Constitutional Design and the Seeds of Degradation in Divided Societies: The Case of Bosnia-Herzegovina

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Introduction

Although at times vaguely defined, the phenomenon of 'constitutional degradation' can be observed in a variety of forms in many constitutional democracies around the world and is currently at the centre of lively debates in the political and academic spheres. Broadly speaking, such a phenomenon – also referenced in the literature as 'democratic backsliding' or 'democratic erosion' – indicates the deterioration of the institutional and ideological foundations of liberal constitutional democracies.[1] One of the core elements of the theoretical definition of degradation is that the process unfolds from a

[1]M. Loughlin, 'The Contemporary Crisis of Constitutional Democracy', 39 *Oxford Journal of Legal Studies* (2019) p. 436-437.

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moment in time after which democracy started to deteriorate.[2] However, as noted by Ginsburg and Huq, 'things get trickier if there is disagreement on whether democracy existed in the first instance'.[3] In this regard, the authors recall the example provided by the Russian Federation. Indeed, despite offering a 'rich catalogue of erosion's forms and instrumentalities',[4] it is debatable whether the post-Soviet Russian political system ever was democratic. Therefore, Ginsburg and Huq introduced an interesting category in the scholarship, i.e. the 'marginal cases of erosion'.[5] These do display forms of degradation of their democratic foundations but do not offer clarity as to when democracy started to deteriorate, since they might be constitutional systems still in transition towards democracy. If in the last decade studies on the democratic backsliding in Poland and Hungary, or even the United States, have proliferated in the literature, the complexity of 'marginal cases' has not drawn much attention and thus constitutes a gap in the literature. Nonetheless, engaging with these cases offers a unique chance to further explore the domain of constitutional degradation, depicting a more nuanced and complete picture of the expressions of erosion across constitutional systems.[6]

Moreover, the role played by internal diversity in the context of degradation is under-researched. While the scholarship generally acknowledges the role that internal diversity might play in the process of erosion, mentioning it as a potential cause for degradation,[7] constitutional systems where such diversity is deeply entrenched within the system tend to be overlooked in the literature. This clearly emerges from the absence of divided societies in the universe of case studies generally analysed by the scholarship on constitutional degradation. However, the role played by internal diversity should be further explored, as it triggers the need for models of constitutional design in which diversity is recognised and accommodated or integrated within the system, each carrying different sets of outcomes.[8]

[2]T. Ginsburg and A.Z. Huq, *How to Save a Constitutional Democracy* (University of Chicago Press 2018) p. 44.

[3]Ibid.

[4]Ibid.

[5]Ibid.

[6]Also, as Ginsburg and Huq observed, 'it is hard to ignore [them] entirely if we are interested in how democracy declines': Ginsburg and Huq, *supra* n. 2, p. 44.

[7]T. Ginsburg and A.Z. Huq, 'Defining and Tracking the Trajectory of Liberal Constitutional Democracy', in M. Graber et al., *Constitutional Democracy in Crisis?* (Oxford University Press 2018) p. 46.

[8]For the different models of constitutional design for divided societies, *see* J. McGarry et al., 'Integration or Accommodation? The Enduring Debate in Conflict Regulation', in S. Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press 2008) p. 41.

In light of this, the aim of this article is to focus on a rather exceptional case study, i.e. Bosnia-Herzegovina, to further explore these two gaps in the literature. The choice of this case study is motivated by several reasons. First, Bosnia-Herzegovina does not fit into the theoretical categories of erosion as defined by the literature. Indeed, even though the country is experiencing forms of constitutional degradation, such as violations of liberal rights of speech and association and of the principles of the rule of law, it is difficult to clearly identify the moment in time when there was a fully democratic constitution that started to deteriorate. The 1995 Dayton Peace Agreement brought peace in the country after a violent war, but at the same time introduced elements of degradation 'inherent' in the constitutional design. As such, it could be argued that the Constitution was never fully democratic but, rather, it was already at some stage of degradation. Therefore, to unfold the complexity of degradation in Bosnia-Herzegovina, this article attempts to identify a moment in time in the constitutional transition when the country was at its 'highest' level in democratic terms, after which democracy further deteriorated. In this respect, the proposal of the so-called 2006 'April package' of constitutional reforms is framed an apex moment in Bosnia-Herzegovina, after which democracy started to decline even more than it already had. To highlight the peculiar aspects of this case, this study proposes a distinction between the 'inherent degradation' in the Constitution and the 'dynamic degradation' deriving from internal political actions, addressing them separately. Second, Bosnia-Herzegovina is a classic example of a divided society, namely a society divided along ethno-cultural lines and in which these cleavages are permanent markers of political mobilisation.[9] By focusing on Bosnia-Herzegovina, this study further explores the role of internal diversity in the process of degradation. Finally, this constitutional system is a perfect exemplification of the potential impact that constitutional design can have on a deeply divided system. Indeed, the literature generally holds that constitutional design plays a necessary but not sufficient role in causing and preventing democratic erosion, weighing the socio-economic and political factors as more relevant than the legal rules. Conversely, the analysis of the Constitution of Bosnia-Herzegovina shows that some degraded elements can be 'inherent' in the constitutional design, suggesting that degradation can derive from political factors, as well as already being entrenched in the constitutional design.

Overall, the aim of the article is to engage with a case study that challenges some of the theoretical foundations of the literature on democratic erosion, delving into an analysis of the constitutional system of Bosnia-Herzegovina through the lenses of constitutional degradation. To do so, the article first outlines

[9]S. Choudhry, 'Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design in Divided Societies', in Choudhry (ed.), *supra* n. 8, p. 4-5.

the main elements of the theoretical framework on constitutional degradation and its limits, discussing why the case study does not fit into the categories identified by the literature. Then, the study tackles the constitutional system of Bosnia-Herzegovina, highlighting its foundational principles and the unique presence of the international community within the system. This allows the phenomenon of constitutional degradation in Bosnia-Herzegovina to be properly addressed, distinguishing between the 'inherent elements' of degradation already present in the constitutional design, and the 'dynamic elements' deriving from the political actions that worsened an already weak constitutional democracy. To sum up, the article contributes to the debate on constitutional degradation by addressing two gaps in the literature, as Bosnia-Herzegovina allows us to draw attention to: (i) a case study that challenges the theoretical framework on democratic erosion; and (ii) a constitutional system characterised by deep internal diversity.

The theoretical framework on constitutional degradation

Definition, causes and instruments

In the literature many expressions[10] have proliferated alongside the adjectives 'constitutional' or 'democratic', e.g. rot,[11] degradation,[12] erosion,[13] backsliding,[14] decline,[15] decay,[16] recession,[17] and regression.[18] Although each of these terms has its own nuance, this article will use the expression constitutional degradation 'as an umbrella term for a variety of concepts which all, in different ways, focus on

[10]For a detailed review of the different terms adopted by the literature, *see* T.G. Daly, 'Democratic Decay: Conceptualising an Emerging Research Field', 11 *Hague Journal of the Rule of Law* (2019) p. 9.

[11]J.M. Balkin, 'Constitutional Crisis and Constitutional Rot', in M. Graber et al., *Constitutional Democracy in Crisis?* (Oxford University Press 2018) p. 13.

[12]Loughlin, *supra* n. 1.

[13]Ginsburg and Huq, *supra* n. 2, p. 43-47.

[14]N. Bermeo, 'On Democratic Backsliding', 27 *Journal of Democracy* (2016) p. 5; W. Sadurski, 'How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding', 18 *Sydney Law School Research Paper* (2018) p. 1; T.T. Koncewicz, 'The Democratic Backsliding in the European Union and the Challenge of Constitutional Design', in X. Contiades and A. Fotiadou (eds.), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2020) p. 312.

[15]A. Jakab and H. Schweber, 'Special Issue Editorial: Constitutional Decline, Constitutional Design, and Lawyerly Hubris', 6 *Constitutional Studies* (2020) p. 1.

[16]Daly, *supra* n. 10.

[17]A.Z. Huq, 'How (Not) To Explain Democratic Recession', 19 *International Journal of Constitutional Law* (2021) p. 723.

[18]L. Diamond, 'Democratic Regression in Comparative Perspective: Scope, Methods, and Causes', 28 *Democratization* (2021) p. 22.

the creeping deterioration of democratic rule in states worldwide'.[19] One of the most systematic definitions in the literature is provided by Ginsburg and Huq, who framed constitutional degradation as 'a process of incremental, but ultimately still substantial, decay in the three basic predicates of democracy – competitive elections, liberal rights to speech and association, and the rule of law'.[20] This definition encompasses one of the defining features of the concept recurrent in the literature, namely the image of a gradual process rather than a rapid democratic collapse.[21] For example, Balking makes unique use of the term 'constitutional rot', by which the author means a 'degradation of constitutional norms that may operate over a long period of time', a 'specific malady of constitutions of representative democracies',[22] as well as a 'long and slow process of change and debilitation'.[23] On their part, Jakab and Schweber also refer to a 'gradual decline of democracy and the rule of law'[24] while addressing constitutional decline. Daly too defines 'democratic decay' as the 'incremental degradation of the structures and substance of liberal constitutional democracy'.[25] Again, such a definition echoes the idea of a slow and gradual process of 'hollowing out of democratic governance'.[26] Furthermore, another defining feature of constitutional degradation is that the literature tends to frame it as an internal process. In other words, 'the force that unravels ongoing democratic contestation is often [. . .] internal to the democratic system'.[27] Therefore, as also recalled by Loughlin, constitutional degradation seems to emerge 'from within, rather than from outside'[28] the existing constitutional structure.

Aside from identifying the core elements of the phenomenon of constitutional degradation, the scholarship also addressed how to recognise the process of degradation and its underlying causes, an issue that Uitz argued has been overlooked by comparative constitutional scholarship.[29] Indeed, in the literature can be found a series of legal and institutional mechanisms[30] allowing the

[19]Daly, *supra* n. 10, p. 16.

[20]Ginsburg and Huq, *supra* n. 2, p. 43.

[21]*See* Ginsburg and Huq, *supra* n. 2, p. 73. Similarly, Bermeo argues that 'traditional' executive coups are being replaced by what she defines 'executive *aggrandizement*': Bermeo, *supra* n. 14, p. 6.

[22]Balkin, *supra* n. 11, p. 17.

[23]Balkin, *supra* n. 11, p. 20.

[24]Jakab and Schweber, *supra* n. 15, p. 1.

[25]Daly, *supra* n. 10, p. 17.

[26]Ibid.

[27]Ginsburg and Huq, *supra* n. 7, p. 77. The same idea is expressed by Bermeo when defining executive 'executive *aggrandizement*': Bermeo, *supra* n. 14.

[28]Loughlin, *supra* n. 1, p. 447.

[29]*See* R. Uitz, 'Can You Tell when an Illiberal Democracy is in the Making? An Appeal to Comparative Constitutional Scholarship from Hungary', 13 *International Journal of Constitutional Law* (2015) p. 279.

[30]Ginsburg and Huq, *supra* n. 2, p. 72-73.

unfolding of democratic erosion, such as the use of constitutional amendments to alter basic governance arrangements, the elimination of checks and balances that operate between different branches, the centralisation and politicisation of executive power, the contraction or distortion of a shared public sphere in which liberal rights of speech and association can be exercised, and the elimination or suppression of partisan political competition.[31] Concerning the underlying causes,[32] according to Balkin, there are four factors that accelerate constitutional rot: the loss of trust in government and among citizens; the polarisation of the polity; increasing economic inequality; and the occurrence of policy disasters.[33] The resulting risks can be 'deadlock and a political system that is increasingly unable to govern effectively',[34] as well as a gradual descent into authoritarian regimes. Once again, the risk is to fall into a state in which constitutions provide a mere façade to undemocratic behaviours, not adhering to the principles of constitutionalism.[35] To these factors, Ginsburg and Huq add other possible causes, such as structural changes in the global economy, transnational populism, and 'long-term demographic changes, in Europe and America, with regard to ethnic and racial heterogeneity'.[36]

Finally, the domain of constitutional design[37] is often recalled in the theoretical framework on constitutional decline.[38] Indeed, the previous mechanisms through which degradation takes place were identified precisely to be able to understand 'specific elements of constitutional design that either exacerbate or mitigate the risk of such democratic erosion'.[39] Generally, the literature agrees on the fact that constitutional design plays a necessary but not sufficient role in countering

[31]Ginsburg and Huq, *supra* n. 2, p. 91-115.

[32]For a thorough review on the causes and instruments of democratic erosion, *see also* A. Jakab, 'What Can Constitutional Law Do against the Erosion of Democracy and the Rule of Law?', 6 *Constitutional Studies* (2020) p. 8.

[33]Balkin, *supra* n. 11, p. 18.

[34]Ibid., p. 19.

[35]On façade constitution and constitutionalism, *see* G. Sartori, 'Constitutionalism: A Preliminary Discussion', 56 *The American Political Science Review* (1962) p. 853.

[36]Ginsburg and Huq, *supra* n. 7, p. 46.

[37]For some references *see also* T. Ginsburg (ed.), *Comparative Constitutional Design* (Cambridge University Press 2012); D.S. Lutz, *Principles of Constitutional Design* (Cambridge University Press 2006).

[38]*See* for example the articles in the special issue edited by A. Jakab and H. Schweber, 'Constitutional Decline, Constitutional Design, and Lawyerly Hubris', 6 *Constitutional Studies* (2020), or the book chapter written by T.T. Koncewicz in the *Routledge Handbook of Comparative Constitutional Change*: *see* Koncewicz, *supra* n. 14. Ginsburg and Huq too dedicate a chapter of their book to the role that constitutional design can play to mitigate the effects of democratic erosion: *see* Ginsburg and Huq, *supra* n. 2, p. 164-204.

[39]Ginsburg and Huq, *supra* n. 2, p. 72.

constitutional degradation. Indeed, Jakab and Schweber argue that 'legal rules on their own of whatever form or rank are unable either to cause or to stop constitutional decline'.[40] Thus, in their view, context-dependant factors matter more than constitutional design in causing and preventing democratic erosion. This is also supported by the study of legal systems (e.g. Poland, France, Germany) which suffered from different degrees of democratic decline, independently from their constitutional design. Specifically, while referring to the Polish case, Sadurski argues that 'no institution can survive without a reasonable consensus about norms'[41] and that, despite the Polish Constitution proving to be resilient, it was not sufficiently entrenched in the political culture to resist populist actions.[42] In Germany and France, Grote observes that non-legal and non-institutional factors played a significant role in the success of democracy in both constitutional systems, despite the existing differences between the two,[43] and thus that 'institutional safeguards and "soft" factors like civic education should be viewed not in isolation, but as complementary and mutually reinforcing'.[44]

Challenging the theoretical framework

Before proceeding with the analysis, an underlying challenge should first be addressed. Indeed, the entire theoretical framework on degradation is built on a conception of liberal constitutional democracy[45] that appears to be limiting for divided societies.[46] As famously argued by Lijphart, the paradigm of competitive politics does not hold in divided societies since, in these polities, cleavages are not crosscutting, producing political moderation, but mutually reinforcing, thus leading to immoderation.[47] This challenges the underlying assumptions of competitive politics, namely that 'opposition parties will eventually share powers and that, because of the shifting nature of majority coalitions, governing parties

[40]Jakab and Schweber, *supra* n. 15, p. 2.

[41]W. Sadurski, 'Constitutional Design: Lessons from Poland's Democratic Backsliding', 6 *Constitutional Studies* (2020) p. 77.

[42]Ibid.

[43]R. Grote, 'The Role of Institutional Design in Preventing Constitutional Decline: The Radically Different Approaches in Germany and France', 6 *Constitutional Studies* (2020) p. 128-130.

[44]Grote, *supra* n. 43, p. 130.

[45]For an overview on different conceptions of democracy in the literature, *see* Ginsburg and Huq, *supra* n. 7, p. 32-37.

[46]According to the scholarship, a divided society can be defined as a society in which two elements are simultaneously present: (1) the existence of internal ethno-cultural differences ; and (2) these differences translate into political fragmentation: *see* Choudhry, *supra* n. 9, p. 4-5.

[47]A. Lijphart, *Democracy in Plural Societies* (Yale University Press 1977) p. 3.

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will not abuse their power'.[48] Therefore, in divided societies electoral competition based on a majoritarian model of democracy does not lead to shifting majorities but may create the permanent exclusion of minorities, which 'may eventually step outside of politics and turn to violence'.[49] As noted by Horowitz, 'purely procedural conceptions of democracy are thus inadequate for ethnically divided polities, for the procedure can be impeccable and the exclusion complete'.[50] In the legal scholarship on constitutional degradation, this perspective seems to be missed. Even though Ginsburg and Huq warn of 'the clear and present danger to democracy of a hegemonic party operating in the context of perceived or actual deep social divides',[51] the concrete consequences of such danger in terms of constitutional degradation are not further explored and remain a marginal observation.

This underlying challenge to the theoretical framework on democratic erosion directly recalls the scholarly debate on the models of constitutional design for divided societies.[52] In this respect, the argument according to which some models of constitutional design may undermine the democratic capacity of divided societies is nothing new. Indeed, despite being a gap in comparative constitutional law scholarship, it is a recurring debate in the field of comparative politics.[53] Specifically, within the branch studying power-sharing (or consociational) arrangements as a device to manage ethnic conflict,[54] the tensions between power sharing and democracy have been explored.[55] As previously recalled, Lijphart did not oppose power sharing to democracy altogether, but specifically to majoritarian democracy, deeming it inadequate to address the challenges posed by divided societies.[56] Conversely, Lijphart considered consociational democracy as the most

[48]Choudhry, *supra* n. 9, p. 17.

[49]Ibid., p. 18.

[50]D. Horowitz, 'The Challenges of Ethnic Conflict: Democracy in Divided Societies', 4 *Journal of Democracy* (1993) p. 31.

[51]Ginsburg and Huq, *supra* n. 2, p. 90.

[52]*See* Choudhry (ed.), *supra* n. 8.

[53]*See* for example A. Guelke (ed.), *Democracy and Ethnic Conflict: Advancing Peace in Deeply Divided Societies* (Palgrave Macmillan 2004).

[54]For more on power sharing, *see also* S. Keil and A. McCulloch (eds.), *Power-Sharing in Europe* (Palgrave Macmillan 2021); A. McCulloch and J. McGarry (eds.), *Power-Sharing: Empirical and Normative Challenges* (Routledge 2017); J. McEvoy and B. O'Leary (eds.), *Power Sharing in Deeply Divided Places* (University of Philadelphia Press 2013).

[55]*See* for example D. Bochsler and A. Juon, 'Power-Sharing and the Quality of Democracy', 13 *European Political Science Review* (2021) p. 411; C.A. Hartzell and M. Hoddie, *Power Sharing and Democracy in Post-Civil War States* (Cambridge University Press 2020); S. Noel (ed.), *From Power Sharing to Democracy* (McGill-Queen's University Press 2005).

[56]*See* A. Lijphart, 'Consociational Democracy', 21 *World Politics* (1969) p. 207; A. Lijphart, 'Constitutional Design for Divided Societies', 15 *Journal of Democracy* (2004) p. 96; A. Lijphart, *Thinking About Democracy* (Routledge 2008).

appropriate form to be adopted in plural societies, being based on a set of primary and secondary characteristics. The former features are the establishment of a power-sharing executive and the guarantee of (territorial and/or non-territorial) autonomy, whereas the latter characteristics are an electoral system based on proportional representation and the granting of veto powers to groups entitled to share power within the constitutional system. According to consociational theory, the presence of these characteristics (or a mixture of them) allows for the accommodation of communities' interests and claims.[57]

Power sharing as originally theorised by Lijphart has attracted many criticisms,[58] due to its tendency to 'freeze' and institutionalise cleavages and the tensions between the collective and individual dimensions of rights. However, over the years consociational theory has been further refined and variations of power sharing have been proposed.[59] Among these, it is interesting to recall the distinction between 'corporate' and 'liberal' consociationalism,[60] as it addresses the rigidity of the traditional formulation of power sharing. On the one hand, 'corporate consociationalism' provides that the groups entitled to share power are pre-determined in the constitution, especially in terms of group representation in political institutions. On the other, 'liberal consociationalism' is based on what also Lijphart called 'self-determination'.[61] Indeed, liberal consociations leave 'the question of who shares power in the hands of voters',[62] for instance by setting thresholds to cabinet formation. Therefore, such a configuration would correct some of the critical elements of consociational theory, by 'providing the political space for the lessening of ethnic divisions'.[63]

For its part, Bosnia-Herzegovina is a perfect representation of the debate on constitutional design for divided societies, since in the aftermath of the war in 1992-1995, the country was at the centre of the debate as to which model of constitutional design ought to be adopted to accommodate internal diversity and

[57]For a detailed description of these four features, *see* A. Lijphart, 'The Wave of Power-Sharing Democracy', in A. Reynolds (ed.), *The Architecture of Democracy* (Oxford University Press 2002) p. 37.

[58]*See* D. Horowitz, 'Constitutional Design: Proposals v. Processes', in Reynolds (ed.), *supra* n. 57, p. 15.

[59]For a complete overview, *see* S. Wolff, 'Complex Power-sharing and the Centrality of Territorial Self-governance in Contemporary Conflict Settlements', 8 *Ethnopolitics* (2009) p. 27.

[60]A. McCulloch, 'Consociational Settlements in Deeply Divided Societies: The Liberal-Corporate Distinction', 21 *Democratization* (2014) p. 501.

[61]Lijphart defines 'self-determination' as 'a method or process that gives various rights to groups within the existing state – for instance, autonomy rather than sovereignty – and it allows these groups to manifest themselves instead of deciding in advance on the identity of the groups': Lijphart (2008), *supra* n. 56, p. 66.

[62]McCulloch, *supra* n. 60, p. 503.

[63]Ibid., p. 509.

ensure peace and stability, eventually leading to the design of a constitutional system characterised by complex power-sharing arrangements. Therefore, the country's consociational nature makes it difficult to apply the theoretical framework on constitutional degradation to Bosnia-Herzegovina, since there never was a 'traditional' constitutional democracy that could deteriorate starting from a definite moment in time. Nevertheless, Bosnia-Herzegovina is experiencing some elements of degradation, as will be further explained in the rest of the article.

The constitutional system of Bosnia-Herzegovina

The founding principles of the Dayton Constitution

The current Constitution of Bosnia-Herzegovina was drafted as Annexe IV of the Dayton Peace Agreement and directly introduced into the system upon signature of the international agreement[64] in December 1995, without any internal ratification by constituent assemblies or popular referendum.[65] The constitutional system is based on two interlinked principles, each having a deep impact on the functioning of the system. The first is the principle of 'constituency of people',[66] a notion introduced by the Dayton Constitution, which in the preamble identified Bosniacs,[67] Croats, and Serbs, as 'constituent peoples', along with the so-called 'others', i.e. national minorities (e.g. Roma, Jews), citizens with an ethnically mixed background, or who refuse to affiliate to a constituent people and declare themselves simply as 'Bosnians'.[68] The distinction between 'constituent peoples' and 'others' is extremely relevant since, following a corporate consociational logic, only the former are entitled to share power at the central level and to collective rights.[69] Furthermore, the parity among constituent peoples is one of the pillars of

[64]Constitution of Bosnia-Herzegovina, Art. XII(2).

[65]J. Woelk, *La Transizione Costituzionale della Bosnia ed Erzegovina* (CEDAM 2008) p. 80.

[66]For more on the constituency principle, *see* Z. Begić and Z. Delić, 'Constituency of Peoples in the Constitutional System of Bosnia and Herzegovina: Chasing Fair Solutions', 11 *International Journal of Constitutional Law* (2013) p. 447.

[67]The term 'Bosniac' refers to the Muslim population and is used to avoid the overlap between ethnic and religious identities.

[68]According to the 2013 census, Bosniacs account for the 50.1% of the population, Serb 30.8%, Croat 15.4%, other 2.7%, not declared/no answer 1%: data available at https://www.cia.gov/the-world-factbook/countries/bosnia-and-herzegovina/#people-and-society, visited 21 June 2023. In 2003, a law of the parliamentary assembly of Bosnia-Herzegovina officially recognised 17 national minorities: *see* the OSCE Mission Report, 'National Minorities in BiH', https://www.osce.org/files/f/documents/7/b/110231.pdf, visited 21 June 2023).

[69]S. Gavrić et al., *The Political System of Bosnia and Herzegovina: Institutions – Actors – Processes* (Sarajevo Open Center 2013) p. 23.

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the power-sharing arrangements introduced by Dayton, as the three constituent peoples are the building blocks for political representation in central political institutions (i.e. the bicameral parliamentary assembly, the collective presidency, the council of ministers). Power sharing in Bosnia-Herzegovina also provides that the constituent peoples' representatives in central political institutions must adopt decisions through cross-community mechanisms[70] and that they are granted substantial veto powers on 'vital interest issues'.[71] Therefore, the entire constitutional system of Bosnia-Herzegovina revolves around such delicate balance among constituent peoples, ensuring peace but overall burdening the system with its complex architecture.

The second principle is 'complex federalism'[72] and concerns the territorial organisation of powers. The Dayton Constitution designed a complex multi-tiered system[73] with multiple layers of government: the central state; two subnational entities (i.e. the Federation of Bosnia-Herzegovina and the Republika Srpska); and ten cantons within the Federation. The two subnational constitutions established two rather different systems, creating a significant asymmetry in institutional design. If the 1992 Republika Srpska Constitution laid down a highly centralised and unitary system, the 1994 Constitution of the Federation of Bosnia-Herzegovina provided for a territorially decentralised system. A further layer of government is the Brčko district, established in 2000 after an arbitration process and designed as a neutral and self-governing unit under the sovereignty of the Constitution and laws of the central state.[74] Moreover, each level of government (state, entities, cantons, Brčko district) has its own legislative, executive, and judicial branches, resulting in a high degree of internal political, administrative, and judicial fragmentation. The Constitution also grants the entities relative constitutional and legislative autonomy and extensive rights concerning the delegation of powers and responsibilities.[75] Therefore, it is safe to conclude that the 'real power of the state of Bosnia-Herzegovina rests with the entities'.[76] This has created increasing clashes between

[70]Constitution of Bosnia-Herzegovina, Art. IV(3)(d).

[71]Ibid., Art. IV(3)(e)-(f).

[72]On Bosnian federalism *see* S. Keil, *Multinational Federalism in Bosnia and Herzegovina* (Ashgate 2013); J. Woelk, 'Bosnia-Herzegovina: Trying to Build a Federal State on Paradoxes', in M. Burgess and A. Tarr (eds.), *Constitutional Dynamics in Federal Systems: Sub-National Perspectives* (McGill-Queen's University Press 2011) p. 109.

[73]In federal literature, multi-tiered systems are those systems with multiple tiers of government in which the central level coexists with subnational entities having law-making powers: F. Palermo and K. Kössler, *Comparative Federalism* (Hart Publishing 2017) p. 8.

[74]Gavrić et al., *supra* n. 69, p. 23, 56.

[75]Constitution of Bosnia-Herzegovina, Art. III.

[76]Gavrić et al., *supra* n. 69, p. 51.

the central and subnational levels, often culminating in secession threats, especially on the part of the Republika Srpska.

The complex territorial design reflected the territorial ethnic distribution resulting from the outcome of the war. Indeed, the operations of ethnic cleansing and forced displacement of people dramatically changed the internal distribution of ethnic groups. Therefore, the Republika Srpska is predominantly populated by Bosnian Serbs, while the Federation of Bosnia-Herzegovina is of Bosniac and Croat majority, with four cantons of Bosniac majority, three cantons of Croat majority, and the remaining two mixed Bosniac-Croat. However, as noted by Woelk, the static nature of the post-war territorial partition entrenched in the new constitutional system seems to clash with the dynamic element encompassed in one of the guiding principles of the Dayton Peace Agreement, i.e. the return of refugees and displaced persons to their homes and territories[77] to revive the multi-ethnic nature of the state.[78] This kind of clash is one of the underlying challenges that Bosnia-Herzegovina has been facing since the establishment of the Dayton constitutional system.

The role of the international community

Another distinctive element of the constitutional system is the unique presence of the international community. The current international presence in Bosnia-Herzegovina is directly related to international involvement in the conflict and subsequent democratic transition, which started even before the outbreak of the war. In the aftermath of the Slovenian and Croatian referendum for independence in 1991, the European Community set a series of conditions for the recognition of the newly independent states emerging from the dissolution of the former Yugoslavia, such as the establishment of democratic constitutions, respect for the rule of law, democracy, human rights, and the protection of minorities. To these, for Bosnia-Herzegovina, the European Community required the holding of an independence referendum, which was held at the beginning of March 1992 and passed with the votes of only the Bosniac and Croat citizens, as the Bosnian Serbs boycotted the vote. Then, even before the drafting of the 1995 Dayton accords, the international community intervened with another international agreement to address the conflict, namely the Washington Agreement. This agreement was signed in 1994 to end the hostilities between the Croat and Bosniac communities and formed the Federation of Bosnia-Herzegovina (later recognised as one of the two entities).

[77]Dayton Peace Agreement, Annexe 7.
[78]Woelk, *supra* n. 65, p. 84, 102-106.

Moreover, a strong international involvement was seen in the constitution-making process.[79] Indeed, the international community, especially the US and some member states of the European Community, eventually took the lead in the process of conflict resolution and opened a negotiating table that led to the conclusion of the Dayton Peace Agreement.[80] Notably, neighbouring countries acted as representatives of the interests of the warring parties, as the Republic of Croatia signed the agreement for the Bosnian Croats, and the former Federal Republic of Yugoslavia for the Bosnian Serbs. The only national political actor present at the table of negotiations was the president of the former Republic of Bosnia-Herzegovina, acting as the representative of the Bosniac interests.

What makes the current presence of international actors in Bosnia-Herzegovina unique is that they are not 'external actors influencing the political system itself, but instead are integrated into the political structure of the state'.[81] Specifically, Annexe 10 of the Dayton Peace Agreement provides that 'a considerable number of international organisations and agencies will be called upon to assist the civilian implementation of the Agreement'.[82] As often observed in the scholarship, this has created a 'lack of local ownership of political developments'[83] and has generated a considerable debate in the political and academic spheres.[84]

The most peculiar actor in place established by Annexe 10 is the Office of the High Representative, an ad hoc international body responsible for monitoring the implementation of the civilian aspects of the peace agreement[85] and acting as 'the final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement'.[86] Over time, the role and tasks

[79]For further references on international involvement in constitution making and its consequences on deeply divided societies, *see* C. Saunders, 'International Involvement in Constitution Making', in D. Landau and H. Lerner (eds.), *Comparative Constitution Making* (Edward Elgar 2019) p. 69; B. O'Leary, 'Making Constitutions in Deeply Divided Places: Maxims for Constitutional Advisors', in Landau and Lerner (eds.), ibid., p. 186; A. McCulloch and J. McEvoy, 'The International Mediation of Power-Sharing Settlements', 53 *Cooperation and Conflict* (2018) p. 467.

[80]Officially entitled 'The General Framework Agreement for Peace in Bosnia and Herzegovina', the Dayton Peace Agreement was concluded in Dayton (Ohio) on 22 November 1995, and later signed in Paris on 14 December 1995.

[81]Gavrić et al., *supra* n. 69, p. 88.

[82]Dayton Peace Agreement, Annexe 10, Art. I, para. 36.

[83]Gavrić et al., *supra* n. 69, p. 88.

[84]B. Knoll, 'Bosnia: Reclaiming Local Power from International Authority', 3 *EuConst* (2007) p. 357.

[85]The competences of the High Representative are listed in Dayton Peace Agreement at Annexe 10, Art. II, para. 26.

[86]Dayton Peace Agreement, Annexe 10, Art. V.

of the High Representative have significantly changed. In 1997, the Peace Implementation Council, an international organisation created to support the Agreement, empowered the High Representative with the so-called 'Bonn powers',[87] i.e. the power to remove from office the public officials violating legal commitments and/or the Dayton Peace Agreement, as well as to impose legislation deemed necessary for the political development of Bosnia-Herzegovina when the central or entity institutions fail to do so.[88] Unsurprisingly, this was a double-edged sword. If, on the one hand, the use of such powers allowed the solution of some political deadlocks relating to the adoption of legislation on fundamental areas,[89] on the other, all these laws were imposed by a body not directly elected by the citizens of Bosnia-Herzegovina, and thus not enjoying democratic legitimacy.[90] Moreover, it should be pointed out that, even though in 2006 the Steering Committee of the Peace Implementation Council adopted a strategic document providing the future withdrawal of the High Representative, the closure of such body has not yet occurred,[91] and the newly appointed High Representative began his mandate in August 2021.

The other crucial institution where an international presence is deeply entrenched is the Constitutional Court of Bosnia-Herzegovina. The Constitution provides that the Court is composed of nine judges, three of them being international judges selected by the president of the European Court of Human Rights after consultation with the collective presidency, and they should not be citizens of Bosnia-Herzegovina or of neighbouring countries.[92] The Court has exclusive jurisdiction over disputes on competencies between the entities, between the entities and the central state, or between central state institutions, and assesses the constitutionality of the entities' constitution or laws, as well as of state legislation.[93] Access to the Court is not direct but limited to institutional roles (such as the presidency or the chair of the council of ministers) or to one-fourth of the members of the parliamentary assembly. The Court also acts as

[87]For an extensive review of the Bonn powers, *see* T. Banning, 'The "Bonn Powers" of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment', 6 *Goettingen Journal of International Law* (2014) p. 259.

[88]Between 1996 and 2007, the High Representative imposed 112 laws within the legislative competences of the parliamentary assembly of Bosnia-Herzegovina, while between 1997 and 2012 more than 200 public officials were dismissed: *see* Gavrić et al., *supra* n. 69, p. 89.

[89]The main areas of intervention were the adoption of a single currency, the anthem, the flag, and the election laws.

[90]Gavrić et al., *supra* n. 69, p. 89.

[91]In 2008, the Peace Implementation Council set out the requirements to be met prior to the closure of the Office of the High Representative, i.e., the so-called 'Agenda 5-2': *see* https://www.ohr.int/agenda-52/, visited 21 June 2023.

[92]Constitution of Bosnia-Herzegovina, Art. VI(1)(a)-(b).

[93]Ibid., Art. VI(3)(a).

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appellate jurisdiction and may be referred by lower courts for constitutionality assessments.[94] It should be noted that the Constitutional Court of Bosnia-Herzegovina is one of the few (still existing) examples of 'hybrid' constitutional courts,[95] i.e. courts composed of both local and foreign judges. Ideally, the former would promote local legitimacy, while the latter would guarantee impartiality and professionalism. This is a specific configuration designed for post-conflict deeply divided societies to avoid ethnic bias, implying that international judges would cast decisive votes in split decisions.[96] Despite the pressing nature of the 'post-conflict dilemma'[97] that hybrid courts are designed to respond to, the literature observed that the presence of international judges tends to be 'ambivalent'.[98]

Constitutional degradation in Bosnia-Herzegovina

As anticipated, Bosnia-Herzegovina challenges some of the theoretical foundations of the framework on constitutional degradation. Indeed, degradation can be observed within the constitutional system, affecting some of the elements identified by the literature (i.e. degradation in electoral competition, liberal rights, the rule of law), but it is debatable whether there ever was a moment in time when the Constitution could be considered fully democratic. To engage with such a peculiar case, it is first necessary to outline the process of constitutional transition occurring in Bosnia-Herzegovina, to assess whether it is possible to identify the moment in time after which democracy started to (further) deteriorate. Then, to properly assess constitutional degradation, a distinction should be made between the degraded elements 'inherent' in the Dayton Constitution, as well as the 'dynamic' elements of degradation, which occurred progressively and worsened democracy, already in critical conditions.

The phases of the constitutional transition

As framed by Woelk, the process of constitutional transition in Bosnia-Herzegovina started with the signing with the Dayton Peace Agreement and unfolded in three phases: 'imposed', 'guided', and 'conditional' transitions.[99]

[94]Ibid., Art. VI(3)(b)-(c).

[95]On hybrid constitutional courts, *see* R. Dixon and V. Jackson, 'Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts', 57 *Columbia Journal of Transnational Law* (2018) p. 283.

[96]A. Schwartz, 'International Judges on Constitutional Courts: Cautionary Evidence from Post-Conflict Bosnia', 44 *Law & Social Inquiry* (2017) p. 2.

[97]Schwartz, *supra* n. 96, p. 2.

[98]Ibid., p. 25.

[99]Woelk, *supra* n. 65, p. 45-46.

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Overall, the (ongoing) transition has been characterised by the tension between the static and dynamic elements of the constitutional system, i.e. between the rigid ethnic and territorial separation and the aspiration to rebuild a multi-ethnic society.[100]

The first phase of the transition (1995-1997) witnessed the predominance of the static element, with the implementation of the Dayton Peace Agreement and the setting out of the political institutions as provided by the newly established Constitution. Inevitably, this strengthened a logic of internal segregation and led to a clear separation on ethnic and territorial bases. In the second phase (1997-2005), there was a shift towards the dynamic element with the 'constitutional corrections' to the original Dayton constitutional settlement. The goal was to promote the reconstruction of a multi-ethnic society, through the rights of refugees and displaced persons to return to their homes, to overcome the imposed ethnic segregation that resulted from the operations of ethnic cleansing during the conflict. In this respect, the role of the Constitutional Court was crucial. Indeed, in the 2000 'constituent peoples' case,[101] the Court first imprinted a multinational dimension onto the constitutional system. In this landmark case, the Court ended the principle of ethnic segregation of groups within the territory, recognising the equality of constituent peoples across the entirety of the territory, and not only in the entities where they constituted the majority.[102] However, the implementation of the Court judgment was only possible thanks to the direct intervention of the High Representative, who imposed the changes to the constitutions and legislations of the entities necessary to comply with the decision of the Constitutional Court. Indeed, this confirmed the need for an intervention on an internationally appointed figure, in the absence of a shared vision of the new multinational state.[103]

The third phase of the democratic transition (still ongoing) was oriented towards the emancipation of the constitutional system from the 'international protectorate' and towards the process of European integration. The perspective of the EU membership called for new developments, to ensure a sustainable and functional system. In this third phase, the focus was on so-called 'local ownership',[104] i.e. a shift towards a direct responsibility taken on by political actors of Bosnia-Herzegovina in the process of reforms. If some progress was made in the implementation of human rights standards, with the establishment of a Human Rights Chamber (later Human Rights Commission) and of the

[100]Ibid., p. 257.

[101]Constitutional Court of Bosnia-Herzegovina, 1 July 2000, decision U-5/98.

[102]Gavrić et al., *supra* n. 69, p. 24-26.

[103]Woelk, *supra* n. 65, p. 258.

[104]*See* C. Solioz and S. Dizdarević (eds.), *Ownership Process in Bosnia and Herzegovina* (Nomos 2003).

ombudsman institutions, the attempts to reform the Constitution were not successful. The most meaningful proposal for constitutional reforms was the so-called 2006 'April package'. Strongly supported by the United States, the package of reforms reacted to the increasing criticism of the Dayton Constitution coming from prominent international organisations, such as the Venice Commission,[105] as well as local experts.[106] Despite a substantial reform of the system being generally perceived by the public as the only way to proceed towards a more functional and sustainable state able to implement the necessary reforms to proceed in the process of European integration, national political elites did not show a real interest in abandoning the status quo.[107] Indeed, the April package included four proposals for reforms and would have modified the Constitution in fundamental domains. First, it would have rationalised and detailed state competencies as well as shared competencies between the state and the entities. Then, it provided a significant adjustment in the composition, competencies, and procedures of the parliamentary assembly, with the house of representatives (i.e. lower chamber) becoming the legislative body, and the house of peoples (i.e. highest chamber) becoming a guarantee of the vital interests of the constituent peoples. It would have also introduced substantial changes in the collective presidency, with an indirect election by the house of representatives. Finally, the last proposal would have modified the composition, election, and procedures of the council of ministers.[108] The elaborate package of reforms was presented in the parliamentary assembly in April of 2006,[109] even though the parliamentary debate lasted only one day. Eventually, the package failed to reach the necessary two-thirds majority by only two votes and was not adopted.

Despite its failure, the experience of the April package represented the first (and currently only) attempt to change the Dayton Constitution towards a more sustainable constitutional system, even though some fundamental elements of dysfunctionality (i.e. the complex territorial structure) were not properly addressed.[110] It was the first moment in the democratic experience of Bosnia-Herzegovina when the formal procedure to amend the Constitution reached the parliamentary vote, involving not only political elites but also NGOs in the

[105]*See* European Commission for Democracy Through Law, 'Opinion on the Constitutional Situation of Bosnia and Herzegovina and the Powers of the High Representative' CDL-AD (2005) 004.

[106]J. Marko, 'Constitutional Reforms in Bosnia and Herzegovina 2005-06', 5 *European Yearbook on Minority Issues* (2007) p. 212.

[107]Woelk, *supra* n. 65, p. 240.

[108]For a detailed analysis of the proposed reforms, *see* Marko, *supra* n. 106, p. 207-218.

[109]Parliamentary Assembly of Bosnia and Herzegovina, 'Amendments to the Constitution of Bosnia and Herzegovina' (2006).

[110]Woelk, *supra* n. 65, p. 250.

debate.[111] It is for precisely this reason that this article argues that the proposal of the April package of reforms represents the moment in time when democracy in Bosnia-Herzegovina was, at least potentially, at its highest level of functionality. Even though identifying such a 'peak' moment in the failure of constitutional reforms (and not in their success) may seem counterintuitive, it provides a strong indication of the complexity and dysfunctionality of the system and allows us to better frame the dynamics of degradation in Bosnia-Herzegovina. If the phase of 'constitutional corrections' and the drafting of reforms seemed to indicate a potential improvement in the system, after the failure of the package the prospects of constitutional reforms rapidly declined. Indeed, the two most voted for parties in the political elections held in October 2006 took opposing positions on the reforms, and the parties in the Republika Srpska strongly defended their entity against any attempt to change the status quo.[112] Since then, 'constitutional reform has been a taboo',[113] and the respective positions of the three main parties representing the constituent peoples have been radically different. Therefore, after the apex moment provided by the concrete prospect of constitutional reforms overcoming Dayton's rigidity, democracy in Bosnia-Herzegovina started to deteriorate even further through the actions of political elites.

Inherent elements of degradation

The elements of degradation that are 'inherent' in the Constitution, and thus derive from the Dayton constitutional design, concern the domain of electoral competition and the rule of law. Indeed, the most 'obvious' issue to recall is the institutional discrimination that prevents national minorities from holding the highest electored positions at the central level (i.e. the collective presidency and the second chamber of the parliamentary assembly). In this respect, Bosnia-Herzegovina is rather well-known for the *Sejdić and Finci* judgment of the European Court of Human Rights,[114] delivered by the Grand Chamber in 2009. The case addressed the application of Dervo Sejdić and Jakob Finci, who belonged to the so-called 'others', respectively of Roma and Jewish origin. Since the Electoral Code requires candidates to self-declare affiliation to one of the three constituent peoples in order to be eligible to stand for election as president and to

[111]Ibid.

[112]Ibid., p. 251.

[113]J. Woelk, 'Forced Together, Never Sustainable? Post Conflict Federalism in Bosnia and Herzegovina', 71 *Kansas Law Review* (2022) p. 265.

[114]ECtHR [GC] 22 December 2009, No. 27996/06 and 34836/06, *Sejdić and Finci* v *Bosnia and Herzegovina*. For further references, *see also* S. Bardutzky, 'The Strasbourg Court on the Dayton Constitution: Judgment in the Case of Sejdić and Finci v. Bosnia and Herzegovina, 22 December 2009', 6 *EuConst* (2010) p. 309.

the house of peoples (i.e. the second chamber), the two applicants were excluded from the electoral competition. The applicants claimed, therefore, that they were being discriminated against on the basis of their ethnic origin, and alleged that this was a violation of the European Convention on Human Rights. The government justified the differentiated treatment of the two citizens who refused to affiliate with the constituent peoples on the ground that the system of ethnic affiliation guaranteed the peaceful coexistence of communities, as well as the delicate constitutional system designed by the Dayton Peace Agreement. For its part, the Strasbourg Court framed it as a case of ethnic discrimination against vulnerable peoples[115] and declared the constitutional provisions to be in breach of Article 14 ECHR read in conjunction with Article 3 Protocol No. 1, and of Article 1 of Protocol No. 12. The decision of the Court was positively received by the international community but provoked multiple reactions and triggered a heated debate in the legal scholarship concerning the relationship between consociations and human rights standards.[116]

Although the judgment in *Sejdić and Finci* remains unimplemented since 2009, other cases[117] have been adjudicated by the Strasbourg Court, and they all represent 'variations on a theme', shedding even more light on the rigidity of the constitutional system. The subsequent cases dealt with the exclusion of minorities from electoral competitions on the basis of their ethnic (non) affiliation or on their place of residence. In *Zornić*, the applicant refused to affiliate with any of the constituent peoples since she identified as 'Bosnian', thus solely as a citizen of Bosnia-Herzegovina, a possibility not contemplated by the electoral legislation. In *Pilav* and *Pudarić* the issue involved ineligibility on the basis of the place of residence. The applicant in *Pilav* resided in the Republika Srpska and declared his affiliation to the Bosniac constituent people but was nevertheless considered ineligible for the collective presidency since the Constitution provides that citizens residing in the Republika Srpska's territory may directly elect only the Serb member of the presidency.[118] As a Bosniac citizen, Pilav could not stand for the election of the Bosniac member of the presidency because, to do so, he would have had to reside in the Federation of Bosnia-Herzegovina. In *Pudarić*, the

[115]S. Graziadei, 'Democracy v. Human Rights? The Strasbourg Court and the Challenge of Power Sharing', 12 *EuConst* (2016) p. 67.

[116]For more on power sharing and human rights, *see* C. Bell, 'Power-Sharing and Human Rights Law', 17 *The International Journal of Human Rights* (2013) p. 204; C. McCrudden and B. O'Leary, *Courts and Consociations: Human Rights Versus Power Sharing* (Oxford University Press 2013).

[117]*See* ECtHR 15 July 2014, No. 3681/06, *Zornić* v *Bosnia and Herzegovina*; ECtHR 26 May 2016, No. 56666/12, *Šlaku* v *Bosnia and Herzegovina*; ECtHR 9 June 2016, No. 41939/07, *Pilav* v *Bosnia and Herzegovina*; ECtHR 8 December 2020, No. 55799/18, *Pudarić* v *Bosnia and Herzegovina*.

[118]Constitution of Bosnia-Herzegovina, Art. V.

situation was reversed: the applicant was a Serb citizen residing in the Federation, and his candidacy for the presidency was rejected by the Central Electoral Commission on the same grounds. Since the Strasbourg Court's case law remains unimplemented to this day, the limitation of the electoral competition is a persisting element of degradation in Bosnia-Herzegovina. Moreover, it should be remembered that the country is required to amend its electoral legislation to meet the EU and Council of Europe standards to avoid discrimination against national minorities.[119]

Another crucial element of 'inherent degradation' concerns the design of the judicial system. Indeed, the Constitution delegates its organisation and responsibilities to the entities and Brčko district,[120] meaning that each subnational level in the multi-tiered system (i.e. entities, cantons, Brčko district) has its own judicial system. In absence of any coordination mechanism, this resulted in an extremely fragmented judiciary. Looking at the central level, the picture is even more complex. In 2002, the High Representative imposed the Law on the Court of Bosnia-Herzegovina, establishing a Court having state-level jurisdiction and marking a moment of particular importance. Its tasks comprised overseeing the effective implementation of competencies at state level and the protection of human rights and the rule of law. However, as a functional jurisdiction, the establishment of the Court was not sufficient to create a unified judicial system for the country, as this would require, for instance, the establishment of a Supreme Court at the highest appeal board. This is a recurrent issue in the debate on reforms, but there is no political majority to sustain such an initiative as it would entail the entities conceding power of jurisdiction and autonomy to the central level.[121] Therefore, the judicial system is fragmented *per se* and incomplete, affecting its capacity to deliver effective justice[122] and undermining the principles of the rule of law.

Dynamic elements of degradation

Aside from the 'inherent' elements of degradation, Bosnia-Herzegovina is also experiencing forms of erosion that do not depend on constitutional design, but on

[119]ECtHR [GC] 22 December 2009, No. 27996/06 and 34836/06, *Sejdić and Finci* v *Bosnia and Herzegovina*, Para. 21-25.

[120]Constitution of Bosnia-Herzegovina, Art. III(3)(a).

[121]Gavrić et al., *supra* n. 69, p. 45-46.

[122]For example, the civil judiciary is overburdened with a backlog of cases (e.g. 1.9 million cases relating to unpaid utility bills), thus provoking excessive length of court proceedings, while weak trial management and lenient enforcement of procedural discipline further aggravate the normal length of proceedings and reduces efficiency, especially in business-related matters: *see* 'Expert Report on Rule of Law Issues in Bosnia and Herzegovina' (2019) paras. 34-37.

the political actions that occurred more and more frequently after the failure of the 2006 April package of reforms. These resemble the more 'classic' forms of degradation as framed in the literature and affect the domains of the liberal rights of speech and association and the rule of law. Regarding liberal rights, the latest EU Commission Progress Report on Bosnia-Herzegovina stated that 'no progress was made to guarantee freedom of expression and of the media by protecting journalists from threats and violence and ensuring the financial sustainability of the public broadcasting system. Challenges persist as regards freedom of assembly, particularly in the Republika Srpska entity'.[123] Among many dramatic episodes, we must remember the violent reactions by the Bosnian Serb government against the peaceful demonstrations asking for justice for the death of David Dragičević, which occurred in unclear circumstances in 2018 and was never fully investigated by the authorities of the Republika Srpska.[124] Similarly, journalists and the independent media are constantly at risk of censorship, and the mainstream media is deeply dependent on political parties' financing and pressures.[125] Unsurprisingly, this limits the full development of the public sphere, another expression of degradation identified in the scholarship.

In relation to the process of erosion in the domain of the rule of law, judicial independence remains one of the most pressing issues in Bosnia-Herzegovina, even though the situation has slightly improved since the end of the war. In 2005 the High Judicial and Prosecutorial Council was established by a transfer-agreement as an independent body, designed to ensure the independence, professionalism, and neutrality of the judicial powers, being responsible for appointments, removals, and the course of judges' careers. However, the Council is not immune from corruption allegations, and the 2019 'Priebe Report'[126] noted that 'serious miscarriages of justice have become apparent due to lack of leadership capacity, allegations of politicisation and conflicts of interest, inefficient organisation, insufficient outreach and transparency, and, finally, its failure to implement reforms'.[127] Up until the establishment of the Council, judges were exposed to strong political pressure, as they were appointed by the ministers of

[123]European Commission, 'Bosnia and Herzegovina 2022 Report' (12 October 2022) p. 6.

[124]A. Sasso, 'Let's Go All the Way. In David Square, Banja Luka', *Osservatorio Balcani e Caucaso*, 05 October 2018, https://www.balcanicaucaso.org/eng/Areas/Bosnia-Herzegovina/Let-s-go-all-the-way-.-In-David-Square-Banja-Luka-190360, visited 21 June 2023.

[125]H. Rovcanin, 'Bosnia's Local Journalists Under Political Pressure: Report', *Balkan Insight*, 18 May 2018, https://balkaninsight.com/2018/05/18/bosnia-s-local-journalists-under-political-pressure-report-05-18-2018/, visited 21 June 2023.

[126]Officially called 'Expert Report on Rule of Law Issues in Bosnia and Herzegovina', the 'Priebe Report' was prepared in 2019 by a group of legal experts at the request of the EU Commission to assess the condition of the rule of law in Bosnia-Herzegovina.

[127]'Expert Report on Rule of Law Issues in Bosnia and Herzegovina' (2019) paras. 65-66.

justice at the different levels and thus subjected to parties' interference. Despite its introduction in the judiciary, judicial independence in Bosnia-Herzegovina is still far from being a reality, and structural reforms are needed to address the lack of accountability and transparency.

Another element of erosion concerns the recurrent non-compliance with court judgments. Aside from the unimplemented case law of the European Court of Human Rights in *Sejdić and Finci* and others, the Constitutional Court of Bosnia-Herzegovina has had relevant compliance issues with some of its judgments,[128] further undermining respect for the principles of the rule of law.[129] For instance, in 2010 the Court declared the unconstitutionality of some sections of the Election Act 2001 and of the Statute of the City of Mostar and provided that the central electoral legislation and the Statute of Mostar had to be amended.[130] However, the requested amendments were not implemented until 2020, leaving Mostar without an elected mayor for 12 years.[131] Another example of political refusal to comply concerns the case on the establishment of the public holiday in the Republika Srpska.[132] In its 2015 decision, the Constitutional Court of Bosnia-Herzegovina ruled unconstitutional the article of the Law on Holidays of the Republika Srpska establishing a 'national day' on 9 January, marking the day in 1992 when Bosnian Serbs declared the independence of Republika Srpska, insofar as it was discriminatory against the non-Serb population. Nonetheless, prior to the decision, the Republika Srpska legislature pre-emptively declared that it would not obey the Court's decision if it were to invalidate the law on public holidays, an intention confirmed by the celebration of the 'national day' on 9 January 2023, despite the Court's ban.[133]

Untangling the complexity of degradation

A few observations can be made on constitutional degradation in Bosnia-Herzegovina. As mentioned, to properly assess democratic erosion a distinction

[128]A. Schwartz and M.J. Murchison, 'Judicial Impartiality and Independence in Divided Societies: An Empirical Analysis of the Constitutional Court of Bosnia-Herzegovina', 50 *Law & Society Review* (2016) p. 830.

[129]As also noted by the ECtHR in its judgment in *Baralija*: ECtHR 29 October 2019, No. 30100/28, *Baralija* v *Bosnia and Herzegovina*.

[130]Constitutional Court of Bosnia-Herzegovina, 26 November 2010, Case U-9/09.

[131]*See* V. Repovac-Nikšić, 'Local Elections in Bosnia and Herzegovina – Political Changes in Times of Pandemic', 8 *Contemporary Southeastern Europe* (2021) p. 30.

[132]Constitutional Court of Bosnia-Herzegovina, 26 November 2015, Case U-3/13.

[133]A. Kurtic, 'Armed Police and Bikers Parade as Bosnian Serbs Mark Banned Holiday' *Balkan Insight* 9 January 2023, https://balkaninsight.com/2023/01/09/armed-police-and-bikers-parade-as-bosnian-serbs-mark-banned-holiday/, visited 21 June 2023.

had to be made between the 'inherent' degradation in the constitutional framework and the 'dynamic' erosion resulting from political actions. Some of the current deficiencies in the system come from the initial constitutional design, which did not provide for a functional judicial system at the state level and institutionalised electoral discrimination against national minorities through the pre-determination of the groups entitled to share power. The consociational model imposed by Dayton, as it was designed, proved extremely resistant to reform. Indeed, despite the relative accessibility of the procedure to amend the Constitution,[134] the experience of the 2006 April package shows that the success of constitutional reforms entirely depends on the political will of ethno-nationalist parties. Interestingly, in terms of measures that political actors adopt to advance erosion, this appears to be in contrast with those identified by the literature on degradation. If constitutional amendments altering basic governance arrangements are considered as 'the most obvious available pathway to democratic erosion',[135] in Bosnia-Herzegovina political elites have been avoiding amending the Constitution, thus preserving some elements of degradation. In fact, for the ethno-nationalist parties, advancing constitutional reforms to implement the *Sejdić and Finci* judgment and other needed reforms, would mean abandoning the status quo. This aspect reflects the 'dynamic elements' of erosion that do not depend on the original constitutional design, but rather on political decisions that worsened an already critical situation. Concerning the violations of liberal rights of speech and association, their degradation derives from political strategies, especially in the Republika Srpska, despite the Constitution guaranteeing those rights.[136] The same is true for non-compliance with the rulings of the Constitutional Court, which undermines the principles of the rule of law and derives from political actions, not from constitutional design. Therefore, it can be concluded that in Bosnia-Herzegovina legal (i.e. constitutional design) and extra-legal factors (i.e. political actions) are co-dependent in the process of constitutional degradation. This link between legal and extra-legal factors clearly emerges when looking at the degradation occurring in the domain of the rule of law, since both inherent (i.e. electoral discrimination and fragmented judiciary) and dynamic elements of degradation (i.e. compliance issues) are at play.

[134]Constitution of Bosnia-Herzegovina, Art. X(1): 'This Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives.' The only formal limit to constitutional amendments is set out in para. 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': *see* C. Steiner and N. Ademović, *Constitution of Bosnia and Herzegovina. Commentary* (Fondacija Konrad Adenauer 2012) p. 975.

[135]Ginsburg and Huq, *supra* n. 2, p. 91.

[136]Constitution of Bosnia-Herzegovina, Art. II(3)(g)-(i).

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A second aspect to consider concerns the presence of international actors in pivotal institutions in Bosnia-Herzegovina, such as the High Representative and the Constitutional Court, which appears to be related to some of the 'dynamic' manifestations of constitutional degradation. Indeed, the recent political crisis, prompted by Republika Srpska in 2021, escalated when the former High Representative imposed the genocide denial ban, as he was deemed not a legitimate actor to impose such legislation. Certainly, secessionist claims were pre-existent, but it seems equally significant to notice that the opposition to the decision of an internationally appointed figure was instrumentally used by the Serb leadership to reclaim political power. Also, non-compliance with some crucial Constitutional Court decisions by the Serb entity is often related to the fact that international judges sided with the Bosniac judges and were accused, therefore, of not being impartial. Among many others, the most recent example of this tension between national and international actors is provided by the declaration made by Bosnian Serb leader, Milorad Dodik, claiming that the Republika Srpska would have ignored the imposed suspension of a property law on the part of the High Representative.[137] Such a law had been previously deemed unconstitutional by the Constitutional Court,[138] ruling that the properties covered by the entity law were solely under state jurisdiction, and not entity jurisdiction.[139] At the time of the Court judgment, Bosnian Serb leadership had already declared that the Republika Srpska institutions would not have complied with the judgment.[140] Such non-compliance led to the decision of the High Representative to suspend the law until the new decision of the Constitutional Court, which eventually confirmed the ineffectiveness of the property law.[141] Therefore, if it is true that the international presence is constitutionally entrenched in the system and that the High Representative and the foreign judges act within their mandate to uphold the Constitution, it is also true that their persisting presence is more and more controversial, especially in terms of legitimacy. This is particularly evident when considering the recent exercise of the Bonn powers by the High Representative, when he imposed changes to the

[137]A. Kurtic, 'Bosnian Serb Leader Vows to Defy International Envoy Over Property Law' *Balkan Insight*, 28 February 2023, https://balkaninsight.com/2023/02/28/bosnian-serb-leader-vows-to-defy-international-envoy-over-property-law/, visited 21 June 2023.

[138]Constitutional Court of Bosnia-Herzegovina, 22 September 2022, Case U-10/22.

[139]For more on the dispute over the unconstitutional unilateral transfer of state competencies already started in 2021, *see* J. Woelk, 'On Federal Systems, Competencies and Transfer Agreements' *Oslobođenje*, 22 November 2021, https://www.oslobodjenje.ba/dosjei/teme/on-federal-systems-competencies-and-transfer-agreements-709819, visited 21 June 2023.

[140]A. Kurtic, 'Dodik Slates Bosnian Court Ruling Against Republika Srpska Property Law' *Balkan Insight*, 22 September 2022, https://balkaninsight.com/2022/09/22/dodik-slates-bosnian-court-ruling-against-republika-srpska-property-law/, visited 21 June 2023.

[141]Constitutional Court of Bosnia-Herzegovina, 2 March 2023, Case U-5/23.

subnational constitution and electoral legislation of the Federation of Bosnia-Herzegovina after polls closed in the last political elections in October 2022,[142] thus attracting much criticism.[143]

Conclusion

This article has aimed to engage with the complexity of the constitutional system of Bosnia-Herzegovina, which simultaneously provides for degraded elements inherent in its constitutional design and for dynamic elements of erosion, which has led to further degradation in an already degraded democracy. An exceptional case and single-country study, such as Bosnia-Herzegovina, does not offer a generalisable result, and comparative research on other cases would be necessary to further explore the domain of constitutional degradation in divided societies. However, despite its peculiar nature, Bosnia-Herzegovina does provide insights and evidence on the fact that the imposed constitutional design did plant the seeds for (inherent) democratic erosion.[144] Moreover, the experience of Bosnia-Herzegovina shows that the tension between endogenous and exogenous forces during the constitutional transition had and still has a great impact on the quality of democracy.[145]

Most of all, the analysis of Bosnia-Herzegovina offered an opportunity to include internal diversity as an analytical lens through which to explore constitutional systems experiencing degradation.[146] Indeed, the article showed that constitutional provisions deemed necessary to manage diversity in a divided society have the potential to reinforce degradation and even prevent reforms to address democratic erosion. In this respect, it is important to remember the argument made by Jakab and Schweber, according to which 'constitutional rules are important [. . .] because *in combination with certain social and political forces* they can effectively protect democracy and the rule of law'.[147] Certainly, 'law in the books' on its own is not capable of 'fixing' constitutional degradation, and it should be connected to the societal and political contexts in order to meet the needs of citizens and protect the principles of

[142]A. Brezar, 'Bosnia's Peace Envoy Changed Laws Mid-election' *Euronews*, 7 October 2022, https://www.euronews.com/my-europe/2022/10/07/bosnias-peace-envoy-changed-laws-mid-election-but-what-does-it-mean, visited 21 June 2023.

[143]D. Kalan, 'Bosnia's Peace Envoy is Caught in a Political Tug of War' *Foreign Policy*, 24 February 2023, https://foreignpolicy.com/2023/02/24/bosnia-christian-schmidt-peace-envoy-constitution-changes/, visited 21 June 2023.

[144]*See also* A. Merdzanovic, '"Imposed Consociationalism": External Intervention and Power Sharing in Bosnia and Herzegovina', 5 *Peacebuilding* (2017) p. 22.

[145]*See* Woelk, *supra* n. 65, p. 36-42.

[146]For an interesting comparative politics perspective on the impact of ethnic politics on degradation, *see* J. Rovny, 'Antidote to Backsliding: Ethnic Politics and Democratic Resilience', *American Political Science Review* (2023) p. 1.

[147]Jakab and Schweber, *supra* n. 15, p. 3.

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constitutionalism. In relation to Bosnia-Herzegovina, this interaction between the legal rules and the socio-political context becomes even more significant when considering the process of European integration. The analysis provided in this article clearly indicates that, without the will of the political parties, the Constitution and legislation of Bosnia-Herzegovina cannot be reformed to meet the key priorities on democracy, fundamental rights, and the rule of law necessary to join the European Union.[148] Identifying a way forward is not an easy task, though some encouraging signals – such as the experience of the citizens' assembly[149] and the granting of the status of candidate country from the European Council[150] – should not be ignored.

As a final remark, the article aimed to emphasise that constitutional design for divided societies remains a pressing issue to be addressed by comparative constitutional law scholarship, and not only by comparative politics. Notably, internal diversity has become the norm rather than the exception in contemporary democracies, and many other divided societies exist in Europe, e.g. Spain, Northern Ireland, Belgium, Kosovo, North Macedonia, and Cyprus, as well as in the rest of the world. Looking at the European context, some of these societies have experienced deep political crises, such as attempts at unilateral secession in Spain and a fragile executive with recurrent stalemates in its formation in Northern Ireland. Others still experience territorial and institutional instability, such as Kosovo and Cyprus, with competing identity claims. In these constitutional systems, instability might lead to forms of degradation, and the analytic lens of internal diversity might be needed to address future democratic erosion.

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[148] *See* EU Commission, 'Commission Opinion on Bosnia and Herzegovina's Application for Membership of the European Union' (29 May 2019).

[149] *See* Woelk, *supra* n. 113, p. 270-271.

[150] European Council, 'Enlargement and Stabilisation and Association Process – Council Conclusions' (13 December 2022) paras. 78-94.

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