2001, U-26/01, para 26; CC BiH, 10.5.2002, U 18/00, paras 47 and 51; CC BiH, 28.5.2010, U 12/09, para 31.

[76] CC BiH, 28.5.2010, U 12/09, para 31: 'the State and the Entities have the joint obligation not only to ensure the highest level of protection of human rights but also to guarantee an equal implementation of these rights.'

[77] Human Rights Commission within the CC, 13.06.2006, CH/02/12468 *et al*., para 152.

[78] This is suggested by the title of the chapter 'Concurrent competences' in Steiner and Ademović (2010), p. 585.

[79] E.g. Steiner and Ademović (2010), p. 580; Begić (1997), p. 300; Kurtćehajić and Ibrahimagić (2007), p. 274. For an opposite opinion, see Pobrić (2000), p. 344. With regard to certain responsibilities, authors argue in favour of the exclusive competence of the state, e.g. macroeconomic stability in BiH. See European Commission Delegation to BiH (2003), p. 42.

[80] Meškić (2011b), p. 54.

[81] CC BiH, 25.06.2004, U 68/02, para 41.

[82] Case 15/81 *Schul* [1982] I-1409, para 33.

of discrimination includes not only technical measures but also positive legislation and a positive obligation of the state to guarantee the institutional protection of prohibition of discrimination.[83] With regard to the single market, the state is obliged to institutionally guarantee the prohibition of discrimination on the grounds of residence or entity citizenship.[84] Thirdly, the Court deems it possible to ensure the principles of the common market although the competences are split:

> Although the constitutional distribution of competences under Article III of the Constitution of Bosnia and Herzegovina allocated certain competences to the Entities that may influence the creation of a single market as the State's obligation, the autonomous status of the Entities is conditioned by the hierarchically superior competences of the State, which includes protection of the Constitution of Bosnia and Herzegovina and its principles . . . In this regard, the supremacy of the State over the Entities and the District of Brčko, which follows from Article III (3) (b) of the Constitution, allows it to take appropriate measures to secure the enjoyment of constitutional rights to all persons.

It is noticeable that the lack of state competence in adopting private law has shifted the question of positive integration under Article I/4 into the focus of the CC. By interpreting the state obligation to guarantee rights under Articles I/4 and II in a non-discriminatory way, the Court has the tendency to give competences to the state to adopt private law where it finds it 'necessary', but it does not expressly state in which form this is to be conducted.

This is clearly expressed in Decision U 5/98-II[85]:

> The different legal systems of the Entities, with different types of property or regulations of property law, may indeed form an obstacle to the freedom of movement of goods and capital as provided for in Article I/4 of the Constitution of BiH. Moreover, the constitutionally guaranteed right to privately owned property, as an institutional safeguard throughout Bosnia and Herzegovina, requires framework legislation by the State of Bosnia and Herzegovina in order to specify the standards necessary to fulfil the positive obligations of the Constitution elaborated above. Hence, such framework legislation should determine, at least, the various forms of property, the holders of these rights, and the general principles for the exercise of property rights in property law that usually constitute an element of civil law codes in democratic societies.

Negative integration in the spirit of Article I/4 has not been the subject of private law cases before the CC. However, bearing in mind the practice of the Court, Article I/4 should be interpreted in the light of the ECJ demanding the consideration of horizontal effect (*Drittwirkung*)[86] as a link between public and private law. An example is Case U 12/09,[87] where the CC analysed the maternity pay of public servants at state institutions. Since issues connected with the principle of the welfare state fall within the competence of the entities, the challenged provision

[83] CC BiH, 5.10.2002, U 18/00 No. 30/02.

[84] CC BiH, 28.5.2010, U 12/09, para 30.

[85] CC BiH, 18.2.2000, U 5/98-II, para 29.

[86] Case C-281/98 *Roman Angonese v. Cassa di Risparmio di Bolzano* [2000] I-4139, para 34; Meškić and Samardžić (2012), p. 297.

[87] CC BiH, 28.5.2010, U 12/09, para 30.

of Article 35 of the Salaries and Remunerations in the Institutions of BiH Act[88] with regard to the calculation and payment of maternity leave benefits only referred to 'the regulations governing this field according to the place of payment of the contributions per each employee'. In practice, this provision had the effect that employees resident in Republika Srpska are guaranteed to receive their whole salary, while in the Federation of BiH this issue is ruled by the Federation authorities as well as by the cantons or even the municipalities, which results in important differences, with some cantons not paying any benefits at all.

The CC firstly stated that female employees in state institutions had been treated differently in comparable situations. As a justification for such discrimination, the division of competences between the state and the entities was taken into consideration. The Court pointed out that in this area responsibilities are granted by the Constitution to the state. These responsibilities are partly of an international and partly of a national character, and arise with regard to the creation of working conditions without discrimination under Article II/4 of the Constitution of BiH together with Article 1 Protocol No. 12 ECHR, and under Article I/4 on the establishment of the single market in BiH. The Court emphasised its previous practice, according to which Article I/4 needs to be interpreted in the light of ECJ jurisprudence, which is why:

> social benefits like maternity leave for employees of state institutions should not depend on the residence of the person in question, given that the idea of a single market implies that the state makes an employment opportunity equally attractive to all citizens of BiH, notwithstanding entity boundaries, entity citizenship, or place of residence.

The Court pointed out that EU Regulation No. 1408/71 on the application of social security schemes to employed persons and to members of their families moving within the Community[89] needs to be respected, as well as further international conventions.[90] Finally, the Court concluded: 'the competence of the entities to regulate social policy is not appropriate to the aim sought to be achieved with regard to social protection and equal remuneration', and 'thus, the state and the entities have the joint obligation not only to ensure the highest level of protection of human rights but also to guarantee an equal implementation of these rights'.

[88] OG No. 50/08 and 35/09.

[89] OJ EU 1997, L 28, p. 1.

[90] These are the Convention on the Elimination of All Forms of Discrimination against Women (1979), International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto (1966).

6 Application of SAA and ECJ Jurisprudence: The Example of Competition Law

Another example is the Competition Act of BiH.[91] Pursuant to Article 71(2) SAA, any practice shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from (ex) Articles 81, 82, 86 and 87 of the EC Treaty and interpretative instruments adopted by Community institutions. Although the Competition Act was adopted 3 years before the ratification of the SAA, Article 43 states that the Competition Council, as the competent institution for the protection of fair competition in the first instance, 'may for the purpose of the examination of a concrete case, take into account the judicial practice of the ECJ and the decisions of the European Commission'. In a recent judgment, the Court established that the exclusive importer of Volkswagen cars for BiH, ASA Auto, violated the Competition Act, because it abused its dominant position on the market by discriminating against a contracting party.[92] ASA Auto signed a letter of intent with MRM., a potential distributor of Volkswagen cars, but the terms of the letter of intent were less favourable than those signed with previous traders. When MRM. violated the less favourable clauses of the letter of intent, ASA Auto decided not to conclude the licence agreement.

In general, every party, even those with a dominant market position, is free to choose its contracting partners.[93] However, the Court clarified that ASA Auto, by means of the letter of intent had already established a business relationship with MRM. Namely, it is easier to establish the abuse of the dominant market position when an already existing relationship is cancelled, since it changes the present situation on the market, than in the case of denial of entry into a new contractual relationship.[94] The cancellation of an existing business relationship by a party in a dominant market position represents an abuse if it is not justified and does not fulfil the requirements of proportionality.[95] ASA Auto used the violation of the clauses of the letter of intent as justification. The Court took into consideration that the violated clauses were not included in the letters of intent signed with other traders, and therefore declared the justification discriminatory and the cancellation of the business relationship unjustified. The Court concluded all licensed traders are treated unequally and discriminatorily by the application of different conditions for the same business with different parties/distributors.

Additionally, the Court examined the obligation of ASA Auto to conclude a contract with MRM. It based its argumentation on the abovementioned Article

[91] OG BiH, No. 48/05, 76/07 and 80/09.

[92] Court of BiH, decision No. S1 3 U 005412 10 Uvl, 15.3.2012., M.R.M. Ljubuški/ASA Auto d.o.o. Sarajevo (*ASA Auto*); See Meškić (2012).

[93] Case 27/76 *United Brands* [1978] I-207, para 184.

[94] Jung (2009), para 153.

[95] Brinker (2009), para 36.

43 of the Competition Act and relied on the practice of the ECJ. The Court listed four requirements for the obligation to conclude a contract:

1. a licence is necessary for the other party in order to access and stay on the relevant market;
2. the risk of exclusion of efficient competition if the licence is not given;
3. a future negative influence on technical developments in the field to the detriment of consumers;
4. there is no objective justification for the denial of a licence.

The Court did not expressly refer to a particular decision of the ECJ, but the conditions named may be found in the *IMS Health* decision.[96]

7 The Judicial System in BiH and the Lack of a Supreme Court at the State Level

The judicial system of BiH currently consists of:

- three constitutional courts (the Constitutional Court of BiH, the Constitutional Court of the Federation of BiH and the Constitutional Court of Republika Srpska)
- the Court of BiH (with competences related to criminal and administrative acts adopted at the state level, not at the entity level)
- two Supreme Courts of the entities
- sixteen cantonal courts and district courts (ten in the Federation of BiH, five in Republika Srpska and one in the District of Brčko)
- forty-eight municipal and elementary courts (28 in the Federation of BiH, 19 in Republika Srpska and one in the District of Brčko)
- five district commercial courts in Republika Srpska and a higher commercial court in Banja Luka.

One particularity of the judicial system of BiH is the presence of judges who are not nationals of BiH, so-called 'international judges'. Three out of nine judges in the CC are international judges. Nevertheless, the court rarely refers to the practice of foreign constitutional courts. When establishing the principle of the equality of the constituent peoples in BiH, the Court relies on the binding effect of the wording in the preamble of the Constitution, and therefore bases its argumentation on the judgment of the Canadian Supreme Court in the case *Reference re Secession of Quebec*.[97] Even the dissenting opinions of international judgments show no signs of additional reference to comparative constitutional law. However, the CC

[96] Case C-418/01 *IMS Health* [2004] I-5039, para 52; See also the decision of the Commission, 24.3.2004, COMP/C-3/37.792 (Microsoft), para 428; Henning and Stephanie (2005), p. 112.

[97] The Supreme Court of Canada (1998), 2.S.C.R; See Alijević (2012).

continuously and regularly refers to the ECtHR to an extent that the ECtHR has a fundamental influence on the jurisprudence of the CC, which means that its jurisprudence may be regarded as being at least partially influenced by international judges.[98] On the other hand, the regular reference to the jurisprudence of the ECtHR may also be seen as a result of the very important position of the ECHR within the Constitution of BiH with its direct effect on the legal system of BiH.

The lack of a supreme court at the state level is deemed by several authors as a weakness in ensuring common legal standards, equality and a free economic area.[99] While the Supreme Courts of the Federation of BiH (FBiH) and Republika Srpska (RS) assume this role at the level of the entities, and the Appellate Court of the District of Brčko in the territory of the District of Brčko, but only regarding questions contained in the Constitution of BiH 'arising out of a judgment of any other court in Bosnia and Herzegovina' in accordance with Article VI/3(b) of the Constitution, the appellate jurisdiction of the CC in Article VI/3(b) of the Constitution of BiH is the only legal area where a judicial hierarchy all the way to the state level is established. Therefore, the judges of the CC regard this jurisdiction as partial compensation for the lack of existence of a supreme court at the state level.[100] The Commission stated in its BiH Progress Report for the year 2007, which is adopted on the basis of the criteria listed in Article 49 TEU,[101] that the CC due to the lack of a supreme court is acting more and more as an appellate court.[102] Such a development makes it difficult for the CC to fulfil its basic function of protecting constitutional rights.

The EU Commission mentioned the lack of a supreme court at the state level in its annual reports on BiH 2007–2010.[103] In this analysis, it is not intended to provide answers to the question of whether it would be good for BiH to have a supreme court, given that every other EU state has already provided the answer. The intention is rather to analyse, by taking into consideration the constitutional structure of BiH and the difficulty of the political elements agreeing on any institution at the state level, whether a supreme court at the state level is really

[98] Dicosola (2010).

[99] Trnka (2006), p. 346; Dauster (2010), p. 11; Steiner and Ademović (2010), p. 99; Alijević (2010), p. 209; Dobrača (2005), p. 60; Sadiković (2003), p. 13, available at: http://www.soros.org.ba/index.php?option=com_content&view=article&id=64%3Austav-bih-ka-novim-rjeenjima&catid=49&Itemid=89&lang=ba. Accessed 15.4.2011.

[100] Miljko (2001), p. 39; Trnka (2006), p. 349; Simović (2003), p. 22, available at: http://www.soros.org.ba/index.php?option=com_content&view=article&id=64%3Austav-bih-ka-novim-rjeenjima&catid=49&Itemid=89&lang=ba. Accessed 15 April 2011.

[101] OJ EU 2010, C 83, 1–388.

[102] Commission, 6.11.2007, Bosnia and Herzegovina Progress Report for the year 2007, COM (2007) 663, p. 13.

[103] Commission, 6.11.2007, Bosnia and Herzegovina Progress Report for the year 2007, COM (2007) 663, p. 13; Commission, 5.11.2008, Bosnia and Herzegovina Progress Report for the year 2008, COM (2008) 674, p. 13; Commission, 14.10.2009, Bosnia and Herzegovina Progress Report for the year 2009, COM (2009) 533, p. 12; Commission, 9.11.2010, Bosnia and Herzegovina Progress Report for the year 2010, COM (2010) 660, p. 12.

necessary or if it could possibly be a condition for membership of the EU. Analysing this question from the perspective of the preliminary reference in Article 267 III TFEU, there is a requirement for 'a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law' to bring relevant questions of EU law before the ECJ. In legal science, the abstract theory, which interprets the formulation 'a court against whose decisions there is no judicial remedy' as the highest court in the constitutional order of the Member State, is in conflict with the concrete theory, which speaks in favour of any court against whose decision no legal remedy is possible in that particular matter. In favour of the abstract theory, there is the formulation 'against whose *decisions*' in the plural, while the concrete theory provides wider possibilities for individual legal protection.[104] The ECJ stated in the *Lyckeskog* decision that Article 267 III TFEU does not necessarily demand the existence of a supreme court. The material function can be exercised by another court with the power of making a final decision, which in legal science leads to the conclusion of the application of the concrete theory.[105] The purpose of Article 267 III TFEU is to hinder the establishment of jurisprudence in a Member State which would not be in line with EU law.[106] The goal is that one court with the highest power or the final decision at the national level is obliged to assign issues to the ECJ in accordance with Article 267 III TFEU.[107]

From the perspective of legal protection, in the part of the Report of the Commission where the judicial system is analysed, there is a direct criticism of the lack of a judicial organ which could harmonise the application of laws between the four internal judicial competences: the state level, the Federation of BiH, Republika Srpska and the District of Brčko. In this way, the fragmentation of the legal frameworks endangers effectiveness, a criterion that is not mentioned in the conclusions of the European Council[108] but which is an integral part of the whole analysis of the report on the progress of BiH towards the EU. The question arises as to whether, from the principle of effectiveness together with the obligation to transpose the *acquis* throughout the whole territory of BiH, an obligation can be concluded to establish a supreme court at the level of BiH which would ensure that legislation which is uniformly transposed in national law is actually uniformly applied throughout the whole territory. Without the establishment of a state institution which would have the competence of a supreme court, there would be no institution which would, after the legislator has done its part of the assignment by

[104] Hartley (2003), p. 283.

[105] Case C-99/00 *Criminal proceedings against Kenny Roland Lyckeskog* [2002] I-4839, para 14. On the basis of this judgment, the concrete theory is supported by eg. Karpenstein (2009), para 52; Stanivuković (2009), p. 106; Oppermann et al. (2009), p. 272; Haratsch et al. (2010), p. 247; Supporters of the abstract theory include Hartley (2003), p. 284; Wegener (2007), para 24.

[106] Case 107/76 *Hoffmann-La Roche AG v. Centrafarm Vertriebsgesellschaft Pharmazeutischer Erzeugnisse mbH* [1977] 957, para 5.

[107] Stanivuković (2009), p. 106.

[108] Priebe (2008), p. 314.

transposing the *acquis*, ensure the effective and uniform application of such legislation throughout the whole territory of BiH.[109] From the EU perspective, the power of the state authorities is not divided. All authorities are accountable when it comes to ensuring the effectiveness of EU law at the national level. The ECJ confirmed in the *Köbler* decision that all state authorities, including the court with the highest power or right of final decision, can be liable for breach of EU law.[110]

The reason for the absence of a supreme court at the state level can be seen in the division of competences among the state and the entities. Article III of the Constitution of BiH established competences for the entities in criminal and civil matters. The Venice Commission performed an analysis of the need for a supreme court in BiH in 1998.[111] The Commission deemed it necessary for there to be a common court for electoral and administrative matters. Based on this conclusion, a common court was established in BiH in 2000 with competence in state law.[112]

The Venice Commission did not examine if Article III of the Constitution of BiH contained all the competences divided between the state and the entities. Namely, the previous analysis of the division of competences between the state and the entities is confirmed in the legislative practice of BiH, where different private laws with the goal of harmonisation with EU law are adopted at the state level regardless of the lack of an explicit competence based on Article III/1 of the Constitution. This is true in the field of intellectual property law, including the Copyright and Related Rights Act,[113] the Trademark Act, the Patent Act, and the Industrial Designs Act,[114] as well as in the field of consumer law, which mostly regulates civil obligations,[115] and the Competition Act.[116]

Now the question needs to be asked as to which court in BiH will ensure the uniform application of laws at the state level adopted with the purpose of establishing a common market, based on the provision in Article I/4 of the Constitution, as well as the obligation of the state to harmonise its legal order with EU law. On the basis of the laws mentioned above, state institutions have been established such as the Competition Council, the Council for Authors' Rights and the Ombudsman for the Protection of Consumer Rights (with competences in criminal and administrative proceedings, excluding property claims in civil litigation). The CC in these areas has appellate jurisdiction, which is mostly connected to the protection

[109] Meškić (2011b).

[110] Case C-224/01 *Gerhard Köbler v. Austria* [2003] I-10239, para 31.

[111] Venice Commission, Opinion on the need for a judicial institution at the level of the state of Bosnia and Herzegovina, CDL-INF (98) 17, Strasbourg 1998, available at: http://www.venice.coe.int/docs/1998/CDL-INF%281998%29017-e.asp. Accessed 10 April 2011.

[112] BiH Court Act, OG BiH Nos. 29/00, 15/02, 16/02, 24/02, 03/03, 37/03, 42/03, 04/04, 09/04, 35/04, 61/04, 32/07 and 97/09; Consolidated version published in OG BiH No. 49/09.

[113] OG BiH No. 63/10.

[114] OG BiH No. 53/10.

[115] Consumer Protection Act, OG BiH No. 25/06.

[116] Competition Act, OG BiH Nos. 48/05 and 76/07; Act on Amendments to the Competition Act, OG BiH No. 80/09.

of human rights. The Court of BiH has competences in criminal and administrative matters, electoral rights, and property litigation between the state, the entities and the District of Brčko, and also in cases of a conflict of competences involving the District of Brčko and the Court of BiH. The competences in these areas are restricted to the meaning and application of state laws,[117] Thus, the Court of BiH represents a judicial and legal area at the state level as a separate legal order which exists alongside the entity areas. Therefore, it is correct to conclude that the Court of BiH, as a special court, stands outside the hierarchy of the entities, and whose current competences in the worst case could lead to additional diversification of law in BiH.[118]

8 Conclusion

The application of international legal sources in national law is theoretically determined by two classical theories with different specific features. For the application of international legal sources, the Constitution of BiH provides arguments for both monistic and dualistic theories. This theoretical question does not need a unilateral decision in favour of one approach or the other, because the practical impact is not significant in the moderate approaches of dualism and monism.

International law is distinguished in the Constitution of BiH in different ways by means of the Constitution being part of the DPA. As the general principles and ECHR and its protocols have direct effect, they are deemed to have primacy over national law. For all other international agreements, the *argumentum e contrario* has not been used appropriately by the CC. These agreements although not explicitly mentioned in the Constitution are of a constitutional rank, but do not have precedence over the Constitution. The SAA, as an agreement concluded with the EU as a supranational organisation, has a specific ranking within the national legal system.

The wording of Article II/4 of the Constitution of BiH has raised questions because human rights are mentioned in connection with the prohibition of discrimination. This inauspicious wording has to be clarified by the classical methods of interpretation, in particular by systematic and teleological interpretation.

[117] One exception exists, according to Art. 7(2) of the Court Act of BiH, which is constituted by jurisdiction over criminal acts established by the criminal laws of the entities and the District of Brčko, but again with very narrow conditions, namely when such criminal offences endanger the sovereignty, territorial integrity, political independence, national security or international personality of Bosnia and Herzegovina; may have serious repercussions or detrimental consequences to the economy of Bosnia and Herzegovina; may have other detrimental consequences to Bosnia and Herzegovina or may cause serious economic damage or other detrimental consequences beyond the territory of an entity or the District of Brčko of Bosnia and Herzegovina.

[118] Dauster (2010), p. 12.

In international law, this is expressed in Article 31(1) of the Vienna Convention: '[the] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.'[119] Human rights enjoy direct application parallel to the existing principle of prohibition of discrimination. The dogma of fundamental rights has acknowledged that the rights of freedom and equality are two different categories of human rights, and are not dependent on each other.

The division of competences with regard to private law has led to a quantity of parallel laws at the different state levels in BiH. Fundamental questions of harmonisation have to be solved by the legislator or jurisprudence. Co-operation between the courts and legal literature could be more effective than new definitions of competences, particularly if there is no majority for constitutional changes.

The SAA for BiH has been ratified by BiH but not by the EU. Thus, it cannot enter into full force and effect, although single provisions have already been applied, and jurisprudence and legal literature already refer to the content of the SAA. The EU has declared that it will not ratify the SAA until BiH implements the ECtHR *Sejdić-Finci* decision, because without its implementation BiH violates Article 1 of the Interim Agreement. Overall, the direct effect of the SAA is acknowledged. The question of the hierarchy of laws as usual has to be interpreted. Due to the nature and purpose of the SAA, it can be deemed as having precedence over national laws but being subordinate to constitutional provisions. Jointly and severally, the SAA with its direct effect and supremacy causes complex legal and practical questions in a country which currently lacks sufficient skills for the application and enforcement of EU law.

An organisational question in BiH is the infrastructure of the judiciary. The creation of a supreme court is a reasonable requirement. This can be seen as a political question, but irrespective of the creation of a supreme court, the courts could enhance voluntary co-operation in order to establish a unified system in terms of the principles of transparency, legal certainty and equality in guaranteeing the rule of law and human rights.

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