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CONSTITUTIONAL DEVELOPMENT WITHOUT  
CONSTITUTIONAL AMENDMENTS. THE CASE  
OF BOSNIA AND HERZEGOVINA

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*To Una and Tarik*



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## TERMINOLOGY

In this study, the term Bosnia may be used denoting the whole Bosnia and Herzegovina. With that abbreviation, there will be no intention to omit the importance of Herzegovina as one of the regions which constitutes the contemporary state of Bosnia and Herzegovina.

The main nations living in Bosnia and Herzegovina are Bosniaks, Croats and Serbs. The adjectives Croat and Serb denote affiliation with the nation, while the terms Croatian and Serbian relate to the two countries, Croatia, and Serbia<sup>1</sup>. In the meantime, the contemporary term Bosniak needs to be distinguished from the more general term Bosnian: the first is related to Muslim citizens of Bosnia and Herzegovina, the latter denoting all inhabitants of Bosnia, irrespective of national background<sup>2</sup>.

The contemporary state of Bosnia and Herzegovina is composed of two entities: the Federation of Bosnia-Herzegovina (Federacije Bosne i Hercegovine, FBiH) and the Serb Republic (Republika Srpska, RS).

It is important to notice, that the first term should not be confused with the Bosnian state, while the second should not be confused with the neighbouring Republic of Serbia.

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<sup>1</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.XV

<sup>2</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.XV

## INTRODUCTION

The Western Balkan has always been a borderland between East and West and represented, for the 21st century, the scene of important geopolitical changes. Within the region, present-day Bosnia and Herzegovina can be observed as a place of great complexity: just think of the religious mix that has solidified over hundreds of years or the role that the murder of Archduke Francesco Ferdinando played in Sarajevo to understand the role more central than ever in the country in defining today's Europe. Outskirts and capital at the same time, Sarajevo represented a fruitful experiment in multiculturalism and inter-religiousness until the beginning of the Nineties, when, following the dissolution of Tito's Yugoslavia, conflicts of independence broke out. Episodes, those of the war, which appear to be indissoluble from the current situation of Bosnia and Herzegovina, on all fronts. The Peace Agreements for Bosnia and Herzegovina signed in Dayton and the subsequent actions of reconstruction of the state are at the centre of this work that moves its steps starting from key questions such as: What years of conflict have produced in Bosnian society? How have national and international actors moved to ensure peace in Bosnia and Herzegovina? What were and still are the main effects of the Daytonian system? Why do many believe that the Dayton Peace Agreement represent an element of instability in the framework of present-day Bosnia and Herzegovina?

Through the study of the parties in conflict and of the different motivations, in order to explain the desire to create an ethnically divided state, we will come to observe how Bosnia and Herzegovina presents itself today using different angles. The paradoxes contained in the Dayton Agreement; its top-bottom application without a real process of citizen involvement; and the prospects for improvement through the involvement of civil society are the three main fields of analysis used for this work.

The objective, here, will be to observe the peace created by Dayton and the socio-political ecosystem created by it after the thirty anniversary of the signing of the



*pax daytoniana*. It will shed light on the limits created by it as regards a possible peaceful coexistence between the Croatian, Bosniaks and Serbian communities, focusing the observation on the important role that the citizens themselves could play in Bosnia and Herzegovina for the real overcoming of the sectarian division between ethnic groups. The constitutional ban imposed on those who belong to the "Others" category to access the highest political arenas of the country represented a crucial node in Bosnia in recent years and in its delicate relationship with the European institutions.

In the third and last chapter of this research we will try to give ideas for changes to the current system, such as: (i) the strengthening of the local government system for a greater representation of citizens; (ii) overcoming complex, fragmented and not very representative electoral dynamics of the multi-ethnic situation in Bosnia and Herzegovina; and (iii) the importance shown by examples of civil society, as a complex system of relationships between institutions, individuals, market and sometimes families<sup>3</sup>, and social unity, as in the case of protests across the country in the spring of 2014. Another important issue, elaborated from multiple perspectives in chapter three of the following work has to deal with the welfare logic of international intervention, which has done nothing but favour a system teeming with NGOs, often in conflict with each other for the management of resources.

To understand the present, with its delicate perspectives, it will be useful initially to look at what was the Bosnian landscape on the eve of the breakup of the Yugoslav Federation. In fact, only by taking into consideration the delicate historical balances between the different communities, it will be possible to observe at best the reason for the current political and social positions of the respective ethnic groups. Therefore, the first chapter begins with a conceptual analysis of the right of self-determination of Bosnia and Herzegovina, compared with the secessionist phenomena of Republika Srpska. The chapter then continues

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<sup>3</sup> Alex Jeffrey, *The Improvised State. Sovereignty, Performance and Agency in Dayton Bosnia*, (United Kingdom: Wiley-Blackwell, 2013), p.107

with a general analysis of the Dayton Peace Agreement focusing on some of the most important Annexes such as Annex 3 on post-war political elections, Annex 4 of the Constitution of the current Bosnia and Herzegovina, Annex 6 on the protection of human rights and Annex 7 concerning the situation of internally displaced persons, and the return and relocation of internal and external refugees. The first part of the work concludes by taking into consideration the action of some international organizations engaged in Bosnia and Herzegovina such as the Organization for Security and Co-operation in Europe, the North Atlantic Treaty Organization and the figure of the Office of the High Representative.

The aim of this research is to focus on some critical points of the Dayton Agreement whose modification could prove to be fundamental for a stabilization of the Bosnian situation and overcoming the divisions among the citizens of the country. Many steps have been taken since Bosnia and Herzegovina was battered by bombs in one of the most tragic event in recent European history, but the path to follow still seems long and uncertain.

# Chapter 1 - From the conflict in Bosnia and Herzegovina to the construction of the new State

## Section 1 - Self Determination and Right of Secession in Multi-ethnic Bosnia

The purpose of this first section will be to analyse the foundation on which contemporary Bosnia and Herzegovina rests. Starting from the concept of self-determination and analysing then the possibility of secession at the eve of the breakup of the former Yugoslavia, we will try to understand the differences in legitimisation between Bosnians and Serbs.

Regarding the concept of self-determination, the idea of the international community is particularly ambiguous. In fact, as Lee C. Buchheit as pointed out in his *The Legitimacy of Self-Determination*, at the United Nations level there has been “a veritable blizzard of General Assembly and Security Council resolution [in favour of self-determination] over the years”<sup>4</sup>.

The United Nation Charter, signed in San Francisco in 1945, determines the concept of self-determination as a guiding principle for the UN, as highlighted in Art. 1(2) and Art. 55. Also, few General Assembly Resolutions or Declarations<sup>5</sup>, as well as the UN International Covenant on Civil and Political Rights are important here<sup>6</sup>.

The principles of equal rights and self-determination of people were then elaborated in the Helsinki Final Act (1975), specifically at the Art. VIII in which it is stated that “all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development”.

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<sup>4</sup> Lee C. Buchheit, “Secession: The Legitimacy of Self-Determination” in Lanyi, George A. *The Journal of Politics* 41, no. 3 (1979), p.34

<sup>5</sup> UN General Assembly Resolutions 1514, 1541 (1960) and 2625 (1970)

<sup>6</sup> Art.1 (1) “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”

In every case, we need to focus on the fact that these concrete recognitions of the right of self-determination must be interpreted with respect for the territorial integrity, political unity, and sovereignty of independent States. In this sense, the legal principles described here suffer from a certain ambiguity that results from colonial and post-colonial history, with which the United Nations has had to reckon. As Daniel Kofman stated in his work: for several decades this ambiguity has been interpreted according to the principle of ‘salt water’, “upholding the right of colonies to acquire independence from the mother countries (with whom they were separated by seas) but disallowing secessions from these newly founded states in Africa, Asia or elsewhere, if the central state opposed it”<sup>7</sup>.

Therefore, we must try to understand the motivations that drive ethnic groups to seek political independence.

Generally, a territorial claim per se is not the most relevant goal to be achieved, even in cases where territorial resources are particularly relevant. In fact, in a world still dominated by a system of sovereign states, one of the most coveted things is represented by statehood as a way to confer benefits to groups with specific cultural and historical identities. But to understand what these benefits mean in concrete terms, we need to focus firstly on understanding what a state is.

One of the most famous formulas regarding the concept of state is the one stated by German sociologist Max Weber regarding the monopoly on the use of legitimate force. This idea, over the years, influenced many theories including the one elaborated by Anthony Giddens, who defines the nation-state as “a set of institutional forms of governance maintaining an administrative monopoly over a territory with demarcated boundaries, its rules being sanctioned by law and direct control of the means of internal and external violence”<sup>8</sup>. This viewpoint clearly focuses on the benefits that a group that shares a national identity gain from the control it acquires over the entire set of jurisdictions that make up a state. Some of these benefits may involve the act of taking control of that group's destiny or

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<sup>7</sup> Daniel Kofman in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.34

<sup>8</sup> Anthony Giddens, *The Nation-State and Violence Volume 2 of A Contemporary Critique of Historical Materialism*, (United Kingdom: Polity Press, 1985), p.120

deciding on symbols, government flag, and anthem; all of them play an important role in reinforcing the sense of community of a homogeneous ethnic group. Finally, becoming independent, that group acquires “the highest and most prestigious external recognition available in the contemporary world-membership in the United Nations General Assembly”<sup>9</sup>.

The fact that identities are often multiples and overlapping bring our research now in the field of secession.

This problem may arise when, within a new-born state, one or more minorities claim the right to self-determination. Regarding this, Daniel Kofman immediately warns us that it is important to avoid creating a matrix where each minority decides to have its own state, as already mentioned above in relation to the importance of maintaining a territorial and political unity within a given territory.

At this point, therefore, we must ask ourselves some key questions in order to understand the current situation in Bosnia and Herzegovina in the light of the criticisms made in this work of the institutional system imposed by the Dayton Peace Accords.

Was Bosnia's self-proclaimed independence in 1992 to be considered an illegitimate succession? Was the subsequent creation of the Bosnian Serb Republic a legitimate act of self-determination of a homogeneous group?

At that time, the European Arbitration Commission for the Former Yugoslavia (Badinter Commission), reasonably due to the circumstances, argued that the Socialist Federal Republic of Yugoslavia was in a state of “inevitable dissolution”<sup>10</sup>. While the American Secretary of State, James Baker, and the European Community spokesmen<sup>11</sup> were insisting on Yugoslavia’s integrity, they

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<sup>9</sup> Daniel Kofman in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.36

<sup>10</sup> Daniel Kofman in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.39

<sup>11</sup> EC President Jacques Delors, Italian foreign minister Gianni De Michelis and British Foreign Secretary Douglas Hurd. In the following years Hurd was severely criticised for his decisions regarding the war in Bosnia. He advocated a policy of non-intervention. He preferred UN humanitarian intervention to military action. Much has been speculated about the interests of the Foreign Office in the Balkans and the influences that conditioned Hurd's choices. Hurd's policy of compromise towards Serbia drew much

also declared their opposition to the use of force and repression organised by Belgrade<sup>12</sup>.

Some scholars argued about the fact that Bosnia and Herzegovina was, at that time, an artificial construction aimed at the creation of a Muslim state. We need to highlight, however, that Bosniaks never formed a majority in the Federal Republic of Bosnia during the Yugoslavia; so clearly Bosniaks could not claim for themselves the independence of an entire republic in which they themselves were under the 50% of the total population<sup>13</sup>. So, as Kofman wrote, “If the Bosniaks sought an ethnic Muslim state, either they would have to subjugate the other two main ethnic groups, which would of course altogether lack legitimacy, or else they would have to accept the partition of Bosnia, as Bosnian Serb nationalists demanded”<sup>14</sup>.

Another question here arises; “If the SFRY could be broken up, why not the Republic of Bosnia and Herzegovina?”<sup>15</sup>.

Some pro-Serbs scholars as Robert M. Hayden argued that “when it was recognized as an independent state and admitted to the United Nations, the Republic of BiH was at least as advanced in a process of dissolution [Badinter] as was the SFRY in January 1992”<sup>16</sup>. However, these theories forgot some fundamental facts: (i) not every homogeneous group enjoys a right of self-determination, especially if this include a secession; (ii) a multiethnic society can have a supra-ethnic identity derived from its right of self-determination; and (iii) the dissolution of SFRY at that time created a constitutional vacuum in which it was necessary to reconstitute

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criticism: French President Chirac accused the British Foreign Secretary of being a new Neville Chamberlain. The controversy led Hurd to resign in early July 1995. In 1997 he became a Baron and entered the House of Lords.

<sup>12</sup> Daniel Kofman in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), pp.41-42

<sup>13</sup> The 1991 Bosnia census show that the three constituent groups followed these percentage: 43.5% Bosniaks, 31.2% Serbs, 17.4% Croats (<http://ghdx.healthdata.org/record/bosnia-and-herzegovina-population-and-housing-census-1991>)

<sup>14</sup> Daniel Kofman in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.45

<sup>15</sup> idem

<sup>16</sup> Robert M. Hayden, “Bosnia’s Internal War and the International Criminal Tribunal” in *The Fletcher Forum of World Affairs* 22, no. 1 (1998), p.51

Bosnia and Herzegovina, especially in the light of the conflict that began in 1991 between Croats and Serbs in the Krajina region.

In other words, “Serb minorities had a right to a full complement of minority rights and guarantees, but not a right of recursive secession from the new states”<sup>17</sup>, as highlighted by the Opinion 2 of the Badinter Commission. And this because there is a basic asymmetry that we need to underline here between primary and secondary secession<sup>18</sup>, because “the obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles”<sup>19</sup>.

In summary, these studies underline how Bosnia, as a legitimate state entity created during the broader process of dissolution of Yugoslavia, fell victim to the irredentist and secessionist violence of the Bosnian Serbs.

The international intervention to stop the ethnic violences in Bosnia and Herzegovina was organised in response to the dramatic humanitarian crisis in the country. However, as we will see in the further sections, the Peace Agreement has been criticised by many for creating a cumbersome and often an ineffective political system, as well as for entrenching the ethnic cleansing carried out during the war and undermining the unity and independence of the Bosnian Republic<sup>20</sup>. Indeed, regarding the desire of secession that drove Serbs to create Bosnian Serb Republic, the Dayton Agreement's nation-building provisions for the post-war Bosnia and Herzegovina leave this central tension of the conflict unresolved<sup>21</sup>.

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<sup>17</sup> Daniel Kofman in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.43

<sup>18</sup> Daniel Kofman in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.47

<sup>19</sup> Opinion 3 Badinter Commission: <http://www.ejil.org/pdfs/3/1/1175.pdf>

<sup>20</sup> John Malik, "The Dayton Agreement and Elections in Bosnia: Entrenching Ethnic Cleansing through Democracy". *Stanford Journal of International Law* 36, no. 2 (2000), p.304

<sup>21</sup> John Malik, p. 307

## Section 2 - The General Framework Agreement for Peace in Bosnia and Herzegovina

After three years of conflict, on November 1, 1995, the work on the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement), also known as the Paris Protocol, began.

Thanks to his work of "parallel diplomacy"<sup>22</sup>, the US Deputy Secretary of State, Richard Holbrooke, forced the Croatian President Franjo Tuđman, the President of Bosnia Alija Izetbegović - accompanied by the Bosnian Minister of Foreign Affairs Muhamed Sacirbey -, and the President of the Federal Republic of Yugoslavia<sup>23</sup> Slobodan Milošević, as a representative figure of the Bosnian Serb people, to sit around a table to reach a peaceful solution to the war that had been raging in Bosnia and Herzegovina<sup>24</sup>.

The actions of reconciliation were not easy: the Contact Group realised that the different delegations had "opposite and almost irreconcilable points of view"<sup>25</sup>.

The Bosnian delegation was the weakest one, and it always seemed to be on the verge of abandoning negotiations if the violence against the civilian population did not cease, restoring a situation of freedom for the citizens of Bosnia and Herzegovina<sup>26</sup>.

Given the continuous difficulties of mediation, Holbrooke - together with the special envoy of the European Union Carl Bildt, and the deputy foreign minister of the Russian Federation Igor' Ivanov - decided to build negotiations starting from the approval of a preamble of eleven articles (or Annexes) that had the main objective, at the Article 1, to make Croatia, Bosnia and the Bosnian-Serb Republic recognize "mutual sovereign equality", the necessity of resolving disputes by peaceful means and the abstention from "any action, by threat or use of force or otherwise, against the territorial integrity or political independence of Bosnia

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<sup>22</sup> A. Rossini, *Holbrooke. Il negoziatore*. Osservatorio Balcani e Caucaso

<sup>23</sup> Subsequently State Union of Serbia and Montenegro (2003-2006)

<sup>24</sup> A. Rossini, *op. cit.*

<sup>25</sup> Angelo Lallo and Lorenzo Torresini, *Il tunnel di Sarajevo. Il conflitto in Bosnia-Erzegovina: una guerra psichiatrica?*, (Italy: Ediciclo, 2004), p.68

<sup>26</sup> Angelo Lallo and Lorenzo Torresini, *Il tunnel di Sarajevo. Il conflitto in Bosnia-Erzegovina: una guerra psichiatrica?*, (Italy: Ediciclo, 2004), p.68



Herzegovina or any other State"<sup>27</sup>. A deadline was also set for the work and subsequent ratifications which was November 21, 1995.

The diplomatic process was not only aimed at breaking off hostilities, but also at "examining the delicate situation of ethnic fragmentation following the war" and the new geopolitical balances that were emerging in the region<sup>28</sup>.

The eleven Annexes that make up the Dayton Peace Agreement could be divided in two main important groups: the first group concerns the military aspects, and includes Annexes 1-A and 1-B on peacekeeping and military stabilisation, while the second group is composed of properly civilian aspects. The different annexes dealt with issues such as future elections (Annex 3), the Constitution of the new Bosnia and Herzegovina (Annex 4), the problem of respect and protection of human rights (Annex 6) and issues related to refugees and internally displaced persons (Annex 7), as well as the creation of the National Monuments Commission (Annex 8), the Agreement on Public Companies Bosnia and Herzegovina (Annex 9), the Agreement on Civilian Implementation (Annex 10) and the Agreement on International Police Force (Annex 11).

Undoubtedly, "the main problems on the table of the delegations concerned the division of territory; the division of areas under military control of Croats and Bosniaks; the restitution of Vukovar and some areas of Slavonia claimed by Croatia; the status of Sarajevo as the capital city; the extension of the Brčko area, a strategic corridor between Bosnia, Croatia and Republika Srpska, crucial for the connections between the Serb entities"<sup>29</sup>. These issues were addressed from the ethnic approach elaborated by Holbrooke within the pax americana project, affecting both the civilian and military dimensions.

As elaborated in Annex 2 of the Agreement, Bosnia and Herzegovina was divided into different entities according to the majority community that inhabited particular

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<sup>27</sup> U.S. Department of State, *General framework agreement for peace in Bosnia and Herzegovina*

<sup>28</sup> Angelo Lallo and Lorenzo Torresini, *Il tunnel di Sarajevo. Il conflitto in Bosnia-Erzegovina: una guerra psichiatrica?*, (Italy: Ediciclo, 2004), p.69

<sup>29</sup> Angelo Lallo and Lorenzo Torresini, *Il tunnel di Sarajevo. Il conflitto in Bosnia-Erzegovina: una guerra psichiatrica?*, (Italy: Ediciclo, 2004), p.72

Human Rights Watch, *Second Class Citizens: The Serbs of Croatia*, 1 March 1999, D1103, available at: <https://www.refworld.org/docid/3ae6a7df4.html> [accessed 28 July 2021]

areas at the time of the ratification of the treaties. This division concretely legitimised the ethnic cleansing and replacement operations carried out on Bosnian territory, decreeing the victory of those who had fought to annex several predominantly Muslim territories to the dream of Greater Serbia<sup>30</sup>.

The geopolitical conformation decided at Dayton fragmented the multi-ethnic dimension of Bosnia and Herzegovina: Serbs were entrusted with the control of the Bosnian-Serb Republic, an entity composed of 63 municipalities including Banja Luka, Prijedor and Bijeljina for an extension of 49% of the total Bosnian territory; Croats and Bosniaks were instead entrusted with the management of the Croat-Muslim Federation of Bosnia Herzegovina: 51% of the territory and the administration of 92 municipalities including Sarajevo, Mostar, Tuzla and Zenica divided into cantons<sup>31</sup>.

According to Marie E. Berry, after the Srebrenica massacre, Prijedor was the area with the second highest rate of civilian killings committed during the Bosnian War<sup>32</sup>. The composition of non-Serbs was drastically reduced: out of a population of 50,000 Bosniaks and 6,000 Croats, only some 6,000 Bosniaks and 3,000 Croats remained in the municipality by the end of the war<sup>33</sup>.

The city of Bijeljina was attacked on 1 and 2 April 1992. After an explosion in a Serbian café, an explosive device Bosnian Muslims, the town, inhabited mostly by the latter, was stormed by the Arkan. Three days of fighting followed, during which the Yugoslav People's Army - led by the then Milošević's government - did not intervene, while foreign observers were prohibited from entering the town<sup>34</sup>.

In its reports Human Rights Watch (HRW), stated that "Serb paramilitaries wearing balaclavas took up positions around the city, including sniper positions in windows

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<sup>30</sup> Angelo Lallo and Lorenzo Torresini, *Il tunnel di Sarajevo. Il conflitto in Bosnia-Erzegovina: una guerra psichiatrica?*, (Italy: Ediciclo, 2004), p.72

<sup>31</sup> The territory of FBiH combines the settlements of the Muslim and Croat communities according to what has been established by the Washington Agreement in 1994

<sup>32</sup> Marie E. Berry, *Women, and Power: From Violence to Mobilization in Rwanda and Bosnia-Herzegovina*, (United Kingdom: Cambridge University Press, 2018), p.191

<sup>33</sup> Gabrielle Kirk McDonald and Olivia Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law. The Experience of International and National Courts: Materials. Vol. 2 part. 1*, (Netherlands: Kluwer Law International, 2000), p.1182

<sup>34</sup> Jože Pirjevec, *Le guerre jugoslave*, (Italy: Einaudi, 2001), p.142

on the top floor of buildings”<sup>35</sup>. According to photojournalist Ron Haviv: "Serbian forces struck first, with several buses of soldiers arriving in the town, seizing the radio station, and forcing local Serbs to reveal the identities of non-Serbian residents of the town. The Serbian forces were also involved in the assault”<sup>36</sup>. They began a campaign of violence against local Bosnians and part of the Serb population, committing several rapes and murders, and searching residents' homes and looting their property.

The municipality of Brčko had a particular fate at that time, becoming an autonomous local administrative reality that formally belongs to both entities. Officially constituted on March 8, 2000, as a result of an arbitration, the Brčko district represents a real buffer between the two Bosnian entities and Croatia, placed on the inter-entity border line sanctioned by the General Framework for Peace in Bosnia and Herzegovina. Unlike other municipalities it does not have its own coat of arms and adopts exclusively the Bosnian flag. The peculiarity of this district is that it is also divided internally on an ethnic basis despite the independent nature of the administration: 48% (including the city of Brčko) is to be considered within the Republika Srpska, while the remaining 52% is part of the Federation of Bosnia and Herzegovina.

The city of Sarajevo itself has undergone changes in the territory that made up its municipality before the war. Today it is divided between Sarajevo, the country's capital, and Istočno Sarajevo, the urban part of the city that became part of the Bosnian Serb Republic after the war. Located to the east of the main Bosnian municipality, Istočno Sarajevo only began to be recognized as a city in its own right during the war, when many of Serb families from Sarajevo moved to the eastern quarter of the city to avoid the massive bombing, renaming the area Srpsko Sarajevo. Then in 2011, following what was the actual administrative division between Sarajevo and East Sarajevo, the Constitutional Court of Bosnia and Herzegovina called for a name change from Srpsko Sarajevo to Istočno Sarajevo<sup>37</sup>.

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<sup>35</sup> <https://www.hrw.org/reports/2000/bosnia/BOSN005.pdf> (PDF) (Report). Human Rights Watch. August 1992.

<sup>36</sup> David Keane (2003). *Arkan: Baby-faced Psycho* (Documentary), min 20:00

<sup>37</sup> from Serbian Sarajevo, to Eastern Sarajevo

Another important issue touched upon by the peace agreements in Bosnia and Herzegovina was related to the large percentage of refugees and displaced persons produced by the war.

It is estimated that 2.3 million people left their homes during the conflict: about 1.3 million became refugees by fleeing to the Federal Republic of Yugoslavia or to other countries abroad, especially Germany; the remaining million became internally displaced persons to all intents and purposes. Understandably, with the end of hostilities, many of the displaced wanted to try to return to their homes, but the situation was far more complex than expected<sup>38</sup>. Many of the territories had undergone profound changes in their social structures: the pressures between the new dominant ethnic groups and the minorities created in many towns a climate hostile to the return of old citizens. The same houses, previously abandoned, had been repeatedly occupied or sub-occupied by people who had found them empty over the years and often the local administrations had authorised new people to take possession of the properties<sup>39</sup>; on other occasions the houses were no longer there and left the place to debris and rubble.

Another major problem was related to the risk of trauma for displaced persons who might encounter again the executioners who had forced them to leave their homes. According to the World Report 1999 of Human Rights Watch, about 475 thousand people actually managed to return to their city, but of these only 15 thousand were now minorities in the territory they had previously inhabited. Therefore, being able to do so, most of the refugees and displaced persons went to live in other areas of Bosnia that we could define ethnically less hostile: Serbs in Republika Srpska, Bosniaks and Croats in the Federation of Bosnia Herzegovina.

To date, more than one million refugees have returned to Bosnia, but this figure is worrying if one observes that most of them fled from the current Bosnian Serb Republic and today decide to settle in the territories of the Federation<sup>40</sup>.

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<sup>38</sup> Margaret Vandiver in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.168

<sup>39</sup> Margaret Vandiver in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.171

<sup>40</sup> Jovan Divjak and Florence La Bruyere, *Sarajevo, mon amour*, Translated by Paciucci, Gianluca. (Italy: Infinito edizioni, 2008), p.191

This situation, strengthened by the territorial division on ethnic basis operated by Dayton Agreement, did nothing but cement the effects of ethnic cleansing in difficult rural areas<sup>41</sup>. It can be noted that "Ethno-politics [of Dayton] applied to a formally democratic society, such as the Bosnian-Herzegovinian one, moved between the desire to ensure the protection of ethnic groups and their inclusion in institutions (thus gradually overcoming distrust and resentment cemented by the armed conflict) and the emergence of at least two undemocratic distortions produced by the ethno-national form adopted by the government"<sup>42</sup>.

Institutionally, due to the Peace Agreement Bosnia has acquired a collegial Presidency, on the old Yugoslavian model, composed of a representative of Serbs, one of Croats and another of the Muslim community who must alternate in holding the office of President of Bosnia Herzegovina every eight months.

Despite the difficulties, the end of the work came on November 21, 1995, when the agreements reached were signed in Dayton, hence their usual name.

Then Bosnia, Federal Republic of Yugoslavia, and Croatia, under the supervision of the Contact Group for Bosnia and Herzegovina, composed by United States of America, United Kingdom, France, Germany, Italy, and Russia, validated with their signature the treaty in Paris, precisely in Versailles, on December 14 of the same year after a civil conflict lasted 3 years, 8 months, 1 week and 6 days.

The Dayton Peace Agreement guarantees both the international continuity of Bosnia and Herzegovina as a multi-ethnic state, thus conforming to the international recognition that took place three years earlier, and the constitutional basis for the political and economic reconstruction of the state.

It includes, in the Appendix 4, the modern Constitution of the new state. The relevant thing here is that the Constitution was written in English, and for years the text was not officially translated into local languages generating considerable

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<sup>41</sup> Margaret Vandiver in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.173

<sup>42</sup> Florian Bieber, "The Challenge of Institutionalising Ethnicity in the Western Balkans: Managing Change in Deeply Divided Societies". *European Yearbook of Minority Issues*, vol. 3 (2003/2004), pp.89-107

linguistic ambiguities<sup>43</sup> and evident consequences on the symbolic-identity level.<sup>44</sup> The latter has been translated only in 2009, highlighting the fact that "democratic legitimacy in the constituent process was replaced by the international decision to impose"<sup>45</sup> certain actions and a constitutional framework from above that could bring about a concrete end to the conflict.

As Jens Woelk pointed out in his work: "with the aim of ending the war between ethnic groups, according to the Dayton Peace Agreement, every group is represented by its own *kin State*"<sup>46</sup>.

In this sense, the Agreement completely lacks any democratic and national origin: in particular, no referendum or any other act of parliamentary approval of the representative bodies of the two entities has been provided for.

The strong international pressures that have determined the creation of a new state, The Serb Republic of Bosnia, have acted "not through a constituent process wanted and realised by the peoples of Bosnia"<sup>47</sup>, but it can be said that this has recognized *de jure* what the ethnic cleansing had conquered *de facto*.

Daniel Kofman from Oxford University argued that "Dayton was the logical consequence of four years of international appeasement of ethnic aggression, genocide and consequent primarily by Serbian and Bosnian Serb illegal forces, and

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<sup>43</sup> The word "law", for example, can be translated by several terms (zakov, pravo, pravilo, uredba), all with different meanings.

<sup>44</sup> In Bosnia and Herzegovina the officially recognized languages are three. Besides Croatian and Serbian, Bosnian (or Bosniak) is also recognized. From a purely linguistic perspective, these are to be considered as variants of the Shtokavian dialect, which serves as the only and shared basis of the language more commonly called "Serb-Croatian". In concrete terms, the above-mentioned variants are affected by the linguistic policies of the various national cultural centres: Belgrade, Zagreb, Sarajevo.

<sup>45</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.80

<sup>46</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p. 80

<sup>47</sup> Gustavo Gozzi, "Democrazia e nazionalismi. La Bosnia-Erzegovina: una democrazia impossibile" in *Guerre e minoranza* edited by Gozzi Gustavo and Martelli Fabio (Italy: Il Mulino, 2004), 157-180. (in Jens Woelk pag. 81)

on somewhat more limited scale, by Herzegovinian Croats and their backers in Zagreb”<sup>48</sup>.

The state territory continues to be divided into 2 entities, whose constitutions were adopted before the signing of the Dayton Peace Agreement, despite the fact that the Dayton constitution provides for 3 constituent people: Bosniaks, Serbs and Croats<sup>49</sup>.

This mainly because the cease-fire line was declared “inter-entity boundary line”, avoiding the more contentious word "border" that could give rise to a recognition of quasi-state nature to both entities of the State of Bosnia and Herzegovina. In this way a "twin federal state" was constituted, able to guarantee the multi-ethnic character of its institutions through solutions of consociational democracy and power sharing<sup>50</sup>.

Due to the system established by the Dayton Peace Agreement, Entities are the constituent political bodies of Bosnia and Herzegovina.

Thanks to the Annex 4 - Art III.3.a, all the competences and functions not expressly attributed to other entities are exercised by them, and their dominant position is symbolically demonstrated even in the sphere of foreign affairs. In fact, Entities have a crucial role in helping the central government to respect and implement international obligations with "all the necessary support" (Article III.2.b)<sup>51</sup>.

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<sup>48</sup> Daniel Kofman in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.31

<sup>49</sup> The Serbian Republic declared itself independent from Bosnia and Herzegovina on February 28, 1992 and its constitution was adopted on April 7, 1992. On the other hand, the Muslim-Croat Federation of Bosnia and Herzegovina, was constituted on March 18, 1994 after the Washington Agreement between Croats and Bosniaks and on June 24 of the same year the constituent assembly adopted the federal Constitution.

See:

Službeni glasnik Republike Srpske“, broj 21/92 – prečišćeni tekst ([https://www.narodnaskupstinars.net/sites/default/files/upload/dokumenti/ustav/lat/ustav\\_republike\\_srpske.pdf](https://www.narodnaskupstinars.net/sites/default/files/upload/dokumenti/ustav/lat/ustav_republike_srpske.pdf))

Ustav FBiH - Parlament Federacije Bosne i Hercegovine (<https://www.predstavnickidom-pfbih.gov.ba/bs/page.php?id=103>)

<sup>50</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.84

<sup>51</sup> UN General Assembly Security Council. “GENERAL FRAMEWORK AGREEMENT FOR PEACE IN BOSNIA AND HERZEGOVINA” (1995). Available from: [https://peacemaker.un.org/sites/peacemaker.un.org/files/BA\\_951121\\_DaytonAgreement.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/BA_951121_DaytonAgreement.pdf). pag: 64

A relevant fact is that the Entities can independently establish and maintain relations with neighbouring States and enter into agreements with other States and international organisations; the only condition is the approval by the state parliament (art. III.2.d).

This faculty was aimed at guaranteeing and favouring the special relations maintained by the Serbs Republic with Serbia and by the Croats in the FBiH (especially in Herzegovina) with Croatia.

Above all, it is fiscal autonomy that is of extremely political importance and allows the Entities to act independently. The Constitution of BiH contains only general principles for the necessary support to be given in the confrontation with the state government (art. III.2.b); these financial support obligations are to be sustained to the extent of one third by the RS and two thirds by the FBiH (art. VIII)". Despite the deliberate choice of the term "Entity" with which they wanted to underline their different nature compared to one "State", complete institutional structures have been created in both Entities that strongly resemble real state structures, with a President, a government, and legislative and judicial bodies.

At this point, we might think that the two Entities are equal. On the contrary, they are very different, and sometimes also antagonistic to each other.

The Republic of Serbs has a unitary system, while the Federation of Bosnia and Herzegovina is composed by 10 Cantons, most of them ethnically homogeneous<sup>52</sup>. In addition to this, we have to consider the internationally administered Brčko District, bordering both entities and Croatia.

As regards the form of government of the Entities, it should be remembered that in the Republic of Serbs, before the 2002 Constitutional reform, "there was a single-chamber system and therefore all legislative power was exercised by a national

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<sup>52</sup> Five of the Cantons (Una-Sana, Tuzla, Zenica-Doboj, Bosnian-Podrinje, and Sarajevo) have a Bosniak majority, three (Posavina, West Herzegovina and Canton 10) have a Bosnian-Croat majority, while two of them (Central Bosnia and Herzegovina-Neretva) are 'ethnically mixed', meaning no ethnic group has a majority, so there are special legislative procedures for the protection of their political interests.



assembly, with deputies elected according to a simple proportional electoral system”.

On the other hand, the federal structure of the FBiH is also reflected in its institutional set-up which sees at the centre a bicameral system with a chamber of deputies (140 deputies) and a House of Peoples to represent the interests of the ten cantons; the 74 members of the latter are elected by the cantonal assemblies guaranteeing proportional ethnic quotas (30 Bosniaks, 30 Croats and 14 "others"). Symbolic expression of the equal constitutional status between Bosniaks and Croats in the Federation is also the rotation between the President and Vice President as well as in the office of Prime Minister of that Entity<sup>53</sup>.

Despite their strong stance towards the State - the Constitution even recognizes citizenship of both levels of government, without clarifying the details regarding the meaning and content of these citizenships and the relationships between them (Annex 4, art. I.7) - neither the FBiH nor the RS were able to effectively control their entire territory.

The highly decentralised cantonal structure of the FBiH facilitated the maintenance of parallel institutional structures of the cantons and Croat military units as well as direct political, institutional, and financial relations with Croatia. “In the RS, political centralization and disintegration geographical area caused similar disturbances in political functionality: the Dayton Peace Agreement had not created an Entity with territorial contiguity, which in the future could perhaps have sought annexation to Serbia, but an Entity composed of two separate areas and connected only through the city of Brčko in northern Bosnia”<sup>54</sup>.

Within the Framework of Dayton Peace Agreement, the State’s competencies are limited to foreign and foreign-trade policy; customs and monetary policy; finances of the institutions and for the international obligations of Bosnia; immigration, refugee, and asylum policy and regulation; international and inter-entity criminal

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<sup>53</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.86

<sup>54</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), pp.86-87

law enforcement; establishment and operation of common and international communications facilities; regulation of inter-entity transportation; and air traffic control<sup>55</sup>. All the other functions, as Jens Woelk highlights, depend on the Entities' choices<sup>56</sup>, and even the state functions newly described are subject to strong limitations: on the one hand, the role that the international community is called upon to play in the life of the country (and the successive tasks assigned to it during the implementation phase) reduces the autonomy of the government; on the other hand, the constitutionally guaranteed right of the Entities to establish "special relations" with neighbouring states, i.e. Serbia and Croatia, allows the Entities to autonomously manage an important part of the external relations of Bosnia and Herzegovina.

In fact, State's institutions are called "shared institutions", and this denomination clearly describes that the central government is economically and politically dependent on the Federation of Bosnia and Herzegovina and Republic of Serbs.

In this sense, Bosnia can be described as a triple power-sharing system, based on power-sharing in entities and cantons, as well as at the state level.

If we take the consociational definition of power-sharing proposed by Arend Lijphart, we can identify a power-sharing system on the basis of four characteristics. "The first and most important element is government by a grand coalition of the political leaders of all significant segments of the plural society"<sup>57</sup>. The other three basic elements of consociational democracy are (i) mutual veto rights, that can serve as additional protection of interests of minority groups, (ii) proportionality in political representation, civil services and allocation of funds, and (iii) a high degree of autonomy for each segment to run its own internal affairs<sup>58</sup>.

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<sup>55</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), pp.46-47

<sup>56</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.88

<sup>57</sup> Arend Lijphart, *Democracy in Plural Societies. A Comparative Exploration*, (United Kingdom: London, 1977), p.25

<sup>58</sup> Arend Lijphart, *Democracy in Plural Societies. A Comparative Exploration*, (United Kingdom: London, 1977), p.25

Analysing this theoretical assumption, we could observe that in Bosnia and Herzegovina, both entities and the state level governments require the creation of grand coalitions, which include members from all three dominant nations<sup>59</sup>. In the Muslim Croat Federation there must be eight Bosniak ministers, five Croat ministers and three Serb ministers. Additionally, each minister has at least two deputies from the other two communities. Similarly in the Serb Republic, five ministers must be Bosniak and three Croat.

Proportional representation is also a cornerstone of the institutional arrangement at the state level where all three groups should be represented proportionally, and each community has the right to veto decisions by parliament that may negatively affect the community. Here the formal quota is based on entities rather than ethnicity, prescribing those two thirds of the ministers have to be from the Federation and one third from the Republika Srpska<sup>60</sup>.

Similarly, segmental autonomy is only granted at the state level (to entities, which are the locus of autonomy of the groups) and in the Federation (to cantons).

In 2002, some constitutional amendments requested by the High Representative diminished the ethnic autonomy represented by the entities<sup>61</sup>, thus limiting the ability of the three constituent nations to govern themselves at the level of the cantons or entities.

The primary function of entities and cantons remains that of guaranteeing the autonomy of different groups, a consequence of the distribution of the population.

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<sup>59</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.44

<sup>60</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.44

<sup>61</sup> At the end of his mandate, the High Commissioner Wolfgang Petritsch, issued three decisions to adequate the Entities' Constitutions to the fundamental principles established in the ruling of the constitutional Court. The first decision had the aim of adopting modification within the Federation of Bosnia and Herzegovina, the second concerned the correction of the unconstitutional provisions of the Republic of Serbs, while the third amended the electoral law conforming it to the previous constitutional changes. Petritsch's decisions regarding constitutional modifications were adopted on April 19, 2002. the amendments to the federation's constitution were published in the Official Gazette of the FBiH n.16 / 02 of 28/04/2002; those of the RS in the Official Gazette of the RS n.21 / 02

In the Federation, the ten cantons, mostly mono-ethnic, constitute the segmental autonomy of

the power-sharing agreement of the Federation. In the Serbian Republic, the Bosniaks and Croats have no autonomy<sup>62</sup>. This was prevented by the strong mono-national and centralist conception of the Serbian Republic and consolidated by the long delay in the return of refugees, with the result that many non-Serbs in the government and parliament actually represent refugees and displaced people who no longer live in the Serbian Republic<sup>63</sup>.

The state level most adequately satisfies institutional power-sharing requirements, but at the same time it is also the most limited in terms of the power granted to it. Most of the powers, according to the constitution, are formally delegated to entities and informally much of the remaining power is exercised by the High Representative. There was, however, an overall strengthening of the central institutions and, likewise, a weakening of the institutions.

The extension of the power-sharing mechanisms to the two entities, in particular to the Serbian Republic, effectively strengthened the state level. Likewise, the increase in state administration and the creation of additional ministries have led to a more effective state level. The weakness of the nationalist government, in power since the beginning of 2003, suggests that the performance of the central level will remain below its potential.

The two predominant characteristics of the Bosnian state are: (i) a consociative structure at the level of common state institutions; (ii) an asymmetric multinational federation.

The high degree of decentralisation has weakened the sharing of power at the centre, as joint decisions are few (and were even fewer in the early post-war years). In addition, the commitment to the state is asymmetrical.

While most Bosnian political parties support a strong central government power, Serbs and Croat political parties largely see the interest of their community best

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<sup>62</sup> Bieber in UNRISD, Summaries of Country Case Study Manuscripts  
[https://www.unrisd.org/80256B3C005BD6AB%2F\(httpAuxPages\)%2FF8FC88407B081A86C1256E5C0032C639%2F%24file%2FSummary.pdf](https://www.unrisd.org/80256B3C005BD6AB%2F(httpAuxPages)%2FF8FC88407B081A86C1256E5C0032C639%2F%24file%2FSummary.pdf), PAG. 11

<sup>63</sup> idem

represented by a high degree of decentralisation. This uneven support for the central state has had a strong impact on the consociative system. Since sharing allows any group to block decision-making, the stability of the system is based on a degree of similarity of support of all groups in the state. If in a multinational federation, areas of autonomy are able to function even if (or even more so if) common institutions fail, the system of power-sharing arrangements in Bosnia is often subject to blockages<sup>64</sup>.

As Florian Bieber pointed out in his book *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, “The Dayton peace accords that ended the war produced a very complex governance regime. The country became, in a sense, a semi-protectorate because of the very extensive presence of the international community in the fields of security and administration. In addition, stringent and wide-ranging XII rules for balanced group representation produced seven different types and levels of government, 13 constitutions, more than one hundred ministries, and veto rights at most levels of government”<sup>65</sup>. Therefore, we find the national government, the two Entity governments, the one created for the administration of the Brčko district and, finally, the ten cantonal governments within FBiH. All these for a population of about four million inhabitants<sup>66</sup>.

It is by virtue of this division of the territory and this sharing of competences that Bosnia and Herzegovina can today be considered one of the most decentralised states in the world.

## Section 2.1 - The Shared Institutions

According to the Constitution of BiH (Annex 4 of Dayton Peace Agreement), the central state can rely on some common institutions.

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<sup>64</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.46

<sup>65</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.XII-XIII

<sup>66</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.XII-XIII

### Section 2.1.1 - Presidency

It is the highest state body and combines representative functions with the coordination of Bosnia's foreign policy.

The members of the Presidency not only represent the three constituent ethnic groups (and only those), with one Croat, one Serb and one Bosnian politician being elected - but members are also elected separately from the two entities: one Croat and one Bosnian elected from the territory of the Federation, and each voter can only vote for one seat, so that only Croats vote for Croatian presidential candidates and only Bosnians for Bosnian candidates; and one Serb elected from the territory of the Republika Srpska (Article V, par. 1). The members rotate every eight months. The presidency is thus based on territorial and national representation, and it is characterised by equal representation and veto power for each group<sup>67</sup>.

By its nature, the presidency must strive to adopt all presidential decisions by consensus (Article V, para. 2). This consensus is not always easy to achieve, as one or more members of the presidency may declare a presidential decision to be prejudicial to a vital interest of one of the constituent peoples. In this case, the decision is immediately referred to the National Assembly of the Republika Srpska or to the Croat or Bosnian delegates in the House of Peoples of the Federation. If at least two-thirds of the parliamentarians of the two entities vote against the initial will of the Presidency, then the decision cannot take effect because it is considered dangerous to the freedom and interests of one or more of the constituent peoples<sup>68</sup>.

Considering ethnicity as the main cleavage that cuts through contemporary Bosnia, in most cases the members of the presidency are elected to represent primarily their respective nation and only secondarily their federal entity.

Both the war and the Dayton system have resulted in largely homogeneous entities; a certain level of diversity, however, reinforced by the return of refugees and internally displaced persons, has remained in both the Federation and the Republika

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<sup>67</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.48

<sup>68</sup> David Chandler, *Faking Democracy After Dayton. 2nd ed*, (United Kingdom: Pluto Press, 2000)

Srpska. In this respect, therefore, the electorate of members of the presidency is not inherently and exclusively mono-ethnic.

As Florian Bieber has highlighted in his *Post-War Bosnia: Ethnicity, Inequality and Public Sector Governance*, the usefulness of the participation of other groups in voting for the representatives of the other group has been the subject of several studies<sup>69</sup>.

Some, including Lijphart, argue that in a power-sharing arrangement the representative should represent their respective community and any dilution of this principle could undermine their legitimacy and ability to negotiate with representatives of other groups on behalf of their group<sup>70</sup>.

Others, from an opposing position, have observed that with the participation of other groups, elected leaders might be more moderate than representatives who are selected on a purely political basis. representatives who are selected on a purely mono-ethnic basis<sup>71</sup>.

#### Section 2.1.2 - Council of Ministers

Under the Dayton system, the presidency is responsible for appointing the president of the Council of Ministers, who in turn appoints the ministers and deputy ministers. Both positions, however, only become official after approval by the House of Representatives.

Also, according to the Dayton Peace Agreement, a maximum of two thirds of all ministers may be appointed from within the territory of the Federation of Bosnia and Herzegovina and deputy ministers may not come from the same constituent people as their ministers (Article V, paragraph 4).

Following the indications of the High Representative, the Presidency decided that the Council of Ministers would be headed by two co-chairs, one Bosnian and one

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<sup>69</sup> see Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), pp.51-52

<sup>70</sup> Arend Lijphart, "The Power-Sharing Approach." in Joseph V. Montville (ed.), *Conflict and Peacemaking in Multiethnic Societies* edited by Montville, Joseph V. (United States of America: 1991), p. 497-498

<sup>71</sup> Donald L. Horowitz, *Ethnic Groups in Conflict*, (United States of America: University of California Press, 1985), p.646

Serb, rotating weekly, with a Croatian vice-president, and that each minister would have two deputies from the other two peoples<sup>72</sup>.

#### Section 2.1.3 - Parliament

At Article IV the Constitution defines BiH as a parliamentary democracy whose legislative power is entrusted to a national parliament.

The Parliamentary Assembly of Bosnia and Herzegovina is a bicameral legislative body consisting in the following two chambers: the House of Representatives composed of 42 members, elected for a four-year term by proportional representation; and the House of Peoples composed by 15 members, appointed by the parliaments of the entities: 5 members elected by the National Assembly of the Republika Srpska, 5 Bosniak members and 5 Croat delegates from the respective groups of the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina.

As highlighted by Florian Bieber in its work, “while the caucuses in the House of Representatives are based on parties, there are three caucuses in the House of People, one for each nation. The House of People is thus primarily tasked with preserving the interests of the nations, while the lower house is more determined by political parties”<sup>73</sup>.

The parliament is responsible for (i) establish its own budget and that of the other institutions; (ii) implement decisions of the Presidency; 3) ratify international treaties.

#### Section 2.1.4 - Constitutional Court

Last but not least, shared institution is the Constitutional Court of Bosnia and Herzegovina, whose functions are regulated in the Article VI of the Annex 4. It is composed of nine members: four chosen by the House of Representatives of the

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<sup>72</sup> OHRB (1996v) Office of the High Representative Bulletin, 27, 2 December. Available from: [http://www.ohr.int/ohr\\_archive/ohr-bulletin-27-december-02-1996-3/](http://www.ohr.int/ohr_archive/ohr-bulletin-27-december-02-1996-3/)

<sup>73</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.55



FBiH, two by the National Assembly of Republika Srpska, and three by the President of the European Court of Human Rights after a consultation with the Presidency of Bosnia and Herzegovina (Article VI.1.a). The Constitution also states at Article VI.1.b that the judges must be "distinguished jurists of high moral standing", and that any eligible voter so qualified may serve as a judge of the Constitutional Court.

The Constitutional Court has the task of settling disputes between the Entities, between the common institutions and one or both Entities, and between the different common institutions. It is also the final instance of appeal and the compatibility of laws with the Constitution and international conventions signed by BiH.

The decisions of the Court are made by simple majority, and it must argue and publish what has been decided.

### Section 3 - International Actors

From the picture described above, and from an overall reading of the Peace Agreement, it appears undeniable that the work of "diplomatic engineering" carried out in Dayton contains a basic ambiguity concerning the political regime chosen for Bosnia and Herzegovina. In fact, among the clauses of the agreement there is a basic tension between those that entail the partition of the country according to ethnic logic, as in the case of the Annexes 1, 2, 3 and 4, and those that tend towards its reunification, like Annex 6 on Human Rights and Annex 7 on Refugees and Displaced Persons.

The paradox lies in the fact that, if on the one hand the choice of a strongly decentralised model for Bosnia-Herzegovina is understandable, given its strong ethnic diversity and the variety and contrasts that arose from the 1992-1995 war, on the other hand, it is not clear why we have not been attributed to the central state the minimum competences normally recognized even in the most limited forms of federalism.

The coexistence of factors tending to both unity and division leaves to those who will be in charge of the reconstruction, to their will and to the powers that will be attributed to them, the right to decide which of the two poles to move towards.

It is therefore necessary to understand now the role assigned to the international actors in the implementation of the agreement itself.

On the one hand, NATO was assigned the task of creating a military force capable of supporting the implementation of the Dayton Peace Agreement (IFOR, Implementation Force); on the other hand, the various international organisations involved (United Nations, Organisation for Security and Co-operation in Europe, and Office of the High Representative) were called upon to continue their role in the civil reconstruction of the country.

With the Dayton Agreement, the role of coordination of international actions in Bosnia was entrusted to the High Representative of the international community, who was charged with following and facilitating the application of the civil clauses of the peace agreement.

The mandate of this figure is well described by Annex 10 and foresees several tasks, including: encouraging the parties to respect the commitments taken in Dayton; coordinating the activities of civil organisations and institutions; participating in the meetings of the Donors' Conference; presiding over a Joint Commission composed of international and local actors involved in the application of the civil clauses of the agreement; establishing contacts with international actors involved in the military stabilisation of the country; periodically updating the international community on the progress of activities<sup>74</sup>.

The Office of the High Representative receives directives and is accountable for its activities to the Peace Implementation Council, created in London in December 1995, and composed of states and international organisations active in Bosnia and Herzegovina. While the OHR is primarily responsible for coordination, the United Nations is responsible for the implementation of the PIC.

For the first time in its history the OSCE also acquired a leading role in peacekeeping in BiH. This was essentially due to three reasons: first of all, the OSCE, unlike other international organisations, had remained largely uninvolved in Bosnian affairs during the conflict, thus not having to deal with the credibility deficit with the local population. Second, being a pan-European organisation, the OSCE had the merit of including both European states and the United States and Russia. Finally, the OSCE had some experience in the areas in which it was called upon to operate, especially in the electoral field<sup>75</sup>.

The objectives of the OSCE mission are described in Annex 3 and Annex 6 of the DPA and concern respectively the supervision of the electoral process and the surveillance and promotion of the respect of human rights. In fact, this organisation, the only one among all civilian actors involved in the implementation of the agreement, saw itself as having responsibilities also in the military sector: the OSCE should have negotiated agreements concerning regional stabilisation (Annex 1-B).

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<sup>74</sup> Art II, Annex 10 - <http://www.ohr.int/about-ohr/mandate/>

<sup>75</sup> OSCE, Mission to Bosnia and Herzegovina/Mandate: <https://www.osce.org/mission-to-bosnia-and-herzegovina/mandate>

In this sense, taking into consideration Yugoslavian past and the war that brought the country to its knees for four years, it can be understood that the task of restoring democracy was not only fundamental but also arduous for the OSCE<sup>76</sup>.

As a result of this development, Bosnia has acquired some characteristics similar to a protectorate since 1997.

The increased role of the High Representative has led to the passage of significant laws that would otherwise have been indefinitely delayed or watered down<sup>77</sup>.

However, some argue that despite the positive outcomes, the role of international institutions has harmed the development of power-sharing structures. As Marcus Cox explains, the High Representative's decisions in Bosnia and Herzegovina relieve participants in power-sharing structures from implementing negotiations or seeking compromises, effectively relieving them of their responsibilities, and allowing nationalist politicians to advocate intransigent positions without the fear of being blamed if a compromise is not found<sup>78</sup>.

As a result of this, "nationalist politicians have often welcomed interventions by the High Representative that relieve them of responsibility for difficult policy positions"<sup>79</sup>. Power-sharing institutions in Bosnia, in addition to their original weaknesses, were further undermined by heavy international intervention.

It is important to note, however, that representatives of the three national parties showed little willingness to engage in serious coalition-building and negotiation even before the strengthening of the role of the Office of the High Representative.

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<sup>76</sup> Florian Bieber, *Post-War Bosnia. Ethnicity, Inequality and Public Sector Governance*, (United Kingdom: Palgrave MacMillan, 2006), p.84

<sup>77</sup> As in the case of the joint Bosnian licence plates reform to facilitate movement between entities or the property law and its role in facilitating the return of minorities

<sup>78</sup> Marcus Cox, *State-Building and Post-War Reconstruction: Lessons from Bosnia*, *The Rehabilitation of War-Torn Societies*, (Switzerland: Casin, 2001), pp.12-15

<sup>79</sup> Marcus Cox, *State-Building and Post-War Reconstruction: Lessons from Bosnia*, *The Rehabilitation of War-Torn Societies*, (Switzerland: Casin, 2001), pp.14

## Chapter 2 - Paradoxes and failures of Dayton Agreement

As mentioned in the first chapter of this work by giving an overview of the Dayton Peace Agreement, the Annexes contained in it are not free from critics and paradoxes.

One of the most delicate aspects of the Dayton system is undoubtedly represented by the Constitution of Bosnia and Herzegovina. This is not perceived as a constitution of a nation created by putting the citizens at the centre, but as a document imposed by foreign institutions through the mediation between the states of Bosnia, Croatia and the Federal Republic of Yugoslavia.

The text of the Agreement suffers from schizophrenia caused by the desire to reconcile multiple personalities, such as the three nationalities, within a single state boundary. In doing so, the main focus of the Bosnian constitution lies not so much in the concept of "citizen" as in the idea of "entity". As Fionnuala D. Ní Aoláin - former Special Representative of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia and Professor of Law at the University of Ulster - stated in her article *The Fractured Soul of the Dayton Peace Agreement*, "the term *entity* appears fifty-five times in the document [of the Constitution], while the term *citizen* appears only seven times"<sup>80</sup>.

In other words, we could say that the Constitutional text is a Dayton constitution, created by the international community and accepted by the parties in three different declarations, and not a Bosnian constitution in the sense that is not the product of a lengthy internal consensus seeking, but "an agreement of geographical coercion glued together by common institutions"<sup>81</sup> forcing entities into a marriage of convenience.

Particular attention has been paid to the concept of constituent peoples of Bosnia and Herzegovina. In fact, according to the 2013 census, more than 96% of the

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<sup>80</sup> Fionnuala D. Ní Aoláin in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.71

<sup>81</sup> Fionnuala D. Ní Aoláin in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.72

Bosnian population belongs to the three groups: Bosniaks, Croats and Serbs. The term “constituent” here refers to the fact that these three ethnic groups are equally mentioned and recognized within the constitution, and that none of them can be considered as non-indigenous groups. Within the Constitution, none of them is recognized as a majority, so they enjoy equality as groups. This system is a legacy of former Yugoslavia.

The constitutional principle of collective equality of constituent peoples following from the designation of Bosniaks, Croats and Serbs as constituent peoples prohibits any special privilege for one or two of these peoples, as any domination in governmental structures or any ethnic homogenisation through segregation based on territorial separation<sup>82</sup>.

According to the Dayton Constitution, people who do not recognize themselves as part of the three constituent groups are regarded as "Others"<sup>83</sup>. In this regard, the great contradictions contained within the Constitution are beginning to appear.

Indeed, according to the European Court of Human Rights, and therefore according to the Dayton Constitution, the principle of non-discrimination and the principle of effective equality must apply to all people in Bosnia and Herzegovina. This should include the right of every citizen to participate in elections actively and passively, having the right to vote and stand as a candidate. However, the joint presidency of Bosnia and Herzegovina and two thirds of the seats in the House of Peoples are closed, both in terms of voting and candidacy, to any citizen who does not declare himself Bosniak, Croat or Serb<sup>84</sup>.

According to the principles of consociational democracy, the power must be exercised through the participation of all important groups of a state<sup>85</sup> and this is

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<sup>82</sup> [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL\(2002\)127-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2002)127-e), P. 3 and <https://www.esiweb.org/publications/imposing-constitutional-reform-case-ownership>

<sup>83</sup> In the 2013 Bosnian census, 2.73% of the population was recognized as Others. In addition to these, 0.71% did not declare their membership, to which is added a 0.18% who did not respond

<sup>84</sup> <https://www.refworld.org/pdfid/469cbfd80.pdf> The status of constituent peoples and minorities in Bosnia and Herzegovina

<sup>85</sup> Florian Bieber. “Institutionalising Ethnicity in Former Yugoslavia: Domestic vs. Internationally Driven Processes of Institutional (Re-)Design”. *The Global Review of Ethnopolitics*. 2. (2003), pp.3-16

the reason why the Constitution established the tripartite presidency, the system of subdivision of ministers and vice-ministers and what is described in the previous chapter in relation to the ethnic division of powers. However, we must underline here how these mechanisms, created with the aim of expanding representation and inclusion, are limited to only the three constituent peoples. Minorities in Bosnia and Herzegovina are therefore totally excluded due to the privileged representation created through the Dayton system<sup>86</sup>.

As mentioned above, this aspect represents in practice a serious violation of common European standards for the protection of minorities, as no one belonging to an "Other" ethnic group or no person who refuses to declare their ethnicity<sup>87</sup> can stand as a deputy or as a member of the presidency<sup>88</sup>.

In 2011 the Senior Programme Officer in Constitution-Building in the Africa and West Asia region, Zaid Al Ali, published an article named Constitutional Drafting and External Influence in which it is stated: "This clearly discriminatory regime was endorsed by all the external actors that participated in the drafting process, including the United States and the European Union, mainly for the purpose of seeking an accommodation between the three principal warring factions and with a view to ending the conflict. Thus, although the new Constitution and the remainder of the Dayton Peace Accords did successfully achieve that objective, the rights of minorities and fundamental freedoms such as the right to racial and religious equality were subordinated to the Constitution's horizontal distribution of powers, making it impossible for BiH to live up to the commitments it undertook when it joined the Council of Europe"<sup>89</sup>.

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<sup>86</sup> In 2003 the Parliamentary Assembly of Bosnia and Herzegovina adopted the Law on the Protection of Rights of Members of National Minorities. The law recognizes 17 national minorities present in Bosnia and Herzegovina: Albanians, Montenegrins, Czechs, Italians, Jews, Hungarians, Macedonians, Germans, Poles, Roma, Romanians, Russians, Ruthenians, Slovaks, Slovenians, Turks, and Ukrainians. It was a landmark document for Bosnian national minorities as it gave them the right to protect their cultural, religious, educational, social, economic and political freedoms, needs and identities

<sup>87</sup> As in the case of people from mixed families who choose not to define their ethnicity

<sup>88</sup> According to the Art. 4.19 of the BiH electoral law, all candidates for the FBiH House of Representatives, for the Presidency and Vice-Presidency of the RS as well as the National Assembly of the RS must indicate their belonging to one of the three constituent peoples or to the group of "others"

<sup>89</sup> Zaid Al Ali, "Constitutional Drafting and External Influence", in *Comparative Constitutional Law. Research Handbooks in Comparative Law series* edited by Tom

The lack of factual recognition of minorities who recognize themselves in the "Others" category and their consequent exclusion from public office was strongly criticised by the Venice Commission (European Commission for Democracy through Law).

## Section 1 - The Opinion of Venice Commission

The appointment of the Venice Commission by the Parliamentary Assembly was aimed at examining the powers and actions of the High Representative, in particular with regard to their compliance with the fundamental principles of the Council of Europe and with the European Court of Human Rights; in the alternative, the Commission also had to examine the conformity of the Constitution of Bosnia and Herzegovina (Annex IV of the DPA) with these principles and with the ECHR<sup>90</sup>. In its opinion, the Venice Commission deals with three main problems: (i) the effectiveness and rationality of the current constitutional structure, (ii) the conformity of the Bosnian Constitution with the ECHR and with the European Charter for local self-government, and, finally, (iii) with the conformity of the powers of the High Representative with standards of the Council of Europe.

In the *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Power of High Representative* the Venice Commission found that the constitutional structure of Bosnia and Herzegovina is not sustainable, efficient, or even rational. The Commission also argues that drastic reforms in the short, medium, and long term must be implemented in order to move forward on the path of European integration. Undoubtedly, one of the main priorities is the strengthening of powers at the state level, as found in section IV.1.b of the document. In this sense, the work of the Commission highlights the need to reach a balance between the protection of

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Ginsburg and Rosalind Dixon (United Kingdom: Edward Elgar Publishing Limited, 2011), p. 82-83

<sup>90</sup> European Commission for Democracy through Law. *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Power of High Representative*. (March 2005)



the interests of the constituent peoples, on the one hand, and the need for an effective government, on the other<sup>91</sup>.

In relation to the minority issues, in the chapter “Citizens or peoples as the basis of the State” (IV.1.c), the Commission observes the contrast between the numerous individual guarantees and an institutional system substantially based on the representation of the constituent peoples, which entails the risk of exclusion from the representation of Others, as well as the interpretation of all issues in the light of the interests of the constituent peoples and, finally, an obstacle to the natural democratic change between majority and minority due to a party system strongly linked to ethnicity<sup>92</sup>. In this sense, the Commission expresses its doubts on the conformity of the provisions on the composition and election of the Presidency of the State and the House of Peoples reserved for members of the three constituent peoples. These provisions would appear to be incompatible with Protocol No. 12 and art. 14 of the ECHR, and therefore with the prohibition of discrimination based on ethnicity (sub 67-80).

The Commission therefore proposes the replacement of the clear indication of the members (Bosniak, Croat or Serb) through an ethnically neutral wording, or through the introduction of limits so that members of the same people do not cover more than one office of the Presidency.

Although the opinion of the Venice Commission is not legally binding, it provoked a rich and heated debate, especially regarding the end of the “protectorate” system and the use and nature of the *Bonn Powers*<sup>93</sup>, both within Bosnia and Herzegovina and internationally.

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<sup>91</sup> The possibility of veto for violation of vital interests of one or more constituent peoples must, according to the Commission, be more precisely defined as the problem of this veto is found in its preventive use (sub 30-34 and following)

<sup>92</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.165

<sup>93</sup> The term refers to the substantive powers granted to the Office of High Representative in December 1997 in Bonn (Germany), in order to prevent the implementation of the Dayton Agreement from being delayed or hindered by local nationalist politicians. The OHR has been asked to: (i) make binding decisions when local parties appear unable or unwilling to act; (ii) remove government officials who violate legal commitments or, in general, the DPA from office. Bonn Powers were used extensively by the OHR in the following decades.

The opinion of the Venice Commission had highlighted the deficit in guaranteeing the participation rights of minorities in Bosnia and Herzegovina, and therefore of those groups and citizens who do not belong to one of the three constituent peoples, for example Jews, Roma, and other numerically small groups among to which the citizens declared themselves "Others". However, the opinion was not followed up in terms of constitutional changes and electoral laws: after the failure of constitutional reforms in the spring of 2006, in fact, the presidential and parliamentary elections (at the state, entity, canton level and in the Brčko district) of October 2006, took place on the basis of the disputed provisions<sup>94</sup>.

Considering that they are discriminated because of their ethnicity, given that representation in the institutions is limited to citizens belonging to one of the constituent peoples (Bosnians, Croats and Serbs), in 2006 and 2007 three Bosnian citizens appealed to the European Court for Human Rights in Strasbourg.

In addition to discrimination, the applicants complain that they are deprived of passive electoral right, since it is constitutionally impossible for them to be elected as, for example, the tripartite Presidency is reserved for a Bosniak, a Croat and a Serb - similarly, the reservation is valid for the President and for the two Vice-Presidents of the Entities and for all other important positions, since the institutional equality of the constituent peoples must be guaranteed. However, the Constitution of Bosnia and Herzegovina requires compliance with the ECHR; moreover, Bosnia has ratified the aforementioned Protocol no.12 of the ECHR according to which the equality of all citizens must be guaranteed in the electoral procedures for public offices, allowing citizens the right to vote and stand as candidates.

This contradiction of Dayton - the solution of the conflict between the three large groups, to the detriment of other citizens, and therefore a supremacy of the ethnic and collective factor over individual rights - has already been highlighted by the Venice Commission: in case of - probable - ruling of the European Court of Human Rights in favour of the applicants, the Bosnian institutions will be forced to modify

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<sup>94</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.166

the provisions, constitutional and electoral, in order to open access to high institutional offices also to "other" citizens.

The appeal to the European Court of Human Rights in Strasbourg was filed by the Bosnian citizens Dervo Sejdić and Jakob Finci because they were unable to run for the highest offices in the Entities and at the state level, due to their belonging to ethnic minority groups<sup>95</sup>.

Ilijaz Pilav also appealed to the Court because, although he belongs to the Bosniak constituent group, he resides in an Entity in which "his" constituent people are not represented in the Presidency of the State<sup>96</sup>. Pilav is a Bosniak member of the *Stranka za BiH* (Party for Bosnia and Herzegovina). He was born in Srebrenica and now he lives in Republika Srpska. In 2006 he submitted his candidacy for the elections to the Presidency of Bosnia and Herzegovina, but this candidacy was rejected because the applicant could not be elected to the Presidency from the territory of the Republika Srpska considering that he declared affiliation with Bosniaks.

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<sup>95</sup> Dervo Sejdić of Roma ethnicity and Jakob Finci of Jewish ethnicity

<sup>96</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.168

## Section 2 - Sejdić and Finci v. Bosnia and Herzegovina

As mentioned in the previous paragraph, this case involves the Bosnian citizen of Roma ethnicity Dervo Sejdić and Jakob Finci, of Jewish origin, therefore belonging to the category "others" and not to a constituent people.

Both of them were active participants in political life, occupying public offices at the local level, and intended to run in the elections for the House of Peoples (the upper chamber of the National Parliamentary Assembly) and for the joint Presidency of Bosnia and Herzegovina. Since the 2001 Election Act requires that candidates must declare their affiliation with one of the constituent peoples in order to be eligible to run for office, the Central Electoral Commission considered both Sejdić and Finci ineligible, as they refused to disavow their origin by affiliating with one of the constituent peoples. Claiming that they had been discriminated against on the grounds of their ethnic origin, the applicants filed their case in 2006. Subsequently, it was communicated to the government in 2008 and, after having seen their claims rejected by the Bosnian Constitutional Court, they decided to take their case to the Strasbourg Court. The jurisdiction was relinquished to the Grand Chamber in 2009, and at the end of that year, the judgement was published<sup>97</sup>.

They were assisted by lawyers specialised in human and minority rights: Sejdić was represented by F. Javier Leon Diaz, currently Deputy Head of the Department for Legal Affairs at OHR; Finci was represented by Clive Baldwin, formerly of Minority Rights Group International now with Human Rights Watch, and Sheri Rosenberg, a professor at Cardozo Law School, with advice and assistance from Minority Rights Group International.

As Elyse Wakelin highlighted in her article *The Sejdic and Finci Case: More Than Just a Human Rights Issue?*, the case Sejdić and Finci v. Bosnia and Herzegovina arose from separate claims being brought to the European Court of Human Rights, where both parties claimed that the Bosnian constitution to be discriminatory on the basis of race, religion and association with a national minority. Whilst Sejdić was

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<sup>97</sup> In June 2009, a public hearing was held, and in December 2009 the Court published its decision

unable to stand as a candidate for the Presidency, Finčić was prevented from being a candidate for the House of Peoples. Both argued that their inability to stand for high office positions were a direct result of Articles IV and V of the Dayton Constitution which reserves these positions for the constituent peoples<sup>98</sup>.

The Grand Chamber judgement of December 2009 ruled that Bosnia had violated Protocol No. 12 (general prohibition of discrimination) and Article 14 of the European Convention on Human Rights (prohibition of discrimination), in conjunction with Art. 3 Protocol no. 1 (right to free elections), due to ethnic discrimination enshrined in its constitution<sup>99</sup>. The Court ruled that these discriminatory provisions lacked the necessary proportionality to make them justifiable, although some felt it should have ruled that the exclusion of ethnic minorities from high office at the time of the signing of the Peace Agreements served a legitimate purpose of seeking an accommodation between Bosniaks, Croats and Serbs, given that the constitutional structure was established in the ashes of a violent conflict and, in their view, the time was not yet ripe for a change in the system. For example, judge Bonello of the ECHR disagreed with the judgement, observing that a supranational court cannot arrogate to itself the right to bring about a change in a constitutional order born of one of the most violent conflicts the European continent has ever known, without considering the destabilising effects that such changes may have<sup>100</sup>.

Following this ruling, the Council of Europe called for immediate implementation of the Court's decision before the October 2010 elections, to ensure that national minorities could run for high office<sup>101</sup>. In an attempt to follow up the ruling, the Bosnian government adopted an action plan and formed a working group made up

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<sup>98</sup> Elyse Wakelin, "The Sejdic and Finčić Case: More Than Just a Human Rights Issue?", *E-International Relations*, October 31, 2012

<sup>99</sup> To deepen the arguments of the Court, it is advisable to consult: Christopher McCrudden and Brendan O'Leary. "Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements". *European Journal of International Law*, Volume 24, Issue 2 (2013): 477-501

<sup>100</sup> European Court of Human Rights. Grand Chamber, "CASE OF SEJDIĆ AND FINČIĆ v. BOSNIA AND HERZEGOVINA (Applications nos. 27996/06 and 34836/06)", December 22, 2009, pp.54-57

<sup>101</sup> Council of Europe, "The urgent need for constitutional reform in Bosnia and Herzegovina' Parliamentary Assembly. Document 12222", April 27, 2010

of the National Council of Ministers. However, this group was unable to reach a consensus due to inadequate knowledge, time and resources, and divergent political views. Furthermore, representatives of national minorities did not participate in the working group, and this raised doubts about the working group's ability to provide for the rights of "others". Although the Council of National Minorities of Bosnia and Herzegovina proposed amendments to eliminate ethnic discrimination in May 2010, these have not been included in any current proposals to the Council of Europe. The government's inability to make constitutional changes meant that the October 2010 elections were held with provisions limiting positions to constituent peoples<sup>102</sup>.

With regard to this situation, political leaders have taken contrasting positions towards constitutional change: while the Muslim SDA party has expressed support for change in favor of minorities, the Croatian HDZ and some Serb politicians have called for changes to further autonomy for their respective ethnic groups. In this sense, one of the main problems is that it is difficult for the main parties to put aside ethnic issues for the sake of a real solution. In fact, in 2012, the European Commissioner Štefan Füle and the Secretary General of the Council of Europe Thorbjørn Jagland hinted that “faced with a number of disparate proposals, we regret that it appears that these issues are given a lower priority by Bosnia and Herzegovina’s leaders than political rivalries”<sup>103</sup>.

## Section 2.1 - Consequences and implications of Sejdić and Finci v. Bosnia and Herzegovina

In the last decade, the judgement of the European Court of Human Rights analysed here has been at the centre of a lively debate.

The relationship between human rights and power sharing is one of the most significant aspects to be considered, as some contradictions are evident. One of the

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<sup>102</sup> Elyse Wakelin, “The Sejdic and Finci Case: More Than Just a Human Rights Issue?”, *E-International Relations*, October 31, 2012

<sup>103</sup> European Commission, “Statement by Commissioner Štefan Füle and Secretary General of the Council of Europe Thorbjørn Jagland on the Road Map for Bosnia and Herzegovina’s EU membership application and the execution of the European Court of Human Rights’ “Sejdić and Finci”- judgement”, September 3, 2012

pillars of the consociational model is to treat some groups differently from others in relation to their ethnicity, language, or religion. This is in contrast with the principle of non-discrimination, which on the contrary prohibits differentiation on basis of the same reasons<sup>104</sup>. In addition, as highlighted by Lidia Bonifati from University of Bologna, consociational democracies are based on group identity or in other terms on collective rights, whereas human rights revolve around the individual, and thus individual rights<sup>105</sup>.

It is also interesting to note the role played by national and supranational courts in cases involving consociational democracies. In fact, according to the American law professors Samuel Issacharoff and Richard Pildes, national courts are reluctant to judge consociative measures as incompatible with human rights and in most cases they prudently 'defend' consociative mechanisms or even expand their logic<sup>106</sup>. For Bonifati, even the European Court of Human Rights initially followed this hypothesis, as demonstrated in the cases *Belgian Linguistics* (1968) and *Mathieu-Mohin and Carfayt* (1987)<sup>107</sup>. However, *Sejdić and Finci v. Bosnia and Herzegovina* breaks new ground by declaring the consociational model in violation of human rights.

A convincing explanation for the change in the Court's behaviour is offered by Christopher McCrudden and Brendan O'Leary<sup>108</sup>, who identified four main evolutions between the two Belgian cases and the Bosnian case: (i) a more structured approach to discrimination against minorities by the Council of Europe and the European Court of Human Rights; (ii) an evolution of the Court's approach to interpreting the rights to political participation; (iii) a growing criticism of

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<sup>104</sup> David Wippman. *International Law and Ethnic Conflict*, (United States: Cornell University Press, 2018), p.231-232

<sup>105</sup> Lidia Bonifati, "Molto rumore per nulla? Dieci anni dalla sentenza Sejdić-Finci", *University of Bologna*, January 2020

<sup>106</sup> see: Samuel Issacharoff, "Democracy and collective decision making", in *International Journal of Constitutional Law*, 6/2008, (United Kingdom: Oxford Academic Press, 2008), pp. 231-266 and Richard Pildes, "Ethnic identity and democratic institutions: a dynamic perspective" in *Constitutional design for divided societies*, ed. Sujit Choudhry (United Kingdom: Oxford Press, 2008), pp. 173-201

<sup>107</sup> Lidia Bonifati, "Molto rumore per nulla? Dieci anni dalla sentenza Sejdić-Finci", *University of Bologna*, January 2020, p. 6

<sup>108</sup> Christopher McCrudden and Brendan O'Leary. "Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements". *European Journal of International Law*, Volume 24, Issue 2 (2013): 477-501

consociative democracies by international human rights organisations, such as the Venice Commission; and (iv) a specific interpretation of the Bosnian conflict and Bosnia's commitments to the Council of Europe and the European Union.

All these factors created the conditions for the Court to distance itself from what it had previously stated in the Belgian cases and "dare" to take a different position. Moreover, as noted by Céline Tran<sup>109</sup>, the Strasbourg Court has relied substantially on international human rights bodies to gather information and, as a result, the decision of the case was strongly influenced by a liberal approach to human rights.

The failure of the Bosnian government to comply with the European Court's ruling in the Sejdić and Finci case certainly has human rights implications for Bosnian citizens, who are prevented by the Bosnian constitution from running for high office because of their status of "others", but in general, the failure to comply with the Court's ruling and the continued difficulties in meeting European deadlines could have a greater effect on Bosnia in the long term.

On its behalf, the European Union urges Bosnia to "meet its responsibilities and work together to (i) implement the Strasbourg Court of Human Rights ruling, (ii) fulfil the country's commitments to the Council of Europe, and (iii) advance the EU integration agenda"<sup>110</sup>.

The majority of Bosnian population is in favour of Bosnia joining the European Union. In fact, a recent survey by the Bosnian Agency for European Integration shows that 72%<sup>111</sup> of the population is in favour of Bosnia as a member of the EU. However, up to this point, "the promise of EU membership has not been 'sufficient tool' for Bosnian politicians to enforce European values, norms and rules and work

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<sup>109</sup> Céline Tran, "Striking a Balance Between Human Rights and Peace and Stability: A Review of the European Court of Human Rights Decision Sejdić and Finci v. Bosnia and Herzegovina". *Human Rights Brief* 18, no.2 (November 2011): 3-8

<sup>110</sup> European Commission, "Štefan Füle European Commissioner for Enlargement and European Neighbourhood Opening speech at the launching of the High Level Accession Dialogue with Bosnia and Herzegovina High Level Accession Dialogue", June 27, 2012

<sup>111</sup> Erhan Akdemir, "European Union Perception Of Bosnia And Herzegovina's People". *Journal Of Balkan Research Institute* vol.7, no.1 (July 2018), p.9

This data must be compared with a poll conducted in 2011, in which 88% of the population was in favour of Bosnia as a member of the EU (see: Bedrudin Brljavac, "Assessing The European Criteria In Bosnia And Herzegovina: A Litmus Test For The European Union". *Journal of Comparative Politics* 5, no. 1 (01, 2012): 4-23)



on their implementation in domestic policies”<sup>112</sup>. Despite public support, Bosnia's future as a member of the EU is only possible if political parties put aside ethnic feuds and find a solution to the court ruling and begin their journey towards membership and future stability and prosperity.

To conclude the analysis of the Sejdić and Finci judgement, it was perceived as revolutionary by the international community. Indeed, for the first time, a supranational court considered the constitution of a consociational democracy incompatible with human rights since it violated the European Convention on Human Rights.

In terms of effectiveness, it is possible to observe that since 2009 the European Court of Human Rights has been called to judge four other cases, all related to the precedent set by Sejdić and Finci v. Bosnia and Herzegovina<sup>113</sup>. However, if from a legal point of view the case has constituted a significant precedent in the jurisprudence, from a political point of view, in Bosnia and Herzegovina, the impasse concerning the institutional reforms to be implemented in order to follow the judgement is still very far from being overcome<sup>114</sup>.

Ten years after the judgement, the applicants published an open letter<sup>115</sup> addressed to state and international institutions, urgently requesting that Sejdić and Finci v. Bosnia and Herzegovina be implemented in time for the 2020 local elections in Mostar and the 2022 presidential elections. Currently, what was requested has not been achieved. Specifically, the petitioners demanded: (i) the elimination of discrimination in electoral processes; (ii) the implementation of the judgments, as provided for in Article 10 of the Constitution<sup>116</sup>, without this becoming a political

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<sup>112</sup> Bedrudin Brljavac, "Assessing The European Criteria In Bosnia And Herzegovina: A Litmus Test For The European Union". *Journal of Comparative Politics* 5, no. 1 (01, 2012), p.5

<sup>113</sup> (i) Zornić v. Bosnia and Herzegovina in 2014; (ii) Pilav v. Bosnia and Herzegovina and (iii) Šlaku v. Bosnia and Herzegovina in 2016; (iv) Baralija v. Bosnia and Herzegovina in 2019

<sup>114</sup> Mainly because of the veto rights within the Parliamentary Assembly

<sup>115</sup> Azra Zornić, Jakob Finci and Others, "Open letter: Until When?", *Women Citizens for Constitutional Reform*, December 2019

<sup>116</sup> ""(1) Amendment Procedure: This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the

issue between parties; (iii) that the Dayton Constitution be amended through amendments to remedy discrimination on the basis of ethnic origin, affiliation or place of residence.

The international community, reiterating Daytonian schizophrenia, sided with the signatories, as argued by Johann Sattler, Head of the EU Delegation and EU Special Representative in Bosnia as of 2019<sup>117</sup>.

In fact, in a short article published in December 2019, Sattler firmly expressed his desire to see the amendments necessary to implement the Strasbourg judgments implemented, as an important step for the continuation of the country's path to European integration<sup>118</sup>.

In conclusion, while the European judgment in *Sejdić and Finci v. Bosnia and Herzegovina* was initially welcomed for its extraordinary nature, over the years the lack of concrete effects and changes in the Bosnian system to overcome the discrimination raised by the case made the Court's judgment lose its significance. Indeed, although the Court was courageous in wanting to depart from the path mapped out by its own jurisprudence and that of national courts, the work done was not enough to clearly identify the actors, processes, and timelines for implementing changes to the Bosnian constitutional order, leaving these aspects in uncertainty<sup>119</sup>. It is precisely this ambiguity that has allowed the Bosnian political forces to ignore the Court's ruling (and all the subsequent ones mentioned here), perpetuating a self-preserving political system and leaving the country in a state of institutional paralysis that still seems far from being resolved.

In Bosnia and Herzegovina, the greatest risk is that of identifying relations between the Entities with inter-ethnic relations between Serbs, Bosniaks or Croats. Thus, all

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House of Representatives. (2). Human Rights and Fundamental Freedoms: No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph”

<sup>117</sup> Lidia Bonifati, “Molto rumore per nulla? Dieci anni dalla sentenza *Sejdić-Finci*”, *University of Bologna*, January 2020, pp.13-14

<sup>118</sup> Johann Sattler, “Change is never easy, but necessary”, *Europa.ba - EU Ambassador's blog*, December 2019

<sup>119</sup> Christopher McCrudden and Brendan O’Leary. “Courts and Consociations, or How Human Rights Courts May De-stabilize Power-sharing Settlements”. *European Journal of International Law*, Volume 24, Issue 2 (2013), p.497

reforms must take into account this risk of allowing one ethnic group to dominate over another. The difference between a multi-ethnic state and a multinational state appears clearly in this context.

To obviate these risky consequences of the current territorial and governmental structure of Bosnia and Herzegovina and to reduce, at the same time, the complexity of the system, making it also more effective and less expensive, in 2004 a radical and provocative proposal was launched to abolish the Federation of BiH<sup>120</sup>. This proposal would offer the advantage of a substantial increase in actors at the state-federal level, given that the Republika Srpska (which would not be touched as any radical intervention would be politically impracticable) and the Brčko District would be on the same level not only with another antagonist, but with ten Cantons. Twenty years ago, in the phase of consolidation of the Dayton structures, such a proposal would have immediately given rise to strong suspicions of a plan aimed at a “ethnic homogenization” through the cantonalization of Bosnia. As Jens Woelk pointed out in his research on constitutional development in Bosnia and Herzegovina, “such ethnically based cantonisation would have been interpreted as compensation for ethnic cleansing during the war, which is why the Vance-Owen peace plan was particularly criticised in 1993”<sup>121</sup>.

In a different context, this interesting provocation, even if politically unfeasible, might be used to highlight the risk of a further consolidation of the combination between ethnic institutionalisation and too many levels of territorial government, recalling the primary need of an increase in the government and administrative capacities of the federal state and therefore of Bosnia and Herzegovina. The main provocation therefore does not lie in the proposal for a radical reform to make the

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<sup>120</sup> European Stability Initiative, “Making federalism work: a radical proposal for practical reform”, January 8, 2004

<sup>121</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.170

levels of government more effective, but rather in the equally radical idea of binding "ethnic federalism" to a more pluralistic design<sup>122</sup>.

A very relevant example in terms of ethnic division is the 'two schools under one roof' school system. Within the same schools, students follow radically different educational programmes based on their ethnicity. Very often the school principal chooses to fragment the pupils also in terms of space, dedicating different entrances, places, and times to the students in order to avoid mixed groups<sup>123</sup>. These measures started out as transitional, but they have been consolidated today, becoming the cause of systematic and long-lasting segregation. Indeed, in its 2018 report, the OSCE mentions the presence of more than 50 "Schools Under One Roof", mainly in border cantons<sup>124</sup>.

It goes without saying that in this context the radical proposal of abolishing the Federation of Bosnia and Herzegovina has remained an academic provocation.

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<sup>122</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.170

<sup>123</sup> OSCE. "Two Schools Under One Roof" - *The Most Visible Example of Discrimination in Education in Bosnia and Herzegovina*". December 2018

<sup>124</sup> OSCE. "Two Schools Under One Roof" - *The Most Visible Example of Discrimination in Education in Bosnia and Herzegovina*". December 2018

### Section 3 - An Intermediate Evaluation

According to Joseph Marko, professor of Public Law and Political Sciences at University of Graz, and one of the three international judges on the Constitutional Court of Bosnia-Herzegovina appointed under the Dayton Agreement by the President of the European Court of Human Rights, “there are several lessons to be learned from the experience of implementing the Dayton Constitution in Bosnia-Herzegovina”<sup>125</sup>.

First of all, numerous problems are inherent in the concept of the multinational state: the ambiguity of territorial delimitation on an ethnic basis ends up reinforcing the majority ethno-national identity, and the tendency towards ethnic homogenization at the sub-state level. As a result, there is less needed to compromise, which would be the essence of democratic decision-making. The “pillarization” through institutional segregation contributes considerably to consolidate and perpetuate ethno-national identities, and therefore risks closing the few channels of possible international cooperation. However, institutional segregation alone cannot create trust between groups. At best it can create security, and it is difficult to limit the mechanisms of segregation over time: in all contexts identification (and identity formation) is dominated by the ethno-national dimension, thus preventing the formation of multiple identities and a common matrix of “secular” civic identity.

Furthermore, such homogenization and ethnic predominance at the substate level with a focus on three constituent peoples entails the discrimination and exclusion of minorities or, in other words, those that the Dayton Agreement identifies as “others”.

As Marko pointed out, “any discussion to abolish the territorial delimitation along ethnic lines, and/or the principle of ethnic quotas for state institutions, meets fierce resistance from the dominating ethnonationalist political elites. Moreover, there is

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<sup>125</sup> Joseph Marko. “United In Diversity?: Problems Of State And Nation-Building In Postconflict Situations: The Case Of Bosnia - Herzegovina”. *Vermont Law Review*, vol. 30, no.3 (Spring 2006), p. 542

some sort of an ethnic “King Midas effect”: if such institutional mechanisms are accepted, they tend to affect all spheres of life<sup>126</sup>.

Secondly, the concept of a nation-state based on the “civic” nation, with a completely neutral or “colour blind” Constitution in ethnic terms, cannot be the solution for the future of Bosnia and Herzegovina. The total elimination of social and cultural relevance of ethnic identities will remain a utopia in a context, where ethnicity has been so important during the last decades, and even centuries. It is therefore a positive obligation for State authorities to guarantee ethno-cultural pluralism towards all citizens for a concrete realisation of a democratic society<sup>127</sup>. This affirmative duty refers to Art. 9 of the European Convention of Human Rights, from which it can be interpreted that the role of the authorities in a situation of conflict between groups is not to remove the causes of tensions by eliminating pluralism, but to guarantee mutual tolerance between competing groups<sup>128</sup>.

Finally, the "unity in diversity" formula must therefore be interpreted in new terms and re-defined. Instead of the false dichotomy between individual and collective rights, a distinction articulated in different levels of reference to the collective dimension of rights must be observed. From the exercise of an individual right that makes sense only to the extent that at least the de facto existence of a group is recognized (i.e. the case of linguistic rights), up to guarantees that consider the groups not only as an “object”, but as owners of subjective rights (in the case of personal or cultural autonomy)<sup>129</sup>.

Consequently, the fundamental values of the order cannot be reduced to the one-dimensional formation of a national identity in combination with absolute loyalty

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<sup>126</sup> Joseph Marko. “United In Diversity?: Problems Of State And Nation-Building In Postconflict Situations: The Case Of Bosnia - Herzegovina”. *Vermont Law Review*, vol. 30, no.3 (Spring 2006), p. 543

<sup>127</sup> Joseph Marko. “United In Diversity?: Problems Of State And Nation-Building In Postconflict Situations: The Case Of Bosnia - Herzegovina”. *Vermont Law Review*, vol. 30, no.3 (Spring 2006), p. 544

<sup>128</sup> European Court of Human Rights. *Guide on Article 9 of the European Convention on Human Rights*. (August 2021). para 51-53, pp. 20-21

<sup>129</sup> Joseph Marko. “United In Diversity?: Problems Of State And Nation-Building In Postconflict Situations: The Case Of Bosnia - Herzegovina”. *Vermont Law Review*, vol. 30, no.3 (Spring 2006), p. 546-548

towards the "ethnic" nation, but cultural diversity itself must become a fundamental value, as an enrichment both political communities made up of several groups, and individuals, through the possibility of choice and inter-ethnic communication and cooperation. Consequently, minority protection cannot only be defensive, but must include positive values<sup>130</sup>.

Therefore, the solution cannot exist in the dichotomy between "ethnic nation" and "civic nation", with the necessary and mutual exclusion of the other model, but only in the combination of both models, which guarantees multi-ethnic cooperation at all levels and integration through common state loyalty<sup>131</sup>.

International intervention has often been directed in this direction, but a precise and shared project between the same international actors was not always recognizable, frequently masked by a generic reference to European standards. Furthermore, there is the paradox of the paternalistic approach, which frequently induces international actors to replace the will of the population with the presumed one or with their own. In addition to this, politicians declare the international community responsible for everything and we can also report an increasingly passive attitude of the population, as the decisions of international actors seem to escape any form of control<sup>132</sup>.

From the inherent contradictions in the Dayton Agreement - imposed by the international community in order to end the war and stabilise the post-war period - to the exercise of re-building a functioning state in Bosnia and Herzegovina, it is clear that the unsolved problem remains the development of a common and shared vision of this States: both within the international community and among citizens, in order to make it sustainable in the future.

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<sup>130</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.174

<sup>131</sup> Joseph Marko. "United In Diversity?: Problems Of State And Nation-Building In Postconflict Situations: The Case Of Bosnia - Herzegovina". *Vermont Law Review*, vol. 30, no.3 (Spring 2006), p. 549-550

<sup>132</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.175

Quoting Sumantra Bose, the dilemma is “exactly, what kind of state is international intervention trying to construct in post-war Bosnia?”<sup>133</sup>.

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<sup>133</sup> Sumantra Bose, *Bosnia after Dayton: Nationalist Partition and International Intervention*, (United Kingdom: Oxford University Press, 2002), p. 91



## Chapter 3 - Bottom-up Changes?

### Section 1 - Local Government

As described in previous chapters, the structure of Bosnia and Herzegovina was radically changed by the war in the 1990s.

The reorganisation of the country brought by the Dayton Peace Agreement is based on an ethnic division between the two entities. As the political-science professor Mirko Pejanović pointed out in his works, this territorial change has led to the creation of more than 30 municipalities, which are now added to the 109 municipalities that existed before the war<sup>134</sup>. However, these examples of local government do not find extensive consideration in Annex 4 or in the text of the peace agreement in general. The system imposed in 1995, in fact, confers maximum powers to the two entities: the Federation of Bosnia and Herzegovina and Republika Srpska, and - only as a result - the bipolar division between these two entities is also found in the institutions of local government.

In addition to this, there is the aforementioned Brčko district, in the middle of the two Entities (to unite them or - according to some - separate them), which enjoys a special status in the sense that it is directly under the national sovereignty of the Bosnian State.

In a context like the Bosnian one, strongly influenced by ethnic or cultural diversity, local political institutions could play an important role. However, despite the positive potential of transferring powers and functions to the local level for the integration of ethnically or culturally diverse groups, the tensions still present in some areas may prove to be obstacles to decentralisation or local government reform.

It should be mentioned here that “the continuing weakness of the state and the constitutional necessity to ensure full equality at every level between the 3 constituent peoples have led to a situation where around 60% of the GDP is still

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<sup>134</sup> Mirko Pejanović, “Local Self-Government: A Must for Democracy, Civil Society and EU Integration” in *Peacebuilding and Civil Society in Bosnia-Herzegovina. Ten Years after Dayton* edited by Fischer Martina (Germany: Lit-Verlag, 2006), p. 218

spent on maintaining state and entity apparatus [due to the presence of] 3 rotating presidents at state level, 2 presidents at entity level, 13 prime ministers, over 180 ministers, 760 members of various legislative bodies, and 148 municipalities. Furthermore, the voluntary or imposed transfer of a number of competences to the state level has not resulted in a corresponding reduction of the entity apparatus”<sup>135</sup>. A system such as this, which is so fragmented and characterised by duplication on several levels of governing bodies, causes enormous economic expenditure.

The federal structure of Bosnia and Herzegovina, the recognition of the Entities and the compositions of cantons within the Federation were necessary conditions for the end of the war. However, this territorial organisation was (and still is today) in strong contrast to the principle of minority returns, an important instrument for the reconstruction of a multi-ethnic society. Due to real or perceived discrimination, cases of actual return are still rare: there are many examples of refugees who returned to their place of origin for a limited period of time before moving to areas where their group is dominant<sup>136</sup>.

Finally, the ethnic divisions at all levels in the country also had a direct impact on local self-government.

Following the amendments to the Entity Constitutions in 2002<sup>137</sup>, representation in the public administration at all levels is now guaranteed to all three constituent peoples. This representation, however, is proportional to the numerical consistency

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<sup>135</sup> Council of Europe, “Constitutional reform in Bosnia and Herzegovina. Parliamentary Assembly Resolution 1513 (2006)”, June, 29, 2006, para 2

<sup>136</sup> To learn more, see: Peter Lippman. “Promoting Return of Refugees: Sarajevo and Zvornik in Bosnia and Herzegovina” in *Managing Hatred and Distrust: The Prognosis for Post-Conflict Settlement in Multiethnic Communities in the Former Yugoslavia* edited by Dimitrijevic Nenad and Kovács Petra (Hungary: Local Government and Public Service Reform Initiative, 2004)

<sup>137</sup> “The implementation of the decision of the Constitutional Court was the subject of much discussion, including opinions of the Venice Commission (CDL-INF(2001)006 and CDLAD(2002)024). In the end an agreement between major political parties within BiH was reached, and in April 2002 and October 2002 the High Representative imposed the amendments to the Entity Constitutions which were part of this Agreement. The basic approach chosen was based on the equality of constituent peoples throughout the territory”

European Commission for Democracy through Law. *Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Power of High Representative*. (March 2005), p.4

of the respective group in the country and it should be noted here that the first official census in post-Dayton Bosnia was only possible in 2013. The previous census dates back to 1991 and therefore did not reflect the situation, and the respective needs, of the population after the conflict. As we previously saw in Chapter 2, this system of representation contains elements that discriminate against those who do not recognize themselves in the three constituent groups - thus excluding Jews, Roma and anyone else who falls into the "Others" category - or those who live in an area where their ethnicity is not dominant<sup>138</sup>.

For these reasons, in its 2006 Monitoring Report, the Congress of Local and Regional Authorities of Europe concludes by asking to reduce as much as possible the ethnic elements in the electoral system and to give the central State the power to provide all international implementations at all territorial levels, following in particular the European Charter of local self-government<sup>139</sup>. Regarding other reforms still deemed necessary, we can mention (i) the harmonisation of laws, especially of the Cantons; (ii) the regulation of the distribution of VAT revenues with clear criteria and equalisation measures in favour of the weaker Municipalities to be drawn up in consultation with the authority's premises as well as (iii) the final decision on ownership issues<sup>140</sup>.

The recent reform legislation concerning local government was adopted in accordance with the European principles laid down in the European Charter of Local Self-Government<sup>141</sup>, thus providing a solid basis for further measures needed to transform local government into an effective instrument closer to the citizen. However, the various paradoxes of the Bosnian constitutional framework -

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<sup>138</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.187

<sup>139</sup> Congress of Local and Regional Authorities in Europe. *Local and regional democracy in Bosnia and Herzegovina. Explanatory Memorandum*. (October 2019)

<sup>140</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.187

<sup>141</sup> The Charter was adopted within the framework of the Council of Europe and opened for signature by the Council of Europe's member states on 15 October 1985. All CoE member states are parties to the Charter, and new member states of the Council of Europe are expected to ratify the Charter as soon as they can

especially the ethnic element and its strong institutionalisation in favour of the three constituent peoples in an exclusive way - are also evident at the local level and create negative repercussions especially in the areas of autonomy of municipal authorities, implementation of minority rights and the complex electoral system at the administrative level.

We could say, in other words, that the local government system is extremely complex and not very coherent, especially regarding the delimitation of responsibilities between the municipal level and the Entity or Canton level. Finally, the fiscal administrative autonomy of municipalities is quite limited. The distribution of competences and decision-making procedures at local level are not efficient and administrations are often not competent and effective. In addition, main ethnic parties exercise strong control over media and decision-making processes. This domain often results in discriminations against minorities and prevents the creation of a culture of participation among ethnicities.

The international community, essential for the guarantee of stability in Bosnia and Herzegovina, has also contributed to the democratic deficit of the institutions due to reforms and measures imposed without the involvement of citizens. People's disappointment is manifested in the dramatic drop in turnout, which remains around 50% of voters in the last municipal elections<sup>142</sup>. Thus, over the years, the international community's frustration with the democratisation process has increased significantly, ultimately leading to a change of strategy: recently, assistance has increasingly focused on technical and administrative issues of improving the governance system, in particular the strengthening of institutions at all levels. These functional aspects are essential to make local administrations more efficient and to improve the quality of public services for the benefit of citizens; moreover, the new legislative framework should provide a solid basis for the implementation of functional reforms everywhere. Nevertheless, some of the main difficulties mentioned above persist, such as the strong party control and the problems of financing large projects. In fact, to give an example, municipalities do

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<sup>142</sup> 45.52% of citizens with the right to vote in Bosnia and Herzegovina in 2004; 55% in general terms (an unexpected result), but only 40% in the cities were voters preferred small multi-ethnic parties, in 2008; 53,88% in 2016; and 50% in the last round of voting in 2020

not have the right to incur a debt with the aim of investing to attract new private investments.

Above all, the territorial structure, impractical and very expensive, often prevents cooperation especially between neighbouring municipalities belonging to different entities or cantons. The weakness of the central State and the lack of a comprehensive and uniform reform framework, or at least of coordination between the Entities, are again reflected here. The motto "one country, two systems" remains. Collaboration between the Entity governments and strong political will on the part of Bosnian politicians would be needed to create not only modern, sustainable, and effective administrative structures throughout the country, but to transform them into inclusive units of local self-government open to the participation of their citizens<sup>143</sup>.

As it has been highlighted many times in this work, the Dayton Agreement was firstly organised as a peace agreement with the aim of ending the struggles, and just in the background as a foundation for the state's reconstruction.

It is not surprising, therefore, that Annex IV of the General Framework for Peace in which the Constitution is contained had "also, and perhaps above all, a symbolic function, guaranteeing the continuity of the state at the price of sufficient concessions to the individual parties to the conflict"<sup>144</sup>, as pointed out by the jurist Jens Woelk.

In such circumstances, there was not and could not be developed even a minimal common vision of the State in which the three belligerent parties (the constituent peoples - Bosniaks, Serbs and Croats), but also all citizens (including the "others"), had to live together: instead, guarantees for groups and their elites dominated, through segregation and mutual control, while functional solutions on the effectiveness and efficacy of the institutional structures created were lacking.

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<sup>143</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.200

<sup>144</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.233

Consistent with the Dayton compromise formula, there was no recourse to popular approval of the Constitution. This was due not only to the controversial symbolic value of the use of the referendum at the beginning of the conflict, but also to the fact that the Constitution was an integral part of the 'package' for peace, the details of which could no longer be discussed without risking compromising the peace agreement that has hardly been reached. It would have been impossible, in the immediate post-war period, to organise a popular consultation because each of the three constituent peoples was a 'galaxy' in its own right. It is therefore clear that the agreement that emerged was more the result of a compromise imposed by international actors.

In this sense one can say, as Woelk rightly points out, that it was not intended - and still is not intended - that the people of the Bosnian state should exist: there are three different constituent peoples, and then all the “others”<sup>145</sup>. Therefore, great importance was attached to the institutionalisation of differences between peoples, preferring an “ethnic sovereignty” to a popular one<sup>146</sup>.

The state model imposed under the Dayton system is based on a tension between characteristics of both “civic” and “ethnic” democracy, as described in previous chapters. This tension, which repeatedly required the intervention of the High Representative and the Constitutional Court, is at the basis of the main concerns regarding the sustainability of this model. This situation has done nothing but reinforce the idea of an international protectorate in which Bosnia seems to have run aground.

It should be noted here, as Sumantra Bose points out in his article *The Bosnian State a Decade after Dayton* regarding the aforementioned 2002 reforms, “much of this reform can be derided as either symbolic or superficial window dressing. But this levelling of the institutional structure of rights and representation across BiH still represents a step in the right direction, especially in the context of substantial

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<sup>145</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.234

<sup>146</sup> Jens Woelk, *La transizione costituzionale della Bosnia ed Erzegovina. Dall'ordinamento imposto allo Stato multinazionale sostenibile?*, (Italy: CEDAM, 2008), p.234

minority returns”<sup>147</sup>. In other words, the situation remains complex and full of pitfalls, but some progress - albeit weak - has been made.

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<sup>147</sup> Sumantra Bose, “The Bosnian State a Decade after Dayton” in *Peace without Politics? Ten Years of State-Building in Bosnia* edited by Chandler David (United Kingdom: Routledge, 2006), p. 328

## Section 2 - Facilitating Reconciliation through Quota Borda Electoral System

In her book *Balkan Tragedy: Chaos and Dissolution after the Cold War*, the Balkan expert and Political Science professor Susan Lampland Woodward stated: “The elections in Yugoslavia in 1990 (...) became the critical turning point in the process of political disintegration”<sup>148</sup>. Perhaps if the electoral system had been different at the time, the elections would not have been so disruptive.

The electoral system used in Bosnia since Dayton has also, in effect, been little more than a sectarian headcount. Now, the chosen electoral system often exacerbates the situation it is supposedly meant to heal, as we had already discussed in this work. We could say that if democracy must be an integral part of the peace process, the structures used in that democracy must themselves be peaceful.

Hence, the purpose of this section is to outline the importance of a peaceful electoral system, which enables people to engage in a personal process of reconciliation, peaceful in its outcome, inclusive, and balanced.

First of all, we could say that proportional representation (PR) is less radical than simple or plural majority voting, but this system is still contradictory: the one who gets the support of a large share of voters is elected, and what the other voters think of his or her candidacy is irrelevant. In fact, in fractured societies, the success of a candidate sometimes depends on the extent to which he or she has managed to antagonise or not those other voters who are not part of his or her ethnic group or quota.

In pure democratic theory, the candidate should, if elected, represent everyone in his or her constituency. The problem is that sometimes a candidate can only represent his own, leaving many feeling underrepresented<sup>149</sup>.

In simple proportional systems, a candidate may only represent his or her share, but since there are more than one winner, the number of people who feel

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<sup>148</sup> Susan L. Woodward, *Balkan Tragedy: Chaos and Dissolution after the Cold War*, (United States of America: Brookings, 1995), p. 118

<sup>149</sup> Peter Emerson in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.148



underrepresented will be smaller. Ideally, however, an electoral system should not be divisive and exclusive, but cohesive and inclusive, leaving no one feeling alienated. The principle of proportionality is obviously important, but so is the principle of inclusiveness.

If we consider that the list of principles on which an electoral system should be based is quite long, in the case of post-Dayton Bosnia, the list should include some important principles outlined by Peter Emerson:

- (i) Every law-abiding citizen should have the right to run for office, either independently or as a member of a particular party;
- (ii) The electoral system should allow voters to express more than one preference if they so wish. Ipso facto, of course, the procedure used in the count must take all such preferences into account;
- (iii) The number of preferences to be expressed will vary according to the number of persons to be elected although, for practical purposes, it should rarely exceed six<sup>150</sup>.

While divisions in the count along ethnic lines may be necessary because of the Dayton Agreement, according to this analysis they should not be allowed to interfere with the voters' rights to full expression of their preferences. In expressing a second preference, a voter is in effect saying that he or she is prepared to compromise as an essential part of any peaceful democratic process that should be useful for the rebuilding of society after a conflict. More than that, a second preference allows the willing voter to actively participate in a rapprochement between parties and ethnic groups, especially in a case like Bosnia where parties are strongly linked to ethnicity.

In this sense, a less antagonistic system than a majoritarian one should encourage a certain amount of cooperation between parties, independent candidates and between communities. In other words, as many have pointed out, electoral competitions in fragile societies should be based more on the 'win-win' principle than on the 'win-or-lose' principle.

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<sup>150</sup> Peter Emerson in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.148

To give a concrete example: in Republika Srpska, instead of one party winning both the presidency and the vice-presidency, presidential and vice-presidential elections should award the posts of president and vice-president regardless of their affiliation. The fact that a candidate chooses to be part of an ethnically characterised party should therefore not be a requirement to be elected<sup>151</sup>.

In general terms, as pointed out by the director of the De Borda Institute Peter Emerson, no electoral system should put non-ethnics at a disadvantage compared to ethnics<sup>152</sup>.

As was the case in post-Dayton Bosnia, any count must be based on a principle of proportional representation, and this in turn should result in a reasonably low threshold. The measure of proportionality, however, should be based on more than the first preferences of voters. Moreover, in an ideal world, proportionality should be determined by the voters themselves. For example, if a proportion of voters wish to vote for candidates of a particular gender, they should be able to do so.

The constituency principle should help ensure that any regional or national minority can obtain representation in all local, regional, and national chambers, and overall proportionality can best be ensured by a second-tier or supplementary electoral system. A top-up electoral system is the second part of the count; the first part takes place in local constituencies and can be first-past-the-post or PR-list or PR-Single Transferable Vote or whatever; the second part considers either those same votes or a second ballot at regional or national level and is normally conducted as a PR-list count. It is an attempt to ensure that, on a national scale and despite any local quirks, the electoral system is proportional overall<sup>153</sup>.

The aim of this PR + PR system is to ensure that while each small constituency will inevitably have a high threshold - in a 4-seat constituency, it is around 20%, and any party with less than 20% support cannot be elected; in the regional/national top-

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<sup>151</sup> As in the case of Ilijaz Pilav who appealed to the Court because, although he belongs to the Bosniak constituent group, he resides in Republika Srpska

<sup>152</sup> Peter Emerson in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.149

<sup>153</sup> VEDI PAG. 150

up, however, the constituency is obviously large, and the threshold correspondingly small, meaning that even small parties can get representation. Thus, a good electoral system will encourage (and enable) voters to vote sincerely and not tactically, as is the case when a bad system is used.

Since in a good second-tier system, voters would invariably vote the same way in both tiers, a better approach would be to use a top-up system based on a second, different count of the same electoral information. It should be noted that any electoral system to be used in Bosnia - as contained in the Dayton Peace Agreement - must satisfy all three ethnic groups: those who do not wish to be associated too closely with any of these groups, let alone the "Others" outside these groups, should not be excluded. Moreover, there should be only one type of ballot paper in each constituency, and this is not the case. In the presidential elections, for example, the ballot papers in Republika Srpska and the Federation of Bosnia and Herzegovina are different. This ballot should list party and independent candidates equally.

If for obvious reasons the Bosnian electoral system has to be Dayton-compliant, it should nevertheless be designed in such a way as to provide for a natural evolution towards a system ideally suited to the perfect 'multi-multi' society (i.e., a society in which candidates are elected and policies are chosen regardless of the ethnicity, religion or gender of the people involved).

## Section 2.1 - Quota Borda System in Bosnia and Herzegovina

In 1770 the French mathematician Jean-Charles de Borda published a paper called *Sur la forme des élections* in which he made a brilliant contribution to political science. In fact, he was the first to develop a mathematical theory of elections and, aware of the risk that elections could result in the selection of a candidate who did not respond to the 'true' preferences of the voters, he developed the method of voting by score or rank-order. This system was then taken up and reworked by the British philosopher Michael Dummett in his 1984 publication named "Voting Procedures". This system, according to its developers, must follow some important principles:

1. a candidate's success is determined by the preferences exercised in his or her favour;
2. any party or group that obtains a quota will thus obtain fair representation;
3. the principle of proportionality must be combined with the principle of constituency, giving, where appropriate, multi-member constituencies of three to nine representatives;
4. while a threshold of 25% to 10% respectively is suggested for this system, a lower and fairer threshold can be achieved by operating a simultaneous top-up system in a larger regional constituency<sup>154</sup>.

As Emerson pointed out in his research, voters in the Quota Borda System are called to vote for a fixed number of candidates (often  $2 < n < 7$ ). If the voter fills out a complete ballot, he gives  $n$  points to the candidate he likes most,  $n-1$  points to his next favourite,  $n-2$  points to his third preference, and so on, down to 1 point for the candidate he likes least. Consequently, if a voter fills in only a partial ballot, or - in other words - he votes for  $m$  candidates (where  $m$  is  $0 < m < n$ ), he will give  $m$  points to the candidate he likes most,  $m-1$  points to his next favourite,  $m-2$  points to his third preference, and so on, up to 1 point for the candidate he likes least<sup>155</sup>.

The purpose of this system is to encourage voters to vote for more than one candidate.

The question now is: how do we count the votes? As far as counting the first preference is concerned, this makes no difference: the first preference remains the candidate who gets  $m$  or  $n$  points. At this stage of the QBS count, a candidate only gets the maximum number of points (i.e.,  $n$  points) from a voter handing in a complete ballot.

In doing so, the voter not only declares his or her first preference but is expressing a willingness to compromise. In the Bosnian case, the most significant aspect in this respect is that the voter may express preferences that go beyond the traditional

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<sup>154</sup> Peter Emerson in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.151

<sup>155</sup> Peter Emerson in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.152

ethnic division. He could, in other words, choose to implement a conscious act of reconciliation.

It is to be expected that the voter will in most cases give his first preference to a candidate from his own ethnic group; but at least, in this system, he still has the opportunity to give his support to candidates from a different ethnic group.

#### Section 2.1.1 - Presidential Elections

The main point, as noted above, is that there should be one - and only one - ballot paper for the presidential elections in Bosnia and Herzegovina. Unfortunately, as long as the Dayton provisions establish that each national community (i.e., Bosniak, Serb or Croat) will elect one member of the three-person presidency, it will be necessary for all candidates to identify themselves as belonging to one national community. However, from the voters' point of view, there should be freedom to choose a candidate over ethnicity. Indeed, just as some Bosniaks have the possibility to vote for the Croatian list<sup>156</sup>, all residents of Republika Srpska should also be free to vote for whomever they want<sup>157</sup>.

For Peter Emerson, every voter should be able to express three preferences, giving three points to his favourite candidate, two points to his next favourite and one point to his third choice<sup>158</sup>.

In this case there might be a danger that many voters would try to cross the ethnic divide and influence the outcome not only of someone from their own nation, but also of a second or third person from another national community. This, however, should not be seen as a danger, but rather as an encouragement for others to do the same. "If there were any fanciful result, it would be an 'unholy alliance' in which

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<sup>156</sup> Due to the 1994 Washington Agreement between Croat and Bosniaks, who share control of the Federation according to the division into cantons

<sup>157</sup> The problem arises when citizens who live in an area where they are in a minority want to run for president of the country, as in the case of Ilijaz Pilav repeatedly described in this work

<sup>158</sup> Peter Emerson in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.152

three extreme nationalist parties come together to support each other”<sup>159</sup>. Moreover, if the three normally antagonistic parties were still determined to cooperate, the result could resemble the desired inter-ethnic cooperation so hoped for in post-conflict Bosnia and Herzegovina.

#### Section 2.1.2 - Parliamentary Elections

Under this system, parliamentary elections could operate based on a top-up system. Any party that felt it had a good chance of winning  $x$  seats in a particular constituency would want to field  $x$  or  $x+1$  candidates. At this stage of a QBS election these candidates would, in effect, be in competition with each other. In the top-up election, on the other hand, all members of any party would be in competition with each other.

#### Section 2.1.3 - Local Elections

In local elections, “to ensure the full benefit of the top-up, each party will want to stand in all municipal constituencies”<sup>160</sup>, which helps to create a more cohesive and less fragmented environment. Such a top-up will ensure that the electoral system is equally fair for both large and small parties. In most municipal elections, voters would only be asked to vote for three candidates, again on the basis of the QBS. As a result, most municipal counts would not be too complicated.

Concluding this analysis largely elaborated by Emerson in his paper "How a Quota Borda System May Facilitate Reconciliation" we must focus on some important aspects. While various international documents express the importance of free and fair elections, these concepts have hardly found practical application in Bosnia and Herzegovina. In this context, in fact, we can say that the characteristics of freedom and equity are hardly linked to the electoral system currently in use.

Another interesting study in relation to electoral dynamics in Bosnia and Herzegovina is the one conducted by Benjamin Reilly in his book “Democracy in

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<sup>159</sup> Peter Emerson in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.152

<sup>160</sup> Peter Emerson in Džemal Sokolović and Florian Bieber, *Reconstructing Multiethnic Societies: The Case of Bosnia-Herzegovina*, (England: Ashgate Publishing, 2001), p.152

Divided Societies Electoral Engineering for Conflict Management”. In this text, political scientist Benjamin Reilly reflects on the role of the alternative voting system as a tool for reconciliation in countries undergoing reconstruction or characterised by fragmented societies.

According to this study, despite the importance of mechanisms for reconciliation, very little has been done in Bosnia and Herzegovina in terms of inter-ethnic moderation or accommodation: “if anything, electoral incentives have pushed in the opposite direction”<sup>161</sup>. Both in 1996 and 1998, national elections brought the most intransigent nationalist formations to power, underlining the need for cross-cutting electoral incentives to encourage more peaceful and democratic policies. Despite this need, Bosnia's three largest ethnic parties have always had little interest in acting across ethnicity, relying primarily on the votes of their community for their success<sup>162</sup>. In a sense we could say that the first elections in Bosnia and Herzegovina after the Dayton Agreement could function as a method for an ethnic census: each party received support only from the population belonging to its own group.

Based on the reforms recommended in 1999 by the United Nations High Representative for more open and multi-ethnic policies, the alternative voting system was introduced in Bosnia and Herzegovina. Under the proposal, voters for Bosnia's tripartite presidency can choose to indicate the order of their favourite ethnic group candidates running for one of three seats. However, voters are not allowed to express preferences for candidates of other ethnic groups.

Remaining compliant with the Dayton Peace Agreement, it is obvious that many political party leaders have chosen systems that favour their party. The problem here is that the three main nationalist parties do not consider the electorate and its

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<sup>161</sup> Benjamin Reilly, *Democracy in Divided Societies: Electoral Engineering for Conflict Management. Theories of Institutional Design*, (United Kingdom: Cambridge University Press, 2001), p.146

<sup>162</sup> The main ethnic parties in Bosnia and Herzegovina are (i) SDA, Stranka Demokratske Akcije, for muslim Bosniaks; (ii) HDZ BiH, Hrvatska demokratska zajednica Bosne i Hercegovine, for christian Croats; (iii) SNSD, Savez nezavisnih socijaldemokrata, for orthodox Serbs

will to be very important, causing unfavourable consequences for the citizens as a whole<sup>163</sup>.

In this sense, an important change for an effective and concrete reconciliation in Bosnia and Herzegovina also depends on an improvement in the electoral system that must be based on careful consideration of the voters who are currently fragmented, as well as on the opportunities that a new system could provide to citizens to actively practice reconciliation through voting processes.

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<sup>163</sup> Think of those who are unable to re-enter these electoral logics or to assert their active or passive political rights due to their ethnicity or residence



### Section 3 - Civil Society and Social Capital in Bosnia and Herzegovina

As has already been pointed out in this paper, in post-Dayton Bosnia and Herzegovina, the establishment of new state laws and institutions was a top-down affair, permitted and favoured by the Bonn powers retained by the High Representative. Despite this, international agencies have publicly continued to celebrate the importance of bottom-up processes, capable of engaging active citizenship in view of the constitution of a “new politics”.

In his work *The Improvised State. Sovereignty, Performance and Agency in Dayton Bosnia*, Alex Jeffrey - taking up what was already theorised by Partha Chatterjee in “The Politics of Governed: Reflections on Popular Politics in Most of the World” - underlines that the claim to popular consensus has begun to be so important for the modern conception of state since the French Revolution<sup>164</sup>. In fact, since 1789, the legitimacy of the state has been based on the assumption of popular sovereignty conducted through the consent of citizenship<sup>165</sup>.

In Bosnia and Herzegovina this tension between imposition and popular sovereignty has required a series of tactics that simultaneously emphasise the international obligation to control state institutions while attempting to cultivate popular participation. A relevant problem arises at this point. As we know the legitimate sovereignty in Bosnia and Herzegovina after the war is based on the three main ethno-national identities that govern the state at both local, entity and state level through the complex system described in the first chapter. The quest to establish Dayton BiH as a legitimate sovereign form therefore required the creation of parallel processes for the cultivation of forms of popular political participation that were brought together under the term “civil society building”.

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<sup>164</sup> See Brian C. J. Singer, “Cultural versus Contractual Nations: Rethinking Their Opposition.” in *History and Theory* 35, no. 3 (1996): 309 – 337

<sup>165</sup> Alex Jeffrey, *The Improvised State. Sovereignty, Performance and Agency in Dayton Bosnia*, (United Kingdom: Wiley-Blackwell, 2013), p.111

The political antecedents to the promotion of civil society can be traced back to two more or less contemporary political transformations: (i) from the role played by dissident and pro-democracy groups in the fall of communism across Central and Eastern Europe in the late 1980s; (ii) from the discourses on international development which, since the early 1990s, have begun to promote economic and social development through non-state actors, in particular NGOs. In this sense, Jeffrey underlines how “This neoliberal ideology has been embodied in the initiatives of the World Bank structured around the promotion of good governance and structural adjustment policies of the International Monetary Fund”<sup>166</sup>.

From a historical and political perspective, the seed of the promotion of civil society has deep roots. As emphasised by Chris Hann, already in the works of Plato and Socrates the concept of civil society was used to describe the rational processes for the resolution of conflicts and the achievement of the common good. In this sense, this primordial form of civil society is to be understood as a “mechanism of mediation [...] between the selfish goals of individual actors and the need for some basic collective solidarity in a moral community”<sup>167</sup>.

With the advent of the Age of Enlightenment in the 1700s, scholars such as Adam Smith and Adam Ferguson developed the concept of civil society in a new way. According to these scholars, civil society should not only be considered as a social or political practice, but also as an economic practice, which involves the exchange of ideas and goods. From this derives Adam Smith's famous economic theory: if economic transactions could be conducted with civility, state intervention was deemed unnecessary.

A century later, at the turn of the 1700s and 1800s, for Hegel civil society suffered from the capitalist mode of production: a place of competing class relations, each with little interest in the common good. Consequently, according to him, the state

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<sup>166</sup> Alex Jeffrey, *The Improvised State. Sovereignty, Performance and Agency in Dayton Bosnia*, (United Kingdom: Wiley-Blackwell, 2013), p.112

<sup>167</sup> Chris Hann, “Introduction: Political society and civil anthropology” in Elizabeth Dunn and Chris Hann, *Civil Society. Challenging Western Models*, (United Kingdom: Routledge, 1996), p.3

played an important role in mediating the selfish tendencies of certain elements of civil society.

In the nineteenth century, the German philosopher Karl Marx challenged Hegel's theory because he believed that the private dimension of civil society prevailed over the public aspect, with excessive emphasis on the individual's rights to pursue self-interest.

Despite their differences, these models describe the notion of civil society as external to the state and potentially responsible for the state itself. For Marx and Hegel, civil society is to be considered as a fundamental aspect of democratic practice<sup>168</sup>. The role of civil society in democratic societies was extensively addressed by Alexis de Tocqueville in "De la Démocratie en Amérique" (1835). In fact, according to Tocqueville, the guarantee of individual freedoms can be found in some democratic devices: (i) local self-government, (ii) the separation of church and state, (iii) freedom of press, (iv) indirect elections, (v) an independent judiciary and (vi) associative life.

All this had particular importance in Bosnia and Herzegovina in relation to the melting between civil society and associative life operated by the intervention agencies for the reconstruction of the country.

In his research, Alex Jeffrey focused on the desire to portray civil society as a democratic prerequisite separate from the state<sup>169</sup>. In doing this he examined the speech by Ombudsman Jasminka Džumhur delivered to the OSCE, who defined civil society as "a sphere of institutions, organisations, networks, and individuals, located between the family, the state and the market, and citizens will form associations to defend their common interests. In its simplest form, civil society is a group of institutions and associations of associations, connecting citizens with governments and the private sector"<sup>170</sup>.

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<sup>168</sup> Chris Hann, "Introduction: Political society and civil anthropology" in Elizabeth Dunn and Chris Hann, *Civil Society. Challenging Western Models*, (United Kingdom: Routledge, 1996), pp. 3 - 6

<sup>169</sup> Alex Jeffrey, *The Improvised State. Sovereignty, Performance and Agency in Dayton Bosnia*, (United Kingdom: Wiley-Blackwell, 2013), pp.113-115

<sup>170</sup> Jasminka Džumhur, "Introductory Speech of Jasminka Džumhur, Ombudsperson of Bosnia and Herzegovina at the OSCE Supplementary Human Dimension Meeting on

In other words, civil society is understood here as a space that should be able to democratically negotiate individual and collective needs. According to this vision, and in relation to what has happened in recent years in Bosnia and Herzegovina, NGOs are identified with “civil society” because of their perceived autonomy, combined with their presumed ability to pluralize the institutional arena and bring more democrats in the political sphere. Such a perception has led to the suggestion that their mere presence in post-war Bosnia and Herzegovina is evidence of democratisation. This line of thinking reflects quantitative assessments of democratisation, in which the number of NGOs is correlated to the level of, or 'depth', of democracy. Perhaps the most evident examples of such an instrumental approach are contained in the work of organisations such as Open Society Foundation as they attempt to construct indices of democracy largely based on numerical analysis of the presence of NGOs<sup>171</sup>.

NGOs are perceived in a contradictory way: they are “both part of the state in terms of the delivery of services and supposed to provide the opportunity for people to come together to resolve contestation with civility”<sup>172</sup>. These processes perform a twofold manoeuvre: cultivating a sense of individualism through competitive funding processes between organisations while simultaneously attempting to present these NGOs as examples of new forms of collaboration and inclusiveness.

The policy of “civil society building” through the presence of NGOs was particularly acute in Brčko district when following the announcement of the Final Award the Supervisor suspended district elections until October 2004<sup>173</sup>. In fact, due to nationalist results in polls across Bosnia and Herzegovina, his intention was to wait for political parties to emerge “with Brčko-based programs”<sup>174</sup>. According to some, this situation did not limit democracy, as the work of institutions such as

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National Human Rights Institutions (Ombuds institutions, commissions, institutes and other)”, Osce.org, April 2011, p.1

<sup>171</sup> Alex Jeffrey, *The Improvised State. Sovereignty, Performance and Agency in Dayton Bosnia*, (United Kingdom: Wiley-Blackwell, 2013), p.113

<sup>172</sup> Alex Jeffrey, *The Improvised State. Sovereignty, Performance and Agency in Dayton Bosnia*, (United Kingdom: Wiley-Blackwell, 2013), p.109

<sup>173</sup> Brčko's case is particularly important due to its "contact" nature between the Federation of Bosnia and Herzegovina, Croatia and the Serbian Republic of Bosnia.

<sup>174</sup> Alex Jeffrey, *The Improvised State. Sovereignty, Performance and Agency in Dayton Bosnia*, (United Kingdom: Wiley-Blackwell, 2013), p.115

the district government and the Assembly were open and transparent, allowing local civil society groups to attend deliberations and pressure councillors. Precisely for this reason, numerous initiatives have been launched to strengthen civil society in the district, including UNDP 'Brčko Local Action Program' which invested approximately \$ 3.1 million with the aim of fostering civil involvement.

Observing the numerous presences of NGOs in a small but complex reality like Brčko, one can figure out the competition that each organisation must face to accumulate social ties or symbolic capital, with the aim of translating them into funding for its activities<sup>175</sup>. This situation has only increased the distrust among the over 18 registered NGOs present in Brčko; hence we have small organizations that blame the larger NGOs for only keeping an office open, and vice versa the larger organizations that blame the small ones for not being effective at all or for being tied to nationalistic political realities for their survival. A vertical relationship was therefore seen between NGOs and donors, but the horizontal connection between other realities of civil society is difficult to implement<sup>176</sup>.

In this context it seems that the discourse on the importance of civil society in strengthening multi-ethnicity has decreased in importance - even at the national level - due to the perceived transition from post-war reconstruction to the realpolitik of economic transformation and international withdrawal. The risk, in today's Bosnia and Herzegovina, is that the feeling of a gentrification of civil society is strengthened precisely because of the factors mentioned here, since the processes of neoliberal governance have taken precedence over reconciliation concerns.

In recent years in Bosnia and Herzegovina the rate of membership in formal associations is very low, mostly linked to ethnic dynamics, and individuals tend to favour informal relationships, based on personal connections and family ties<sup>177</sup>.

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<sup>175</sup> Regarding the situation of Brčko District another important publication is Alexander Sam Jeffrey, *Democratisation, civil society and NGOs: the case of Brčko district* (Durham University, 2004)

<sup>176</sup> Alex Jeffrey, *The Improvised State. Sovereignty, Performance and Agency in Dayton Bosnia*, (United Kingdom: Wiley-Blackwell, 2013), p.118

<sup>177</sup> UNDP, *The Ties That Bind. Social Capital in Bosnia-Herzegovina. National Human Development Report*", (Bosnia and Herzegovina: United Nations edition, 2009), Available at: [http://hdr.undp.org/sites/default/files/bosnia\\_nhdr\\_2009\\_en\\_0.pdf](http://hdr.undp.org/sites/default/files/bosnia_nhdr_2009_en_0.pdf)

As described by anthropologist Steven Sampson, limited membership in formal organisations does not mean that citizens cannot count on a tradition of solidarity, which in some cases derives also from the networks created during the conflict. In his attempt to map local initiatives and civil society activities, in 1997 Sampson found that some 400 civil society organisations and volunteer groups, including notably community groups, focus on neighbourhood, employment or common interest the main family groups existed together or integrated. He also found that family groups often performed what we would now call civic functions, providing security and well-being<sup>178</sup>.

Entering the labour market in Bosnia and Herzegovina has to be done mainly through membership or affiliation with a party, which in turn requires identification with an ethno-national category. Some citizens said that at the time of the interview they were asked if they are affiliated with any political party and as regards the search for a job, the government is considered the largest employer. In this sense, belonging to one of the majority parties based on one's ethnicity is considered important in order to enjoy a stable and paid position. Since public institutions are directly controlled by political parties, party membership is often one of the surest ways to secure a position in the public sector<sup>179</sup>, a practice that gives rise to the phenomenon of “party clientelism”.

As others have already pointed out, nationalism and ethno-national identity become a pragmatic choice in mind to get a job or a favour<sup>180</sup>.

In her research on social mobilizations beyond ethnicity Chiara Milan focused on the concept of *štela*, which can be translated as “connection” and can be conceived

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<sup>178</sup> Steven Sampson, “Weak States, Uncivil Societies and Thousands of NGOs Western Democracy Export as Benevolent Colonialism in the Balkans”, in *The Balkans in Focus: Cultural*

*Boundaries in Europe* edited by Sanimir Resic and Barbara Törnquist Plewa, (Sweden: Nordic Academic Press, 2002), pp. 27–44

<sup>179</sup> Stef Jansen, *Yearnings in the Meantime: “Normal Lives” and the State in a Sarajevo Apartment Complex*, (United States: Berghahn Books, 2015)

<sup>180</sup> Larisa Kurtović, “What is a Nationalist? Some Thoughts on the Question from Bosnia-Herzegovina” in *Anthropology of East European Review* 29, 2011, pp.242–253

as “a local notion that articulates a form of nepotism cum clientelism”<sup>181</sup> that connotes - and to a certain extent regulates - access to public services, universities, health care and above all to the labour market through social and of the family. The štela system reproduces informality and in turn gives rise to political patronage. These informal exchanges of favours lead to inequality and helplessness, as this practice involves corruption that already reaches high levels in the country. According to Milan, the system based on patronage networks has become of absolute relevance to the daily life of individuals, as the power and influence of ethnic groups complement and, at times, even provide the basic services that the state cannot offer, such as access to welfare and social protection<sup>182</sup>. Informal channels and political clientelism appear to be functional to maintaining popular support and reproducing the domination of the country's ruling elite.

There is therefore a generalised benevolent and paternalistic view of patronage which in turn also has an impact on civic activism and collective action in the public space. In a society where informal networks and cronyism predominate, where the number of retirees prevails over that of the employed and where politics and the economy often mix, social pressure cannot be underestimated in influencing the decision of individuals whether to be involved or not in public demonstrations and protests. Very often, in fact, the social pressure due to clientelist networks prevents citizens from taking to the streets due to the risk of being discovered and perhaps fired by their employer, which as we have said is in most cases the public administration. Clientelism is therefore functional to ethno-national parties and elites who pervasively enter many aspects of citizens' lives and exploit social pressure, the fear of being abandoned even by informal connections and generalised mistrust to limit mass mobilizations<sup>183</sup>. It is no coincidence that citizens report that local authorities use threats of job loss to curb dissent: those who have jobs tend to

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<sup>181</sup> UNDP, *The Ties That Bind. Social Capital in Bosnia-Herzegovina. National Human Development Report*, (Bosnia and Herzegovina: United Nations edition, 2009), p.3

<sup>182</sup> Cvete Koneska, *After Ethnic Conflict: Policy-Making in Post-Conflict Bosnia and Herzegovina and Macedonia*, (United Kingdom: Routledge, 2014)

<sup>183</sup> Florian Bieber, “Bosnia and Herzegovina: A Failed Success” in *State-Building and Democratization in Bosnia and Herzegovina*, edited by Soeren Keil and Valery Perry, (England: Routledge, 2015), pp. 213–219

refrain from actively participating in public life for fear of losing it. In turn, retirees, not having to ask themselves the problem of having a job, seem to be more prone to dissent.

In contrast to the importance of political party membership and connections to secure jobs, citizens of BiH in general express a high level of distrust of political parties imbued with moral condemnation. In turn, religious institutions enjoy much more support<sup>184</sup> and this data can help us interpret the distrust of state institutions as a real aversion to politics.

### Section 3.1 - Restriction of Civil Society and Civic Activism in Republika Srpska

Several local observers describe RS as being governed in an authoritarian way, due to the concentration of power in the hands of Milorad Dodik, leader of the Alliance of Independent Social Democrats (*Savez Nezavisnih Socijaldemokrata*, SNSD), the government formation in RS since 2006 born from the union of:

- (i) Socialist Democratic Party (*Demokratska socijalistička partija*), born from a split of the Socialist Party of Republika Srpska;
- (ii) Party of Independent Social Democrats (*Stranka nezavisnih socijaldemokrata*);
- (iii) Social-Liberal Party (*Socijal-liberalna stranka*);
- (iv) Democratic Party for Banja Luka and Krajina (*Demokratska stranka za Banjaluku i Krajinu*);
- (v) New Workers' Party (*Nova radnička stranka*).

In addition to being the chairman of the SNSD party, Milorad Dodik previously served as the entity's Chairman between 2010 and 2018 and twice as Prime minister (between 1998 - 2001 and 2006 - 2010), before being elected as Serbian member of the Tripartite Presidency of Bosnia and Herzegovina in 2018. On several

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<sup>184</sup> Analitika – Center for Social Research, “Survey Results: The Trend of Citizens’ Distrust in Political Parties and Institutions in Bosnia and Herzegovina Continues” (2015) Available at: [www.analitika.ba/sites/default/files/publikacije/povjerenja\\_gradana\\_u\\_vlast\\_eng.pdf](http://www.analitika.ba/sites/default/files/publikacije/povjerenja_gradana_u_vlast_eng.pdf)



occasions, Dodik was accused of exercising his power arbitrarily, raising concerns in the international community due to his strong position nationalist<sup>185</sup>.

The political agenda of the SNSD party foresees the agreement of further autonomy, and then independence, to Republika Srpska and bases its support on the claims of Serbian nationalism and on the continuous threats of secession of the RS from the rest of the country. The second strongest Serbian party in Republika Srpska is the Serbian Democratic Party (*Srpska Demokratska Stranka*, SDS), founded in 1990 by Radovan Karadžić, sentenced in 2016 to forty years in prison for crimes against humanity and genocide by the International Tribunal for the former Yugoslavia. The opposition party has essentially the same program as the government one, based on maintaining the ethnic supremacy of the Serbs over the Muslims and Croats who returned to their homeland.

Despite being a multi-ethnic city before the war, Banja Luka has undergone dramatic demographic changes because of the massive displacement of people caused by the 1992-95 conflict and the city's demographic balance has been altered following two major events. First, the expulsion of some 50,000 non-Serbian individuals as a result of the ethnic cleansing campaign. Secondly, the massive arrival in the city of Bosnian Serb refugees, displaced from the areas of Bosnia-Herzegovina and Croatia where they lived before the war. Today most of the population of Banja Luka define themselves as Serbian nationals. Although over time they have become an episodic phenomenon, in the last decade there have been attacks on war returnees and the non-Serb component of the population in Banja Luka. In 2008, nationalist groups attacked participants in a ceremony held in the city's Islamic centre. Likewise, in 2001 thousands of Bosnian Serb nationalists violently disrupted the opening ceremonies for the reconstruction of the centrally located Ferhadija mosque, killing one Bosnian Muslim and wounding dozens of others<sup>186</sup>.

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<sup>185</sup> Florian Bieber, "Patterns of Competitive Authoritarianism in the Western Balkans" in *East European Politics* 34 (3, 2018): 337–354

<sup>186</sup> Xavier Bougarel, "Death and the Nationalist: Martyrdom, War Memory and Veteran Identity among Bosnian Muslim" in *The New Bosnian Mosaic: Identities, Memories and*

The capital of Republika Srpska is widely perceived as the stronghold of Bosnian-Serb nationalism and still figures as a sort of heart of darkness of Bosnia and Herzegovina, as well as “the centre of unreconstructed nationalism”<sup>187</sup> where there is a constant and exasperated display of Serbianity<sup>188</sup>. In such a context, the actions of those who are critical to the government and political opponents are delegitimized and they are often labelled as “national traitors linked to foreign interests”<sup>189</sup>. Autocratic government and strong nationalist rhetoric, connected to a general restriction of civil liberties, are unfavourable conditions for social mobilisation in the Republika Srpska.

The repression exercised against political opponents makes any public expression of dissatisfaction and disagreement with political representatives risky. Attacks on freedom of expression and peaceful assembly intensified in the late 2010s, causing concern in human rights organisations, as well as physical threats and direct violence<sup>190</sup>. In this sense, the intimidating actions of local authorities against activists’ act as a further deterrent against an explicit political action.

There are also legal restrictions that hinder grassroots activism and street entertainment in particular: since 2008, the Law on Public Assembly prohibits staging protests in front of public institutions, at less than 50 metres from buildings (Art. 2)<sup>191</sup>. For this reason, demonstrations in Banja Luka are only allowed in two

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*Moral Claims in a Post-War Society* edited by Elissa Helms and Xavier Bougarel, (United Kingdom: Ashgate Publishing, 2007)

<sup>187</sup> Heiko Wimmen, “Divided They Stand. Peace Building, State Reconstruction and Informal Political Movements in Bosnia-Herzegovina, 2005–2013” in *Social Movements in the Balkans: Rebellion and Protest in the Balkans* edited by Florian Bieber and Dario Brentin, (England: Routledge, 2018), pp. 9

<sup>188</sup> Commonly public offices do not expose Bosnian flag, just the Republika Srpska’s one

<sup>189</sup> Heiko Wimmen, “Divided They Stand. Peace Building, State Reconstruction and Informal Political Movements in Bosnia-Herzegovina, 2005–2013” in *Social Movements in the Balkans: Rebellion and Protest in the Balkans* edited by Florian Bieber and Dario Brentin, (England: Routledge, 2018)

<sup>190</sup> Cases of police repression and arrests occurred during the demonstration of the Pravda za Davida movement on 25 December 2018 in Banja Luka

<sup>191</sup> European Commission for Democracy through Law. *Laws on Public Assemblies of the Cantons of the Federation of BiH, of the District of Brcko and the Law on Public Gatherings of the Republika Srpska* (2008, as of November 2019), p.141

places: the central Krajina square and the Mladen Stojanović park<sup>192</sup>. In February 2015, the National Assembly of Republika Srpska approved the Law on Peace and Public Order which extends the sanctions already foreseen for gatherings in the public space to social media. In practice, the law imposes strict regulation on protest and the right of association, such as sanctioning free online expression and freedom of the media by extending the definition of public places to social networks.

In practice, freedom of expression is perceived as severely limited as it criminalises posts and messages that seem to “disturb the public order, display symbols, images, drawings or texts containing indecent, offensive or disturbing content or insult or engage in rude or insolent behaviour”<sup>193</sup>. For this reason, there have been heavy criticisms from local NGOs, supported by international organisations such as the Organisation for Security and Cooperation in Europe and the international NGO Human Right Watch, concerned about the consequences that such a norm he may have the right to freedom of assembly and speech.

On several occasions, Milorad Dodik has openly defined international NGOs as foreign actors aiming to overthrow Republika Srpska<sup>194</sup> (Lynch 2014). Frequent threats against local dissidents have raised the concern of Amnesty International, prompting it to denounce restrictions on freedom of expression and assembly in the entity. Amnesty International's 2014 report acknowledged the persistence of the scale of intimidation of journalists by state officials, including beatings, death threats and a police raid on a newsroom. Furthermore, the NGO reported that national authorities often failed to investigate complaints.

### Section 3.2 - A Virtuous Example of Civil Society Beyond Ethnicity

In Bosnia there have been virtuous examples of civil society that has mobilised going beyond ethnic divisions, as has been well documented by Chiara Milan, research fellow at the Institute of Humanities and Social Sciences of the Scuola Normale Superiore.

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<sup>192</sup> Chiara Milan, *Social Mobilization Beyond Ethnicity: Civic Activism and Grassroots Movements in Bosnia and Herzegovina*, (England: Taylor & Francis Inc, 2019), p.62

<sup>193</sup> OSCE. *New Law Devastating for Free Expression and Free Media on the Internet in Republika Srpska, Bosnia and Herzegovina, Mijatović says*. OSCE press release, 2015

<sup>194</sup> Lily Lynch. *The Self-Destruction of Republika Srpska*. *The Balkanist*, March 2014. Available at: <http://balkanist.net/the-self-destruction-of-republika-srpska/>

In fact, in 2014 the country recorded many protests in some cities such as Tuzla and Sarajevo. These mobilizations have been the largest and most participatory in the whole country since the end of the war in the 1990s.

Particularly important here is the fact that these episodes involved people belonging to different social classes and groups: the reasons that led to the riots were considered so important as to overshadow ethnic divisions, unifying people regardless of their political belonging or affiliation. According to what Chiara Milan reported, this aspect was so radical that it led public opinion and researchers to label them as “socijalni bunt” (social revolts). In this sense, the episodes of 2014 show us how ethnicity can be “marginalised and decentred (or even dismissed) as the primary category of identification in conflict-ridden and ethnified settlements”<sup>195</sup>.

Even in a divided society in which “the ability of individuals to escape from ethnic identities is severely limited”<sup>196</sup>. From the analysis carried out by Milan it emerges that in the face of concrete problems collective action can activate “alternative identities that deliberately replace, and sometimes clash with, the dominant ethnonational categories of identification”<sup>197</sup>. In this sense, the case of non-ethnic protests in Bosnia and Herzegovina is particularly relevant because in general the ethno-national identification in the country has a great weight compared to other dimensions of identity and the relations between the different national groups dominate overall. political actions. This identification did not completely disappear during the protests but was overshadowed or overshadowed by other factors. Therefore, one's belonging to an ethnic group has not been denied, but the politicisation of the latter and the role played by ethno-centrist political formations in fragmenting the population has been questioned. Despite the aforementioned unfavourable conditions for the virtuous development of civil society in Bosnia and Herzegovina, these protests - in some cases leading to an episode of riot - represent a starting point that reflects the social and political changes in the Balkans in recent

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<sup>195</sup> Chiara Milan, *Social Mobilization Beyond Ethnicity: Civic Activism and Grassroots Movements in Bosnia and Herzegovina*, (England: Taylor & Francis Inc, 2019), p.1

<sup>196</sup> John Nagle, *Social Movements in Violently Divided Societies: Constructing Conflict and Peacebuilding*, (United Kingdom: Routledge, 2016), p.12

<sup>197</sup> Chiara Milan, *Social Mobilization Beyond Ethnicity: Civic Activism and Grassroots Movements in Bosnia and Herzegovina*, (England: Taylor & Francis Inc, 2019), p.2

years. One aspect to note is that the cases in question were concentrated in large cities or metropolises, which gives the further element of division in Bosnian society between city and countryside as well as between the Federation of Bosnia and Herzegovina and Serbian Republic in Bosnia. Although no similar large-scale protests or demonstrations took place in Republika Srpska, solidarity support groups were formed in Banja Luka, Gradiška and Prijedor.

#### Section 3.1.1 - 2014 Upspring

Numerous protests occurred in Bosnia and Herzegovina in February 2014 due to rising levels of corruption and unemployment. These mobilizations were called *Socijalna pobuna* (Social rising) and represented a movement of people that reflected widespread dissatisfaction with the country's dire socio-economic condition and the elite's reluctance to change things for the better. In the wake of what happened a few years earlier in the Arab countries of the MENA area, the media in Bosnia and Herzegovina have labelled these protests as *Bosansko proljeće* (Bosnian Spring), with a clear reference to the Arab Springs, large-scale demonstrations against authoritarianism and political corruption that occurred starting from 2010 in the Maghreb and Mashreq.

Unlike other cases that occurred in the country, 2014 demonstrations brought socio-economic issues to the fore, catalysing the long-boiling discontent of almost all sectors of the population with a consequent rise in tensions. The beginning of the *Bosansko proljeće* is dated February 5, 2014, when there was a demonstration of workers from the failed private factories in the city of Tuzla. In this large mobilisation, the police intervened with violence in riot gear to repress and disperse the demonstrators. In turn, in a real escalation, the demonstrators reacted violently to the repression, causing - just like in the Arab Springs case - a wave of numerous mass protests that also brought international media attention to Bosnia and Herzegovina.

The main causes of these protests were: (i) rising levels of unemployment, (ii) the loss of certain rights of workers and social security and (iii) the accusation, towards national authorities, of following their interests without fulfilling their duties as citizens' representatives.

The peculiarity of the *Socijalna pobuna* in Bosnia and Herzegovina is that it has spread across much of the country, including individuals beyond their ethnicity and social class. These protests also marked a change in terms of contentious practices, due to the high degree of radicalization that created “the greatest challenge to the post-war Bosnian political system”<sup>198</sup>. It is therefore interesting to study this phenomenon because due to its scope and the level of clash between citizens and authorities it represented a turning point in the recent history of the country.

For philosopher Danijela Majstorović and political scientist Anđela Pepić from University of Banja Luka, the 2014 uprising represented “the most significant bottom-up challenge to ethnically constituted disorder, bypassing ethnic divisions in favour of a proto-civic sense of common citizenship and class solidarity”<sup>199</sup>. According to others, what happened in 2014 triggered a new sense of commonality, because it was a “wonderful moment of awakening (...), that moment in which all those people realised they had the same problem, that they could talk about it publicly and that they could put on the political agenda”<sup>200</sup>. Others said the 2014 protests “marked the first time since the end of the Bosnian wars in 1995 in which citizens came out in masses to protest, not in support of or against politicians, but rather against the characteristics of politics itself in the country”<sup>201</sup>.

It can be said that in the past the citizens of Bosnia and Herzegovina were not ready to face large-scale radical protests against the strong and ramified structure of ethno-national political alliances: despite the conditions for expressing discontent, there were no examples of previous applications. However, in 2014, the anger over the worsening living conditions and the corrupt political elite quickly turned into months of street protests and public assemblies, starting with Tuzla, and then

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<sup>198</sup> Adam Fagan and Indraneel Sircar, *Europeanization of the Western Balkans: Environmental Governance in Bosnia-Herzegovina and Serbia*, (United Kingdom: Palgrave MacMillan, 2015), p.161

<sup>199</sup> Danijela Majstorović and Anđela Pepić, “From Dayton to Brussels via Tuzla: post-2014 economic restructuring as europeanization discourse/practice” in *Bosnia and Herzegovina, Southeast European and Black Sea Studies*, 15:4 (2015)

<sup>200</sup> Chiara Milan, *Social Mobilization Beyond Ethnicity: Civic Activism and Grassroots Movements in Bosnia and Herzegovina*, (England: Taylor & Francis Inc, 2019), p.108

<sup>201</sup> Adam Fagan and Indraneel Sircar, *Europeanization of the Western Balkans: Environmental Governance in Bosnia-Herzegovina and Serbia*, (United Kingdom: Palgrave MacMillan, 2015), p.161

spreading widely in urban centres in Bosnia and Herzegovina. Following what was described in the previous section regarding the limits to popular mobilizations in Republika Srpska it is necessary to specify here that most of the mobilizations took place in the Federation of Bosnia and Herzegovina.

As described in previous chapters, the constitutional consociation of the Dayton Peace Agreement may have been the necessary tool to end the war, but it also helped to strengthen the ethno-nationalist conflict caused by the war, its foundation of exclusion. social and exclusive sharing of ethno-nationalist power. The system of ethnic division of powers has also accelerated the socio-economic crisis in Bosnia and Herzegovina and limited the ability of citizens to express their political will in the best possible way. Indeed, as Chiara Milan and others who have described the *štela* system have pointed out, clientelist relationships are often the only way to a dignified life in Bosnia and Herzegovina and since the price of membership is ethno-national identification, ethnopolitics became the only politics in post-Dayton Bosnia and Herzegovina<sup>202</sup>.

Regarding the Dayton system Danijela Majstorović and Anđela Pepić report that “activists tried to suppress the so-called *Anti-Dayton group* precisely because they did not want the debates on constitutional reform to overshadow the new demands”<sup>203</sup>. This must be understood if it is recognized that the ideas of constitutional reform have often been used by nationalist political elites as a potential tool of domination. In the *Bosansko proljeće* case of February 2014, protesters demanded greater social justice, including control over the privatisation of state-owned enterprises and companies.

Although the level of clash between institutions and demonstrators has reached high levels, the protests of February 2014 produced some important effects, such as the momentum in the process of European integration. For some, however, these

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<sup>202</sup> Danijela Majstorović and Anđela Pepić, “From Dayton to Brussels via Tuzla: post-2014 economic restructuring as europeanization discourse/practice” in *Bosnia and Herzegovina, Southeast European and Black Sea Studies*, 15:4, p.2

<sup>203</sup> Danijela Majstorović and Anđela Pepić, “From Dayton to Brussels via Tuzla: post-2014 economic restructuring as europeanization discourse/practice” in *Bosnia and Herzegovina, Southeast European and Black Sea Studies*, 15:4, p.3

outcomes were determined by the desire not to lose credibility with the international community and not by a real interest of the political class in the demands of citizens. In this regard, there have been few changes for everything concerning the difficulties of the cumbersome system of present-day Bosnia and Herzegovina, as in the case of the great paradox described by the case *Sejdić and Finci vs. Bosnia and Herzegovina*. In this sense, on the international and national level, it seems that the common opinion concerns the need for a constitutional reform capable of going beyond the many obstacles of the country, also imposed - but not due solely and exclusively - by the Dayton Peace system.

In the post-2014 phase of Bosnia and Herzegovina, political elites managed to stay in power by pandering to popular interests while at the same time making sure that a common vision beyond ethnicity does not emerge. Such a common vision, in fact, should provide a minimum consensus on the past, thus ensuring a semblance of historical justice, or provide a sustainable and socially responsible plan and this is still difficult to achieve in such a fragmented country<sup>204</sup>.

The reluctance to produce a common vision finds no remedy in the politicisation of conditionality, as Bosnia and Herzegovina could be an "eternal candidate for the EU" or alternatively it could be accepted based on questions of mere political expediency rather than the actual fulfilment of its obligations.

An important role could be played by the 2014 Compact for Growth and Jobs, signed in Bosnia and Herzegovina following the conclusions of the EU Foreign Affairs Council published in April 2014 and their call for a broader EU-BiH agenda. The Pact is sufficiently vague, and its effects depend on how it is implemented: if implemented based on the social transversality reintroduced by the demonstrators and through a redistribution policy, this could favour a more solid process of opening to Europe.

If, on the other hand, the Pact were implemented without directly challenging the economic and political conditions that produced the violence of the protests, we could see BiH take a turn in the direction of Europe's growing populist right. This is a dangerous position that could uncover the darker sides of "illiberal democracy"

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<sup>204</sup> Think, for example, about the complex system of Two Schools Under One Roof



in a country with a war-torn and corrupt economy. In Bosnia and Herzegovina, a new policy is needed which is in tune with the common goods and interests of citizens and which does not base its agenda on strengthening one's power through the escalation of ethnic tensions. At a time when the scarcity of resources is increasingly evident, an equality policy is important for all those who have lost something in the Bosnia and Herzegovina of the post-Dayton transition. As highlighted by Majstorović and Pepić “perhaps, somewhere among the failed nationalist fantasies that have left us alone in the European semi-periphery, we can realise our predicament after Dayton as a starting point and look at plenums and protests as a spark of hope for a future solidarity awaits us”<sup>205</sup>.

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<sup>205</sup> Danijela Majstorović and Anđela Pepić, “From Dayton to Brussels via Tuzla: post-2014 economic restructuring as europeanization discourse/practice” in *Bosnia and Herzegovina, Southeast European and Black Sea Studies*, 15:4, p.18



## CONCLUSION

In recent years Bosnia and Herzegovina, as the whole region of south-east Europe, has re-acquired centrality at the European level mainly for security reasons. The Balkan Route, the constant growing pollution, and the role of countries as a crucial hub of international terrorism between the Middle East and Europe are the main problems affecting Western Balkans.

For its part, the region has long shown its willingness to abandon the role of a mere unstable European periphery. However, despite this, it is seen as a place where democratic consolidation still seems difficult. It is true that the politics of these countries appears as an intricate maze of clientelisms, but in general terms new generations appear ready to continue the path of Europeanization trying to remain vigilant as regards respect of European principles and human rights. Therefore, as recognized by the Berlin Process starting from 2014, the need for a solid involvement of civil societies and stakeholders within the region must be reaffirmed. And in this sense, it is essential for Europe to identify the right local partners to not let the reforms requested by the Europe remain on paper, making the opportunity given by the European Commission to be effectively functioning democracies<sup>206</sup>.

Countries like Bosnia, Serbia – with the controversial figure of Aleksandar Vučić - , Albania, Montenegro, the Republic of Macedonia, and the self-proclaimed Republic of Kosovo have to deal with a population in slow and inexorable decline moving towards central Europe, high levels of public debt and unemployment, as well as the inefficiency of institutions and the relentless ethnocentrism of political elites. Even in the face of ever higher indices regarding the lack of press freedom, for the American NGO Freedom House countries such as Bosnia Herzegovina, Kosovo and the Republic of Macedonia must be considered “hybrid regimes”, while Serbia and Montenegro appear as “semi-consolidated democracies”<sup>207</sup>.

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<sup>206</sup> Marzia Bona, Luisa Chiodi. “Il Futuro incerto dei Balcani in Europa”. *Osservatorio Balcani e Caucaso*

<sup>207</sup> Freedom House, *Nations in transit 2018: confronting illiberalism*. Online

The main challenges to be faced for these countries are the adaptation of the internal situation with a view to accessing the European Union; the development of a solid regional cooperation so as to resolve bilateral disputes developed in recent history; the choice of reliable partners who are in turn stable figures and not disturbing influences as perceived by Europe today Turkey, Russia, China or the Gulf countries; the strengthening of regional and national security as well as the increase of good-governance arenas, even processes of economic transformation in order to overcome a crisis that strongly affects women and young people of working age. It will therefore be up to the countries to decide how to face these challenges. For the Union's Institute for Security Studies, the most probable scenarios for 2025 are mainly three: (i) "Europe's time", (ii) "The Balkans in limbo" and (iii) "Ghosts of the past". The first one is the most positive scenario imaginable, the latter the worst. As stated by Croatian Prime Minister Ivo Juričić for the ceremony to launch the official annexation process of Serbia and Montenegro, "now is the time to offer a friendly hand to overcome the old obstacles and be able to write a new page of history"<sup>208</sup>.

In the first ideal future, cooperation will also involve initiatives such as the development of a high-speed railway network and a regional airline which, thanks also to the economic support of the United Arab Emirates, could be able to connect the capitals of the Western Balkans. The idea is that the development of a stable and peaceful future also depends on the free movement of individuals and goods. An aspiration that the Balkans could pursue to establish a "mini-Schengen area". It would be interesting to be able to launch a regional information channel with the intention of developing bridges between the various ethnic communities. This news channel should record its programs in 3 main languages: BHS (Bosnian-Serbo-Croatian), Albanian and Macedonian; programs may be distributed in Romanian, Hungarian, Greek, Bulgarian and Roman for minorities.

As regards the economic aspects, it is hoped that the Regional economic area, introduced with the Trieste Summit in 2017, will be able to increase the region's

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<sup>208</sup> Marko Čeperković, Florence Gaub, "Balkan Futures. Three scenarios for 2025", (France: European Union Institute for Security Studies, 2018), p. 29

market potential by attracting important foreign investments. In this context, an increase in intra-regional trade is invited, which in 2025 is expected to be 35% against 21% in 2017, compared to total exchanges. Another important point in this scenario will be to develop the technology in all areas of the Balkans, where today there are many rural areas without optimal IT coverage. This is both to help companies towards efficient technological progress and to relaunch the role of education. Technological development would then have a positive impact in the world of work, favouring the employment of personnel in key sectors such as computer engineering and design. By doing so, the regional average unemployment of 21% could drop to 14.5% in 2025. Naturally, the path to take in this direction is not easy and much work remains “focusing on the rule of law, corruption, and full implementation of regional agreements. But today should be a day of celebration, as the future of the Western Balkans has never looked brighter”<sup>209</sup>.

The second scenario that can be imagined, *The Balkans in limbo*, assumes that between now and 2025 the pro-European changes in the countries of the region will not be followed up and the policy will continue to be patronizing without taking on the demands of civil society.

In this panorama, the dormant hotbeds of nationalism could grow. The Republika Srpska could carry out a strong policy of rapprochement with Serbia in an anti-Atlantic function in favour of the Kremlin. In this sense, the annexation of Bosnia Herzegovina and Serbia to the European Union would become impossible.

Albania could continue its practice of non-transparent use of public funds to ensure public jobs and secure jobs for supporters of the Socialist Party. As regards the Republic of Kosovo, the situation resulting from this scenario of limbo does not look positive. The shadow of Slobodan Milošević could increase the tensions between Albanians and Serbs already started in May 2019. Russia - which will continue to see the opening of the Union and NATO towards Kosovo as an attempt to threaten the Kremlin - could foment Serbianity in an anti-Albanian key<sup>210</sup>.

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<sup>209</sup> Marko Čeperković, Florence Gaub, “Balkan Futures. Three scenarios for 2025”, (France: European Union Institute for Security Studies, 2018), pp. 30-32

<sup>210</sup> Marko Čeperković, Florence Gaub, “Balkan Futures. Three scenarios for 2025”, (France: European Union Institute for Security Studies, 2018), p.47

Third and last scenario that is analysed in the *publication Balkan Futures. Three scenarios for 2025* is what sees the ghosts of the past re-emerge. In this perspective, the current situation would be further polarized by the power groups in the region, favoured by a growing corruption and judicial impunity. The influence of partners who are now judged to be negative would create a highly disruptive effect in the region: Russia's veto against the recognition of Kosovo in the United Nations would favour a chain separatist effect that would see the partition of the Republic and the consequent claim - with a domino effect - of independence from the Serbian Republic of Bosnia and Herzegovina. The growing influence of Islamic countries in Bosnia and Herzegovina, and in the Muslim area of Kosovo would increase the risk of radicalization, opening the way for a new generation of radical Islamists<sup>211</sup>. The role of the Balkans in the global market would be heavily subordinated to China which would boast important influences on the region's economy. In this perspective, the high unemployment rate for local citizens would cause migration to northern Europe that would increase exponentially.

All this would only create instability in favour of the development of organized crime, currently present in the various states. The processes of European annexation would therefore be blocked bidirectionally: either by the countries themselves on external pressures, as could be the case of Republic of Serbia, or by the European Union due to strong internal dysfunctions in the cases of Kosovo, Montenegro, and the Republic of Macedonia<sup>212</sup>.

Having analysed the three possible scenarios for 2025, it is clear that the trend of the next three years will play a crucial role for the future of the Western Balkans in Europe and - it could be added - in the entire World.

The region is now on the way to undergo economic, political-social and security transformations that could be an opportunity for renewal, as well as serious

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<sup>211</sup> The first generation is represented by the role of the mujahideen in Afghanistan during the civil war of the 1980s. The second generation of the al-Qua'ida jihadist front in Iraq is then indicated. The third radical Islamist generation finally composed of the new radicalized by the Islamic State organization, founded in 2013

<sup>212</sup> Marko Čeperković, Florence Gaub, "Balkan Futures. Three scenarios for 2025", (France: European Union Institute for Security Studies, 2018), pp.55-58

consequences if the states do not prove ready to face the changes. Countries will therefore have to deal with the negative trends (declining population, public debt and unemployment, inefficient institutions, ethnocentrism, and an old education model) and as many possibilities for positive change (access to the EU, abandonment of partners destabilizing, regional cooperation, developing an efficient security and justice system, increasing the rule of law and economic transformations for growth)<sup>213</sup>.

Studying the actual situation in Bosnia and Herzegovina it can be concluded that the Dayton Peace Agreement was a short-sighted and limited attempt to restore peace in Bosnia and Herzegovina. The important role played by the peace negotiations for the reduction of tension in the area, which in the summer of 1995 reached unprecedented levels of violence with Srebrenica genocide, is certainly not doubted. However, at the end of this work, one can conclude that the ethnic division of Bosnia did not solve the problem that had been at the root of the conflict.

Today the country is experiencing a profound dichotomy between what is political world, inefficient and corrupt, and Bosnian civil society, attentive to the new demands regarding individual freedoms, human rights, and the reassessment of the importance of the role of culture.

What is hoped is that the country will be able to take on the new challenges also by strengthening independent and civic associations, groups, or political parties, like ones who achieved unexpected results in the 2018 elections, but still insufficient to ensure that Bosnia overcome the ethno-politics of parties such as SDA, SNSD and HDZ BiH.

There are also important questions for a country that has chosen to not deal with its recent past: sale of land with mass graves to private entrepreneurs, redefinition of Yugoslav toponymy in a nationalistic key and gentrification in the areas of Sarajevo destroyed by bombing. These are just some of the phenomena taking place today.

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<sup>213</sup> Marko Čeperković, Florence Gaub, "Balkan Futures. Three scenarios for 2025", (France: European Union Institute for Security Studies, 2018), p. 12, 20

If you were to ask today to young people born and raised in Bosnia and Herzegovina after the conflict - with Bosnian passports - their identity, they would hardly answer immediately “I am Bosnian”. Although representing the future of the country, the ethnic divisions among the new generations are still perceptible and it will therefore be easier to hear the answer “I am Croatian”, “I am Serbian”, “I am Bosniak”.

Vinko Puljić, bishop of the Diocese of Sarajevo since 1990, argues that the difficulty is living together in acknowledging diversity, an idea that underlies the process of establishing the European Union<sup>214</sup>.

From the point of view of international relations, it is therefore expected that in the future Western states will be able to look to Bosnia and Herzegovina as a partner in the path of stability and full democratic efficiency and no longer as a peripheral and unstable country, closed between the gates of European Union and the Republic of Serbia with traditional pro-Russian traits. Only by trusting and working together with civil society can put pressure on the political world - which has been fossilized for years in the palaces of power thanks to a dense network of patrons - and will turn the page in an environment of peaceful cooperation, working at the goal of mitigating and defusing the latent ethnic tensions that inhabit this country with such a heterogeneous composition.

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<sup>214</sup> Paolo Rumiz in A. Lallo, L. Toresini, *Il tunnel di Sarajevo. Il conflitto in Bosnia Erzegovina: una guerra psichiatrica?*, (Italy: Nuovadimensione edizioni, 2004), p.12



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