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Who is shaping whom? – The role of the B&H Constitution in establishing the rule of law culture

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Abstract: The main premise of the Constitution of Bosnia and Herzegovina (B&H) is that B&H shall operate under the rule of law. Establishing the rule of law is not simply a process, it requires, alongside legal reforms, also socio-economic reforms. Establishing the rule of law also depends on establishing a rule of law culture. However, a constitution is a framework that shapes legal and political culture in a society. This is a two-way process where a culture also shapes how a constitution is implemented in practice. In this paper, the author analyses the role of the B&H Constitution in establishing the rule of law culture in B&H. In this context, the author analyses who influenced whom. Has the B&H Constitution shaped the legal and political culture in B&H or inherited legal and political culture in B&H has shaped the B&H Constitution?

Keywords: political-legal culture; rule of law; rule of law culture; Bosnia and Herzegovina.

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1 Introduction – on the culture of the rule of law

Although the rule of law is primarily a legal concept, it cannot be studied without a sociological, cultural and historical background [Selznick, (2016), p.21]. The rule of law does not depend only on the normative compliance of the legal system with the rule of law. The rule of law is also influenced by social, historical, and cultural factors. The very concept of law, as Radbruch ([1932] 2019, §4, p.51) points out, is a cultural concept –

a concept that refers to the relationship between values and reality in which the meaning of reality is to serve values. In a way, the rule of law is more a culture than a set of rules [Stromseth et al., (2006), p.310]. As Fonseca (2015, p.2) explains, the rule of law cannot be separated from legal culture (tradition) because the state and law are not only products of institutions but also products of culture. In this regard, as stated by Häberle (2000, p.17), the constitution is an expression of the state of cultural development, a means of cultural self-presentation of a nation, a mirror of its cultural heritage, and the foundation of new hopes. Friedman (1987, p.204), among other things, divides legal cultures into modern and traditional. Legal cultures are formed on the basis of legal theories and doctrines, e.g., on the basis of the discussions that take place within these concepts. In this sense, Aguiar-Aguilar (2022, p.3) identifies the following legal cultures: culture or cultures of legality, judicial ideology, legal ideology, legal consciousness, judicial role conceptions and legal preferences.

A culture of the rule of law implies a community committed to respecting legitimate authority and obeying the law as a moral obligation. In addition, the rule of law requires the existence of a culture of legality and public trust in the postulates and virtues of the rule of law. This includes the understanding that positive law is always subject to correction according to the standards of truth and justice (the rule of law) because in the culture of the rule of law positive law does not have the last say [Selznick, (2016), p.37]. The culture of adherence to the law, as we can see, is undoubtedly part of the culture of the rule of law, but above that, justice is a general principle, which means that in the culture of the rule of law, laws are amended to try to achieve the ideal of justice. A good example is Tocqueville's ([1835] 1990, p.210) following observation where he explains that the people in America obey the law not only because the source of the law is popular authority, but because the law can be modified at any point which may prove vexatious.

In order for a culture of the rule of law to exist, it is necessary to have the following: a relationship of trust between the rulers and those being ruled; the state and society are bound by the laws they adhere to; the legitimacy of judicial and security institutions, systems, and actors; institutions and laws are inclusive – they recognise and respond to the justice and security needs of all individuals; the ideal of the rule of law is based on reality [McKay, (2015), pp.18–19]. The culture of the rule of law is a *condicio sine qua non* for the validity of the normative rule of law. Hayek ([1960] 1998) thus says that the rule of law will be realised in practice only if the legislator feels bound by it. That means that the rule of law (in a democracy) should be the part of moral tradition of the community and commonly accepted by the majority [Hayek, ([1960] 1998), p.181]. Democratic culture, a legal tradition that includes an independent judiciary, a developed legal profession, the police, and the civil service, is the basis for the realisation of the rule of law, claims Raz (1990, p.339). Laws do not legitimise themselves nor can they be legitimised by other laws or other legal acts that create them – the legitimacy of laws is found in the acceptance of obedience to them. That is why there must be a collective will – of both those who rule and those who are ruled to accept the legal obligation of the law. Without it, the rule of law is a dead letter [Fonseca, (2015), p.2] or, as Krygier (1996/1997, p.18) describes it, an inspiring and perhaps fruitful fantasy, but a fantasy nonetheless. In this context, Häberle (2000, p.19) explains that the normative power of the constitution works through culture – role models, and educational goals, but also the legal protection of citizens due to fundamental rights and an independent judiciary can only exist if they have their basis in legal culture. If citizens believe that laws are just and institutions are effective, they will use laws to resolve conflicts and will accept that their

behaviour is constrained by such laws. On the other hand, if citizens doubt the fairness of laws and the effectiveness of institutions, they will look for alternative ways to resolve conflicts – which will consequently lead to the weakening of laws and institutions [Stromseth et al., (2006), p.311]. Therefore, the rule of law and legal culture are biomes, one cannot be studied without the other because, in the end, the rule of law can only exist where there are cultural foundations for it. If there are no cultural foundations for the rule of law – then the rule of law can only be realised as a normative and temporary stage within society [Fonseca, (2015), pp.10–11]. The mutual relationship between legal culture and the rule of law is best described by Godson, who says that without law and without a mechanism of force to impose justice, legal culture *per se* is unable to maintain the rule of law. Legal culture needs law enforcement, but law enforcers also need culture. Without a legal culture, the rule of law is neither sustainable nor desirable [Fonseca, (2015), pp.10–11]. Krygier explains that the rule of law depends more on socio-economic relations in society than on the laws themselves [Zimmermann, (2007), p.25].

However, the rule of law is not just a legal culture. Also, political culture is essential to the rule of law culture. The division of legal culture in this context, as stated by Hasanbegović (2021, p.130), can be divided into the legal culture of human rights and the legal culture of subjects, while the political tradition (which, according to the author, determines legal culture) can be divided into democratic and authoritarian political traditions. Based on the above, the culture of the rule of law represents a mixture of the legal culture of human rights and the democratic political tradition, and in addition, a mandatory part of the culture of the rule of law is the culture of adherence to the law (Silbey, 2010). In such a relationship, democratic political culture contributes to citizens being involved in the formation of laws or amending laws. On the other hand, the culture of adherence to the law contributes to the fact that those who rule and those who are ruled adhere to the laws passed, and crucially, the legal culture of human rights contributes to the fact that citizens are aware of the fact that positive legal regulations do not have the last say and that laws should be adapted to obligations of respecting human rights – because they (human rights) have the last say in the rule of law culture. Therefore, the rule of law can only be established where citizens seriously understand their rights [Zimmermann, (2007), p.28].

Thus, the rule of law culture requires citizens to believe in the virtues of a legal order under which they live, and the institutional culture – institutions ought to operate in line with the rule of law. The institutional rule of law culture is the precondition for establishing the rule of law among citizens. In this paper, I will analyse the role of the Bosnia and Herzegovina (B&H) Constitution in the context of these two requirements of the rule of law culture.

2 Brief history of B&H and the lack of the rule of law culture

Throughout its history, B&H was under the rule of the Ottoman Empire, the Austro-Hungarian (A-H) Empire, the Kingdom of SHS (the Kingdom of Yugoslavia), and socialistic Yugoslavia (SFRJ). The rule of law is, of course, a modern principle, but some societies throughout their history have established preconditions for the rule of law, and some of them have not. In this part of the paper, I analyse, whether these cultural preconditions for the rule of law have been established throughout the history of B&H.

2.1 Ottoman period (1463–1878)

As part of the Ottoman Empire, B&H was influenced by the political and legal culture of the Ottomans. Čorbić (2021, p.107) points out that complex bureaucratic practices and corruption were inherited by the Ottoman Empire in Balkan countries. Corruption was only a consequence of the political-legal system of the Ottoman Empire [Malcolm, (2011), p.191]. Dymarski (2016) claims that it was the Ottomans who created the culture of authoritarianism (authoritarian political culture) in the Balkan states. Because, as he claims, the lack of any tradition of democratic representation, underdeveloped political culture, and the absence of the press as an instrument of public control of public opinion formation means copying the Ottoman culture of power (rule by law tradition) in the Balkan states. Dževdet Pasha gives an account of the political and legal culture that developed in B&H in his work *Spisi*. Examining the reasons why the court in Sarajevo collected low revenues, Dževdet Pasha wrote:

“(…) the revenues of the commercial court are quite low and are not even sufficient for the salary of the court secretary (*kātib*). The court administration, therefore, complained that in such conditions ‘the salary of the court president is not completely covered’. I was very surprised by this complaint. So, I immediately went to the commercial court and we went through all the books. I found that during twelve months the highest monthly income did not exceed 350 *kuruş*, and that was quite rare (...) It turned out that these modest incomes were generated from court cases that were conducted for merchants outside Sarajevo. Sarajevo merchants did not come to court at all. Therefore, I needed to examine how trade is conducted in Bosnia (...) this business is carried out in the following way: merchants from sandžak and kadiluk take goods worth several hundred *kuruş* from Sarajevo merchants. Together with the goods that they will transport to their place, they also take over the invoice for the type and value of the goods. At the same time, the Sarajevo merchants do not ask them for any guarantee that they will pay for the taken goods, they do not ask for any confirmation or a person who would be a witness about taking over the goods. Therefore, if one of those merchants denied his debt, the Sarajevo merchant would have no grounds to sue him.” [Filan, (2017), pp.92–93, translated]

We meet this state of harmony between people in Locke’s pre-state (natural) state, where people live in general harmony without conflicts. Based on what was stated, merchants in B&H at that time did not even need the state because there were no disputes between merchants at all. But is Dževdet Pasha’s report true? First of all, during the period when Dževdet Pasha wrote his travelogues, the Ottoman Empire was about to collapse. It is unlikely that such a harmonious situation could have prevailed in B&H in that period. What other explanation could there be that the commercial court had so few cases that it could not pay the wages of the employees? From the perspective of the political-legal culture that was developed in the Ottoman Empire, it is more likely that the inhabitants of B&H, more precisely merchants, did not trust the work of the court, and therefore decided to resolve their disputes out of court (alternatively). As explained in the introduction of this text, where there is no culture of the rule of law, citizens do not trust the judicial institutions, so they decide to settle their disputes outside the judicial institutions. Based on this statement of Dževdet Pasha, although he tried to portray the situation as idyllic, we can conclude that in B&H at that time there was no trust in judicial institutions – there was no rule of law culture. It is also understandable why there was no trust in judicial institutions. In this context, Andrić (2017, p.26) writes that in this

period of the Ottoman Empire, the only revenue for administrative and court officials (*muselimi* and *qadis*) was from bribes, because they did not have a permanent salary. It was corruption that made the population distrust the judicial institutions in resolving their disputes.

2.2 Austro-Hungarian period (1878–1918)

B&H was a part of the A-H Empire as a *corpus separatum*. The A-H Empire had the main influence on the modernisation of the legal system of B&H, and it had an important role in importing legal transplants from West Europe. ‘Europeanisation’ of B&H’s legal and political culture led to the adoption of new laws and new institutions. Also, the A-H introduced the civil law system in B&H. In the first years of ruling Benjamin Kállay, this process did not make sufficient changes to B&H’s society in the context of democratisation. His era can be described as ‘bureaucratic absolutism’. In the context of legal and political reforms, he left the legal order based on the privileges of the Muslim landowning elite to collect rents and taxes from the mainly Christian peasants known as *kmetovi*. Thus, he legalised the landlords’ privileges from the era of Ottoman rule, to protect landlords. Kállay recruited an army of civil servants from the centre of the Empire with the intention to implement bureaucratic authoritarianism. For the first decade of Kállay’s rule, the political life in B&H was remarked as obedience to the Imperial family [Donia, (2021), pp.137–138].

Kállay’s death (1903) was a turning point in the policy of the A-H towards B&H [Okey, (2007), p.144]. Therefore, B&H became a more equal ‘partner’ in the A-H. As a product of the new policy, B&H got the first ‘Constitution’ (*Zemaljski ustav/Statut*) in 1910. It was not enacted by the state assembly of B&H but, the central authorities of the A-H enacted the Constitution for B&H. This Constitution established the Bosnian Diet, and with other additional laws, established the Bosnian Government (*Zemaljski savjet*) and District Council (*Kotarsko vijeće*). Also, the Constitution proclaimed the rights of citizens of B&H. More precisely, the Constitution stated the catalogue of rights. In the second article, the Constitution states that all citizens of B&H are equal before the law [Constitution/*Statut*, 1910, Art. 2 (§3)]. Within the Constitution, parliamentarism and human rights were imported to B&H. But, B&H at that period was not a real parliament democracy nor human rights were unchangeable constraints to the monarch. The Bosnian Diet did not have legislative power, and still, this power was in the hands of the monarch. In enacting new laws in B&H, the Bosnian Diet only could advise the monarch, but it did not have independent power to enact a law. Additionally, human rights were a changeable category, where the monarch in the case of war or other emergencies could dismiss all human rights [Mutapčić, (2011), pp.102–104]. The era of fled constitutionalism did not last long, because it was stopped by the First World War. Of course, the era of constitutionalism (1910–1914) brought positive changes to B&H, but still, it was not a truly liberal democratic change for B&H.

2.3 The period of the Kingdom of SHS/Yugoslavia (1918–1941)

The Kingdom of the Serbs, Croats, and Slovenes (SHS) was proclaimed in 1918 by King Alexander. B&H was a part of the Kingdom of SHS (see: Zukić, 2014). The background idea of this newly created state was to unify all Slavic nations, who live in

Balkan, in one state [Pirjevec, (1993), p.109; also see: Milosavljević, 2019]. The Constitution of the newly formed state was adopted in 1921 (the Vidovdan Constitution). This period of ‘constitutionalism’ lasted till 1929 when the King suspended the Constitution and introduced dictatorship. The King enacted the new constitution in 1931 [Savić, (2021), p.21]. The Vidovdan Constitution defined the state as a parliamentary monarchy. Also, the Vidovdan Constitution stated the separation of powers between the legislative, executive, and judicial branches, but in fact, the King had the power to control all branches and he was essentially the first constitutional factor [Savić, (2021), pp.22–24].

The Vidovdan Constitution also prescribed political rights that were limited by special laws [Savić, (2021), p.24]. Kosnica and Protega (2019, p.151) mention four features of political rights in the Kingdom of SHS. The first feature is the significant link between nationality and the design political community. Then, the inequality of suffrage, the authoritarian approach of the authorities toward political rights, and legal particularism. So, political rights in the Kingdom of SHS were ‘dead letter’.

In 1929, the King introduced the dictatorship, and dissolved the assembly, justifying his decision with national and state interests. The new constitution, introduced in 1931, stopped the era of dictatorship but maintained the royal power of the King to control everything [Savić, (2021), pp.24–25]. “The existence of the Kingdom of Serbs, Croats, and Slovenes/Yugoslavia in the period 1918–1941 in a political sense, was marked by the changes of a covert and open dictatorship, whereby the proclaimed democratic rights and freedoms represented only a show for the public” [Savić, (2021), p.21]. So, formally the Kingdom of SHS/Yugoslavia planned to be a democracy, but in practice, this state was authoritarian.

2.4 The period of socialistic Yugoslavia (1945–1992)

After the end of the Second World War, B&H continued to exist as part of Yugoslavia or rather its federal unit. Yugoslavia, led by the Communist Party, was creating a new political and legal culture based on the principles of communism and socialism. According to Uzelac (2010, pp.382–385), the characteristics of the socialist legal tradition are reflected in the fact that legal procedures serve to protect the interests of political elites, then in the fear of decision-making by the judicial authorities and the status of judges, which is low but comfortable. In Yugoslavia, there was quasi-constitutionalism, based on the rule by law system [Baričević, (2007), p.208]. Yugoslavia had a structured form of institutions that formally corresponded to the system of the rule of law (in the formal sense!), such as the Constitutional Court of Yugoslavia, ordinary courts, the Assembly of Yugoslavia, and the Presidency of Yugoslavia. The aforementioned institutions and legal norms were used to maintain the ruling communist regime in power. The Yugoslav system was characterised not only by the legitimisation and legalisation of government actions by the courts but also by the fight against political dissidents and political control of the work of the administration. The Communist Party had absolute power in governing the country. All institutions within the constitutional system of Yugoslavia served the Communist Party had the purpose of legitimising the actions of the Party. Essentially, the Constitutional Court of Yugoslavia had no constitutional control over the work of the Communist Party. Participation of citizens in political processes was at a low level, mostly due to distrust in the possibility of influencing political processes. The reason for this was the lack of information about the

gatherings of citizens and the facts related to the specific decisions that were decided upon. Also, a low level of education about the importance of participation, a low level of knowledge about political processes, and a low level of political culture resulted in the abstinence of citizens from participating in political processes [Leonardson and Mirčev, (1979), p.193]. Human rights existed in the constitutional system of Yugoslavia, but these human rights were usually limited by laws and other legal acts [Macfarlane, (1990), pp.129–130]. Therefore, the citizens of Yugoslavia were not guaranteed human rights beyond the will of the state authorities, but the issue of respect for human rights depended primarily on the will of the regime. So, also in Yugoslavia, there was a lack of the rule of law culture, because citizens did not trust institutions, and institutions did not operate in line with the rule of law.

So, B&H was always a part of authoritarian or semi-authoritarian states, with the lack of a rule of law culture. The lack of a rule-of-law culture can be named a rule-by-law tradition. Dyzenhaus (2021, p.261) explains that in this type of tradition, the law does not exist apart from the law that is standardised as such by the legislative authority, regardless of the content of legal norms. In the next part of the text, I will analyse the role of the B&H Constitution in society with the lack of a rule of law culture. Also, I will analyse who is shaping whom? Does the B&H Constitution shape the political and legal culture of B&H's society, or does B&H's society influenced by the rule by law tradition shape the B&H Constitution?

3 B&H Constitution and the rule of law culture

B&H became an independent state in 1992, and in the period from 1992–1995 was a victim of an armed conflict. Finally, as a consequence of the armed conflict, the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Agreement/DPA) was signed in 1995. This agreement also regulates the future constitutional structure of B&H. Namely, the B&H Constitution represents Annex IV of the DPA. In the context of this text, this was the first Constitution in the history of B&H that explicitly referred to the rule of law. Article I(2) of the B&H Constitution reads: “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections” [Art. I(2) of B&H Constitution (1995)]. This aspiration of the rule of law state, which is prescribed in the B&H Constitution is a typical example of, as Hasanbegović (2021, pp.123–139) named it ‘unfounded normative optimism’ because the rule of law is not founded in the culture of that state. As I depicted, throughout the whole history of B&H, it has never been established something that we call the rule of law culture. Also, the B&H Constitution is the first Constitution in the history of B&H that in a modern manner protect human rights. Moreover, the B&H Constitution prescribes the protection of human rights like no other constitution in the world [Chandler, (2000), p.92]. Now, I will analyse is the B&H Constitution shaped the B&H rule by law tradition, or whether the B&H rule by law tradition shaped the B&H Constitution. I will analyse two aspects of the rule of law culture. Firstly, the institutional culture, whether institutions of B&H operate in line with the rule of law, secondly whether citizens of B&H trust the institutions of B&H, and finally, whether they believe in the virtue of the B&H Constitution.

In 2019, the Europe Union conducted a report on the rule of law in B&H. This Expert Report on Rule of Law issues in B&H marked the main issues of the rule of law in B&H. About judicial proceedings, the report states that “Civil justice proceedings are laborious, complex and formalistic and take an excessive amount of time. This significantly limits the citizens’ right to effective judicial protection in civil matters and leads to increased legal uncertainty” [Expert Report on Rule of Law issues in B&H, (2019), Para. 32]. Additionally, the major source of citizens’ dissatisfaction with the civil proceedings is the excessive length [Expert Report on Rule of Law issues in B&H, (2019), Para. 34]. “Efficiency of courts in business related matters, in particular in the areas of contract enforcement and bankruptcy must be significantly improved. Timely adjudication in these matters is essential to support a healthy business environment, investment and economic growth” [Expert Report on Rule of Law issues in B&H, (2019), Para. 37]. Also, “(...) administrative justice is not efficient in protecting the individual rights of citizens against decisions or the failure to act of public authorities” [Expert Report on Rule of Law issues in B&H, (2019), Para. 40]. Moreover, “[t]he criminal justice system in BiH is failing to combat serious crime and corruption” [Expert Report on Rule of Law issues in B&H, (2019), Para. 42]. Regarding civil, criminal, and administrative justice, the institutions of B&H failed to offer satisfaction to the citizens of B&H. Comprehensively, on establishing the rule of law, the Expert Report states that “[i]mplementation of rule of law is insufficient, often due to poor management of human resources, political interference and a lack of a culture of accountability and transparency” [Expert Report on Rule of Law issues in B&H, (2019), Para. 21]. So, this report depicted that the institutions of B&H do not operate in line with the rule of law and that there is no institutional rule of law culture in B&H yet.

This produces distrust of the citizens of B&H toward the institutions. In the survey conducted in 2013, 79.9% of citizens said that they do not trust to government on the state level, and 79.1% of citizens do not trust the state assembly. On entities institutions, 74.4% of citizens said that they do not trust parliaments and 71.2% of citizens do not trust governments. On the judiciary, only 33.7% of citizens trust this branch [Survey on Citizens’ Trust in Government Institutions, Political Actors, and Other Organisations in B&H, (2013), p.1].

How do the citizens of B&H see the B&H Constitution? The survey conducted in 2021 states that 41.2% of citizens see the B&H Constitution as an absolute obstacle to the progress of B&H. Additionally, 30.5% of citizens of B&H see the B&H Constitution as an obstacle to the progress of B&H to some degree [Puhalo, (2022), p.37]. Therefore, 57.1% of the citizens of B&H think that B&H needs a new constitution. Interestingly, many of the citizens (53%) of B&H did not read the B&H Constitution [Puhalo, (2022), p.19]. In that context, the B&H Constitution did not establish ‘constitutional patriotism’, because the citizens of B&H do not see the B&H as the foundation for the progress, but as an obstacle.

4 Conclusions – who is shaping whom?

The main question in this paper is – whether the B&H Constitution shapes the political and legal culture of B&H, or whether the political and legal culture of B&H shapes the B&H Constitution. In this paper, I briefly depicted B&H’s history, intending to analyse what type of political and legal culture was developed during the history of B&H. One of

the main features of B&H's history is the lack of the rule of law culture that can be named as the rule by law tradition. The B&H Constitution prescribes too optimistic aspiration that the state with the lack of the rule of law culture or the state with long the rule by law tradition shall operate under the rule of law. Although the B&H Constitution intends to shape the legal and political culture of B&H in order to establish the rule of law culture, in fact, the inherited rule by law tradition has been shaping the B&H Constitution. Therefore, the institutions of B&H do not operate in line with the rule of law, as the Expert Report states. In that context, the citizens of B&H do not trust to institutions of B&H, and also citizens of B&H see the B&H Constitution as an obstacle to the progress of the state. Because of this, the B&H Constitutional framework did not fulfil any of the requirements of the rule of law culture. Firstly, the B&H constitutional framework did not create circumstances where the institutions will operate the rule of law. Secondly, the B&H constitutional framework did not make circumstances where citizens of B&H will trust the institutions of B&H, and additionally, did not make circumstances where citizens will believe in the virtue of the Constitution.

Another question is why the B&H Constitution has failed to establish the rule of law culture. In my opinion, the first reason has well established the rule by law tradition in B&H's society. It would be too optimistic to expect that the B&H constitutional framework can shape the well-established rule by law tradition. The second problem of the B&H Constitution is that provisions of the B&H Constitution which prescribe ethnic discrimination, are not in line with the rule of law, so the intention of the B&H Constitution proclaimed in Article I(2) is contradictory to constitutional provisions. To some degree, the B&H Constitution is inconsistent with itself. The third reason is that the B&H Constitution was primarily enacted to establish peace, not the rule of law.

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