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CONVEGNO SCIENTIFICO INTERNAZIONALE

FROM NATIONAL SOVEREIGNTY TO NEGOTIATION SOVEREIGNTY
"Days of Law Rolando Quadri"

DALLA SOVRANITÀ NAZIONALE ALLA SOVRANITÀ NEGOZIALE
"Giorni del Diritto Rolando Quadri"

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ROMAN CONSTITUTIONAL MODEL AS AN INSTRUMENT OF PEACE IN POST-CONFLICTUAL SOCIETIES – NEGOTIATED SOVEREIGNTY AND CONSOCIATIONAL DEMOCRACY**

Abstract

The subject of this paper is the search for new possible constitutional solutions for re-uniting the states divided by ongoing or frozen conflicts. Based on some recent experiences, especially Dayton accord that ended the war in Bosnia and Herzegovina, author believes that roman constitutional model, as opposed to commonly diffused Germanic or Anglo-Saxon model, constitutes a more useful resource of rules that could be basis for developing new legal instruments to resolve current and future conflicts. Among them, of special interest are the idea of complex electoral system with guaranteed seats for certain societal groups and voting by not necessarily territorial-based electoral units, imperative mandate as an element of direct democracy, the "negative power", i.e. the possibility of some political bodies to block the decisions of other bodies, and the decision-making by consensus of the members of political bodies.

Keywords: *war, peace, democracy, Roman law, sovereignty, republic, intercession, veto, negative power.*

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RIMSKI USTAVNI MODEL KAO INSTRUMENT MIRA U POST-KONFLIKTUALNIM DRUŠTVIMA – PREGOVORNI SUVERENITET I KONSOCIJACIONA DEMOKRATIJA

Apstrakt

Predmet ovog rada je potraga za novim mogućim ustavnim rešenjima za ponovno ujedinjenje država podeljenih tekućim ili zamrznutim sukobima. Na osnovu nekih nedavnih iskustava, posebno Dejtonskog sporazuma kojim je okončan rat u Bosni i Hercegovini, autor smatra da rimski ustavni model, za razliku od uobičajeno rasprostranjenog germanskog ili anglosaksonskog modela, predstavlja korisniji izvor pravila koja bi mogla da budu osnov za razvoj novih pravnih instrumenata za rešavanje sadašnjih i budućih sukoba. Među njima su od posebnog interesa ideja o složenom izbornom sistemu sa zagarantovanim mandatima za određene društvene grupe i glasanjem ne nužno teritorijalno zasnovanih izbornih jedinica, imperativni mandat kao element neposredne demokratije, "negativna moć", odnosno mogućnost nekih političkih organa da blokiraju odluke drugih organa i donošenje odluka konsenzusom članova političkih tela.

Ključne reči: *rat, mir, demokratija, rimsko pravo, suverenitet, republika, posredovanje, veto, negativna moć.*

1. Introduction - Failed states

The idea of state is, in the historical context, a relatively recent idea. First ever use of the word (it. *Stato*) is usually attributed to Machiavelli, and the first development of the theory of state we own to Hobbs.[1] The most commonly accepted definition is the one that Max Weber gave in the 1918: "human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory".[2]

The notion of state, without which we couldn't imagine public law nowadays, didn't even exist before the creation of absolute monarchies in the XVI and XVII centuries.[3] Since than, and even more so after the creation of the nation-states in the XVIII and XIX century, the state became a new reality: an organization that exercises sovereignty, or, in the words of Rolando Quadri, an organization that "has organs possessing irresistible force over individuals" (*organi dotati di forza irresistibile sugli individui*).[4]

Between the Peace of Westphalia of 1648 and the creation of the United Nations in the 1945, the European countries built a new system of international law, radicated in ideas of Hugo Grotius; the so called westphalian system. Contrary to all of previous systems of international law based on principle of hierarchy and subordination of political entities and shared sovereignty between "universal power" (Empire), "intermediate" political entities, and client and vassal entities, the westphalian system, especially after the formal abolition of the Holy Roman Empire in the 1806 and creation of the Concert of Europe in 1815, was based on the idea of independence and equality of states, as the only legitimate subjects of sovereignty.

Both in the field of international law and domestic law, states were the only subjects who could legitimately use force, which included also the right to conduct wars with other countries (*ius ad bellum*). Very detailed and carefully elaborated rules regulating the proclamation of war, conduct of war, and concluding the peace treaties, partially based on previous ideas from ancient and medieval law, were created in both doctrine and praxis between 1648 and 1945.

The westphalian system regarding *ius ad bellum* was abolished with the promulgation of the Charter of the United Nations in the 1945, which in the article 2 paragraphs 3-4 prohibited the war as a mean of resolving disputes between states.[5] In the past, only

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1 T. Hobbs, *Leviatan*, London: Andrew Crooke, 1651.

2 *...der moderne Staat ein anstaltsmäßiger Herrschaftsverband ist, der innerhalb eines Gebietes die legitime physische Gewaltsamkeit als Mittel der Herrschaft zu monopolisieren mit Erfolg getrachtet hat...* - M. Weber, „Politik als Beruf", *Gesammelte politische Schrfiten*, Potsdam: Institut für Pädagogik der Universität Potsdam, 1919, 402.

3 In antiquity, the sovereignty depended to community of citizens, and there was no idea of state as an organization that exercises the monopoly of force. In feudal society, hardly any ruler or feudal lord could claim a complete monopoly of force. Autonomous communities, Church, and powerful vassals, among others, would put limits to it.

4 R. Quadri, *Scritti giuridici. Diritto della Comunità europea. Diritto pubblico. Teoria generale del diritto*, Vol. III, Milano: Giuffrè, 1988, 5-6.

5 The war between states is allowed only in the case of defense of foreign attack (art. 51).

states had the *ius ad bellum*; and the UN Charter has taken this right away only from them, and not from sub-national and supranational bodies.

The civil wars are not prohibited by the international law; nor they could be, because the are internal affair of respected countries, out of field of international law. Consequently, most of the wars in the post-WWII era were civil wars.

Furthermore, the articles 24 and 25 and the title VII of the Charter of UN allow military operations for "peace keeping" with permit of Security Council. In that manner, the UN became, paradoxically, a side in some civil wars, like Korean War (1950-1953). To make matters worse, many countries and international organization conducted military interventions in other states under the pretext of "peacekeeping" (or using some other euphemism like "humanitarian intervention"), even without permit of the Security Council, usually taking side in an already existing internal conflict.[6]

The limitation of the legal capacity of states in the international law, by abolishing their right to resolve the conflicts among them, if they cannot be resolved in a peaceful manner, by classical wars, had catastrophic impact, especially on the third world countries. Instead of direct confrontation, the conflicts among great powers about the spheres of influence are resolved by "proxy wars": by igniting a civil war in another country, or taking side in already existing conflict by "peace keeping mission".

Since 1945, civil wars become increasingly and steadily more numerous, more protracted, and more brutal[7]. In great parts of the world, especially in south Asia, Africa and south America, civil war became almost endemic situation, because new and vulnerable states created in the processes of decolonization and partition of Soviet Union became battlefields for proxy-wars among great powers. Several dozen countries do not have complete control over their own territory in this moment. Such countries are often labeled as "failed states": they aspire to be states, and are recognized as such by other countries, but in practice they do not match the abovementioned definition of state, because they lack the "irresistible force": the monopoly of power on parts of their territory is *de facto* in hands of various sub-state entities and rebel movements.

2. Problem of reconstruction of post-conflict societies – The interesting case of Bosnia and Herzegovina

One of the reasons for this global crisis is that there are no universally accepted legal solutions for resolving internal conflicts. The existing rules of war are made to resolve international conflicts among the states, and not conflicts between rebel militias, tribal groups, etc, in which other countries participate only indirectly.

[6] For example, NATO bombing of Federal Republic of Yugoslavia in 1999 was a continuation of Kosovo* War, while Russian invasion of Ukraine in 2022 was a continuation of War in Donbass.

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999.

[7] According to the data of the Geneva Academy of International Humanitarian Law and Human Rights, at the moment of writing this article there were more than 110 armed conflicts in the world, some lasting for more than 50 years, www.geneva-academy.ch, 26 July 2024.

There are, mostly, three ways how the civil wars get ended nowadays:

- Military defeat and total destruction of one of the sides of the conflict, and re-establishment of state sovereignty over the territory by brutal force.[8]
- Frozen conflict, with a possibility of a new escalation.[9]
- Secession and creation of new, internationally recognized country.[10]

There are very few cases in which a peace agreement between warring parties would be concluded, that would at the same time brought to re-establishment of the state sovereignty, offer guarantees of safety for all of the ex-warring parties, and bring more or less lasting and sustainable peace. Certainly, the case of Lebanon is one of them; but the author of this article found more interesting the case of Bosnia and Herzegovina.[11]

Hardly any peace agreement has been so much criticized and faced so much hostility and disdain by legal scholars, as Dayton Agreement of 1995 (officially: *General Framework Agreement for Peace in Bosnia and Herzegovina*).[12] Still, this document not only successfully ended the war, but made possible probably the most successful reconstruction of a war-divided country in recent history. In spite of diffidence and prophecies of various experts that it wouldn't last for a long, it lasts for almost 30 years by now.[13]

[8] This is the most common and least desirable way to end a war. It is usually followed by a wave of refugees and humanitarian crisis. We saw it, for example, in Vietnam War, Biafran conflict in Nigeria, Krajina conflict in Croatia, Tamil uprising in Sri Lanka, and, very recently, War in Afghanistan, and Nagorno Karabakh conflict in Azerbaijan.

[9] For example, cases of Somaliland, Transnistria, Abkhazia, South Ossetia, North Cyprus, Kosovo*, Korea and Taiwan.

[10] No need to give examples for it: the number of sovereign countries more than doubled from the 1945, from 99 to 195. It is not the end of the process: there are dozens of active secessionist movements in the world.

[11] On Bosnian war see for example: S. Broz, *I giusti nel tempo di male – testimonianze dal conflitto bosniaco*, Trento: Erickson, 2015; C. R. Shrader, *The Muslim-Croat Civil War in Central Bosnia – A Military History*, Texas A&MUniversity Press, Lewis 1992-1994; F. Christia, *Alliance Formation in Civil Wars*, Cambridge: Cambridge University Press, 2012; A. Finlain, *Le guerre nella Jugoslavia. 1991-99*, Gorizia: Libreria editrice goriziana, 2014; G. Jelisić, *Uomini e non uomini – La guerra in Bosnia Erzegovina nella testimonianza di un ufficiale jugoslavo*, Verona: Zambon, 2013; J. R. Shindler, P. Karlsen, *Jihad nei Balcani. Guerra etnica e al-Qa'ida in Bosnia* (1992-1995), Gorizia: Libreria editrice goriziana, 2009.

[12] On perception of Dayton peace agreement and on bosnian constitution see for example L. Leone, S. Ziliotto (a cura di), *Dayton, 1995 – la fine della guerra in Bosnia ed Erzegovina e l'inizio del nuovo caos*, Infinito edizioni, Formigine 2020; S. Bose, *Bosnia after Dayton – Nationalist Partition and International Intervention*, C. Hurst & Co., London, 2002; L. Montanari, „La complessa soluzione istituzionale adottata in Bosnia ed Erzegovina: finalità ed effetti nel passare del tempo", *European Diversity and Authonomy Papers* EDAP 02/2019, 6-27: J. Woelk, *La transizione costituzionale della Bosnia ed Erzegovina – dall'ordinamento imposto allo Stato multinazionale sostenibile?*, Cedam, Padova, 2008; D. P. Golić, „Ustavnopravni položaj predsednika Republike Srpske u svetlu uporednog prava", Strani pravni život, 2/2021, 231-247

[13] Given how much Bosnia and Herzegovina suffered in the war (more than 100.000 dead and over 2.000.000 of refuges in a country of less than four and a half million of inhabitants), today it might appear to an observer from abroad to be in relatively good shape. There are no walls or other physical barriers that separate members of various ethnic groups, as in Cyprus or Palestine. The traveler can pass the administrative borders of various regions, which were once the battle lines, without realizing it. Many refugees have returned home and many inhabited places are multi-ethnic again. Ethnic violence is almost

Dayton agreement created a specific constitutional system, not comparable to any other in the world. We shall mention only some of its peculiar characteristics.

Constitution of Bosnia and Herzegovina is actually an annex of Dayton peace agreement, so it is a document created in international contractual form, because the agreement was signed not only by representatives of Bosnia and Herzegovina, but also of the other countries involved in Bosnian War (Serbia and Croatia), and representatives of interested great powers.

The constitution guaranties a special status of the three major ethnic groups of Bosnia and Herzegovina, who were also sides in conflict (Bosniaks, Serbs and Croats), and indicated them as "constituent peoples" (*konstitutivni narodi*). Their representatives participate in different organs in which decisions are to be made by consensus or by qualified majority, including the three-member Presidency, and the upper chamber of the Parliament, making Bosnian political system a kind of consociational democracy.[14] Citizens of Bosnia, who are not members of the three ethnic groups mentioned above, cannot be elected members of the Presidency or deputies in the Upper House.[15]

non-existent and the danger of terrorist attacks is lower than in Western countries. The economic situation is comparable to that of other non-EU Balkan countries, such as Serbia and Montenegro, but also to that of some EU countries such as Bulgaria, and is probably better than in North Macedonia, Albania or Turkey. There are problems, especially corruption and economic difficulties, but they are mostly not a direct consequence of the war. In short, life in Bosnia and Herzegovina is not significantly different from that of other countries of similar level of economic development that have not suffered from recent conflict. However, in the West, the Bosnia case is not considered a success, and the Bosnian model is generally not seen in favorable light.

[14] The Presidency of Bosnia and Herzegovina is a collegial body, a sort of triumvirate, in which decisions are usually taken with the consent of the representatives of the three "constituent peoples". In the event that two members agree on a decision, the third has the right of veto, the exercise of which blocks the execution of the decision. If confirmed by two thirds of the members of the Assembly of the Republic of Srpska (when used by the Serbian representative) or by two thirds of the members of the delegation of an ethnic group in the House of Peoples (when used by a Croat or a Bosniak), the veto repeals permanently the decision of the Presidency (art. V of the Constitution). Even in Parliament, there is the institution of a suspensive veto. In the House of Peoples, the upper chamber of the Bosnian parliament, in the case of dissent among the delegations of the three peoples, the majority of the Serbian, Bosniak or Croatian delegates can declare any decision harmful to the interests of their people. In this case, if the problem cannot be resolved in parliament through mediation, the assembly's decision is suspended and the case referred to the Constitutional court. Despite the constitutional proclamation of the equality of all citizens before the law, the votes of members of the various ethnic groups do not have the same weight, given that there is positive discrimination against the less numerous ones. For example, Croats are twice less numerous than Serbs and three times less numerous than Bosniaks, but still have an equal number of representatives in the Upper House and in the Presidency.

[15] The fact that not every citizen can be a candidate for all political functions has created problems, because this calls into question the existence of the principle of equality of citizens. In that regard, the Grand Chamber of the European Court of Human Rights promulgated on 22 December 2009 the judgment against Bosnia and Hercegovina in the case Sejdić and Finci v. Bosnia and Herzegovina (27996/06 and 34836/06), on the basis of violation of Article 14 of the European Convention on Human Rights. The plaintiffs were two Bosnian citizens, respectively of Roma and Jewish ethnicity, who as such had not been able to run for the Presidency and for the Upper House of Parliament. Nonetheless, Bosnia and Herzegovina has not changed its Constitution in the meantime.

There are also elements in the Constitution that make Bosnia and Herzegovina effectively a protectorate of the international community, and not a completely independent state, especially in regard of institution of High Representative and in composition of the Constitutional Court.[16]

Bosnia and Herzegovina has a complex territorial structure with a wide autonomy of various territorial bodies, both with regard to the executive power (including police forces) and the legislative power.[17]

3. Negotiated sovereignty - For a future post-conflictual constitutional law

The idea that a change of the state borders could be a peace-making remedy is wrong in most cases. Not only because the inviolability of sovereignty and territorial integrity of states should remain an essential principle of international law,[18] but also because even when a secession of a part of a country, or a transfer of a portion of territory to another country, is recognized by the state from which the territory is taken away, it rarely brings peace. Often, a new endangered minority is created in that way, and a

[16] Out of nine members of the Constitutional court, three are not elected by the bodies of Bosnia and Herzegovina, but by the President of the European court for human rights, and these three judges cannot be citizens of Bosnia and Herzegovina, nor of the neighboring countries: Serbia, Croatia and Montenegro (art. VI of the Constitution). Finally, not in the Constitution, but in the Annex 10 of the Dayton Agreement, the function of the High Representative for Bosnia and Herzegovina is established. He represents the Council for the Implementation of Peace, an international organization of 55 countries and entities interested in implementing the provisions of the Dayton Peace Agreement. At the Council meeting in Bonn in 1997, the High Representative was granted enormous powers, allowing him, among others, to enforce binding decisions if Bosnian bodies hesitate to do so and to remove public officials, including democratically elected ones, if he believes that they are hindering the implementation of the Peace Agreement. Using these powers, the High Representative has, among other things, made changes to the Constitution of the Republic of Srpska, proclaimed various laws by decree without any parliamentary procedure, dismissed and sometimes disfranchised many officials, including members of parliament, ministers and judges. No appeal is possible against his decisions.

[17] The country is divided into two entities, the nature of which is not specified: the Republic of Srpska (*Republika Srpska*) and the Federation of Bosnia and Herzegovina (*Federacija Bosne i Hercegovine*), previously known as the Croatian-Muslim Federation (*Hrvatsko-Muslimanska Federacija*) or, in common parlance, simply known as the Federation. The Republic of Srpska comprises 49% of the territory and is organized as a unitary entity. The Federation, however, which includes 51% of the territory but more than 60% of the country's inhabitants, is divided into ten autonomous cantons. Legislative power is shared between the so-called "common organs" of Bosnia and Herzegovina, the entities (the Republic of Srpska and the Federation), and, in the case of the Federation, the assemblies of the cantons. Finally, the Brčko District, a territory whose final status was not specified during the peace negotiations, enjoys a special status. The District is in theory a condominium of the Federation and the Republic of Srpska; in practice it enjoys vast autonomy.

[18] In favor of this principle, see: A. Sinagra, "Sovranità dello Stato e divieto di ingerenza nei suoi affari interni", *Ordine internazionale e diritti umani* 2015, 780-787; A. Sinagra, "In difesa della sovranità dello stato (In Defence of Sovereignty)", *Cross-border Journal for International studies* 4/2015, 7-16.

setting for a new war is staged.[19] Protectorate or foreign intervention are also not a solution; they are contrary to the principle of state sovereignty too, and usually only create a frozen conflict.

Experts in the field of constitutional law should have a major role in peace negotiations, apart of diplomats and experts of international law. Not the change of borders, but the change of the constitutional structure of a state must be solution. Even when there is a will to end an international conflict and restitute the occupied territories to another country, it is possible that some constitutional instruments could be needed to re-incorporate these territories.[20]

Federalization or territorial autonomy can help,[21] but not always. The protagonists of contemporary wars are increasingly the various communities and social groups that may lack international recognition, or the ability to effectively control the territory and create a state organization, or both: various ethnic, religious, tribal and regional groups; political groups and factions; paramilitary organizations, guerrilla groups, resistance movements, etc. Genuine peace can only be achieved if those who waged the war agree to end it. In a war-divided country, the lasting peace and the re-establishment of state sovereignty can be at the same time gained only if warring parties accept to surrender their de-facto sovereignty established in war to the state. But, in change of what would they accept to negotiate it?

When the social fabric is irreparably torn apart by war, it can no longer unite under absolute power. Why should communities, which have fought a war, have mutual trust immediately after the war? This is not just a question of democracy: the smaller side in a divided society could feel in danger, even when it is subjected to the absolute power of the majority in a democratic state. Classical, Anglo-American model based democracy, established on principle that the democratic government is elected by majority

[19] For example, after the intention of Great Britain to give independence to Ireland became clear, the members of the protestant community who didn't wanted to stay in the newly created country started arming themselves, initiating the North Ireland conflict. A lot of countries faced civil wars soon after independence, the South Sudan which gained independence in 2011 being the freshest example: the independence was followed by a brutal civil war (2013-2020), and *de facto* division of South Sudan. The idea of (partially recognized) Kosovo* independence as a mean to protect civil rights of Albanian minority, means in practice oppression for Serbian minority in Kosovo*; the government of Kosovo* does not exercise effective control in the regions with Serbian majority, especially in the north of the region. It is unacceptable that Russian-occupied parts of Ukraine be either returned to Ukraine or ceded to Russia, without guarantees for return of refugees and security of minorities on the "wrong" side of the border. And, who thinks that two-state solution would put an end on Palestinian conflict, is either a propagator of ethnic cleansing, or is unaware of the fact that there are more than 2.000.000 Arabs in Israel proper, and more than 700.000 Israelis living on occupied territories.

[20] If we suppose that for some reason NATO troops would suddenly withdraw from Kosovo*, or Russian troops fro Crimea and Donbass, remains unanswered question how would be these territories re-incorporated in respective countries, and would there be a continuation war if local population wouldn't accept such an arrangement?

[21] On the specific case of Hong Kong see for example V. B. Ćorić, F. F. Fernandez Jankov, „Autonomija Hong Konga na osnovu principa jedna država dva sistema: preispitivanje koncepta međunarodne obaveze", *Strani pravni život* 1/2021, 79-89.

of popular votes, offers no guarantee that the opinion of the minority will be respected, and can hardly function in divided societies. We should try something else.

The Bosnian experience is just one example of how conflicts can be resolved; but it is an *ad hoc* solution based on local conditions, and, by the way, has many flaws even in that regard. It is not a universal model that could be followed.

The possible source of a universal model for solving of the problem of "failed states" is the roman constitutional model. As many scholars, first of all professors Pierangelo Catalano and Giovanni Lobrano, have convincingly demonstrated with their research,[22] the reception of ancient ideas in the modern age has led to the creation of constitutions, which we can indicate as based on "roman" model, in the sense that these constitutions share some main ideas deriving from antiquity, such as popular sovereignty, direct democracy and the unity of power. This current of thought, which finds its root in Rousseau,[23] has played an important role in the formation of various political ideologies, above all the revolutionary ones, and, through them, has influenced modern constitutionalisms. Some of the constitutions that depend to this model are Jacobin, Bolivarian, and socialist constitutions, and the Swiss constitution.[24] As such, the "roman" constitutional model contrasts with nowadays dominant "Germanic" or "Anglo-Saxon" one, based mainly on English constitutionalism and ideas such as state sovereignty, representative democracy and the separation of powers; this model, as is well known, spread among the thinkers of continental Europe mostly thanks to its acceptance by Montesquieu.

Here are some of the solutions of the roman constitutional model that possibly could be useful.

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[22] See for example: P. Catalano, "A proposito dei concetti di rivoluzione nella dottrina romanistica contemporanea (tra rivoluzione della plebe e dittature rivoluzionarie)", *SDHI* 77/1977, 440-455; P. Catalano, *Linee del sistema sovrannazionale romano,* Torino: Giapichelli, 1965; P. Catalano, *Populus romanus Quirites*, Torino: Giapichelli, 1974; P. Catalano, „La divisione del potere a Roma (a proposito di Polibio e Catone)", *Studi in onore di Giuseppe Grosso* 6,Giuffrè, Torino 1968-1974, 665-691; P. Catalano, *Tribunato e resistenza*, Torino: Paravia, 1971; G. Lobrano, Giovanni, "Dalla lex publica Populi Romani alla 'loi' della Costituzione del 1793", *In memoria di Ginevra Zanetti. Archivio storico egiuridico sardo di Sassari. Studi e memorie*, Regesta Imperii, Sassari 1994, 263-283; G. Lobrano, *Diritto pubblico romano e costituzionalismi moderni*, Carlo Delfino, Sassari, 1990; G. Lobrano, *Il potere dei tribuni della plebe*, Milano: Giuffrè, 1982; G. Lobrano, "Dalla lex publica Populi Romani alla 'loi' della Costituzione del 1793", *In memoria di Ginevra Zanetti. Archivio storico egiuridico sardo di Sassari. Studi e memorie*, Regesta Imperii, Sassari 1994, 263-283. See also: T. Alexeeva, *Principi costituzionali sovietici e diritto pubblico romano,* in *Teoria del diritto e dello stato*, 2, 2010, 255 ss.

[23] Especially in his most famuos work, J. J. Rousseau, *Du contract social; ou Principes du droit politique*, Amsterdam 1762.

[24] On reception of roman constitutional model in Serbian and Yugoslavian constitutional history see: S. Aličić, "Sulla difesa dei diritti civili in Serbia in riferimento ad alcuni concetti giuridici romani: narodni tribuni e potere negativo", *Roma e America – diritto romano comune* 33/2012, 19-34; S. Aličić, „Il modello di Rousseau e il costituzionalismo jugoslavo Recezione del diritto romano – principi generali e realtà contemporanea", *Roma e America – diritto romano commune*, 40/2019, 45-54; S. Aličić, „Il concetto di „repubblica" nelle costituzioni jugoslave: origine romana", *Ius Romanum* 2019, 232-239; S. Aličić, „La defensa de los derechos civiles en Serbia", *ÉFOROS. Publicación Semestral del Instituto Latinoamericano del Ombudsman – Defensor del Pueblo –ILO*, 1/ 2014, 46-62; S. Aličić, „Le antiche radici della ideologia rivoluzionaria della Prima rivolta serba (1804-1813)", *Roma e America. Diritto romano comune*, 38/2017, 123-141.

3.1 Seats reserved for members of certain societal group – Electoral units by principle of personality - Imperative mandate and direct democracy

The seats in the parliament guaranteed to the ethnic minorities, or other vulnerable groups, like women, are not unknown in modern constitutional law. As we have seen, in Bosnia and Herzegovina there are entire state organs completely organized on this principle, like the Upper House of the parliament and the Presidency. There were issues in Bosnia caused by the fact that the representatives are elected by territorial districts.[25] Much better solution would be to introduce electoral units by principle of personality. In ancient Rome, there was exactly such a voting system. One person could vote on *comitia* for making a decision in accordance with the principles of direct democracy, or for election of a magistrate, in both cases on the basis of certain criteria, depending of which *comitia* was convocated, or which public official would be elected. A Roman could vote as a member of certain *curia* (clan) if voting in *comitia curiata*; on the basis of depending to a *centuria* (military unit in which one would be conscripted on the basis of property status) if voting in *comitia centuriata*; or on the basis of dependence to a *tribus* (territorial district), if voting in *comitia tributa;* or on the basis of being a plebeian, if voting in *comitia plebis*. The electoral list (*census*) was carefully compiled and updated. The *censores*, public officials whose competence was compilation of these lists, were among the highest ranking roman magistrates.[26]

We could think about establishment of several different levels and types of electoral units today. Once established, these electoral units and guaranteed number of seats shouldn't be changed because of demographic changes.[27]

Also, should be added that the introduction of imperative mandate, as accepted in most of roman-model inspired constitutions, as an element of direct democracy, would further strengthen the position of voters.

There is no reason to limit the principle of reserved seats to legislative body only. It is possible to imagine in the future not only reserved seats in parliament, but also in

[25] The incumbent Croatian representative in Presidency Željko Komšic is widely believed to be elected mostly by Bosniak votes.

[26] On roman *comitia*, voting units and censuses see: P. de Franbcisci, "Per la storia dei «comitia centuriata»", *Studi Arangio-Ruiz* 1, Jovene Napoli 1953, 1-32; E. Schönbauer, "Die römische Centurien-Verfassung in neuer Quellenschau", *Historia* 2/1953, 21-49; E. Schönbauer, „Die Centurien-Reform", *Studi Albertario* 1, Milano: Giuffrè, 1953, 699-737; U. Coli, "Tribù e centurie dell'antica repubblica romana", *SDHI.* 21/1955, 181-222; U. Coli, "Voce "Census"", *Novissimo Digesto Italiano* III, Torino 1959, 105-109; F. Gallo, "Voce "Centuria"", *Novissimo Digesto Italiano* III, Torino 1959, 115-116; J. Gaudemet, "Le peuple et le gouvernement de la république romaine", *Labeo* 11/1965, 147-192; F. De Martino, "Territorio, popolazione ed ordinamento centuriato", *Diritto economia e società nel mondo romano. Diritto pubblico* II, Napoli 1996, 259 ss.; U. Paananen, "Legislation in the comitia centuriata", *Senatus Populusque Romanus*, Helsinki 1993, 9-73; L. Ross Taylor, *The Voting Discricts of the Roman Republic. The 35 Urban and Rural Tribes,* American Academy, Rome 1960; R. Develin, "Comitia tributa plebes", *Athenaeum* 53/1975, 302-337.

[27] For example, the main reason why one-state solution for Palestine was not accepted was initial fear of unlimited Jewish immigration on the side of Arabs, and, later, the fear of the high Arab natural increase, on the side of Jews. On one-state solution see M. Masri, *Constitutional Frameworks for a One-State Option in Palestine: an Assessment*, extract from the book *Rethinking Statehood in Palestine*, Oakland: University of California Press, 2021, 225-252.

other public offices, including executive or judiciary. The principle of reserved seat has been for the first time applied in the *lex Genucia de magistratibus* in 342 b. C,[28] according to which at least one of two consuls had to be plebeian. There are other solutions of that kind in the roman law, including the Edict of Augustus of Cyrene.[29] By this edict, it was allowed that in the province of Cyrene, whose population consisted of Greeks and Romans, mixed juries of half greek-half roman members could be created, should a greek inhabitant of that province be brought to trial.

3.2. Collective public offices - Self-organizing of citizens - Negative power and veto

All the roman magistratures, except for *dictator* nominated in a state of emergency, were collective bodies, with at least two or more members. The decision making was not based on majority of votes, but on equal power (*par potestas*) of members of the college of magistrates. Each of the members could exercise power on his own, if no other member would block him by doing so by right of intercession. By principle, the members of a college of magistrates should seek to resolve the problematic issues by consensus. If they are not able to do so, various solutions were developed to prevent the blocking of decision making, including division of competences among members of college of magistrates, or rotation by turns determined by lot.[30]

But there are other ways of protecting rights of a societal group, apart of participating in common organs. If members of a societal group no longer see the possibility of protecting their interests before the common political organs, they would naturally self-organize. The peculiarity of the roman political system is, that to the one of such organizations was attributed a competence to bring decisions with legislative power and to elect public officials: *concilia plebes* (Council of the Plebs).[31] Right to self-organization and making decisions in matters concerning the interests of a societal group is not unknown thing in modern day politics, although the term plebiscite has obtained a different meaning nowadays.

As a last resort, there is so called "negative power": the institution of veto, or a possibility of an organ to block the decision of other. It should be distinguished by intercession in a collective organ, or right to block the decision of the members of the same political body, in which the decisions are to be brought by consensus. Veto is instead a right of an organ that has no competence to decide at all on its own, to block decision of another organ. Its origin is in the *veto* of the tribune of the plebs (*tribunus plebis*) in ancient Rome,[32] which inspired a number of modern constitutional solutions.

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[28] L. Fascione, "La legislazione di Genucio", *Legge e società nella repubblica romana; a cura di F. Serrao, II. (estr.)*, 1988.

[29] F. de Vissher, *Les édits d'Auguste découverts à Cyrène*, Louvain: Bibliothèque de l'Univ. 1940.

[30] On roman magistrates see for example G. Tibiletti, "Evoluzione di magistrato e popolo nello Stato romano", *Studia Ghisleriana 2.1,* estr., 1950, 1-21.

[31] On *concilia plebis* see for example A. G. Roos, *Comitia tributa - concilium plebis, leges – plebiscita*, Amsterdam: Noord-Hollandsche Uitgevers-Mij, 1940.

[32] On plebean tribune see E. Korneniann, "Volkstribunat und kaisertum", *Festschrift für Leopold Wenger 1,* München 1944, 284-316; M. Bianchini, "Sui rapporti fra 'provocatio' ed 'intercessio'", *Studi Scherillo* 1,

4. Conclusions

Based on the presupposition that the wars between members of the UN are considered illegal by the rules of the contemporary international public law, while civil wars are not, and on the fact that most of the post-WWII military conflicts were indeed civil wars (although often with the elements of foreign intervention), it is easy to conclude that the problem of resolving military conflicts is getting more and more pushed from the field of the international public law to the terrain of the constitutional law. Furthermore, the contemporary wars are often led by non-state subjects, i.e. by rebel groups, guerrillas, militias and other, most often ethnically or politically based, groups. While generally having strong sense of unity, they often lack centralized organization, territorial control, international recognition, or all of these elements. So, the traditional legal rules created for resolving conflicts between states cannot always be applicable by principle of analogy.

In the case of failure of a state to exercise legitimate power over its territory, we need new legal means to regulate the new reality. If in a civil war the former state sovereignty is *de facto* partially transferred to various communities and sub-state territorial entities, we should seek to find legal solution to this situation. The classical (or, more precisely, Anglo-American) majority-based "winner takes it all" democracy cannot help us; the majority will always vote against the interests of minority in a divided society. How to convince the minority to lay down their arms and accept to live under the state sovereignty again, if not through the guarantee that they could block the future decisions that would be against their interests? But what form this guarantee should exactly have, is a very delicate question that should be carefully examined in the future.

Some "alternative" constitutional ideas that showed to be relatively successful in resolving recent conflicts, like those in Bosnia and Herzegovina and Lebanon, are *ad hoc* solutions, not universal models. But the very idea of warring parties negotiating the transferring of *de facto* existing sovereignty (gained at war) to the reconstituted state, under the condition that most important decisions should be in the future brought by political consensus in a sort of consociational democracy, shouldn't be *a priori* refused as totally wrong. This solution not good indeed; it can make decision making more difficult, and in some instances, as we have seen in Bosnia, menace the principle of equality of citizens. But it's sometimes the only possible solution. And, in with a carefully equilibrated political system and precisely defined mechanism hot to turn this idea into a functioning system, maybe it could work.

Solutions of the roman constitutional model, especially promoted by Jean Jacques Rousseau, that could basis for a new model of post-war constitutionalism, are, among others, the right of groups of citizens to political self-organization (on the model of *concilia plebis*), voting by (non necessarily territorial) electoral units (*comitia*), the decision

Milano 1972, 93-110; G. Lobrano, 1982; P. Catalano; 1971. On influence on modern constitutionalism see Constenla, Carlos R. *Teoría y práctica del defensor del pueblo*, Temis – Ubijus – Reus – Zavalia, Bogotá-México 2010.

making by consensus of the members of political bodies (*par potestas*), seats reserved for members of certain societal group in various bodies (on the model of *lex Genucia de magistratibus*), and the "negative power" (*veto*).

Some of these solutions could, possibly, be useful for creation of new institutes for creating peaceful post-conflict societies.

References

Alexeeva, T. "Principi costituzionali sovietici e diritto pubblico romano", *Teoria del diritto e dello stato*, 2, 2010, 255 ss.

Aličić, S. "Sulla difesa dei diritti civili in Serbia in riferimento ad alcuni concetti giuridici romani: narodni tribuni e potere negativo", *Roma e America – diritto romano comune,* 33/2012, 19-34.

Aličić, S. „La defensa de los derechos civiles en Serbia", *ÉFOROS.* Publicación Semestral del Instituto Latinoamericano del Ombudsman – Defensor del Pueblo –ILO, 1/ 2014, 46-62.

Aličić, S. „Le antiche radici della ideologia rivoluzionaria della Prima rivolta serba (1804-1813)", *Roma e America. Diritto romano comune,* 38/ 2017, 123-141.

Aličić, S. „Il concetto di „repubblica" nelle costituzioni jugoslave: origine romana", *Ius Romanum,* 2019, 232-239.

Aličić, S. „Il modello di Rousseau e il costituzionalismo jugoslavo Recezione del diritto romano – principi generali e realtà contemporanea", *Roma e America – diritto romano commune*, 40/2019, 45-54.

Bianchini, M. "Sui rapporti fra 'provocatio' ed 'intercessio'", *Studi Scherillo* 1, Milano 1972, 93-110.

Bose, S. *Bosnia after Dayton – Nationalist Partition and International Intervention*, London, C. Hurst & Co., 2002.

Broz, S. *I giusti nel tempo di male – testimonianze dal conflitto bosniaco*, Trento, Erickson, 2015.

Catalano, P. *Linee del sistema sovrannazionale romano*, Torino, Giapichelli, 1965.

Catalano, P. *Tribunato e resistenza*, Torino, Paravia, 1971.

Catalano, P. „La divisione del potere a Roma (a proposito di Polibio e Catone)", *Studi in onore di Giuseppe Grosso,* 6, Torino, Giuffrè, 1968-1974, 665-691.

Catalano, P. *Populus romanus Quirites*, Torino, Giapichelli, 1974.

Catalano, P. "A proposito dei concetti di rivoluzione nella dottrina romanistica contemporanea (tra rivoluzione della plebe e dittature rivoluzionarie)", *SDHI* 77/1977, 440-455.

Constenla, C. R. *Teoría y práctica del defensor del pueblo*, Bogotá-México. Temis – Ubijus – Reus – Zavalia, 2010.

Coli, U. "Tribù e centurie dell'antica repubblica romana", *SDHI,* 21/1955, 181-222.

Coli, U. "Voce 'Census'", *Novissimo Digesto Italiano* III, Torino 1959, 105-109.

De Franbcisci, P. "Per la storia dei "comitia centuriata"", *Studi Arangio-Ruiz* 1, Napoli, Jovene, 1953, 1-32.

De Martino, F. "Territorio, popolazione ed ordinamento centuriato", *Diritto economia e società nel mondo romano. Diritto pubblico* II, Napoli 1996, 259 ss.

De Vissher, F. *Les édits d'Auguste découverts à Cyrène,* Louvain, Bibliothèque de l'Univ., 1940.

Develin, R. "Comitia tributa plebes", *Athenaeum,* 53/1975, 302-337.

Fascione, "La legislazione di Genucio", *Legge e società nella repubblica romana*; a cura di F. Serrao, II. (estr.), 1988.

Finlain, A. *Le guerre nella Jugoslavia. 1991-99*, Gorizia, Libreria editrice goriziana, 2014.

Fotini, C. *Alliance Formation in Civil Wars*, Cambridge, Cambridge University Press, 2012.

Gallo, F. "Voce 'Centuria'", Novissimo Digesto Italiano III, Torino 1959, 115-116.

Gaudemet, J. "Le peuple et le gouvernement de la république romaine", *Labeo,* 11/1965, 147-192.

Golić, P. „Ustavnopravni položaj predsednika Republike Srpske u svetlu uporednog prava", *Strani pravni život*, 2/2021, 231-247.

Hobbs, T. *Leviatan*, London, Andrew Crooke, 1651.

Jelisić, G. *Uomini e non uomini – La guerra in Bosnia Erzegovina nella testimonianza di un ufficiale jugoslavo*, Verona, Zambon, 2013.

Korneniann, "Volkstribunat und kaisertum", *Festschrift für Leopold Wenger 1,* München 1944, 284-316.

Leone, S. Ziliotto (a cura di), *Dayton, 1995 – la fine della guerra in Bosnia ed Erzegovina e l'inizio del nuovo caos*, Formigine, Infinito edizioni, 2020.

Lobrano, G. "Il principio democratico di Roma", *SDHI,* 28/1962, 316 ss.

Lobrano, G. *Il potere dei tribuni della plebe*, Milano, Giuffrè,1982.

Lobrano, G. *Diritto pubblico romano e costituzionalismi moderni*, Sassari, Carlo Delfino, 1990.

Lobrano, G. "Dalla lex publica Populi Romani alla 'loi' della Costituzione del 1793", *In memoria di Ginevra Zanetti. Archivio storico egiuridico sardo di Sassari. Studi e memorie*, Sassari Regesta, Imperii, 1994, 263-283.

Lobrano, G. "Circa l'uso del diritto pubblico romano – dal 'Contrat social' di J.-J. Rousseau alla 'Storia della costituzione romana' di F. de Martino", *Roma e America*, 27/2009, 3 ss.

Masri, M. *Constitutional Frameworks for a One-State Option in Palestine: an Assessment, extract from the book Rethinking Statehood in Palestine*, Oakland, University of California Press, 2021, 225-252.

Montanari, L. „La complessa soluzione istituzionale adottata in Bosnia ed Erzegovina: finalità ed effetti nel passare del tempo", *European Diversity and Authonomy Papers EDAP,* 02/2019, 6-27.

Paananen, U. "Legislation in the comitia centuriata", *Senatus Populusque Romanus*, Helsinki, 1993, 9-73.

Quadri, R. "Scritti giuridici. Diritto della Comunità europea" *Diritto pubblico. Teoria generale del diritto*, Vol. III, Milano, Giuffrè, 1988.

Roos, A. G. *Comitia tributa - concilium plebis, leges – plebiscita*, Amsterdam, Noord-Hollandsche Uitgevers-Mij, 1940.

Rousseau, J. J. *Du contract social; ou Principes du droit politique*, Amsterdam 1762.

Shindler, R., Karlsen, P. *Jihad nei Balcani. Guerra etnica e al-Qa'ida in Bosnia* (1992-1995), Gorizia, Libreria editrice goriziana, 2009.

Shrader, R. *The Muslim-Croat Civil War in Central Bosnia – A Military History*, Lewis, Texas A&MUniversity Press, 1992-1994.

Schönbauer, E. „Die Centurien-Reform", *Studi Albertario* 1, Giuffrè, Milano 1953, 699-737.

Schönbauer, E. „Die römische Centurien-Verfassung in neuer Quellenschau", *Historia,* 2/1953, 21-49.

Sinagra, A "In difesa della sovranità dello stato (In Defence of Sovereignty)", *Cross-border Journal for International studies,* 4/2015, 7-16.

Sinagra, A. "Sovranità dello Stato e divieto di ingerenza nei suoi affari interni", *Ordine internazionale e diritti umani,* 2015, 780-787

Taylor, L. R. "The Voting Discricts of the Roman Republic", *The 35 Urban and Rural Tribes,* Rome, American Academy, 1960.

Tibiletti, G. "Evoluzione di magistrato e popolo nello Stato romano", *Studia Ghisleriana 2.1,* estr., 1950, 1-21.

Weber, M. „Politik als Beruf", *Gesammelte politische Schrfiten*, Potsdam Institut für Pädagogik der Universität Potsdam, 1919, 396-450.

Woelk, J. *La transizione costituzionale della Bosnia ed Erzegovina – dall'ordinamento imposto allo Stato multinazionale sostenibile*?, Cedam, Padova, 2008.

Ćorić, V., Fernandez Jankov, F. F. „Autonomija Hong Konga na osnovu principa jedna država dva sistema: preispitivanje koncepta međunarodne obaveze", *Strani pravni život,* 1/2021, 79-89.

Other Sources

Charter of the United Nations, San Francisco 1945.

General Framework Agreement for Peace in Bosnia and Herzegovina, https://peacemaker.un-.org/sites/peacemaker.un.org/files/BA_951121_DaytonAgreement.pdf.

Constitution of Bosnia and Herzegovina (Annex IV of the General Framework Agreement for Peace in Bosnia and Herzegovina and „Official Gazette of Bosnia and Herzegovina, no. 25/2009 – Amemdment I).

Judgement of the Grand Chamber of the European Court of Human Rights in the case *Sejdić and Finci v. Bosnia and Herzegovina* promulgated on 22 December 2009 (27996/06 and 34836/06).

Academy of International Humanitarian Law and Human Rights, www.geneva-academy.ch, 7 July 2024.

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