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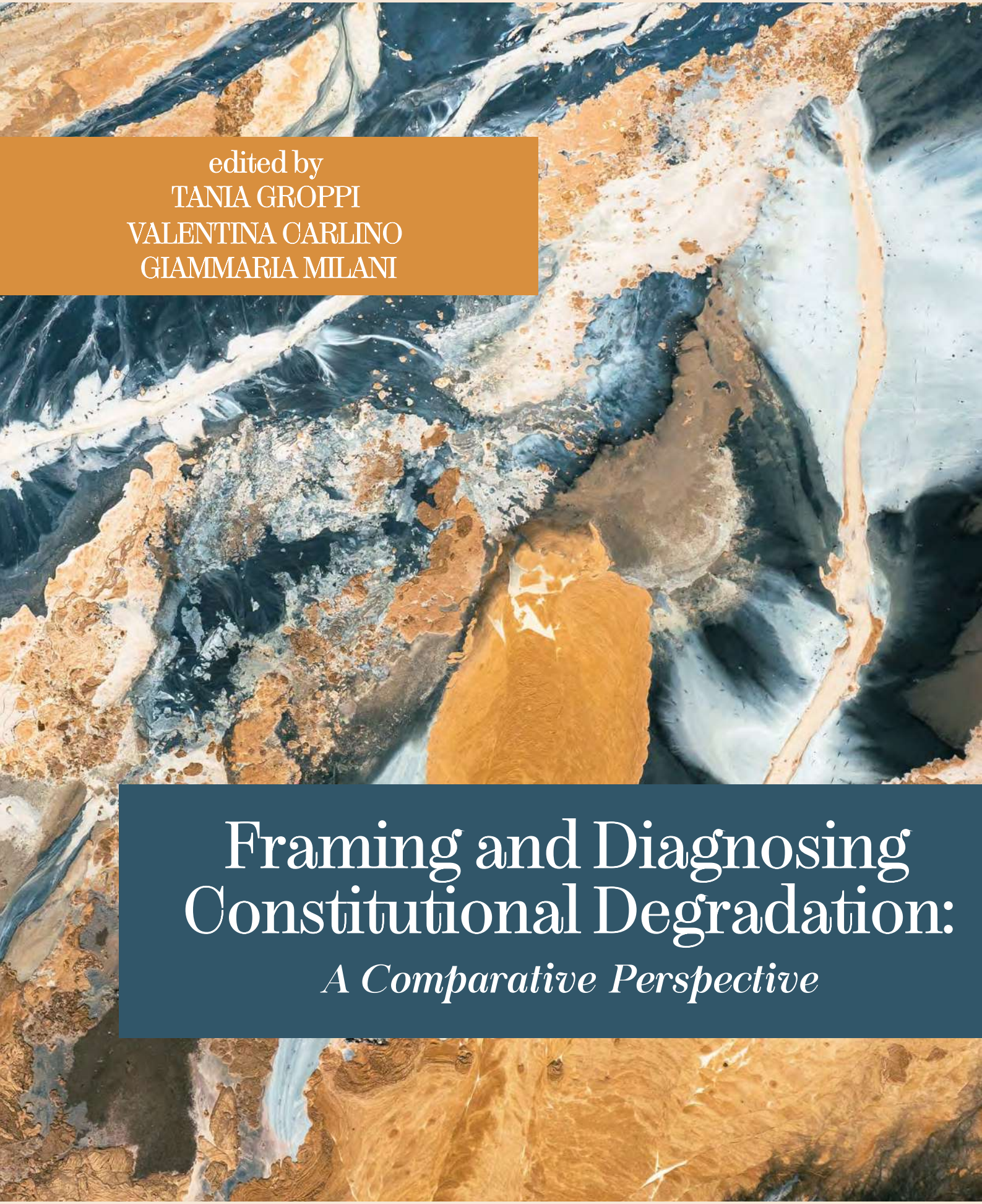

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TANIA GROPPI
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Framing and Diagnosing Constitutional Degradation:

A Comparative Perspective

2022
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Framing and Diagnosing Constitutional Degradation: A Comparative Perspective

Edited by Tania Groppi, Valentina Carlino and Giammaria Milani

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This book collects the proceedings of the workshop "**Framing and Diagnosing Constitutional Degradation**", held at Certosa di Pontignano (Siena, Italy) on June 21st and 22nd, 2021.

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TABLE OF CONTENTS

TANIA GROPPI, VALENTINA CARLINO AND GIAMMARIA MILANI
Preface **VII**

Part I
The Processes of Constitutional Degradation

MARIO PERINI
Introduction **3**

GIANMARIO DEMURO
Populism and Constitutional Degradation **5**

CARLA BASSU
The rule of law to the test **7**

GIACOMO GIORGINI PIGNATIELLO
Transformative Constitutionalism and Constitutional Courts in the European Legal Space. Germany and Italy in a Comparative Perspective **11**

MICOL PIGNATARO
Constitutional Degradation in a Time of Coronavirus: Reflecting on Governmental Accountability in the United Kingdom and Italy **21**

ANDREA VERNATA
Governing Bodies and Representative Assemblies: time for a new balance? **32**

GIUSEPPE NAGLIERI
Overturning the Pillars of Democratic Representation Trough Modern Technology-Based Partisan Gerrymandering **39**

Part II
A Global Comparative Perspective on Constitutional Degradation

PIER LUIGI PETRILLO
A Global Comparative Perspective on Constitutional Degradation. An Introduction **51**

IBRAHIM KABOGLU
The Republic of Turkey: the end of Constitutionalism or of Constitutional Democracy? **55**

DIANA MARIA CASTANO VARGAS
Constitutional Regressions: the Prism of Indicators in the Colombian State **63**

LIDIA BONIFATI
Constitutional Design v. Constitutional Degradation: Strengthening the Rule of Law in Bosnia-Herzegovina **83**

THIAGO BURCKHART
Constitutional Degradation and the Protection of Cultural Rights in Brazil: Deconstitutionalization and Institutional Deregulation **93**

VALENTINA CARLINO
Undemocratic Threats in the African context: which lesson to be learned from the Benin turning? **101**

FERDINANDO LA PLACA
Constitutional Degradation: a Comparative Overview **111**

GIACOMO SALVADORI
When the Judiciary gives weight to words. Italy and Spain compared on the repression of dissent **121**

FEDERICO SPAGNOLI
The Process of Constitutional Degradation in Spain. The Catalan Secession Crisis and the Scottish "precedent" **131**

EVIS GARUNJA
The Effects of Vetting Process on Constitutional Changes of Albanian Judiciary System **141**

Part III
Institutional Arrangements which Can Protect Liberal Democracy

IRENE SPIGNO
Introduction **153**

YLENIA MARIA CITINO
Comparing Constitutional Provisions Regarding Parliamentary Opposition. An Introductory Note **157**

ILARIA DE CESARE
Constitutional Degradation and the Italian Parliament. How can the Centrality of the Representative Body in the Italian Legal System be preserved? **167**

MARCO BRUNO FORNACIARI
Involution of the Constitutional Order and the Role of the Highest Courts: a Comparative Perspective **177**

MAYRA ANGÉLICA RODRÍGUEZ AVALOS
In defense of the Constitution: Judicial Autonomy and the Crusade of Judiciary in Mexico **185**

FRANCESCO ALBERTO SANTULLI
The Italian Crisis of Political Parties as a Phenomenon of Constitutional Degradation: what is to be done? Thinking about the electoral law **193**

MARCO ANTONIO SIMONELLI
The People's Watchdog. Safeguarding Democracy via Media Independence **201**

GIULIA VASINO
De-constructing and Re-building Procedural Standards: New Trends in the Current Stage of the Italian Constitutional Review of Legislation **209**

Part IV
European Integration and Constitutional Degradation

FRANCESCO CLEMENTI
First Constitutional essentials first. An introduction to the Panel "European integration and Constitutional degradation" **221**

JOSEP MARIA CASTELLÀ ANDREU
Judicial Independence and the Rule of Law According to the Venice Commission **225**

STEFANO BARGIACCHI
The Accountability Public Finances in a Democratic Degradation Framework: the Case of Hungary. Is everything OK if the austerity acquis is (more or less) respected? **239**

LUCA DELL'ATTI
The Neo-liberal Twist of European Integration as a Degradation of Social Constitutionalism. Counter-trends in the Management of the Pandemic **245**

SIMONE GIANELLO
The European Convention on Human Rights as a tool for the protection of the rule of law (articles 17 and 18 ECHR) **253**

PIETRO MASALA
Emerging Collective Implications of Personal Data Processing: challenges and responses in the European context **263**

OMAR MAKIMOV PALLOTTA
Fighting Europarties' Democratic Backsliding: Arguments for a Multilevel Approach **273**

PAOLA PANNIA
Excluded from Guarantees, Excluded from the Community. "Institutional Uncertainty" in the Migration Domain as a Symptom of "Constitutional Degradation" **281**

Elenco delle Autrici e degli Autori **291**

Tania Groppi, Valentina Carlino and Giammaria Milani

Preface

In the late 1990s, scholars pointed out the rise of "world (or global) constitutionalism", a legal concept that mirrored the famous Fukuyama's proclamation on the "end of history". They wanted to express the convergence of national constitutions, especially as the protection of fundamental rights was concerned, towards liberal democracy[1].

Over the last twenty years, everything has changed.

Non-democratic States, which seem to be more successful in terms of economic development, increasingly challenge the benefits of liberal democracy. In fact, such countries are presented as alternative models by their leaders, who vaunt their economic successes, the speed and efficiency of their decision-making processes and the stability of their regimes[2]. Such a trend, started in the 1990s by the founder of the State of Singapore, Lee Kuan Yew, is still ongoing. As for Europe, one should especially refer to the speeches of the Hungarian Prime Minister Viktor Orbán, in government since 2010, and the Russian leader Vladimir Putin, in power, in various roles, since 1999, not to mention the Turkish president Recep Tayyip Erdoğan, in power since 2003.

This transformation is not taking place through the classic technique of *coups d'état*, but through different processes of "reverse transitions", consisting of a gradual slide towards undemocratic regimes[3]. From a procedural perspective, several studies pointed out that such regimes were established gradually, incrementally, as a result of a series of changes that appear to be of limited scope if taken into account separately, but nonetheless suitable to determine a general decline of the liberal democracy if considered as a whole: attacks to the independence of the judiciary, capture of constitutional courts and independent bodies by political majorities, control of the media, restriction of the right of expression and assembly, compression of local autonomy. These processes are geared towards a concentration of power in the hands of governments which, often supported by large and long-lasting electoral majorities, claim to speak in the name of the people, as if "the people" were a single entity and had one single voice. Hence the definition commonly used of "populism"[4].

The outcome is regimes that political scientists call "hybrids" [5]. In fact, they do not present all the traditional characteristics of authoritarian regimes, as the rights of liberty are not totally suppressed and there is little recourse to criminal law, while elections continue to be competitive (hence the name "competitive authoritarianism"). Some democratic elements co-exist with authoritarian ones, thus leading to the definition of "illiberal democracy".

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[1] B. ACKERMAN, *The Rise of World Constitutionalism,* in *Virginia Law Review,*1997, 771 ff.; M. TUSHNET, *The Inevitable Globalization of Constitutional Law*, in *Virginia Journal of International Law*, 2009, 49, 987; D.S. LAW, M. VERSTEEG, *The Evolution and Ideology of Global Constitutionalism*, in *California Law Review*, 2011, 99, 1162 ff.

[2] See for instance D. BELL, *The China Model: Political Meritocracy and the Limits of Democracy*, Princeton, 2015.

[3] Among the first scholars to identify the features of the *constitutional retrogression*, T. GINSBURG, A. Z. HUQ, *How to Save a Constitutional Democracy*, Chicago, 2018.

[4] On the different types of populism see J. M. CASTELLÀ, M.A. SIMONELLI (eds.), *Populism and Contemporary Democracy*, London, 2022.

[5] Several expressions have been used: *hybrid regimes* (M. TUSHNET, *Authoritarian Constitutionalism,* in *Cornell Law Review*, 2015, 391 ff.); *competitive authoritarianism* (S. LEVITSKY, L. WAY, *The Myth of Democratic Recession*, in *Journal of Democracy* 2015, 45 ff.); *illiberal democracy* (F. ZAKARIA, *The Rise of Illiberal Democracies*, in *Foreign Affairs,* 1997, 22 ff.).

If this trend is especially affecting new democracies, the so-called "established democracies" are also not immune from such virus. Even in those countries, one should notice the emergence and success of political movements inspired by non-democratic historical experiences or which reject, more or less explicitly, the principles of liberal democracy. Overall, a lack of confidence in democratic processes and in political parties is emerging in the perception of public opinion, as witnessed by polls and by the declining turnout in elections.

The populist rhetoric is based, among other elements, on the rejection of representative institutions and the promotion of a direct and immediate relationship between the leader and the people[6]. Indirect, representative democracy, and its immediate institutional embodiment, the Parliament, is considered as an antagonist of the only supposedly natural and genuine form of democracy, i.e. direct democracy[7]. Political scientists have shown, in addition to the growing disaffection with democratic institutions, an increasingly widespread appreciation, also in those countries, for "illiberal democracy", due to its greater efficiency compared to representative democracy[8].

As far as separation of powers is concerned, the populist rhetoric tends to make the Executive, and especially its head, the main interlocutor of the people. Whereas Parliament is deprived of its representative function, the Executive assumes a position of absolute primacy within the system of government.

Democratic degradation also appears to over-emphasize the importance of the majority principle[9]: hence, the right of the opposition to participate and the possibility to elaborate alternative political guidelines is not guaranteed and the opposition is quickly marginalized[10]. Similarly, the independence of counter-majoritarian institutions (constitutional courts, the judiciary, independent authorities) becomes the first target of populists when in power, with the aim to capture the watchdog within the majoritarian sphere.

The effects of these impulses may transform the constitution into a "constitution of power" or a "partisan constitution", designed to bring populist movements to power and to allow them to maintain and exercise their power without the limits, conditions, checks and balances that are typical of a liberal democracy[11].

The roots and the reasons of such crisis are complex.

A first element that is usually pointed out is the decline of the Westphalian concept of sovereignty: political decisions are taken beyond the State territory, at international level, very often by economic and financial actors. Therefore, there is a mismatch between what citizens participate in (through their representatives) and the places where decisions are actually taken, which increasingly transcend geographical boundaries.

Other aspects are related to the so-called digital revolution and thus the new ways of communicating. Internet and the social media, using algorithms and artificial intelligence, create gated communities among people with similar thoughts and ideas, ultimately

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[6] J.W. MÜLLER, *Populist Constitutions. A Contradiction in Terms?,* in *www.verfaffungsblog.de,* 2017.

[7] P. BLOKKER, *Populist Constitutionalism*, in *www.iconnectblog.com*, 2017.

[8] R. FOA, Y. MOUNK, *The Danger of Deconsolidation: The Democratic Disconnect,* in *Journal of Democracy*, 2016.

[9] T.G. DALY, *Diagnosing Democratic Decay*, paper presented at the *Comparative Constitutional Law Roundtable Gilbert & Tobin Centre of Public Law*, 2017.

[10] A. HUQ, T. GINSBURG, *How to Lose a Constitutional Democracy*, cit., 136.

[11] P. BLOKKER, *Populist Constitutionalism*, cit.; J.W. MÜLLER, *Populist Constitutions*, cit.; C. PINELLI, *The Populist Challenge to Constitutional Democracy*, in *European Constitutional Law Review*, 2011, 7, 12; J. M. BALKIN, *Constitutional Rot and Constitutional Crisis*, in *Maryland Law Review*, 2018, 1, 151; M. DANI, *The 'Partisan Constitution' and the Corrosion of European Constitutional Culture*, in *LEQS Paper*, 2013.

promoting fragmentation and polarization to the detriment of the pluralistic spirit of liberal democracy.

Moreover, the increase of inequalities in contemporary societies weakens social cohesion and the sense of identity[12]. The vanishing possibility of social mobility, the difficulties of daily life resulting from cuts in public spending, the uncertainties of a future that seems to depend on uncontrollable variables, generate, in the multitudes of citizens of Western democracies, a multiplicity of negative emotions: resentment, envy, distrust, insecurity, fear and even anger. In an age of limited resources, where there are few desirable jobs and even unskilled labour positions are becoming increasingly difficult to find, it is easy for discouragement and a sense of abandonment to prevail.

The eternal, great dichotomy between high and low, between above and below, reappears[13].

All those circumstances, together with the rise of an illimited global capitalism and a voracious market economy, generated a diffused sense of confusion and distrust, which facilitated the emerging of political forces proposing to preserving people's unity by fostering a "tribal" (in Hannah Arendt's terms) national identity, very often manipulating history, symbols, educational plans. This identitarian move goes hand in hand with sovereignism: as the former represents a political ideology that stresses national identity and traditional values, especially opposing mass immigration, while the latter expresses an attitude to "protect" the domestic system from supranational and international institutions and rules, human rights treaties included.

The essays presented in this volume are aimed at analysing several national experiences, first to shed the light on the processes through which degradation occurs. Diagnosing the degradation is necessary in order, for those who believe in the constitutional liberal democracy, to develop a response.

To this end, the book tries to answer four crucial questions: how and through which legal tools are these processes taking place worldwide? Which are the institutional arrangements that can promote them and, therefore, which are the particularly vulnerable elements of the constitutional liberal democracy? Which institutional arrangements could protect constitutional liberal democracies? As for the Member States of the EU, an organization based on the rule of law, what is the relationship between constitutional degradation and European integration?

Most of the papers are the result of a call for papers especially addressed to junior scholars, with the addition of some essays of invited senior scholars. All papers where first discussed during the Workshop on "Framing and Diagnosing Constitutional Degradation", held at Certosa di Pontignano (Siena, Italy), on June 21st and 22nd, 2021. The workshop, which is part of the research project on "Framing and Diagnosing Constitutional Degradation", funded within the PRIN 2017 programme (Principal Investigator Professor Tania Groppi), was originally scheduled for June 2020 but was postponed due to the CoViD-19 pandemic. All essays underwent a robust peer review scrutiny, which, together with the editorial review, while extensive in time, ultimately proved essential to ensure the quality and soundness of the works. Finally, the papers are published one year after the Workshop: while Authors made every effort to keep their papers current, for this reason, some papers may not account for the latest developments. As editors, we apologize to the Authors for this delay.

[12] G. SITARAMAN, *Economic Inequality and Constitutional Democracy*, in M.A. GRABER, S. LEVINSON, M. TUSHNET (eds.), *Constitutional Democracy in Crisis?*, Oxford, 2018, 536.

[13] See T. GROPPI, *Oltre le gerarchie. In difesa del costituzionalismo sociale*, Bari-Roma, 2021, 81 ff.

The book is organised around four parts, which mirror the four sessions of the workshop where the papers were discussed.

The first part is dedicated to the exam of some procedural aspects of constitutional degradation, examining courts, parliaments, governments, electoral arrangements. The second part presents several case-studies, considering European, African and Latin-American experiences. The third part deals with institutional arrangements which can protect liberal democracy, focussing on the role of the opposition, the independence of the judiciary, the constitutional design of constitutional courts. Finally, the fourth session is specifically dedicated to the European region, examining the role of the European Union and the Council of Europe in protecting liberal democracy.

The Chair of each session (Mario Perini, Pier Luigi Petrillo, Irene Spigno, Francesco Clementi) wrote a short introduction to each part. The essays wrote by the invited guests (Gianmario Demuro, Carla Bassu, Ibrahim Ö. Kaboğlu) follow.

The authors would like to thank all the contributors and all the people, especially the DIPEC (Research Group for European and Comparative Public Law) members and staff, who made the Pontignano 2021 Workshop and this publication possible.

Siena, July 24th, 2022

Lidia Bonifati*

Constitutional Design v. Constitutional Degradation: Strengthening the Rule of Law in Bosnia-Herzegovina**

ABSTRACT: ***The concepts of "constitutional degradation" and of "divided societies" are closely linked, as the former is at the core of the challenges posed by the latter, namely societies divided along ethno-cultural lines, and in which these lines are relevant markers of political mobilization. Indeed, the outcome of the tensions among groups may be violent (e.g., civil conflicts, ethnic cleansing, genocide), but even in absence of violence they may have a corrosive effect on the constitutional structure of the State. Consequently, this paper addresses two aspects: (1) how the processes of constitutional degradation take place in divided societies, and (2) to what extent they depend on the adopted model of constitutional design. Given the complexity of the subject, this article aims at exploring the topic by focusing on a specific matter in a determinate case study, namely the judiciary in Bosnia-Herzegovina. Indeed, Bosnia is a classic example of a divided society where the model of constitutional design introduced a complex judicial system. First, the paper deals with the theoretical framework of the concept of constitutional degradation in divided societies and focuses on the judiciary as a vulnerable area undergoing a process of degradation. Then, it examines how the Bosnian constitution designed the judiciary, and how the consociational model introduced by the Dayton Peace Agreement influenced its organization, especially at the state level. Finally, the article explores the problematic aspects emerging from the process of degradation, by taking into account the key priorities set by the 2019 Commission Opinion and the findings of the Priebe Report. Moreover, it recalls the proposals of constitutional reforms currently lost in the stalemate of the Bosnian political institutions, caused by the Dayton-system itself. This last element leads to the overall conclusion: the impact of constitutional design arrangements on divided societies should not be underestimated, as it can easily lead to a process of constitutional degradation.***

SUMMARY: Introduction. – 2. Constitutional degradation in divided societies. – 3. The judiciary in Bosnia and Herzegovina. – 3.1 The Bosnian constitutional structure. – 3.2 A fragmented judicial system. – 4. The process of degradation in Bosnia and Herzegovina. – 4.1 Problematic aspects of the Bosnian judiciary. – 4.2 The role of the European Union and the Venice Commission. – 5. Conclusive remarks.

1. *Introduction*

The concepts of "constitutional degradation" and "divided societies" are closely linked. The former generally indicates the deterioration of the institutional and ideological foundations of constitutional liberal democracies and is usually associated with the current crises of constitutionalism, as in Poland and Hungary[1]. The latter refers to those societies divided along ethnic, linguistic, religious, cultural, and national lines, and in which these cleavages are permanent markers of political mobilization[2]. The two concepts are intertwined when considering the challenges arising from divided societies. Indeed, the outcome of the tensions among ethno-cultural groups may either be violent (e.g., civil conflicts, ethnic cleansing,

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** **This work has been subjected to blind peer review.**

[1] M. LOUGHLIN, *The Contemporary Crisis of Constitutional Democracy*, in *O.J.L.S.*, 2019, 39(2), 436-437.

[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?*, Oxford, 2008, 4-5.

genocide), or even in the absence of violence, they may lead to the deterioration of the state's constitutional structure. Both sets of outcomes constitute processes of constitutional degradation.

This article aims at further exploring how the processes of constitutional degradation take place in divided societies and to what extent they depend on the adopted model of constitutional design. The literature on constitutional design for divided societies has extensively debated the "best" model of constitutional design[3], especially following the "third wave of democratization"[4]. Although the objective of constitutional design is to engineer an institutional structure for the protection of fundamental rights, vis-à-vis a pre-existing (perhaps violent) condition of constitutional degradation, this article argues that some elements of degradation not only remain once the violence ends, but also that these persist because the model of constitutional design itself reinforces them. To justify this claim, the article focuses on a specific case study, namely Bosnia and Herzegovina.

Indeed, the choice of such a country was due to three reasons. First, it is a classic example of a divided society. In Bosnia, ethnic and religious groups used to peacefully coexist until such diversity was exploited by political ethno-nationalism in the 1990s, leading to the most violent war on European soil since World War II. Moreover, in the aftermath of the conflict, Bosnia was at the centre of the debate on which constitutional model should be adopted to accommodate internal diversity, leading to the conclusion of the Dayton Peace Agreement in 1995 and the introduction of a consociational model. Finally, the country perfectly exemplifies constitutional degradation caused by constitutional design. The lack of institutional representation of the "others", i.e., those ethno-cultural minorities not entitled to share power by the constitution, is a well-known instance of degradation, as demonstrated by the (still unimplemented) 2009 ECtHR judgement on *Sejdić and Finci v. Bosnia and Herzegovina*[5].

However, this article aims to explore a specific area vulnerable to the processes of constitutional degradation, namely the judiciary. In the literature, the judicial branch is considered one of the pillars of the rule of law[6] and consequently of constitutional liberal democracies[7]. The current crises of constitutionalism in Poland and Hungary are a perfect representation of this phenomenon. More specifically, this article is interested in examining how the design of the judiciary is linked to constitutional degradation in Bosnia and Herzegovina. Indeed, the judicial system designed by the Dayton Peace Agreement is rather complex and decentralised and partially incomplete, especially at the central level. Moreover, a recent ECtHR case (*Baralija v. Bosnia and Herzegovina*)[8] highlighted the willingness of the executive to ignore the rulings of the Bosnian Constitutional Court, further endangering the respect of the rule of law principles in Bosnia.

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[3] See A. LIJPHART, *Constitutional Design for Divided Societies*, in *J. Dem.*, 2004, 15(2), 96-109; D. HOROWITZ, *Constitutional Design: Proposals Versus Processes*, in A. REYNOLDS (ed.), *The Architecture of Democracy*, Oxford, 2002; J. MCGARRY, B. O'LEARY, R. SIMEON, *Integration or Accommodation? The Enduring Debate in Conflict Regulation,* in S. CHOUDHRY (ed.), *Constitutional Design*, cit.

[4] S.P. HUNTINGTON, *Democracy's Third Wave*, in *J. Dem.*, 1991, 2(2), 12.

[5] ECtHR [GC] 22 December 2009, No. 27996/06 and 34836/06, *Sejdić and Finci* v *Bosnia and Herzegovina*.

[6] See T. BINGHAM, *The Rule of Law*, London, 2011; M. KRYGIER, *Rule of Law*, in M. ROSENFELD, A. SAJÓ (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, 2012; A. SAJÓ, *The Rule of Law*. in R. MASTERMAN, R. SCHÜTZE (eds.), *The Cambridge Companion to Comparative Constitutional Law*, Cambridge, 2019.

[7] See Y. HASEBE, C. PINELLI, *Constitutions*, in M. TUSHNET, T. FLEINER, C. SAUNDERS (eds.), *Routledge Handbook of Constitutional Law*, London and New York, 2013, 9-19.

[8] ECtHR 29 October 2019, No. 30100/18, *Baralija* v *Bosnia and Herzegovina*.

The article is structured as follows. First, it deals with the theoretical framework of constitutional degradation in divided societies. Then, it examines how the Bosnian constitution designed the judiciary and how the consociational model introduced by the Dayton Peace Agreement influenced its organization. Finally, the article explores the problematic aspects emerging from the process of degradation.

2. *Constitutional degradation in divided societies*

«Constitutional democracy is not being overthrown; it is being degraded»[9]. These few words describe the essence of the crises that constitutional democracies are facing around the world, after being "the only game in town"[10] since the end of the 20th century. The instances of such process of degradation are many, among the most (in)famous ones it can be recalled the illiberal turn of Poland and Hungary. Ginsburg and Huq recognise that such processes of degradation can "take many forms"[11], and they examine the mechanisms through which the constitutional erosion takes place. First, degradation is an incremental process rather than immediate, and it does not present the violent and abrupt features of a *coup* or a revolution. Conversely, it «involves the use of legal powers to achieve a gradual deterioration in the three basic institutional predicates of constitutional democracy: electoral competition, basic rights of expression and association, and the integrity of institutions»[12]. Therefore, the issue is how existing legal powers can enact the erosion of the pillars of constitutional democracy. Specifically, Ginsburg and Huq identify five methods: (1) constitutional amendments, (2) elimination or weakening of existing constitutional checks, (3) strengthening of executive power, (4) weakening of civil society organisations, and (5) suppression of party competition[13]. Furthermore, Loughlin observes that the socio-political forces that express such erosion «emerge from within, rather than outside, the existing structures of constitutional democracy»[14]. According to such view, it might be easily argued that constitutional design matters a great deal since it builds the institutional spaces for potential degradation and, conversely, for constitutional protection from such degradations. Therefore, constitutional design might create and resolve the problem of degradation.

However, when shifting the focus to what Choudhry defines as "divided societies", the situation seems to be different. A divided society is a society divided along ethno-cultural lines, and in which those divisions become markers of political mobilization and translate into political fragmentation[15]. In these societies, the tensions among ethno-cultural communities might give result in violence (e.g., civil conflicts, genocide, ethnic cleansing), or even in absence of violence, have a corrosive effect on the existing constitutional structure (e.g., institutional discrimination, constitutional crisis, political stalemate). Therefore, the challenges posed by divided societies are of high practical importance, and constitutional design plays a crucial role in facing the potential of constitutional degradation.

[9] M. LOUGHLIN, *The Contemporary Crisis*, cit., 437.
[10] M. LOUGHLIN, *The Contemporary Crisis*, cit., 436.
[11] T. GINSBURG, A.Z. HUQ, *How to Save a Constitutional Democracy,* Chicago, 2018, 34.
[12] M. LOUGHLIN, *The Contemporary Crisis*, cit., 447.
[13] T. GINSBURG, A.Z. HUQ, *How to* Save, cit., 72-73.
[14] M. LOUGHLIN, *The Contemporary Crisis*, cit., 447.
[15] S. CHOUDHRY, *Bridging Comparative Politics*, cit., 5.

Recalling the three institutional features of constitutional democracy involved in the process of degradation (i.e., electoral competition, basic rights of expression and association, integrity of institutions), a few instances in divided societies may be provided to clarify the concept. Northern Ireland is a perfect exemplification of a process of degradation involving the integrity of institutions. In 1998, the Good Friday Agreement ended the conflict between the unionist and nationalist communities (the so-called "Troubles"), introducing power-sharing mechanisms in the constitutional architecture[16]. The Agreement did put an end to violence, but the executive has been highly unstable, collapsing multiple times and leaving the small nation without a government (2002-2007, 2017-2020). This is due to the fact that if one of the two heads of the executive resigns, the entire body collapses, a mechanism that can be used for strategic reasons.

Moving to a case of deterioration of the electoral competition, another example is provided by Bosnia and Herzegovina. As already mentioned, in 1995, the Dayton Peace Agreement introduced a consociational democracy in which the three main ethnic groups (the so-called "constituent peoples") share power in the central political institutions. As in Northern Ireland, such mechanisms have ended the war in Bosnia and Herzegovina but have also created a condition of permanent discrimination of other ethnic minorities. This became evident with the ECtHR judgement on *Sejdić and Finci v. Bosnia and Herzegovina* in 2009, yet to be implemented. The Strasbourg Court condemned Bosnia for discriminating against the Roma and Jewish applicants, who were deemed non-eligible for the highest electoral posts due to their non-affiliation to the constituent peoples.

Therefore, in both cases, it can be argued that the constitutional degradation came "by design" rather than "from within" by exploitation of socio-political forces.

Finally, moving the focus on the rule of law, it certainly is a permeant concept in contemporary constitutionalism and has been extensively discussed by legal scholarship while addressing the illiberal turn of Poland and Hungary[17]. For the limited purpose of this article, the judiciary will be considered an essential element of the rule of law and as a pillar in the attempts to "operationalise" the rule of law to analyse and diagnose its state of health. More specifically, the reference to "independent and impartial courts" appears in the definition of the rule of law given by the European Commission in the Communication on the "2020 Rule of Law Report"[18], along with other elements derived from the case-law of the Court of Justice of the European Union[19] and the European Court of Human Rights[20]. Similarly, the same expression is used by the Venice Commission when identifying the six principles defining the rule of law and its "Rule of Law Checklist"[21]. Moreover, independent courts are considered an essential element in divided societies since they are an indispensable institutional mechanism

[16] See J. MCGARRY, B. O'LEARY, *The Northern Ireland Conflict: Consociational Engagements*, Oxford, 2004.

[17] See D. KOCHENOV, *The EU and the Rule of Law – Naïveté or a Grand Design?*, in M. ADAMS ET AL. (eds.), *Constitutionalism and the Rule of Law: Bridging Idealism and Realism*, Cambridge, 2017, 419 ff.; L. PECH, D. KOCHENOV, *Better Late than Never? On the Commission's Rule of Law Framework and Its First Activation*, in *J. Comm. Mar. Stud.*, 2016, 1062 ff.; L. PECH, D. KOCHENOV, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, in *Eur. Const. L.R.*, 2015, 512 ff.

[18] European Commission, *2020 Rule of Law Report. The Rule of Law Situation in the European Union*, 2020.

[19] See L. PECH, D. KOCHENOV, *Respect for the Rule of Law in the Case Law of the European Court of Justice: A Casebook Overview of Key Judgments since the Portuguese Judges Case*, Stockholm, forthcoming.

[20] See R. SPANO, *The Rule of Law as the Lodestar of the European Convention on Human Rights: The Strasbourg Court and the Independence of the Judiciary*, in *Eur. L.J.*, 2021.

[21] Venice Commission, *Rule of Law Checklist*, 2016, 20.

to protect the human rights of ethno-cultural minorities[22]. Therefore, the judiciary is one of the vulnerable areas subject to constitutional degradation.

3. *The judiciary in Bosnia-Herzegovina*

3.1 *The Bosnian constitutional structure*

The constitution of Bosnia-Herzegovina was drafted in 1995 as Annex 4 of the Dayton Peace Agreement (DPA). The DPA formally ended the conflict in Bosnia, which broke out in the overall process of dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY) and, more specifically, in the aftermath of the referendum on the independence of the Bosnian Republic from the Federation. The constitution-making process thus witnessed a strong international involvement, especially of the United States, as the DPA was concluded in Dayton, Ohio, and was signed by the Republic of Croatia for the Bosnian Croat community, while by the Federal Republic of Yugoslavia for the Bosnian Serbs. It should be noted that only the Bosniaks, i.e., the Muslim population, were represented by a national actor, namely the Republic of Bosnia and Herzegovina.

The Dayton constitution designed a complex multi-tiered system composed of two entities (the Federation of Bosnia-Herzegovina (FBiH) and the Republika Srpska), and of Brčko District. The constitutions of the two entities established two rather different systems. The Federation is territorially decentralised into ten cantons (four of Bosniak majority, three of Croat majority, and two mixed Bosniak-Croat), while the Republika Srpska is a territorially centralised and unitary system of Serb majority. Each level has its own executive, legislative and judicial branches, resulting in a high degree of internal fragmentation. The constitution grants the entities relative constitutional and legislative autonomy and extensive rights concerning the delegation of responsibilities[23]. Therefore, the «real power of the state of Bosnia and Herzegovina rests with the entities»[24].

At the central level, the constitution introduced strong power-sharing elements in the central institutions, namely a collective presidency and a bicameral parliament elected on the basis of a territorially based ethnic principle. The three so-called “constituent peoples”, i.e., Bosniaks, Serbs, Croats, equally share power in each state institution (Presidency, Parliament, Council of Ministers), adopt decisions through cross-community mechanisms, and exercise veto rights on “vital interest issues”.

3.2 *A fragmented judicial system*

The constitution of Bosnia-Herzegovina delegates the organisation and the responsibilities for the judicial system to the entities and Brčko District[25]. In the Federation, the judicial system is structured in 31 Municipal Courts, ten Cantonal Courts, and one Supreme Court. If the Municipal Courts may exercise jurisdiction over one or many municipalities, the competency

[22] S. CHOUDHRY, R. STACEY, *Independent of Dependent? Constitutional Courts in Divided Societies*, in C. HARVEY, A. SCHWARTZ (eds.), *Rights in Divided Societies*, Oxford, 2012, 87.

[23] Constitution of Bosnia-Herzegovina, art. III.

[24] S. GAVRIĆ, D. BANOVIĆ, M. BARREIRO, *The Political System of Bosnia and Herzegovina: Institutions - Actors – Processes*, Sarajevo, 2013, 51.

[25] Constitution of Bosnia-Herzegovina, art. III 3(a).

of the Cantonal Courts correspond to the cantonal borders. The Supreme Court is the highest authority, while the Constitutional Court of the Federation is not counted as a judicial power, but it is mentioned as an organ of abstract normative control. On the opposite side, the judicial power in the Republika Srpska is exercised by 20 General Courts, five District Courts, and one Supreme Court. The General Courts are responsible for one or more municipalities, while several General Courts come under the authority of one of the District Courts. As in the Federation, the Supreme Court is the highest authority, and the Constitutional Court of the Republika Srpska deals with abstract normative control. A separate judicial structure was introduced in the Statute and the Law on the judicial system in Brčko District. The structure comprises a General Court and a Court of Appeal[26].

At the central level, the situation is more complex. The Court of Bosnia-Herzegovina was established in 2007, having national-level jurisdiction and marking a moment of particular importance to the Bosnian judicial system. Its tasks are comprised of the protection of effective implementation of the central state's competencies and the protection of human rights and the rule of law. However, this Court system has not yet fulfilled the prerequisites for a uniform central-state judicial system, as it would require the establishment of a Supreme Court of Bosnia-Herzegovina at the highest appeal board. Even if this idea was included in former reform discussions, there was no political majority to sustain such initiative because this would mean losing part of the entities' power of jurisdiction and autonomy.

The constitution of Bosnia-Herzegovina provides the basis for the central-level Constitutional Court[27], which is comprised of nine members: four appointed by the House of Representatives of the FBiH (two Bosniak and two Croats), two Serbs by the National Assembly of the Republika Srpska, and three judges by the President of the European Court of Human Rights. Therefore, it is a unique case of a Constitutional Court with the presence of international judges. The Bosnian Constitutional Court rules on controversies between the entities, the central state and the entities, and the central state institutions. Concerning the access to the Constitutional Court, those eligible are every member of the Presidency, the chairman of the Council of Ministries, the chairmen and deputies of the two chambers of the Parliament, a quarter of the delegates in the chambers at the central level and entity Parliaments.

Finally, the establishment of the High Judicial and Prosecutorial Council (HJPC) in 2005 was pivotal for the judicial system in Bosnia. The HJPC is an independent body designed to ensure the independence, neutrality, and professionalism of the judicial powers. It is composed of fifteen members: eleven appointed among fellow judges and prosecutors and four lay members appointed by the Council of Ministers, the Parliamentary Assembly, and one each bar association in the entities. The Council is responsible for the election of judges and prosecutors at all levels and their careers, it rules on questions of judges' non-compliance with other functions and ensures continuous and adequate funding of courts and prosecutor offices.

[26] S. GAVRIĆ, D. BANOVIĆ, M. BARREIRO, *The Political* System, cit., 44-45.

[27] Constitution of Bosnia-Herzegovina, art. VI.

4. *The process of degradation in Bosnia and Herzegovina*

4.1 *Problematic aspects of the Bosnian judiciary*

Judicial independence was the main issue in the post-war justice system. In fact, judges were exposed to strong political pressure and interference. Up until the establishment of the High Judicial and Prosecutorial Council, many issues threatened the degree of internal and external independence of judges. For instance, the appointment of judges and prosecutors used to be in the hands of the Ministers of Justice (and thus of political parties) at the different levels; the funding and human resources for the judiciary were inadequate; the backlog created by the lack of judges and resources was significant; the professional training for judges and prosecutors was poor, and so they were often young and inexperienced, easily subject to the intimidation of local politicians and warlords. All these factors encouraged the culture of lawlessness, as well as judicial corruption and conflict of interests, affecting the public opinion and the trust in the justice system.

In order to safeguard judicial independence, the appointment and dismissal of judges and their career advancement are centralised in the hand of the HJPC, and the judges of the Court of Bosnia-Herzegovina and the Courts in the entities are now assigned lifelong assignments. Moreover, the training is now provided by the Judicial and Prosecutorial Training Centres of the entities. Another important element to guarantee the separation of power is significant financial independence. The HJPC applies to the central-level Ministry of Justice for its annual budget, which must then be adopted by the parliament.

However, several critical aspects still persist. In particular, the so-called Priebe Report[28], prepared by a group of legal experts at the request of the EU Commission, recently highlighted many concerning issues that the Bosnian justice system is currently struggling with. One of these is the lack of a culture of responsibility, accountability, and transparency, which still needs to be fully developed within public institutions and leads to the lack of trust of the citizens towards their judicial system[29]. According to the legal experts, structural reforms of the judiciary are urgently needed to address a series of issues that undermine the accountability and efficiency of the system. For example, the non-implementation of the ECtHR *Sejdić-Finci* ruling and subsequent case law indicates «lack of determination of the country to respect the rule of law»[30], as also stated by the Strasbourg Court in the *Baralija* case, underlining the fact that the government was ignoring a ruling by the Constitutional Court concerning the Mostar local elections and thus undermining the respect of the rule of law principles[31]. Moreover, the civil judiciary is overburdened with a backlog of cases, thus provoking excessive length of court proceedings. Aside from civil justice, the criminal justice system exposes the deepest problematics of the judiciary in Bosnia and Herzegovina and its weakness in terms of respect of the rule of law. First and foremost, the criminal justice system still fails to properly contrast serious crime and corruption, as «none of the four criminal justice jurisdictions is adequately functioning»[32]. Cooperation is extremely weak and would need substantial improvement and commitment on all levels of government. External interference, pressure, threats, and intimidation of prosecutors and judges are still cause of

[28] *Expert Report on Rule of Law Issues in Bosnia and Herzegovina*, 2019.
[29] *Expert Report*, cit., para. 16-24.
[30] *Expert Report*, cit., para. 28.
[31] L. BONIFATI, *Molto Rumore per Nulla? Dieci Anni Dalla Sentenza Sejdić-Finci*, in *Forum Quad. Cost.*, 2020, 68.
[32] *Expert Report*, cit., para. 42.

great concern and further undermine judicial independence, a pillar of the rule of law. This aspect becomes especially evident in cases relating to high-level corruption, complex financial crimes, and organised crime, leading to impunity and aggravating the lack of trust on the part of the citizens. Finally, many war crimes still remain to be addressed, rendering justice to the victims of the 1992-1995 war in Bosnia-Herzegovina.

4.2 *The role of the European Union and the Venice Commission*

In March 2019, the European Commission launched the "EU initiative to enhance the Rule of Law in Bosnia and Herzegovina", leading to the 2019 Opinion on Bosnia's application for membership and the already recalled Priebe Report. In the 2019 Opinion, the Commission set a series of key priorities to be addressed in terms of democracy/functionality, the rule of law, fundamental rights, and public administration reforms. Specifically, the rule of law priorities concern the improvement of the functioning of the judiciary by adopting new legislation on the HJPC and on the Courts of Bosnia and Herzegovina in line with European standards and the strengthening of the prevention and fight against corruption and organised crime, including money laundering and terrorism.

Along with these priorities, the Priebe Report pointed out in particular that trust needs to be rebuilt, human rights and fundamental freedoms must be guaranteed, justice must serve citizens, the HJPC needs fundamental reform and a radical change of behaviour, and integrity of judicial office holders must be ensured. Finally, the Reports highlights that the constitutional framework is only part of the problem concerning the judiciary and the respect of the rule of law since political will is identified as the deepest obstacle for reform. However, it could be argued that the lack of political will also depend on the lack of incentives provided by the current constitutional architecture (e.g., by veto powers), in a vicious circle.

On its part, the Venice Commission was asked to submit an opinion on the draft law on the HJPC in 2014[33], and expressed some concerns on the possible transfer of competences from the HJPC to the entities in the appointments of prosecutors and on the permanence of the ethnic logic in the composition of the judicial system, possibly affecting its functioning. Moreover, the Venice Commission concluded that it would be recommended that «the HJPC be provided with an explicit constitutional basis because it believes that this would facilitate the role of the HJPC as the guarantor of the independence of the judiciary of Bosnia and Herzegovina»[34]. These concerns are in line with the findings of the Priebe Report relating to the need for reforms of the HJPC. In fact, the legal experts observed that the judicial body should follow a non-ethnic approach and be based on merit, that the procedures for the election of the HJPC members should be revised, that the disciplinary procedures and bodies within HJPC should be radically reformed, that it should be subject to performance appraisal, and that quality, transparency, and outreach should be significantly expanded.

[33] Venice Commission, *Opinion on the Draft Law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina*, 2014.

[34] Venice Commission, *Opinion on the Draft* Law, cit., para. 127.

5. *Conclusive remarks*

The issue of the relationship between constitutional design models and democracy has been greatly discussed in the literature, especially concerning the compatibility of power sharing with democracy[35]. More specifically, the purpose of this article was to explore the link between constitutional design and constitutional degradation in divided societies through the analysis of a particular case study, namely Bosnia and Herzegovina.

The study highlighted the limitations regarding the upholding of the principles of the rule of law in Bosnia and Herzegovina. Judicial independence is still an urgent matter to be properly addressed, as well as transparency, accountability, and trust. Moreover, the process of constitutional degradation in Bosnia-Herzegovina may also be detected in other spheres of the constitutional system, as demonstrated by the non-implementation of the *Sejdić-Finci* judgement and the fact that, up until a few months ago, the city of Mostar was without an elected mayor.

However, if in the "classical cases" of constitutional degradation the societal-political forces exploited the existing constitutional structure, when turning the attention to divided societies it seems rather evident that the process of constitutional design itself planted the seeds for potential processes of degradation. In Bosnia, the complex constitutional architecture designed by Dayton significantly aggravates the capacity of the constitutional system to properly uphold the rule of law in a vicious circle that still appears very difficult to be broken. Constitutional and institutional reforms are still lost in the political stalemate and are held hostage by the interests of political parties that do not have any incentive in changing a system currently in their favour, granting them strong veto powers to defend their "vital interests". Therefore, the power-sharing mechanisms introduced by the DPA do not facilitate the discussion and adoption of the reforms deemed necessary by the Priebe Report, nor the constitutional reforms to implement *Sejdić-Finci* ending institutional discrimination of minorities.

In conclusion, the showcase of Bosnia-Herzegovina seems to uphold the hypothesis that constitutional degradation came "by design". For this reason, constitutional designers should take into account the potential for degradation when engineering a new constitution or drafting constitutional amendments since the consequences could be extremely difficult to overcome in a later stage.

[35] See C.A. HARTZELL, M. HODDIE, *The Art of the Possible: Power Sharing and Post—Civil War Democracy*, in *World Pol.*, 2015, 37 ff.; C. BELL, *Power-Sharing and Human Rights Law*, in *Int. J. Hum. Rts.*, 2013, 204 ff.; S. NOEL, *From Power Sharing to Democracy. Post-Conflict Institutions in Ethnically Divided Societies*, Montréal, 2005; A. LIJPHART, *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*, London and New York, 2008.