

## **SPECIFIC INFLUENCE OF THE LEGAL NATURE ON THE FORMATION PROCEDURE OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA**

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### **ABSTRACT**

This article aims to examine the legal regulation of the Constitutional Court of Bosnia and Herzegovina with due regard to its legal nature and influence on the system of state power. The article applies system analysis as the main research method, which allows for a comprehensive examination of the constitutional framework and legal acts regulating the Court. This includes an evaluation of the Rules adopted by the Court itself and the debates on judicial independence and foreign influence. The results of the research highlight tensions between autonomy and accountability, especially concerning the participation of international judges and the ethnic composition of the Court. The study contributes to the ongoing discussion on optimizing the formation procedure of constitutional courts in complex federal systems. Considering the specific formation and politico-territorial structure of Bosnia and Herzegovina and the role of the constitutional control body within the system of state authorities, the authors conclude that in establishing the Constitutional Court of Bosnia and Herzegovina as a crucial element of the system of checks and balances, the constitutional founders made every effort to ensure its autonomous position and constructive influence on the functionality of Bosnia's state mechanism. Some aspects of the organization of the Constitutional Court require reforms to guarantee its independence and maintain its high authority. Achieving a sustainable and balanced model of constitutional oversight will depend on reconciling internal political divisions and reducing reliance on external actors.

**Keywords:** constitutional control; legal nature; judicial independence; checks and balances; State sovereignty; legal regulation.

### **INFLUÊNCIA ESPECÍFICA DA NATUREZA JURÍDICA NO PROCEDIMENTO DE FORMAÇÃO DO TRIBUNAL CONSTITUCIONAL DA BÓSNIA E HERZEGOVINA**

#### **RESUMO**

Este artigo tem como objetivo examinar a regulamentação legal do Tribunal Constitucional da Bósnia e Herzegovina, considerando sua natureza jurídica e influência no sistema de poder estatal. O artigo utiliza a análise de sistemas como principal método de pesquisa, o que permite um exame abrangente do arcabouço constitucional e dos atos jurídicos que regulam o

Tribunal. Isso inclui uma avaliação das Regras adotadas pelo próprio Tribunal e os debates sobre independência judicial e influência estrangeira. Os resultados da pesquisa destacam as tensões entre autonomia e responsabilização, especialmente no que diz respeito à participação de juízes internacionais e à composição étnica do Tribunal. O estudo contribui para a discussão em andamento sobre a otimização do procedimento de formação de tribunais constitucionais em sistemas federais complexos. Considerando a formação específica e a estrutura político-territorial da Bósnia e Herzegovina, bem como o papel do órgão de controle constitucional no sistema de autoridades estatais, os autores concluem que, ao estabelecer o Tribunal Constitucional da Bósnia e Herzegovina como um elemento crucial do sistema de freios e contrapesos, os fundadores constitucionais envidaram todos os esforços para garantir sua posição autônoma e influência construtiva na funcionalidade do mecanismo estatal da Bósnia. Alguns aspectos da organização do Tribunal Constitucional requerem reformas para garantir a sua independência e manter a sua elevada autoridade. Alcançar um modelo sustentável e equilibrado de controle constitucional dependerá da reconciliação das divisões políticas internas e da redução da dependência de atores externos.

**Palavras-chave:** controle constitucional; natureza jurídica; independência judicial; freios e contrapesos; soberania do Estado; regulamentação jurídica.

## 1 INTRODUCTION

With the adoption of the 1963 Constitution, the Socialist Federal Republic of Yugoslavia became the first socialist state to implement the European model of constitutional review into its constitutional system. As a result, the institution of constitutional justice in Bosnia and Herzegovina is one of the oldest among the countries of Central and Eastern Europe (Dmičić, 2012; Polovchenko, 2017). However, it is difficult to speak of continuity in the creation of the current Constitutional Court of Bosnia and Herzegovina as the modern state of Bosnia and Herzegovina was established under challenging conditions of conflict among the peoples of the former Socialist Federal Republic of Yugoslavia, with direct involvement and, at times, the dictates of the international community (Hajden, 2003; Vučić *et al.*, 2010). This influence is reflected in the 1995 Constitution of Bosnia and Herzegovina. According to Article 1 of the Constitution of Bosnia and Herzegovina, the country is defined as a democratic state operating on the principles of the rule of law and free and democratic elections, consisting of two entities: the Federation of Bosnia and Herzegovina and the Republika Srpska. The Constitutional Court of Bosnia and Herzegovina serves as the constitutional oversight body, ensuring compliance with the Bosnian Constitution (Ćeman, 2015; Senjak, 2015). The circumstances and conditions under which the Constitution of Bosnia and Herzegovina was adopted significantly influenced its content and the legal status of the body responsible for ensuring its adherence.

One of the most noticeable features observed in the study of the constitutional control institution of Bosnia and Herzegovina lies in its system of legal regulation. The normative foundation of the legal status of the Constitutional Court of Bosnia and Herzegovina is established by the 1995 Constitution of Bosnia and Herzegovina. The highly abstract provisions of Article 6 “The Constitutional Court” laid the legal groundwork for the organization and functioning of the Constitutional Court and its jurisdiction. However, the 1995 Constitution of Bosnia and Herzegovina did not provide for the adoption of a legislative act that would further detail these constitutional provisions. To develop the constitutional provisions regulating the status of the Constitutional Court of Bosnia and Herzegovina, the Court was assigned the responsibility of independently adopting the Rules that would comprehensively regulate matters related to its organization and activities. In the former Socialist Federal Republic of Yugoslavia, the elaboration of constitutional provisions regarding the status and proceedings of the constitutional court is typically subject to special constitutional legislation (as in Croatia) or ordinary legislation (as in Serbia). However, the framers of the 1995 Bosnian Constitution, seeking to maximize the autonomy of the constitutional control body (including its independence from the legislative authority), decided to empower the Constitutional Court of Bosnia and Herzegovina to develop and adopt detailed regulations governing its organization and operation. Among the Balkan states, only North Macedonia has followed a similar approach. As a result, the Rules adopted (based on and in execution of point b) of Clause 2 of Article 6 of the Constitution of Bosnia and Herzegovina) by the Constitutional Court of Bosnia and Herzegovina at its plenary sessions on January 23 and February 12, 2014 are currently in effect. According to constitutional provisions, these Rules represent the sole normative act that fully regulates the legal status of the Constitutional Court of Bosnia and Herzegovina. Consequently, the Rules constitute a special normative act that provides detailed regulations concerning the legal status of the Court, the procedure for the election (appointment) and dismissal of constitutional judges, their immunity, the procedure for filing petitions with the Constitutional Court, the Court’s forms of activity, procedural specifics for various categories of cases, and the types of acts issued by the Constitutional Court, etc. In Decision No. U 7/13 of September 27, 2013, the Constitutional Court of Bosnia and Herzegovina emphasized that the Rules of the Constitutional Court as an act whose adoption falls within the Court’s exclusive jurisdiction possess a unique constitutional nature. This uniqueness arises from the need and intent to ensure the autonomy and independence of the Constitutional Court. Given this constitutional

nature and the fact that its source is the Constitution itself, the Constitutional Court considers that its Rules may be regarded *sui generis* as a law within the meaning of point a) of Clause 3 of Article 6 of the Constitution of Bosnia and Herzegovina (Delo No. U 7/13, 2013). Moreover, neither the Parliamentary Assembly nor any other body has the authority to adopt acts regulating matters that, under point b) of Clause 2 of Article 6 of the Constitution of Bosnia and Herzegovina, fall within the exclusive jurisdiction of the Constitutional Court (Karan; Aleksić, 2016).

Not all Bosnian experts have responded unequivocally positively to this specific approach to regulating the organization and functioning of the Constitutional Court of Bosnia and Herzegovina. Professors S. Karan and S. Aleksić argue that the current Constitution raises questions about the extent to which the Constitutional Court of Bosnia and Herzegovina is truly independent and impartial, given that it adopts its regulatory acts (Rules) under which it administers justice, without these Rules being subject to public oversight. This makes the Court's potential capabilities problematic (Karan; Aleksić, 2016). Similarly, L. Ožegović contends that the overly abstract constitutional provisions governing the status of the Constitutional Court have granted judges excessive leeway in interpreting the Basic Law, including through the adoption of the Court's own Rules. Therefore, Bosnia and Herzegovina requires a law on the Constitutional Court (an external, general act independent of the Court itself) that would regulate all aspects of the Court's status (Ožegović, 2013). However, in agreement with the aforementioned decision of the Constitutional Court of Bosnia and Herzegovina, M. N. Simović and M. Simović (2014a, 2014b) point out that since the Court's Rules hold a specific constitutional position and have a special constitutional nature, no other body, including the Parliamentary Assembly of Bosnia and Herzegovina, has the authority to regulate matters concerning the organization and functioning of the Constitutional Court as the Constitution does not provide for such regulation. Analyzing the arguments of these opposing positions, it is evident that both sides aim to ensure the independence and functionality of the Constitutional Court but propose fundamentally different approaches to achieving this status. On the one hand, concerns about the legislature's ability to regulate the status of the Constitutional Court as a potential tool of influence over a body tasked with overseeing the constitutionality of its actions are entirely valid. On the other hand, the Court's ability to operate entirely independently, combined with the *de facto* lifetime tenure of constitutional judges, makes the Constitutional Court more than just a guardian of the Constitution. It lends credibility to characterizations of Bosnia and Herzegovina's governance

as a juristocracy. Thus, a potential solution that could address the concerns raised by both sides would not be an ordinary law but rather a special (constitutional) law adopted by a qualified majority of both chambers of the Parliamentary Assembly of Bosnia and Herzegovina, possibly with subsequent approval by the legislative bodies of the country's entities. Such a law would hold legal force close to that of the Constitution. However, under the current political conditions in Bosnia and Herzegovina, the adoption of such a law is practically impossible due to fundamentally divergent views among political forces regarding the future structure and composition of the Constitutional Court and the state mechanism of Bosnia and Herzegovina.

## **2 METHODS**

We used a comprehensive set of methods, with the main approach being system analysis. This method helped us establish the relationship between the legal nature and the process of forming the constitutional control body and propose improvements to the normative regulation of the Constitutional Court of Bosnia and Herzegovina.

## **3 RESULTS AND DISCUSSION**

### **3.1 Distinctive legal nature of the Constitutional Court**

The legal nature and position of a constitutional oversight body within the system of state authorities are directly influenced by its designated functions and the measures it is empowered to implement, which affects the operations of other state institutions. The Constitutional Court of Bosnia and Herzegovina, in exercising its authority and intervening in the activities of other branches of government, is tasked with reviewing decisions of courts of general jurisdiction, overseeing the executive branch's compliance with the Constitution of Bosnia and Herzegovina, invalidating unconstitutional laws, resolving disputes between different levels of government, etc. Alongside these broad and excessively abstract powers, the constitutional oversight body has been granted the right to further develop its authority through its interpretative practice and the regulation of its activities in the Rules of the Constitutional Court of Bosnia and Herzegovina. The Court has made full use of this prerogative in a highly creative manner, differentiating its powers in normative review and

competence dispute resolution while also expanding its appellate jurisdiction, effectively transforming it into a constitutional complaint mechanism. However, the most striking example of this evolution is the Court's growing role in the legislative process, particularly within the procedure for unblocking the Parliamentary Assembly of Bosnia and Herzegovina. The content of constitutional court rulings often reflects the political realities of the state (Ademović *et al.*, 2012; Kuzmanović, 2002).

Therefore, the Constitutional Court of Bosnia and Herzegovina is not a component of the legislative, executive, or judicial branches. According to Article 6 of the Constitution of Bosnia and Herzegovina, it is positioned as a distinct, independent, and autonomous body that functions as a mechanism of checks and balances concerning the three other branches of government. From this, a logical conclusion follows: the Constitutional Court of Bosnia and Herzegovina embodies a special form of authority within the state. As a result, the Bosnian legal doctrine remains significantly divided regarding the legal nature and the position of the Constitutional Court within the state governance system. For example, Bosnian constitutional scholar Professor N. Ademović argues that the notion of the Constitutional Court as a distinct form of authority does not reflect reality. In his view, the Constitutional Court falls within the judicial branch as this logically follows from the name of the institution and the fact that constitutional oversight exercised by the Court is a type of legal control. The Constitutional Court deals exclusively with legal issues, and its decisions are judicial rulings based on legal norms rather than political considerations (Ademović *et al.*, 2012). Thus, Ademović insists on the judicial nature of the Constitutional Court of Bosnia and Herzegovina.

A fundamentally different approach to the legal nature of the Constitutional Court of Bosnia and Herzegovina is expressed by another Bosnian constitutional scholar, Professor G. Marković. He argues that the Constitutional Court of Bosnia and Herzegovina, like any constitutional court, is a political body *par excellence*. This fact, although often denied or reluctantly acknowledged, explains the specific nature of the Court's organization, composition, and appointment process. The federal character of the Constitutional Court stands out more prominently than that of other institutions of Bosnia and Herzegovina enshrined in its Constitution. This is due to the role assigned to it by the drafters of the Constitution, i.e., one that cannot be reduced solely to that of a constitutional interpreter (Marković, 2013). Thus, Marković insists that the Constitutional Court of Bosnia and Herzegovina is a political body actively engaged in the political process.

Another perspective within the Bosnian legal doctrine is advocated by M. Tadić, who

asserts that the Constitutional Court does not belong to the legislative, executive, or judicial branches (in their classical understanding). Instead, it represents a unique form of authority (*sui generis*) that regulates the three branches of government (Tadić, 2015). This perspective was also the foundation upon which the Constitutional Court of Bosnia and Herzegovina based its development of the Rules of the Constitutional Court of Bosnia and Herzegovina.

The Constitutional Court possesses a special nature distinct from purely judicial or political institutions. As a result, it is perceived as a holder of a unique constitutional-judicial (fourth) power that extends beyond the classical division of powers into three branches (Pavlov; Kremyanskaya, 2015). As the guardian of constitutional legality in the state, the Constitutional Court ensures that all three traditional branches of government operate within the constitutional framework, constrained by fundamental principles of constitutionalism (Pavlov *et al.*, 2018; Polovchenko, 2019a, 2020). By resolving both horizontal and vertical disputes between entities and the federal level of government, as well as by overseeing the constitutionality of normative acts at the entity level, the Constitutional Court of Bosnia and Herzegovina ensures the preservation of national unity while simultaneously promoting the federal principles in the functioning of state institutions (Polovchenko, 2019b, 2019c). In this role, the Constitutional Court of Bosnia and Herzegovina acts as a “negative legislator” (Polovchenko, 2019a; Shashkova *et al.*, 2019). Moreover, if the three branches of government fail to fulfill the fundamental functions assigned to them by the 1995 Constitution of Bosnia and Herzegovina (according to the Constitutional Court’s own interpretation), it often assumes these functions, ensuring the supremacy and direct applicability of the Constitution. This is evident in its interference with the administration of justice through its appellate jurisdiction (Reshenie Konstitutsionnogo suda, 2005) and in its role as a “positive legislator” within the framework of constitutional review (Odluka Ustavnog suda BiH, 2004). In this “activist” capacity, the Constitutional Court of Bosnia and Herzegovina significantly exceeds the boundaries of the Kelsenian court model of a “negative legislator”, freely interpreting the abstract provisions of the Constitution, thereby assuming a fundamentally different role within the state apparatus. It emerges as a higher-order body, a crucial element in the system of checks and balances, to some extent even surpassing the three classical branches of power. This characterization of the nature and position of the constitutional oversight body within the state governance system most accurately reflects the status of the Constitutional Court of Bosnia and Herzegovina.

### 3.2 Procedure for the formation of the Constitutional Court

One of the most critical conditions for the independence of the Constitutional Court is the special procedure for its formation (Polovchenko, 2013). According to Article 6, Section 1 of the 1995 Constitution, the Constitutional Court of Bosnia and Herzegovina consists of nine members. Two constitutional judges are elected by the National Assembly of the Republika Srpska, four are elected by the House of Representatives of the Federation of Bosnia and Herzegovina, making up six so-called “local” judges, while the remaining three, known as “international” judges, are appointed by the President of the European Court of Human Rights after consultations with the Presidency of Bosnia and Herzegovina.

In the Republika Srpska, the judges of the Constitutional Court of Bosnia and Herzegovina are elected by the National Assembly. The National Assembly is a unicameral representative body of the Republika Srpska, making it logical that it independently elects two judges of the Constitutional Court of Bosnia and Herzegovina (Dmitric, 2002). In the Federation of Bosnia and Herzegovina, four judges of the Constitutional Court are elected by the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina. Since the House of Representatives of the Federation’s Parliament is only one of the chambers within the federal entity, several Bosnian legal experts question why four judges are elected by the House of Representatives rather than the House of Peoples. The House of Representatives does not serve as a body representing either the constituent peoples or the entities of the Federation of Bosnia and Herzegovina. Moreover, the very procedure for electing constitutional judges has been the subject of justified criticism from experts (Marković, 2013).

As Marković points out, the current procedure for electing constitutional judges by the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina would not be as problematic if the Constitution of Bosnia and Herzegovina required a qualified majority for the election of a constitutional judge in the House of Representatives of the Federation’s Parliament. However, since a qualified majority is not mandated, the issue of electing Croatian judges to the Constitutional Court of Bosnia and Herzegovina may arise at any time. The root of the problem lies in the asymmetry of the Federation of Bosnia and Herzegovina, which results in an overwhelming majority of representatives in the House of Representatives belonging to the Bosniak community. If a compromise is not reached between the Bosniak and Croatian political parties, it is possible that Bosnian deputies could

elect Croatian judges (Marković, 2013). While this might be acceptable if deputies based their selection of Constitutional Court judges solely on their level of expertise and professional experience, this is not the case. Political considerations and even ethno-cultural biases often play a decisive role. For this reason, it would be more justified if the primary role in the election of constitutional judges of Bosnia and Herzegovina was assigned to the House of Peoples of the Parliament of the Federation of Bosnia and Herzegovina, while the House of Representatives would propose candidates for appointment. We believe such an arrangement would ensure a fairer balance of interests between the population and the cantons of the Federation of Bosnia and Herzegovina.

When analyzing the above, it is important to note, first, that the election of members of the Constitutional Court of Bosnia and Herzegovina is a complex process adjusted to the specific relationships that underpin all other institutions of Bosnia and Herzegovina, namely, the structure of Bosnia and Herzegovina as a “complex” state. In this case, the federal principle of entity representation is applied. Second, none of the constitutional judges who are citizens of Bosnia and Herzegovina are elected directly by the state institutions of Bosnia and Herzegovina but only by entity institutions. This is even though the Constitutional Court of Bosnia and Herzegovina is a state body responsible for ensuring the protection of the Constitution of Bosnia and Herzegovina. The reasons for such a procedure in forming the Constitutional Court of Bosnia and Herzegovina should primarily be sought in the high level of autonomy of the entities and their desire to preserve it. Marković claims that the anticipated role of the Constitutional Court within the system of governmental institutions in Bosnia and Herzegovina, along with its composition and decision-making process, suggested that it would be a major player in the future constitutional reform of Bosnia and Herzegovina. For this reason, the entities were interested in and actively sought control over its composition to exert influence over the decisions of the Constitutional Court of Bosnia and Herzegovina. Therefore, we can assume that the judges of the Constitutional Court of Bosnia and Herzegovina act as ethnic representatives of the constituent peoples to which they belong. However, the Constitution of Bosnia and Herzegovina does not require judges to belong to any specific constituent people, nor does it mandate that they declare their ethnic affiliation. Moreover, the Constitution of Bosnia and Herzegovina does not explicitly state that judges from the Federation of Bosnia and Herzegovina must necessarily be Bosniaks and Croats or that judges from the Republika Srpska must necessarily be Serbs. An analysis of the current Rules of the Constitutional Court of Bosnia and Herzegovina indicates that, hypothetically,

judges could be representatives of other ethnic groups. Karan and Aleksić rightly argue that ethnic requirements and corresponding interpretations are inconsistent with the principle of judicial independence (Karan; Aleksić, 2016).

In the Bosnian legal doctrine, it is believed that the ethnically conditioned election of local judges to the Constitutional Court of Bosnia and Herzegovina violates point (a) of Clause 1 of Article 6 of the Constitution of Bosnia and Herzegovina. This is because the article does not explicitly require mandatory parity in the representation of the three constituent peoples within the Constitutional Court of Bosnia and Herzegovina. However, the Constitution of Bosnia and Herzegovina does not exclude such parity either. Moreover, this principle is indirectly reflected in the current Rules of the Constitutional Court of Bosnia and Herzegovina. For example, Article 39 of the Rules states that if fewer than three judges elected by the House of Representatives of the Parliament of the Federation of Bosnia and Herzegovina are present at a plenary session of the Constitutional Court, or if no judge elected by the National Assembly of the Republika Srpska is present, the session is postponed. However, if the same situation arises again without valid reasons, the next session proceeds regardless. In addition, Clause 3 of Article 86 of the Rules stipulates that the President and Vice President of the Constitutional Court of Bosnia and Herzegovina cannot belong to the same constituent people or other groups. Furthermore, according to Article 83 of the Rules, the President of the Constitutional Court is elected by secret ballot at a plenary session, following a rotation system among judges elected by the legislative bodies of the entities, in conformity with point (a) of Clause 1 of Article 6 of the Constitution of Bosnia and Herzegovina. This ensures that for two consecutive terms, the President of the Constitutional Court cannot be a judge from the same constituent people or another group as the previous President or their predecessor. However, this election process does not “guarantee the ethnic affiliation of a judge, but only their affiliation with an entity”.

Nevertheless, the principle of parity among the constituent peoples was not intended to have a decisive role in the formation of the Constitutional Court as Article 6, Section 1, Clause (b) of the Constitution of Bosnia and Herzegovina requires that constitutional judges who are citizens of Bosnia and Herzegovina be only distinguished legal experts selected based on their high professional qualifications. However, Bosnian constitutional scholars emphasize that a constitutional convention exists under which judges who are citizens of Bosnia and Herzegovina are still elected according to their ethnic affiliation (Marković, 2012). The issue arises concerning the representation of Roma, Jews, and other national minorities in the

Constitutional Court of Bosnia and Herzegovina. These minorities are collectively referred to in the Constitution of Bosnia and Herzegovina under the term “Others”, meaning those who do not belong to the constituent peoples but reside within the country. As mentioned earlier, the 1995 Constitution of Bosnia and Herzegovina does not formally exclude the possibility of appointing constitutional judges from among the “Others” and the Rules of the Constitutional Court of Bosnia and Herzegovina adopted in 2014 fully allow for this. This issue has gained relevance in light of the ruling of the European Court of Human Rights (ECHR) in the case of *Sejdić and Finci v. Bosnia and Herzegovina*. The court upheld the complaint of two citizens of Bosnia and Herzegovina, D. Sejdić and J. Finci, of Roma and Jewish descent, respectively, who had been denied the right to run for the Presidency of Bosnia and Herzegovina (Abashidze; Solntsev, 2010) because they did not identify with any of the country’s constituent peoples. Despite various incentives and appeals, the Bosnian authorities have failed to implement the ECHR ruling and amend the Constitution of Bosnia and Herzegovina. This once again demonstrates that Bosnian society remains ethnically divided and that the Dayton Accords, along with the Constitution of Bosnia and Herzegovina, have not united the peoples residing in the country but have instead provided a legal framework for their division. Based on the above, it is reasonable to conclude that political rather than doctrinal factors have influenced the specific procedure for selecting constitutional judges from among the citizens of Bosnia and Herzegovina (Marković, 2013; Trnka, 2009). Given Bosnia and Herzegovina’s complex federal structure and the strained relations between its entities and the federal authorities, the constitutional solution regarding the appointment of six “local” judges to the Constitutional Court appears to be justified.

The same cannot be said about the procedure for electing the remaining three “international” judges of the Constitutional Court of Bosnia and Herzegovina. Currently, these judges are foreign nationals appointed by the President of the ECHR according to Article 6, Section 1, Clause (a) of the 1995 Constitution of Bosnia and Herzegovina, following consultations with the Presidency of Bosnia and Herzegovina. However, there is no provision specifying how the outcome of these consultations is determined, including whether the opinion of the Presidency of Bosnia and Herzegovina is binding on the President of the ECHR when appointing these three judges to the Constitutional Court of Bosnia and Herzegovina. There is every reason to believe that this is merely a formality, especially considering that, according to Article 6, Section 1, Clause (b) of the Constitution of Bosnia and Herzegovina, the President of the ECHR is explicitly prohibited from appointing a

constitutional judge from any country bordering Bosnia and Herzegovina. This restriction applies to Croatia, Serbia, and Montenegro, which share borders with Bosnia and Herzegovina.

In the theory of constitutional justice, it is considered inadmissible for foreign nationals to defend the constitution and laws of another state. According to Karan and Aleksić, this constitutional arrangement indicates Bosnia and Herzegovina's limited sovereignty as a state entity (Karan, 2014). On the contrary, Ademović argues that "international" judges in the supreme court of the state can be explained by the belief of the drafters of the Constitution of Bosnia and Herzegovina that the Constitutional Court would play an exceptional role in ensuring the stability of the country's system of governance during the most challenging times following the war. For comparison, with regard to the executive branch (the Presidency of Bosnia and Herzegovina and the Council of Ministers) and the legislative body (the Parliamentary Assembly), the drafters of the Constitution refrained from introducing even minimal elements of international influence. As Ademović highlights, for institutions requiring complete neutrality, it was essential to establish a safeguard ensuring their independence from ethno-political influence. In his opinion, this safeguard was the inclusion of foreign experts, which applied both to the Constitutional Court of Bosnia and Herzegovina and the Central Bank of Bosnia and Herzegovina (Steiner; Ademović, 2010). Marković asserts that the appointment of foreign judges to the Constitutional Court implicitly proves that it is a political body *sui generis* intended to play a significant role in the process of constitutional reforms. The scholar suggests that the drafters of the Constitution of Bosnia and Herzegovina likely envisioned the Constitutional Court as playing a crucial role in interpreting the 1995 Constitution in the post-war period and, consequently, in the process of constitutional reform, given the additional powers outlined in Article 3, Section 5 of the Constitution. Moreover, foreign judges were expected to rise above the international conflict and make decisions solely based on professionalism and legal science rather than political considerations. However, it is difficult to assess to what extent they have succeeded in this endeavor. Nonetheless, Marković argues this was likely the intention of the drafters of the Constitution, who could have at least anticipated that judges who were citizens of Bosnia and Herzegovina appointed by the political bodies of the entities would be more susceptible to the temptation of relying on political criteria in their decision-making (Marković, 2013).

Several Bosnian authors point out and the practice of the Constitutional Court of Bosnia and Herzegovina confirms that the voting patterns of the Court's international judges

show a clear bias toward the unitarization of Bosnia and Herzegovina and the de facto support of only one of the constituent peoples. For example, in a 2015 ruling by the Constitutional Court of Bosnia and Herzegovina (Odluka Ustavnog suda BiH), the votes of three international judges and two Bosniak constitutional judges against the four votes of Serbian and Croatian constitutional judges declared certain provisions of the Law on Holidays of the Republic of Srpska unconstitutional. This meant that “even the national holiday of the Republic of Srpska celebrated on St. Stephen’s Day was deemed unconstitutional” (Popovich, 2015). A similar situation occurred in 2020 when, with the decisive influence of “international” judges, the Constitutional Court of Bosnia and Herzegovina ruled in a way that effectively transferred the regulation of agricultural land ownership in the Republic of Srpska from the entity’s authorities to the federal institutions of Bosnia and Herzegovina. This decision led to the adoption of a resolution by an overwhelming majority of the National Assembly of the Republic of Srpska, which, among other demands, called for the exclusion of “international” judges from the country’s constitutional oversight body. Another consequence of this ruling was a statement by M. Dodik, the Serb member of the Presidency of Bosnia and Herzegovina, who warned that the Republic of Srpska might seek to secede from Bosnia and Herzegovina if the Constitutional Court continued to violate the terms of the Dayton Agreement by undermining the rights of the federal entities in favor of the central government.

Attention should be drawn to point (d) of Clause 1 of Article 6 of the Constitution of Bosnia and Herzegovina which provides for the possibility that, after five years from the initial appointment, the Parliamentary Assembly may adopt a law establishing a different procedure for electing the three judges currently appointed by the President of the ECHR. Moreover, the Rules of the Constitutional Court of Bosnia and Herzegovina, adopted by the Court itself also recognize this possibility. This became the subject of a constitutional review request regarding the compatibility of Article 2 of the Court’s Rules (specifically, its provision stating that the Constitutional Court exercises its rights and duties according to the Constitution, the Rules, and other acts of the Court (Clause 2, Article 2 of the Rules), with point (d) of Clause 1 of Article VI of the Constitution, which allows for an alternative method of electing the three judges appointed by the ECHR President. The party submitting the request argued that the contested provision of the Constitutional Court’s Rules effectively precluded the Parliamentary Assembly from “regulating the election of the three judges differently”. In its ruling, the Constitutional Court affirmed the authority of the Parliamentary

Assembly of Bosnia and Herzegovina to pass a law establishing an alternative procedure for electing these three judges. However, it also clarified that point (d), Clause 1, Article 6 of the Constitution explicitly limits this legislative power to the method of electing Constitutional Court judges and only to the three judges appointed by the ECHR President. Furthermore, the Court emphasized that under no circumstances should this constitutional provision be interpreted more broadly as the petitioner had suggested. Thus, point (d), Clause 1, Article 6 of the Constitution in no way calls into question the exclusive competence of the Constitutional Court to independently adopt its own Rules as stipulated in point (b), Clause 2, Article 6 of the Constitution (Delo No. U 7/13, 2013).

It is worth noting that constitutional framework of Bosnia and Herzegovina stands in contrast to the practices of other European states with complex ethnic or federal structures. For instance, in Germany, the Federal Constitutional Court (Bundesverfassungsgericht) is formed through a cooperative mechanism involving both chambers of parliament (Bundestag and Bundesrat), ensuring a balance between federal representation and democratic legitimacy. Similarly, in Belgium, constitutional judges are appointed by the King based on nominations from both linguistic groups, reflecting the country's federal and consociational character. Unlike Bosnia and Herzegovina, however, neither system relies on foreign judges to guarantee neutrality. These comparative examples suggest that multiethnic or federated states tend to seek internal mechanisms of representation and legal stability, rather than externalized judicial control. Bosnia and Herzegovina's reliance on international judges may be understood as a post-conflict necessity, but in the long term, it risks distancing the judiciary from national political processes and accountability frameworks.

### **3.4 Proposed Models for Reforming the Formation Procedure**

Nevertheless, the issues related to the formation of the Constitutional Court of Bosnia and Herzegovina have led several Bosnian and international experts to propose their projects for what they consider the optimal model for forming the Constitutional Court. Karan and Aleksić suggest maintaining the existing procedure for electing Constitutional Court judges by the legislative bodies of the entities but eliminating the “international” judges appointed by the ECHR President. Instead, they propose granting the House of Representatives of the Federation of Bosnia and Herzegovina the right to elect two additional constitutional judges and the National Assembly of the Republic of Srpska elect one additional judge (Karan;

Aleksić, 2016). Other experts argue that the most promising option for Bosnia and Herzegovina would be a mixed model for forming the Constitutional Court, in which all three branches of government would participate in the election process (Marković, 2012). Under this model, one-third of the judges could be elected by the Parliamentary Assembly of Bosnia and Herzegovina, another third could be appointed by the Presidency of Bosnia and Herzegovina through consensus, and the remaining third could be elected by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina. We have repeatedly expressed support for a mixed model of forming the Constitutional Court, involving all three branches of government, as the most optimal approach for ensuring its independence, including in resolving constitutional disputes (Polovchenko, 2003, 2015). However, given the specific structure of governance in Bosnia and Herzegovina characterized by often insurmountable contradictions both between the entities and among various ethno-cultural communities, the mixed model of forming the Constitutional Court does not appear to be the most suitable option. A more appropriate approach for Bosnia and Herzegovina would be a system in which the Parliamentary Assembly of Bosnia and Herzegovina, along with the representative bodies of the entities, participates in the election of Constitutional Court judges. This remains relevant despite the criticism frequently expressed in the academic literature on constitutional justice regarding the exclusive role of representative bodies in forming constitutional review institutions, including our opinion expressed in this article (Polovchenko, 2003).

The weak point of electing constitutional judges through a legislative body lies in the fact that judges, to some extent, become dependent on the parliament, i.e., the institution whose legislative activities they are meant to oversee. In the case of the Parliamentary Assembly of Bosnia and Herzegovina, this issue would arise only concerning the House of Representatives, and even there, it is largely mitigated by the absence of a stable parliamentary majority within the chamber. This means that if the House of Representatives were involved in the election of constitutional judges, the issue of a parliamentary majority versus a minority would not be as pronounced as in the parliaments of other states (Nenadić, 2012).

Instead of the three “international” judges, both chambers of the Parliamentary Assembly could participate in the election of three judges to the Constitutional Court of Bosnia and Herzegovina, given that both chambers hold equal authority within the Parliamentary Assembly. In such a system, the upper chamber (the House of Peoples) could nominate candidates for constitutional judges, while the lower chamber (the House of

Representatives) would be responsible for their election. This approach would most effectively ensure the parity of interests among the constituent peoples while also considering the interests of other ethnic groups residing in Bosnia and Herzegovina. It would guarantee that the judges of the Constitutional Court of Bosnia and Herzegovina remain independent of direct influence from any particular entity.

#### **4 CONCLUSIONS**

Thus, the constitutional founders envisioned a special role for the Constitutional Court within the system of state power. As the only court established by the 1995 Constitution at the federal level, it was granted exceptionally broad constitutional powers in norm control, resolution of jurisdictional disputes, and appellate review of decisions made by all courts in Bosnia and Herzegovina. It plays a legislative role, particularly in unblocking the Parliamentary Assembly. Alongside its extensive and abstract powers, the Constitutional Court of Bosnia and Herzegovina has been granted the authority to develop these powers independently through its interpretative practice and by regulating its activities in the Rules of the Constitutional Court. For example, it has transformed its appellate authority into the institution of constitutional complaint. This suggests that the Constitutional Court serves as a bearer of a distinct constitutional-judicial (fourth) power that transcends the classical separation of powers into three branches, ensuring that all three traditional branches remain within the constitutional framework. As a result, it can be argued that the Constitutional Court of Bosnia and Herzegovina has become a crucial element in the system of checks and balances, to some extent even standing above the three classical branches of government. This elevated status demands the highest degree of respect from the citizens of Bosnia and Herzegovina. However, a foreign element within the Constitutional Court does not necessarily contribute to this respect. Undoubtedly, the constitutional founders intended for foreign judges, who were not involved in the international conflict, to serve as a stabilizing factor in the post-war period, rendering decisions based solely on their professional expertise rather than ethnic-political considerations. First, this would have contributed to the sovereignty of Bosnia and Herzegovina. Second, it would have eliminated the possibility of controversial decisions that disrupt the balance of interest among the constituent peoples, preventing situations where the votes of three foreign judges and two representatives of one constituent people outweigh those of the remaining judges. Third, it would have created a real

opportunity to amend the Rules of the Constitutional Court of Bosnia and Herzegovina to improve judicial procedures. Finally, it would have ensured the genuine independence of the constitutional justice body, thereby strengthening its internal institutions, which is an obligation Bosnia and Herzegovina must fulfill in the process of European integration. However, due to the fragmentation of Bosnian-Herzegovinian society and the absence of a unified vision regarding the future development of the constitutional control body, such a law has yet to be adopted.

In light of the identified challenges, we recommend gradually phasing out the participation of international judges and replacing them with candidates jointly elected by both chambers of the Parliamentary Assembly, ensuring parity between the constituent peoples while enhancing national sovereignty. To balance autonomy with accountability, it is advisable to introduce a constitutional law (adopted by qualified majority) that defines the fundamental principles of the Court's organization, while preserving the Court's exclusive right to adopt detailed internal Rules. These measures would not only strengthen the legitimacy and independence of the Court in Bosnia and Herzegovina but also offer a valuable model for constitutional courts in other divided or post-conflict societies. From a broader theoretical perspective, the Bosnian case underscores the need for constitutional courts to be embedded within national consensus rather than external guarantees, which may initially stabilize governance but risk undermining democratic development if prolonged indefinitely.

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