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International influence on the Institutional Asset in Bosnia and Herzegovina: the Constitutional Court

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Introduction

Even if all people are generally informed about the fall of the Yugoslav regime and the wars that characterised the transition, as soon as the conflicts in the area formally concluded, those countries returned to being forgotten by the majority. The most complex and violent conflict in the area was the Bosnian War, which unfolded from 1992 to 1995. Despite this lack of coverage, the Country displays numerous peculiarities and is undergoing a deep crisis yet, making it an interesting subject of study. Both its history and its present situation are characterised by extremely complex dynamics, which lead to a never-ending number of new questions arising.

In this final dissertation, I will focus on the vast international influence in the country's post-war period, questioning some of its most controversial aspects. As a matter of fact, international actors have been as present in the institution-building process as they were arguably ineffective, starting from the constitution of the country itself, which represents both a symbol of unity and of strong division. Even if progress has undoubtedly been made over the years, the inability to complete many of the initiatives, together with the local communities being now more divided than ever lead us to question whether the final objective of creating a self-sustaining State has been reached and especially how the international participation has affected the process and outcome.

After a brief outline of the historical context and of the main international initiatives that have been implemented, my focus will shift on the Constitutional Court. I will examine its composition, which unusually includes international judges, and evaluate queries that may arise upon its effectiveness, independence and legitimacy.
Additionally, its interactions with other sources of international participation will be considered: the High Representative, with which a delicate equilibrium for the maintenance of the authority of both institutions has been established, and the European Court of Human Rights. Because all other efforts have failed, the European Court now appears to be the only institution able to trigger the actual constitutional development necessary for the ultimate establishment of a "healthy" and independent State.

The present condition of the country is characterised by a polarised society and ineffective institutions. Amongst the factors contributing to this state is the reliance e if the local actors on the international ones, and the diffused responsibility in the system, which makes it difficult for people in the political scene to be held accountable for their actions and shortcomings. Therefore, the key question for the future is whether this bitter stalemate will continue, or the necessary conditions for change will finally be created.

Chapter 1 – From the conflict to the post-war reconstruction

1.1 Historical development of the conflict

The armed conflict in Bosnia and Herzegovina took place between 1992 and 1995. It followed the general distress in the Balkan area after the death of Tito in 1980, which marked the end of the peaceful coexistence between the different ethnic groups. The breakup of the Socialist Federal Republic of Yugoslavia began in the early 1990s following political upheaval, the emergence of independent political parties and the rise of nationalism, especially in Serbia, with Slobodan Milošević, later elected as President, paving the way. The first multi-party elections indeed transformed the relations amongst people, with ethno-nationally based parties dominating the political scene. Slovenia and Croatia were the first countries to declare independence on 25 June 1991, thus signalling the start of the Yugoslav Wars. Bosnia and Herzegovina, one of the six Constituent Republics, followed soon after.

The elections in December 1990 led to the formation of a tripartite coalition government representing the tree main groups living in a multi-ethnic Bosnia: Muslim Bosnians, also known as Bosniaks (44%), Orthodox Bosnian Serbs (31%) and Catholic Bosnian Croats (17%), with no ethnic group forming the absolute majority, a peculiar case even for Yugoslavia. However, cooperation revealed to be almost impossible, with each party developing its own parallel power structure. The Bosnian Serb community, represented by the leader of the Serb Democratic Party (SDA) Radovan Karadžić, became especially difficult to handle. Following the unilateral declaration of the *Republika Srpska*, composed of several regions within Bosnia, the SDA, which had strong links with the Serbian government in Belgrade, started boycotting the Presidency's meetings and the Referendum on Independence, where turnout was 64.4%, roughly corresponding to the Croatian and Bosniak population. Nevertheless, independence was proclaimed on 3 March 1992.

All attempts at "cantonization" by the European Community were failed. There was no clear way to divide the territories on the basis of ethnicity, as different ethnic groups lived together in most towns. When the European Community itself and the United States recognised Bosnia and Herzegovina as an independent state on 6 and 7 April 1992, the Bosnian Serb paramilitary forces, supported by the Yugoslav People's

Army, launched an attack on Sarajevo, thus initiating the 1425 days-long siege, the longest of a capital city in the history of modern warfare. They also targeted Bosniak towns in the western region, expelling the population and initiating the process of ethnic cleansing, that culminated in genocide following the Srebrenica massacre. The result has been a renovated type of war, combining elements of civil war and international conflict, due Serbia and Croatia's involvement (Kaldor, 2001, pag.31).

Within six weeks the forces of the *Republika Srpska*, led by General Ratko Mladić, gained control over two thirds of the territory, owed to their higher number of military forces and a weakening of the Bosnian Republic itself due to the international arm embargo and to the parallel conflict with the Croat forces in the country.

The international community, which didn't initially intervene in hopes of reaching an autonomous solution to the conflicts in the all of the Yugoslavia region, responded with an international arms embargo, the establishment of a no-fly zone, humanitarian aids and the declaration of Safe Areas protected by the United Nations Protection Force (UNPROFOR). Srebrenica, located 5km away from the Dutch Battalion's base in Potočari, was indeed part of the area, but remained unprotected, resulting in the population's bloody massacre. NATO also intervened with various airstrikes against violations by the Serbian-controlled aircraft.

Relations between Bosniaks and Croats during the war were also turbulent, as I mentioned, causing a "war within the war". But as the Washington Agreement was signed in March 1994, a collaboration between the two forces against the common Serbian threat has been possible. After a large-scale offensive of the Bosnian Army and the Croatian Defence Council (HVO), the Bosnian Serb leaders agreed to participate in peace talks at Dayton, US, which eventually resulted in the negotiation of the General Framework Agreement for Peace in Bosnia and Herzegovina, also known as the Dayton Peace Agreement (DPA), signed on 14 December 1995 in Paris, putting the war to a formal end.

The Research and Documentation Centre (*Istraživačko Dokumentacioni Centar*, or IDC), estimated more than 100,000 deaths and 30,000 missing people, with a 2.2 million

out of 3.8 million displaced persons caused by ethnic expulsion, thus radically altering the distribution of the ethnic groups in the country.

1.2 An end to the war: the Dayton Peace Agreement

Prior to the peace talks in Dayton, promoted by the Clinton administration, various other plans for the resolution of the conflict have been proposed and discussed. However, due to the irreconcilable position of the different parties involved, which comprised both offenders and victims, it often resulted in the failure of getting a full approval. A particularly relevant project has been brought by Cyrus Vance and Lord Owen following the International Conference on the Former Yugoslavia. The Vance-Owen Plan developed around the principles of decentralisation and of division of power, structured to guarantee a fair representation of the three main ethnic groups. Even if it did not result in a complete consensus, it represented the basis for the approval of the General Framework Agreement.

The US, with its potential to truly make a difference through its policies, had avoided engagement in the area, both during the Croatian War and during the first period of the Bosnian War, but soon changed the approach, with the American diplomatic efforts often making a difference throughout the conflict and during talks for the Agreement. Assistant Secretary of State for Europe Richard Holbrooke was fundamental to the inclusion and involvement of leaders in Zagreb and Belgrade, mainly leaving other actors aside, as he did with the European Community. Consequently, the drafting process has been characterised by unrepresentativeness, non-inclusiveness and non-transparency, damaging the long-term legitimacy of the accords. Aided by the fact that the Serbian president Milošević himself, who was eager to lift the sanctions held against the country, took part in the negotiation instead of the military leaders, necessary compromises over territories were made by all parties, with the Dayton Agreement finally signed on 14 December 1995 in Paris. The constitutional choices that have been made were a concession due to the military situation of the period. The intent was to re-build trust between the conflicting parties, but in practice power has been concentrated in the hands of increasingly ethnically homogenised governmental units, due to close interconnection between territoriality and ethnicity (Grewe and Riegner, 2011, pag.26).

1.2.1 The "International Constitution"

The final Agreement established in Annex 4 the Constitution of Bosnia and Herzegovina. The national constitution is therefore an international one, with the constituent power not emanating from an internal and unitary stance, but rather interestingly, as a result of international will. It contains a combination of federal and consociational principles, prescribing a complex mix of power sharing and territorial decentralization.

The three ethnic populations have been given the status of constituent peoples, thus representing a form of ethnic sovereignty.

The presidency is famously tripartite and collective, with eligibility for elections combining territorial and ethno-national requirements.

As established in Annex 4, Art. I.3, the two Entities composing the Republic are the Federation of Bosnia and Herzegovina and the *Republika Srpska*, with each of them adopting their own constitution and each citizen holding both the citizenship of Bosnia and of one of the Entity[1].

Competences are divided in Article III, controversially granting the Entities the power to establish parallel relations with neighbouring states and to enter into agreements with states and international organizations with the Parliamentary assembly's consent.

The Parliamentary Assembly, composed by the House of Peoples and House of Representatives acting in a strong bicameral framework, reflects the division in entities and is regulated according to the ethnic criterion. The House of Peoples has a total of 15 delegates, two-thirds from the Federation (five Croats and five Bosniaks) and one third from the *Republika Srpska*. In the House of Representatives, on the other hand, 42 delegates are elected from the territory, so that other ethnic minorities have the possibility to be elected as well. Surprisingly, there is no provision and no objective criterion to determine a person's ethno-national status, sufficing to self-classification in most cases.

Veto Power is another determining factor in the overall functioning of the country. It applies both in the presidency, where a decision can be declared as disruptive of a vital

[1] General Framework Agreement, Annex 4, Art. I.7

interest of a particular entity, and in the Parliament with a majority of either the Bosniak, Serb or Croat delegates rejecting a proposed decision of the Parliamentary Assembly again on grounds of vital interests.

The outcome, therefore, is a weak state composed of two strong entities, and a special strategically relevant border district, Brčko. In addition, the Federation is composed of 10 cantons and 11 municipalities. The country, home to 3.5 million people, has at present five Presidents (Tripartite Presidency, president of the Federation and President of the *Republika*), fourteen governments, 13 different constitutions and prime ministers, with each territory having its own police, media and administration. In total, the country has over 260 ministers and around 750 elected representatives, making the state administration extremely expensive to maintain. This leads to different standards granted across the country, as there is no state level institution with supreme jurisdiction and general competence to guarantee uniform application (Henda, 2012, pag.16).

The profound division of the Bosnian society originates in the political and institutional separation within the country. Beyond ideology, this influences its population in a more tangible way, affecting the status of its education, media and the economy in different parts of the country (Bieber, 2006, pp.33-39).

Consequently, it's not surprising to see that Bosnia is still in a situation of gridlock, with no majority forming within the country to initiate the needed reforms and changes, at least not without an invasive international participation.

1.2.2 Criticisms of the new asset and its management

Richard Holbrooke clarified that the initial aim of the agreement was limited to ending the War in Bosnia, avoiding further escalation. The plan was not to create a basis for a permanent solution to the Bosnian Question. However, a long-term arrangement is exactly what it turned in, partly due to the institutional immobility of the country throughout the years which followed the official "end of war". Paradoxically, this immobility was the unintended result of choices made during the DPA negotiations. As a matter of fact, the framework imposed by the agreement didn't solve any pre-existent state issues. Instead, it institutionalised them, assuring the continuation of war by other means: by politics.

In the immediate year after the signature, the NATO-led international military Implementation Force (IFOR) was responsible for creating and maintaining a safe and secure environment. Unlike the previous UNPROFOR, it was equipped with a peace-enforcement mandate, initially limited to one year but after several prorogations, it was replaced by the Stabilisation Force (SFOR) "for as long as would be required to secure lasting peace".

Subsequent changes that were expected come in the post-war years though never arrived, with the country failing to evolve into a self-sustaining and stable democracy, remaining mired in a zero-sum politics (Bennett, 2016, pag.3).

In addition to the complex and over-decentralized institutional asset, another issue that led to this stagnancy is the lack of motivation for a shift in power. The Dayton agreement was in a way rewarding the efforts behind the ethnic cleansing by recognising a wartime political entity, the *Republika Srpska*, and institutionalizing ethnic divisions (O Tuathail, 2006, pag.145).

The present organisation is the consequence of warfare and of strong pressures from the international community. Nevertheless, representatives taking part in the discussions and signing the agreement were the same ones that created those very divisions and had something to gain from their maintenance, with power being concentrated in their hands. As Christopher Bennet claims, "if Bosnia were to become a functioning democracy governed by the rule of law, their power bases would evaporate" (Bennett, 2016, pag.11). The elections held nine months after the signing of the Dayton Peace Agreement, failed to revitalise Bosnia's political landscape and simply entrenched ethno-national divisions, and so did all developments thereafter.

Another aspect to consider are the formal issues connected to the new constitution which rise fundamental doubts about the arrangement that it established. There are two main considerations: firstly, it has no constitutional or democratic value. The constitutional text has been approved without any form of constitutional proceeding (Dicosola, 2010, pag.192). There has never been a form of political legitimation through, for example, a state-wide referendum, as it was part of a "political compromise". The European Commission for Democracy through Law, also referred to as the Venice Commission, is an advisory body of the Council of Europe and issued a number of opinions regarding the situation in the country, giving extensive aid to its development. Regarding the democratic legitimation, it claimed that "the Constitutions of Bosnia and

Herzegovina and the Federation of Bosnia and Herzegovina were political compromises to overcome armed struggle and the main focus was their contributions to the establishment of peace. They were negotiated in foreign countries and in a foreign language and can in no way be considered as reflecting a democratic process within the country"[2]. The commission has often urged an overall reform of the constitutional system, which at the moment is "nor efficient neither rational"

Secondly, even if a catalogue of individual human rights is provided under Annex 6, which also provides for the direct application and priority over all other laws included as part of the European Convention for the Protection of Human Rights and Fundamental Freedoms[3], Annex 4 contains a number of discriminatory provisions. Some have been judged by the Constitutional Court of Bosnia and Herzegovina and by the European Court of Human Rights in a number of cases. An example in *Sejdic and Finci v. Bosnia and Herzegovina*, which I'll examine in Chapter 3. The same can also be said for provisions contained in the Entity Constitutions identifying ethnicity as the sole criterion for citizenship, which the Constitutional Court was ready to overturn in the *Constituent Peoples* decision, striking down the claims of ethnic hegemony in the entities (McCrudden and O'Leary, 2013, pag.87).

1.3 International actors in the post-war state-building process

The political development of Bosnia and Herzegovina cannot be understood without considering the involvement of the international community, whose participation has been extensive not only through international people involved in national institutions themselves, but also through external overseeing bodies.

1.3.1 An overview of the participation

The Office of the High Representative (OHR), the political and institutional counterpart of IFOR, was provided for in the General Framework Agreement under

[2] European Commission for Democracy through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, Venice, 12 March 2005, opinion n. 308/2004 Available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2005)004-e

[3] The Constitutional Court of BiH, in decisions U 5/04 of 31 March 2006 and U 13/05 of 26 May 2006, was of the opinion that the ECHR did not have priority over the State Constitution. However, it arrived at a different conclusion in decision AP 2678/06 of 29 September 2006, para.22

Annex 10 with the status of a diplomatic mission. Mediating between national people and institutions and the international community, its role was to ensure the evolvement of the country into a peaceful democracy able to take responsibility for its own affairs, setting it on track to a more consistent integration in European institutions. Article II of Annex 10 sets out the function and responsibilities given to the High Representative, which include the monitoring and implementation of the peace settlement and aiding in any difficulty arising in the process. In the period from 1995 to 2000, it has contributed to the establishment of vital laws, such as the Law on Citizenship, on State Border Service and on the Human Rights Ombudsman, which significantly contributed towards the state building of the country. Moreover, it established several institutions, amongst all the Indirect Taxation Authority, the State Investigation and Protection Agency, the Armed Forces of Bosnia and Herzegovina and the High Judicial and Prosecutorial Council.

In such a complex framework, the participation of the OHR was necessary. However, the presence of this body has also been subject to criticism, and many international and local political actors called for its reform, as the enforcement of constitutional changes and the override of national powers may result into the transformation into a full protectorate, which is not the ultimate aim of the European Union (Tuathail, 2005, p.63).

Soon after the successful negotiation of the Agreement, a Peace Implementation Conference was held in London to mobilise international support, culminating in the establishment of the Peace Implementation Council (PIC). Fifty-five countries and agencies are members to it and subsequent meetings throughout the years have introduced significant innovations. Among all, the Bonn Conference in December 1997 radically expanded the power given to the OHR, introducing the so-called Bonn Powers, which have in some instances been used to override the veto rights of one of the constituent people. While there is no doubt that the legislative process is cumbersome and the veto rights provide extensive opportunities to block the adoption of legislation, such emergency powers need to cease together with the emergency originally justifying their use.

In 2002, Bosnia became a member of the Council of Europe, and in 2008 it signed the Stabilisation and Association Agreement with the European Union, which entered

into force in June 2015. Among the priorities required, there was the amendment of electoral legislation and the fulfilment of all the Council of Europe post accession requirements. To meet all commitments, the presidency in a joint effort with the international community proposed the April Package, the first significant initiative for constitutional changes. This drive for development originated from the United States administration and was strongly supported by the European Union, particularly from Germany through its embassy in Bosnia and Herzegovina. However, it was unsuccessful due to irreconcilable political differences. the proposal dropped in parliament and efforts in the next years, such as the Prud Proposals or the Butmir Package, failed too because of the rejection by the Alliance of Independent Social Democrats (SNSD), the Dodik-led governing party in the *Republika*.

In 2008, following the widespread legitimacy concerns in the country, the "5+2 exit strategy" for the closure of the OHR has been presented at the PIC Brussels meeting. The strategy includes five objectives and two condition that have to be fulfilled to achieve the full transition to an independent, functional and sustainable state. The political reality, on the other hand, is different and an effective path to the ability of granting those requirements still hasn't been found. Moreover, the Peace Implementation Council is subordinate to the UN Security Council, which in Resolution 1031 emphasised the "full peace implementation", therefore setting an even higher standard for a ceased international participation which is still far from being attained, with an early exit posing disastrous results.

1.3.2 Consequences of the international involvement

The international participation has indeed facilitated the process of institution building. Nevertheless, this top-down system has led to many "side effects" which have been undermining the ultimate goal of creating a self-sustained state justified on the grounds of future EU membership.

This approach led to the perception of the country as a controlled democracy: external democracy promotion whose undemocratic elements, are directly inserted within the country and benefit from widespread powers of control, constituting a direct, undefiable, influence over its political development (Victor D. Bojkov, 2003, pp. 42-43).

The local government has been overly dependent on external power and has not accounted for its own responsibility during the country's crisis, adopting a dependent and passive attitude. There is no incentive for them to accept political compromises. The knowledge that if not agreement is concluded the High Representative will impose the needed legislation himself, leads all other parties to decision-making to avoid making the required effort and take responsibility. As a matter of fact, the democratic principle of the sovereignty of people is far from respected. In this regard, the main problem is that the more this dependency is entrenched in the system, the harder it is to plan the closure of the High Representative, entering a vicious circle where the way out would be far from clear to reach.

Another element that contributed to the ultimate inefficient nature of the international community is its inconsistent commitment. The emerging crisis in Kosovo in 1999, together with the 2001 attack on the World Trade Centre and the invasion in Afghanistan (2001) and Iraq (2002) shifted its focus from the community to other, otherwise considered 'urgent' issues. The change in attitude is illustrated by the Office of the High Representative budget cuts from 35 million euros (1999) to 25 million (2001), following a decision by the Peace Implementation Council. This decreasing attention was also due to the inability to bring about significant change and increasing frustration for the failure of continuous efforts, as occurred with the April Package, with no long-term objectives ever being officially fulfilled (Kulanić, 2011, pag.179).

All the aforementioned aspects and factors contributed to the deadlock in which the country today, with ethnic differences forming the principal notions of politics, an increasing popularity nationalism similar to that of the 1990s, economic stagnation caused by transitional issues during the transformation of its previously communist market to a free market economy and unwilling local politicians ignoring their responsibilities.

The weak and scarcely sovereign central government is therefore still unable to bring about change needed to overcome the present situation.

Chapter 2 – The hybrid Constitutional Court in the Bosnian context

2.1 Divided Societies and Hybrid Courts

The actors involved in the resolution of the conflict and in the management of the post-war period not only had to undertake a process of state-building but also of nation-building, due to the diversity and division of Bosnian society. What characterises a divided society is not simply ethnic and cultural diversity but the extent to which these differences are "politically salient - that is, they are persistent makers of political identity and bases for political mobilization" (Choudhry, 2008, p. 5). Therefore, if we are to understand ethnicity through political interest, then such diversity can only translate to political fragmentation, a prevalent issue in Bosnia. Thus, policymakers are faced with the challenge of responding appropriately, evaluating multiple models of allocation of decisional power in the institutions. This is ultimately set out in the constitution, which shall institute a legitimate form of government and guarantee protection of all ethnic groups without sacrificing governmental effectiveness (Grewe and Riegner, 2001, p.4). A fundamental aspect of this process is the creation of a shared political identity between the different social groups, and in doing so, international law can increasingly influence the design of constitutions in an attempt to cope with divided, post-conflict societies.

Bosnia and Herzegovina is a clear example of how the recent trend of "internationalised constitutionalism" is a way to cope with the peculiarities of divided societies. Even if this approach is perceived as a positive step forward towards a more integrated and interconnected world, cases of its application also raise questions about its effectiveness and legitimacy, as we've seen from political and institutional immobility.

If we also consider international intervention elsewhere, we notice that a "menu for constitutional design" which establishes a set of best practices has often been promoted. When considering the judiciary, hybrid courts are often present in countries in which the capacity and independence of local judges is compromised. In this case, this type of court is introduced in the institutional asset of the country as it effectively responds to the common problem of ethnic bias in a post-conflict state. Local members are included to promote legitimacy, while international ones are selected for their

expertise and impartiality (Schwartz, 2019, p.1). But if we consider established sovereign states which do not possess these kinds of "needs", it is rare that hybrid courts are included, as it is generally taken for granted that the judiciary is to be native to the polity it serves, both for reasons of legitimacy and state sovereignty.

2.1.1 The Constitutional Court of Bosnia and Herzegovina

A written constitution is generally intended to have specific and legally binding effects on citizens and on political institutions. Therefore, there must be some means of enforcing it and providing some remedy through the process of constitutional review. The function is commonly exercised by a constitutional court, "an independent organ of the State whose central purpose is to defend the normative superiority of constitutional law within the juridical order". (Sweet, 2012, p. 2). This centralised model of exclusive exercise of review power was introduced by Hans Kelsen's concept of the legal system and mainly expanded after World War II, when a higher level of limitations was needed in light of the historical events.

In Bosnia, the internationalization of the judiciary through the introduction of a hybrid constitutional court was deemed an appropriate step, considered the general situation in the country.

Already during the Yugoslav regime, the republics disposed of their own constitutional justice system, which is not dissimilar to the present-day Court but has evidently been modified in terms of power and internationalized nature.

The Constitution of Bosnia and Herzegovina provides for the establishment of a constitutional court in Art. VI. Consistently with the Kelsenian model, the court has exclusive abstract review jurisdiction to decide upon any dispute that arises under the Constitution. Competences also include cases of inter-institutional litigations between central organs, organs of an Entity as well as federal disputes between the entities, individual complaints against the judgement of any court and review of the vital interest veto of one of the constituent peoples or Entities. These competences are formulated in the constitutional text in extremely general terms, with principles such as "upholding the constitution" needing inevitable interpretation. This approximation generates

uncertainty with respect to the competences themselves and raises problems for its legitimacy and capacity to implement the text (Grewe and Riegner, 2011, p.45).

The most evident aspect of the internationalisation of the court is found in its hybrid composition, aimed at preventing ethnic outvoting, with judges contributing with their diversified legal expertise and thus improving local judges' ability in decision making. It is composed of a total of nine members. Consistently with the system of ethno-territorial power-sharing present in other national institutions, four judges are selected by the House of Representatives of the Federation, conventionally two Croats and two Bosniaks, two by the Assembly of the Republika Srpska and three selected by the President of the European Court of Human Rights after consultation with the Presidency. It is mandatory for the three internationally appointed judges to not have Bosnian nationality or that of any of its neighbouring countries. It is integral to their role in court, that they represent a neutral power in an environment where constitutional politics tend to evolve based on ethnicity. However, there is no requirement for any particular professional qualifications, only a "high moral standard". It follows in practice that when the entity legislature appoints the judge, it is often a choice with particular political implications. This is particularly true in the *Republika Srpska*, where the appointment is directly controlled by the dominant party in Parliament, which has always been a Serb nationalist one. Nevertheless, if we assume foreign judges to be impartial and independent, their presence mechanically reduces the possibility of ethnopolitical influence, as the alliance of international judges with any ethnic group can outvote the other two.

The first set of judges have been appointed for a 5-year non-renewable mandate, while they have enjoyed long-term tenure with mandatory retirement at the age of 70 since 2003.

2.1.2 Multiethnicity – the Constituent Peoples Case

Despite all the questions that have been arising on some aspects of the constitutional court, the institution occupies a key position in driving constitutional reform and strengthening the state through its judgements, opening up possibilities for the development of the country. The focus of the international community in the country has shifted within the first years from the prevention of incoming hostilities to ensuring

the conditions for a lasting asset in the country. In practice, the main aim is to re-build the multiethnicity that had characterized the country up until a few years prior to the War. This goal, however, was inconsistent with the existing arrangements of the country. Early attempts to push for change through elections or through collaboration with the local ethnic groups failed, so a harder and more independent stance had to be taken. The Constitutional Court together with the High Representative, the two main bodies endowed with constitutional mandate, had an integrational approach in its decision to shift the balance from collective rights and ethnic power sharing to the protection of minorities, emphasising the principles non-discrimination and citizenship (Marko, 2005, p.11). Its influence in this process towards a multi-ethnic society culminated with the landmark ruling U-5/98, often referred to as the "Constituent Peoples decision", a case which highlights the tensions between commitments to individual rights and the imperatives of an ethnic consociational peace deal (Choudhry and Stacey, 2012, pag.98).

The Case was composed of four partial decisions published between January and August 2000. Chair of the Presidency of Bosnia and Herzegovina at the time, Alija Izetbegović, brought an abstract review challenge to the Court, asking to evaluate the consistency of the Constitutions of both Entities with the national Constitution, specifying those provisions which he viewed as unconstitutional. The key question was whether Bosniaks, Croats and Serbs were Constituent Peoples throughout the country or specifically in their respective Entity as well (that is, Bosniaks and Croats as constituents of the Federation and Serbians of the *Republika*). The options were either to recognise a bi-national Federation or to rely on the return of refugees and displaced persons in order to re-establish a multi-ethnic society. The ruling followed the second possibility, confirming the constituent status of all people also at the Entity level. The majority concluded that "ethnic segregation can never be a legitimate aim with respect to the principles of democratic societies"[4] and went as far as stating that individual rights are as important to peaceful coexistence between ethnic groups as collective rights of the constituent entities themselves. The provisions were therefore declared invalid and the court required the revision of Entity Constitutions. However, no specific amendment was proposed, and the political parties disagreed on the changes to be made. Ultimately, to

[4] U-5/98 para 96

implement the decision, the Office of the High Representative intervened in 2002 securing compliance.

What was controversial in this instance is the voting distribution amongst the judges, who clearly divided along ethno-national lines. Both the Croat and the Serb judges opposed the decision, while the numerically superior international judges sided with the Bosniaks and allowed them to reach the simple majority. In such a deeply divided society, such a determinant role of the international actor is likely to be contested with the claims of favouring the interests of the international community. This was not the only case in which the international judges played a pivotal role. Another more recent example is Case U-14/12. This 2015 case challenged violations of the right against discrimination protected under Art. II.4 and by Art.1 of Protocol No. 12 to the ECHR. In this instance and many others too[5], judges divided along the same lines in the same way as they did in "Constituent Peoples".

2.2 Judicial independence

Considering the political standing related to each ethnic group – a unitary stance of the Bosniak community and the more decentralised, even secessionist one of the Croats and Serbs – and the ethnic bias that is connected to it, the purpose of international judges is to further their level of impartiality. This impartiality, together with judicial independence, are at the core of the effective functioning of the court as a whole. Nevertheless, if we consider international courts such as the International Court of Justice, "judicial politics" are inevitable and acknowledged, with judges tending to favour states of similar economic and political status. This occasionally interferes with the adequate fulfilment of the judicial function and adversely affects the perceived legitimacy of the institution (Shany, 2008, p.5). The awareness of this bias led to the questioning of the actual independence and legitimacy of international judges themselves in the Constitutional Court of Bosnia and Herzegovina.

[5] See also cases concerning actions carried on by the High Representative and the OHR: U-9/00 (3 November 2000), U-25/00 (23 March 2001) on the constitutionality of OHR imposed amendments to the Law on Travel Documents, U-26/01 (28 September 2001) on the constitutionality of the Law on the Court of Bosnia and Herzegovina. In the first two cases the Court divided 7-2, while the latter passed with a 5-4 majority composed of the international judges, that determine the majority in any divided case, in conjunction with the Bosniak. In all cases, the two Serb judges were on the dissenting side.

The international judges are extremely relevant to the Court and its decisions. The only way for them not to determine a final ruling would be for all the three Constituent Peoples to form an independent and compact majority. And while it is possible, in practice this is very unlikely to occur in this environment of mistrust and conflicting interest amongst the communities. In addition to evaluating local judges, it is worth to analyse independence and impartiality of the international judges too, given the decisive decision-making power in their hands.

2.2.1 Independence and Impartiality of local judges

Analysing the judges' votes, we can clearly see that their opinions do indeed divide predictably along ethno-national lines (Schwartz and Murchison, 2016, pag.824). As it is clear from the court's cases, when a judgement is non-unanimous, the Bosniak side will usually be in opposition to its Serbian counterpart, with the Croat position being more variable. At times this occurs as a result of a lack of independence, but a lack of impartiality is also an important factor.

Given the situation, there are two main theoretical reasons why ethno-national affiliation is expected to influence judicial behaviour in the court. First, if we apply a broad understanding to the Attitudinal Model of judicial behaviour and adapt the left-right ideological spectrum to political preferences which depend on ethno-national affiliation, we will find that individual judges' votes reflect differences in ethno-national affiliation itself. Consequently, this affiliation would result in "In-Group Favouritism" (Tajfel, 1974, p.67).

Following these considerations, Schwartz and Murchison tested a number of hypothesis' in their empirical study on judicial impartiality. In their study, they analysed the effect of long-term tenure and its relation to dissenting opinions and to the extent to which co-ethnic petitioners are likely to be favoured. Their findings suggested that the significant influence of ethno-national affiliation on the Constitutional Court of Bosnia and Herzegovina were found in cases of abstract review decisions. They demonstrate that it is possible to accurately predict the division of judges and not specifically that which is linked to the duration of their mandate, contradicting what is usually understood by long-term tenure attenuates divisions (2016, pp. 833-46).

Despite the claims that the decentralized and fragmented governmental system in Bosnia is an effective deterrent from Court Curbing practices (Schwartz, 2019, p.21), there is still a great need for judicial independence. Even in homogeneous democratic countries, constitutional courts have been found to be politicized in terms of their appointment process, decision-making and cases heard (Hönnige, 2009, p.980). These aspects will logically be accentuated in a country undergoing a troubled transition such as Bosnia. In the country, the factor which is specifically affecting politicization of the court is the election procedure of the Judges. No specific professional qualification is required: the judge is only to be selected within "distinguished jurists of high moral standards"[6]. This factor, together with the simple majority in the parliaments required for the election, contributes to the politicization of the election procedure, therefore benefitting individuals who are appreciated for their previous political experiences in the respective Entity (Kushi, 2017, p.6).

A recent case concerning judges' impartiality in the Constitutional Court is Simić v. Bosnia and Herzegovina[7]. The applicant, Krstan Simić, was a member of the National Assembly of the *Republika Srpska* and the vice-president of the Alliance of Independent Social Democrats, "SNSD". After taking office as a judge of the Constitutional Court, he was removed from any political position to ensure independence. Due to the fact that a local non-governmental organisation informed the Constitutional Court in 2009 of a letter sent to the president of the SNSD and to then prime minister of the *Republika Srpska*, it became evident that the judge maintained close ties to the political party. Moreover he released a series of media interviews discussing and criticising the work of the Court.
Proceedings were brought before the constitutional Court under Art.101 of the Rules of the Court, with the objective of dismissing a judge from office due to the risk of a lack of impartiality and independence. The Court unanimously voted for his removal on 8 May 2010.

Despite Mr Simić denying opportunities to inspect and present his case in the Court, he later appealed to the Court of First Instance, to the Court of Appeal and finally, after the exhaustion of local remedies, to the European Court of Human Rights. He appealed to violation of Articles 6, 10, and 13 of the Treaty on the Functioning of the

[6] Constitution of Bosnia and Herzegovina, Art. VI-1(b)
7 application no. 75255/10 in 08.12.2016 at the European Court of Human Rights, available at hudoc.echr.coe.int

European Union, respectively on the fairness of the proceedings, freedom of expression and effective resolution, which were all rejected by the ECHR on grounds of ill-founded and inadmissible claims.

2.2.2 International judges' voting behaviour – to what extent can they be considered independent?

While Bosniak judges have especially favoured integrationist constructions of the constitution with its Serb and Croat counterparts preferring more multinational, federal and consociational positions, the behaviour of internationally appointed judges stills remains less predictable than that of local judges (McCrudden and O'Leary, 2013, pag.92). Nevertheless, the question of their independence remains, as they have often been criticised of favouring the centralised preferences of the Bosniak politicians and of the Office of the High Representative.

Home-state bias is a factor that possibly influences judges while deciding upon a ruling. Almost all of the judges appointed by the President of the ECHR come from Western Europe, which has been continuously involved in the state regions which host the Bosniak community. It is reasonable to assume that this position can affect judges during their evaluation of various cases. More specifically, judges have been found to conform to sociological expectations of their native countries when asked to provide dissenting opinions. For example, when analysing the position of judges Feldman (UK) and Grewe (France), McCrudden and O'Leary stated that the British judge predictably adopted a "pragmatic, pluralist and territorially accommodationist outlook", while Judge Grewe had a more integrationist temperament (2016, pag.90). Strategic considerations and evaluations of how a decision is going to be perceived and consequences a certain level of activism are also likely to affect judicial behaviour.

Allegations that the votes of foreign judges have been favouring the Bosniak position have been tested by Professor Alex Schwartz by examining decisions arising under the Court's abstract review jurisdiction. His findings showed that while they were significant more likely to favour challenges brought by the Federation of Bosnia and Herzegovina, no evidence of statistical significance supports the claim that foreign judges are biased against the *Republika Srpska* (2019, pp.10-13). However, patterns do show

that that when there's a split decision in Court, it is usually structured in such a way that allows the foreign judges to cast the pivotal vote, acting as the "Swing Justices" in the Court. In these instances, data shows that it is more likely for Serb and Croat judges to be opposed, displaying a contrasting view to the foreign and Bosniak parties, a clear sign ethno-national patterns within the court.

Despite this, the court has not coherently displayed behaviour which opposes the entities and ethnic groups, the permanent presence of the international judges has been creating dissent and faced frequent opposition. The standard questions that have been surrounding the international presence apply here as well, and proposals of outright removal of the three external judges have been frequent throughout the years. One of the most recent instances has occurred after the declaration of non-conformity with Articles I, II of the Constitution of Bosnia and Herzegovina of the Law on Holidays of the *Republika Srpska*[8], establishing January 9 as a public "statehood" holiday in the Entity, considered discriminatory against non-Serbs living in the *Republika*. In this instance the President of RS Milorad Dodik refused to implement the final ruling after calling a referendum on 25 September 2016 in which 99.8% of the voters declared themselves in favour of defying the court.

So far, the Serb side is the only one pushing for the removal of international judges from the constitutional Court, with Bosniaks and Croats openly opposing this initiative[9]. However, continuous attempts at boycotting and opposition by the government in Banja Luka[10], are fostering the secessionist trends of the entity and do not show signs of stopping, posing serious danger for the current functioning and overall future of the institution.

[8] Official Gazette of the Republika Srpska, 43/07

[9] Bosnian Presidency Members Criticize Dodik In Dispute Over International Judges. Radio Free Europe Radio Liberty Balkan Service. February 19, 2020

[10] the de-facto capital of the Republika Srpska

Chapter 3 – External influences over the functioning of the Constitutional Court

3.1 The relation between the Constitutional Court and the High Representative

Following the significant increase in powers decreed in the 1997 Bonn Peace Implementation Conference, the High Representative (HR) seized the opportunities that an increased margin of action could have and aimed at speeding up the process to bring about change that the mandate provided for. The main way in which the HR took advantage of the new powers was to issue binding decisions to remove uncooperative civil servants or public officials from office. In most cases this occurred in instances of unwillingness to cooperate with the International Criminal Tribunal for the former Yugoslavia.

Additionally, the High Representative imposed legislation, both at the state level and within the entities and their constitutions. Because this practice allows to bypass the complex legislative procedures and obstruction by the vetoes, it has proved advantageous not only for the development of the country as a whole, but also for the Constitutional Court and the preservation of its authority. In many occasions, the intervention of the High Representative with imposed legislation has guaranteed the compliance with some of the more controversial court's decisions that would otherwise have remained unimplemented. In the Rules of the Constitutional Court it is stated that its decisions are final and binding (Art. 72). All authorities are obliged, within the limits of their competences to implement the decisions. Additionally, Art. 239 of the Criminal code provides the liability to public prosecution of the official responsible for failure of enforcement. Nonetheless, during the years many rulings have been ignored without any consequence. The limited resources of the Prosecutor's office and difficulties in the identification of individuals responsible for implementation contributed to this widespread impunity. According to a 2015 report by the EU Delegation, as many as eighty-nine decisions had remained unenforced up to that point.

Even if the number of unimplemented decisions has been decreasing, the phenomenon poses a great threat to the court's authority. Recently, a Court's decision

declared unconstitutional Art. 53 of the Law on Agricultural Land of *Republika Srpska*[11], thus establishing that the Entities are not the owners of agricultural land: the State is. This politically sensitive decision triggered a strong reaction from the Serbs of Bosnia and Herzegovina. Dodik defined the decision "a kind of coup d'état", renewing separatist threats and strong critics to the Court's International Judges. Considering the immediate and strong reaction, this decision is likely not going to be implemented[12].

In many instances, the High Representative has provided support for the Court with regard to this lack of implementation through the legislative power that the figure was endowed with, thereby forcing compliance. As mentioned in Chapter 2, this occurred in the case of the Constituent Peoples decision. Without the intervention of the Office of the High Representative, Entity governments were likely to avoid implementation, thereby ignoring the ruling.

Even if this legislative practice ultimately aims at providing the necessary change in the country, it was not always positively accepted from the local players. In the first place, it was not immediately clear if the High Representative had in fact the power to overcome the Parliament in passing national laws. The Bonn Declaration mentions the ability to promulgate binding decisions, but not explicitly to pass primary legislation, as it was interpreted to do.

Another uncertainty concerned the ability of the Constitutional Court to review the resulting legislation, as the HR represented the final authority in the interpretation of all aspects of the peace agreement[13]. When we consider the High Representative a product of international law, he[14] could indeed pass legislation which is immune to review, jeopardising the integrity of the constitution and the rule of law in Bosnia (Schwartz, 2019, p.23). However, when issuing domestic law, the Representative acts as a substitute of national authorities and shall consequently be subject to the constitutional law of the country. These uncertainties opened the ground to many attacks on the position and powers of the High Representative.

[11] Case No. U 8/19 (6 February 2020)

[12] https://balkaneu.com/law-on-agricultural-land-in-rs-sparks-another-crisis-in-bih

[13] General Framework agreement, Annex 10, Art. 5.

[14] All the High Representatives appointed up to this day have been men, hence why I use the male personal pronoun.

Doubts have been eventually clarified in a series of cases of the Constitutional Court. Case U-9/00 challenging the Law on the State Border Service – which had been enacted by the High Representative following the failure of the Parliamentary Assembly to adopt it independently – confirmed the reviewability of acts of the HR for the first time, basing the reasoning on the role of functional duality – an authority of one legal system intervening in another legal system – making his actions amounting to acts regarded as Law of Bosnia and Herzegovina, and therefore subject to the jurisdiction of the Constitutional Court, unlike the exercised of the rest of his powers. (para. 5). Even if the ability of review can be easily bypassed by issuing a decree, properly recognised as an exercise of international power instead of legislation, by exerting a form of control on imposed legislation, at least apparently, the court is nonetheless perceived as more authoritative and effective, providing for at least some measure of accountability for the role of the High Representative.

Over the years, the court has carefully and strategically evaluated the instances in which it opposed the High Representative. Although the figure has been of aid to the court and its authority, by virtue of the Bonn Powers, it does have the means to easily override decisions. Therefore, the process of review has never amounted to a strong check on its authority, with the general tendency not to question the instruments issued, resulting in "the High Representative and his office enjoying broad discretion to determine the nature and scope of actions that they may take" (Everly, 2008, pp.90-91). Challenging the core elements of the International Community's agenda might result in the overruling of the court's decisions, thereby causing damage in terms of credibility to the Constitutional Court.

The overall result is a delicate equilibrium in which both parties provide some kind of legitimacy and authority to the other. No matter if these ongoing practices, in which the international component is undoubtedly the equilibrium determinant, are there to improve the overall functionality of the country, they are very unstable due to challenges brought by local actors and to the prolonged time they the international mandate has been influencing the mechanisms of the state..

3.2 The relation between the Constitutional Court and the ECHR

Traditionally, constitutional law in western countries has been a domestic matter. However, recent trends have hinted to an increasing influence exerted by the international legal framework. After the end of World War II, judges have been growingly empowered through increased authority conferred to constitutional courts. Although they are essentially domestic tribunals established by national constitutions, they quickly became subject to extra-national norms through regional treaties and courts (Schwartz, 2003, pag.1). A clear example is given by the European Court of Human Rights and by the European Court of Justice. As well as dealing with countries over which they have jurisdiction, they have also functioned as a point of reference for courts looking for guidance in dealing with similar issues, as it occurred with the South African Constitutional Court, which has often referred to foreign precedents in its judgements[15].

This process of internationalization of constitutional law is indeed evident in Bosnia and Herzegovina. The country ratified the European Convention on Human Rights in 2002, which has been involved in the review of a number of disputes in the country. Even if in the Bosnian case involvement goes a step further, entering the field of judicial appointment in the Constitutional Court itself, some general considerations are still relevant to the case.

3.2.1 The ECHR and its role in the legal framework

The European Convention on Human Rights serves the European legal framework as a "constitutional instrument of European public order"[16] so it is argued that at least to some extent it functions as a constitutional court through the increasing exercise of "International public authority" (Von Bogdandy, Dann & Goldmann, 2008, p.1376): the performance of governance activities by international institutions influencing the domestic level. However, this increasingly popular public law perspective on global governance questions the traditional role of national institutions. Therefore, due to the

[15] See State v. Makwanyane; Minister of Health v. Treatment Action Campaign

[16] Loizidou v. Turkey (Preliminary Objections) Application no. 15318/89 (1995), para. 75

fact that the European Court of Human Rights (ECHR) enforcing the Convention mainly deals with courts in sovereign states, its position and its influence have been questioned.

But while discourses on the "constitutionalisation" of the legal landscape of Europe is a current topic of discussion, the profound diversity of the members calls for clearer boundaries to the scope of the ECHR. The limits of its role are set by the Margin of Appreciation[17]: the doctrine according to which each member state has a degree of discretion when taking action in the area of a Convention right, thus giving space to the different legal and cultural traditions of each country. By balancing sovereignty with the obligations of member states, disputes are primarily to be resolved at the domestic level, but then supervision needs to be carried on by the ECHR. In this way, the European Court does not represent a court of "fourth instance" (Ulfstein, 2014, p.3), but only deals with significant errors and infringements, supervising the correct application of the Convention in national courts. In this way, jurisdiction mainly remains a domestic matter.

As with any international element, the idea that European Courts have the ability to overrule national Parliaments does not come without issues. Since national courts must comply with judgements of the ECHR and consistently interpret national legislation in light of the *erga omnes* effects of the court previous practice, instead of passively condemning the court and engaging in practices of non-compliance, they might aim to an internationally relevant position by actively interacting with the ECHR. In this way, courts have the ability to influence interpretations so to build new standards that yield to broader consensus, in the respect of the Convention and acting within reasonable margins of interpretations.

In practice, however, the court is facing progressive resistance. The path to an expanded focus of the European Court is blocked by a weak constitutional legitimacy, further eroded by the increasing difficulties in handling the Eastern European enlargement and the rising number of applications (Repetto, 2013, p.2).

However, if we limit our discussion to the Bosnian case, the ECHR plays an essential role. It is currently the only judicial institution which has the ability to judge inconsistencies in the Constitution and provide for their resolution. So, providing important inputs that can lead to change.

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[17] Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, available at http://conventions.coe.int/Treaty/en/Treaties/Html/213.htm

3.2.2 The Sejdić and Finci Case and the need for constitutional change

A landmark case for Bosnia and Herzegovina which involved the European Court of Human Rights is the 2009 ruling of Sejdić and Finci v. Bosnia and Herzegovina[18] concerning discriminatory provisions in the electoral procedure.

The two applicants, Mr. Dervo Sejdić and Mr. Jakob Finci are two citizens of Bosnia and Herzegovina of Roma and Jewish ethnicity. Therefore, when referring to the ethnic group present in the territory, they're members to what is referred to as "Others" and aren't part to any of the Constituent Peoples. The applicants claimed that the Constitution of Bosnia and Herzegovina prevents them from being candidates and running for elections for the House of Peoples of the Parliamentary Assembly as well as for the Presidency, respectively under Articles IV and V. As a matter of fact, the institutional positions mentioned are assigned on grounds of affiliation to one of the ethnic groups composing the Constituent Peoples, that is Bosniak, Croat and Serb Bosnians. This exclusion, resulting from the consociational aspect of the institutional asset which determines power sharing in a divided society based on social or ethnic grounds, was claimed to be discriminatory, therefore going against core elements of the European Convention on Human Rights.

The Constitutional Court had previously encountered the issue in three different cases[19], each time declaring the challenge inadmissible. In a Separate Concurring Opinion to the Case AP-2678/06, David Feldman, one of the three international judges sitting in the Constitutional Court, outlined how the Court had no margin of action in reviewing the claims. The Constitutional Court is legally required to "uphold this Constitution" by Art. VI. Therefore, it cannot make any decision rendering parts of the Constitution itself ineffective. No matter if the Constitution appears to have conflicting provisions and values, the task of the Court is to give effect to it in all circumstances, including its inconsistencies.

[18] Applications Nos. 27996/06 & 34836/06 (European Court of Human Rights, Dec. 22, 2009). Available at http://www.echr.coe.int.

[19] Case U-5/04: request by the Chair of the Presidency for abstract review of the compatibility of Art. V of the Constitution with the directly applicable European Convention; Case U-13/05: request for review of the compatibility of the Election Law with the Convention; Case AP-2678/06: rejection of an appeal against administrative and judicial decisions applying the Election Law.

The political structure set up by the Constitution turns on ethnic and group identity, operationalising it in the process of government (Choudhry, 2012, p.96). So, as long as Art. V of the Constitution includes a differential treatment, the drafters of the Election Law, the Election Commission and the Courts have no choice but to follow the constitutional provision.

Contestation of such discriminatory provisions in the constitution already emerged when Bosnia became a member of the Council of Europe in 2002. In ratifying the Convention and Protocols without reservation, it voluntarily agreed to meet the relevant standards and when signing the Stabilisation and Association Agreement in 2008, it newly committed to ament electoral legislation. Furthermore, the Venice Commission made concerns explicit in its Opinion on the Electoral law of Bosnia and Herzegovina[20] and later in the Opinion on the Constitutional situation in Bosnia and Herzegovina and the Powers of the High Representative[21] adopted at its 62nd plenary session in 11-12 March 2005. Paragraph 66 states: "the rules on the composition and election of the Presidency and the House of Peoples raise concerns as to their compatibility with the European Convention on Human Rights. The rules on the composition and election of the House of Peoples seem incompatible with Art. 14 ECHR, the rules on the composition and election of the Presidency seem incompatible with Protocol No. 12, which enters into force for BiH on 1 April 2005".

The point highlighted by the Venice Commission in the Opinion correspond to the claims brought to the ECHR in Sejdić and Finci. After recognising that the exclusion was pursued in the name of restoration of peace in the country, which is an aim compatible with the general objectives of the Convention (para. 45), it stated that the maintenance of the current system did not satisfy the requirement of proportionality (para. 46), considering the existence of other mechanisms of power sharing that do not result in the exclusion of entire communities. Consequently, the Court voted with a majority of fourteen to three regarding the ineligibility of the applicant to stand for election in the House of Peoples, establishing the violation of Art. 14 on the prohibition of discrimination in conjunction with Art. 3 of Protocol No. 1 establishing the right to free elections for a legislature. Following the same principle, by sixteen votes to one it declared the violation

[20] Venice Commission, Doc. CDL-INF(2001)21, 24 October 2001.
[21] Available at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2005)004-e

of Art. 1 of Protocol No. 12 on the general prohibition of discrimination as concerns the applicant's ineligibility to stand for election to the Presidency.

The European Court compensated the inability of action of the Constitutional Court due to an unresolvable norm conflict in different parts of the Constitution (Milanovic, 2010, p.640). The points made in the judgement highlight the tension between co-existing commitments to individual rights and an ethnic distribution of political power within the Dayton Agreement.

In spite of the significance of the judgement, it remains unimplemented to this day. The only possible remedy for the applicants is an amendment to the Constitution. Constitutional Change requires a satisfactory level of political agreement among different actors involved in the country.

While it can be said that progress has been made throughout the years, I argue that this step is not feasible, considering the condition of national institutions.

The failure of the April Package for constitutional change has not been followed by any new round of talks, signalling a generally weak interest and no incentives to development. Changes of smaller scale not amounting to constitutional amendment have been planned in the Reform Agenda created by the European Union, the World Bank, the International Monetary Fund and the Council of Ministers of Bosnia and Herzegovina in collaboration with governments of both entities. Covering the 2015-2018 period, these reforms provided for a series of policies focused on six key areas for the improvement of the economic, social, and political conditions. Institutions charged with implementing the reform initially gave a positive feedback. However, delays in the program in 2017 caused the agenda to be uncompleted now.

With very few concrete results achieved so far, European institutions and more generally the International Community are growing increasingly frustrated, as the local community is. Without the needed constitutional changes, not exclusively limited to Election Law reforms, the primary foreign policy goal to join the European Union would be impossible to reach. But more importantly, no complete independence and self-sustainment of the country can be achieved. Taking notice of the inability to create a path towards an efficient and well-functioning state, if no radical change occurs aimed at simplifying the current political system and solving the conflicting tendencies that have

been leading the country to a situation of stagnation, both in the international commitment and in the national dynamics, the final goal that has been pursued during these years, from the signature of the General Framework Agreement in Dayton to today, is probably not going to be reached in the near future.

Conclusion

This final project has evaluated the management of the post-war state building process in Bosnia and Herzegovina, focusing on the role that the international community has played in it.

The Country hasn't recovered from the trauma caused by a violent and destabilising war. While it never resorted to arms and violence after the signature of the General Framework Agreement, ethnical divisions and political polarisation are a serious issue impeding the necessary development in its institutions.
Although the High Representative and the Constitutional Court, two institutions charged with securing a smooth transition in Bosnia, repeatedly intervened to overcome the inefficiencies of state asset, the country is still after 15 years from the end of the conflict in a situation of gridlock.

The Constitutional Court has contributed to avoiding the escalation of ethno-national ideals in the institution and to the establishment of an even more unbalanced power division thanks to the presence of the three international judges. However, questions about their pivotal role and about national sovereignty generally, led the position to be controversial due to lack of legitimacy and acceptance by the local actors.
Foreign judges in this hybrid Constitutional Court are deemed necessary in for the maintenance of acceptable levels of independence and impartiality necessary for the correct performance if its duties. However, the extent to which their extensive participation and decisional power can be justified by their (dubious) neutral stance is arguable.
In this hostile climate, the Constitutional Court as well as the rest of the international initiatives aimed at supporting Bosnia failed to guide the country to a path towards a local ownership of the state and a smooth path to a future European integration.

Even so, it would be incorrect to place all the responsibility for the present situation in the hands of the actors that are intervening in this process. Rather, the problem lies at the very foundation of the Nation.

In fact, the Dayton Agreement established a State whose system accentuated the complexity of the dynamics between the Constituent Peoples. The agreement has failed to strike a fair balance between the collective dimension and individual freedoms, resulting in the impediment of any tentative of amendment of the Constitution. Thus, the consequence is a perpetuation of the political stagnation in which local politicians take obstructive attitudes and avoid cooperation, while the international bodies impose decisions or issue sentences that fail to determine the necessary changes due to lack of cooperation.

For Bosnia and Herzegovina to have a positive prospect for the future some steps are essential: the weakening of the role that the ethnic principle plays in the national dynamics, an increased interest in supra-national values and the establishment of more powerful central government that yields to a more efficient political system.

Hopefully, with this paper, I have drawn some interest to a current issue that is often disregarded but that can lead to broad and varied points of reflection.

To summarise, while the present and the future of Bosnia and Herzegovina are precarious and insecure, the only certainty is the need to proceed with constitutional reforms and create a "self-sustaining" and democratic state. This process, in past years as now, needs stimulation and support from external actors, as the local political class is unable to develop a common vision of the State. Nevertheless, the international community must also radically change its strategy of actions if positive and tangible effects are to be achieved.

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Summary

L'influenza internazionale sull'assetto istitutionale in Bosnia ed Erzegovina:
la Corte Costituzionale

La dissoluzione della Repubblica Socialista Federale di Jugoslavia che avvenne all' inizio degli anni '90 è stato un processo difficoltoso e traumatico per tutta l'area balcanica. Il conflitto bosniaco tuttavia si è distinto per le difficoltà dovute dalla presenza una società composta prettamente da minoranze etniche, senza nessun gruppo maggioritario. Le tre principali etnie, bosgnacchi, serbi e croati, guidate da partiti di base etnica sempre più nazionalistici, cessarono di coesistere pacificamente ed entrarono in un violento conflitto volto ad una separazione territoriale. Particolarmente ostile fu il ruolo dell'autoproclamata *Republika Srpska* all'interno del paese. Essa infatti aveva rapporti privilegiati con il governo di Belgrado, il quale forniva sostegno politico e militare alla rispettiva comunità etnica presente nel territorio Bosniaco.

Sia il conflitto che il periodo successivo sono stati caratterizzati da una forte presenza internazionale. In questa tesi finale ho analizzato come questo elemento abbia influenzato il processo di s*tate* e *nation building* e come esso non si sia rivelato adeguato per il raggiungimento di in uno Stato auto-sostenibile. Infatti, ancora oggi, dopo il fallimento di innumerevoli proposte e iniziative, il Paese si trova in una situazione di grande difficoltà a livello politico ed economico.

Il coinvolgimento della comunità internazionale è stato ampio e a tratti controverso, ma determinante per le sorti del conflitto e per la ricostruzione del Paese e delle sue istituzioni. A questo proposito, l'impegno diplomatico degli Stati Uniti d'America portò nel 1995 alla firma del "*General Framework Agreement For Peace in Bosnia and Herzegovina*" (più comunemente "Accordo di Dayton), che pose formalmente fine agli scontri armati. Oltre a disporre le misure per il mantenimento della pace nel Paese, l'Annesso 4 contiene la Carta costituzionale che da quel momento regola il funzionamento dello Stato e ne stabilisce i principi cardine.

É infatti raro che un accordo internazionale includa al suo interno la Costituzione da adottare, poiché essa non è più espressione della "volontà del popolo", ma il risultato di

una posizione internazionale. L'assenza di un potere costituente unitario ha dato vita ad un acceso dibattito sulla legittimità e sull'erosione della sovranità nazionale.

L'assetto istituzionale che è risultato a seguito di questo processo si basa sulla presenza di tre popoli costitutivi tra cui il potere viene diviso.
Lo Stato è composto da due entità: la Federazione di Bosnia ed Erzegovina, essa stessa suddivisa in 10 cantoni , e la Repubblica Serba di Bosnia ed Erzegovina (*Republika Srpska*), gestite dal governo centrale formato dalla presidenza tripartita. La sovranità etnica è evidente in tutte le istituzioni: nella Presidenza, nelle due camere del Parlamento e nella Corte Costituzionale e esaltata da poteri di veto sulla base di interessi vitali. Tuttavia, il risultato di queste scelte ha dato vita a uno Stato centrale molto debole descritto come una "federazione a due livelli", composto da due forti Entità che gestiscono autonomamente la politica interna. Queste divisioni esasperate hanno a loro volta causato l'inasprimento delle tensioni già presenti nella società, frutto di una lunga e violenta guerra, influenzando sempre più pervasivamente ogni aspetto della vita dei cittadini.

La presenza internazionale non solo ha determinato l' attuale assetto del Paese, ma ha anche agito per mezzo di Uffici presenti sul territorio, tra tutti l'Alto Rappresentante e il *Peace Implementation Council*, ma anche tramite la collaborazione di figure internazionali direttamente incluse nelle istituzioni, come nel caso della Corte Costituzionale.

La Corte Costituzionale di Bosnia ed Erzegovina, prevista dall'Art. VI della Costituzione, è peculiare non tanto per le competenze attribuite, quanto per la sua composizione. Su un totale di nove membri, due rappresentano l'etnia bosgnacca, due quella croata, due quella serba. Infine, tre giudici sono di nazionalità straniera diversa da qualsiasi nazione confinante. Essi sono designati dal Presidente della Corte Europea dei Diritti dell'Uomo a seguito di una consultazione con la Presidenza bosniaca.
Le corti ibride, come quella appena descritta, sono inusuali. Tuttavia, in società divise in cui le differenze etniche hanno una notevole rilevanza politica, il modello internazionale spesso le prevede affinché la presenza di giudici esterni al Paese garantisca il livello di indipendenza e imparzialità necessario per salvaguardare la superiorità della legge

costituzionale, quindi attenuando il problema del *bias* etnico che può rischiare di inficiare il corretto esercizio delle sue funzioni.

Nel caso della Bosnia ed Erzegovina, infatti, non è possibile fare affidamento sull'indipendenza dei membri della Corte appartenenti alle singole etnie, considerando la predisposizione a valutazioni di tipo politico durante la nomina dei giudici e anche la possibile affiliazione a uno degli stati confinanti, come dimostrato nel caso *Simić v. Bosnia ed Erzegovina*.
In particolar modo, la componente serba si è dimostrata estremamente critica e tendente a pratiche ostruzionistiche nei confronti della Corte, in quanto spinta dalla volontà di uno stato maggiormente decentralizzato.

I giudici internazionali ricoprono un ruolo fondamentale nella Corte e nelle sue decisioni finali grazie alla superiorità numerica di cui essi godono, in quanto le decisioni vengono assunte a maggioranza semplice. Ciononostante, è corretto affermare che i giudici internazionali ricoprano realmente un ruolo di ruolo di *pouvoir neutre* e che la loro presenza sia giustificata per garantire l'imparzialità dell'istituzione?
A questo proposito, è riconosciuto che i giudici possano non essere completamente distaccati da qualsiasi valutazione di tipo ideologico influenzata dallo stato di provenienza, di tipo strategico, nonchè dalla tendenza a favorire gli interessi della comunità internazionale.

La presenza di giudici esterni è stata a lungo discussa e spesso le decisioni da loro determinate ritenute di scarsa obiettività, in quanto favorivano maggiormente la comunità bosgnacca. Mente non è presente alcun dato di rilevanza statistica per quanto riguarda particolari favoritismi, è tuttavia significativo sottolineare che in casi di divisioni all'interno della corte, è tipico trovare la parte serba in opposizione a quella bosgnacca, ma anche ai giudici internazionali, mentre i croati mantengono una posizione meno prevedibile.
Le etnie bosgnacche e croate si sono fino ad ora opposte ai tentativi di rimozione delle componenti internazionali nella Corte da parte dei serbi, che hanno spesso sfidato l'autorità dell'istituzione ignorandone i giudizi o boicottando la sua attività

Anche le dinamiche tra la Corte Costituzionale e l'Alto Rappresentante, figura già prevista dall'Accordo di Dayton, sono di particolare rilevanza. L'Ufficio dell' Alto Rappresentante (*Office of the High Representative,* OHR), il cui ruolo è quello di assicurare l'evoluzione del paese in una democrazia pacifica in grado di assumersi la responsabilità dei propri Affari, a seguito dei "*Bonn Powers*" a lui conferiti nel 1997, ha la facoltà di rimuovere funzionari pubblici dal loro incarico e di imporre atti legislativi sia a livello statale che nelle due Entità.
Quest'ultima pratica consente di bypassare il complesso processo legislativo e i poteri di veto che spesso impediscono tentativi di riforma nel Paese.
La Corte Costituzionale stessa ne ha tratto dei benefici, in quanto grazie all'intervento di questa figura sono stati imposti i rimedi necessari per l'implementazione delle sue sentenze, riducendo così le inadempienze e preservando la sua autorità.
Le leggi emanate dall'Alto Rappresentante sono anch'esse soggette a revisione costituzionale. Nonostante un "prodotto" del diritto internazionale debba di norma essere immune alla revisione, è stato decretato che in questo caso le sue azioni equivalgono a quelle del legislatore nazionale, e quindi soggette alla revisione della Corte al fine di non compromettere l'integrità della Costituzione.
In questi anni, tuttavia, la Corte ha valutato attentamente le istanze cui opporsi all'Alto Rappresentante, tendendo a non causare danno alla sua stessa credibilità, in quanto egli ha il potere di sovrastare qualsiasi giudizio negativo tramite l'utilizzo di decreti propriamente riconosciuti come forma di potere internazionale e quindi non revisionabili.

Lo strumento di controllo di legittimità costituzionale delle leggi è fondamentale per garantire il carattere democratico di un regime. Ma il potere giudiziario, come si è potuto dimostrare nel caso Bosniaco, si deve sempre più spesso confrontare con altri livelli di influenza. La ratifica della Convenzione Europea per la salvaguardia dei Diritti dell'Uomo nel 2002 e la sua inclusione nella Carta Costituzionale rende il Paese soggetto ad un sistema di tipo transnazionale e a norme internazionali, portando ad una sempre maggiore internazionalizzazione del diritto. Alcune prospettive sul diritto pubblico infatti sostengono che il sistema legale si stia evolvendo verso una costituzionalizzazione dell'ordine europeo. Nel caso della Bosnia, oltre a queste valutazioni generali che si applicano a tutti i 47 Stati membri dell' ECHR, ad essere di

particolare rilevanza è il ruolo che la Corte Europea dei Diritti dell'Uomo occupa nel processo di nomina giudiziaria.

Nonostante la giurisdizione europea e il carattere sempre più internazionale della legge pongano una serie di riserve e di problematiche concettuali, la Corte Europea è garante di uno standard comune e ha la facoltà di sostenere lo Stato durante il percorso verso un regime più stabile e democratico.
Il caso *Sejdić e Finci v. Bosnia e Eerzegovina* dimostra come l'ECHR sia talvolta l'unico soggetto a dare l'input per uno sviluppo significativo all'interno del Paese. In questo Caso giudiziario, due cittadini bosniaci di etnia Rom ed Ebraica denunciarono davanti alla Corte Europea il carattere discriminatorio di alcuni aspetti della Costituzione. In quanto di etnia diversa da quella dei tre Popoli Costituenti, al Sig. Sejdić e al Sig. Finci veniva automaticamente negata la possibilità di concorrere per l'elezione alla Presidenza o alla Casa dei Popoli, una delle due Camere che compongono il Parlamento. La Corte Costituzionale, che deve limitarsi ad applicare il contenuto della Carta costituzionale, aveva dovuto in precedenza affrontare il problema in tre diversi casi, ogni volta dichiarando il ricorso inammissibile. Nonostante in essa ci sia un evidente scontro tra diversi principi, la Corte non ha la facoltà di rendere nulle o inefficaci parti della Costituzione stessa. L'ECHR invece, sulla base della Convenzione, decretò una violazione e richiese rimedio tramite emendamenti costituzionali. Anche se la Commissione di Venezia e il Consiglio d'Europa avevano già sottolineato la necessità di un cambiamento a livello costituzionale, ad oggi la decisione non è stata implementata.

Per ottenere questo tipo di risultato è necessaria un' unità politica che ad oggi non è stata raggiunta. Se le istituzioni non riescono ad uscire compattamente da questa situazione di immobilità e a portare a termine le riforme necessarie, qualsiasi visione della Bosnia ed Erzegovina come Stato completamete indipendente è difficile da immaginare in un futuro prossimo.