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The Contribution of the Constitutional Court of Bosnia and Herzegovina to the Protection of Constitutional Values

REPORT

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I – Introduction

The Framework of Peace adopted in Dayton and signed in Paris on December 14th1995 deserves credit for having ended the armed conflict in former Yugoslavia. This document containing 11 Annexes sought at the same time to establish an armistice, a peace settlement and a domestic Constitution. The Constitution (Annexe 4) is written only in English. There is no authentic local version and this Constitution has never been approved by the People or by a local procedure.

Thus, at the end of the war, the Bosnian society was profoundly divided. As a response to this divided nature, the Constitution combines three forms of constitutionalism: "Classical", "ethnic" and "internationalized" constitutionalism. Elements of classical, liberal constitutionalism, such as democracy, separation of powers, the rule of law and human rights, were modified in different ways, and we can group these modifications into the categories of "ethnicization" and "internationalization" of the constitutional order. While both concepts represent attempts at adapting classical constitutionalism to the contextual circumstances, some of their aspects conflict at the same time with those principles which have traditionally been considered as prerequisites for legitimate government, such as democratic equality of citizens, majority rule, the right to vote, and judicial review.

This contribution aims at analyzing the role of the Bosnian Constitutional Court in dealing with both of these more recent concepts: internationalization (II) and ethnicity (III).

II – Internationalization

In order to end the continuing bloodshed on the ground and to protect the constitution-making as well as the constitutional implementation from capture by one particular ethnic group, the solution the international community imagined was a wide internationalization of the whole constitutional life.

In particular, two internationalized institutions play a major role: The Constitutional Court (A) on the one hand, and the "High Representative" of the international community on the other (B).

A/The internationalization of the Court

While Constitutional Courts represent a cornerstone of classical constitutionalism, the constitutional order of Bosnia at the same time follows this tradition by the institution of a strong Constitutional Court and departs from classical ideas by the internationalization of several aspects of this Court. The analysis of its hybrid composition (1), its competences (2), and the standards of review (3) will illustrate this.

1. Composition

The Constitutional Court is composed of 9 judges, 6 local and 3 international. The local judges consist of 2 Bosnian Serbs, 2 Bosnian Croats and 2 Bosniacs. The Serb judges are elected by the Assembly of the Republika Srpska, the Croat and the Bosniac by the House of Representatives of the Federation of Bosnia and Herzegovina and the 3 international judges are selected by the president of the European Court of Human Rights after consultation with the Presidency.

This composition, the only one mentioned by the Constitution, corresponds in fact to the Plenary Court. Besides, the Rules of the Court (Art. VI-2.b)) [1] refer to the "Grand Chamber" composed of 5 local judges and to the Chamber of 3 judges.[2] The plenary Court adopts its decisions by majority and is competent for the abstract review as well as for the cases referred to it by the Grand Chamber. The latter one adopts its decisions unanimously and decides on the appeals. If the unanimity cannot be reached, the case is referred to the Plenary, something that happens rather frequently. The Grand Chamber exercises in fact the most important part of the Court's tasks so that the Plenary meets only each two months.

Nevertheless, the most sensitive problems are resolved in the Plenary, sometimes according to ethnic divisions, sometimes in a quite transversal way. The hybrid composition of the Court, by its very existence, reduces mechanically the possible cases of local political influence. Furthermore, it is seen, in a rather ambivalent manner, as an element of neutrality, of independence, of impartiality and of the reputation of the Court and as a risk of heteronomy. Moreover it is certainly perceived in quite different ways depending on the point of view: inside the Court, the public opinion and the political (ethnic) leaders.

2. Competencies

The competencies of internationalized Constitutional Courts are an important factor for appreciating whether and to what extent the Courts are able to implement and to enforce the constitutional provisions.

The Bosnian Court decides on :

- Constitutional disputes between the State and the Entities or between State institutions or the Entities. In these cases, only the highest political authorities may complain[3].

- Direct appeals by individuals against judgements of any court if they raise constitutional questions. The request has to be introduced in a delay of 60 days. These are by far the most frequent requests submitted to the Court.

- The issues referred by any court concerning whether a law is compatible with the Constitution, with the European Convention for Human Rights, or with the laws of Bosnia and Herzegovina. This kind of concrete control is very seldom.

- The last category of competencies which is employed a little more frequently concerns the vetoes opposed on behalf of the "vital interest" of one of the constituent peoples (Art. IV-3.e)f)) or of one of the Entities (Art. V-2.d)). Altogether, the Court decides on about 3000 requests per year.[4]

The general function of the Court is to uphold the Constitution. On the one hand, it implies that the Constitutional Court draws its jurisdiction not only from Article VI-3 (a)b)c)) but also from other provisions of the Constitution and that it is an independent constitutional organ whose competencies are to be interpreted in an extensive way in order precisely to make it able to

[1] Articles 7 to 10 Rules of Court

[2] The Chamber composed of the President and the two local Vice-Presidents takes unanimous decisions on requests of interim measures and on designation of judges rapporteurs.

[3] Members of the Presidency, Prime Minister, and one fourth of the parliamentarian assemblies of the State and of the Entities.

[4] For instance, in 2009, the Court has received 4209 requests; it has decided 3294 cases and, on 30 December, 6243 cases were still pending. In 2010, it received 6056 requests, decided on 4057 cases and, at the end of the year, 8243 cases were still pending.

uphold the Constitution. In the same direction points the provision according to which the Court adopts its own rules of court by a majority of all members (art. VI) and the fact that, besides the Constitution, no law prescribes to the Court how to act and how to decide. But on the other hand, such general principles as upholding the Constitution require to be interpreted. Yet, it is impossible for the Constitutional Court of a new and weak State to give systematically a wide interpretation of its powers. Hence the vagueness of the Bosnian text generates an uncertainty with respect to the competencies of the Court which are oscillating between rather restrictive and more extensive conceptions on judicial review. On the one hand, the competencies in the abstract normative control have often been interpreted in a large manner including the review of by-laws or of the statuses of municipal councils. Questions such as the names of cities or the composition of municipal councils have thus been decided by the Court.[5] On the other hand, the Court considers in principle that the contestation of a general norm such a law being an exclusive matter of general interest, cannot be initiated by an individual. In consequence, it is reluctant to quash a law in an appellate procedure for the only reason that this law is unconstitutional. Sometimes however it refers in such cases to the necessary quality of the law in the sense of Article 6 ECHR and to the principle of the rule of law.

3. Standard of review

Large parts of international law, in the field of human rights first of all, are introduced into the Constitution which itself is part of an international treaty, conferring a direct effect to these norms. The Constitutional Court considers the Annexes others than Annex IV to be part of the applicable constitutional law. Thus the Bosnian Constitution in a wider sense consists of all the 11 Annexes which charge Bosnia and Herzegovina with number of obligations related to peace- and state building. With regard to its direct impact on domestic law, the most important part is Annex 6 which is largely recalled in Article II of the Constitution.

Article II makes the ECHR directly applicable in Bosnia and Herzegovina indicating that it has "*priority over all other law*". This Article entails also a catalogue of national rights largely identical to the ECHR. Furthermore it refers to the rights contained in the international instruments referred to in Annex I of the Constitution[6] and to the rights of displaced persons and refugees[7]. Finally, pursuant to Article X-2., "*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*."

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[5] The decisions of the Court are published in English on the web-side of the Court: http://www.ccbh.ba/eng/ The relevant decisions are namely: U 4/05 (22 April 2005), Statute of the city of Sarajevo; U 7/05 (27 January 2006), Statutes of the towns of Istocno Sarajevo and Banja Luka; U 6/08 (30 January 2009), Resolution of the National Assembly of RS refusing to recognize the Kosovo State; the decision on the principles in this matter: U 1/09 (29 May 2009) concerning a general Decision and an individual Decree of the government of the Federation.

[6] These instruments are : 1948 Convention on the Prevention and Punishment of the Crime of Genocide
1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto
1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto
1957 Convention on the Nationality of Married Women 1961 Convention on the Reduction of Statelessness
1965 International Convention on the Elimination of All Forms of Racial Discrimination
1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto
1966 Covenant on Economic, Social and Cultural Rights
1979 Convention on the Elimination of All Forms of Discrimination against Women
1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
1989 Convention on the Rights of the Child
1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
1992 European Charter for Regional or Minority Languages
1994 Framework Convention for the Protection of National Minorities

[7] Reference made to Annex 5.

Thus the ECHR occupies a very special position in the Bosnian constitutional order: It seems to be intangible and to be located at a supra constitutional rank. Although the Constitutional Court denies such an interpretation arguing that the Convention derives its authority only from the Constitution,[8] it places nevertheless the ECHR at the same rank as the Constitution and accepts consequently to refer to it and to its case law as standard of review. In fact, most complaints in the appellate procedure invoke the convention rights, first of all Article 6.

While within the Constitutional Court, the internationalization is integrated in the executive and the legislative branch, it is not integrated but organically separated, juxtaposing to the national authorities an international representative.

B/ The High Representative

This institution possesses considerable extra-constitutional legislative and executive competencies to ensure the implementation of the civilian aspects of the peace plan. It has an ambivalent relationship to classical constitutionalist beliefs: On the one hand, it can be seen as another element of checks and balances in ethnically divided polities, and the HR in Bosnia was instrumental in overcoming political stalemates within state institutions. On the other hand, the institution's actions themselves are largely insulated from judicial review, which is problematic in terms of the doctrine of separation of powers and accountability.

In BiH, the international Community as well as the European Union supervise the pacification, the return of refugees, the democratization and the establishment of a multicultural state through the institution of a High Representative and its Office (OHR) (Annex X). The HR has interpreted – very generously[9] – his own competencies until their confirmation by the Peace Implementation Council (PIC) Conference in Bonn.[10] The so-called "Bonn powers" authorize him specially to remove public officers, to detain persons suspected of terrorism or of having committed war crimes and to make laws in the place of the Parliament.

These powers appear all the more problematic as the High Representative is an international institution and as such, its acts cannot normally be controlled by any national organ. Despite this principle, the Constitutional Court, in agreement with the HR and relying on the idea of functional duality, has accepted to review these laws. By doing so, the laws enacted due to the HR, are assimilated to ordinary parliamentary acts and thus become reviewable by the Court.[11] This derogation however was inapplicable to the HR's individual decisions. They entirely remain international acts and are consequently excluded from the Court's jurisdiction.[12] Nevertheless, in the 2005 decided Bilbija case, the Constitutional Court has accepted to examine a request against such decisions. In absence of its own power to review, it held the Bosnian State bound by a positive obligation to provide a judicial review of these decisions[13] according to Article 13 of the ECHR. This led to a conflict with the HR, who ordered to the state not to implement this judgment.[14] The European Court of Human Rights, towards whom the applicants turned next, found in the Beric and Bilbija[15] cases, that it had no jurisdiction to review the HR's powers,

[8] U 5/04, Presidential elections, 31 March 2006.
[9] See Oellers-Frahm, 208
[10] Doc. S/1997/979 of 16 December 1997, the so-called « Bonn Powers »
[11] U 9 / 00, Law on State Border Service, 3 November 2000 and U 26 / 01, Law on the Court of BiH, 28 September 2001
[12] See the motivation in AP 953 / 05,Bilbija, §§ 41 to 49.
[13] AP 953 / 05, 8 July 2005
[14] See the letter reproduced in the Beric decision (§ 19) of the ECHR: Decision of the fourth section as to the admissibility in the case Beric and others v. Bosnia and Herzegovina, Application nos. 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05 of 16 October 2007.
[15] ECHR, fourth section, decision as to the admissibility, Applications nos. 45541/04 and 16587/07 by D. Kalinić and M. Bilbija v. Bosnia and Herzegovina, 13 May 2008

because they were authorized and delegated by the UN's Security Council alone. Thus the detainment of individuals initiated by the HR was neither imputable to BiH nor an act falling under the jurisdiction of this State (Art. 1 and 13 ECHR). The individual powers of the HR remain consequently without any judicial review in spite of the Court's efforts to act in this direction. How does it deal with the other non classical element of constitutionalism, i.e. the ethnic element?

III – Ethnicity

The Constitution of BiH recognizes ethnicity as a constitutional category. The question is how to combine these elements with civic and democratic equality and which is the role of the CC in this field. In this regard, three aspects seem of particular importance: The status of ethnic groups (1); the territorial organization (2); and the power sharing mechanisms within the central institutions of government (3).

1. The status of ethnic groups: ethnos or demos?

The Dayton Agreement implicitly but clearly rejects the concepts of a single nation state or of minority rights in concluding the preamble of the Constitution by the following formula: "Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows". The – completely fictive[16] – constituent power mentioned in this provision are the three ethnic groups, the "Others" being put into brackets in their quality as both constituent peoples and citizens. According to this provision, the Bosnian State is first of all composed by the constituent peoples and only secondly by the citizens.

The Constitutional Court of BiH has been confronted with the consequences of ethnicization in numerous proceedings. The landmark ruling on ethnicity is the "constituent peoples" case of 2000[17]: Here, the Court was confronted with the basic question of what status the constituent peoples had within the two entities. The Court concluded that the entities were not to be equated with the territory of a particular constituent people, and that the three constituent peoples enjoyed equal collective rights in both entities.[18] The constitutions, which the two entities had enacted, had cast doubts on the equal status of the ethnicities by privileging the Serb population in the Republika Srpska or, respectively, Croats and Bosniacs in the Federation of BiH. The Constitutional Court invalidated numerous provisions in both entity constitutions regarding, for instance, the status of constituent peoples and the use of languages.

The Court derives most of its conclusions from the principle of equality of the constituent peoples, and thus bases them on a collectivist and ethnic logic.[19] But at the same time, the Court introduces a civic and individualist element in its reasoning by constructing a strong link between the equality of constituent peoples on the one hand and the principle of a democratic multi-ethnic state on the other hand. This principle, proclaimed in the preamble and Article I-2, rests on the idea of a pluralist society[20] and on the general equality principle.[21] The Court

[16] Maziau, 2002, L'internationalisation du pouvoir constituant, *RGDIP,* p. 568

[17] U 5/98 *Constituent peoples,* four partial decisions, 28/30 January, 18/19 February, 30 June/ 1 July and 18/19 August 2000.

[18] See Marko and N. Maziau, Le contrôle de constitutionnalité des Constitutions de Bosnie-Herzégovine, *Revue Française de droit constitutionnel* 2001, 195 seq.

[19] Compare to Art. 245 of the 1974 Constitution of the SFRY which recognizes the equality of nationalities and nations within the state.

[20] Line 3 of the Preamble ; see C. Grewe, Peace in pluralism through democracy and fair procedures in : C. Steiner / N. Ademovic (ed.) Constitution of Bosnia and Herzegovina. Commentary, Konrad Adenauer Stiftung, 2010, 44 seq.

[21] Line 1 of the Preamble

employs expressions such as “compromise formula” or “balance” in order to make clear that ethnic power sharing and collective equality must be balanced with individual equality, civic voting rights and political majority. In the Court’s conception, constitutional rules and principles based on ethnic affiliation must be seen as an exception explicitly authorized by the Constitution.

While the Constitutional Court certainly wished to balance ethnic and civic elements in the “constituent peoples”-case in 2000, subsequent developments cast doubts on the success and the maintain of this jurisprudence. The principle of equality of the constituent peoples could not prevent the increasing ethnic homogenization of the entities[22]. In subsequent case law, the Court invalidated the municipal status of the city of Sarajevo for the reason that it conferred privileges, such as a guaranteed minimum representation, only to some and not to all constituent peoples.[23] In other instances, the Court had to annul entity coats of arms, hymns and flags, which constitute important symbolizations of collective identity, because they did not represent all ethnic groups[24] or to quash the ethnically colored names of towns and municipalities.[25] Hence it can be observed that the ethnical element takes an increasing place in the constitutional order which is favored by the territorial organization.

2. Territorial organization

The Bosnian Constitution opts for a decentralized state structure, which does not explicitly link territorial organization and ethnicity. However, the fact is that the constitutional system, as it stands, almost unavoidably leads to a close and problematic interconnection of territoriality and ethnicity. The Dayton Agreement provides for a strong vertical separation of powers, the state being composed of two entities: The rather centralized Republika Srpska and the strongly decentralized Federation of Bosnia and Herzegovina.[26] This is evidenced by the distribution of competencies between the central state and the entities: It is not only based on a general clause attributing powers, as a matter of principle, to the entities (Article III.-3a), but also restricts the competencies enumeratively assigned to the central level to a bare minimum (Article III.-1). As a result, the entities are competent in matters of police, taxes, criminal and civil law, judiciary and property, and the central state remains weak and dependent on the entities in formulating, executing and financing its policies. The still dominant position of the entities is reinforced by the electoral system: Central institutions are elected by or within the entities, so that all state power is emanating from the entities. This creates a problematic link between ethnic quotas on the central level and territoriality.

3.Ethnic quotas and vetoes

Quotas and reserved posts within state organs are means to ensure the participation of all ethnic groups and to protect their interests in legislative and executive decision-making. The Dayton Constitution institutes a system of ethnic quotas in central government, which ensures equal representation for all three constituent peoples irrespective of their population share and election results.

The central legislature consists of two parliamentary chambers, the House of Representatives and the House of Peoples. The system is truly bicameral, as legislation

[22] C. Grewe, Territorialität und Ethnizität in Bosnien-Herzegowina oder wie unmöglich ist die Demokratie?, *Jahrbuch des Föderalismus* 2010,
[23] U 4 / 05, Statute of the city of Sarajevo, 22 April 2005.
[24] U 4 / 04, two partial decisions of 31 March and 18 November 2006 on Flags, Coats of arms and anthems of the Entities as well on official holidays
[25] U 44 / 01, Names of towns, 27 February 2004.
[26] Special Status for the District of Brcko.

must be passed by both Houses. The executive is composed of the Council of Ministers and the three-member Presidency.

The members of the Presidency (Article V.-1) and the 15 delegates in the House of Peoples (Article IV.-1) are elected by the legislative bodies of the entities and are subject to ethnic quotas: The Constitution stipulates that 5 of the 15 members of the House of Peoples are elected within the Republika Srpska and must all be Serbs; 10 delegates are elected within the Federation, among whose 5 must be Croats and 5 Bosniacs (Art. IV-1). Similarly, the three member Presidency must consist of one Bosniac and one Croat, each directly elected from the territory of the Federation, and one Serb directly elected from the territory of the Republika Srpska (Art. V *chapeau* and para. 1).

The specific interconnection of territoriality and ethnicity in BiH raises serious normative problems with regard to the passive right to vote and democratic equality: The election rules concerning the House of Peoples and the Presidency imply that a "wrong residence" can deprive the members of the constituent peoples from their right to stand for elections: A Croat or Bosniac resident in the Republica Srpska cannot be elected to the House of Peoples or to the Presidency, and vice versa. In addition, the quota system means that those who do not identify themselves as a member of one constituent people cannot be elected at all to either organ.

These arrangements have been contested several times before the Constitutional Court of BiH[27] and eventually before the European Court of Human Rights. The Constitutional Court rejected the complaints essentially for reasons of normative hierarchy: The rules challenged in the applications are contained in the Constitution itself, and cannot therefore violate guarantees of non-discrimination and equality in the very same text. In addition, the Court refused to confer a supra-constitutional rank to guarantees of equality derived from the ECHR and its Protocols.

The European Court of Human Rights did not face such problems of hierarchy: In the landmark Sejdić and Finci case handed down in 2009,[28] the Grand Chamber ruled on an application by Bosnian citizens who identified themselves as members of the Jewish and Roma communities and were therefore totally excluded from the House of Peoples and the Presidency. The Court held that the exclusion of non-constituent peoples indeed amounted to a violation of these standards. It did not accept the argument that the restoration of peace still justified these specific power sharing arrangements more than a decade after the civil war ended. This underlines that the margin of appreciation, which the Court generally leaves to states in electoral matters, is limited when it comes to discrimination on ethnic grounds.

The effects of ethnic quotas are further exacerbated by the fact that the Dayton Constitution combines them with another element of power sharing: Ethnic veto rights in legislative and executive decision making. These rules ensure, firstly, that the representatives of each constituent people can block legislation they consider destructive to the "vital interest" of their ethnic group. In principle, both the House of Representatives and the House of Peoples, adopt legislation by simple majority. However, a proposed decision of the Parliamentary Assembly may be declared to be destructive to a vital interest of a constituent people by a majority of the Bosniac, Croat, or Serb Delegates in the House of Peoples. The invocation of the vital interest veto generally results in the convocation of a joint parliamentary commission, and, in case of continuing disagreement, the referral of the

[27] AP 35 / 03, Elections to the House of peoples, 28 January 2005, dissenting opinion judge Grewe; U 5 / 04, Elections to the Presidency and the House of Peoples, 31 March 2006 U 13 / 05, Electoral Law, 26 May 2006, Dissenting opinions of judges Feldmann, Palavric and Grewe.

[28] ECHR, Grand Chamber, Sejdić and Finci v. Bosnia and Herzegovina, *nos. 27996/06 and 34836/06,* Judgment of 22 December 2009.

matter to the Constitutional Court for review of "procedural regularity" (Article IV-3 e) and f)). In addition, slightly different vital interest vetoes are operated in the House of Representatives (Article IV-3 d), and in the Presidency, where each single member can essentially block executive decision-making.

The combination of ethnic quotas and ethnic vetoes has disabled legislative decision making to a considerable extent and further contributed to political inaction and governmental ineffectiveness.[29] Moreover, the frequent veto use cements minority rule over a majority of citizens. It also intensifies discrimination of "Others", whose parliamentarians in the House of Representatives do not dispose of a veto on their own. Finally, most disputes on the veto exercise end up in the Constitutional Court.

In its case law, the Court interpreted its competence to review the "procedural regularity" broadly to encompass the power to examine whether the proposed legislations' substance was truly "destructive to the vital interest". Furthermore, it applied an interpretation to the notion of "vital interest" and "destructiveness" which tends to favor the integration and reconciliation of the ethnic groups. Thus it held that "the effective participation of constituent peoples in the processes of political decision-making and prevention of absolute domination of one people by the others represent the vital interests of each constituent people."[30] Even though the Courts case law has somewhat contributed to the resolution of blockages, it was unable to actively remedy legislative omissions and inaction.

Eventually, only a constitutional reform will remedy the situation. For instance, the Venice commission has proposed to strengthen the position of the House of Representatives and of the Council of Ministers at the expense of the Presidency and the House of Peoples.[31] However, reform efforts concerning the veto rights inasmuch as relating to the discrimination of others have failed so far or have not even started.

[29] Under the SFRY Constitution of 1974, the veto rights were generalized as well and have in practice contributed to increasingly immobilize the central institutions.

[30] U 10/05, Vital interest of the Croat People concerning the law on public Broadcasting System, 22 July 2005, § 25

[31] Venice commission, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, CDL-AD (2005) 004, and CDL-AD (2008) 027, Amicus curiae in the Sejdic and Finci case