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# CONSTITUTION MAKING IN POST CONFLICT SOCIETIES: KOSOVO AND BOSNIA AND HERCEGOVINA COMPARED

## ALKOTMÁNYOZÁS KONFLIKTUS UTÁNI TÁRSADALMAKBAN: KOSZOVÓ ÉS BOSZNIA-HERCEGO- VINA ÖSSZEHASONLÍTÓ ELEMZÉSE

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ATIFETE JAHJAGA<sup>1</sup>

### 1. INTRODUCTION

Post conflict societies are generally characterized with difficult circumstances: dealing with the legacies of the conflict, rebuilding the society, peace and state building processes. Usually the post conflict societies experience the authority shift due to the repression and continuous human rights violations conducted by the previous repressive authorities. The authority shift including here governance arrangements, exercise of authority through separation of powers and protection for human rights is secured and guaranteed by the constitutions as the highest legal act. In regular situations, usually the constitutions are drafted and amended by the national institutions with the wide participation of the public, however in post conflict situations we are evidencing that the constitutions either are drafted entirely by the international community or the national institutions are supported heavily in the process of constitution drafting. The case of constitution making in Bosnia and Hercegovina (BiH) and Kosovo exemplify this developments. Comparing the content of the Constitution BiH and Constitution of Kosovo the objective of this paper is to identify how the legacies of the past governance authorities and human rights protections have been utilized in order to lay the grounds for eliminating future ethnic conflicts.

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## 2. CONSTITUTION MAKING IN POST CONFLICT SITUATIONS: INTERNATIONAL ASSISTANCE IN CONSTITUTION MAKING

Constitution making in the case of Kosovo and BiH has taken place in a very complex and critical circumstances characterized by wars that devastated the societies. The legacies of war crimes, crimes against humanity, conflict related sexual violence, missing persons and economic destructions characterize the post conflict reconstruction of the countries. Additionally, the societal divisions on ethnic bases continue to be present as well. In these circumstances the post conflict societies need assistance from the international community, at first in ending the conflicts – usually through peace agreements, and also in the rebuilding of the future. The internationally mediated peace settlements of conflicts<sup>2</sup> envisage enactment of constitutions, which institute a legitimate form of government, guarantee the protection of all ethnic groups and ensure a functional government.<sup>3</sup> In the case of BiH, the Dayton Agreement, which ended the war was drafted and finalized by international actors and was put ahead for signature to the state representatives.<sup>4</sup> This level of involvement of international community in constitution drafting questions the constitutions legitimacy from the traditional point of view.<sup>5</sup> In the case of Kosovo, international actors were heavily involved from in the drafting process of Kosovo's Constitution, starting with the identification of potential members of the constitutional Working Group foreseen by the Ahtisaari Plan.<sup>6</sup> The Ahtisaari Plan foresaw 'international supervisory structures' for the initial period of Kosovo's independence, and laid out detailed provisions for its constitution and various aspects of government.<sup>7</sup>

<sup>2</sup> The terms political settlement, and conflict settlement will be used to refer to the forms of internationally mediated agreements that have ended the violent conflicts including peace agreements.

<sup>3</sup> R. PARIS – T. D. SISK: *Managing Contradictions: The Inherent Dilemmas of Postwar Statebuilding*. International Peace Academy, 2007, <http://www.ipacademy.org/media/pdf/publications/iparpps.pdf> (2 March 2021), describing state-building as "a crucial element in any larger effort to create the conditions for a durable peace and human development in countries that are just emerging from war".

<sup>4</sup> The Dayton Agreement and all related texts maybe found in Office of the High Representative (ed.): *Bosnia and Herzegovina. Essential texts* (Sarajevo, 3rd revised and updated edition, 2000).

<sup>5</sup> A. STEWART: *The International Community in Bosnia: Enduring Questions of Legitimacy*. *Chinese Journal of International Law*, 2006 (3).

<sup>6</sup> M. WELLER: *Contested Statehood: Kosovo's Struggle for Independence*. Oxford University Press, 2009, 240.

<sup>7</sup> United Nations, Security Council, Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council Addendum Comprehensive Proposal for

Generally, the constitutional development process in post conflict settings aim for certain important goals, including here drafting a document that would be broadly acceptable to the people – a document that not only that is acceptable for the society that is intended to but also acceptable to the international community.

### 3. THE CONTENT OF CONSTITUTION IN KOSOVO AND BiH

The internationalized constitutions reflect international views about the structure of governance, division of power, appropriate legal standards, and vision of the nation in the post conflict setting.

Very often the political divisions marked with legacies of the historic past and further damaged with recent wars are masked with ethnic divisions. This historic political divisions get mobilized more in post conflict scene, through establishment of the political parties on ethnic lines forming simple democratic majority rule and domination of one political group over the others. Hence, conflict settlements in a form of peace agreements like in the case of BiH, or transposed in the constitutional text like in the case of Kosovo contain standards to remedy these divisions through providing for forms of government that ensure protection and representation of ethnic groups, and standards that constitute the political shared identity.

Constitutional engineering after international interventions have instituted mechanisms of power sharing consociational democracy and territorial autonomy, striving for adequate balance of accommodation and integration of ethnic diversity.<sup>8</sup> LIJPHART states that the internationalized constitutional drafters should be focusing in particular on the constitutional needs of countries with deep ethnic and other cleavages. In such deeply divided societies the interests and demands of communal groups can be accommodated only by the establishment of power sharing.<sup>9</sup>

In the case of BiH, the 1995 Dayton agreement preserved the Bosnian state by creating a consociational confederation of two radically autonomous 'Entities' and three peoples, with a complicated system of power-sharing structures to be

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the Kosovo Status Settlement I-IV, 26 March 2007 [Comprehensive Proposal for the Kosovo Status Settlement].

<sup>8</sup> A. LIJPHART: *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*. London – New York, Rutledge, 2008. See also: Y. GHAI (ed.): *Autonomy and Ethnicity: negotiating competing claims in multi-ethnic states: negotiating competing claims in multi-ethnic states*. Cambridge, Cambridge University Press, 2000.

<sup>9</sup> A. LIJPHART: Constitutional Design for Divided Societies. *Journal of Democracy*, 2004 (2), 96.

overseen by an international governor with wide-ranging authority. These very same structures are to be found in Annex 4 of the Dayton Constitution: as such reference is made in the Preamble to “*Bosniacs, Croats and Serbs, as constituent peoples (along with Others) ...*” In accordance with Article IV. I, the “House of Peoples”, as the upper body of parliament consists of five Croats, five Bosniacs and five Serbs. In accordance with Article V, the Presidency consists of three members: a Bosniac, a Croat and a Serb. In addition, there is ensured in accordance with Article V. 4. b. a proportion of constituent peoples in the nomination procedure for ministers and their deputies for the Council of Ministers, as a collegiate organ. As a result of the classification of Republika Srpska and the Federation of Bosnia and Herzegovina as entities in accordance with Articles I. 1 and I. 3 of the Constitution, the legal continuity of the Republic of Bosnia and Herzegovina, as internationally recognized state out of the 1992 dissolution of the communist state of Yugoslavia was ensured. Not only the change of name to Bosnia and Herzegovina, but also in particular the weak position of the so called national “Institutions of Bosnia-Herzegovina” under the distribution of power should be regarded as expressions of a balance of power and a drafting compromise between the warring parties. Article III. 1 states that only matters of foreign policy, foreign trade policy, customs policy, monetary policy, international and inter-Entity criminal law enforcement and regulation of inter-Entity transportation, are in the jurisdiction of the national organs, whilst the general clause of paragraph 3 of that Article provides that all “*governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina*” are within the jurisdiction of the entities. As a result, the entire internal and external security as provided by both the police and military apparatus has been constitutionally rendered to the jurisdiction of the entities. Consequently, and as a result of the *de facto* existing ethnic separation, the national organs themselves cannot properly function. Parliament and the Presidency cannot therefore fulfil their legislative role so that the “High Representative,” established under Annex 10 of the Agreement started – in interpreting his powers extensively – to promulgate legislation in the place of a Parliament blocked along ethnic lines.<sup>10</sup> The constitution established a deeply decentralized and unstable state, described by one of the former judges of the Court as ‘the weakest federal system in the world’,<sup>11</sup> which framed a system of

<sup>10</sup> J. MARKO: Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance European Diversity and Autonomy Papers. *EDAP*, 2004 (7), 6.

<sup>11</sup> J. MARKO: Constitutional Reform in Bosnia and Herzegovina. *European Yearbook of Minority Issues*, 2005 (5).

government for a truly unstable and ‘fragile democracy’.<sup>12</sup> YEE states that the BC institutionalized ‘ethnic sovereignty’,<sup>13</sup> a number of powersharing mechanisms that, because of their often discriminatory nature, stand in apparent conflict with the wide-ranging entrenched human rights protections.<sup>14</sup>

In Kosovo the Ahtisaari Plan, which was granted pre-eminence over even the Constitution itself,<sup>15</sup> prescribed “constitutional, economic and security provisions... aimed at contributing to the development of a multi-ethnic, democratic and prosperous Kosovo”.<sup>16</sup> Contrary to the BiH Kosovo is a unitary state, governed by central and municipal level.<sup>17</sup> The basic provisions of the Constitution confirm that Kosovo is a democratic state based on the equality of its citizens and the rule of law. The sovereignty of the state stems from its people. The state is indivisible and has no territorial claims against, nor shall seek union with, any state or part of any state, as required by the Ahtisaari document. The Constitution of Kosovo contains far more rigid consociational arrangements than that of BiH, even though the biggest minority group of Kosovar Serbs is only an estimated 5–8 per cent of the population.<sup>18</sup> Twenty of the 120 seats in the Assembly are reserved for minority communities, with at least ten for the Kosovo Serb community, and another ten guaranteed to other minorities, including Roma, Ashkali, Egyptian, Bosnian, Turkish, and Gorani.<sup>19</sup> Minority presence on government ministries, the Supreme Court, and the office of the Ombudsperson is also provided for in quotas.<sup>20</sup> Complex voting rules prevent majoritarianism. An amendment to the Constitution requires a two-thirds vote of the Assembly as well as two-thirds of the reserved minority seats.<sup>21</sup> Laws of ‘vital interest’ similarly require a majority of the Assembly and a majority of votes from the minority communities.<sup>22</sup> Unlike in Bosnia and Herzegovina, however, the laws characterized as of vital interest are exhaustively listed in the Constitution, which has caused less ‘ethnic blockage’

<sup>12</sup> S. ISSACHAROFF: *Fragile Democracies: Contested Power in the Era of Constitutional Courts*. Cambridge, Cambridge University Press, 2015.

<sup>13</sup> S. YEE: The New Constitution of Bosnia and Herzegovina. *European Journal of International Law*, 1996 (2).

<sup>14</sup> *Sejdić and Finci v. Bosnia and Herzegovina* [gC], nos 27996/06 and 34836/06 ECHR 2009; *Zornić v. Bosnia and Herzegovina*, no. 3681/06 ECHR 2014.

<sup>15</sup> Constitution of the Republic of Kosovo, Article 143.

<sup>16</sup> Comprehensive Proposal for the Kosovo Status Settlement, Ibid. fn 58.

<sup>17</sup> Kosovo Constitution, Articles 1 and Article 4.

<sup>18</sup> F. KORENICA – D. DOLI: The Politics of Constitutional Design in Divided Societies: The Case of Kosovo. In: *Croatian Yearbook of European Law & Policy*. Vol. 6. 2010.

<sup>19</sup> Kosovo Constitution, Art. 64 (2).

<sup>20</sup> Kosovo Constitution, Arts. 96, 103, 133.

<sup>21</sup> Kosovo Constitution Art.65 (2).

<sup>22</sup> Kosovo Constitution Art. 81.

in the executive and legislative processes than has been experienced in Bosnia and Herzegovina.<sup>23</sup> Until September 2012, the constitution of Kosovo vested final authority in the 'International Civilian Representative' (ICR) to oversee the implementation of the Ahtisaari Plan, which under Article 143(2) of the Constitution '*shall take precedence over all other legal provisions in Kosovo*'.

Kosovo's constitution also contains very strong human rights protections. Chapter II contains 35 articles on Fundamental Rights and Freedoms, while Chapter III concerns the Rights of Communities and Their Members, largely reproducing parts of the Ahtisaari Plan. Under Article 22, a range of human rights instruments are declared to be directly applicable in Kosovo, and in case of conflict they have priority over other laws or government acts. Under Article 53, the rights guaranteed in the constitution '*shall be interpreted consistent with the court decisions of the European Court of Human Rights*'. This very high minority protection is in line or even way ahead of the standards applied in other European countries, however their implementation still remain a challenge.<sup>24</sup> The literature on civil war settlement suggests that bills of rights serve two functions in post conflict constitutions: a regulative role to check the abuse of public power and a constitutive role to serve as the basis of a new constitutional identity.<sup>25</sup>

<sup>23</sup> Kosovo Constitution Article 81 [Legislation of Vital Interest] reads:

1. The following laws shall require for their adoption, amendment or repeal both the majority of the Assembly deputies present and voting and the majority of the Assembly deputies present and voting holding seats reserved or guaranteed for representatives of Communities that are not in the majority:

- (1) Laws changing municipal boundaries, establishing or abolishing municipalities, defining the scope of powers of municipalities and their participation in intermunicipal and cross-border relations;
- (2) Laws implementing the rights of Communities and their members, other than those set forth in the Constitution;
- (3) Laws on the use of language;
- (4) Laws on local elections;
- (5) Laws on protection of cultural heritage;
- (6) Laws on religious freedom or on agreements with religious communities;
- (7) Laws on education;
- (8) Laws on the use of symbols, including Community symbols and on public holidays.

2. None of the laws of vital interest may be submitted to a referendum.

<sup>24</sup> E. LANTSCHNER: Protection of Minority Communities in Kosovo: Legally Ahead of European Standards – Practically Still a Long Way to Go. *Review of Central and East European Law*, 2008 (33).

<sup>25</sup> S. CHOUDHRY: After the Rights Revolution: Bills of Rights in the Postconflict State. *Annual Review of Law and Social Science*, 2010 (6).

#### 4. CONCLUSION

In the case of BiH, constitutional structure outlined in Dayton peace agreement continues to face criticism in that the governance arrangements contributing to political and ethnic divisions, leading to challenges in governance and reforms have been discussions about the need for constitutional. In the case of Kosovo, the constitutional set up is consider positive since it provides for integration of communities in governance structures and provide wide human rights protections. However, there is a need for advancement of political elite to use the constitutional safeguards and not be hampered by political interests. Also, both constitutions, that of BiH and Kosovo establish a Constitutional Court with the authority to review the constitutionality of laws and decisions at both the state and entity levels that derive from the constitution and other legal framework.

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