

Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia- Herzegovina and Kosovo Compared

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- I. Introduction
 1. Divided Societies as a Challenge for Internationalized Constitutional Projects
 2. Comparative Perspectives: Three Forms of Constitutionalism in Bosnia-Herzegovina and Kosovo
- II. The Historic Context and the Internationalization of Constitution-Making in Bosnia-Herzegovina and Kosovo
 1. The Historical and Ethno-Political Context
 2. The Internationalized Genesis of the Constitutional Orders
- III. Ethnicity in the Constitutional Orders and Constitutional Jurisprudence of Bosnia-Herzegovina and Kosovo
 1. The Conceptual Status of Ethnic Groups: Between *Ethnos* and *Demos*
 2. Territorial Organization: Local Self-Determination or Ethnic Segregation?
 3. Ethnic Quotas and Vetoes: Balancing Protection and Participation with Democratic Equality and Majority Rule
- IV. Forms and Defects of Internationalized Constitutionalism in Bosnia-Herzegovina and Kosovo
 1. Internationalized Constitutional Courts
 - a. Composition
 - b. Competencies
 - c. Applicable Law and Standards of Review
 2. International Supervision by the Representatives of the International Community
- V. Concluding Observations

I. Introduction

Over the past decades, the international community has increasingly become involved in processes of state-building. These processes often include the creation of new constitutional orders. Although this is not an entirely new phenomenon, internationalized constitution-making has gained particular momentum since the mid-1990s in such diverse circumstances as Bosnia-Herzegovina, Macedonia, East Timor, Sudan, Afghanistan, Iraq and Kosovo.¹ All these internationalized constitutional projects draw to some extent on basic concepts of liberal constitutionalism, such as democracy, separation of powers, rule of law and human rights. However, constitutional choices in these contexts go beyond classical questions of the architecture of democracy and the rule of law. They pose the problem of constitutional design in “divided societies”, and they raise the connected question of the legitimate constitutional role of international institutions and of international law.

1. Divided Societies as a Challenge for Internationalized Constitutional Projects

In political science, a society is considered as “divided” not simply because it is ethno-culturally diverse. Rather what defines a divided society is that these differences are, in the words of *Sujit Choudhry*, “politically salient – that is, they are persistent markers of political identity

* The views expressed here are given from a personal academic point of view and not in an official judicial capacity.

** The views expressed here are his own and do not reflect the position of the GIZ. Both authors would like to thank Karin Oellers-Frahm for her comments on an earlier version of this paper.

¹ For an overview, see A. von Bogdandy/ S. Häußler/ F. Hanschmann/ R. Utz, “State-Building, Nation-Building, and Constitutional Politics in Post-Conflict Situations: Conceptual Clarifications and an Appraisal of Different Approaches”, *Max Planck UNYB* 9 (2005), 579 et seq., and further contributions in that volume; S. Chesterman, *You, the People. The United Nations Transitional Administration, and State-Building*, 2004; N. Feldman, “Imposed Constitutionalism”, *Connecticut Law Review* 37 (2004), 857 et seq. and the responses to his contribution in the same issue.

and bases for political mobilization”.² Ethnicity is equated with political interest, and ethno-cultural diversity translates into political fragmentation.³ Political parties often are organized along ethnic lines, and simple majority democracy risks turning into domination of one ethnic faction over others. The general lack of trust between ethno-political groups renders it difficult to reach consensus on important questions of public policy, including the constitutional order and its day-to-day functioning. Hence ways must be found to enact a constitution which institutes a legitimate form of government and guarantees the protection of all ethnic groups, while still ensuring a modicum of governmental effectiveness. What is more, in situations where many features of the classical nation state are absent, the constitution must often constitute the very *demos* that governs itself through this foundational text⁴ – i.e. it must help create the shared political identity which transcends the dominant ethnic allegiances. In short: the challenge is one of both state- and nation-building at the same time.⁵

The question of how to address these challenges has been at the heart of a debate in comparative political science for some time. Political scientists have highlighted mechanisms of power sharing, consociational democracy or territorial autonomy, and they have discussed the adequate balance of accommodation and integration of ethnic diversity.⁶ Comparative constitutional law initially approached more contemporary aspects of constitutionalism from the specific perspectives of transitional democracy, minority protection or human rights law. Only recently have comparative lawyers started to give deeper thought to di-

² S. Choudhry, “Bridging comparative politics and comparative constitutional law: Constitutional design in divided societies”, in: S. Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?*, 2008, 3 et seq. (5).

³ Ibid.

⁴ Ibid., 5-6.

⁵ On the distinction between state- and nation-building see von Bogdandy et al., see note 1, 579 et seq.

⁶ B. Brian, “Political accommodation and consolidated democracy”, *British Journal of Political Science* 5 (1975), 477 et seq.; A. Lijphart, *Democracy in Plural Societies: A Comparative Exploration*, 1977; D. Horowitz, *Ethnic Groups in Conflict*, 1985; G. Lehmbruch, *Verhandlungsdemokratie. Beiträge zur vergleichenden Regierungslehre*, 2003; A. Lijphart, *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*, 2008.

vided societies as a more general and comprehensive phenomenon which affects all areas of constitutional law.⁷

This turn to comparative law coincides with a renewed interest of international law scholars in constitutional engineering after international interventions. For international law and international institutions often influence the genesis, substance and institutional design of the new constitutions for post-conflict societies. While power sharing and consociational devices have been used for some time, internationalization is a rather recent attempt at coping with the particularities of divided societies. The integration of international and constitutional law is often given a positive connotation as a form of “progressive constitutionalism”, but international constitutional engineering also raises questions with regard to the effectiveness and legitimacy of such external interventions in core areas of state sovereignty and popular self-determination. Generally speaking, models of internationalized constitutionalism in divided societies seem to challenge many of comparative constitutionalism’s basic theoretical prerequisites for legitimate government. Consequently, as *Joseph Marko* puts it with regard to Kosovo, it is precisely such environments which may be the litmus test for modern democratic theory and constitutionalist thinking.⁸

2. Comparative Perspectives: Three Forms of Constitutionalism in Bosnia-Herzegovina and Kosovo

In this article, we propose to approach divided societies from the perspective of comparative constitutional law. We make an attempt to compare two internationalized constitutional projects which lend themselves to comparison perhaps more than others: Bosnia-Herzegovina (BiH) and independent Kosovo, whose new constitution entered into

⁷ Y. Gai (ed.), *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*, 2000; S. Tierney, *Constitutional Law and National Pluralism*, 2004; S. Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?*, 2008. For a view of the practical relevance of constitutional law for managing cultural diversity worldwide, see UNDP, *Human Development Report: Cultural Liberty in Today’s Diverse World*, 2004.

⁸ J. Marko, “Power Sharing and Territorial Pluralism in Kosovo”, in: F. Palermo/ J. Woelk (eds), *Territorial Pluralism in Comparative Perspective*, 2011, in print.

force on 15 June 2008.⁹ Both territories share a common (constitutional) history within Yugoslavia and a similar experience of ethno-political violence. With ethnic tensions still ongoing, they both represent “divided societies” as defined above. Both have been placed in a highly internationalized regime by the international community – BiH at the beginning of the new wave of internationalized constitutional engineering, Kosovo much further down the road in that process. Given the experiences with and criticisms of the Bosnian model,¹⁰ one might thus expect to find a certain learning curve in constitutional design in Kosovo. In addition, the experiences gained from the implementation of the Bosnian constitution might contain lessons for the same process which Kosovo is currently undergoing. Conversely, the solutions em-

⁹ For first substantive treatments of the Kosovo Constitution, see J. Marko, “The New Kosovo Constitution in a Regional Comparative Perspective”, *Review of Central and East European Law* 33 (2008), 437 et seq.; M. Weller, “The Kosovo Constitution and Provisions for the Minorities in Kosovo”, *European Yearbook of Minority Issues* 6 (2006/07), 485 et seq.; D. Doli/ F. Korenica, “Calling Kosovo’s Constitution: A Legal Review”, *The Denning Law Journal* 22 (2010), 51 et seq.; id., “What about Kosovo’s Constitution: Is there anything special? Discussing the grundnorm, the sovereignty, and the consociational model of democracy”, *Vienna Journal on International Constitutional Law* 5 (2011), 49 et seq.; M. Riegner, “Die internationalisierte Verfassungsgerichtsbarkeit in Kosovo: Instrument zur Friedenssicherung und Entwicklungsförderung?”, *ZaöRV/ HJIL* 71 (2011), 543 et seq.; Marko, see note 8.

¹⁰ From the extensive literature, see on constitutional aspects for instance S. Yee, “The New Constitution of Bosnia and Herzegovina”, *EJIL* 7 (1996), 176 et seq.; C. Stahn, “Föderalismus im Dienste der Friedenssicherung – Bosnien-Herzegowina unter dem Friedensabkommen von Dayton”, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.), *Jahrbuch des Föderalismus*, 2002, 393 et seq.; J. Marko, “Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance”, *European Diversity and Autonomy Papers* 7/2004, available at <www.eurac.edu/edap>; K. Oellers-Frahm, “Restructuring Bosnia-Herzegowina: A Model with Pit-Falls”, *Max Planck UNYB* 9 (2005), 179 et seq.; J. Woelk, “Stagnation oder Integration: die Verfassung Bosnien-Herzegowinas”, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.), *Jahrbuch des Föderalismus*, 2009, 353 et seq.; C. Steiner/ N. Ademovic, *Constitution of Bosnia and Herzegovina. Commentary*, 2010; C. Grewe, “Territorialität und Ethnizität in Bosnien-Herzegowina oder wie unmöglich ist die Demokratie?”, in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.), *Jahrbuch des Föderalismus*, 2010, 329 et seq.

ployed in Kosovo may have ramifications for the necessary constitutional reform process in Bosnia.

The comparison illustrates that both BiH and Kosovo respond to the divided nature of their societies by combining three forms of constitutionalism: “classical”, “ethnic” and “internationalized” constitutionalism. For the purposes of this article, we understand “classical constitutionalism” as a specific combination of normative principles governing the exercise of public authority, including the separation of powers, rule of law, human rights protection as well as democratic self-determination of a unified nation on the basis of citizenship, individual equality and majority rule. These elements of classical constitutionalism were modified in significant ways in BiH and Kosovo alike in order to adapt them to the contextual circumstances of the respective divided societies. We group these modifications into two analytical categories, which we term “ethnicization” and “internationalization” of the constitutional orders. Hence, the aim of our comparison is, firstly, to highlight the differences and similarities in the “ethnic” and “internationalized” constitutional choices made and to inquire how far these choices represent modifications of classical constitutionalist thinking. Secondly, we will attempt to evaluate how the respective constitutional choices perform in terms of legitimacy and governmental effectiveness, and we will try to point out problems and lessons learned.

Our analysis proceeds in four steps: we will begin in Part II. by briefly setting out the respective ethno-political and historic contexts and the internationalized genesis of the constitutional orders. In Part III., we address selected elements of ethnic constitutionalism and compare how the constitutional orders and constitutional jurisprudence attempt to balance recognition and accommodation of ethnic diversity on the one hand and inclusion and integration on the other hand. In Part IV., we turn to internationalization. More precisely, we will compare two important internationalized institutions imbued with a continuing constitutional role in both legal orders: the hybrid Constitutional Courts on the one hand, and the supervisory representative of the international community – termed High Representative in BiH and International Civilian Representative in Kosovo – on the other hand. Part V. attempts to draw some general conclusions.

Such comparisons, and evaluative assessments, pose methodological problems.¹¹ Constitutional arrangements and their performance cannot

¹¹ On respective problems of functionalist and contextualist comparative methodologies, see for instance G. Frankenberg, “Critical Comparisons:

be assessed by merely looking at constitutional texts, and both may depend more on diverging extra-legal contexts than on legal factors. In addition, the notions of governmental effectiveness (understood as the capacity to take and implement decisions) and of “classical constitutionalism” offer no homogenous and precise normative frame of reference. Yet, a context-sensitive comparative analysis still has the advantage that it highlights similarities and differences in constitutional choices, and possibly helps to identify how far these choices were determined by, or indeed helped change, the respective context. Moreover, comparison offers a – relative, if not absolute, and admittedly imperfect – standard for assessment. We do not intend to postulate a universally applicable normative constitutional standard, nor will we venture into a more thorough political, sociological or otherwise empirical evaluation. Instead, as comparative lawyers, we propose to pay particular attention to case law – from both Constitutional Courts and from the European Court of Human Rights. While the Constitutional Courts’ jurisprudence might provide some indication of the practical workings and difficulties of the systems, the European Court’s case law may furnish a provisional yardstick to assess the systems’ performance against what is increasingly seen as a common European constitutional standard.¹²

Re-thinking Comparative Law”, *Harv. Int’l L. J.* 26 (1985), 411 et seq.; R. Teitel, “Comparative Constitutional Law in a Global Age”, *Harv. L. Rev.* 117 (2003-2004), 2570 et seq.; P. Legrand, “The Same and the Different”, in: P. Legrand/ R. Munday (eds), *Comparative Legal Studies: Traditions and Transitions*, 2003, 240 et seq.

¹² J.A. Frowein, “Der Europäische Menschenrechtsschutz als Beginn einer europäischen Verfassungsrechtsprechung”, *Juristische Schulung* 26 (1986), 845 et seq.; F. Hoffmeister, “Die Europäische Menschenrechtskonvention als Grundrechtsverfassung und ihre Bedeutung in Deutschland”, *Der Staat* 40 (2001), 349 et seq.; C. Walter, “Constitutionalizing (inter)national Governance”, *GYIL* 44 (2001), 170 et seq. Using the European Court of Human Rights case law as a reference point is not to say, however, that such case law itself is necessarily immune to critique.

II. The Historic Context and the Internationalization of Constitution-Making in Bosnia-Herzegovina and Kosovo

Constitutionalization in BiH and Kosovo took place in specific historic and demographic circumstances. We will briefly recall this context before describing the internationalized genesis of both constitutions.

1. The Historical and Ethno-Political Context

The story of ethnic conflict in Yugoslavia and of its violent break-up has been told in detail elsewhere.¹³ As far as constitutional history is concerned, BiH and Kosovo had formally differing constitutional statuses under the constitutional system of the Socialist Federal Republic of Yugoslavia in place since 1974.¹⁴ BiH was considered as one of the constituent republics of the Federal Republic, a status which arguably included the constitutional right to secede, which Bosnia made use of in 1992. While the three main ethnic groups in BiH – Serbs, Croats and Bosniacs – were constitutionally recognized as co-nations within the Yugoslav Federation, Kosovo Albanians were accorded only the status of a “nationality”, whose ethnic kin had formed a nation state outside Yugoslavia.¹⁵ Kosovo enjoyed a somewhat lesser, but still considerable degree of self-government as an autonomous province within the Serb republic, a status which constitutionally precluded secession. In 1989/1990, a constitutional reform largely abrogated the autonomy status, and a declaration of independence by Kosovo-Albanian representatives in 1991 remained inconsequential.¹⁶

¹³ See, for instance, L. Sell, *Slobodan Milosevic and the Destruction of Yugoslavia*, 2002.

¹⁴ The Constitution of 1974 is reprinted in W. Simons, *The Constitutions of the Communist World*, 1980, 424 et seq. For the following, see notably the preambular article I as well as arts 1 and 2.

¹⁵ T. Várady, “Minorities, Majorities, Law, and Ethnicity: Reflections of the Yugoslav Case”, *HRQ* 19 (1997), 9 et seq.; Marko, see note 8, at 2.1.

¹⁶ E.F. Pichl, “Kosovo in den jugoslawischen Verfassungssystemen: 1974 bis 1998”, in: J. Marko (ed.), *Gordischer Knoten Kosovo/a. Eine politikwissenschaftliche, rechtsvergleichende und völkerrechtliche Analyse des Kosovo/a-Konflikts*, 2000, 75 et seq.; Sell, see note 13, 65 et seq.

The demographics of the two territories differ: according to the 1991 census, Bosnia had roughly 4.3 million inhabitants, of which 43 per cent identified as Bosniacs, 31 per cent as Serbs, 17 per cent as Croats, and nine per cent as others.¹⁷ Before the Bosnian civil war, these groups were dispersed over the entire territory, a situation which drastically changed during and after the war. The *Dayton Agreement* of 1995 split the Bosnian territory in two Entities, the Bosniac/Croat Federation of Bosnia and Herzegovina (about 51 per cent of the territory) and the Republika Srpska (49 per cent of the territory). According to a 1997 estimation quoted by the Constitutional Court of BiH,¹⁸ the share of Serbs living in the Republika Srpska has increased from 54,3 per cent in 1991 to 96,79 per cent in 1997, whereas the number of Bosniacs declined from 28,77 per cent to 2,19 per cent and Croats from 9,39 per cent to 1,02 per cent and the “others” from 7,53 per cent to 0,00 per cent.

In contrast, independent Kosovo is home to a clear ethnic Albanian majority and a considerably smaller group of local Serbs and other ethnic groups. Figures concerning current population shares in Kosovo vary, but range from 88-92 per cent Albanian, 5-8 per cent Serb and 4-5 per cent others, with a total population of less than two million inhabitants.¹⁹ Another difference is that Serbs and other ethnic minorities are less concentrated but dispersed over the territory. This is particularly true for most parts of central and south Kosovo, which holds some small enclaves of Serb populations. The exception is the district of North-Mitrovica, north of the Ibar river up to the border to Serbia,

¹⁷ Agency for Statistics of Bosnia Herzegovina, Demography, Thematic Bulletin 2 November 2010. As the Bosnian legislator has so far failed to adopt the necessary law to organize a new census, the numbers cited for periods after the war must be considered as estimations.

¹⁸ See U 5/ 98, Constituent Peoples, four partial Decisions of 28 and 30 January, 18 and 19 February, 30 June and 1 July and 18 and 19 August 2000, here: 3rd Partial Decision, paras 86 and 87. All Decisions of the Court are published in English on the website of the Court, available at <<http://www.ccbh.ba/eng>>.

¹⁹ UNMIK/ Kosovo Ministry of Public Services, Kosovo in Figures, 2005, 9, available at <<http://web.archive.org/web/20080309073836>>; Statistical Office of Kosovo, Series 4: Population Statistics, February 2008, 7; CIA World Factbook, Kosovo <<https://www.cia.gov/library/publications/the-world-factbook/geos/kv.html>>. The numbers cited here must equally be seen as estimations. The results of the 2011 census were still pending at the time of writing and already contested before publication.

which is mainly populated by Serbs.²⁰ In terms of the historic context, Kosovo, unlike BiH, has had a strong record of continuous ethnic division, oppression and retaliation between the Albanian and Serb populations ever since the Serb conquest of the territory from the Ottoman Empire in 1912.²¹

2. The Internationalized Genesis of the Constitutional Orders

When NATO interventions sought to bring an end to inter-ethnic violence in 1995 and 1999 respectively, the hostilities had intensified ethnic divisions, and BiH and Kosovo alike represented divided societies in their most extreme form.²² The establishment of a new peaceful order was thus confronted with questions at the heart of the debate on divided societies in political science:²³ how can the parties to a conflict be incentivized to compromise on a new constitutional order in the first place? And how can the constitution-making process be protected from capture by one particular ethnic group? In both situations, the answer to these questions was the strong involvement of the international community in the respective constitution-making processes. This external influence is captured by the notion of the “internationalized *pouvoir constituant*”.²⁴ Such international involvement touches upon core areas of internal sovereignty and collective self-determination and modifies the classical liberal notion of the *pouvoir constituant*, which requires it to be somehow connected to, and reflect, the will of the people.²⁵ Ex-

²⁰ Marko, see note 8, at 2.1.

²¹ Ibid., at 1.1.; E. Marko-Stöckl, “Identity Formation, State- and Nation-building in Bosnia-Herzegovina and Kosovo: On Historical Continuities and Discontinuities of Minority Conflicts in South East Europe”, in: E. Lantschner/ J. Marko/ A. Petričušić (eds), *European Integration and Its Effects on Minority Protection in South Eastern Europe*, 2008, 11 et seq.

²² On the effects of war on ethnic mobilization and identity formation, see I. Macek, *Sarajevo under Siege. Anthropology in Wartime*, 2009.

²³ Cf. Choudhry, see note 2, 20.

²⁴ P. Dann/ Z. Al-Ali, “The Internationalized Pouvoir Constituant: Constitution-Making Under External Influence in Iraq, Sudan and East Timor”, in: A. von Bogdandy/ R. Wolfrum (eds), *Max Planck UNYB* 10 (2006), 423 et seq.; N. Maziau, “L’internationalisation du pouvoir constituant”, *RGDIP* 106 (2002), 549 et seq.

²⁵ See, for instance, the overview by A. Kalyvas, “Popular Sovereignty, Democracy, and the Constituent Power”, *Constellations* 12 (2005), 223 et seq.;

ternal involvement may gain some functional legitimacy though, perhaps comparable to that of Constitutional Courts, if it pursues the legitimate aim of, for instance, mediating a compromise between conflicting parties, counterbalancing disproportionate factional influence and ensuring the inclusiveness and equal access to the drafting process. In addition, as has been argued elsewhere, legitimacy concerns can further be met if and when international involvement is transparent, as unobtrusive as possible, not guided by self-interest and rather concerns the process than the substance of constitution-making.²⁶ We will see that in Kosovo these requirements were met better than in BiH, which is partly due to lessons learned, but also a result of the different military and political context.

In BiH, constitution-making occurred in the context of diplomatic peace negotiations behind closed doors, and was shaped by the immediate need to end the continuing bloodshed. International involvement pursued the – surely legitimate – aim of ending the hostilities and coercing the conflicting parties to compromise on a new institutional order, but was not specifically aiming at a particularly inclusive or transparent drafting process. The result was the General Framework Agreement for Peace in Bosnia and Herzegovina (GFAP), also called the *Dayton Peace Agreement* (DPA), which is an international treaty supplemented by eleven²⁷ Annexes. Annex 4²⁸ contains the constitution of BiH. It is written in English language only and its content is considered to be largely imposed by the international community.²⁹ Despite its imposed

C. Cronin, “On the Possibility of a Democratic Constitutional Founding: Habermas and Michelman in Dialogue”, *Ratio Juris* 19 (2006), 343 et seq.; C. Möllers, “Pouvoir Constituant – Constitution – Constitutionalisation”, in: A. von Bogdandy/ J. Bast (eds), *Principles of European Constitutional Law*, 2006, 183 et seq.

²⁶ On legitimacy considerations and (the absence of) legal requirements regarding external involvement in constitution-making processes, see Dann/ Al-Ali, see note 24, 458 et seq.; Feldman, see note 1, 880 et seq.; S. Choudhry, “Old Imperial Dilemmas and the New Nation-Building: Constitutive Constitutional Politics in Multinational Polities”, *Connecticut Law Review* 37 (2005), 933 et seq. (936 et seq.).

²⁷ Some authors speak of twelve Annexes see <http://www.ohr.int/dpa/default.asp?content_id=380>, given that Annex 1 is divided in Annex 1 A and Annex 1 B.

²⁸ Reprinted in Steiner/ Ademovic, see note 10, 1 et seq.

²⁹ On the genesis of the constitution and the lack of real negotiations, see Oellers-Frahm, see note 10, 187 et seq.

nature, the *Dayton* Constitution largely accepted the territorial partition along the frontlines of the day, which is reflected in the provisions on territorial organization and on the status of ethnic groups.³⁰

While the *Dayton Agreement* deserves credit for having ended the armed conflict, its unrepresentative and intransparent genesis and its imposed nature have cast doubts on the Constitution's internal legitimacy. The text entered into force simply upon signature by the presidents of the Republics of Serbia, Croatia and BiH, i.e. two foreign officials not representing those subjected to the newly established order.³¹ The text was never ratified nor formally approved by representatives of the entire people of BiH.³² It derives its formal validity from international law, and its legitimacy rests on the international law principle of state consent, and not on the constitutional law principle of popular sovereignty. The constituent power, incarnation and symbol of state sovereignty, has largely been transferred to the international community. This is perceived as a legitimacy deficit, which has impaired the Constitution's ability to fulfil important constitutional functions.³³ Subsequent attempts to amend the constitution and remedy its deficiencies, as had been intended by its framers, have failed until today due to disagreements among the local mostly mono-ethnic political parties, which is the actual core of the Bosnian constitutional malaise today.³⁴

³⁰ E. Šarčević, "Völkerrechtlicher Vertrag als 'Gestaltungsinstrument' der Verfassungsgebung: Das Daytoner Verfassungsexperiment mit Präzedenzwirkung?", *AVR* 39 (2001), 297 (329 et seq.).

³¹ *Ibid.*, 309.

³² While the Parliament of the former Republic of BiH approved the text, it did so without the majority required for constitutional amendments under the applicable old constitution. It was only accepted later by the respective legislative bodies of the two Entities composing the new state of BiH, the Federation of BiH and the Republika Srpska. See C. Steiner/ N. Ademovic, "Introduction: Genesis and Legitimacy of the Constitution of Bosnia and Herzegovina", in: *id.*, see note 10, 29 et seq.; Marko, see note 10, 8 et seq.

³³ From the literature on this problem, see e.g. Steiner/ Ademovic, see note 32, 30 et seq. Šarčević, see note 30, 305 et seq., doubts whether it is a constitution at all. For a contrary view that analyses the situation as a "legal revolution", see N. Maziau, "Les constitutions internationalisées. Aspects théoriques et essai de typologie", available at <www.unisi.it/ricerca/dip/dir_econo/COMPARATO/maziau.doc>.

³⁴ On the (failed) reform efforts, see J. Marko, "Constitutional Reform in Bosnia and Herzegovina 2005-06", *European Yearbook of Minority Issues* 5 (2006-2007), 2008, 207 et seq.; Woelk, see note 10, 361 et seq.

If these criticisms apply to a lesser extent to Kosovo, this is first and foremost due to the different political context in which constitution-making took place. Kosovo had been placed under international territorial administration and military control by Security Council Resolution 1244 of 10 June 1999.³⁵ Constitution-making occurred in several steps and mainly in the context of negotiations about Kosovo's future status. Territorial control and the prospect of independence gave the international community considerable political leverage over both Belgrade and the Kosovo Albanian leadership. When the Constitution of the Republic of Kosovo entered into force in June 2008, this was only the last of multiple steps in the internationalized process:³⁶ already in 2001, the head of the UN territorial administration, the Special Representative of the Secretary General, had decreed a so-called "Constitutional Framework for Provisional Self-Government in Kosovo"³⁷ on the basis of Security Council Resolution 1244. The Framework created provisional institutions of self-government, including an Assembly of the Republic of Kosovo (Kosovo Assembly) as a legislative body.³⁸ Further steps of constitution-making occurred mainly in the context of subsequent status negotiations with Belgrade, moderated by the UN special envoy *Martti Ahtisaari*. Kosovo Albanians were represented by a "Unity Team", whose composition was largely determined by earlier elections held under international supervision and boycotted by Kosovo Serbs.³⁹ The negotiations eventually failed, and *Ahtisaari* unilaterally submitted

³⁵ For a comparative overview over UN territorial administration in BiH and Kosovo, see C. Stahn, "International Territorial Administration in the former Yugoslavia: Origins, Developments and Challenges ahead", *ZaöRV/HJIL* 61 (2001), 107 et seq.; J. Friedrich, "UNMIK in Kosovo: Struggling with Uncertainty", *Max Planck UNYB* 9 (2005), 225 et seq.

³⁶ For a more detailed account of the following legislative history, see Marko, see note 9, 439 et seq.; M. Riegner, "The two faces of the internationalized *pouvoir constituant*: Independence and constitution-making under external influence in Kosovo", *Goettingen Journal of International Law* 2 (2010), 1035 et seq. (1041 et seq.).

³⁷ UNMIK Regulation 2001/9 of 15 May 2001.

³⁸ C. Stahn, "Constitution Without a State: Kosovo under the United Nations Constitutional Framework for Self-Government", *LJIL* 14 (2001), 531 et seq.

³⁹ On the status negotiations, see in detail M. Weller, *Contested Statehood: Kosovo's Struggle for Independence*, 2009; H. Perrit, *The Road to Independence for Kosovo. A Chronicle of the Ahtisaari Plan*, 2010.

the so-called “Comprehensive Settlement Proposal”⁴⁰ (*Ahtisaari Plan*) to the UN in March 2007, recommending “supervised independence” for Kosovo. Due to disagreements with Serbia and the Russian Federation, the proposal was neither included in an international treaty nor endorsed by the Security Council. It was only unilaterally accepted as binding by the Kosovo Assembly and in the Kosovo Declaration of Independence of 17 February 2008.⁴¹

Unlike the *Dayton Agreement*, the *Ahtisaari Plan* did not comprise a constitution as such. Rather its Annexes contained detailed procedural and substantive prescriptions for future constitution-making in an independent Kosovo. These prescriptions were deeply concerned with the constitutional protection of the Serb and other minorities in the newly independent polity. The protective mechanisms were largely imposed upon the Albanian majority, who accepted them in exchange for independence. As foreseen by the *Ahtisaari Plan*, the actual constitutional text was drafted by a constitutional commission of local representatives, supported by international advisors.⁴² The draft was then approved by the International Civilian Representative, who had largely replaced the Special Representative of the Secretary General, and by the Kosovo Assembly.⁴³ The constitutional text is written in Albanian, Serbian and English and closely follows the substantive prescriptions in the *Ahtisaari Plan*, notably with regard to minority protection. As a result of the entire process, the Constitution’s legitimacy is formally based on popular sovereignty and on the consent of those governed by it. International involvement pursued the legitimate aim of ensuring the inclusiveness of, and equal access to, the drafting process, in particular for the Serb minority. Influence on substance extracted far-reaching concessions regarding minority protection from the dominant Albanian majority. Hence, even though international influence was indirect and gave way to mainly local involvement towards the end, it nevertheless was – and remains – pervasive. Thus local elites still deplore a sense of lack of ownership at times, while the Serb minority living within Kos-

⁴⁰ Doc. S/2007/168/Add. 1 of 26 March 2007, available at <<http://www.unosek.org/unosek/en/statusproposal.html>>.

⁴¹ On the status process and the Plan, see Marko, see note 9, 441 et seq.; Perit, see note 39, 119 et seq.; Riegner, see note 36, 1044 et seq.

⁴² On the drafting process, see Marko, see note 9, 442 et seq.; J. Tunheim, “Rule of Law and the Kosovo Constitution”, *Minnesota Journal of International Law* 18 (2009), 371 et seq. (374 et seq.).

⁴³ Riegner, see note 36, 1048 et seq.

ovo, which already felt unrepresented by Belgrade during the status talks, largely boycotted the immediate constitution-making process and initial elections.⁴⁴

The differing political contexts, namely the situation of extreme urgency in Bosnia, render it difficult to draw general conclusions from the comparison. For sure, it stresses the need to apply equal care not only in the drafting of substantive provisions, but also in the design and timing of the constitution-making procedure. The comparison may suggest that, where feasible, a carefully sequenced, multiple step process may provide more initial legitimacy and more political space for adequate substantive constitutional choices than a one-off imposition. On the other hand, the genesis of a constitutional order – which, historically speaking, often does not satisfy the very democratic requirements it purports to establish – is only one factor in later perceptions of legitimacy. Subsequent democratic practice under the new constitution may generate its own legitimacy, and acceptance by elites and the population also depends on the day to day performance of the new institutional order. This raises the question of how the constitutional orders of BiH and Kosovo, once established, perform in practice, notably in managing inter-ethnic relations.

III. Ethnicity in the Constitutional Orders and Constitutional Jurisprudence of Bosnia-Herzegovina and Kosovo

The constitutional orders of BiH and Kosovo both recognize ethnicity as a constitutional category and employ devices of consociational democracy, power sharing and territorial autonomy to contain ethnic divides. Thus both represent models of “ethnic constitutionalism” and ethnically conceived nation states. Yet, the two systems put different emphasis on ethnic distinctions on the one hand and civic elements and democratic equality on the other. They provide different answers to the question of how much accommodation and how much integration of ethnic diversity is needed in divided societies.⁴⁵

⁴⁴ Marko, see note 9, 449 et seq.

⁴⁵ On the “accommodation v. integration” debate, see J. McGarry/ B. O’Leary/ R. Simeon, “Integration of accommodation? The Enduring Debate in conflict regulation”, in: Choudhry, see note 7, 41 et seq.

It is important to note that the ethnicization of constitutional life is not a new phenomenon or necessarily a “western” imposition, but was already a feature of the Socialist Federal Republic of Yugoslavia’s constitutional order.⁴⁶ The 1974 Constitution had already established a complex system of power sharing which recognized ethnically conceived co-nations or nationalities, and constitutional practice was increasingly influenced by ethnic aspects from the 1980s onwards.⁴⁷ Yet, the partial continuation of these historic arrangements occurred in a radically changed context, characterized by its post-conflict nature and imposed democratic constitutionalism. This had more or less problematic consequences, and we will discuss three structural aspects of ethnic constitutionalism that stand out as problematic in BiH: the overemphasis on ethnic collectives on a conceptual level, which has favoured a general ethnicization of political and constitutional life (under 1.); territorial organization and its segregating effects (2.); and the power sharing mechanisms within the central institutions of government, where ethnic quotas and vetoes have led to discrimination, political stalemate and governmental ineffectiveness (3.). Each part first describes the constitutional arrangements in BiH, then discusses their practical effects and problems in light of case law, and eventually turns to the lessons learned and problems encountered in Kosovo.

1. The Conceptual Status of Ethnic Groups: Between *Ethnos* and *Demos*

One of the fundamental questions of constitutional design in divided societies is how the constitution conceptualizes the status of the ethno-cultural collectives it seeks to accommodate and integrate. Such general conceptions of *ethnos* or *demos* not only furnish the ratio for concrete institutional or territorial arrangements, but also reflect, and possibly influence, processes of collective identity formation and “nation-building”.⁴⁸ In BiH, the *Dayton Agreement* implicitly but clearly re-

⁴⁶ Cf. article 1 of the 1974 Constitution, which defines the Federation as a “state community of voluntarily united nations and their Socialist Republics.”

⁴⁷ Várady, see note 15, 10 et seq.; F. Bieber, “Jugoslawien nach 1945”, *Historicum* 2002/2003, 22 seq.; A. Mujkić, “We, the Citizens of Ethnopolis”, *Constellations* 14 (2007), 112 et seq.; Marko, see note 8, at 2.1.

⁴⁸ See on the aspect of national identity formation von Bogdandy et al., see note 1, 599 et seq.; R. Utz, “Nations, Nation-Building, and Cultural Inter-

jects the concept of a single nation state as well as the approach of “minority protection”, when it concludes the preamble of the Constitution by the formula: “Bosniacs, Croats, and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows”. The – completely fictive⁴⁹ – constituent power mentioned in this provision are the three ethnic groups, the “Others” being put into brackets in their quality as both constituent peoples and citizens.⁵⁰ According to this provision, the Bosnian state is first of all composed by the constituent peoples and only secondly by the citizens. In other words, the group aspect with its collective dimension seems more important than the individual rights of citizenship. Indeed, citizens appear not only as a secondary category in the preamble, but possess two political identities: the Constitution institutes an Entity citizenship, from which national citizenship is derived (article I-7).⁵¹ Citizenship remains in a transitional situation, which differs from the concept in classical constitutionalism based on the “abstract” citizen and his or her identification with the political unity of the people of the state. In contrast, the ethnic elements in the Bosnian Constitution reflect, but also contribute to the fact that considerable segments of the political elites and of the population conceive of themselves as members of ethno-religious communities and not of a collective of citizens.⁵² Combined with premature democratic elections, these identity politics have repeatedly brought radical and ethnically oriented political parties into power.⁵³ This has intensified the ethnic divide, which pervaded not only the constitu-

vention: A Social Science Perspective”, in: von Bogdandy/ Wolfrum, *ibid.*, 615 et seq. Foundational: B. Anderson, *Imagined Communities*, 1983.

⁴⁹ Maziau, see note 24, 568 et seq.

⁵⁰ Šarčević, see note 30, 308.

⁵¹ Cf. the similar article 249 of the 1974 SFRY Constitution, which recognizes simultaneously a single citizenship of the SFRY and the citizenship in the different Republics.

⁵² Stahn, see note 10, 397; G. Haller, “‘Individualisierung’ der Menschenrechte? Die kollektive – demokratische – Dimension der Menschenrechte und ihre Bedeutung für Integrationsprozesse, illustriert durch das Beispiel des State-Building in Bosnien und Herzegowina”, *Zeitschrift für Rechtssoziologie* 31 (2010), 123 et seq. (124).

⁵³ On the issue of elections, see R. Belloni, “Peacebuilding and consociational electoral engineering in Bosnia and Herzegovina”, *International Peacekeeping* 11 (2004), 334 et seq.

tional life of the central state, but was also reflected in the constitutions enacted in the Entities, and in legislation on the local level.

As a result, the High Representative established by the international community has repeatedly used his para-constitutional powers to remove radicals from public office, and the Constitutional Court of BiH has been confronted with the consequences of ethnicization in numerous proceedings. The landmark ruling on ethnicity is the “Constituent Peoples” case of 2000.⁵⁴ Here, the Court was confronted with the basic question of what status the constituent peoples had within the two Entities. The Court concluded that the Entities were not to be equated with the territory of a particular constituent people, and that the three constituent peoples enjoyed equal collective rights in both Entities.⁵⁵ The two sub-state Constitutions, which the two Entities had enacted, had cast doubt on the equal status of the ethnicities by privileging the Serb population in the Republika Srpska and, respectively, Croats and Bosniacs in the Federation of BiH. The Constitutional Court invalidated numerous provisions in both Entity constitutions regarding, for instance, privileges of constituent peoples and the use of languages.

The Court derives most of its conclusions from the principle of equality of the constituent peoples,⁵⁶ and thus bases them on a collectivist and ethnic logic. But at the same time, the Court introduces a civic and individualist element in its reasoning by constructing a strong link between the equality of constituent peoples on the one hand and the principle of a democratic multi-ethnic state on the other hand. This principle, proclaimed in the preamble and article I-2, rests on the idea of a pluralist society⁵⁷ and on the general equality principle.⁵⁸ The Court employs expressions such as “compromise formula” or “balance” in order to make clear that ethnic power sharing and collective equality

⁵⁴ U 5/ 98, Constituent Peoples, four partial Decisions, see note 18.

⁵⁵ For discussions of the case, see C. Stahn, “Die verfassungsrechtliche Pflicht zur Gleichstellung der drei ethnischen Volksgruppen in den bosnischen Teilrepubliken – Neue Hoffnung für das Friedensmodell von Dayton?”, *ZaöRV/ HJIL* 60 (2000), 663 et seq.; N. Maziau, “Le contrôle de constitutionnalité des Constitutions de Bosnie-Herzégovine”, *Revue Française de Droit Constitutionnel* 45 (2001), 195 et seq.

⁵⁶ Cf. for a similar logic article 245 of the 1974 Constitution of the SFRY, which recognizes the equality of nationalities and nations within the state.

⁵⁷ Line 3 of the Preamble. See C. Grewe, “Peace in pluralism through democracy and fair procedures”, in: Steiner/ Ademovic, see note 10, 44 et seq.

⁵⁸ Line 1 of the Preamble.

must be balanced with individual equality, civic voting rights and political majority. In the Court's conception, constitutional rules and principles based on ethnic affiliation must be seen as an exception explicitly authorized by the Constitution. Consequently, they must be interpreted in a narrow way, and they are by no means a general organizational model for the state, the Entities or the local level.⁵⁹ Insofar, the constitutional principles of a multi-ethnic democratic state and of a pluralist society embody traditional elements of liberal constitutionalism and individual rights protection in the nation state and reflect political scientist "integrationism". In contrast, the constituent peoples represent collective rights and power sharing in a post-conflict and post-national consociational democracy or "accommodationism".⁶⁰

While the Constitutional Court certainly wished to balance ethnic and civic elements in the "Constituent Peoples" case in 2000, subsequent developments cast doubt on the success of this jurisprudence. The principle of equality of the constituent peoples could not prevent the increasing ethnic homogenization of the Entities, and in some instances the constitutional jurisprudence even favoured the generalization of ethnic representation at all levels of the state and in most fields of the public sphere.⁶¹ In subsequent case law, the Court invalidated the municipal statute of the city of Sarajevo for the reason that it conferred privileges, such as a guaranteed minimum representation, only to some and not to all constituent peoples.⁶² In other instances, the Court had to annul Entity coats of arms, hymns and flags, which constitute important symbolizations of collective identity, because they did not represent all ethnic groups.⁶³ In order to remedy such disintegrative identity politics, the Court had to go as far as to provisionally change the ethnically coloured names of towns and municipalities, which it considered inconsistent with the Constitution.⁶⁴ While the same results could have been achieved by reference to individual rights and equality of citizens, the Court largely stuck to the logic of collective equality. In sum, the

⁵⁹ U 5/ 98, 3rd Partial Decision, see note 18, para. 68. See also C. Steiner/ N. Ademovic, "Preamble", in: *id.*, see note 10, 61 et seq.

⁶⁰ Cf. on accommodation and integration Choudhry, see note 2, 26 et seq.

⁶¹ Grewe, see note 10, 329 et seq.

⁶² U 4/ 05, Statute of the City of Sarajevo, Decision of 22 April 2005.

⁶³ U 4/ 04, two Partial Decisions of 31 March and 18 November 2006 on Flags, Coats of Arms and Anthems of the Entities as well as on Official Holidays.

⁶⁴ U 44/ 01, Names of Towns, Decision of 27 February 2004.

integrative potential and argumentative reservoir contained in the constitutional provisions on citizenship, individual rights and non-discrimination remained dormant.⁶⁵

The defects of constitutional design and practice in BiH had become all too obvious by the time constitution-makers started drafting the Constitution of the Republic of Kosovo in 2007. Indeed, the constitutional text seems to react in many ways to the Bosnian experience, but also reflects the differing political and demographic context as outlined above:⁶⁶ the leverage of international actors, as well as the existence of one dominant Albanian ethnic group, enabled different constitutional choices than might have been possible in Dayton. Most of these choices regarding ethnicity were preconfigured by the *Ahtisaari* Plan, which in turn had been influenced by the standards established in and under the Constitutional Framework. Finally, the constitutional reform process in Macedonia had in the meantime furnished practical experience with more successful configurations of ethnic constitutionalism.⁶⁷

As a result, the Kosovo Constitution conceptualizes the status of ethnic groups rather differently than the *Dayton Agreement*: first of all, the preamble of the Kosovo Constitution recognizes only one “people of Kosovo”, which comprises all ethnic groups. Consequently, article 14 institutes a single citizenship of the Republic of Kosovo, and no “entity citizenship” like in Bosnia. The Law on Citizenship equally reflects an inclusive agenda.⁶⁸ These provisions clearly strengthen the civic conception of constitutionalism and represent a stronger counterbalance to the ethnic elements equally contained in the Constitution.⁶⁹ The fundamental norm on the conception of ethnicity is contained in article 3, which elevates the empirical ethnic diversity to a normative structural

⁶⁵ Similarly Stahn, see note 55, 689 et seq.

⁶⁶ At II. 1 and II. 2.

⁶⁷ Marko, see note 9, 438, 450. For details on the Macedonian compromise, see U. Brunnbauer, “The Implementation of the Ohrid Agreement: Ethnic Macedonian Resentments”, *Journal on Ethnopolitics and Minority Issues in Europe* 1 (2002), 1 et seq.; J. Marko, “The Referendum on Decentralization in Macedonia 2004: A Litmus Test for Macedonia’s Interethnic Relations”, *European Yearbook of Minority Issues* 4 (2004-2005), 695 et seq.

⁶⁸ D. Doli, “The Concept of Citizenship Through Time: Approaching the Inclusiveness and Equality. The Case of Kosovo Law on Citizenship”, *Contemporary Issues in Law* 10 (2010), 205 et seq.

⁶⁹ Cf. Marko, see note 10, 443.

principle of the Constitution:⁷⁰ “The Republic of Kosovo is a multi-ethnic society consisting of Albanian and other Communities, governed democratically with full respect for the rule of law through its legislative, executive and judicial institutions.”

The principle implies the recognition of ethnic groups as relevant constitutional categories and serves to legitimize a range of collective ethnic privileges and affirmative action provisions contained in the following provisions. It thus goes beyond the general equality principle (article 24) and the general principle of pluralism in the list of constitutional values (article 7). The different aspects of the multi-ethnicity principle are fleshed out in the provisions on state organization and the institutional order⁷¹ and on individual rights, which include *inter alia* the direct application of international human rights and minority protection instruments.⁷² In addition, Chapter III on the “Rights of Communities and their Members”, which implements Annex II of the *Ahtisaari* Plan, contains a number of objective affirmative action obligations on the part of the state (article 58) as well as individual and collective entitlements with regard to e.g. language, education and the media (listed in article 59), requires equitable representation in the public service (article 61) and institutes organizational and procedural protection mechanisms (arts 60 and 61), without, however, instituting fixed quotas.⁷³

Constitutional and official terminology avoids both the notions of “constituent people” and “minority”, but instead employs the term “community”. The Constitution defines the notion as “[i]nhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo ...”, but “every member of a community shall have the right to freely choose to be treated or not to be treated as such” (article 57 paras 1 and 2), thus adopting a more liberal and subjective approach. In practice, the respective protective mechanisms are geared first and foremost towards the small Serb population, which has become an overall minority in Kosovo but remains the majority in some municipalities. Besides, the mechanisms are also being used by the Turkish, Roma or Gorani popu-

⁷⁰ In a similar vein Doli/ Korenica, Calling Kosovo’s Constitution, see note 9, 62.

⁷¹ See below, III. 2 and 3.

⁷² See below, IV. 1.c.

⁷³ See also below, III. 2. and III. 3., IV. 1.b.

lations, and the Law on Communities⁷⁴ clarifies that if the majority Albanian community is in the minority in a particular municipality, it shall also enjoy specific entitlements derived from the multi-ethnicity principle.⁷⁵

From a normative perspective, the principle as such seems ambivalent. On the one hand, it implicitly considers ethnic communities as constituent elements of the entire society, but does not accord major groups the status of equal co-nations as in Bosnia. Rather the particular mention of the Albanian community, and the relegation of non-Albanian groups to the status of “Others”, might be regarded as having an unnecessarily dominating and divisive undertone. On the other hand, the principle characterizes the entire state and society as multi-ethnic, thereby suggesting one possible element of an overarching common national identity based on the integration of ethnic diversity. It will depend on constitutional practice which of the two elements shapes national and local politics as well as societal relations more intensely. To date, a truly multi-ethnic state and identity remain more a normative vision than a social reality.⁷⁶

This ambivalence is reflected in the early case law of the newly established, internationalized Constitutional Court of Kosovo, which started operating in September 2009.⁷⁷ It was confronted for the first time with inter-ethnic conflicts in the highly publicized “Prizren Emblem” case⁷⁸ and has started to flesh out its approach to multi-ethnicity in its Judgment of 18 March 2010.⁷⁹ In the much discussed ruling, the Court banned the coat of arms introduced by the municipality of Priz-

⁷⁴ Law No. 03/L-047 on the Protection and Promotion of the Rights of Communities and their Members, 13 March 2008.

⁷⁵ Cf. on this aspect Weller, note 9, 499 et seq.

⁷⁶ Marko, see note 8. See below, III. 2. and III. 3. for detailed assessments of the practical working of the ethnic aspects in the Kosovar constitutional system.

⁷⁷ For a detailed analysis of the Court, see below, IV. 1. The Decisions of the Court are available also in English language on the Court’s website at <www.gjk-ks.org>.

⁷⁸ Case No. KO 01/ 09, *Cemailj Kurtisi v. The Municipal Assembly of Prizren*, Judgment of 18 March 2010, available in English at <http://www.gjk-ks.org/repository/docs/ko_01_09_Ven_ang.pdf>.

⁷⁹ For a discussion of the case, see Riegner, see note 9, 564 et seq. See also Doli/ Korenica, *Calling Kosovo’s Constitution*, see note 9, 64.

ren because it violated the constitutional guarantees of multi-ethnicity.⁸⁰ The emblem had been pushed through by the Albanian majority in the city council and displayed the building of the “League of Prizren” and the number 1878. This referred to the birthplace and -year of the modern Albanian nationalist movement, which originated in Prizren. The provocative symbolism was challenged by members of the local minority communities living in and around Prizren,⁸¹ which is traditionally multi-ethnic and home not only to a Serb, but also Turkish, Gorani and other minorities.

The Constitutional Court followed the applicant’s arguments and held that the symbol violated the structural principle of multi-ethnicity in article 3, the catalogue of constitutional values, including pluralism, in article 7, and norms on individual and collective participation rights and identity protection (arts 57 para. 3, 58 para. 4, 59, 124 para. 1).⁸² The Court stressed the importance of symbols for collective identity formation – “symbols are not pure images and decorations”, “[they] have an influence on assembling and joining in one idea”⁸³ – and concludes “[T]he emblem of the Municipality ought to be a symbol of all the citizens and should reflect the multiethnic nature of the Municipality.”⁸⁴ The Court attached two legal consequences to these findings: firstly, it banned the use of the emblem; secondly, it ordered the municipal council to adopt a new multi-ethnic symbol within three months. While the first part has met with wide support and proved to be enforceable – the emblems are not in official use any more –, the second part has raised concerns regarding the separation of powers, expressed in a separate opinion by an international judge,⁸⁵ and has met enforcement problems.⁸⁶ The deadline had to be extended,⁸⁷ as the

⁸⁰ According to the explicit provisions in arts 113 para. 2 (2) and 62 para. 4 of the Constitution, municipal statutes are subject to review by the Constitutional Court.

⁸¹ Case No. KO 01/ 09, see note 78, para. 12: “The emblem, [the applicant] says, does not transmit a message of multi-ethnicity in the very multiethnic area that is the Municipality of Prizren.”

⁸² *Ibid.*, para. 32.

⁸³ *Ibid.*, para. 44.

⁸⁴ *Ibid.*, para. 46.

⁸⁵ Concurring Opinion of Judge Almiro Rodrigues, Judgment in the Case No. KO 01/ 09, available at <http://www.gjkkk.org/repository/docs/ko_01_09_mend_ang.pdf>.

⁸⁶ On the general problem of the execution of constitutional court rulings, see European Commission for Democracy through Law (*Venice Commission*),

Court was unable to force a political majority in the city council to adopt a new emblem.

In conclusion, the decision solicits two remarks: firstly, the case illustrates that constitutional law and the Constitutional Court in Kosovo, supported as elements of state building by the international community, are able to effectively determine negatively which forms of majority government are inconsistent with minority protection and non-discrimination principles. They experience much more difficulty, however, when engaging in positive measures of identity construction, and thus “nation” building, which largely remains the domain of democratic and inclusive politics.⁸⁸ The second remark regards the Court’s reasoning, which seems to oscillate between ethnic collectivist and civic conceptions of equality – the Court quotes almost all relevant constitutional provisions, and refers to both “citizens” and “communities” in its argument. The experiences of the Bosnian Constitutional Court certainly call for a careful balancing of both aspects. In the long run, individual equality of citizens and the value of pluralism enshrined in the Constitution might prove to hold an even more convincing and integrative argumentative reservoir than the concept of multi-ethnicity.

2. Territorial Organization: Local Self-Determination or Ethnic Segregation?

Territorial autonomy and federalism are classical organizational principles for divided societies.⁸⁹ They may satisfy self-determination demands on a local level and create a sense of security for particular groups. If misused, however, they may contribute to ethnic segregation and disintegration. In this regard, the Bosnian Constitution opts for a decentralized state structure, which does not explicitly link territorial

Decisions of Constitutional Courts and Equivalent Bodies and Their Execution, Report adopted by the Commission at its 46th Plenary Mtg at 17 May 2001, CDL-INF (2001) 9, available at <[http://www.venice.coe.int/docs/2001/CDL-INF\(2001\)009-e.asp](http://www.venice.coe.int/docs/2001/CDL-INF(2001)009-e.asp)>.

⁸⁷ Constitutional Court of Kosovo, Order of 21 June 2010, Case No. KO 01/09, *Cemailj Kurtisi v. The Municipal Assembly of Prizren*, available at <http://www.gjk-ks.org/repository/docs/case_no_ko_%2001_09.pdf>.

⁸⁸ Riegner, see note 9, 567 et seq.

⁸⁹ From the extensive literature, see the overview by J.A. Frowein/ R. Bank, “The Participation of Minorities in Decision-Making Processes”, *ZaöRV/HJIL* 61 (2001), 1 et seq. (18 et seq.).

organization and ethnicity. However, the fact is that the constitutional system, as it stands, almost unavoidably leads to a close and problematic interconnection of territoriality and ethnicity. The *Dayton Agreement* provides for a strong vertical separation of powers, the state being composed of two Entities: the rather centralized Republika Srpska and the strongly decentralized Federation of Bosnia and Herzegovina.⁹⁰ The Bosnians prefer to qualify this organization as a “complex” rather than a “federal” state, perhaps because this system is in some respects closer to a confederation than to federalism.⁹¹ This is evidenced by the distribution of competencies between the central state and the Entities. It is not only based on a general clause attributing powers, as a matter of principle, to the Entities (article III-3a)), but also restricts the competencies enumeratively assigned to the central level to a bare minimum (article III-1). As a result, the Entities are competent in matters of police, taxes, criminal and civil law, judiciary and property, and the central state remains weak and dependent on the Entities in formulating, executing and financing its policies. The still dominant position of the Entities is reinforced by the electoral system. Central institutions are elected by or within the Entities, so that all state power emanates from the Entities.⁹² This creates a problematic link between ethnic quotas on the central level and territoriality, discussed below.⁹³

As has been pointed out above, these constitutional choices were a concession to the military situation of the day and part of the peace bargain. They also intended to rebuild trust between the conflicting parties through a strong vertical separation of powers and guaranteed ethnic representation. However, this set-up meant that in constitutional practice power has largely been concentrated in the hands of decentralized and increasingly ethnically homogenized governmental units. Political parties rarely extend beyond one Entity and are mostly formed

⁹⁰ In addition, the district of Brcko enjoys a special status as a “single administrative unit of local self-government existing under the sovereignty of Bosnia and Herzegovina” (article 1, Statute of 7 December 1999), available at <http://www.ohr.int/ohr-offices/brcko/default.asp?content_id=5367>.

⁹¹ F. Bieber, “Governing Post-War Bosnia-Herzegovina”, in: K. Gál (ed.), *Minority Governance in Europe*, 2002, 321 et seq. (326); Stahn, see note 10, 393; Woelk, see note 10, 356. This mirrors the increasing decentralisation of the SFRY, especially the distribution of competencies in the 1974 Constitution.

⁹² On this point the similarity to the 1974 SFRY Constitution is also extensive: see for instance arts 284 and 321.

⁹³ At III. 3.

along ethnic lines. The entire system has contributed to the ethnic homogenization of the Entities, favoured political disintegration, complicated compromising in central institutions, and damaged the effectiveness of the central government.⁹⁴ The Constitution foresees mechanisms to partly remedy the weakness of central institutions, as it enables the Entities to transfer responsibilities to the central state (article III-5), but local political actors were unable to agree on such reforms. As a result, the responsibility was largely transferred to the international institutions. Hence it was mainly the High Representative who used his overriding legislative powers to transfer competencies from the Entities to the central level. For instance, he established a Central State Court, a demarche challenged before, but accepted by, the Constitutional Court.⁹⁵ The Court itself found in the “Constituent Peoples” case that the central level disposed of certain implied powers, notably to implement human rights provisions in the Constitution.⁹⁶ Generally speaking, such international influence has, however, not been able to overcome territorial segregation.

In light of these experiences and its different context, the Kosovo Constitution attempts to institute a stronger central government and to separate territoriality and ethnicity, at least on a normative level. Kosovo’s territorial organization is not federal, but unitary, with only two levels of governance: central institutions and municipalities. The Constitution concentrates most competences on the central level, but also contains a guarantee for local self-government (arts 123-124). Municipalities have standing in the Constitutional Court to contest the constitutionality of laws or acts of central institutions which curtail their right to local self-government (article 113 para. 4). This right is concretised by a range of exclusive statutory powers in important fields such as educational and social services and local planning.⁹⁷ These constitutional choices reflect the different demographics as well as the fact that the Constitution did not have to consolidate military losses and gains, due to international administration. Strong central institutions promise

⁹⁴ Marko, see note 10, 6; M. Zivanovic, “Lessons (not) learned with regard to Human Rights and Democracy: The case study of Bosnia-Herzegovina”, in: W. Benedek (ed.), *Lessons (not) learned with regard to Human Rights and Democracy. A Comparison of Bosnia and Herzegovina, Kosovo and Macedonia*, 2010, 30 seq.

⁹⁵ Cf. Stahn, see note 10, 398 et seq.

⁹⁶ Cf. Marko, see note 10, 28.

⁹⁷ Law on Local Self-Government Nr. 03/L-040 of 20 February 2008. See also Marko, see note 8, at 2.2.

more efficient government and seem to be more appropriate to a country of the size of Kosovo. Yet, local self-government in Serb territorial strongholds has become a source of concern. Due to Belgrade's insistence, territorial re-organization resulted in a number of municipalities with a Serb majority population.⁹⁸ In addition, the implementing legislation institutes an asymmetric system of local government: it grants designated municipalities with a Kosovo Serb majority population enhanced competences in health, educational, cultural and police matters, as well as the right to inter-communal and cross-border cooperation.⁹⁹ These privileges allow Serb municipalities to create a functional equivalent to territorial autonomy and open the door for continued influence from Belgrade. Parallel institutions supported by Belgrade continue to operate notably in Serb dominated North Mitrovica, where they fulfil governmental functions and intensify the ethnic territorial divide. The area thus remains under a sort of "dual sovereignty."¹⁰⁰

The Constitutional Court in Kosovo has yet to hand down decisions in this respect, but constitutional problems emerge already. The meagre text of arts 123-124 gives little guidance on how much self-government Serb municipalities enjoy under the Constitution. The constitutional guarantee is largely fleshed out by ordinary legislation, and the Constitutional Court will have to develop its own constitutional notion of local self-government.¹⁰¹ More importantly, the central government's partial lack of control over its territory has led, for instance, to massive backlogs of cases in certain municipal and district courts, which call into question access to justice, the right to an effective remedy and the right to trial within a reasonable time.¹⁰² Finally, dual sovereignty over Northern Kosovo as such is irreconcilable with the claim to normative validity and practical effectiveness of the Kosovo Constitution and remains a continuous source of ethnic tension. These devel-

⁹⁸ Ibid., at 2.2.; International Crisis Group, *Serb Integration in Kosovo: Taking the Plunge*, Europe Report No. 200, 12 May 2009.

⁹⁹ Cf. Marko, see note 8, at 2.2, with further references on the respective legislation.

¹⁰⁰ International Crisis Group, *North Kosovo: Dual Sovereignty in Practice*, Europe Report No. 211, 14 March 2011.

¹⁰¹ On the similar situation in Germany and respective case law of the German Constitutional Court, see e.g. E. Schmidt-Aßmann, "The Constitution and the Requirements of Local Autonomy", in: C. Starck (ed.), *New Challenges to the German Basic Law*, 1991, 167 et seq.

¹⁰² International Crisis Group, *The Rule of Law in Independent Kosovo*, Europe Report No. 204, 19 May 2010.

opments illustrate that de-linking territoriality and ethnicity on the constitutional level is problematic in the absence of effective central institutions which are able and, in the case of the international community, willing to actually enforce this constitutional choice. As a result, the “better” normative solution may in actual fact lead to a more significant divergence of normative order and social reality and thereby undermine the legitimacy of the entire constitutional order.

3. Ethnic Quotas and Vetoes: Balancing Protection and Participation with Democratic Equality and Majority Rule

Another classical element of power sharing in consociational democracy is the introduction of guaranteed representation, namely through quotas and reserved posts within state organs. They are means to ensure the participation of all ethnic groups and to protect their interests in legislative and executive decision-making. In BiH, the *Dayton* Constitution institutes a system of ethnic quotas in the central government, which ensures equal representation for all three constituent peoples irrespective of their population share and election results. The executive is composed of the Council of Ministers and the three-member Presidency. The central legislature consists of two parliamentary chambers, the House of Representatives and the House of Peoples. The system is truly bicameral, as legislation must be passed by both houses (article IV). The House of Representatives is elected in entitywide polls, and the Constitution does not institute quotas but only stipulates that 28 members have to be elected in the Federation and 14 in the Republika Srpska. In contrast, the members of the Presidency (article V-1) and the 15 delegates in the House of Peoples (article IV-1) are elected by the legislative bodies of the Entities and are subject to ethnic quotas. The Constitution not only stipulates that five of the 15 members of the House of Peoples are elected within the Republika Srpska and ten within the Federation, it also requires that the delegates from the Republika Srpska must all be Serbs, and that those from the Federation must be five Croats and five Bosniacs (article IV-1). Similarly, the three-member Presidency must consist of one Bosniac and one Croat, each elected from the territory of the Federation, and one Serb elected from the territory of the Republika Srpska (article V *chapeau* and article V-1).

Ethnic quotas and guaranteed minimum representation modify principles of democratic equality, as some groups gain a disproportionate influence on the composition of state organs. Yet, in many consocia-

tional democracies, quotas are seen as legitimate modifications of democratic equality and considered to be justified by the need to protect minorities and to ensure their participation and integration in political life.¹⁰³ However, the specific interconnection of territoriality and ethnicity in BiH raises serious normative problems with regard to the passive right to vote and democratic equality. The election rules concerning the House of Peoples and the Presidency imply that a “wrong residence” can deprive the members of the constituent peoples of their right to stand for elections: a Croat or Bosniac resident in the Republika Srpska cannot be elected to the House of Peoples or to the Presidency, and *vice versa*. In addition, the quota system means that those who do not identify themselves as a member of one constituent people cannot be elected at all to either organ.¹⁰⁴

These problematic arrangements have been contested several times before the Constitutional Court of BiH and eventually before the European Court of Human Rights.¹⁰⁵ The Constitutional Court rejected the complaints essentially for reasons of normative hierarchy:¹⁰⁶ the rules challenged in the applications are contained in the Constitution itself, and cannot therefore violate guarantees of non-discrimination and equality in the very same text. In addition, the Court refused to confer a supra-constitutional rank to guarantees of equality derived from the European Convention on Human Rights (ECHR) and its Protocols, which, by virtue of article II-2 of the Constitution, are directly applicable within BiH and “have priority over all other law”, but do not, in the Court’s view, trump other constitutional provisions on the composition of state organs.¹⁰⁷ The European Court of Human Rights did not face such problems of hierarchy: in the land-

¹⁰³ See e.g. Frowein/ Bank, see note 89, 5 et seq.

¹⁰⁴ Stahn, see note 10, 395; Woelk, see note 10, 363 et seq.; Grewe, see note 10, 329 et seq.

¹⁰⁵ For a discussion of this case law, see the comment by M. Milanović in *AJIL* 104 (2010), 636 et seq.

¹⁰⁶ AP 35/ 03, Elections to the House of Peoples of 28 January 2005, Dissenting Opinion Judge Grewe; U 5/ 04, Elections to the Presidency and the House of Peoples of 31 March 2006; U 13/ 05, Electoral Law of 26 May 2006, Dissenting Opinions of Judges Feldmann, Palavric and Grewe. See also Milanović, see note 105, 639 et seq.

¹⁰⁷ On the hierarchy question, see below, IV. 1.c.

mark *Sejdić and Finci* case¹⁰⁸ handed down in 2009, the Grand Chamber ruled on an application by Bosnian citizens who identified themselves as members of the Jewish and Roma communities and were therefore totally excluded from the House of Peoples and the Presidency. The applicants relied on the prohibition of discrimination in article 14 ECHR in conjunction with article 3 of Protocol 1, which guarantees free elections to the legislature. The second basis was the general prohibition on discrimination in article 1 of Protocol 12, which also applies to access to executive office. The Court held that the exclusion of non-constituent peoples indeed amounted to a violation of these standards. It did not accept the argument that the restoration of peace still justified these specific power sharing arrangements more than a decade after the civil war ended.¹⁰⁹

The Court does not elaborate systematically on potential standards of justification, and does not provide any guidance on the more general question what factual circumstances of dividedness may justify diversions from democratic equality. Thus the associated problem of democratic inequality caused by quotas and the linking of ethnicity and territoriality remains unaddressed. In any event, the Court's final conclusion is surely warranted by the situation on the ground in BiH, where elements of the present constitutional set-up precisely reinforce segregation instead of facilitating integration. It seems to be the first time that the European Court of Human Rights declares a constitutional provision of a state party to be in violation of the Convention, and it underlines that the margin of appreciation, which the Court generally leaves to states in electoral matters, is limited when it comes to discrimination on ethnic grounds. From a constitutionalist point of view, the ruling stresses that power sharing in divided societies does not justify any deviation from principles of democratic equality, but that acceptable forms of consociational democracy require a careful balancing of the rights of all, and not just some, communities.

These problematic effects of ethnic quotas are further exacerbated by the fact that the *Dayton* Constitution combines them with another classical element of power sharing: ethnic veto rights in legislative and executive decision making. These rules ensure that the representatives of each constituent people can block legislation they consider destruc-

¹⁰⁸ European Court of Human Rights, Grand Chamber, *Sejdić and Finci v. Bosnia and Herzegovina*, Application Nos. 27996/06 and 34836/06, Judgment of 22 December 2009.

¹⁰⁹ In the same vein, Milanović, see note 105, 638.

tive of the “vital interest” of their ethnic group. In principle, both the House of Representatives and the House of Peoples adopt legislation by simple majority. However, a proposed decision of the Parliamentary Assembly may be declared to be destructive of a vital interest of a constituent people by a majority of the Bosniac, Croat, or Serb Delegates in the House of Peoples. The invocation of the vital interest veto generally results in the convocation of a joint parliamentary commission, and, in case of continuing disagreement, in the referral of the matter to the Constitutional Court for review of “procedural regularity” (article IV-3 e) and f)). In addition, slightly different vital interest vetoes are operated in the House of Representatives (article IV-3 d)), and in the Presidency, where each single member can essentially block executive decision-making (article V-2 d)).

The combination of ethnic quotas and ethnic vetoes has several problematic effects. Firstly, constitutional practice has largely turned the House of Peoples into an organ of veto exercise, and excessive invocation of the vital interest veto has disabled legislative decision making to a considerable extent and further contributed to political inaction and governmental ineffectiveness.¹¹⁰ Moreover, the excessive veto use cements minority rule over a majority of citizens. It also intensifies discrimination of “Others”, whose parliamentarians in the House of Representatives do not dispose of a veto of their own. Finally, most disputes on the veto exercise end up in the Constitutional Court. As the *Venice Commission* has remarked, “it seems inappropriate to leave such a task with major political implications to the Court alone without providing it with guidance in the text of the BiH Constitution.”¹¹¹

In practice, institutional efficiency and the resolution of political stalemates also depend on how the Constitutional Court interprets its function to review the “procedural regularity” of the veto exercise. In its case law, the Court has adopted a double strategy to control the use of vetoes. Firstly, it interpreted its competence to review the “proce-

¹¹⁰ Woelk, see note 10, 355; Stahn, see note 10, 398. However, Bieber, see note 91, 328, considers that power sharing is not the main reason for the inefficiency of the decision making process, but rather the prevailing of the Entity interests and the interventions of the international community. With regard to constitutional history, it seems noteworthy that under the 1974 SFRY Constitution, the veto rights were generalized as well and have in practice contributed to increasingly immobilizing the central institutions.

¹¹¹ *Venice Commission*, Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, CDL-AD (2005) 004, para. 32.

dural regularity” broadly to encompass the power to examine whether the proposed legislation’s substance was truly “destructive of the vital interest”. Secondly, it applied an interpretation to the notion of “vital interest” and “destructiveness” which tends to favour the integration and reconciliation of the ethnic groups.¹¹² It held that “the effective participation of constituent peoples in the processes of political decision-making and prevention of absolute domination of one people by the others represent the vital interests of each constituent people.”¹¹³ It further concluded, for instance, that the official use of a language¹¹⁴ or the return of refugees¹¹⁵ was in the vital interest of all constituent peoples, and thus held that legislation introducing high hurdles to the restitution of property was destructive of the latter interest. Even though the Court’s case law has somewhat contributed to the resolution of blockages, it was unable to actively remedy legislative omissions and inaction. Instead, the High Representative extensively used his legislative powers to enact badly needed legislation, which has generally had a positive effect on the regulative framework and on the functioning of public administration,¹¹⁶ but has caused other problems discussed below.¹¹⁷ Eventually, only a constitutional reform will remedy the situation. For instance, the *Venice Commission* has rightly proposed to strengthen the position of the House of Representatives and of the Council of Ministers at the expense of the Presidency and the House of Peoples.¹¹⁸

¹¹² On the case law regarding vetoes, see R. Bainter/ E. d’Aoust, “Article 4”, in: Steiner/ Ademovic, see note 10, 629 et seq.

¹¹³ U 10/ 05, Vital Interest of the Croat People concerning the Law on Public Broadcasting System, Decision of 22 July 2005, para. 25, but in the case at hand, the Court considered that there was no violation of the vital interest of the Croat people, as well as in case U 7/ 06, concerning the Croat Defense Council, Decision of 31 March 2006, the destruction of the vital interest of the Bosniac people has not been recognized.

¹¹⁴ *Ibid.*, para. 28.

¹¹⁵ U 2/ 04 Bosniac Caucus, Vital Interest concerning the Amendments to Property Law, Decision of 28 May 2004. Similarly, in Case U 8/ 04 of 25 June 2004, the Court found the framework law on higher education to be destructive for the vital interest of the Croat people.

¹¹⁶ Stahn, see note 10, 398.

¹¹⁷ See on the High Representative in detail below, IV. 2.

¹¹⁸ *Venice Commission*, see note 111. See also R. Kocjančič, “Die Verfassungsreform in Bosnien und Herzegowina”, *Zeitschrift für öffentliches Recht* 62 (2007), 439.

However, reform efforts have failed so far due to a lack of consensus among the largely ethnically oriented political parties and elites.

The institutional arrangements in Kosovo follow a more classical separation of powers along the lines of a mixed parliamentary and consociational democracy. The legislative branch consists of the unicameral Kosovo Assembly, which essentially elects both the single President and the Prime Minister.¹¹⁹ Ethnicity is incorporated through a complex system of guaranteed representation, applicable to all three branches of government, and double-majority requirements, confined to the legislature. While ethnic quotas apply to all branches of the central government, they are not constitutionally linked to territoriality. The Kosovo Constitution thus avoids the failures of the Bosnian model and draws on the more positive experiences with the so-called *Badinter Formula* underlying the Macedonian Constitution since the *Ohrid Agreement* of 2001.¹²⁰

More precisely, of the Kosovo Assembly's 120 seats, 20 "are guaranteed for representation of communities that are not in the majority in Kosovo" (article 64 para. 2). Of these 20 seats, ten are reserved for the Kosovo Serb community and ten for the remaining communities (one each for the Roma, Ashkali and Egyptian communities, and one additional seat awarded to either the Roma, the Ashkali or the Egyptian community with the highest overall votes, three for Bosnians, two for Turkish and one for Goranis, arts 64 para. 2, 148 para. 1). Guaranteed representation rules apply to community participation in the executive on cabinet level¹²¹ and within the judiciary¹²² as well as on the municipi-

¹¹⁹ See in more detail on the parliamentary system of government Marko, see note 9, 444.

¹²⁰ Marko, see note 9, 438, 450.

¹²¹ Cf. article 96 paras 3 and 4: at least one Serb and one other minority minister, and at least two deputy ministers each. See further on these provisions and their potential effect on the building of grand coalitions as typical elements of consociational democracy, Doli/ Korenica, What about Kosovo's Constitution, see note 9, 64.

¹²² Arts 103 and 104 ensure minority representation among judges, with guaranteed quotas in appellate courts, while article 108 ensures minority representation in the Kosovo Judicial Council through a procedural mechanism relying on the minority delegates in the Assembly. Arts 109, 110 concerning prosecutorial authorities simply call for them to reflect the multi-ethnic nature of Kosovo.

pal level.¹²³ These rules embrace many ideas of consociational democracy,¹²⁴ but do not institute a generalized system of reserved posts covering most of the available positions, and do not exclude certain groups, but tend to prefer proceduralized mechanisms and the creation of specialized bodies representing group interests over fixed quotas. Also unlike in BiH, the single Presidency, which is elected by the Assembly, is not subject to any ethnicity requirements, but represents the “unity of the people” (cf. arts 84 et seq.).

The quotas ensure the overrepresentation of the minority communities relative to their population share, but do not prevent ethnic outvoting by the dominant Albanian majority. Hence, the quotas are complemented by a system of double-majority requirements applicable to the legislature, which replace the ill-defined “vital interest veto”. Unlike in BiH, the Kosovo Constitution foresees a double majority requirement in two specifically defined legislative scenarios, which places the Serb minority in a veto position in both cases. The first scenario concerns constitutional amendments, which require a two thirds majority of all deputies, including a two thirds majority of all deputies representing the minority communities (arts 65 para. 2, 144 para. 2). The second double-majority rule applies to “legislation of vital interest”, which requires for its adoption or amendment a simple overall majority as well as a simple majority among the 20 deputies representing minority communities (article 81). However, unlike in BiH, the vital interest veto is confined to eight legislative areas exhaustively enumerated in article 81 of the Constitution. They include the delimitation and competences of municipalities, local elections, community rights, language, education, cultural heritage, religious freedom and state symbols. Moreover, the first adoption of such laws, which occurred under strong international supervision, was not subjected to the veto requirement (article 149). Within these areas, the veto is a definitive one, in contradistinction, and reaction, to earlier experiences under international administration: the Constitutional Framework of 2001 had adopted a more liberal conception of power sharing and provided for similar legislative quotas, but only for a suspensive veto by the Serb minority. This led to them

¹²³ Article 62 reserves the post of the “Vice President of the Municipal Assembly for Communities” in multi-ethnic municipalities to a representative of minority communities and accords him standing in the Constitutional Court, but does not institute a general quota.

¹²⁴ See Doli/ Korenica, What about Kosovo’s Constitution, see note 9, 62 et seq.

being outvoted by Kosovo Albanian block voting on repeated occasions.¹²⁵

As a whole, the system indeed shows evidence of a certain learning curve within the international community. It contains mechanisms of guaranteed representation which have the potential to ensure political participation of ethnic minorities while reducing the risk of blockades by confining veto rights to limited and clearly defined areas.¹²⁶ It is noticeable that the cases where the vital interest was invoked in BiH largely correspond to the legislative areas enumerated in the Kosovo Constitution – with some exceptions such as the sensitive issue of property rights and restitution. It seems a preferable constitutional choice to state as a principle that vetoes are limited to some specified areas and define these areas more clearly. As far as early practice in Kosovo is concerned, it seems that the legislative process and executive decision making have not been affected by ethnic blockage to the same problematic extent. On the contrary, the Kosovo Assembly has adopted a substantial set of progressive legislation on minority and other issues, as required by Annex XII of the *Ahtisaari* Plan. This compulsory legislative agenda was part of the independence bargain and thereby prevented certain legislative omissions that occurred in BiH.

The International Civilian Representative, tasked to supervise the implementation of the *Ahtisaari* Plan, has not formally made use of his powers to intervene in constitutional or day to day politics. As for the Constitutional Court of Kosovo, it has issued several decisions regarding disputes within central state institutions, but has not been confronted so far with inter-ethnic conflict at the central level. With regard to compliance with the normative standards set out by the European Court of Human Rights in its *Sejdić* and *Finci* Judgment,¹²⁷ the system is less problematic inasmuch as it does not prevent certain citizens to stand for any public office on account of their ethnicity. Still, the legislative quotas do restrict equality in elections guaranteed under article 14 ECHR and article 3 of Protocol 1, as minority voters have a disproportionate influence on the final composition of the Assembly. Yet, as has been pointed out, the European Court of Human Rights has traditionally accorded a particularly wide margin of appreciation to Member States in the area of electoral systems, and would thus be likely to consider the quotas necessary for the sake of minority protection.

¹²⁵ Marko, see note 8, at 2.1.

¹²⁶ Similarly Marko, see note 9, 450.

¹²⁷ *Supra*, note 108.

What has turned out as problematic instead is Kosovo's lacking capacity to implement the progressive normative framework and the unwillingness of considerable segments of the Serbian elites and population to actually participate in central institutions. Many boycotted polls in independent Kosovo and rather voted in local elections organized by the Republic of Serbia. This illustrates the truism that normative arrangements of power sharing are insufficient in themselves, but must be made use of. The mechanisms elaborated under the headings of consociational democracy and power sharing are at least partly based on the assumption that the ethnic groups to be accommodated are politically active and eager, or at least willing, to actually share the power wielded by the state they live in.¹²⁸ In Kosovo, this willingness still hinges mainly on the normalization of relations between Kosovo and the Republic of Serbia, as the latter continues to wield considerable influence with local Serbs. Conversely, the Kosovo government dominated by ethnic Albanians has made little progress so far in implementing the normatively advanced minority protection and affirmative action provisions in the Constitution and in the implementing legislation. The creation of a truly multi-ethnic civil service has failed so far (with the notable exception of the Kosovo police), discrimination of minorities remains widespread and their political, social and economic inclusion a pressing need.¹²⁹

On a more general level, the comparative analysis illustrates that BiH and Kosovo employ structurally similar elements of "ethnic constitutionalism". However, the Kosovo Constitution indeed finds a better balance between ethnic and civic elements. These normative improvements can be attributed to lessons learned from BiH and elsewhere, but were also made possible by the different demographic context and increased leverage of the international community. The prob-

¹²⁸ Doli/ Korenica, What about Kosovo's Constitution, see note 9, 64, with further references.

¹²⁹ Marko, see note 8, at 3; 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* 33 (2008), 451 et seq. See also Commission Staff Working Document, *Kosovo 2010 Progress Report*, SEC (2010)1329; International Crisis Group, *Kosovo and Serbia after the ICJ Opinion*, Europe Report No. 206, 26 December 2010. For an early critique of UNMIK's handling of the question of whether to "encourage diversity or facilitate integration", see A. Schwarz, "Communities and Minorities in UNMIK's Virtual World of a Multicultural Kosovo", *ZaöRV/ HJIL* 63 (2003), 761 et seq., notably 778.

lems encountered in the first years of Kosovo's independence rather concern deficits in the implementation of the normative order and the inclusion of the Serb minority. Kosovo is, in the words of a critical observer, legally ahead of many European standards, but practically has a long way to go.¹³⁰

IV. Forms and Defects of Internationalized Constitutionalism in Bosnia-Herzegovina and Kosovo

The practical implementation of the respective peace plans and constitutional orders is first and foremost the responsibility of internal, democratic politics driven by representatives of the local population. However, the introduction of new elements of classical constitutionalism and their combination with ethnic moments in the post-conflict divided societies was seen as insufficient to guarantee the effective functioning of a legitimate government, and indeed turned out to be precarious in practice. Hence, the additional solution employed by the international community was the further internationalization of constitutional life. In Bosnia and Kosovo alike, international actors have ensured a continued constitutional role for internationalized institutions under the respective new legal orders. While a wide range of international and European institutions is present in both situations¹³¹, a comparative constitutional law perspective sheds light notably on two internationalized institutions imbued with a *constitutional* mandate: the Constitutional Courts on the one hand, and the High Representative (BiH) and the International Civilian Representative (Kosovo) on the other hand.¹³²

They represent two different forms of internationalization: the Constitutional Courts are hybrid institutions, whereas the offices of the Representatives are thoroughly international in nature. The hybrid model chosen for the judiciary integrates international elements into the

¹³⁰ Lantschner, see note 129, 451.

¹³¹ For an overview of the different forms of internationalization, see F. Bieber, "Institutionalizing Ethnicity in Former Yugoslavia: Domestic vs. Internationally Driven Processes of Institutional (Re)Design", *The Global Review of Ethnopolitics* 2 (2003), 3 et seq.

¹³² Both were Special Representatives of the European Union for certain periods of time. For the purposes of this article, we leave this aspect aside and focus on their respective constitutional roles.

classical structures of the judicial branch,¹³³ while the legislature and executive branch remain national. Instead, they are complemented by, and juxtaposed to, an entirely new international supervisory organ, which holds legislative and executive functions. As the following comparison will show, hybridization and the creation of new international organs have different consequences for the separation of powers, rule of law and democratic legitimacy. Thus, in the following part, we will first turn to the Constitutional Courts to illustrate the different forms and practices of their internationalization. In the next step, we will focus on the Representatives of the international community in order to compare their respective legal bases, powers, interventions and the consequences for constitutionalist principles.

1. Internationalized Constitutional Courts

Historically, the existence of Constitutional Courts is not an entirely new phenomenon in BiH and Kosovo, as they disposed of their own regional constitutional justice system under the Yugoslav constitution for some time.¹³⁴ Yet, the new Constitutional Courts differ considerably in terms of their enhanced powers and internationalized nature, and are essentially creations of the internationalized constitution-making processes. The Constitutional Court of BiH, foreseen in article VI of the Constitution, has become a key actor in political life and a driving force of incremental constitutional reform since its inception in 1997.¹³⁵ In Kosovo, a strong Constitutional Court was already envisaged in the

¹³³ Hybrid arrangements are used not only in the Constitutional Courts, but pervade the ordinary judiciary, too. See L. Dickinson, "The Relationship Between Hybrid Courts and International Courts: the Case of Kosovo", *New England Law Review* 37 (2003), 1059 et seq.; id., "The Promise of Hybrid Courts", *AJIL* 97 (2003), 295 et seq.; E. Bruch, "Hybrid Courts: Examining Hybridity Through a Post-Colonial Lens", *B. U. Int'l L. J.* 28 (2010), 1 et seq.

¹³⁴ Marko, see note 10, 7. See also article 375 of the 1974 SFRY Constitution.

¹³⁵ From the literature on the Court, see J. Marko, "The Status of the Constitutional Court in Bosnia: Law in the books and law in practice", in: Federal Ministry for Foreign Affairs (ed.), *Building Justice. A Conference on Establishing the Rule of Law in Post-Conflict Situations*, 1998, 149 et seq.; id., see note 10; D. Banovic, *Die Verfassungsgerichtsbarkeit in Bosnien und Herzegowina*, 2009.

Abtisaari Plan and instituted by the Constitution.¹³⁶ It started operating in 2009¹³⁷ and has already issued a number of sensitive decisions with considerable political import, causing *inter alia* the resignation of two successive Presidents of Kosovo.

Both Courts are designed to fulfil the function of a *pouvoir neutre*¹³⁸ in the divided societies, where constitutional politics tend to play out along ethnic lines. At the same time, ethnic dividedness makes their character as neutral institutions somewhat precarious. In order to ensure their ethnic and political neutrality, both courts are thus internationalized in several respects and designed as hybrid institutions, drawing from experiences with hybrid courts in other situations.¹³⁹ This somewhat departs from classical ideas of constitutional autonomy and national sovereignty and represents a key element of the model of internationalized constitutionalism employed in both contexts.¹⁴⁰ Therefore it is important to appreciate the efficiency of both Courts in up-

¹³⁶ For first assessments of the Court, see S. Hill/ P. Linden-Retek, "Supervised Independence and Post-Conflict Sovereignty: The Dynamics of Hybridity in Kosovo's New Constitutional Court", *Yale J. Int'l L.* 36 (2010), 26 et seq.; V. Morina, "The Newly Established Constitutional Court in Post-Status Kosovo: Selected Institutional and Procedural Concerns", *Review of Central and East European Law* 35 (2010), 129 et seq.; D. Doli/ F. Korenica, "Kosovar Constitutional Court's Jurisdiction: Searching for Strengths and Weaknesses", *German Law Journal* 11 (2010), 803 et seq.; F. Korenica, "Pointing the Rule of Law in a Transitional Polity: The Case of Kosovo's Law on the Constitutional Court", *Contemporary Issues in Law* 10 (2010), 183 et seq.; Riegner, see note 9, 556 et seq.

¹³⁷ Constitutional Court of the Republic of Kosovo, Annual Report 2009, at <http://www.gjk-ks.org/repository/docs/annual_report_ccourt_2009.pdf>.

¹³⁸ On this concept, see M. Herdegen, "Die Verfassungsgerichtsbarkeit als *pouvoir neutre*", *ZaöRV/ HJIL* 69 (2009), 257 et seq.

¹³⁹ Hill/ Linden-Retek, see note 136, 29 et seq. On other instances, see Dickinson, see note 133, 1059 et seq.; Bruch, see note 133, 1 et seq.

¹⁴⁰ Of course, neither the incorporation of international law into the constitution nor the presence of foreign nationals in superior organs of justice is altogether uncommon. Indeed, in the common law world, Supreme Court judges are at times drawn from foreign legal systems, and namely African countries do not seem to have issues with appointing jurists from, for instance, Jamaica. Even beyond that, the German jurist Ernst Forsthoff served as a constitutional adviser and court judge in divided Cyprus. Legal qualification, professional experience and personal integrity played a more important role than nationality in these circumstances. We thank Bruno Otto Bryde for these comments.

holding constitutional law, and to evaluate the positive, negative or neutral impact of the internationalization. The analysis of their hybrid composition (under a.), their competencies (b.), and the standards of review (c.) will help to answer these questions.

a. Composition

The first and the most visible aspect of the internationalized nature of both Courts is their hybrid composition, embodied by three international judges in each case. The participation of international judges is intended to prevent ethnic outvoting, to contribute expertise of comparative and international law, and thus to improve local judges' capacity in decision making. International actors can also contribute to overcome the ethnic divisions, thus favouring the building of a common identity which, in turn can strengthen the legitimacy, the independence and the impartiality of the Court and an efficient implementation of the Constitution. But it is also clear that the presence of such a foreign element can be seen as an intrusion into the national affairs, as an attempt at supervision, or on the contrary as a superfluous "decoration". In any case, the effect of the internationalization must be appreciated in a cautious approach. How can the situation in BiH and in Kosovo be assessed in this regard?

According to article VI-1 of the Bosnian Constitution, the Court is composed of nine judges, six local and three international. The local judges are elected by the legislatures of both Entities: four are selected by the House of Representatives of the Federation of BiH and two by the Assembly of the Republika Srpska. The three international judges are appointed by the President of the European Court of Human Rights after consultation with the State Presidency of BiH (article VI-1.a.)). In order to strengthen the Court's stability and its independence, perhaps also by transplant of Austrian rules, the term of the mandate is fixed to 70 years.¹⁴¹ The Constitution requires neither a special professional qualification (only a high moral standing) nor does it institute any official ethnic quota among the local judges. However, in practice the two judges elected in the Republika Srpska are Serbs and of the four judges elected in the Federation two are Croats and two Bosniacs.¹⁴² This composition, which is regulated by the Constitution itself, con-

¹⁴¹ The judges initially appointed for five years were not re-eligible.

¹⁴² See Marko, see note 10, 29 et seq. Arts 87 to 89 Rules of the Court refer to the judges coming from the different constituent peoples.

cerns the Plenary Court. The Plenary adopts its decisions by majority, so that the group of international judges allied to one ethnic group can outvote the two others.¹⁴³ The Plenary's jurisdiction concerns only abstract review of legislation, and those cases referred to it by the "Grand Chamber". The Grand Chamber, instituted by the Rules of the Court (article VI-2b)¹⁴⁴, is composed of five local judges, and is complemented by the "Chamber" of three judges.¹⁴⁵ The Grand Chamber is competent for individual appeals and deals with the bulk of cases handled by the Court, so that the Plenary meets only every other month. The Chambers decide unanimously, and only if unanimity among the local judges cannot be reached, the case is referred to the Plenary. This setup creates incentives to compromise, but referrals still happen frequently. Thus the most sensitive problems are resolved in the Plenary, sometimes according to ethnic divisions, sometimes in a quite transversal way.

The main practical difficulties of the Court result from the procedure governing the selection of local judges. The fact that no special professional qualification is required and that the Entities' legislators select the judges often led to the appointment of important political personalities. This favours the persistence of ethnic divisions and can question the independence of the Court. In one case, a local judge has even been dismissed by the unanimous decision of the others.¹⁴⁶ Furthermore, the ethnic quotas can raise difficulties when it comes to the election of the Court's President, since only one ethnic group can stand for election.¹⁴⁷ Nevertheless the Court managed to prevent the blockage of the whole institution by introducing special rules in case of a tied vote and has continuously functioned even while other organs were paralysed.¹⁴⁸ While these problems are not connected to the hybrid composition of the Court, hybridity, by its very existence, mechanically reduces the possible cases of undue ethno-political influence. In general,

¹⁴³ Furthermore, the judges have the faculty to publish with the majority Decision their individual concurring or Dissenting Opinion. It does not happen systematically, but is rather frequent.

¹⁴⁴ Arts 7 to 10 Rules of Court.

¹⁴⁵ The Chamber composed of the President and the two local Vice-Presidents takes unanimous Decisions on requests of interim measures and on designation of judges rapporteurs.

¹⁴⁶ Decision of 8 May 2010. After that, the Assembly of the Republika Srpska has refused for more than a year to select another Serb judge.

¹⁴⁷ Article 87 Rules of the Court.

¹⁴⁸ See Article 40 of the Rules as amended in 2009; Marko, see note 10, 30.

hybridity is certainly perceived quite differently depending on the point of view, be it from the inside of the Court, public opinion or political (ethnic) leaders. It may be seen as a contribution to the neutrality, independence, impartiality and professionalism of the Court, or as a risk of heteronomy and foreign domination. Generally, it seems however that the presence of international judges has at least helped on some occasions to improve the communication between the constituent peoples and with the international community. Such a mediating function may provide some additional legitimacy to the international actors and complement their functional legitimacy as *pouvoir neutre* and guarantors of the functioning, and deblockage, of the Court's decision making procedures.

The composition of the Constitutional Court of Kosovo follows a similar hybrid pattern.¹⁴⁹ It is staffed with nine judges: six locals, nominated by the Kosovo Assembly and appointed by the President of the Republic, and three internationals, appointed by the International Civilian Representative upon consultation with the President of the European Court of Human Rights.¹⁵⁰ Minority representation is ensured by the requirement that two of the six candidates proposed by the Assembly must be backed by a majority of the 20 parliamentarians representing the ethnic minority communities.¹⁵¹ These express rules in the Kosovo Constitution officialise the ethnic representation principles practiced in Bosnia to a certain extent, but only by including a procedural mechanism and not by establishment of fixed quotas, which seems preferable. Moreover, in reaction to the politicization of appointments in BiH, article 114 para. 1 of the Kosovo Constitution requires eligible candidates to be distinguished jurists with no less than ten years of relevant experience.

As a result, the first appointments in 2009 brought four judges of Kosovo Albanian origin, three of them law professors, to the Court; the

¹⁴⁹ See on more detail on the hybrid composition Hill/ Linden-Retek, see note 136, 34 et seq. On organization and composition see also Morina, see note 136, 137 et seq.

¹⁵⁰ Article 152 para. 4 of the Constitution, which foresees appointment by the International Civilian Representative, contradicts Annex I, article 6.1.3 of the *Ahtisaari* Plan, according to which appointments are made by the President of the European Court of Human Rights upon consultation with the Representative. In practice, this divergence does not seem to have caused conflicts. See Hill/ Linden-Retek, see note 136, 35, footnote 43.

¹⁵¹ Article 114 para. 3, respectively article 152 para. 3 of the Constitution, which implement Annex I, article 6.1 of the *Ahtisaari* Plan.

two others were jurists of Serbian and Turkish background.¹⁵² Again, this composition means that theoretically, the two minority judges and the three internationals together form a majority and can prevent both the outvoting by the ethnic Albanian judges and the blockage of the entire institution. It procedurally safeguards the substantive minority protection provisions in the Constitution and the effectiveness of the Court, while the professional eligibility criteria reinforce its character as a *pouvoir neutre*. In the Court's early practice, ethnic block voting is not evident, nor are there pervasive divisions along local vs. international lines.¹⁵³ For the time being, the decisions are prepared by a panel of three judges, but made by all judges *en bloc*. In the long run, it might be advisable to foster local ownership and adopt a model like in Bosnia where international judges only participate in plenary court rulings if local judges cannot reach a unanimous decision. This could be part of a strategy for a sequenced and smooth exit of internationals. Conversely, the Bosnian practice of ethnic quotas, which excludes minorities such as Jews, Roma and individuals who do not wish to identify as a member of one particular people, could consider a more inclusive appointment practice as is emerging in Kosovo.

b. Competencies

The competencies of internationalized Constitutional Courts are an important factor when appreciating whether and to what extent the Courts are able to implement and to enforce the constitutional provisions. Furthermore, they play a major role in the legitimacy question. If a Court disposes of numerous and large attributions, it is not obliged to justify its competencies in each particular case and can concentrate its efforts on substantive arguments to make its reasoning even more convincing. In the inverse situation, the persistent need to justify the Court's interventions inevitably threatens its legitimacy, as well as its capacity to impose the constitutional rules. We will see that once again Kosovo is better fitted in this regard than BiH.

¹⁵² The international judges appointed in 2009 were of Bulgarian, Portuguese and US origin and had held posts at the European Court of Human Rights, the International Criminal Tribunal for the Former Yugoslavia and hybrid courts in BiH respectively beforehand. For the biographical information, see Hill/ Linden-Retek, see note 136, 35.

¹⁵³ Cf. Hill/ Linden-Retek, see note 136, 36 et seq. Concerns that the possibility of Dissenting Opinions would have a divisive effect on the Court (Morina, see note 136, 152 et seq.) have not materialized so far.

The Court in BiH is attributed a general competence to “uphold the Constitution” (article VI-3). This general jurisdiction is somewhat concretised by the following text, but the Court had to extensively interpret the text on repeated occasions and had to rely on the general competence to justify its jurisdiction.¹⁵⁴ The Constitution lists a number of types of requests: the first concerns inter-institutional litigation between central organs or between organs of an Entity as well as federal disputes between the state and the Entities; the second is review of constitutionality of legislation through abstract norm control (article VI-3a)). In these two cases, only the highest political authorities have standing,¹⁵⁵ and the number of requests is rather modest.¹⁵⁶ The third attribution of the Court concerns individual complaints against the judgement of any court, if a constitutional question is raised by one of the parties (article VI-3b)). This procedure is by far the most frequent and concerns the most various items. The fourth competence, concrete norm control through ordinary court referrals (article VI-3c)), remains rare. The last category of competences is employed a little more frequently: it concerns the “vital interest vetoes” of one of the constituent peoples (article IV-3 e) f)) or of one of the Entities (article V-2 d)), as elaborated upon above.¹⁵⁷ Altogether, the Court decides on more than 3000 requests per year.¹⁵⁸

The very laconic formulations in the Bosnian Constitution have caused problems in the Court’s practice. Obviously, such general principles as “upholding the Constitution” must be interpreted. Yet, it is impossible for the Constitutional Court of a new and weak state to give a systematically wide interpretation to all its powers. The vagueness of the constitutional text inevitably raises problems regarding the Court’s legitimacy and its capacity to implement the text. In addition, in the context of the local legal culture, rather influenced by the Austro-Hungarian formalistic traditions, this vagueness also generates uncertainty with respect to the competencies of the Court. Its case law has

¹⁵⁴ See Marko, see note 10, 20 et seq.

¹⁵⁵ The members of the Presidency, the Prime Minister, and one fourth of the Parliamentary Assemblies of the state and of the Entities, the Federation of Bosnia-Herzegovina and the Republika Srpska.

¹⁵⁶ Between 15 and 20 per year.

¹⁵⁷ See at III. 3.

¹⁵⁸ For instance, in 2009, the Court has received 4209 requests; it has decided 3294 cases and on 30 December, 6243 cases were still pending. In 2010, it received 6056 requests, decided on 4057 cases and, at the end of the year, 8243 cases were still pending.

not always contributed to clarify the state of the law, and the jurisprudence seems to oscillate between rather restrictive and more extensive conceptions on judicial review. So, on the one hand, the competencies in the abstract norm control have often been widely interpreted, and now include the review of Entity decisions or of by-laws and statutes of municipal councils. The Court has thus decided on wide-ranging matters such as the names of cities, the composition of municipal councils, or decisions of an Entity legislature on the non-recognition of Kosovo.¹⁵⁹ On the other hand, the Court usually reasons that the contestation of general norms in legislation is exclusively in the general interest, and cannot therefore be initiated by individuals. Consequently, it is reluctant to quash a judgement in an individual appellate procedure if its only defect resides in the fact that the law underlying the challenged ruling is unconstitutional. On some occasions, however, the Court annuls the judgment, or refuses to apply the underlying legislation, and justifies this by reference to article 6 ECHR and to the principle of the rule of law.¹⁶⁰ In order to remove this uncertainty and to improve the implementation of the Constitution, it would be preferable to unambiguously open norm control to individuals.

Compared to the rather short list of procedures in Bosnia, the competences of the Constitutional Court in Kosovo are more elaborate: article 113 enumerates a total of 13 types of proceedings, including disputes among central state organs and between the centre and municipalities, references by ordinary courts, and individual complaints against acts of public authority. Most of the early case law of the Court concerns individual complaints, and in one of its first cases,¹⁶¹ the Court has implicitly indicated its willingness to broadly interpret its respective competence and to review the constitutionality of legislation underlying individual complaint proceedings, in preferable contradistinction to the narrow approach of the Bosnian Court. In addition, the

¹⁵⁹ The relevant decisions are namely: U 4/ 05 of 22 April 2005, Statute of the City of Sarajevo; U 7/ 05 of 27 January 2006, Statutes of the towns of Istocno Sarajevo and Banja Luka; U 6/ 08 of 30 January 2009, Resolution of the National Assembly of the Republika Srpska refusing to recognize the Kosovo state; the Decision on the principles in this matter: U 1/ 09 of 29 May 2009 concerning a general Decision and an individual Decree of the government of the Federation.

¹⁶⁰ Cf. Marko, see note 10, 22 et seq.; C. Steiner/ N. Ademovic, "Article VI", in: *id.*, see note 10, 684 et seq., 744 et seq.

¹⁶¹ KI. 11/ 09, Tomë Krasniqi vs RTK et al., Decision of 16 October 2011 on interim measures.

list of competencies also contains several variants of abstract norm control, which can be initiated by central state organs or parts thereof. As a result of Bosnian experiences with ethnic conflicts on the local level, the Constitution also extends the Court's reach directly into the municipalities. Municipal statutes can be subject to abstract review initiated by central state organs, and the local representative of ethnic minority communities on the municipal level is given standing to refer disputes over acts of local authorities directly to the Constitutional Court.¹⁶² The latter competence has given rise to the ethnically sensitive "Prizren Emblem" case discussed above.¹⁶³

Two items are missing from the list: the politically sensitive issue of party bans is simply attributed to "the competent court" by article 44 para. 3, and, like in BiH, there is no ex-ante constitutional review of international treaties, even though these have direct effect within the Kosovo legal order after ratification and trump ordinary legislation (article 19).¹⁶⁴ These competences can, and should, be attributed to the Court by ordinary legislation.¹⁶⁵ Generally speaking, however, the Kosovo Constitution has instituted a strong Constitutional Court with well defined, extensive powers, which do not cause legitimacy constraints on account of their vagueness as in BiH. This seems all the more important as the Court's early case law has already caused conflicts with other institutions: the quashing of a series of last instance judgments by the Constitutional Court¹⁶⁶ following individual complaints has met with opposition by the Kosovo Supreme Court. Two other rulings caused the resignation of two successive presidents of the Republic of Kosovo and political instability: in September 2010, the Constitutional Court found the then President of the Republic of Kosovo in serious violation of the incompatibility provisions of the Constitution, as he was at the same time the head of a leading political party.¹⁶⁷ After the

¹⁶² Article 62 para. 4.

¹⁶³ At III. 1.

¹⁶⁴ On the apparent contradiction to the review procedure instituted by article 113 para. 3 (4), see below, IV. 1.c.

¹⁶⁵ Article 113 para. 10. In this sense also Marko, see note 9, 449; Morina, see note 136, 146; Doli/ Korenica, see note 136, 834.

¹⁶⁶ KI 40/ 09, Imer Ibrahim and 48 Other former Employees of the Kosovo Energy Corporation v. 49 Individual Judgments of the Supreme Court of the Republic of Kosovo, Judgment of 23 June 2010.

¹⁶⁷ KI 47/ 10, Naim Rustemi and 31 other Deputies of the Assembly of Kosovo. vs. His Excellency Fatmir Sejdiu President of the Republic of Kosovo, Judgment of 28 September 2010.

following general elections, the first in independent Kosovo, the Court annulled the election of the subsequent President for violations of the voting rules in the Assembly.¹⁶⁸ In both cases, the political opposition had chosen to make use of the inter-organ dispute proceedings before the Constitutional Court, and both incumbents resigned after the Court's ruling. The major political actors seem to have accepted, however grudgingly, the Court as the authoritative interpreter of the Constitution. Already in the first years of its existence, the Court has thus become an important player in the constitutional life of Kosovo.

c. Applicable Law and Standards of Review

The third international dimension concerns the influence of international sources on applicable law and the standards of review.¹⁶⁹ This is the very point where, besides the composition, internationalization exercises a direct influence on the Courts' work. Both Constitutions incorporate numerous international law provisions, mainly in the field of human rights, and confer direct effect on them. This raises the question of how Courts deal with international legal instruments and how they approach the relationship between international and domestic law.

While constitutional review in BiH refers to the Constitution, it is important to recall that this Constitution is integrated in an international treaty, the *Dayton Agreement*. A first consequence of this is that the Constitutional Court applies the interpretative rules of article 31 of the Vienna Convention on the Law of Treaties.¹⁷⁰ Secondly, not only Annex 4, but all other Annexes are considered to be applicable constitu-

¹⁶⁸ KO 29/ 11, Sabri Hamiti and other Deputies, Constitutional Review of the Decision of the Assembly of the Republic of Kosovo, No. 04-V-04, concerning the Election of the President of the Republic of Kosovo, dated 22 February 2011, Judgement of 30 March 2011.

¹⁶⁹ For a recent overview over the changing relationship between public international law and constitutional law, see A. Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law", *Vienna Journal on International Constitutional Law* 3 (2009), 170 et seq. For the Eastern European context, see V. Vereshtin, "New Constitutions and the Old Problem of the Relationship between International Law and National Law", *EJIL* 7 (1996), 29 et seq.; P. Sonnevend, "International Human Rights Standards and the Constitutional Jurisprudence of Transition States in Central and Eastern Europe", *ASIL Proceedings* 96 (2002), 397 et seq.

¹⁷⁰ U 5/ 98, 3rd partial Decision of 1 July 2000, see note 18, para. 19.

tional law.¹⁷¹ Thus the Bosnian Constitution in a wider sense consists of all eleven Annexes, which charge BiH with a number of obligations related to peace- and state-building, such as the cooperation with international organizations or the establishment of diverse institutions, including a Human Rights Commission (Annex 6). Moreover, article II of the Constitution incorporates a number of international human rights instruments and makes them directly applicable in the Bosnian domestic legal order: most importantly, the ECHR and its Protocols are directly applicable and have “priority over all other law” (article II.2.). This is followed by a list of rights derived from the ECHR and the incorporation of further 15 international instruments of individual rights protection to be secured “without discrimination”, listed in Annex I to the Constitution and including, *inter alia*, the UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, as well as the Framework Convention for the Protection of National Minorities.¹⁷²

The ECHR occupies a special position in the Bosnian constitutional order: it seems to be intangible and to be located at a supra-constitutional rank. Although the Constitutional Court denies such an interpretation arguing that the Convention derives its authority only from the Constitution,¹⁷³ it nevertheless places the ECHR on the same

¹⁷¹ Cf. Marko, see note 10, 9 et seq.

¹⁷² The full list is as follows: 1948 Convention on the Prevention and Punishment of the Crime of Genocide; 1949 Geneva Conventions I-IV on the Protection of the Victims of War, and the 1977 Geneva Protocols I-II thereto; 1951 Convention relating to the Status of Refugees and the 1966 Protocol thereto; 1957 Convention on the Nationality of Married Women 1961; 1961 Convention on the Reduction of Statelessness; 1965 International Convention on the Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights and the 1966 and 1989 Optional Protocols thereto; 1966 Covenant on Economic, Social and Cultural Rights; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; 1987 European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; 1989 Convention on the Rights of the Child; 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; 1992 European Charter for Regional or Minority Languages; 1994 Framework Convention for the Protection of National Minorities. Furthermore, Annex 5 of the *Dayton Agreement* is concerned with the rights of displaced persons.

¹⁷³ U 5/ 04, Presidential Elections, Decision of 31 March 2006.

rank as the Constitution and accepts its text and Strasbourg case law as a standard of review.¹⁷⁴ In fact, most complaints in the appellate procedure invoke the Convention rights, first of all article 6 ECHR. The other international instruments enumerated in Annex I of the Constitution do not benefit from such a privileged status. For a rather long time, this has incited the Constitutional Court to apply them only when a problem of non-discrimination was at stake; but recently the Court has accepted to implement these instruments even beyond the non-discrimination context.¹⁷⁵

In Kosovo, the internationalization of the standards of review is similar, with some important nuances. The Constitution itself is of domestic law and relates to international standards in three respects: the general relationship between constitutional and international law is governed by article 19, which accords ratified, self-executing treaties and other legally binding norms of international law direct effect and “superiority over the laws of the Republic of Kosovo”. The Constitutional Court will have to reconcile this hierarchy with article 113 para. 3 (4), which empowers the Court to review the compatibility of proposed constitutional amendments with ratified international treaties.¹⁷⁶ A second aspect of internationalization, and a visible result of the “supervised” nature of Kosovo’s independence, is the fact that in case of conflict the *Ahtisaari* Plan enjoys normative supremacy over the Constitution,¹⁷⁷ and all constitutional provisions must be interpreted in accordance with the Plan (article 143 para. 3 of the Constitution). This raises the theoretical question what the actual *Grundnorm* in the constitu-

¹⁷⁴ C. Steiner/ N. Ademovic, “Article II”, in: id., see note 10, 153 et seq., 176 et seq.

¹⁷⁵ AP 839/ 10, Decision of 25 September 2010.

¹⁷⁶ Two interpretations seem possible: firstly, international treaties, once ratified, have a supra-constitutional rank and must be denounced before the amendment can enter into force. The better view may be that the Court’s review does not preclude the constitutional amendment, but is rather meant to be a declaratory Advisory Opinion procedure designed to expose divergences of international obligations and domestic constitutional law. On the lack of a converse review procedure regarding the constitutionality of international agreements, see above. IV. 1.b. See generally, Doli/ Korenica, see note 136, 824 et seq.

¹⁷⁷ For such a – so far unproblematic – conflict with regard to the appointment of international judges to the Constitutional Court, see above, IV. 1.a.

tional order of Kosovo is¹⁷⁸ and entrusts the International Civilian Representative, who is charged with the authoritative interpretation of the Plan (article 147 of the Constitution), with an important para-constitutional function.¹⁷⁹ Thirdly, as far as individual rights protection is concerned, the drafters of the Kosovo Constitution opted for a two track approach that leads to a “hybrid” text:¹⁸⁰ in line with prescriptions of the *Ahtisaari* Plan,¹⁸¹ eight selected international human rights instruments are directly applicable within Kosovo by virtue of article 22 of the Constitution. This includes the ECHR, but also concerns, *inter alia*, the Universal Declaration of Human Rights, the UN Covenant on Civil and Political Rights, the Council of Europe Framework Convention for the Protection of National Minorities and a number of other UN human rights instruments.¹⁸² At the same time, the Constitution contains its own human rights catalogue, beginning with human dignity and encompassing social rights such as equal access to education, health and work, complemented by domestic provisions on possible limitations and emergencies (arts 23-56).¹⁸³

The inclusion of a domestic rights catalogue was a deliberate choice to improve local ownership and to nourish a distinct constitutional identity. It raises the question, however, how international and domestic standards relate to each other. In this regard, article 22 stipulates that international instruments have priority over national laws, which is understood as placing them in a “mezzanine” position between constitutional norms and ordinary law.¹⁸⁴ Yet, the ECHR is placed in a privi-

¹⁷⁸ For a discussion of this aspect, see Doli/ Korenica, What about Kosovo’s Constitution, see note 9, 51 et seq.

¹⁷⁹ See below, IV. 2.

¹⁸⁰ Marko, see note 9, 447.

¹⁸¹ See Annex I, article 2 of the *Ahtisaari* Plan.

¹⁸² The other instruments are: Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Unlike in BiH, the Covenant on Economic, Social and Cultural Rights is absent from the list. Article 58 further requires Kosovo authorities to “respect the standards set forth in the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages.”

¹⁸³ Critical on the multiplication of standards for the restriction of fundamental rights Marko, see note 9, 448.

¹⁸⁴ Marko, see note 9, 448.

leged position: article 53 requires Kosovar institutions, including the Constitutional Court, to interpret all human rights and fundamental freedoms guaranteed by the Constitution “consistent with the court decisions of the European Court of Human Rights.” This goes further than many other European constitutions and compensates the fact that Kosovo is not yet a member of the Council of Europe.¹⁸⁵ It also enables the Constitutional Court to extensively rely on the European Court of Human Rights case law and use it legitimately as a valuable resource, which it does extensively. However, it also raises questions: does article 53 modify the hierarchy established in article 22 and does it constitutionalize the ECHR and its case law?¹⁸⁶ Or should it simply be understood as an order addressed to the local authorities without any hierarchical effect?¹⁸⁷ In addition, problems may arise notably in cases of individual rights collisions, e.g. in conflicts between returning refugees and current tenants of property, or in child custody cases.¹⁸⁸ It is not

¹⁸⁵ On the consequences of the ICJ Advisory Opinion on Kosovo’s Declaration of Independence for Kosovo’s position with regard to, *inter alia*, international organizations, see K. Oellers-Frahm, “Problematic Question or Problematic Answer? Observations on the International Court of Justice’s Advisory Opinion Concerning Kosovo’s Unilateral Declaration of Independence”, *GYIL* 53 (2010), 793 et seq. On the Unilateral Declaration of Independence and its interpretation by the ICJ see A. Orakhelashvili in this Volume, 65 et seq.

¹⁸⁶ Annex I, article 2.1 of the *Ahtisaari* Plan seems to support this view. In a similar vein, Marko, see note 9, 448.

¹⁸⁷ For instance, the similar provision of article 10-2 of the Spanish Constitution is interpreted in this sense. On the status of the ECHR in the Spanish and various other European legal orders, see G. Martinico/ O. Pollicino (eds), *The National Judicial Treatment of the ECHR and EU Laws*, 2010. From the German debate, see only H.J. Cremer, “Zur Bindungswirkung von EGMR-Urteilen”, *EuGRZ* 31 (2004), 683 et seq.; J.A. Frowein, “Die traurigen Missverständnisse. Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte”, in: K. Dicke et al. (eds), *Weltinnenrecht. Liber amicorum Jost Delbrück*, 2005, 279 et seq.

¹⁸⁸ On the latter situation and on conflicting views of the role of the European Court of Human Rights and national constitutional courts, see for instance on the one hand European Court of Human Rights, *Görgülü v. Germany*, Application No. 74969/01, Judgement of 26 February 2004, and on the other hand German Federal Constitutional Court, No. 2 BvR 1481/ 04, Decision of 14 October 2004, available in English at <http://www.bverfg.de/entscheidungen/rs20041014_2bvr148104en.html>. For discussions, see e.g. M. Hartwig, “Much Ado About Human Rights: The Federal Constitutional Court Confronts the European Court of Human

clear yet whether the European Court of Human Rights case law only represents a minimum standard or becomes strictly binding in these instances.

It seems that the conclusion on applicable law and standards of review is largely similar for both Courts. Even if they do not feel authorized to place international law above the Constitutions, they apply it and refer to it in their everyday practice. The Kosovo Constitution adds constitutionally enshrined interpretive duties with regard to international instruments to the panoply of internationalizing mechanisms. Both Courts make an invaluable contribution to the protection of individual rights and thus to the implementation of one of the most important features of classical constitutionalism. Individual rights protection affords agency to individuals, otherwise affected by the potentially dominant ethnic groups, and addresses them in their capacity as citizens. This in turn adds to the legitimacy of the Court. Does this appreciation compensate the negative aspects observed especially with regard to BiH? Probably not completely, given the handicaps formed by the monopoly of the constituent peoples and the very vague enumeration of competencies. Individual rights protection in court cannot replace the required complementary concretization and realization of human rights through democratic politics and legislative action. Litigants and courts can hardly drive the process of identification with common values and political integration alone.¹⁸⁹

But we can certainly conclude that the integrated internationalization within hybrid Courts has not failed. Mixed institutions have the advantage that they can incrementally develop initial intentional hybridity to more organic forms of cooperation between local and international actors.¹⁹⁰ The Courts fulfil an important triple function in protecting individual rights, in balancing democracy and ethnocracy, and in developing a system of checks and balances.¹⁹¹ Beyond these tasks, the Courts face the particular challenge to constructively engage with the second, non-hybrid and more ambivalent international feature of the institutional orders: the constitutionalized supervisory role of a Representative of the international community.

Rights”, *German Law Journal* 5 (2005), 869 et seq.; G. Lübke-Wolff, “ECHR and national jurisdiction – The Görgülü Case”, *Humboldt Forum Recht* (2006), 1 et seq.

¹⁸⁹ Haller, see note 52.

¹⁹⁰ Hill/ Linden-Retek, see note 136, 28 et seq.

¹⁹¹ Marko, see note 10, 36.

2. International Supervision by the Representatives of the International Community

While constitution-makers did not hesitate to introduce an element of hybridity in the judiciary, they did not want to extend this solution to the executive and the legislative branches of government. Hence, both Constitutions establish an exclusively international Representative with para-constitutional executive and legislative competences to supervise and monitor the implementation of the civilian aspects of the respective peace plans. In order to carry out these functions, they dispose of offices with an administrative sub-structure and largely international support staff of considerable size, and were thus designed as genuinely international bureaucracies. The varying, asymmetric internationalization might be explained by the fact that legislative and executive institutions were considered particular incarnations of state sovereignty and its political orientation, and perhaps also by a desire to avoid the complexity that would have been created if international supervision had been integrated into the ethnic power sharing mechanisms.

The supervisory role of the Representatives has an ambivalent relationship to classical constitutionalist beliefs. On the one hand, they can be seen as another *pouvoir neutre* and an additional element of checks and balances in ethnically divided polities. Moreover, the High Representative in BiH was instrumental in overcoming political stalemates within state institutions. On the other hand, the unelected institutions cannot be considered to be representatives of, or empowered by, those subjected to their rule. Furthermore, they were designed to be largely insulated from judicial review, which is problematic in terms of the doctrine of separation of powers and rule of law. These ambivalences raise the question of how far these interferences in the national institutional systems and the deviations from democratic and rule of law principles are justified by the need for a neutral umpire and for overcoming ethnic immobility and political stalemates. A closer look at both instances of international supervision thus seems warranted.

In BiH, the international community as well as the European Union supervise the pacification, the return of refugees, the democratization and the establishment of a multicultural state in particular through the institution of a High Representative and its Office (OHR). The High Representative is appointed by a weakly institutionalized “Peace Implementation Council”, formed after Dayton by a – largely self-empowered – group of states, to which he is politically responsible. The OHR does not derive its authority from any form of local election pro-

cedure, but from international law. The immediate legal basis is Annex 10 of the *Dayton Agreement*, whose article V resumes the High Representative's attributions in the following terms: "The High Representative is the final authority in theatre regarding interpretation of this Agreement on the civilian implementation of the peace settlement". Article I para. 2 foresees a Security Council Resolution as the second legal base for these powers.¹⁹² The respective Resolution endorses the establishment of the High Representative, limits itself to recalling the Dayton formulations, and does not define the respective competencies in more detail.¹⁹³ Consequently, it was the High Representative himself who – very generously¹⁹⁴ – interpreted his own competencies, until they were confirmed by the Peace Implementation Council Conference in Bonn in 1997.¹⁹⁵ The so-called "Bonn powers" authorized him especially to remove public officials from office, including elected representatives, to detain persons suspected of terrorism or of having committed war crimes, and to make laws in the place of the Parliament.

In light of the dysfunctional and inefficient institutional system and intensifying ethno-nationalist mobilization, the High Representatives in BiH have made rather intensive use of both their executive and legisla-

¹⁹² Article I, para. 2: "In view of the complexities facing them, the Parties request the designation of a High Representative, to be appointed consistent with relevant United Nations Security Council resolutions, to facilitate the Parties' own efforts and to mobilize and, as appropriate, coordinate the activities of the organizations and agencies involved in the civilian aspects of the peace settlement by carrying out, *as entrusted by a U.N. Security Council resolution*, the tasks set out below." (Emphasis by the authors). See on the details concerning the competencies of the OHR for instance Oellers-Frahm, see note 10, 206 seq.

¹⁹³ S/RES/1031 (1995) of 15 December 1995. The relevant provisions are: "26. Endorses the establishment of a High Representative, following the request of the parties, who, in accordance with Annex 10 on the civilian implementation of the Peace Agreement, will monitor the implementation of the Peace Agreement and mobilize and, as appropriate, give guidance to, and coordinate the activities of, the civilian organizations and agencies involved, and agrees the designation of Mr. Carl Bildt as High Representative." "27. Confirms that the High Representative is the final authority in theatre regarding interpretation of Annex 10 on the civilian implementation of the Peace Agreement". On the interpretation of this "confirmation" by the Constitutional Court of BiH, see Steiner/ Ademovic, "Article VI", see note 160, 789.

¹⁹⁴ See Oellers-Frahm, see note 10, 208 et seq.

¹⁹⁵ Doc. S/1997/979 of 16 December 1997.

tive powers: for instance, they enacted laws on the transfer of competencies from the Entities to the central level, and removed elected officials from public office for non-cooperation with the International Criminal Tribunal for the Former Yugoslavia. The number of interventions is impressive and reached 153 per year at the high point of the OHR's activities.¹⁹⁶ This raised criticisms with regard to democratic legitimacy and judicial accountability of the OHR,¹⁹⁷ countered by some with arguments relying on the idea of a state of emergency.¹⁹⁸ Consequently, the Constitutional Court was soon confronted with applications challenging both its legislative and executive action.¹⁹⁹ The problem for the Court was that it considered, in principle, that the High Representative's "powers under Annex 10 to the General Framework Agreement, the relevant resolutions of the Security Council and the Bonn Declaration as well as his exercise of those powers are not subject to review by the Constitutional Court."²⁰⁰ Yet, it still subjected, in a first step, legislation by the High Representative to review, relying on the concept of "functional duality": while legislative acts by the OHR were international in origin, in enacting laws the High Representative substituted the Assembly in its functions, and the respective legislation thus became part of domestic law and reviewable by the Court.²⁰¹ When exercising its jurisdiction, the Court initially found legislation enacted by the High Representative to be in conformity with domestic

¹⁹⁶ For a detailed list, see Stahn, see note 10, 399; Woelk, see note 10, 357.

¹⁹⁷ Influential in this regard: G. Knaus/ F. Martin, "Travails of the European Raj", *Journal of Democracy* 14 (2003), 60 et seq.

¹⁹⁸ Cf. on the emergency argument, *inter alia*, A. Rehs, "Von Dayton nach Brüssel – Bosnien und Herzegowina auf dem Wege staatlicher und europäischer Integration", in: Europäisches Zentrum für Föderalismus-Forschung Tübingen (ed.), *Jahrbuch des Föderalismus* 2006, 430 et seq. (440 et seq.). See further on the (mixed) reactions to the OHR's activities Steiner/ Ademovic, "Article VI", see note 160, 791 et seq.

¹⁹⁹ On the following, see also Steiner/ Ademovic, "Article VI", *ibid.*, 782 et seq.

²⁰⁰ U 9/ 00, Law on State Border Service, Decision of 3 November 2000, para. 5.

²⁰¹ U 9/ 00, *ibid.*; U 26/01, Law on the Court of BiH of 28 September 2001. For a detailed discussion and further case law, see Steiner/ Ademovic, "Article VI", see note 160, 795 et seq. See also Stahn, see note 35, 166 et seq., on the concept of functional duality and the differing approach of German courts under occupation after World War II.

constitutional standards, and the High Representative acquiesced into the review.²⁰²

The situation is different with regard to individual, executive acts of the OHR. The Constitutional Court considers that these do not substitute acts of domestic authorities and are not within the Court's jurisdiction as defined by the wording of article VI.²⁰³ However, the Court still attempted to reconcile the absence of substantive review with basic tenets of judicial accountability and the rule of law: in the *Bilbija* case,²⁰⁴ the Constitutional Court found BiH (not the OHR) to be in violation of article 13 ECHR because those individuals subjected to acts by the OHR did not have an effective legal remedy against these acts. Referring to the European Court of Human Rights case law, it held the Bosnian state to be under a positive obligation to ensure judicial review even if it had transferred powers to international institutions.²⁰⁵ The *Bilbija* Judgement led to a serious conflict between the Constitutional Court and the High Representative. In overt defiance of the Court, the High Representative expressly ordered Bosnian state institutions not to implement the ruling.²⁰⁶ In a final attempt to enforce judicial review, the applicants turned to the European Court of Human Rights, but to no avail. In the *Berić* and *Bilbija* cases,²⁰⁷ the European Court found it had no jurisdiction to review the High Representative's powers, as he was exercising lawfully delegated Chapter VII powers of the UN Security

²⁰² Cf. Marko, see note 10, 17 et seq.; Steiner/ Ademovic, "Article VI", *ibid.*, 795 et seq., and 797 for an example of a case in which the Court later did quash a law enacted by the OHR.

²⁰³ 37/ 01, unpublished Decision of 2 November 2001. Cf. Marko, see note 10, 18; Steiner/ Ademovic, "Article VI", see note 160, 801.

²⁰⁴ AP 953/ 05, *Bilbija* and *Kalinić*, Decision of 8 July 2005, paras 52 et seq., with reference to the European Court of Human Rights, *Matthews v. the United Kingdom*, Application No. 24833/94, Judgement of 18 February 1999, paras 29 and 32.

²⁰⁵ Cf. Steiner/ Ademovic, "Article VI", see note 160, 802 et seq.

²⁰⁶ See OHR, "Order on the Implementation of the Decision of the Constitutional Court of Bosnia and Herzegovina in the Appeal of Milorad Bilbija and others, No. AP 953/ 05 of 23 March 2007", available at <www.ohr.int>. On the conflict see Steiner/ Ademovic, "Article VI", *ibid.*, 815 et seq.

²⁰⁷ European Court of Human Rights, *Berić et al. v. Bosnia and Herzegovina*, Application Nos. 36357/04 et al., Decision of 16 October 2007; *Kalinić and Bilbija v. Bosnia and Herzegovina*, Application Nos. 45541/04 and 16587/07, Decision of 13 May 2008.

Council. His acts were neither imputable to BiH nor an act falling under the jurisdiction of this state (arts 1 and 13 ECHR).²⁰⁸

The result of all this is that, as it stands, there is no judicial protection against individual acts of the OHR, a situation which seems irreconcilable with the principle of the rule of law, given that 15 years have passed since the end of the war. In the wake of the abovementioned court rulings, the OHR has considerably reduced the employment of the Bonn-powers, and the last time a High Representative threatened to make use of them, the President of the Republika Srpska declared he was prepared to boycott his decisions. This may indicate the extent to which the continued absence of judicial protection and democratic accountability has damaged the OHR's perceived legitimacy and credibility and has impaired its ability to perform its functions.

In its *Berić* and *Bilbija* Judgements on BiH, the European Court of Human Rights largely relies on, and indeed quotes, its reasoning developed in the Kosovar cases of *Behrami* and *Saramanti*.²⁰⁹ These cases originated during the period of UN territorial administration and thus under the regime of Security Council Resolution 1244. At that time, the European Court held that it lacked jurisdiction to review actions of both NATO and UN territorial administration UNMIK, which was headed by the Special Representative of the Secretary General, because these acts were mandated by Security Council Resolution 1244 and were thus attributable exclusively to the UN Security Council acting under Chapter VII of the Charter. In independent Kosovo, the circumstances underlying the *Behrami* and *Saramanti* cases have changed with the unilateral implementation of the *Ahtisaari* Plan: the Special Representative of the Secretary General has largely been replaced in practice by an International Civilian Representative. The institution of the International Civilian Office (ICO) is clearly inspired by the OHR in Bosnia,²¹⁰ but its legal set-up displays some key differences: the ICO's mandate has a double basis in the *Ahtisaari* Plan and the Constitution of Kosovo. Article 12 of the Plan specifies that the International Civilian Representative is appointed by a so-called "Steering Group" com-

²⁰⁸ On the cases, see P. Sena/ M. Vitucci, "The European Courts and the Security Council: Between Dédoulement Fonctionnel and Balancing of Values", *EJIL* 20 (2009), 193 et seq.

²⁰⁹ European Court of Human Rights, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Application Nos. 71412/01 and 78166/01, Judgment of 5 May 2007.

²¹⁰ Marko, see note 9, 446.

prising “key international stakeholders”. In practice, these stakeholders were France, Germany, Italy, the Russian Federation, the United Kingdom, the United States, the EU and the European Commission, and NATO.²¹¹ Article 2 of Annex IX further tasks the International Civilian Representative to supervise the implementation of the *Abtisaari* Plan and defines his powers: he is the final authority in Kosovo regarding the interpretation of the civilian aspects of the Plan, and is thus theoretically even in a position to review the Constitutional Court’s interpretation of the Constitution in as much as the constitutional provisions at issue must be interpreted in conformity with the *Abtisaari* Plan (article 143 para. 3). In addition, the International Civilian Representative is empowered to annul laws and decisions adopted by the Kosovo authorities and to remove public officials from office. What is lacking from the list, in comparison to Bosnia, is the legislative power to substitute the Kosovo Assembly and enact laws. The International Civilian Representative thus retains only a legislative veto.

Furthermore, in contradistinction to BiH, the *Abtisaari* Plan was never included in a treaty, nor were the powers of the ICO subsequently endorsed in a UN Security Council Resolution. Instead, the legally binding nature of the Plan derives from two sources: first, the Declaration of Independence of Kosovo, which contains a unilateral commitment of Kosovo as a state to abide by the plan. Kosovo thus entered into an obligation under international law to respect the powers of the ICO. Secondly, arts 146 and 147 of the Kosovo Constitution confirm the International Civilian Representative’s powers and require Kosovo institutions to give effect to the ICO’s decisions. In addition, article 147 explicitly prohibits any Kosovar authority to review or restrict the ICO’s powers and their exercise. This clearly excludes any form of judicial review of the ICO’s acts by the Constitutional Court and can be seen as a direct reaction to the Bosnian Court’s attempts to control decisions by the OHR. The normative supremacy of the *Abtisaari* Plan is thus complemented by an enforcement mechanism not subject to any form of judicial review. Those acts which have been subjected to judicial review in BiH – substituting legislation – are not within the powers of the ICO in Kosovo. In sum, the situation raises doubts about the effective interplay of the ICO with local institutions

²¹¹ R. Muharremi, “The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law”, *ZaöRV/HJIL* 70 (2010), 357 et seq. (363).

and serious rule of law concerns and can thus hardly be qualified as a lesson learned.²¹²

In practice, the ICO has not officially made use of its powers in its first three years. This might reflect the otherwise improved constitutional arrangements, but there are other reasons, too. The lack of law-making powers relegates it to a more reactive role in the legislative field, whereas executive functions are mainly performed by the European Union Rule of Law Mission EULEX. The exercise of executive – and also judicial – functions by EULEX also poses problems from the point of view of Kosovo constitutional law, which are beyond the scope of this comparison.²¹³ Still, the existence of article 147, excluding any judicial review of ICO measures, is problematic with regard to article 13 ECHR. The Constitution's clear wording leaves little interpretative space for the Kosovo Constitutional Court. The European Court of Human Rights, in turn, is prevented from hearing cases against Kosovo because it is not a member of the Council of Europe. However, several members of the "International Steering Group", which appoint and give "guidance" to the International Civilian Representative (article 12.2 *Ahtisaari* Plan), are parties to the ECHR. Could these states be held accountable for acts of the ICO in Strasbourg? The European Court's reasoning in *Behrami* and *Saramanti*, doubtful as it may be in itself,²¹⁴ rests on the attribution of the respective acts to the UN and on the supremacy of Chapter VII powers of the Security Council. Unlike in Bosnia, the powers of the ICO in Kosovo were not endorsed in a Chapter VII Resolution. In practice, international actors have attempted to base at least the powers of EULEX on Security Council Resolution 1244,²¹⁵ and such an argument might be made with regard to the ICO, which practically replaced some of the functions of the Special Representative of the Secretary-General. Yet, as the latter still exists, the better view seems to be that the ICO as an institution established by the *Ahtisaari* Plan and the Constitution of independent Kosovo is not cov-

²¹² In the same vein, Marko, see note 9, 449.

²¹³ See on these problems, Muharremi, see note 211.

²¹⁴ Critical e.g. M. Milanović/ T. Papić, "As Bad as It Gets: The European Court of Human Rights' *Behrami* and *Saramanti* Decision and General International Law", *ICLQ* 58 (2009), 267 et seq.

²¹⁵ Cf. E. de Wet, "The Governance of Kosovo: Security Council Resolution 1244 and the Establishment and Functioning of Eulex", *AJIL* 103 (2009), 83 et seq.

ered by Resolution 1244.²¹⁶ Consequently, attribution to the UN seems far-fetched. Rather, the powers of the members of the Steering Group to appoint and guide the ICO seem to amount to quite an effective control over the institution, which would justify attribution of ICO acts to them. Hence, those members of the Steering Group which are at the same time parties to the ECHR can in principle be held accountable for ICO's acts in Strasbourg. Such accountability might not necessarily concern individual acts. Rather, these states should primarily be seen to be under a positive obligation to put a mechanism in place that satisfies the requirements of article 13 ECHR for an effective remedy against ICO acts. This is also in line with the Bosnian Constitutional Court's reasoning in *Bilbija*.²¹⁷ As far as Kosovar institutions are concerned, the same reasoning may be applicable by virtue of arts 22 and 53 of the Constitution in conjunction with article 13 ECHR: they require Kosovo institutions to work with international actors towards the establishment of a review mechanism within the international governance structures themselves.

In sum, the institution of a representative of the international community does not command the same appreciation as the internationalization of the Constitutional Courts. His existence and his powers constitute a major derogation to core principles of constitutionalism, the separation of powers and the access to court, without always providing a convincing compensation in terms of overcoming the ethnic division. Perhaps an evolution is possible for the Kosovar institution, but in Bosnia, the only way out seems to be to bring the mandate of the High Representative to its end.²¹⁸

²¹⁶ Muharremi, see note 211, doubts whether EULEX is even covered by the invitation in the Declaration of Independence.

²¹⁷ See above, IV. 2. at the beginning.

²¹⁸ M. Zivanovic, "Lessons (not) learned with regard to Human Rights and Democracy: The case study of Bosnia-Herzegovina", in: W. Benedek (ed.), *Lessons (not) learned with regard to Human Rights and Democracy. A Comparison of Bosnia and Herzegovina, Kosovo and Macedonia*, 2010, 47: "The 'culture of dominance' and the fact that international organizations active in BiH can be regarded as part of the problem rather than the solution, also represents some serious negative aspects of the 'international dimension'."

V. Concluding Observations

Our comparison has focused on “ethnic” and “internationalized” elements modifying classical constitutionalist principles. It highlighted that, generally speaking, these modifications have so far tended to be more problematic – in terms of legitimacy as well as governmental effectiveness – in the case of BiH than in independent Kosovo. It appears that the realization of the entire program of consociational democracy, including power sharing and vetoes, at all political levels in BiH was unable to generate efficient decision making practices, in particular when combined with strong decentralization. It even seems to solidify the existing ethno-political cleavages and is opposed to ideas of pluralism, which implies social mobility, the possibility to be part of different groups and to play different roles. Furthermore, it leaves all those who do not belong to the recognized collectives without protection and violates their rights to equal democratic participation as enshrined in the ECHR.

At the same time, it would be illusory and inappropriate for constitutional law and scholarship to entirely neglect ethnic diversity leading to the division of society. It remains an important task for comparative constitutional scholarship to further elaborate on features of more mixed constitutional systems, which combine ethnic representation and participation with political majority and individual equality. With regard to BiH, the proposals for reforms towards a more mixed architecture are on the table and need to be put into practice, for instance through a re-organization of the two parliamentary chambers or changes to the vertical separation of powers. The Constitution of independent Kosovo has already instituted a mixed system, which finds a better normative balance between civic and ethnic elements and erects fewer hurdles to efficient decision making. What turns out as problematic instead is the lacking capacity, and sometimes will, to implement decisions and normative programs throughout the entire territory, which is an equally important component of governmental effectiveness.

Many of these practical problems, as well as the more or less problematic normative choices, at least partly result from diverging extra-legal considerations as identified throughout our comparison, be they of military, geopolitical, demographic or historical nature. Another overarching contextual factor, which we would like to emphasize in the end, concerns the formation and attitudes of constitutional elites in Kosovo and in BiH. It seems that the respective constitutional cultures

and practices have been shaped significantly by differing perceptions of “the international” and “the outside world” in the minds of those who ended up in influential constitutional positions. By the time the Kosovo Constitution came into being, many of those responsible had experienced migration, diaspora culture, education abroad and/or ten years of international administration. In BiH, the short period between the end of the war and the entry into force of the new Constitution did less in terms of opening towards the outside world, and many members of the elites in power tended to be more focused on national values. Thus, a more receptive attitude towards outside ideas and international experiences might be another enabling factor accounting for lessons learned in Kosovo.

This learning curve also extends to some aspects of “internationalized” constitutionalism: the internationalized constitution-making process in Kosovo was more representative and transparent, and the hybrid Kosovar Constitutional Court brought further improvements to the appropriate design of internationalized constitutional justice, which has already had, overall, beneficial effects in BiH. However, a more general conclusion seems to be that international intervention in the constitution-making process itself is easier to justify by the specificities of divided societies than a continued or even long-term constitutional role for international actors. In fact, it appears impossible to justify the prolonged existence of purely international, unelected constitutional organs whose mandate is not only ill-defined and unlimited in time, but also entails a severe interference into the separation of powers and is not subjected to any judicial review whatsoever. Such a construct not only implies important derogations from the classical constitutional model, but is also destructive to local ownership and may thus push further away the moment where international involvement is no more needed. The disagreements about the causes of the Bosnian malaise – constitutional design, ethnic divides, or precisely international interference – illustrate this fundamental problem: prolonged and intense international involvement makes it difficult to attribute responsibility for failures or progress and thus obscures political accountability. Constitutional scholarship is thus called upon to contribute to a theory of step-by-step disengagement of the international community and of the restoration of internal sovereignty and self-determination.

This is not, however, tantamount to saying that local elites in power should run entirely free and local populations be simply subjected to the internal workings of their divided societies, whether constitutionally tamed or not. Rather, such a theory of *internal* disengagement

would have to include two complementary, and compensatory, elements of a strong *external* role of the international community: firstly, it should insist on, and externally support, necessary processes of internal constitutional reform and implementation, in order to provide the divided societies with the tools to effectively govern themselves. Secondly, it should strengthen mechanisms of external oversight and further integrate the respective divided societies into the evolving, transnational constitutional frameworks which many other states are increasingly subject to – notably in Europe with the Council of Europe and the European Union. Accordingly, comparative constitutional scholarship may not only contribute to the debate on – internal – constitutional design for divided societies, but might also reflect on inter- and supranational constitutional mechanisms designed to meet the challenges of divided societies.