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FOREWORD

This issue of the International Journal on Rule of Law, Transitional Justice and Human Rights in front of you is already the eleventh edition of an annual, peer-reviewed academic journal, co- published by the Association "Pravnik" and the Konrad-Adenauer-Stiftung's Rule of Law Programme South East Europe. The International Journal is a direct output of the International Summer School Sarajevo (ISSS) which our two organisations co-organise since 2006. Over a period of 14 years, the ISSS has attracted more than four hundred students and young professionals from Europe, Asia and the Americas. After each edition of the ISSS, our aim was to engage our alumni to contribute to academic discussion with their papers on contemporary topics such as Rule of Law, Transitional Justice or Human Rights. An additional goal is to promote an interdisciplinary approach and build bridges between academia and practitioners in these relevant areas.

With the origins of the transitional justice work dating back to the post-World War II period in Europa with the establishment of the International Military Tribunal at Nuremberg, transitional justice has played a key role in the last decades. One major step was the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993. What started as an ad hoc measure quickly became a role model: Since the creation of the ICTY, several international courts have been established to respond to revolting atrocities just like in Rwanda or Cambodia, and a permanent International Criminal Court is now operating in The Hague. In addition, the work of these courts have favoured investigations by national jurisdiction and generated a rich jurisprudence of international humanitarian law.

These achievements don't deprive transitional justice from its uninterrupted importance. Many problems all over the world remain unsolved, constituting an inexhaustible source for its application. This is proved by the variety of topics chosen by the authors of this Journal: It ranges from amnesty and human rights in El Salvador to gender transformation justice in Bosnia and Herzegovina, giving examples from Latin American countries as well as from Europe. By doing so, it does not only give an overview of the current worldwide situation of transitional justice, but also suggests alternative and critical approaches to contemporary challenges of transitional justice. Just like the previous ten editions, the Journal will be open to the public as it represents the ISSS' contribution to global efforts in analysing, understanding and teaching about the rule of law, transitional justice and human rights.

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Towards A Shared Future: Evaluating the Process and Structure of Europeanization and Conditionality as EU Accession Tools for Bosnia-Herzegovina

By Anton Holten Nielsen

ABSTRACT

Since the Dayton Peace Agreement, the EU's engagement with Bosnia-Herzegovina and the Balkans in general has gone through sporadic periods of intensifying cooperation and uncertain disillusion. However, considering the recent geopolitical rivalry between the West and Russia and China in the region, the EU now has a vested interest in strengthening its accession framework. Hence, this article seeks to trace the trajectory of Europeanization and conditionality as EU accession tools for Bosnia-Herzegovina in order to evaluate the modern relationship between the two entities, the remaining reform challenges and thus the possibility of future accession talks. The article analyses the European Commission's most recent key priorities for Bosnia-Herzegovina by outlining the meaning of Europeanization and conditionality and the formal onship between the EU and Bosnia-Herzegovina. Finally, the article weighs the likelihood of EU-complying reform in Bosnia-Herzegovina against the likelihood of the country moving closer to the EU in the future.

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Introduction

Since its inception the European Union (EU) has increased in size through several rounds of accession negotiations[1]. The enlargement process has expanded the internal market, and since the 1990's also the EU's regulatory and normative power[2]. Yet it is not only new member states that feel these effects. Both 'potential candidate' and 'candidate' countries, many of them in the Western Balkans, are experiencing the effects of having to adapt to increasingly complex EU standards and the more fundamental membership criteria such as the 'acquis communautaire' and a certain level of democracy and rule of law[3][4]. While this accession process could seem insulated and timeless, in recent years the Western Balkans have become pawns in a growing geopolitical rivalry between the EU, the US, Russia and China[5]. This new reality has forced the EU to abandon its previous 'wait and see' approach and to ask itself whether the Balkans ever will become members of the EU[6]. As the most recent country to apply for EU membership, Bosnia-Herzegovina is a great example of a country requiring fundamental political and legal reforms to comply with EU standards due to the legacy of war, but that simultaneously represents an interest sphere to the EU. The goal of this article is to highlight historical and structural changes in the formal relationship between the two entities and to point to remaining challenges and future possibilities for Bosnia-Herzegovina's EU membership. This analytical scope provides background to future research on Bosnia-Herzegovina's prospects as an EU candidate country. Hence, this article does not attempt to fill the existing research gap on the EU's transformative power in Southeast Europe, and it does not seek to explain the demands and changes that Europeanization has led to in specific policy areas in Bosnia-Herzegovina. Rather, the article analyses the trajectory of Bosnia-Herzegovina's overall accession process with the EU[7].

This article's argument is divided into four chapters. Chapter 1 briefly analyses the theoretical context of Europeanization and EU conditionality and argues that although the concepts have changed based on the given country in question, the overall framework of required formal reforms and norm changes remain in place for Bosnia-Herzegovina. Chapter 2 examines the context and history of the relationship between the EU and Bosnia-Herzegovina in terms of the structure of Europeanization and EU

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[1] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford: Oxford University Press, 2020), pp. 25, 248

[2] Ibid.

[3] European Commission, 'European Neighborhood Policy and Enlargement Negotiations – Check current status', https://ec.europa.eu/neighbourhood-enlargement/countries/check-current-status_en]

[4] European Commission, 'European Neighborhood Policy and Enlargement Negotiations – Conditions for membership', https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en

[5] Jasmin Mujanović and Molly Montgomery, 'Macron's Veto Leaves Balkans Wide Open for Russia and China', *Foreign Policy,* 31 October 2019.

[6] Jelena Džankić, Soeren Keil, Marko Kmezić (eds.), *The Europeanisation of the Western Balkans*, New Perspectives on South-East Europe, (London: Palgrave Macmillan, 2019), p. 7.

[7] Marko Kmezić (ed.), *Europeanization by Rule of Law Implementation in the Western Balkans* (Skopje: Institute for Democracy SOCIETAS CIVILIS, 2014), vol. I, p. 64.

conditionality. It also evaluates European Commission President Ursula von der Leyen's most recent State of the Union speech and posits that despite an initially hesitant commitment by the EU to the prospect of membership for Bosnia-Herzegovina after the war, and slow progress in effective cooperation since the 2000's, the new von der Leyen Commission has made accession talks a priority. Chapter 3 analyses the current situation in Bosnia-Herzegovina based on the European Commission's 2019 Opinion on the country's EU membership application and argues that in spite of the Commission President's hopeful rhetoric, Bosnia-Herzegovina is still a very long way from fulfilling the EU's key priorities and membership criteria, which would require a complete overhaul of the country's legal-political structure. Chapter 4 discusses the challenges that remain for accession talks to begin and suggests that even though domestic interests are a hindrance to fundamental political change, there are small signs of a willingness to compromise. Although this does not mean that accession talks will be within reach anytime soon, it points to a sparse hope for Bosnia-Herzegovina moving closer to the EU far into the future.

Chapter 1: The theoretical underpinnings of Europeanization and EU conditionality

The EU is often said to wield more influence on domestic institutions and policymaking than any other international organization[8]. This influence becomes obvious in the way that candidate countries for EU membership adapt their domestic politics to EU standards, also known as *Europeanization*. Yet, Europeanization is more than the establishment of standards in a top-down approach affecting both old and new EU member states. Europeanization is also the process of ongoing influence exerted by EU rules and policymaking on the laws, institutions and identities of third countries[9]. It is hence more than a legal framework and describes the interrelated effects of fundamental societal change in culture and norms resulting from both EU and domestic pressure[10]. However, changing formal laws is still easier and more effective than changing norms[11]. EU conditionality can be said to be a prerequisite for Europeanization. It is the requirements for domestic reform that the EU demands in order to move onto the next stage of the pre-accession process. As outlined by Kmezić in the 2014 book "Europeanization by Rule of Law Implementation in the Western Balkans" the stages of EU conditionality typically proceed as follows:

1. *Privileged trade access and additional aid;*
2. *Signing and implementation of the Stabilization and Association Agreements (enhanced form of association agreement);*
3. *Granting of candidate status;*

[8] Kmezić (ed.), *Europeanization by Rule of Law Implementation in the Western Balkans,* p. 43.
[9] Kmezić (ed.), *Europeanization by Rule of Law Implementation in the Western Balkans*, pp. 18-19.
[10] Džankić, Keil and Kmezić (eds.), *The Europeanisation of the Western Balkans*, pp. 4-5.
[11] Ibid., p. 5

4. *Opening of accession negotiations;*
5. *Opening and closing of 35 chapters*
6. *Signing of the accession treaty*
7. *Ratification of the accession treaty by national parliaments and the European Parliament;*
8. *Acceding to the EU as a full member*

In line with this roadmap, the pre-accession process for new EU countries has been "a massive export of EU norms" that since the 1990's has served as a top-down transformation of Southeastern European states[12]. The fundamental question when researching Europeanization is therefore how this political process affects non-EU countries both *de jure* and *de facto*[13]. However, the concept of Europeanization, and hence that of EU conditionality, has changed dramatically in the last two decades, because Balkan states react differently to its application[14]. Nonetheless, the overall framework of required formal reforms and norm changes remain in place for Bosnia-Herzegovina. This article is therefore able to trace the changes in overall agreements and cooperation structures over the last two decades.

Chapter 2: The history of the EU's formal relationship with Bosnia-Herzegovina

The relationship between Bosnia-Herzegovina and the EU dates back to the former Yugoslavia. A formal declaration on the relations between SFR Yugoslavia and the European Economic Community was signed in 1967 and a trade agreement in 1970 based on several years of technical talks and discussions of a potential association agreement[15]. However, it was not until the war in Bosnia-Herzegovina from 1992-1995 that the EU realized a growing sense of responsibility for the country's development. The war's terror and genocide, once it was eventually discovered, was seen as an atrocity on European soil[16].

The EU played a role in ending the war in Bosnia-Herzegovina and the following reconstruction through the Pact for Stability in Europe in 1994 and the Dayton Peace Agreement in 1995[17]. However, despite attempts to boost economic growth in the Balkans through preferential trade agreements and a series of cooperation programs to promote political reforms, the end goal of the EU's policy towards the Balkans states was unclear through the 2000's due to EU members' internal divisions[18]. This also reflects the hesitant role and engagement of the

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12 Kmezić (ed.), *Europeanization by Rule of Law Implementation in the Western Balkan*, pp. 44-46.

13 Ibid., pp. 19, 44.

14 Džankić, Keil and Kmezić (eds.), *The Europeanisation of the Western Balkans*, p. 6.

15 B. Zaccaria, E. G. H. Pedaliu and J. W. Young, *The EEC's Yugoslav Policy in Cold War Europe, 1968-1980* (London: Palgrave Macmillan UK, 2016), pp. 24-43.

16 Peter Lippman, *Surviving the Peace: The Struggle for Postwar Recovery in Bosnia-Herzegovina* (Nashville: Vanderbilt University Press, 2019)

17 Dimitar Bechev, 'Constructing South East Europe: The Politics of Balkan Regional Cooperation, 1995- 2003', thesis, University of Oxford (2005), p. 94.

18 Mariasole Forlani, 'The European Union and the Balkans: An Uncertain Duet', *International Journal of Rule of Law, Transitional Justice and Human Rights* 10 (2019), 141.

international community in the first few years after the war ended[19]. Still, the economic and political reform programs from 1995-2003 were the first instances of a set of conditionalities to be fulfilled in order to gain even more favorable terms in the relationship between the EU and Bosnia, even though the possibility of future EU membership was never explicitly stated[20]. The initial conditionalities lasted until June 2003, when Bosnia-Herzegovina was identified as a potential candidate for EU membership during the Thessaloniki European Council Summit[21]. The reform cooperation has continued since despite slow progress as Bosnia-Herzegovina is one of the countries in Southeast Europe (SEE) that has progressed the least in its current status as a potential EU candidate country due to its constitutional and political structure[22]. In general, none of the Western Balkans are currently considered to have a functional market economy by the European Commission[23].

The Stabilization and Association Agreement (SAA) between Bosnia-Herzegovina and the EU was signed in 2008 and entered into force on 1 June 2015, with an interim agreement on trade having been in force since 2008. The SAA structures a closer partnership between the two parties on issues such as trade and institutional development[24]. The SAA also guides the pre-accession process through a set of pre-negotiation conditionalities. Attempting to move through these conditionalities, on 15 February 2016 Bosnia-Herzegovina presented its application for membership of the European Union[25].

In what appears to be a hopeful sign, new European Commission President Ursula Von der Leyen's first State of the Union speech on 16 September 2020 outlined her vision for the future of the Western Balkans by stating that "*the future of the whole region lies in the EU… The Western Balkans are part of Europe - and not just a stopover on the Silk Road*"[26]. This is a stark contrast to the lack of attention to the Balkans by former Commission President Jean Claude Juncker, who at the start of his term in 2015 made it clear that EU enlargement was not part of his

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[19] Valery Perry, 'Frozen, stalled, stuck, or just muddling through: the post-Dayton frozen conflict in Bosnia and Herzegovina', *Asia Europe Journal* 17 (2018), 110.

[20] Bechev, 'Constructing South East Europe', p. 104.

[21] European Commission, 'European Neighborhood Policy and Enlargement Negotiations – Bosnia and Herzegovina', https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/bosnia-herzegovina_en

[22] Kmezić (ed.), *Europeanization by Rule of Law Implementation in the Western Balkan*, p. 28.

[23] Džankić, Keil and Kmezić (eds.), *The Europeanisation of the Western Balkans*, p. 3.

[24] European Commission Press Corner, 'Stabilization and Association Agreement with Bosnia and Herzegovina enters into force today', 1 June 2015, https://ec.europa.eu/commission/presscorner/detail/en/IP_15_5086

[25] European Commission, 'Opinion on Bosnia and Herzegovina's application for membership of the European Union' (2019), 29 May 2019, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion_en.pdf

[26] Ursula von der Leyen, 'State of the Union Address by President von der Leyen at the European Parliament Plenary', 16 September 2020, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1655]

agenda[27]. In her speech, von der Leyen pointed to the historic nature of the opening of accession negotiations with one of the "pair of two", Albania and North Macedonia, and although the future EU membership of Bosnia-Herzegovina was not explicitly mentioned, given the future of the Western Balkans being in "Europe" and not "the EU", the speech clearly emphasized her desire to ensure that the pre-accession process continues for the rest of the region. Additionally, her reference to "the Silk Road" can be seen as a subtle jab to Chinese geopolitical influence in the region, which the EU cannot afford. Thus, even though Bosnia-Herzegovina is still a long way from opening accession negotiation, it is clear that the EU is paying more attention to the country's progress, which is seen in the transition from the Commission only evaluating national programs in Bosnia-Herzegovina to now publishing the an annual country progress report since 2011[28].

Chapter 3: The Commission's most recent conditionalities and key priorities

But just how far away is Bosnia-Herzegovina from beginning accession negotiations? This part of the article analyses the Commission's most recent Opinion on Bosnia-Herzegovina's EU membership application from May 2019, that sets out 14 key priorities for Bosnia-Herzegovina to address before accession talks can convene[29]. The annual progress report is based on 3897 questions, covering all EU policies, that the Commission has asked the government of Bosnia-Herzegovina, as well as country visits and stakeholder meetings. Overall, the Commission has analysed the current situation in the country to point to current challenges that need to be resolved[30].

From the 14 key priorities, the three priority themes of democracy, political functionality and fundamental rights encompass the majority of the key priorities in the Commission's Opinion (priority 1-5 and 9-13)[31]. Paradoxically, this leaves the theme of rule of law as the shortest (priority 6-8), despite it being the most essential in terms of battling Bosnia-Herzegovina's widespread and systematic corruption[32]. While the priorities relating to democracy and political functionality are about fair elections, the EU acquis, the SAPC parliamentary committee, and establishing a legal hierarchy and regaining national sovereignty[33], the rule of law priorities are about transparency, strengthening cooperation and regulation of public service and procurement - especially in

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[27] C. Bildt, 'Balkans: On track for EU membership or stagnation?', *European Council on Foreign Relations,* 15 February 2018.

[28] European Commission, 'European Neighborhood Policy and Enlargement Negotiations - Bosnia and Herzegovina', file search, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion_en.pdfh

[29] European Commission Opinion, pp. 13-14, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion_en.pdf

[30] Ibid.

[31] Ibid., p. 14-16.

[32] Transparency International, 'Country report - Bosnia and Herzegovina', https://www.transparency.org/en/countries/bosnia-and-herzegovina

[33] European Commission Opinion, pp. 14-15, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion_en.pdf

targeting corruption and organised crime[34].

Although this points to the political system as that which enables corruption and weak governance structures, at the same time, the two types of priorities are mutually reinforcing in a negative feedback loop[35]. Corruption thrives due to the legacy of inherent political rivalries and enshrined powers from the war, yet corruption also ensures that the political elites of Bosnia-Herzegovina have no interest in reform[3637]. In fact, the extensive reform required to address the shortcomings of the political systems in terms of representation, sovereignty and political cohesion, will require a complete redrafting of the Dayton Agreement[38]. At the present moment such reform seems unlikely considering the multiple failed attempts, the resurging ethnic divisions and unprocessed trauma that still dominate the politics of Bosnia-Herzegovina[39]. However, despite the gloomy outlook of failed reform attempts, the prospect of meeting the EU's key priorities is not a lost cause as small steps were taken in the summer of 2020.

Chapter 4: The future of the EU and Bosnia-Herzegovina

In the Commission's 2019 Opinion, key priority 3 under the theme of democracy / functionality is to "*ensure the proper functioning of the Stabilization and Association Parliamentary Committee*"[40]. Until this summer, the parliamentary dimension of the SAA, established in November 2015 as part of the SAA bodies, has not been functioning properly[41]. As the Commission writes, the committee "*failed to adopt its rules of procedure due to the insistence of some delegates from Bosnia and Herzegovina on the inclusion of ethnic voting provisions not in line with European standards*"[42]. However, in July this issue was addressed after the committee agreed upon a new voting procedure[43]. The committee did not follow the European Parliament's proposal of a simple majority as it was taken to be in conflict with Bosnia-Herzegovina's constitutional order where politics is based on two-thirds majorities to ensure veto rights[44]. As a consequence, the order also became the basis of the resolution, and decisions now require a two-thirds majority, but with no regard to ethnicity as the committee is also made up of European parliamentarians[45]. The committee can now function as the joint body for political dialogue between the EU and Bosnia-Herzegovina which was its original purpose. Voting procedures in

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[34] Ibid., p. 15.
[35] Paul Collier, 'How to reduce corruption', *African Development Review* 12(2) (2000), 197-199.
[36] Kmezić (ed.), *Europeanization by Rule of Law Implementation in the Western Balkan*, p. 13.
[37] Džankić, Keil, and Kmezić (eds.), *The Europeanisation of the Western Balkans*, p. 2.
[38] Perry, 'Frozen, stalled, stuck, or just muddling through', 111-113.
[39] Ibid., 113-114.
[40] European Commission Opinion, p. 14, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion_en.pdf
[41] Ibid., p. 4.
[42] Ibid.
[43] 'Bosnia fulfilled one of 14 priorities from the European Commission's Opinion', *European Western Balkans,* 23 July 2020.
[44] Perry, 'Frozen, stalled, stuck, or just muddling through', 111-112.
[45] European Parliament, 'Delegations', https://www.europarl.europa.eu/delegations/en/dsee/about/introduction

a parliamentary committee can seem irrelevant to the bigger picture of EU integration, but together with newly scheduled elections in Mostar, key priority 1 in the Commission's Opinion, the agreement points toward a willingness to compromise[46]. In Bosnian-Herzegovinian politics that is not a given.

The question remains what the future Europeanization and EU conditionality process in Bosnia-Herzegovina will look like. With the political and legal gridlock of interests, it seems unlikely that the fundamental reforms required to adapt to European standards will happen in the near future. In addition, there is the danger that the ongoing relationship with the EU will sour with no imminent rewards in sight. After a hypothetical new constitution and political reform, the record of ad hoc requirements by the EU, also known as constantly changing the goal post, could be seen as part of the problem rather than the solution[47]. For instance, it is not unthinkable that issues of good governance, even after a new accepted structure is in place, will be a hindrance to actual EU membership, especially considering the current rule of law issues with Poland and Hungary[48]. For now, the aim of starting accession negotiations is thus a big task in its own right. This was underscored by French president Emmanuel Macron's veto on accession talks with Albania and North Macedonia in October, 2019[49]. The talks were put on hold due to fear of an irreversible accession process, and a hollowing of EU standards in terms of corruption and governance, despite Commission approval for several years[50]. Following French and Dutch pressure, the Commission changed its enlargement procedure in February 2020, giving more power to the European Council. If desired reform targets are not met, the enlargement process can now be reset[51]. Yet with no credible rewards for Bosnia-Herzegovina in sight, and Russia and China ready to swoop in, the EU has a vested interest in not prolonging the prospect of accession talks unnecessarily.

Conclusion

To conclude, despite the EU's historically wavering commitment to the accession process for Bosnia-Herzegovina, the overall framework of required formal reforms and norm changes remain in place. Over time, it is evident that the European Commission has increased its focus on Bosnia-Herzegovina's domestic conditions and structures rather than just evaluating national development programs. And even though the

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46 'Bosnia fulfilled one of 14 priorities from the European Commission's Opinion', *European Western Balkans,* 23 July 2020.

47 Kmezić (ed.), *Europeanization by Rule of Law Implementation in the Western Balkan*, pp. 26, 49.

48 Lily Bayer and Zosia Wanat, 'Poland joins Hungary in threatening to block EU's budget and coronavirus recovery package', *Politico*, 18 September 2020.

49 'Emmanuel Macron's EU accession veto is a historic mistake', *Financial Times,* 21 October 2019.

50 European Commission, 'European Neighborhood Policy and Enlargement Negotiations – Albania', https://ec.europa.eu/neighbourhood-enlargement/countries/detailed-country-information/albania_en

51 Reuters in Brussels, 'EU can start talks with Albania and North Macedonia over joining', *Guardian,* 23 March 2020.

Commission's most recent key priorities emphasize the need for a fundamental overhaul of the political and legal system in Bosnia-Herzegovina, the new von der Leyen Commission has made accession talks a priority. There is without a doubt a long way to go for accession talks to convene due to clashing domestic political interests, yet as of this year, there are also small signs of a willingness to compromise. Although this does not mean that accession talks will be within reach anytime soon, it points to a sparse hope for Bosnia-Herzegovina moving closer to the EU far into the future - especially considering the EU's strategic interest in warding off other actors in the region.

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Amnesty and Human Rights – The Case of El Salvador

By Milena Schellenberger

ABSTRACT

When the civil war in El Salvador terminated in 1992 after more than a decade of violent conflict an amnesty law was passed in 1993 that prevented all legal investigation and persecution into acts committed during the war on both sides. On 13 July 2016 the Supreme Court of El Salvador found this law to be in violation of human rights and therefore, declared it void, which for the first time after more than 20 years opened the possibility of accountability for the commitment of war crimes during the civil war.

The assessment of the compatibility of amnesty laws with human rights is not un unknown area. The Inter-American Court of Human Rights (IACHR) had been confronted with this topic on several occasions in the last decades. Since it had become a common practise in Latin American states to pass amnesty laws before allowing regime change to happen the IACHR developed an elaborate jurisprudence on its compatibility with the American Convention on Human Rights (ACHR).

This article will elaborate on the development of the jurisprudence of the IACHR regarding amnesty laws and the significance of the decision in the case of El Salvador in 2012. Further, it will assess the Salvadoran Supreme Court`s decision and the implications of the verdict for the state. It will follow up on the implementation process and will conclude with the obstacles this process has faced in the due course.

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Introduction

On 13 July 2016 the Constitutional Chamber of the Supreme Court of El Salvador declared the amnesty law that had been in place since 1993 and had prevented any judicial investigations into crimes of the civil war void and unconstitutional.[52] This opened the possibility for El Salvador to resume investigations and satisfy the society`s claim for justice.

The civil war in El Salvador took place between 1980 and 1992 and led to more than 75.000 mostly civilian deaths. In 1980 several left-winged guerrilla groups united to form the Farabundo Martí National Liberation Front (Frente Farabundo Martí para la Liberación Nacional; FMLN) to fight for reforms to overcome economic and class division in the country upheld by the right-winged and military supported government. After several years of armed conflict, the FMLN achieved controlling some areas in the country and became internationally recognized as a belligerent force. The presidents of the other Central American countries, destinations for many Salvadorian refugees, urged for the initiation of a UN led peace negotiation. These resulted in the termination of the conflict with the Chapultepec Agreement from 16 January 1992.[53] During the peace process several agreements were reached between the parties before signing this final peace treaty. Part of the peace process was the establishment of a Truth Commission, which was installed through the Mexico Agreement in 1991[54] that started its investigations into "serious acts of violence" on 13 July 1992. The final report was published on 15 March 1993. Five days later on 20 March 1993 the Legislative Assembly passed the General Amnesty Law for the Consolidation of Peace (Ley de Amnestía General para la Consolidación de la Paz;[55] General Amnesty Law), which granted "absolute, unconditional and broad amnesty" to all persons involved in the conflict,[56] rendering the results of the Truth Commission as a foundation for justice as envisaged by the peace agreements obsolete. Following proceedings at the Inter-American Court of Human Rights (IACHR) and claims at the National Supreme Court, the Constitutional Chamber on 13 July 2016 declared foresaid law unconstitutional and obliged the Legislative Assembly to pass a new reconciliation law, that would comply with (international) human rights standards.

The following article will explore the jurisprudence of the IACHR on amnesties in the context of a conflict situation and elaborate in how far the

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[52] Judgment on Constitutionality, (13 July 2016) Sala de lo Constitucional de la Corte Suprema de Justicia (Constitutional Chambers of the Supreme Court of Justice of El Salvador), case file No. 44-2013/145-2013, 1, 74.

[53] Permanent Representative of El Salvador to the UN, Letter dated 27 January 1992 from the Permanent Representative of El Salvador to the UN addressed to the Secretary-General, UN Doc. A/46/864 (1992).

[54] An agreement prior to the final Chapultepec Agreement; Permanent Representative of El Salvador to the UN, Letter dated 8 October 1991 from the Permanent Representative of El Salvador to the UN addressed to the Secretary-General, UN Doc. A/46/553 (1991).

[55] General Amnesty Law for the Consolidation of Peace (Ley de Amnestia General para la Consolidacion de la Paz), Decree No. 486, 20 March 1993.

[56] Article 1 General Amnesty Law makes a few exceptions for specific crimes listed in Article 3 not including war crimes.

Salvadorian Supreme Court follows the established principles. Further, the effects of the judgment and the current debate about the establishment of a new reconciliation law will be discussed.

Amnesties and Human Rights in the Jurisprudence of the IACHR

In Latin America it had become a common practice to pass amnesty laws when dealing with the aftermaths of dictatorships and civil wars since the 1980s.[57] Due to many civil organisation-led claims in front of national courts and the IACHR many of them were declared to be in violation of human rights and in the following overturned. The IACHR came to establish an elaborate jurisprudence on the legitimacy of amnesties, which it further developed when confronted with the case of El Salvador in 2012 in the *El Mozote v El Salvador Case*[58].

Amnesties have been used throughout history to overcome wars or conflicts by offering impunity to political and criminal acts in order to end the spiraling violence and serving as an incentive for the involved parties to re-establish and to reintegrate into a reconciled society.[59]

In the recent Latin American context, many countries (e.g. Chile, Brazil, Argentina) adopted very broad self-amnesties when transiting from authoritarian regimes into democracies in order to prevent any kind of accountability for atrocities committed by the regime actors before allowing regime change to happen.

This exclusion of accountability conflicts with the rights of the victims and the victims` relatives of such atrocities. The *de facto* impunity disaccords with the non-derogable character of several international human rights obligations, like the prohibition of torture, summary executions, extrajudicial executions and enforced disappearances.[60]

As enshrined in Article 1 (1) American Convention on Human Rights (ACHR),[61] the state has the obligation to ensure the free exercise of the rights in the Convention, which as Article 2 ACHR specifies includes the obligation to adjust legislative dispositions accordingly. Consequently, a law that prohibits inquiries and persecution of grave human rights breaches, in the case of amnesties usually in the case of war crimes, such as enforced disappearances, extrajudicial or summary executions and torture, renders the obligation to fully grant those fundamental rights without material effect, if violations aren`t sanctioned. This contradicts their non-derogable nature. Therefore, the IACHR in its leading case *Barrios Altos v Peru*[62] decided that

"all amnesty provisions … designed to eliminate responsibility are

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[57] Louise Mallinder, "The End of Amnesty or Regional Overreach: Interpreting the Erosion of South America's Amnesty Laws", 65 INT'l & COMP. L.Q. (2016), 645, 645 f.

[58] IACHR, The Massacres of El Mozote and nearby places v El Salvador, 25 October 2012.

[59] Anja Seibert-Fohr, "Amnesties", MPEPIL (Oxford: Oxford University Press 2015), February 2018, 1; Gwen K. Young, "Amnesty and Accountability", 35 U.C. Davis L. REV. (2002), 427, 433.

[60] IACHR, Barrios Altos v Peru (Judgment), IACtHR Series C No 75, 14 March 2001, 41.

[61] American Convention on Human Rights (ACHR), "Pact of San Jose", UNTS 1144 (p.123), 22 November 1969; entered into force 18 July 1978.

[62] IACHR, Barrios Altos v Peru (Judgment), IACtHR Series C No 75, 14 March 2001.

inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations".[63] Following this line, the IACHR in *Gomes Lund v Brazil*[64] and *Gelman v Uruguay*[65] hold that at least absolute amnesties are in contradiction to human rights obligations for leading to a *de facto* impunity and thus violating the right to fair trial (Article 8 (1) ACHR) and the right of the victim to judicial protection (Article 25 ACHR) in conjunction with Article 1 (1) and 2 ACHR.

When confronted with the case of El Salvador in 2012 in the *El Mozote v El Salvador Case* the IACHR considered this case to be evaluated differently. For the first time the court had to assess an amnesty law that was passed in the context of a reconciliation process following peace negotiations between two parties, in contrast to the self-amnesties passed by the regimes in Peru, Brazil and Uruguay. According to the court an amnesty, thus, had to be viewed in the context of the peace treaty as a mean to terminate violence and humanitarian law, especially the provision of Article 6 (5) Additional Protocol II to the Geneva Conventions from 1949 (AP II)[66], had to be taken into consideration.[67] Article 6 (5) AP II states that

'[a]t the end of hostilities, the authorities in power shall endeavour to grant the broadest **possible** amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained' (emphasis added).

The intent behind this provision is to give effect to the intended "combat immunity", whose aim is to not punish participants of the conflict for the sole reason of participation.[68] Given that the wording refers to the "broadest **possible** amnesty", this shows that this obligation isn`t absolute. Customary humanitarian law itself recognises the obligation of states to investigate war crimes,[69] and according to Rule 159 of the ICRC`s Customary International Humanitarian Law studies[70] explicitly recognizes an exception for war crimes to not be the possible subject of an amnesty. The IACHR found it conclusive that at least an amnesty including acts amounting to war crimes is not covered by the scope of Article 6 (5) AP II.[71] Thus, in the case of El Salvador, where the General Amnesty Law implemented an unconditional and broad amnesty

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[63] IACHR, Barrios Altos v Peru (Judgment), IACtHR Series C No 75, 14 March 2001, 41.

[64] IACHR, Gomes Lund et al. (Guerrilha do Araguaia) v Brazil, 24 November 2010.

[65] IACHR, Case Gelman v Uruguay, IACtHR Series C No. 221, 24 February 2011.

[66] International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

[67] Pablo Gonzalez Dominguez; Edward J. Perez, "Challenges of the Inter American Court of Human Rights's Case Law on Amnesty Laws within Contexts of Transitional Justice," Persona y Derecho 80 (2019), 81, 90.

[68] Anja Seibert-Fohr, "Amnesties", MPEPIL (Oxford: Oxford University Press 2015), February 2018, 11.

[69] See Rule 158, International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, Volume I: Rules (Cambridge: Cambridge University Press 2005), 607.

[70] See Rule 158, International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, Volume I: Rules (Cambridge: Cambridge University Press 2005), 611.

[71] IACHR, El Mozote v El Salvador, 286.

applicable to several acts that amount to war crimes in the terms of Article 8 of the Rome Statute[72] according to the report of the truth commission,[73] this cannot be based on Article 6 (5) AP II.

Further, the court elaborated the possibility of an amnesty to find support in a peace agreement as an incentive to terminate the conflict. As a mean of reconciliation and termination of an armed conflict an amnesty could prevent further harm, and therefore, might justify the non-persecution of committed crimes.[74] Neither the Chapultepec Agreement from 1992, nor its predecessor the Mexico Agreement from 1991 contained regulations regarding amnesties. The Chapultepec Agreement as the final peace treaty, on the contrary, recognized in its Chapter 1 point 5 the necessity to end impunity and to clarify the facts on grave human rights violations committed by the armed forces. Therefore, an unconditional amnesty as implemented by the General Amnesty Law is not compatible with the peace agreement that explicitly sought inquiries and judicial proceedings. With this reasoning the IACHR declared the General Amnesty Law incompatible with the El Salvador`s human rights obligations under the ACHR and ordered El Salvador to fulfilling its obligation under the ACHR to investigate and persecute the crimes committed in the conflict.

The Judgment of the Supreme Court and its Effects

In the past different proceedings against the General Amnesty Law within the national jurisdiction of El Salvador had already failed. On 20 May 1993 the Constitutional Chambers of the Supreme Court dismissed a claim that questioned the constitutionality of the General Amnesty Law as inadmissable. In 2000 following another complaint the Constitutional Chambers issued a sentence declaring that it lacked jurisdiction for assessing a violation of international law, whereas, regarding the constitutional claims the absolute amnesty could be interpreted constitutionally on a case-by-case basis and therefore, needn`t be repealed.[75] Proceedings and investigations on a case-by-case basis never got put into action.

That`s why, the sentence from 13 July 2016 marked a turning point for El Salvador in dealing with its past conflict. After the IACHRs verdict on the *El Mozote vs El Salvador Case* in 2012 neither the executive nor legislative had taken any measures to implement the sentence. Thus, when the Supreme Court repealed the General Amnesty Law, it finally opened the possibility to investigate and persecute the crimes committed during the civil war.

The verdict of the Constitutional chambers followed a similar approach to the one given by the IACHR. First it assessed the constitutionality of an

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[72] UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6.

[73] See: UN Security Council, Annex, From Madness to Hope: the 12-year war in El Salvador:
Report of the Commission on the Truth for El Salvador, S/25500, 1993, 43.

[74] IACHR, El Mozote v El Salvador, 284.

[75] Judgment on Constitutionality, (26 September 2000) Sala de lo Constitucional de la Corte Suprema de Justicia (Constitutional Chambers of the Supreme Court of Justice of El Salvador), case file No. 24-97 /21-98.

amnesty as such, which in the legal context of El Salvador is supported by the constitutional provision in Article 131 No. 26 Constitution of El Salvador (Cn. ES) that explicitly empowers the Legislative Assembly with the right to grant amnesty for political crimes and common crimes related to these. The court clarified that when passing an amnesty, the Legislative Assembly has to harmonise the different public interest. On the one hand the aim of fostering political stability pursued by the peace negotiations and national reconciliation opposed to the judicial interest of seeking truth and responsibility for perpetrators.
Similar to the IACHR, the Constitutional Chambers assessed that certain limitations had to derive from the absolute prohibition of specific conducts as established by Article 4 AP II[76]. Article 4 AP II is considered inderogable. In consequence, these absolute guarantees are to be respected at all times and places, even in situations of conflict. Therefore, amnesty cannot be granted for infringements, because it would render these guarantees without effect, if violations weren`t prosecutable due to amnesties. This would be incompatible with their absolute and imperative nature and hence has to be a limitation to the amnesty.

Thus, any amnesty that includes acts, which form a systematic or generalised violation of Article 4 AP II, constituting a crime against humanity or a war crime, is not compatible with the constitutional order of El Salvador nor the International Legal order. Therefore, the "absolute, unconditional and broad amnesty" as established by Article 1 of the General Amnesty law that only recognized very few limitations in its Article 3, not including war crimes and crimes against humanity, was declared unconstitutional.

The court didn`t limit its verdict to establishing that the absolute amnesty granted by the General Amnesty Law was unconstitutional. It continued assessing the violation of other fundamental and human rights affected by the prevention of investigation into war crimes, especially due to the inactivity over the years due to the application of the General Amnesty Law and detected the necessity for legislative action.

The court found that besides overstepping the limitations, in which an amnesty can be granted, the state had violated its obligation to effectively grant human rights by persecuting grave violations of the same (Article 1 I ACHR in conjunction with Article 144 Cn. ES). Since, victims and their relatives couldn`t seek judicial remedies since the General Amnesty Law was passed in 1993 their right of access to justice and judicial protection (Article 2 (1) Cn. ES), as well as, their right to truth (Article 2 (1), 6 (1) Cn. ES), as a subjective right of the individual and an objective right of the Salvadorian society as such, were further violated.

In a next step the Constitutional Chambers noted the context in which the amnesty was passed, similar to the

[76] Being nationally binding for El Salvador following Article 144 Cn. ES and also being part of customary international law; Judgment on Constitutionality, Supreme Court of Justice El Salvador, No. 44-2013/145-2013, 1, 12.

IACHR. Since it resulted at the end of a peace process the court saw the necessity for reconciliation of the civil society, which might be affected, if broad legal proceedings would take place into all acts of the civil war, even the ones that didn`t constitute ware crimes or crimes against humanity. Given the large time span that had passed since the termination of the conflict and the amount of possible cases to be assessed in an environment, where the evidence will be harder to find, the court saw the possibility of causing a backlog on the investigations of actual war crimes and crimes against humanity, which due to further delay would continue to infringe the victim`s rights.

Therefore, the court mandated the Legislative Assembly to take action within a "reasonable period of time" and establish in a democratic process i) the means to grant public access to information, ii) allocate resources for the victim`s necessities regarding investigations, prosecution and sanctions for the persons responsible of the crimes committed and iii) consider means of reparation for the victims.[77] This was deemed necessary in order to achieve an organised and effective approach to reparation, restitution and persecution, whilst maintaining the separation of powers between judicative and legislative.

After the verdict the court followed up on the implementation of its sentence. In the hearings conducted on 7 July 2017 and 14 June 2019 the Constitutional Chambers interpreted its judgment in its resolutions in order to assessed the fulfilment of the judgment. Thereby it established, that for an effective implementation the obligations weren`t limited to the Legislative, but required actions by the Executive and the Attorney General, as well. To be more precise, the court demanded the Attorney General to start investigations, while the Executive is expected to establish a corresponding state policy enhancing the protection, promotion and guarantee of fundamental rights and allocate the necessary resources. It pointed out that especially given the country`s economic difficulties an effective and thought-out administration of resources is essential for a successful process.[78]
Further, it established that the legislative action had to be conducted until the 28 February 2020, a time limit that though considered "unpostponable", had been postponed several times in the process due to incompletion.

The Current Situation in El Salvador and State of Implementation
Since the verdict more than 4 years have passed and the process of transitional justice is still far from being properly established.
The necessary legislative action has been postponed constantly. Different drafts have been introduced to the Legislative Assembly, most of them not reaching an approving majority. In its resolution from 14 June 2019 the court clarified that only a reconciliation law that fulfilled all human rights

[77] Judgment on Constitutionality, Supreme Court of Justice El Salvador, No. 44-2013/145-2013, 1, 35.
[78] Resolution of Constitutional Chambers of the Supreme Court of Justice of El Salvador regarding the Judgment on Constitutionality, case file No. 44-2013/145-2013, 14 June 2019, p. 12.

standards established by the verdict would be considered constitutional.

Therefore, the Legislative Assembly established a commission in June 2018 that held hearings with different stakeholders (victims` organisations, political parties, military, FMLN descendants, university scholars) of the peace process throughout the country in the process of elaborating a draft bill. This process was finalised on 24 February 2020 and the bill was passed in the Legislative Assembly on 26 February 2020 two days before the deadline of the Supreme Court expired.[79]

President Nayib Bukele is criticising the draft for being unconstitutional and therefore, vetoed the bill on 28 February 2020 in accordance with Articles 138, 137 Cn. ES, which can only be overruled by a two-thirds majority in the Legislative Assembly.

The criticism of unconstitutionality is mainly directed to a provision that empowers the Attorney General to terminate proceedings after a year since the receipt of the claim (Article 60 draft bill), leaving room for possible abuse through deliberate time expirations and thereby neglection of the state`s obligation to fully investigate all war crimes. Further, the possibility of reduced sentences for cooperative perpetrators was criticized by victims` representatives as disproportional to the realised injustice and therefore in violation of their rights.[80]

While the president claims he wants to prevent the *de facto* prescription that political actors afraid of personal persecution are trying to implement with this bill,[81] his motivation is questionable given the recent accusations of him impeding judicial inspections of military files regarding the massacre in El Mozote, one of the largest massacres in modern Latin history.[82]

Though, the bill is unlikely to still come into power, it contains a few interesting aspects that are likely to be maintained in a future draft of the reconciliation law and therefore, worth being looked at.
The bill meant to establish a National Council for Reparations (Consejo Nacional para la Reparación) as a central element, it included regulations on collective memory, public access to information, reparations and judicial proceedings. Regarding the judicial proceedings it includes a few remarkable tendencies that are likely to be maintained in a future bill. One of them is to establish the responsibility of perpetrators not only if they executed the criminal conduct, but also the intellectual author within in the chain of demand in the respective organisation.

The other one is the inclusion of a provision for alternative sanctions, meaning in this case the possibility to

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[79] Yolanda Magaña, “Vetaley de reconciliación por inconstitucional”, Diario El Mundo, El Salvador, 29 February 2020, https://diario.elmundo.sv/veta-ley-de-reconciliacion-por-inconstitucional/.
[80] Deutsche Welle, “Piden que se investigue a Nayib Bukele por "encubrir" masacre salvadoreña de 1981”, 02.10.2020, https://www.dw.com/es/piden-que-se-investigue-a-nayib-bukele-por-encubrir-masacre-salvadore%C3%B1a-de-1981/a-55141255.
[81] Magaña, El Mundo, 2020.
[82] Deutsche Welle, 02.10.2020.

reduce the sentence up to a fourth of the penalty in case the person fully recognizes his participation, apologizes to the victim and collaborates to a complete investigation of the criminal act.[83] The compatibility of such alternatives sanctions has been considered by the IACHR but not yet decided on.[84] In the context of human rights alternative sanctions will have to be considered under the aspects that the alternative sanction doesn`t lead to a *de facto* amnesty by enabling unproportionally light penalties compared to the grave human rights infringement caused by the criminal act.[85] This will depend on the concrete implementation within the bill and its interpretation of the court and can therefore, at this point, not be assessed in detail.

However, the tendency to adopt alternative sanctions might be a useful way to ensure the victim`s right to truth and the public right to information. Especially in the context of El Salvador, where the conflict terminated almost 30 years ago, the establishment of truth will be facing several *de facto* difficulties due to the vast amount of time that has passed without investigations (passing away of witnesses, natural change of crime sights over time, etc). Motivating the perpetrators to wilfully contribute to the process of establishing the truth might therefore, be an effective way of altering the possibilities to fully investigate the facts. This will have to be taken into account by the courts, when assessing if these sanctions are proportional.

For the time being the formerly passed Reconciliation Law (Ley de Reconcilicación Nacional, Decrete No. 147 from 23 January 1992) has entered into force again until replaced by a new reconciliation law,[86] and been applied in the 160 reopened cases by the Attorney General`s Office.

Conclusion

When considering the legality of an amnesty, the context of its establishment is of importance. In contrast to self-amnesties, often passed by authoritarian regimes to prevent later judicial proceedings, amnesties passed in a conflict situation as a result of peace negotiations have to be considered differently. Their purpose of terminating a violent conflict situation, which as such endangers several human rights, can justify the existence of an amnesty as an incentive to advance peace. Though, even an amnesty passed in this context cannot grant amnesty for violations of absolute guarantees and therefore, can`t include war crimes and crimes against humanity. In the case of El Salvador, the amnesty was passed in a post-conflict situation, therefore, an amnesty is not illegitimate as such, but the unconditional and broad amnesty as it was implemented be the General Amnesty Law is incompatible violated human rights.

As for the establishment of the current reconciliation law it will in part have to deal with the scope of judicial proceedings for crimes during the civil war. In this context the ratio of ending

[83] Article 67 draft bill.

[84] Mallinder, "End of Amnesty", 666 f.; IACHR, Case of the Rochela Massacre v Colombia, Merits, Reparations and Costs, Judgment of 11 May 2007, Series C No. 163, 185 ff.

[85] Mallinder, "End of Amnesty", 665.

[86] Judgment on Constitutionality, Supreme Court of Justice El Salvador, No. 44-2013/145-2013, 1, 41.

continued violations of human rights through conflict activities is not applicable anymore. Therefore, the margin of appreciation regarding the balance between the different public interests (reconciliation and peace vs victims` rights to truth and access to justice) will likely shift in favour of the victims` rights.

In conclusion, the judgement of the Supreme Court has given El Salvador another chance for reconciliation and transitional justice that had been hindered by the General Amnesty Law for almost 30 years. Though still struggling with establishing the process, El Salvador is taking steps to face its past and will hopefully continue this process and thereby also be able to strengthen the trust in the state and the rule of law.

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The Truth and Reconciliation Commission in Peru – The victims' right to truth and justice

By Maria Emilia Lehne

ABSTRACT

The Truth and Reconciliation Commission in Peru operated from 2001 until 2003, working on the conflict which took place from 1980 until 2000. At the end of their mandate, they published an expansive report explaining the causes and the consequences of the conflict. The aim of the Truth and Reconciliation Commission in Peru was to protect the victims and give them their right to truth and justice.
The right to truth and justice is internationally seen as an inalienable and autonomous right. Being such a fundamental and important right, which is clue to facilitate reconciliation processes and to reinstall or strengthen democracy, peace and the rule of law in a country, states still do not fully respect this right.
Moreover, the right to truth is connected to the state's duty to judicial protection.

And although the right to truth has still not been generally recognized in national constitutions, the right to judicial protection has. Therefore, states should guarantee the right to truth to victims.

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I. Introduction

My paper will first give you a historical background, explaining what happened in Peru from 1980 until 2000. After that, I will broadly describe what Truth Commission are and what they stand for. I will also shortly try to explain and define the word "victim", although making clear that discussing this issue alone would already be enough for an essay by itself. That is why I will only touch on this issue and show you how the Inter-American Court of Human Rights and the Truth and Reconciliation Commission in Peru operated with this term.

Then I will give an overview on what the Commission of Truth and Reconciliation in Peru did, what information they have gathered and how they impacted the country. Hereafter I will discuss the main issue of this essay, which is the right to judicial protection for the victims. We will see with a few examples how the right to judicial protection is connected to the right to truth.

II. Historical background

Peru was ruled by a military dictatorship for twelve years from 1968 till 1980 by two leaders. Frist by Juan Velasco Alvarado from 1969 till 1975 and then by Franciso Morales Bermúdez from 1975 till 1980.
After twelve years of military dictatorship Peru had democratic elections in 1980, won by Fernando Belaúnde Terry.

In the 1980's a radical communist party, known as "Sendero Luminoso" ("Shining Path"), following Marxism-Leninism-Maoism Thought, started a guerilla war and terrorist attacks against the civilian population and the military starting from the south of the country expanding to the north.

The internal war lasted for twenty years; from 1980 till 2000.

A main problem of this war was not only that Sendero Luminoso killed thousands of people wanting to establish a "new order", but that the government could not handle this conflict at all.

1. Sendero Luminoso

The communist party Sendero Luminoso was led by Abimael Guzmán. He was a professor of philosophy at the University of Ayacucho. In Ayacucho – a city at the south of Peru – is where the very first conflict started. The city itself was characterized by extreme poverty and marginalization.[87]
Since the establishment of the Peruvian Republic on the 28th July 1821 the population in big parts of the highlands and the Amazon region have been neglected. This negligence by the government and big parts of society made it easier for the subversive groups to expand.

The first official attack was 17th May 1980, on the eve of the presidential elections in the Region of Ayacucho. They burned ballot boxes to disrupt the presidential elections, but the perpetrators were quickly caught and the elections proceeded without further problems. This incident received little attention in the Peruvian press.
Throughout the first years of the 1980's Sendero Luminoso expanded through

[87] Klarén, Nación y Sociedad en la Historia del Perú, p. 422

the Andean region and gained more support.
The government at first refused to declare a state of emergency in the regions where the Sendero Luminoso was operating. On the one hand they underestimated the danger the movement would bring, in the other hand the president Fernando Belaúnde Terry was reluctant to cede authority to the armed forces since his first government had ended in a military coup.
In 1982 the government granted political-military powers to the Peruvian armed forces in order to counteract the spread of the guerilla warfare in the highlands but the armed forces abused of their power. At the start of 1983 military groups and the police were fighting these subversive groups in a terrible war. Numerous of human right crimes have been committed by both parties and these crimes are occupying the Peruvian judiciary until today.
Military violence against civilians peaked in 1983 and 1984, with continuous attacks by the military on the rural population, which were suspected of supporting the guerillas.

The conflict caused the forced displacement of 600.000 people and death or disappearance of approximately 70.000 people.[88] 79 % of victims lived in rural areas.[89] More than 70 % of the people spoke Quechua or other indigenous language as mother tongue.[90] 68 % of the people had low levels of formal education.[91] Seeing these numbers and percentages the profile of the victims reflected a discriminatory nature of the violence and long history of subordination of the indigenous peasant population of Peru.[92]
The guerilla conflict ended with the arrest of the leader of Sendero Luminoso in 1992.
But after the arrest Abimael Guzmán the problems in Peru did not end. In 1990 the new president, Alberto Fujimori, was elected.

2. Fujimori's regime

Starting 1990 Alberto Fujimori was elected President and he marks the coming decade with serious social and economic transformations.
Peru had a terrible economic crisis and hyperinflation up to 2.775 % at that time.[93] One of Fujimori's main goals was the economic development and lowering the poverty rates of the country. Therefore he changed the whole judicial and economic structure.
At first, Fujimori promised that the country will not have an economic shock. That was one of the main reasons why he got elected. Nonetheless, shortly after election, the minister of economics – Hurtado Miller – insisted that an economic shock was the only way to somehow stabilize the country.[94]

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[88] Garcias-Godos/ Reategui, Transitional Justice in Latin America, Chapter 10
[89] Garcia-Godos/ Reategui, Transitional Justice in Latin America, Chapter 10.
[90] Febres, Wider das Vergessen, p. 42.
[91] Garcia-Godos/ Reategui, Transitional Justice in Latin America, Chapter 10.
[92] Garcia-Godos/ Reategui, Transitional Justice in Latin America, Chapter 10.
[93] https://www.nytimes.com/1990/01/03/business/peru-inflation-at-2775.3.html; New York Times, 3rd January 1990; seen 22/09/2020 at 10:07 a.m.
[94] https://lucidez.pe/hurtado-miller-a-30-anos-de-fujishock-el-ejemplo-del-pasado-es-imitable-entrevista/; Lucidez, 8th August 2020; seen 22/09/2020 at 10:10 a.m.

On 8th August 1990 the media announced the so called "Fujishock" elevating the rates up to 7.694 %, which was devastating for most of the population.[95]

On 5th April 1992 Fujimori implemented a self-inflicted coup with help of the military.[96] The President dissolved the congress, annuls the constitution of 1979 and took control of the judicial power.[97] He abused of all the benefits he could get from the concentration of authoritarian power.
Fujimori claimed the end of inflation, the economic struggle and the fight against terrorism as a personal success. Even if the numbers of murders and disappearances decreased in 1993, new violations of rights were taking place, primarily violations against the right to fair trials.

Under Fujimori's rule there were many legislative changes.
I want to highlight two of these: an amnesty law (Ley de Amnestía General) which has been signed in 1995 granting amnesty for any human rights abuses or other criminal acts committed from May 1982 to 14 June 1995 and the law of population (Ley Nacional de Población de 1985), which has also been changed in 1995. This led to 200.000 women and 20.000 men being sterilized without their consent.[98] These, in total 220.000 men and women, are not included in the above mentioned number of victims. Neither have these cases been investigated nor documented by the Commission.[99] Most of the victims were poor, marginalized, from indigenous background and they did not know what sterilization means because it was offered as a contraceptive method.[100] President Fujimori was in a drive to decrease poverty and implemented the new law in order to lower the birth and decrease the poverty rate.[101]
President Alberto Fujimori resigned in November 2000 and took refuge in Japan when faced with charges of corruption and the human rights abuses came to light.

The Truth and Reconciliation Commission was established by President Alejandro Toledo on 13th July 2001. In 2003 the Commission released an extensive report regarding all the human rights violations committed between 1980 and 2000, leaving the forced sterilization aside,[102] due to the fact that there was not enough time and resources to investigate those crimes.[103]

III. What are Truth Commissions and what are their objectives

"Truth Commissions are official, non-judicial bodies of a limited duration established to determine the facts,

[95] Klarén, Nación y Sociedad en la Historia del Perú, p. 509
[96] Jo-Marie Burt, Justicia Transitional en el post-conflicto de Peru, p. 50.
[97] Jo-Marie Burt, Justicia Transitional en el post-conflicto de Peru, p. 50.
[98] Dahl, Changing the public narrative: The case of forced sterilizations in Peru.
[99] Movimiento Amplio de Mujeres, Esterilizaciones Forzadas y acceso a la Justicia en el Perú, p. 5.
[100] Dahl, Changing the public narrative: The case of forced sterilizations in Peru.
[101] Dahl, Changing the public narrative: The case of forced sterilizations in Peru.
[102] Ballón, el caso peruano de esterilizacion forzada, 2013.
[103] Kraus, Entre Impunidad y Resistencia, p. 35.

causes and consequences of past human rights violations".[104]

The commission's objectives are outlined in the legal instrument that established it, often a law or some form of executive decree.

There are three objectives that are fundamental:

a. "Truth commission should establish the facts about violent events that remain disputed or denied".[105]
b. "Truth commissions should protect, acknowledge, and empower victims and survivors. Commissions establish a relationship with victims and survivors not only as informers, but also as rights-holders, partners, and as people whose experiences deserve recognition".[106]
c. "Truth commissions should inform policy and encourage change in the behavior of groups and institutions, thus contributing to social and political transformation".[107]

The Truth Commissions are typically created during periods of political change. "A commitment to establish a truth commission is often included in peace agreements, transition-to-democracy negotiations, and in some cases, as a clause in a new constitution".[108] The executive or legislative branch of government establishes a truth commission. The form chosen depends in the institutional and political realities of each country.[109]

There are a variety of Truth Commissions around the world. We have had more than 35 Truth Commission operating since the 1970s all around the world[110] and nearly half of them were established in different countries in Central- and South-America.

The Retting Report, or officially known as The National Commission on Truth and Reconciliation in Chile, operating from 1990 to 1991, was established during the transition from authoritarianism to democracy. Their task was to detail human rights abuses resulting in deaths or disappearances that occurred in Chile during the years of military dictatorship under Augusto Pinochet.

The Commission on the Truth for El Salvador operated from 1992 to 1993 and was a commission approved by the United Nations to investigate the grave wrongdoings committed during the country's twelve year civil war.

In Uruguay there was no official "truth commission" at first. They established two parliamentary commissions to investigate the wrongdoings during the military dictatorship from 1985 until 1987. Their findings however were never officially announced, provoked no significant public reaction or official response from the military, and were disqualified by the then-president.[111]

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[104] González/ Varney, Truth Seeking, p. 9
[105] González/ Varney, Truth Seeking, p. 9
[106] González/ Varney, Truth Seeking, p. 9.
[107] González/ Varney, Truth Seeking, p. 9.
[108] González/ Varney, Truth Seeking, p. 9.
[109] González/ Varney, Truth Seeking, p. 9.
[110] Priscilla B. Hayner in Encyclopaedia Britannica, Truth Commission, 18.09.2008
[111] https://www.encyclopedia.com/humanities/encyclopedias-almanacs-transcripts-and-maps/uruguay-truth-commissions; seen 21/09/2020 at 3:34 p.m.

In response to extensive reports from NGO's, which caught huge attention, the Uruguayan Commission for Peace was established in 2000. This was a non-transitional commission operating from 2000 to 2003, investigating the fate of the disappeared in Uruguay between 1973 and 1985 in accordance with the 1986 Amnesty Law.[112]

As we can see, commissions can be focused on different goals and projects, as well as they can be established in different ways, meaning by the state itself or by the United Nations.

Nevertheless, one thing they always have in common is that their establishment has the purpose to help and protect the victims who have suffered during the conflict.

IV. The definition of Victims

"The notion of "justice for victims" of the most serious crimes has been at the center of the normative developments that we have come to know as transitional justice".[113] The categorization of a "victim" in international law and transitional justice is an important issue although it is difficult to find an exact definition of this word.

It depends on the situation and the type of conflict the country went through. In complex scenarios it also seems very difficult to clearly separate victims from perpetrators, even impossible. Many may have been both, victims and perpetrators of abuses. This makes it very difficult to determine in all fairness who is an "innocent" victim of the conflict.[114]
First, a victim was defined in international law as "whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act."[115]

The Inter-American Court has developed a broader definition, recognizing that violation of human rights can have a much bigger impact, and not only on people whose individual right has been violated directly.[116] The Court recognized, that survivors and family members of killed and tortured people have suffered the same violations stated in Art. 5 of the Inter-American Convention (Right to humane treatment).

The Comisión de la Verdad y Reconciliación (spanish abbr.: CVR) has no explicit definition for "victims" in their final report. Nevertheless, from the final report of the CVR we can deduce, that the word "victim" was understood in a broad sense. Victims were the people who have died or disappeared during the conflict, as well as the survivors. So, not only people who were directly targeted for murder, forced disappearance, rape or torture can be seen as victims. Also their family members and members of the

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112 https://www.usip.org/publications/2000/08/truth-commission-uruguay; seen 23/09/2020 at 7:41 p.m.; United States Institute of Peace, Truth Commission Uruguay, Tuesday, August 1, 2000.

113 Mendez, Victims as Protagonists in Transitional Justice, p. 1.

114 See: Mendez, Victims as Protagonists in Transitional Justice, p. 2.

115 James Crawford, The International Law Commission's Articles on State Responsibility, Cambridge University Press, 2002, p. 254.

116 Mónica Feria Tinta, La víctima ante la Corte Interamericana de Derechos Humanos a 25 años de su funcionamiento, Revista IIDH 2006, p. 161.

community to which they belong can have suffered in many ways.
Discussing these issues in-depth would go beyond the scope of this essay. Still, I wanted to point out that in transitional justice the affected communities have to be heard to improve peace negotiations, "for they will have to live with the consequences of peace deals that may be just or unjust, even as they had to live (and die) with a war that was mostly not of their making".

V. The Truth Commission in Peru

1. General Information

The Commission of Truth and Reconciliation in Peru operated from 2001 to 2003. Because of the participation of many social scientists in the commission, Peru had a historical and sociological approach to truth finding.[117]

Their mandate was to investigate "disappearances, massacres, extrajudicial executions, torture, prison conditions, prosecutions under the anti-terrorist statutes, and so on,"[118] committed by state agents, the Shining Path and Túpac Amaru Revolutionary Movement (MRTA) insurgencies, and civilian self- defense units between 1980 and 2000. The mandate left the decision to identify (or not) moral, political, and/or criminal responsibility to the commission's discretion.[119] The commission was asked to present cases to the attorney general's office for criminal investigation.[120]

2. Findings

The Commission gathered more than 17.000 testimonies in two years.[121] Despite this large number the CVR could not recover all information. Reaching the Andean highlands – where most of the conflicts took place – was difficult because of bad infrastructure, but also the population did not cooperate as expected because of fear, the suffering and the trauma they have had for years.
The CVR was able to identify 18.397 dead and disappeared persons by full name.[122] "The deficiencies in information collection led the commission to employ a statistical estimation technique to infer the total number of victims".[123] "On the basis of the available data, the Multiple Systems Estimation approximated the number of dead to be 69.280 within a 95 percent confidence interval".[124]

"The final report also noted that 75 percent of the victims of the internal armed conflict and authoritarianism were members of indigenous communities that make up less than 25 percent of the total population".[125] While the conflict was not caused by ethnic separatism, the unequal distribution of victimhood along ethnic lines was an alarming indication that centuries of neglect, exclusion, and marginalization had taken its toll on vulnerable populations".[126]

3. Impact

Although the Peruvian Truth Commission generated enormous

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[117] Bakiner, Truth Commissions, p. 128/129.
[118] Bakiner, Truth Commissions, p. 122.
[119] Bakiner, Truth Commissions, p. 122.
[120] Bakiner, Truth Commissions, p. 122.
[121] Febres, Wider das Vergessen, p. 17
[122] Bakiner, Truth Commissions, p. 129.
[123] Bakiner, Truth Commissions, p. 129.
[124] Ball/ Asher/ Sulmont/ Manrique, How Many Peruvian have died?, p. 2.
[125] Bakir, Truth Commissions, p. 130.
[126] Bakir, Truth Commissions, p. 130.

controversy in the public sphere it generated little political impact.

The Toledo government (2001 – 2006) expressed willingness to implement the recommendations, but in the end, unfortunately, this did not happen in such a big extent as expected.

"The CVR's focud on social exclusion, marginalization, and poverty as the root causes of the conflict led conservatives to accuse commissioners of speaking the same language of social justice as the Shining Path".[127] And although the CVR highlighted this problem, Peru still did not improve. 75 % of the victims were indigenous people, showing that the ethnic division was a critical reason for the crimes.[128] 15 years after the armed conflict we can still see a considerable ethnic division in the country of Peru on a daily basis.[129]

Despite the call for self-reflection by the CVR, the three political forces that were in government during the time of conflict – Acción Popular, Alianza Popular Revolucionaria Americana (APRA) and Fujimoristas – failed to assume political responsibility for the violations committed.[130] And among the political parties, responses were varied. While one leading figure would acknowledge the report and take responsibility, another would reject the findings by the Commission.[131]

Furthermore, an aspect that many political parties refused to accept was that the CVR characterized the violent period as an internal armed conflict rather than a war against terrorism.[132] This disqualified any narrative of heroism among political sectors and the military.[133]

From all the different recommendations the CVR has given, the most successful one was reparations for the victims. A significant advance was the July 2005 legislation (Law 28592) that formalized the Comprehensive Reparations Plan (Plan Integral de Reparaciones).[134] Their objectives were to recognize the quality of the victims; contribute to the recovery of conditions, capacities and opportunities for personal development the victims have lost as a consequence of the violence and give compensation for human, social, moral, material and economic consequences, caused by the violence.[135]

One of the latest advances was the establishment of the National Commission on the Search for Missing Persons (Dirección General de Búsqueda de Personas Desaparecidas) in 2019. Their task is to create a national register of missing people, to plan and undertake the search of the missing people and implement a

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[127] Bakir, Truth Commissions, p. 137.

[128] García, A 15 años del Informe Final de la CVR, 2018; https://puntoedu.pucp.edu.pe/noticias/a-15-anos-del-informe-final-de-la-cvr/.

[129] García, A 15 años del Informe Final de la CVR, 2018; https://puntoedu.pucp.edu.pe/noticias/a-15-anos-del-informe-final-de-la-cvr/.

[130] Bakir, Truth Commissions, p. 136.

[131] Bakir, Truth Commissions, p. 136.; The contrasting positions within the Unidad Nacional were embodied by Lourdes Flores, who by and large expressed support for the CVR, and Rafael Rey, who not only condemned the final report but also insinuated some commissioners' links to terrorism.

[132] Bakir, Truth Commissions, p. 137.

[133] Bakir, Truth Commissions, p. 137.

[134] Bakir, Truth Commissions, p. 138.

[135] Aprueban Reglamento de la Ley Nº 28592, Ley que crea el Plan Integral de Reparaciones; DECRETO SUPREMO Nº 015-2006-JUS

psychosocial assistance for family members during the process.[136]
As we can see, the CVR could not achieve the impact it should have in the society and neither in politics. Although it was part of their mandate to present cases to the attorney general's office for criminal investigation, the state did not prosecute the crimes as it should. The CVR published an extensive report but the legal process did not take place. Therefore, cases were taken to international courts, especially to the Inter-American Court of Human Rights in Costa Rica.

VI. Judicial Protection

The Obligation to Guarantee Human Rights and the Right to Judicial Protection

We all have a right to judicial protection, as it is a human right. The right to judicial protection can be found in many international agreements. The Inter-American Court of Human Rights also emphasizes this right in several rulings.
As mentioned above, the national courts in Peru did not prosecute the crimes committed between 1980 and 2000 as it should have happened, leading to a violation of the right to judicial protection.
The right to judicial protection is regulated in Art. 25 ACHR. It says: "everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal […]".

In a ruling by the Inter-American Commission on Human Rights (IACHR) it was noted that the right to judicial protection has to be interpreted broadly.[137] Judicial protection and judicial investigation means that the perpetrator has to be identified, punished and reparations have to be paid.[138] Furthermore the right to judicial protection is not only for the victim who has suffered direct pain but also for the victim's family members, who have also suffered indirectly.[139]

Moreover, we have several international agreements which also grant the right to judicial protection. The International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR) are for example extensive agreements regarding human rights, which Peru has also ratified. These human right treaties have no explicit command concerning criminal prosecution of human right violations. But such an obligation can be derived from the provision to "respect and ensure" and the "judicial protection" (Art. 2 and Art. 9 ICCPR).[140]
Furthermore, the UN-Human Rights Committee wrote in their General Comments that because of "article 7, read together with article 2 of the Covenant, […] States must ensure an effective protection through some machinery of control. Complaints about ill treatment must be investigated effectively by competent authorities. Those found guilty must be held responsible, and the alleged victims must themselves have effective

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[136] García, A 15 años del Informe Final de la CVR, 2018; https://puntoedu.pucp.edu.pe/noticias/a-15-anos-del-informe-final-de-la-cvr/.
[137] Salazar, Die Wahrheitskommissionen, p. 23.
[138] Salazar, Die Wahrheitskommissionen, p. 23.
[139] Monica Feira Tinta, La víctima ante la Corte Interamericana, Revista IIDH, p. 161 ff.
[140] Salazar, Die Wahrheitskommissionen, p. 23.

remedies at their disposal, including the right to obtain compensation".[141] The committees also had similar findings in their reports concerning extrajudicial executions and forced disappearances.[142]

Not only in Peru, but in many other countries in Latin America the right to judicial protection has been denied. I want to introduce you some cases and rulings the Inter-American Court of Human Rights had, where they have stated very clearly that all victims have this right to judicial protection.

In this first case 10.843; Nr. 36/96; Garay Hermosilla vs. Chile the IACHR was dealing with the amnesty law in Chile. Self-amnesty laws are procedures by which the state refuses to prosecute serious crimes. They are applied in a way that human right violators can no longer be accused for their committed crimes. The amnesty law in Chile rendered the crimes legally without effect and deprived the victims of any legal recourse through which they might have identified those responsible for violating their human rights during the military dictatorship, and bring them to justice.

Judge Cancado Trindade of the IACHR has even elevated the right to judicial protection to be jus cogens. In his concurring opinion to the case Barrios Altos vs. Peru, he stated that the amnesty law in Peru was violating Art. 1 (1) (Obligation to Respect Rights) and Art. 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention. The amnesty laws are offensive to the basic human rights to truth and justice. Judge Cancado Trindade elevated the right to judicial protection to jus cogens basing it on the Martens Clause.[143] He "reiterated that the ideas contained in the Martens Clause comprise a principle of general international law and that states were established to protect the common good, not vice versa. Thus, establishing laws of self-amnesty in order to protect the state from allegations of human rights abuses offends the conscience of humanity".[144]

Amnesty laws violate the right to judicial protection because the perpetrators will not face the consequences of their wrongdoings.[145] It blocks the victims' right to obtain any type of compensation.[146] And it does not only violate the right to judicial protection but clearly also violates the right to the truth in the most literal way.[147] The amnesty law blocks any type of investigation and prosecution against the perpetrator, denying the victim their right to know what has happened and leaving them with uncertainty.[148]

In this next case 10.580; Nr. 10/95; Manuel Stalin Bolaños Quiñones vs. Ecuador, the IACHR also stressed that family members of the fatal victim had the right to know the truth about what happened to Manuel Bolaños, the circumstances of his detention and death and the location of his

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[141] CCPR General Comment No. 7: Article 7 (Prohibition of Torture or Cruel, Inhuman or Degrading Treatment or Punishment).
[142] Salazar, Die Wahrheitskommissionen, p. 24.
[143] Concurring Opinion Cancado Trindade, Barrios Altos vs. Peru, p. 1159.
[144] Concurring Opinion Cancado Trindade, Barrios Altos vs. Peru, p. 1159.
[145] See: E/CN.4/2006/91, No. 17.
[146] See: E/CN.4/2006/91, No. 45.
[147] See: E/CN.4/2006/91, No. 16.
[148] E/CN.4/2006/91, No. 45.

remains.[149] "The lack of an investigation by impartial competent authorities, the delay and insufficiency of the investigation which was carried out, and the failure of the State to provide information, constitute a serious violation of the family's right to prompt and effective judicial recourse. The delay in and insufficiency of any efforts of the State to investigate the grave allegations raised by family members in domestic channels has effectively prevented them from realizing their right to justice, and their right to know the truth about what happened to Manuel Bolaños".[150]

In other cases in front of the IACHR like Durand y Ugarte vs. Peru, Quispialaya Vilcapoma vs. Peru or Terrones Silva y otros vs. Peru the IACHR says again that the victims and their family members have a right to truth and justice under Art. 8 (1) and Art. 25 (1) of the Convention.[151] This also includes the right to effective investigations by the court which also should be a state's obligation. The states have to take it as a legal duty to open judicial investigations against the perpetrators and not see it as a simple formality that is condemned to be unsuccessful.[152] Furthermore, judicial investigations should not be seen as a mere interest of only one party which depends on their approach with a prosecutorial initiative.

While the right to truth has been fundamentally framed by the right to access to justice, it also appears certain that the right to truth should be considered autonomous because of its wide-ranging nature. The violation of this right can affect other rights protected by the Convention, depending on the context and particular circumstances of the case.[153]

VII. Conclusion

The participation of victims in the process of transitional justice is crucial.

If the general aim of transitional justice and of Truth and Reconciliation Commissions is to restore peace in a country, a social and historical approach and investigation of the conflict is key to ensure a complete and unbiased understanding.

The Commission of Truth and Reconciliation in Peru had as a main goal to help and protect the victims and gave them a very important role during the whole truth-finding process.

From a political point of view, the aim of the Commission was to assert the victims' rights, especially their right to truth, justice and reparations.[154]

The CVR was designed in a way so that the victims could testify in a less burdensome manner and could be heard without having fear.[155] The Commission was a decentralized office with staff members who were trained and sensitized with the issues which they were going to face and work with.[156] Moreover, they adopted precautions for the victims so they do not have to fear retribution or be exposed to other dangers because of giving their testimony.[157]

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[149] Manuel Stalin Bolaños Quiñones v. Ecuador, para. 45.
[150] Manuel Stalin Bolaños Quiñones v. Ecuador, para. 46.
[151] Durand y Ugarte vs. Peru, para. 130.
[152] Quispialaya Vilcapoma vs. Peru, para. 161.
[153] Terrones Silva vs. Peru, para. 215.
[154] Reategui, Criterios Básicos, p. 16.
[155] Reategui, Criterios Básicos, p. 16.
[156] Reatagui, Criterios Básicos, p. 16.
[157] Reategui, Criterios Básicos, p. 17.

From a public point of view the CVR wanted the victims to be heard. Therefore they had public hearings to sensitize the Peruvian society. Listening to the testimonies should create empathy, recognition and should make the people reflect about the negative past.[158]

It seems like the aims and the preparatory work of the CVR was pretty much impeccable, but the state did not adopt their findings in an adequate way.
"Interpreting modern international law standards, authoritative organs of protection demand that domestic courts and codes of criminal procedure allow for victim participation in the investigation, prosecution and trial of international crimes".[159]

To ensure the victims' rights, the Inter-American Court of Human Rights had to highlight the right to judicial protection and the right to the truth.

The objective of the Commission in Peru – to give the victims their right to truth – could not be fully accomplished. The national courts violated the victims right to judicial protection and thereby their right to the truth. It was the national courts' duty by being the judicial system of the state, to protect the victims and ensure their rights.

We will not be able to fully restore peace and reconciliation in a country if we do not guarantee the victims their right to truth to justice.

[158] Reategui, Criterios Básicos, p. 17.

[159] Mendez, Victims as Protagonists in Transitional Justice, p. 1.

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Fake news, child-kidnapping gangs and violence against the Roma community in France: making social media accountable

By Mihail Stojanoski

ABSTRACT

Can fake news lead to violence? There have been several examples in recent years where fake news has sparked serious incidents, usually in cases when the false information tapped into issues which were already charged with emotion. In the example analysed in this paper, a rumour that circulated on social media about a van on the streets of Paris was tied with the age-old racist stereotype of Roma kidnapping children. The result was a series of violent incidents against the Roma community, mob justice and lynching. In response to events such as this, European countries and social media have increased their efforts in combatting fake news by passing legislation, the effects of which are still unclear. The paper approaches the topics of social media responsibility for incidents such as the one above, while examining some of the measures taken so far. It argues that much like other spheres of public interest, given social media's importance for freedom of expression, the time for stricter regulation and accountability has come. It concludes that the recent legislative efforts carry their own risks and, without the threat of financial liability for social media, may prove insufficient

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1. Introduction

The Roma are Europe's largest ethnic minority. As the European Commission put it succinctly, in spite of this, "*Many EU Roma are still victims of prejudice and social exclusion, despite the discrimination ban across EU Member States.*"[160] This includes overt discrimination by police who ethically profile Roma, punitively raid Roma-majority settlements and beat Roma in custody. It includes the overrepresentation of Roma in prison populations and Romani children in State-care. Elements of more subtle discrimination can be seen in examples such as Travelers not being allowed to camp in certain places, racial prejudice in employment practices as well as simply being told that there are no vacancies in a hotel, in spite of it being obviously false.

On top of all this, to this day many still adhere to the unfounded stereotype that Roma steal children. As elaborated in more detail below, this is a long-standing belief in European folklore which is not only deeply racist in nature, but also untrue. Rumours on social media in early 2019 playing on this belief led to violence against members of the Roma community in Paris in spite of continued appeals to reason from authorities and police arrests.

The subject of this paper is to put the above example in the context of the rising threat of fake news on social media and explore avenues for increasing social media accountability. Some social media platforms have chosen to act and self-regulate, but States have also enacted legislation. The paper explores some of these solutions in order to reach a conclusion about the level of accountability of social media providers/platforms and propose new avenues which could improve that accountability.

2. Fake news and Roma – a centuries-old myth which refuses to die

"*On October 21 [2013] in Dublin, an anonymous Facebook poster tipped off a news channel about a blond-haired, blue-eyed child living with a dark-skinned Roma family. The journalists alerted the police, who raided the home and took the 7-year-old girl away on a hunch—that hunch being the blood libel that Roma steal kids. The next day, seventy-five miles away in Athlone, a 2-year-old boy was removed from his Roma parents in similar circumstances. DNA tests proved both hunches wrong. Rumor and racism had taken the place of policing and journalism, resulting in immense trauma for both families.*"[161]

There is nothing new about the myth that Roma steal children. According to one study conducted for the Irish National Folklore Collection in 2007, the myth is part of a wider European folklore tradition about Romani women stealing non-Romani children. This folklore, having made similar references to Jews in the past,[162] while being clearly racist and xenophobic, as enunciated by the example above, is clearly alive today.[163] Being already on their toes about all the risks to children

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[160] Roma equality, inclusion and participation in the EU (2020)

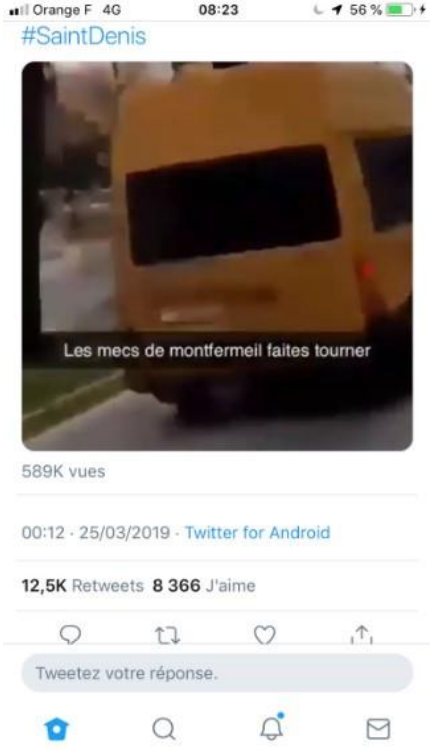
[161] Younge (2013)

[162] McGuire (2013)

[163] According to a study conducted in Italy cited by Hood (2019), "*In some of the cases [of kidnapping], witnesses stated they "saw" the kidnappers without any certainty that they were "Gypsy women" but they were "sure" of it. Trials and legal procedures eventually identified that the culprits may actually have been individuals linked to criminal networks, or even relatives of*

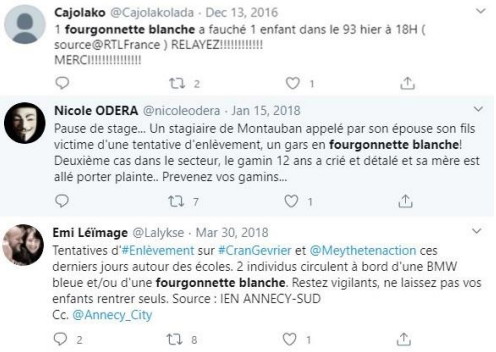
today, parents easily tie their fear for their children's safety into these legends, in spite of there not being even a single recorded case of a Romani person abducting a non-Romani child, anywhere.[164]

This myth is, if nothing, persistent in



European culture, and ties into the general fear of child abduction. Examples from France shown below prove that online content referring to white vans kidnapping children on the streets was present in 2016 and 2018, while one source claims that the rumour has been circulating since 2010.[165]

Examples of tweets about white vans



snatching children in France from 2016 and 2018:

These rumours failed to get significant traction at the time, as evidenced from the relatively low share ratio.[166]

One year later, a similar rumour went viral. During February and March of 2019 posts containing testimonies, photos and videos of alleged kidnappings by a white van began circulating on social media in France, in particular, on Facebook, Twitter and WhatsApp. Although the spread on WhatsApp was done through closed groups and peer-to-peer messaging, the content on Facebook and Twitter is public and therefore simpler to track down and follow. For illustrative purposes this article will analyse the spread of the rumour on Twitter, which, as stated above, is only one of the relevant platforms that were used.

Considering the time that has passed, it is virtually impossible to determine the origin of the revamped rumour, although its amplification on social media platforms is beyond doubt. One likely source may have been a post on Twitter containing a video of a van,

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the children. Yet the public continued to target Roma people each time there were new allegations of abductions."

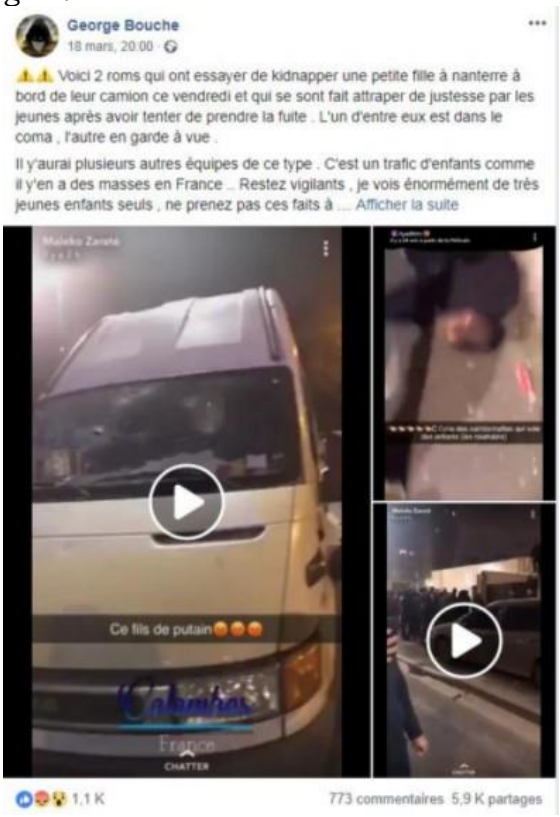
[164] Ibid

[165] A non-exhaustive history of the white-van-stealing-children myth in France is presented by Leboucq (2019). For more details about the "Roma-stealing-children" myth in France, also see Dejean (2019).

[166] These and the other screenshots in the article were taken by the author between September and November of 2020.

published by a profile of a 17-year old student, who had only 161 followers at the time. The post was shared over twelve thousand times and the video was viewed over half a million times in two days:

Another possible source of the rumour is a post on Facebook which also contained videos, and a reference to "two Roma who tried to kidnap a little girl":



What is interesting about this source is that it introduces the Roma community into the equation without any reason or indication. Another thing which is interesting to add is that although a claim is made about an "attempted kidnapping" the videos themselves do not contain any indication of a kidnapping. To top it off, there was no kidnapping or an attempt of one reported to the police in that area during that time.[167]

Other sources of the online rumour are suggested as well, corresponding to, or preceding the same time-period.[168]

There is no single explanation as to why this rumour attracted so much attention in early 2019. One might speculate that a video attracts more attention than text,[169] that the socio-cultural circumstances in France have meanwhile changed and xenophobia increased, or that this was simply the culmination of rumours being spread for years.[170]

One common element in all of the possible sources is that they make conclusions which do not correspond to the content of the video. Namely, the video only shows the aftermath of an alleged kidnapping attempt (i.e. violence against the alleged perpetrator), while the only evidence of what actually preceded the recorded event is the claim of the author.

Whatever the source of the rumour, it sparked a wave of violence against the Roma community around France, the most serious of which involved a mob-style lynch by some twenty individuals armed with knives, bats and steel bars in a Parisian suburb, leaving two Romani individuals with physical

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[167] Leboucq (2019a)

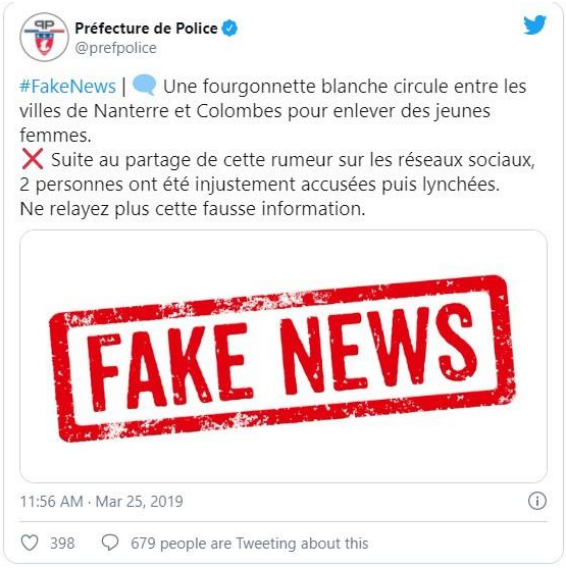
[168] Les Décodeurs (2017). Also see the same source for an earlier version of the same rumour and its evolution.

[169] A claim which certainly has wide support among professionals from the sphere of marketing. One example for illustrative purposes is given by Manjoo (2013).

[170] Dejean (2019) links the revamping of this old myth in France with the policies of Nicolas Sarkozy and Manuel Valls at the beginning of the last decade. In any event, the answer to this question falls outside of the scope of this article.

injuries.[171] In another incident a mob set fire to several vans belonging to Roma, and in several other incidents several Roma were chased by armed groups of locals.[172] For several weeks Romani communities in several impoverished Parisian suburbs were the targets of assaults and threats, some of them being forced to leave their residences. One source gathered that within the space of two weeks, a total of 25 such attacks took place in France, most of which were in the Saint-Denis suburb of Paris.[173]

The police intervened swiftly and made arrests, but that had little effect on the spread of the fake news. Along with various government, NGO and private actors, the police then made appeals on Twitter to clarify the situation in an attempt to counter the viral posts on their terms. As it can be seen, this post which does not make any reference to Roma did not gather nearly as much traction as the ones which sparked the rumour:



Many local and central government spokespersons, legacy media outlets and public figures took to appealing to the common sense of the public in an attempt to calm the tensions. Eventually the wave of violence subsided, but the fear instilled in the community by those events remained. Some Roma told the Guardian that they had been constantly scared and that they were forced to stand guard around their homes since the incidents.[174]

3. What are we doing about this

Following the wave of violence described above, the French government spokesman Benjamin Griveaux called the attacks unacceptable, adding that they showed "*the absolute need to fight 'fake news'*".[175]

It should be noted that by the time of the incidents, France already had a law in place aiming to fight fake news (since November 2018). However, that law had a very narrow scope, focusing on election periods and politically-driven fake news, which may be explained by the fact that President Macron was himself the target of fake news during his election campaign earlier.[176] Furthermore, the law in question had a reactionary approach, namely, it envisaged dealing with the fake news problem through reporting of suspicious content and ex-post-facto

[171] Guy (2019)
[172] Agence France Presse (2019)
[173] Hood (2019)
[174] Agence France Presse (2019)
[175] Roma in France seek protection after attacks sparked by fake news (2019)
[176] For a description of the law and the circumstances surrounding it in a nutshell, see Ce que contient la loi française contre les "fake news" (2018).

takedowns following a court-issued injunction.[177]
On the other side of the Rhine, however, a different approach was taken. Germany chose to regulate social media and shift the responsibility on to them to patrol their own networks for hate speech and fake news. Users were encouraged to report content themselves, and social networks were tasked with verifying if the content in question was in violation of one or more provisions of the Criminal Code, and remove it if appropriate.[178] This was a novel approach which assigned social networks a quasi-judicial role, and was heavily criticized at the time it appeared.[179]

These were the two initial approaches taken by State actors aimed at combatting fake news. The German model was later replicated in Russia, Singapore, the Philippines and other places, as a novel and appealing solution which imposes an obligation on social media to self-regulate. The popularity of the German model may be due to its simplicity and essentially the privatization of the detection and take-down process, which seems like a solution which does not require significant investment or undertaking on the part of Governments. However, restating an already established critique[180], it also grants wide powers to privately-owned social media in regulating freedom of expression, thereby essentially transferring prerogatives of the State to them.[181]

It should be mentioned that social media platforms/networks themselves have indicated their willingness to self-regulate and discourage the spread of fake news, which is an approach in the same vein, which recognizes their responsibility. Initially many social media networks agreed to signing a self-regulatory code of practice[182] which apart from acknowledging social media's responsibility in the proliferation of fake news, did not amount to any specific measures to this end. Social and political pressure eventually paid out and social media networks/platforms were forced to undertake more drastic measures in order to demonstrate social responsibility and prevent liability.

Their actions have varied significantly between actors. Twitter has recently taken to marking various profiles as "government-affiliated" in order to provide context and indicate possible biases of the content published. This measure was initially applied to Sputnik and Russia Today, but was soon applied to western news outlets, politicians, public figures and non-media profiles as well. Furthermore, in view of the 2020 US presidential elections, Twitter added a prompt to tweets that contain a disputed claim every time a user accesses it.[183] This prompt also contained a link to

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177 For an official source on this issue in English, see Against information manipulation (2018)
178 Only with regard to a specific list of articles of the Criminal Code, such as inciting hatred, defamation etc.
179 For a description and a good example of criticism of the law (the NetzDG), see Human Rights Watch (2018). It should be mentioned at this point that the NetzDG is currently undergoing a reform aiming to introduce and improve the due process issues and reporting obligations of social media.
180 Article 19 (2017)
181 This is one of the aspects which is being reexamined in the ongoing process for reform of the NetzDG.
182 Heldt (2019)
183 Information from the twitter handle @TwitterSupport, an official channel of

"credible information", in an attempt to reduce the spread of misinformation.[184]

In response to increased pressure, Facebook has also undertaken steps to tackle the spread of fake news. They have addressed the issue from the angle of the fake news producers by making their work unprofitable, and have launched various initiatives, new products and services.[185] This approach differs from the above one, but it seems to be more fitting to a platform such as Facebook which has paid ads as one of its key features.

Google (Alphabet) has also stepped up its efforts in fighting against fake news, focusing in part on its news aggregator, Google News,[186] but more importantly on YouTube, which has been pointed out by some as a lair of hoax and conspiracy videos that fuel fake news.[187] They have made use of advanced AI to spot fakes and deepfakes[188], and have undertaken to block access to certain claims surrounding the COVID-19 pandemic that they consider dangerous.[189] In April 2020 they announced that they will dedicate and distribute another 6.5 million US Dollars to various fact-checkers and NGOs to this end.[190]

The consensus seems to be that social media networks have fostered an unprecedented growth in the amount of disinformation. As indicated in the first chapter, the risks for the ordinary person are much more tangible than tarnishing reputations of politicians, and can often mean physical harm and a threatened livelihood, particularly for vulnerable communities.

At this juncture we should not forget to mention that all social media have self-defined as "agnostic" distributors—that is, neutral carriers not responsible for the content published through their channels and networks.[191] All of them are also for-profit companies, which means that their primary goal will be the maximization of profit. However, this also means that they have to worry about corporate and brand image, which means that social pressure can be an effective tool to exert changes in their policies. Anti-trust measures aside, societies need to adapt to the new reality of concentrated financial and information-control power of the social media. However, as Voltaire and Peter Parker (Spiderman)'s uncle once said, "*With great power comes great responsibility*".

So what can we do? Can we push social media to self-regulate even further? Should they shoulder the responsibility for people lashing out their insecurities online and harming others? On the other hand, isn't protecting people exclusively a prerogative and obligation

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communication of the social network, published on October 9th, 2020. In practice, the user was required to read the prompt saying that the content in question was disputed, or that a claim with regard to election results was premature, and could only access the content by clicking again.

184 The quotation marks are added not because Twitter got it wrong on this occasion, but to emphasize the peculiarity and novelty of a social medium's intent to establish what credible information is.

185 Working to Stop Misinformation and False News (2017)

186 Abrill (2019)

187 About a link between the belief in a flat Earth and YouTube videos, see England (2019)

188 England (2019a)

189 Google lutte contre la propagation de fakenews sur le coronavirus (2020)

190 Singh (2020)

191 Howell (2018)

of the State? All valid questions, and all very difficult to answer.

4. Conclusion – the case for more accountability of social media

In the era of mass media, journalism used to have a code of conduct. Opinion pieces were clearly separated from news, professional reporters strived for objectivity, and we all admired the role of investigative journalism, whether it was epitomized by the bullet-proof vest worn by wartime reporters, or the symbolic pencil-on-the-ear that brought us Watergate or the Catholic Archdiocese of Boston sex abuse scandal.

With the appearance of social media things have changed significantly. Legacy media has lost its monopoly on reporting and has been forced to share the audience with ordinary people who create and share content, unburdened by ethical constraints. Moreover, this was recognized as an opportunity where political actors could extend their power, so bot farms and political fake news appeared.[192]

From the example examined in chapter one we see how powerful and how consequential fake news can be once it is unleashed on social media, in spite of repeated debunking and placement of counter-narratives by authorities and legacy media.

It was also explained that social media networks/platforms have so far recognized the need for regulation, so what remains is not to decide "if" regulation is needed, but "what kind" and "how much".

A system which requires self-regulation and promises has not proven fruitful in the past. Germany initially experimented with a similar system of regulation which encouraged social media to limit the spread of hate speech and fake news by introducing a non-binding charter. The system failed, which is why the subsequent law was introduced (the NetzDG).[193]

At this point it is prudent to recall that social media platforms/networks are in essence, private, for-profit companies. Although they are not directly culpable for the creation of fake news, they have made their explosion possible by creating spaces for free exchange of information, which brought them opportunities for selling advertising.

If we understand social media as public spaces[194] where content is exchanged, denying access to such spaces would be tantamount to a digital ban on free assembly and free speech. So measures blocking access to social media in order to prevent the spread of fake news would mean throwing the baby out with the water. One can imagine a system which only blocks access to certain content[195] as more nuanced, and as a promising way forward.

However, blocking access to certain content alone, apart from raising the obvious issues of who would be in charge of blocking and how would it be

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[192] As opposed to strictly for-profit fake news, although it is difficult to make a distinction in practice.

[193] Heldt (2019)

[194] van Dijck and Poell (2013)

[195] Content which was found to constitute fake news. By whom and using which methodology, are open questions which merit further examination, but are not within the scope of this paper.

done, seems insufficient if it is not accompanied with accountability. This paper would argue that the best and proven way to impose accountability to a for-profit enterprise would be by making it expensive for it to violate the rules.

The NetzDG envisages high fines for social media if they fail to meet their reporting obligations or if they fail to establish an efficient content reporting system. So, the fines are not intended to be applied on a case-by-case basis, but for systematic errors.[196] This seems to encourage accountability in the broad sense, but to get back to the original example, even if a legal solution such as this was implemented in France, it would not mean much for the frightened and beaten Roma from the Parisian suburbs. They could pursue a claim against the perpetrators themselves, of course, but that is a separate issue which does not touch on the responsibility of social media.

Seeking damages from social media companies for having spread fake news should be put on the table as a possibility by removing formal legal obstacles.[197] One could argue that upon being prompted, social media have a duty to keep their networks clean of content which would lead to violence, the case in hand being a good example of violence ensuing a post that went viral. Their efforts to this end could be construed as an indicator of that obligation. Their failure to act and remove such inflammatory content within a reasonable amount of time would constitute breach of that duty, and therefore amount to negligence. The causal link between the social media posts and the attack on the innocent Roma plaintiffs would be relatively straightforward, and could be provided in the testimony of any of the assailants. This proposal does not aim to present an exhaustive legal argument, inasmuch as provide a line of thinking that might encourage models of accountability for social media in the future.

The other side of enticing such a proposal would be its consequence for freedom of speech and the incentive for social media to resort to mass takedowns. However, this was a fear raised before the coming into force of the NetzDG, and such fears have largely not come true.[198]
In any event, social media platforms/networks have become increasingly important as public spaces and their regulation is long overdue. Whether national regulations on social media would eventually lead to the emergence of international obligations remains to be seen, but a strong financial incentive such as the possibilities described above would certainly go a long way.

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[196] Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act, NetzDG) - Basic Information (2017)

[197] This proposal is made without reference to any national legal system for two reasons: first, the conditions necessary to establish negligence and obtain damages as well as the legal obstacles thereto vary significantly across jurisdictions, and second, such an analysis would be incredibly cumbersome to make.

[198] Pondered data for the first few reports can be found in Echikson and Knodt (2018). The conclusion is made on the basis of that data. Subsequent reports indicate similar trends.

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The Transitional Society of the Bosnian Case: The Women's Efforts during the Era of Peace Resolution and Post-Conflict Reconstruction

By Hristina Crenn

ABSTRACT

This article presents a profound analysis of the diverse legal aspects that influenced over time the structure of the core architectural instruments of the Bosnian type of Feminism in the field of International Relations and Human Rights Law. The necessity to embark on the journey of Peace Resolution was the primordial goal of the last two decades, especially in the aftermath of the war in Bosnia. The incredible efforts of the Bosnian Women seem quite often to be obliterated by the legal pages of history. Thus, somewhere they are mentioned, somewhere not. The fragile circumstances of the war, life under constant threat, systematic violence, ethnic cleansing, hidden mass graves are considered to be the most terrible crimes against humanity committed after the World War II. Many Women activists, locally and nationally, contributed significantly for the process of stabilisation and institutionnalisation of the state apparatus. Hearing the voice of the voiceless female victims, years after the war, and the inclusion of Women in the political sphere of power launched the process of emancipation that challenged tremendously the existence of the patriarchy. The ethnic and religious intolerance is a political instrument that Women try to modify by promoting unity among the huge mass of people.

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"You can chain me, you can torture me, you can even destroy this body, but you will never imprison my mind". - Mahatma Gandhi

Introduction:

Historical overview: The context of the War

Peace is a temporary journey, conflict is a long and disastrous process. Transitional justice is the only remedy in a changing political landscape. However, when and where it all started? Why the war emerged? These are our two main questions of analysis. The Bosnian war started on April 6, 1992, three years after the fall of the Soviet Union and one year after the breakup of Yougoslavia. The armed conflict lasted for three years, until December 14, 1995. During the Siege of Sarajevo, 11 000 people were killed, among them 2000 children. Thus, the Children's Square in the center of Sarajevo is a memorial place that contains the names of the murdered children.

Main Part:

1.The Role of Women's organisations

The structure of leadership always requires a presence of strong personalities determined to change the static pathway of organisation management. Thus, the emergence of new NGOs facilitates the work of many individuals, who can eventually establish communication with the victims of the war and ask for help. The main rhetorics in the aftermath of a conflict is to promote the idea of the universality of Human Rights. Nevertheless, the transition between theory and practice is not always fantastic. It is very easy to enact laws, but very difficult to implement them. The societal fabric of Bosnia and Herzegovina is a complex methodology that doesn't exist anywhere in the world as a political model of governance.

The Dayton agreement is the significant cease-fire that drastically changed the political image of Bosnia and Herzegovina, but didn't improve it. The country was divided into three parts: Bosnia, Herzegovina, and Republika Srpska. The territorial units of Bosnia and Herzegovina constitute a separate entity known as 'the Federation'. Republika Srpska is an independent region of the country. There are 10 cantons in the Federation of Bosnia and Herzegovina and one peculiar territorial unit, Brčko.

Over time, the notion of the universality of Human Rights was shaped differently. A plethora of conventions were promulgated, but none of them actually protected the integrity of the individuals in danger. Women's agency was primordial in the course of the years, especially with the newly founded NGOs. As a result, Women could for a very short period of time reconstruct from scratch the collapsed state apparatus. Several attempts were undertaken to establish a societal democratisation. Unfortunately, such efforts were not crowned with success.

Three years after the war, the ICTY started to collect evidence, interrogate individuals (victims of the war) and arrest the perpetrators. It looks like, that during a war, international law is dormant. The legal provisions 'wake up' after a crime is committed. The international community and the Great Powers failed to protect the population of Bosnia and

Herzegovina. The conflict was orchestrated and led by two powerful military regional leaders - war criminals: Ratko Mladić and Radovan Karadić.

The civil society of Bosnia and Herzegovina is directed by various NGOs, generally led by Women. As a matter of fact, these NGOs are organising interactive educational programs for young children and adults. The *Kvinna till Kvinna Foundation* provides reliable information about the work of NGOs in Bosnia and Herzegovina.

Unfortunately, the Dayton agreement was signed only by Men. No Woman was present during that meeting, which explicitly confirms the hierarchy of male superiority and female subordination in the process of decision - making. Some people say that equality doesn't mean justice, but that doesn't justify the frequent presence of men in the political sphere. Women also have a voice that needs to be heard. Gender equality requires also the usage of gender - neutral based language.

Some of the famous Women NGOs in Bosnia and Herzegovina are: Medica Zenica, Sarajevo Medica, Zene Zenama, Merjem Kewser, AFZ, Active Women Movement, the League of Women Voters, Buducnost in Modrica, Centar za Pravnu Pomoc Zenama, Horizonti in Tuzla etc. These Women's organisations launched the process of institutionnalisation of the private and public sphere of the society. Surprisingly, many of the Women's names could be found on the electoral lists of the municipalities and the local assemblies. Thus, in the era of socialism, Women had equal rights as Men, but in the aftermath of the war, especially during the era of immediate democratisation Women didn't enjoy their political rights. In some cases, they could only act as observers. Initially, the elections were exclusively reserved for Men. It could be widely noticed that Women's suffrage was perceived as a social danger that could ruin the political heaven of Men. On the other hand, many of the NGOs still continue to receive international grants and regional funds. The goal is to support the activities organised by the women living in the provinces. The frequent reunions that take place in the NGOs could help many Women (war survivors) to heal and restore their confidence. This type of speech therapy contributed greatly for the development of their skills that served as an indispensable and valuable asset in the process of searching new job opportunities.

The wide spectrum of social trajectories could preserve the dignity of many Women who wished to ameliorate their mode of life. Women no longer wanted to be perceived as passive citizens. The active life of Women as wage-earners could commonly be defined under the notion of prosperity. The creation of the Women Labour Unions was a convenient mechanism that granted political rights to Women. In addition, such organisations defended Women's rights in the workplace. Professor Zlatiborka Popov-Momčinović in her book *"The Women's movement in Bosnia and Herzegovina - in the words of counterculture"* mentions that the long journey towards sustainable peace sometimes is abruptly interrupted by some party members because their main aim is to discriminate the integrity of Women's rights and the new movement of Bosnian type of Feminism: *"This is why it comes as a surprise that some party*

members, after a successful revolution, shortsightedly defined feminism as a retrograde, bourgeois ideology which only perpetuates the subordination of women by identifying female and/or feminist activism with philanthropic work".[199] At the outset of a revolution, Men always display violence in the battlefield, while Women are more strategic. Majority of Women always try to uphold the honour of their family and search for alternative solutions, especially during a war.

2. The Brutality of the War: systematic violence

Inger Skjelsbæk, a distinguished Norwegian psychologist, defines the atrocities of the war as: *'the war zone, in general, is a place of increased gender polarization"*[200]*.* The philosophical discourse reflects the idea that in a state of a chaos, everything is neglected, the situation is out of control and the only goal of the perpetrators is to attack the enemy. However, the theories of International law are completely different. The dispute must be settled (in French: le processus de règlement des différends), committing crimes against humanity is strictly forbidden because is against the rules or the laws of the war. The order must be maintained.

Inger interviewed various women volunteers - victims of the systematic war rape. Danira, Azra, Ceca, Emila and Berina are the main narrators of the war horrors. Inger's article, entitled: *"Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia and Herzegovina"* perfectly depicts the catastrophic process of the war. As a Psychologist, she is giving a voice to the voiceless victims of the war - Women by hearing their version of the story, what exactly happened. Thus, speaking about the traumatic experience of the past is a process of liberation for those women.

The courage to speak again about something that occurred twenty years ago is a veritable act of writing history in another way, a testimony as a valid source of knowledge. Danira, Azra, Ceca, Emila and Berina have mentioned that some of their family members do not know their story. A problem quite often arises when a woman wants to marry. She might receive a rejection from the father of the family of her future husband and be abandoned. These testimonies reflect the ordinary aspect of the era of Yougoslavia where certainly life was a harmonious ethnical tale. There was no violence. The feeling of social security was prevalent during the long mandate of Tito.

The ICTY (International Criminal Tribunal for the former Yougoslavia) tried many individuals accused of committing sexual violence, systematic rape and ethnical cleansing: Duško Tadić, Zdravko Mucić, Anto Furundžija, Esad Landžo, Hazim Delić, Dragoljub Kunarac, Zoran Vuković, Radomir Kovač and Radoslav Krstić.

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[199] Popov-Momčinović, Zlatiborka. (2013). *Ženski pokret u Bosnu i Herzegovini: Artikulacija Jedne Kontrakulture,* Sarajevski Otvoreni Centar, Centar za empirijska istraživanja religije u Bosni i Herzegovini, Fondacija CURE, p.209-210 (English version of the book)

[200] Skjelsbæk, Inger. (2006). *Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina*, Journal of Feminism & Psychology, p.338

The testimony of Azra clearly states that systematic violence is against the laws of the war. Thus, the military leaders who breach the essence of these laws should be convicted: *"It was in [she says the name of the place] in 1995, where the police, the federal police - asked me if I wanted to tell them what happened to me. They knew that I was injured and that I survived the war rapes. You know, what they (the perpetrators) did to me is something wrong. They committed a crime against me, and what they did I will never forget. I want them to be punished for that. They could have killed me, and I do not know why they did not. Maybe it was God's will or destiny - I do not know - but I want them to be responsible for what they did to me, because those things that happened to me are criminal things. They are crimes against humanity"*[201].

The testimony of Danira depicts the necessary family support that a survivor should receive. On the other side, some women feel obliged to hide the truth from their family members because of the social pressure and pride*: "My husband is very supportive. When we met for the first time, he said to me, 'Do not tell me, I know everything.' He knew when they took me to the concentration camp what would happen to me, and if he had not been so supportive I would have committed suicide. I know two women who do not talk about what happened to them because they are ashamed, and they have not told their husbands. They do not even want to talk to each other or to other women because they are so ashamed!"*[202]. Definitely, it is not easy to share a personal story with other women. Remembering the horrors of the war is even more painful. Therefore, some women will never recover, while other will have the courage to share their testimonies with the audience.

3.The political action of Women: Women Reconcilers

The legal requirements of the article VII of the Dayton Agreement reminds us of the necessity to preserve the nature of human rights in the complex journey of achieving peace: *"Recognising that the observance of human rights and the protection of refugees and displaced persons are of vital importance in achieving a lasting peace, the Parties agree to and shall comply fully with the provisions concerning human rights…"*[203]. Women in their role as Reconcilers frequently organise local activities such as festivals, invite volunteers to take care of the orphans and the old people for free, raise funds for the Women NGOs and offer shelter for homeless people, but most importantly they provide informal educational programs to children and adults. Generally, in the era of Yugoslavia there were no significant problems between the people of various ethnicities. The war was launched by peculiar military individuals who decided to spread hatred and cause problems by portraying the negative ideas of nationalism.

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[201] Skjelsbæk, Inger. (2006). *Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina*, Journal of Feminism & Psychology, p.382

[202] Skjelsbæk, Inger. (2006). *Victim and Survivor: Narrated Social Identities of Women Who Experienced Rape During the War in Bosnia-Herzegovina*, Journal of Feminism & Psychology, p.384

[203] Article VII of the Dayton Agreement (1995)

The UN Resolution 1325 states that the conflict of gender equality should disappear by offering the Women exactly the same political rights as Men : *"the important role of women in the prevention and resolution of conflicts and in peacebuilding, and stressing the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision making with regard to conflict prevention and resolution"*[204]. Women were the first peace activists in the Transitional Society of the Bosnian Case.

4. The judicial aspect of the Women's efforts: the work of the ICTY

The ICTY has qualified the crimes against humanity committed in Bosnia and Herzegovina during the trial of Zdravko Tolimir as: *"massive in scale, severe in their intensity, and devastating in their effect"*[205]. The dual dimension of the image of Women in the aftermath of the war: Women as survivors and Women as victims, reiterates that the painful experience will permanently stay engraved in the history of their country. Almost 2 millions people were displaced. Many children lost their parents. The political chaos that lasted for three years was not giving a promise that the broken future will be repaired. In particular, the War Childhood Museum as a memorial center organises exhibitions where the visitors can observe the personal belongings of many children (the last objects they took from their houses). Each object has a story to tell. Broken dreams, a false hope and a sudden violence are the main elements of the earthquake so - called War.

The ICTY and many local domestic courts have tried female war criminals who were accomplices of the military leaders. Some of the most cruel female war-criminals were: Ranka Tomić, Biljana Plavsić, Nada Kalaba, Sladjana Korda, Ivanka Savić, Azra Basić, Albina 'Nina' Terzić, Monika Karan Ilić and Marina Grubisic Fejzić. Nevertheless, Biljana Plavsić is the only Woman from the Balkan region to be judged by the ICTY, she was convicted for two counts of genocide, one count of violations of the laws of war and five counts for crimes against humanity.

Granting Reparations and memorialisation (remembrance) are the two indispensable mechanisms of transitional justice. The famous memorial places of Sarajevo are: the Monument of the Eternal Flame, the Children's Square, Vraca Memorial Park, the War Childhood Museum and the Sarajevo Rose spots. In other parts of Bosnia and Herzegovina, the Srebrenica Genocide Memorial, the Memorial Park Garavice and the Tunel Spasa (the Tunnel of Hope) testify about the devastating period of the Bosnian history.

The Law on Missing Persons, adopted on October 21, 2004 is a national issue that is inoperative. It is very difficult to find evidence about the disappeared individuals. Only a peculiar number of people can receive a compensation, mainly in the local

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[204] A passage from the UN Resolution 1325

[205] A quote from the Chamber of the ICTY: https://www.icty.org/en/press/zdravko-tolimir-sentenced-life-imprisonment-srebrenica-and-%C5%BEepa-crimes

courts where family members can ask for reparations.

Public apologies were organised many times. However, the people will never forgive the brutal crimes of such gravity. Saying the famous sentence 'I am Sorry' is very easy, however it is just a political instrument that will eventually appease the social revolt. After the war, two significant programs were adopted on a national level: the National Transitional Justice Strategy by UNDP and the Program for Improvement of the Status of Women Victims of Wartime Rape, Sexual Violence and other Forms of Torture by UNFPA. However, on a regional level, a coalition of NGOs established RECOM (a Regional Truth Commission). The programs *'Sarajevo Process'* and *'Regional Housing Program'* were launched as well in order to follow the pending legal cases in front of the local courts during the process of investigation. Many war victims have applied in front of the European Court of Human Rights. A significant decision from the jurisprudence of the European Court of Human Rights *'Palić v. Bosnia and Herzegovina'* tackles the issue of enforced disappearance. In this case, the husband of Mrs. Esma Palić was a military leader who left the house to go to work in the army and suddenly went missing. The federal police in 2001 couldn't find any evidence about her missing husband. The local court offered a compensation to Mrs.Palić (a non-pecuniary damage) of 33 000 euros. In 2009, the body of Mr.Palić was found in a mass grave in Vragolovi.

5. The contested journey towards Peace: the slowness of justice and absence of proof

Jasmina Eminić in her article entitled *"Bosnia-Herzegovina twenty five years after Dayton: ungovernable, unstable and hungry for change"* qualifies the current international presence in Bosnia and Herzegovina as a protectorate. The projects of OSCE and UNMIBH regulate the political events of the country. OSCE is responsible for observing the electoral process and prevent corruption. In 1991, the Women movement marked the role of common leadership. These Women portrayed the paramount importance of the notion of shared identities (women from different ethnicities gathered to denounce the criminal activities of the military leaders by showing the pictures of their sons). The Women Movement praised the role of Motherhood. The actions of the Women in 1991 resemble very much the efforts of the greatest Russian Poetess Anna Akhmatova whose son Lev Gumilyov was imprisoned and forced to work in the Soviet labor camps. Anna was standing in the queue, waiting for hours, hoping to see her son or at least to get some information about him, whether he was alive or not. The multifaceted approach of gender issues genuinely modified the scope of Feminism. The French model of Feminism and the Bosnian one share some similarities. The Women's March to Versailles (1789) during the Revolution and the actions of the French Women of Letters by promulgating the Declaration of the Rights of Woman and the Female Citizen gave birth to the notion of Feminism.

The Bosnian model of Feminism is characterised by the prominent actions of Women NGOs who work tirelessly to build the future of the country while the male politicians remain silent. Another debatable point is that, apparently the human beings did not learn the lessons from the

Holocaust. If they learned them, most probably the Genocide of Srebrenica wouldn't occur. Elements of nationalism intermingled with ethnic intolerance provoked a conflict that left perplexed the entire world. The phenomenon of racism and religious intolerance reigns uncontrollably every aspect of the society. The negative effects of racism and religions intolerance caused a new movement to reign the scope of the entire European mentality: populism. With the rise of populism, the process of immigration and freedom of speech brought into question the democratic principles of the European Union.

Conclusion

The consequences of the war are still deeply felt. In the recent decade a new phenomenon *'brain drain'* emerged. Young people leave the country because there are no work opportunities. Prosperity is one of the crucial elements of success. It is not only the case of Bosnia, but also of the entire Balkan region. The genocide of Srebrenica, the Siege of Sarajevo, the assassination of many children, the ethnic conflict and the religious intolerance resulted with a massive division. This conflict was named under international law as the deadliest one after the Second World War. Jasmine Eminić qualifies the legal dispositions of the Dayton Agreement as the *"Frankestein Monster"*[206], a notion that perhaps from one side reflects the horrors of the war, and on the other one, the unimaginably difficult political system of the State. Three Presidents are elected to decide for the fate of the country, but they never share the same opinions. There is no consensus. Utterly, Bosnia and Herzegovina nowadays is a democracy without stable foundations, exactly like a house, that can immediately collapse if an unexpected political earthquake shakes the entire hierarchical structure and societal welfare. The Women's efforts in post-war reconstruction process testify about the willingness to modify the black scenario of the ethnical division by promoting the values of the international peace and security.

[206] Eminić , Jasmina. (2020, November 9). Bosnia-Herzegovina twenty five years after Dayton: ungovernable, instable, and hungry for change. Forum für Mittelost - und Südosteuropa (FOMOSO). https://www.fomoso.org/en/opinions/commentaries/bosnia-herzegovina-twenty-five-years-after-dayton-ungovernable-instable-and-hungry-for-change/

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Slovenia's Fragmented Past

By Selma Mustafić

ABSTRACT

This article examines the impact of Second World War events on the Slovenian territory in today's public discourse in the country. Specifically, the debate revolves around those Slovenian units that opposed the communist-led national liberation movement and to this end, collaborated with the Nazi and Fascist occupiers. Because of the extrajudicial killings of its members in the summer of 1945 and the faults of the communist regime as a whole, historical revisionists attempt to justify their choice to cooperate with the occupiers, a narrative that established itself after Slovenia gained independence in 1991. Today, in the light of Slovenia's independence and integration into the European Union, historical revisionists attempt to change the meaning of certain decisions, acts, or events to justify them. Despite numerous attempts at national reconciliation, the on-going disagreement in collective historical memory and value systems associated with such memory is used by individual politicians to push their political agenda. In that manner, it remains fairly present in the political and social life of Slovenia.

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Introduction

There are events of such importance that they completely change the course of a country's political, social, and economic existence. Wars, invasions, revolutions, uprisings, totalitarian regimes, crimes against humanity, or genocides are events that leave their mark on the future, and those who carry the future. Together, these individual matters create the foundation of a state and these foundations influence almost all aspects of its further development. Because of the importance these happenings hold, who remembers and interprets them has great influence as well as responsibility. For Slovenia, one of these moments was the Second World War where after being occupied by Axis forces the question of its national survival was posed. Despite various repression policies, the Slovenian nation survived the war albeit with great civilian losses and infrastructure damages.[207] However, what troubles Slovenian society even today are those Slovenian units and the deaths of some of them that opposed the communist-led national liberation movement and to this end, collaborated with the Nazi and Fascist occupiers.[208] After Slovenia gained independence, space opened up for distortion of facts, historical revisionism leading to the creation of an alternative narrative of war events. This article explores to what extent the existence of two wartime narratives influences Slovenian society today, both socially and politically. To understand how two parallel narratives are possible, this article first takes an important look at the war events by analysing and comparing secondary sources. The comparative-historical analysis helps in establishing an objective historical record. Without state independence, the discrediting of the socialist state structure, and the formation of the Slovenian identity after Yugoslavia, the second narrative was less likely to be legitimate. The second narrative appeared through discussions and policies on national reconciliation in the context of Slovenian independence, which is why it is important to interpret them through that specific context. Lastly, to determine the lasting influence of the debate, the discourse of news articles, political statements, and historical monuments is analysed.

Historical background

The Axis powers started military operations against Yugoslavia on the 6th of April 1941. Yugoslavia capitulated only eleven days later marking the beginning of a Fascist and Nazi occupation in Slovenia which was to include both harsh repressive measures to destroy the Slovenian national identity and elements of civil war.[209]

Before the actual invasion, the leading political party, the Slovenian People's Party (SLS[210]) had attempted to reach a common solution with the invader. Their proposal, which was not accepted by the invaders, was for Slovenia to exist as a part of a German protectorate, being convinced the Axis powers will conquer Europe and with

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[207] M. Jogan and Ž. Broder, 'Samostojna Slovenija in kolektivni zgodovinski spomin', *Teorija in Praksa,* 53 (2016), 92.

[208] J. Hösler, 'Sloweniens historische Bürde', *Aus Politik und Zeitgeschichte,* 46 (2006).

[209] J. Prnuk, *Slovenski narodni vzpon 1768-1992.* (Ljubljana: Državna založba Slovenije, 1992). p.296

[210] Slovenian: Slovenska Ljudska Stranka (transl.note)

that, Hitler's New Order shall prevail.[211] After surrendering, Slovenian leaders appealed to the aggressors and requested that all of Slovenia belong to one occupational zone, to somewhat preserve its unity. Despite these attempts, the country was divided between Germany, Hungary, and Italy into three provincial administrative units. Germany occupied Styria, the north-western portion of Prekmurje, the northern part of Upper Carniola, the Mežica Valley, and the Dravograd area. In the meantime, the Italians controlled Ljubljana with Inner and Lower Carniola while Hungary gained a significant part of Prekmurje.[212] All the occupiers had unique assimilation and civilian repression policies ranging from mass destruction, deportation, and in German-occupied areas mass settlement of Germans. Consequently, the conditions during the war differed from region to region meaning the extent of resistance and/or collaboration varied throughout the country. Nonetheless, all three occupiers had a common goal which was to destroy the Slovenian ethnic identity and forcefully subjugate them to the occupier's identity. Immediately after the invasion, four political groups formed the Liberation Front (OF[213]) among them most notably, the Communist Party of Slovenia (KPS), Christian Socialists, the National Democrats – Sokoli, and Slovenian progressive cultural workers.[214] OF was a front to unite all those in favour of an independent, free, and unified Slovenian nation preserving her right to self-determination, which includes both secession and unification with other nations. Additionally, the front stood in opposition to imperialistic war, terror, and persecution. In the beginning, the OF mainly distributed flyers as well as the newsletter *Slovenski poročevalec* intending to educate the masses and unite those wanting to resist the occupation.

With time, the first differences in opinion emerged in how to react to the occupation. After Germany attacked the Soviet Union on the 22nd of June 1941, the KPS started to organize its first fighting formations signalling the start of armed resistance in Slovenia.[215] The party was highly organised, disciplined, and had twenty years of experience working as an illegal party which attracted to the OF both the young and Catholic population.[216] Nevertheless, their revolutionary character or the decision to simultaneously resist the occupation and conduct a social revolution contributed to the polarization of Slovenian society. It left the traditional bourgeoisie feeling threatened. To this end, the KPS independently formed a secret intelligence agency (VOS[217]) to deal with their political counterparts which included those collaborating in any way with the new authorities. On the other hand, other political groups took a much softer stance towards the occupation. The traditional SLS was

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[211] B. Repe, *S puško in knjigo. Narodnososvobodilni boj slovenskega naroda, 1941-1945.* (Ljubljana: Cankarjeva založba, 2015), p.15.

[212] O. Luthar (ed.) *The Land Between: A History of Slovenia.* (Frankfurt: Peter Lang, 2008), p. 419.

[213] Slovenian: Osvobodilna Fronta (transl.note)

[214] Luthar, *The Land Between*, p.424

[215] Ibid, p.427

[216] J. Možina, *Slovenski razkol – Okupacija, revolucija in začetki protirevolucionarnega upora.* (Ljubljana: Medijske raziskovalne storitve, J. Možina, 2019).

[217] Slovenian: Varnostno-obveščevalna služba (transl.note)

weak, especially since the highest governmental representatives had fled to London and unsuccessfully tried to lead the whole Yugoslavia from exile. Furthermore, the rest of the political parties have been discredited among the people for their passiveness as well as collaboration while allegedly waiting for the Allies to come. There were military initiatives from the anti-revolutionary camp as well, such as the Slovenian legion created by the SLS politicians or the Sokol legion from the liberals which later cooperated with Draža Mihailović's Chetnik organisation and were known as the Blue Guard.[218] They opted for a waiting strategy as instructed by the London government-in-exile. Contrarily, although being highly influenced by the KPS, the OF was the only option for patriotic individuals preferring to resist the occupation openly and from the beginning. The conflict between the two sides went beyond the question of resistance but became a political and military struggle on who was to decide the future political arrangements of Slovenia.

Tensions grew as radicals on both sides condoned violence and sporadic conflicts between groups occurred. On the 16th of September 1941, the OF adopted a resolution claiming the OF to be the only legitimate representative of the national liberation struggle and any organisation outside of the OF to be harmful during occupational times.[219] In Ljubljana, armed resistance led to retaliation by the Italians on the civilian population such as deportations to concentration camps and mass shootings. In response to communist liquidations and the consequences of its armed resistance, village guards were established by locals, initially in the countryside. Originally, the goal was to protect individual villages from communist guerrilla takeovers and, with that, protect themselves from Italian repression. The traditional political elites supported them in their fight against the communists and organised themselves into the Slovenian Alliance of illegal political parties and organisations. The Slovenian Alliance was also formally financed and supported by the government in exile and by extension collaborated with Draža Mihailović Chetnik forces.[220] Later, the village guards started to collaborate militarily with the Italians and formed the Anti-Communist Voluntary Militia (MVAC[221]). They were named the White Guard by the partisans, a reference to the enemies of the Red Army in the Russian Civil War. To this end, some scholars claim that communists saw the conflict with the traditional camp as a necessary stage of the revolution, the class struggle.[222] There were instances of Italians forcing locals to enter MVAC units, however, most were volunteers. The occupiers, expectedly, continued to respond harshly to any armed resistance of the OF, both towards partisan units and the civilians.

An event that changed the course of the conflict, was the capitulation of Italy in September 1943 and the German arrival in previously Italian

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[218] B. Mlakar, *Slovensko domobranstvo 1943-1945.* (Ljubljana: Slovenska matica, 2003), p. 17

[219] Prnuk, *Slovenski narodni vzpon,* p.509

[220] Mlakar, *Slovensko domobranstvo,* p. 28

[221] Italian: Milizia volontaria anticommunista (transl. note).

[222] J. Možina, *Slovenski razkol – Okupacija, revolucija in začetki protirevolucionarnega upora.* (Ljubljana: Medijske raziskovalne storitve, J. Možina, 2019).

administrative zones. The anti-communist forces were uncoordinated and divided in their opinion on how to deal with the new occupier at first. In the meantime, the OF called upon their compatriots to put down their weapons with the promise of amnesty. Many units were also defeated by the Partisan forces as early as September 1943. Nonetheless, the remains joined and acted in six German battalions, with their legal status formally called helper police units under German command and General Leon Rupnik.[223] The battalion with the greatest military significance was the Home Guard or Domobranci which was stationed in the Province of Ljubljana. In response, the partisans denounced the White Guard and General Rupnik at the Kočevje Assembly in October 1943 after concluding elections in the liberated territories. This marked the post-war fate of most of their opponents.

As the war approached its end in Slovenia, the main part of the German retreating forces and the Home Guard managed to escape to Austrian Carinthia. Unexpectedly, they were handed over to the partisans by the British Army. It ended with mass killings by the partisans at Kočevski Rog, Vetrinje, parts of Pohorje, and other regions in the summer of 1945.[224] The number of killed Home Guard members is estimated to be around 10,000, however, historians in Slovenia still disagree on the exact number and who ordered the extra-judicial killings. At these sites, other collaborating units such as the Croatian Ustaše, Serbian Chetniks were extra-judicially executed as well. After the war, the Socialist Federal Republic of Yugoslavia was formed with Slovenia as one of the six socialist republics. The one-party system of socialist Slovenia restricted the mentioning of war killings as well as the armed struggle that appeared between groups.[225] It is important to understand, that the national liberation movement was instrumental in defeating the Axis powers in Slovenia, suffered by far the most victims, and was recognised by the Western Allies as a legitimate successor of government. It liberated the country independently, with little help from the Red Army. Furthermore, the combination of strong propaganda, as well as the overall enthusiasm of being free from the aggressor, led to a formation of a strong communist narrative of the Second World War which was common to all Yugoslav republics. The partisans were celebrated as heroes, collaborators labelled as national traitors and this is a crucial element of post-war Slovenian society.[226] In the opinion of many Slovenians today, this is the only plausible course of war events.[227]

National reconciliation

National reconciliation in Slovenia is defined as "the process of overcoming divisions that have occurred in the country as a consequence of crimes and injustices committed during and after the Second World War. The goal of it is for the past to stop being the source of division and disagreements in

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[223] Luthar, *The Land Between,*p. 432.

[224] Ibid, p. 433.

[225] S. Cmrečnjak, 'Slovenska sprava: zgodovinski pregled', *Zgodovinski časopis,* 3-4 (2016), 390.

[226] I. Todosić Lučić 'Heroism in Characters of People's Heroes: Spent Symbolic Capital of Yugoslav Nations?', *Issues in Ethnology and Anthropology,* 4 (2020), 1221–1246.

[227] Jogan and Broder, 'Kolektivni zgodovinski spomin', 90–111.

the political space and that unity and solidarity would prevail in society."[228] The concept of national reconciliation or rather the need for it developed within the Slovenian émigré community many of which were previous Home Guard members. This community developed its narrative of war events, held various discussions abroad, and published works such as personal testimonies or essays. Nevertheless, the first mentions of national reconciliation in Slovenia itself appeared only 25 years after the war. Specifically, in 1975 in an interview with Edvard Kocbeck, a prominent Slovenian poet and partisan veteran called for admittance and redress for the crimes committed. The next important step was the publishing of Spomenka Hribar's essay, *Guilt and Sin*, in which she describes the killings not as a conflict between two groups, but as a national trauma. She defines national reconciliation as the cohesion of all national forces, where there is no place for absolute truth.[229] Despite these and a few other individual incentives, the concept firmly established itself in the Slovenian public sphere only when the country started moving towards independence in 1990. At this point, national reconciliation was understood as a precondition for state consolidation, a proper transition to democracy and independence.[230] Among the last acts of the Presidency of the Socialist Republic of Slovenia was a declaration concerning national and civic appeasement placing national reconciliation in the political sphere as an issue concerning state institutions. The purpose would be to "contribute to the establishment of such a situation in the political and public life of Slovenia where the past no longer represents a burden for interpersonal relations of today and tomorrow."[231] The culmination of events in 1990 can be seen in the Kočevski Rog commemoration, near the Jama graveyard which was attended by 30,000 people as well as by President Milan Kučan and representatives of the Catholic Church.[232] In the following years after gaining independence, the state adopted a series of reconciliation aimed laws, regulations, declarations, and acts. Among them were parliamentary commissions for researching after war killings; establishing the number of victims; regulating the status of victim and compensation. The victim status came to include also civilians exposed to violence from the national liberation army and partisan units. The law regulates that the victim status belongs only to a person if he/she had not voluntarily or professionally collaborated with the aggressor.[233] Another note-worthy step towards reconciliation was the establishment of the Study Centre for national reconciliation by the right-wing government in 2008. The task of the Study Centre is 'to research recent Slovenian history with an emphasis on all three totalitarianisms that were present in the Slovenian territory: fascism, Nazism and communism.'[234]

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[228] Cmrečnjak, 'Slovenska sprava', 385.
[229] Ibid, 394
[230] Ibid, 395.
[231] 'Narodna umiritev kot pogoj za mirno sožitje', *Delo,* 5 March 1990.
[232] 'Spravna slovesnost pred 30 leti: "Da ne bi zamenjali ene krivice z drugo"', *RTV SLO,* 8 July 2020.
[233] Cmrečnjak, 'Slovenska sprava', 421.
[234] Study Centre for National Reconciliation. (2020). Available at

Regardless, the Centre usually focuses only on the violence of communism during and after the war. [235] Apart from the mentioned acts, an essential part of national reconciliation struggles was discovering mass graves, taking care of burials properly, and rehabilitating victims with memorials and/or reparations as well as, changing scriptures on memorials to "Victims of war and revolutionary violence". In regards to persecution of war crimes, whether done by anti-partisans or partisans was quite unsuccessful in Slovenia. Due to the lack of concrete evidence as well as the death of possible suspects, there weren't any convictions. The only judicial process worth mentioning is the re-evaluation of Bishop Rožman's judgment in 1946. Rožman was sentenced by a military court for collaborating with the occupiers to 18 years of strict imprisonment, with a statement that he incited cooperation with the occupier, treason, and crimes against the nation. The judgment was overruled in 2007 on the grounds of significant violations of the provisions of criminal procedures.[236] This was an important step towards reconciliation in the opinion of the Catholic Church.

A fragmented past

When considering national reconciliation steps on paper, a favourable image of transitional justice appears in Slovenia. The work of the Study Centre and researching mass graves has been well funded by the state, and memorials condemning actions of revolutionary violence keep appearing. What happened was that the disintegration of Yugoslavia and discrediting of the socialist regime, opened up the space for criticism, changing of narratives, and to an extent, historical revisionism. Historical revisionism or adaptation of history is used as a tool to adapt to the new ideology of Western liberal democracy. Although the existent historical narrative needed to be criticized, it went as far as legitimizing collaboration as the only viable option in resisting communism. Especially when considering the wider context of the fall of the Berlin Wall and the collapse of communism at the time, collaboration in Slovenia was being interpreted into recognizing the danger of communism ahead of its time, and collaborators are renamed into victims of communist violence.[237] By transferring the role from perpetrators to victims, the group avoids the need for remorse as well as true responsibility for the crimes committed.[238] Common to states in transition is the claim after the regime has fallen, that all of the regime's truths become fallacies and new truths are needed to replace them. This tendency is seen in Slovenian history textbooks that renamed liberation into occupation or collaboration with the occupiers into anti-communism completely changing the previous narrative from occupation to civil

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https://www.scnr.si/en/about-the-centre.html (accessed 25 September 2020).

[235] N. Troha, 'Slovenia. Occupation, Repression, Partisan Movement, Collaboration, and Civil War in Historical Research, *Südosteuropa,* 2, 346. (accessed 25 September 2020)

[236] 'Soba proti Rožmanu razveljavljena', *RTV SLO,* 11 October, 2007.

[237] Jogan and Broder, 'Kolektivni zgodovinski spomin', 93.

[238] O. Luthar, 'Post-Communist Memory Culture and the Historiography of the Second World War and the Post-War Execution of Slovenian Collaborationists', *Croatian Political Science Review,* 55 (2018), 39.

war.[239] The new narrative also implicitly denies resisting the occupation and claims there was only the illegal revolution. What follows is that any resistance towards revolution is allowed by law. The main proponents of this second narrative usually consist of descendants of the Home Guard, the Church, and right-wing politicians.[240] An example of radical requests for historical revision would be the New Slovenian Alliance, the successor of the wartime Slovenian Alliance. In 1993, the organisation claimed that the only way for Slovenia to transition to a democratic country is for the government to recognise the civil war and to recognise the 'national liberation movement as a totalitarian project of collaboration with a foreign and hostile ideological force'.[241] Even today, their newsletter *Zaveza* strongly focuses on questions of the alleged civil war and calls partisans terrorists, claiming the collaborators were the true heroes of the war because they opposed communism. The relationship of the Church towards reconciliation can be found in their declarations which mostly emphasize truth as the basis for reconciliation.[242] Hribar, who was among the loudest proponents of national reconciliation distanced herself from this turn of events, warning that the working of such groups is an attempt of establishing another ultimate Truth, the main reason society was divided before.[243]

What contributes to the reinterpretation of history is the way memorials for wartime victims are built and how they are approached by the government. Monuments to the Home Guard usually occupy the central part of a cemetery and use Christian symbolism to convey the unity between Christianity and 'anti-communism', initiating an emotional response from the viewer.[244] Another important factor of historical interpretation is the approach of public officials and leading politicians to commemorations which declares their stance on the topic and is highly reported by media every year. Because of this, when governments change, the state's stance on the issue changes as well. The historical truth then becomes the way historical facts or lack of them, are interpreted by the current government. The issue then becomes highly politicized and contributes to the usual right-left dispute. Left-leaning leaders are usually more ambiguous in their speeches, tend to refer to the general cruelty of violence and remind the listeners of the importance of the national liberation struggle. On the other hand, right-wing politicians are stricter and prone to stronger definitions of the post-war killings such as genocide.[245] An epitome for this approach would be Janez Janša, a right-wing politician and current prime minister of Slovenia, whose father was a member of the Home Guard. On the commemoration near Kočevski Rog, in June 2020, he claimed that "resistance towards any form of evil is legitimate" and "the only way to completely get rid

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[239] O. Luthar, 'FORGETTING DOES (NOT) HURT. Historical Revisionism in Post-Socialist Slovenia, *Nationalities Papers,* 41 (2013), 885.

[240] G. Kranjc, 'Talking Past Each Other: Language in Post-World War II Killings in Slovenia', *Journal of Genocide Research,* 20 (2018), 567.

[241] Cmrečnjak, 'Slovenska sprava', 404

[242] B. Godeša, 'Reconciliation instead of History', *Prispevki za novejšo zgodovino,* 3 (2016), 110.

[243] Cmrečnjak, 'Slovenska sprava'.

[244] Luthar, 'FORGETTING', 887.

[245] Kranjc, 'Talking Past Each Other', 578.

of evil is not with revenge, or forgetting, but only with the rule of law."[246] What follows from this, as usual with controversial topics, they are used by politicians to pursue their political agenda playing on the sensitivity as well as divisions within the nation. In public discourse, the national liberation movement becomes identified with the socialist model which is inherently anti-capitalist, and neoliberal capitalism presents the main pillar of prosperity in modern independent, European Union member Slovenia. Furthermore, although Slovenia undertook an economic recovery from the socialist model, the values associated with such a model such as social welfare are still current in society.[247] In this way, left and right political parties become partially identified with different narratives, and their governmental policies are interpreted by the opposition and media as such. With this oversimplification of the actors of the past, everyday economic policies turn into historical debates and playing the blame game. For example, are the modern economic problems of Slovenia the legacy of the socialist model or inadequate policies of current governments?

What we are left with is a nation without a collective historical memory which is essential for creating a national identity and values associated with such an identity. This is what Hannah Ardent named, a fragmented past, "a past which has lost its certainty of evaluation."[248] Multiple identities within one nation are not uncommon or entirely problematic. In the words of Hribar "reconciliation is not the eradication of differences, but rather quite the opposite – an a priori assent to these differences. Therefore it presupposes diversity (…) the only presupposition of all these dissimilarities is that people – those who subscribe to and declare all these legitimate and humanly justifiable differences – wish to and want to live in harmony."[249] However, the problem occurs when the lack of a unified history becomes a source of political contestation and hinders future development. A way forward would be to complete the criticism of the national liberation movement and the communist regime with criticism and knowledge of the anti-revolutionary camp. By collaborating amongst each other, historians from both sides can help in avoiding unnecessary political conflict and further distancing between the two sides. The fixation on the inter-Slovenian conflict during the Second World War neglects that by far the largest source of violence at the time was the occupiers. And in that crucial historical moment, most of the Slovenian nation decided to oppose the repressive policies of the forced regime and fought for their freedom and their right to self-determination.

Conclusion

The fall of the Berlin fall in 1989 marked the beginning of the slow dismantling of the socialist regimes in

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[246] I. Mekina, 'Janša na dveh slovesnostih, a z enim samim, zgrešenim prepričanjem: da si domobranci zaslužijo „naše spoštovanje", *Insajder,* 6 June, 2020.

[247] L. Prijon, 'Slovenian Communist Legacy: After 25 Years of Independence of Slovenian Nation', *Slovak Journal of Political Sciences,* 17.2 (2017), 141–165.

[248] H. Ardent, *The Life of the Mind,* (Harcourt Brace Jovanovich, 1977), p. 212.

[249] S. Hribar, "Sprava ni konsez o preteklosti, temveč o prihodnosti"(Kaj se je zgodilo s slovensko zgodovino?) *Razgledi,* 13 May 1994.

south-eastern Europe. The countries entered a transitional period where they attempted to reconcile their newfound independence, democracy, and most significantly capitalism with their turbulent pasts. The Second World War in Slovenia represented a mixture of brutal occupation and repression, revolutionary enthusiasm, collaboration, and fear. Today, in the light of Slovenia's independence and integration into the European Union, historical revisionists attempt to change the meaning of certain decisions, acts, or events to justify them. The Partizani vs. Domobranci debate is still the most controversial issue in Slovenia's modern history. It became the story in the background of governmental policies, political speeches, and the favourite dinner table debate. Until Slovenian academia decides to collaborate in creating a historical record, the past will remain a dividing force in society.

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Transitional Justice in Post dictatorship Brazil and its consequences for Bolsonaro's election 2018

By Leonie Schiedek

ABSTRACT

In the national elections 2018 in Brazil, a right-wing populist and open advocate of the authoritarian military regime that ruled Brazil from 1964 until 1985 Jair Messias Bolsonaro took office. Since the end of the military dictatorship different transitional justice measures were applied in order to compensate past Human Rights violations. However, the perpetrators have never been sentenced and justice has never been restored. In this paper, it is highlighted how the dominant public narrative of the military dictatorship favoured the election of Jair Bolsonaro as reaction to a multiple national crises.

The results show that transitional justice efforts in post-dictatorship Brazil have failed on all levels to re-establish truth, justice and the rule of law. The positive narrative of the military law-and-order dictatorship has pushed the Brazilian voters in the direction of a right-wing politician during several tremendous crises. Bolsonaro's success can therefore be explained by the fertile ground for populist ideas prepared by a fragmented society with roots in the dealings of the past. Further development of the Human Rights and democracy situation in Brazil needs to be observed.

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Introduction

In 2015, the member countries of the United Nations agreed that rule of law should be promoted on both national and international levels together with the warranty of equal access to justice for everyone (SDG 16.3).[250] However, countries in fragile post-conflict situations struggle to fulfil this ambitious target while being in need to find responses to massive Human Rights violations.[251] In Latin America, the population has suffered from state terror with over 100.000 people killed and disappeared under military rule.[252] In the case of Brazil, from 1964 to 1985 the military dictatorship has triggered comparatively little violence, yet once the conflict had ended, military forces defined the terms of transition to a constitutional state.

This paper will elaborate the way transitional justice was implemented after the end of the military dictatorship in 1985 and draw on possible linkages with current politics focussing on president Bolsonaro's term of office. It is assumed that failures in transitional justice attempts after the military rule in Brazil had significant impact to the election of Jair Bolsonaro on the 28 October 2018 and with him a former army captain and far right populist.[253]

The Case of Brazil

During the second half of the twentieth century Brazil was governed by military forces which operated within a logic of 'national security' against the background of the international Cold War alterations. The goal of the Brazilian dictatorship was to re-establish the 'national order' and combat corruption by spreading fear, as well as demobilising and eliminating opposing ideas that could foster domestic subversion. This applied mostly to left-wing activists being classified as enemies of the state as the threat of communism was ubiquitous. The three so-called Institutional Acts to exercise power included a variety of approaches to persecute and punish opponents, such as exile, removal from public office, suspension of political rights, or imprisonment, among others. In addition, arbitrary detention, torture, rape, kidnapping and murder were executed regularly.[254]

The Brazilian case among other Latin American countries is particularly interesting due to the elections in 2018. Brazil was one of the countries, that did not establish a truth commission for a long time, even though experiencing the greatest increase of Human Rights violations among all transitional countries in the region since the end of the military dictatorship.[255]

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250 SDG Knowledge Platform (2015). Sustainable development goal 16. URL: https://sustainabledevelopment.un.org/sdg16 (Last accessed: 23.07.2019).

251 ICTJ (n.d.). What is Transitional Justice?.

252 Goes, I. (2013). Between truth and Amnesia: State terrorism, Human Rights violations and transitional Justice in Brazil. *European Review of Latin American and Caribbean Studies*, 83-96.

253 Hunter, W., and Power, T. J. (2019). Bolsonaro and Brazil's Illiberal Backlash. *Journal of Democracy*, *30*(1), 68-82.

254 Mazarobba, G. (2010). Between reparations, half truths and impunity: the difficult break with the legacy of the dictatorship in Brazil. *SUR-International Journal on Human Rights*, English edition. *7*(13), 6-25.

255 Martín-Beristain, C., Páez, D., Rimé, B., and Kanyangara, P. (2010). Psychosocial effects of participation in rituals of transitional justice:

Since Brazil's global rise as part of the BRICS-states, host of the Football World Cup 2014 and the Olympic games 2016, its self-esteem and optimism increased significantly. However, since 2014, the country was shaken by several crises concerning its economy, the biggest corruption scandal ever recorded and a tremendous increase of violent crime.[256]

During the last twenty years Brazilian politics were influenced by the work of the Labour Party (Partido dos Trabalhadores "PT") led by ex-president Ignacion Lula da Silva (2003-2010) and his successor Dilma Rousseff (PT, as well), who spread a spirit of optimism fighting hunger in Brazil with redistribution initiatives such "Fome Zero" or "Bolsa Familia".[257]

With Jair Messias Bolsonaro a former paratroopers captain during the military dictatorship and congressman since 1991 Brazilian voters put a right-wing populist in the lead of the world's fourth-largest democracy.[258][259]

Defending the interests of active and retired soldiers, Bolsonaro became famous for his aggressive and offensive rhetoric claiming to get rid of his political opponents and to save the country from the current downfall.

In the elections on the 28 October 2018, Jair Messias Bolsonaro received 46,03 percent of all valid votes during the second election round.[260]

Transitional Justice

The International Center for Transitional Justice (ICTJ)[261] defines the term 'transitional justice' as follows: „Transitional justice refers to the ways countries emerging from periods of conflict and repression address large-scale or systematic Human Rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.". In fact, different countries face various transitions as they differ in social, cultural, or political realities.[262] There is no exclusive model of how transitional justice needs to be carried out. However, some normative characteristics of transitional justice have been defined. Four basic characteristics were found comparing different cases: "(1) the reform of political institutions, (2) the assertion of the right to truth and memory, (3) the prosecution and sentencing of public agents who violated Human Rights, and (4) the economic and symbolic reparation for victims of political repression."[263]

A collective-level analysis and review of the literature of the effects of TRCs and trials on Human Rights violations in Latin America. *Revista de Psicología Social, 25*(1), 47-60.

256 Flemes, D. (2018). Wahl in Brasilien: Rechtspopulismus auf dem Vormarsch. GIGA Focus Nr. 5, 1-13.

257 *ibid.*

258 *ibid.*.

259 Hunter and Power, Bolsonaro and Brazil's Illiberal Backlash, 68-82.

260Tribunal superior eleitoral do Brazil (n.d.). Estatísticas Eleitorais. URL: http://www.tse.jus.br/eleicoes/estatisticas/estatisticas-eleitorais (Last accessed: 13.11.2019).

261 ICTJ, What is Transitional Justice?.

262 Schallenmueller, C. J. (2014). Transitional Justice in Brazil and Uruguay: different solutions to the tension between Human Rights and democracy. In *Glasgow, European Consortium for Political Research General Conference,* 1-29.

263 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.

Apart from governments, civil society, civil society groups and the global society need to be considered as relevant actors in post-conflict contexts, as well.[264] Civil society and civil society groups can take a central role in putting pressure on governments. They engage in the mobilisation of bigger parts of society spreading the word about Human Rights violations. pleading for accountability of past actions and documenting and disclosing Human Rights violations. Therefore, civil society can be seen as a counterweight to the offenders trying to limit the extent of the transitional justice efforts. Nevertheless, in most cases, civil society in post-conflict situations performs very weakly, shows a high grade of dependency, or lacks organization. In some cases, civil society does not even support transitional justice efforts.[265]

Global society and international Human Rights activists are increasingly involved in post-conflict situations but sometimes counterproductive and rejected in favour of a broader goal of social reconciliation and transitional justice.[266] The United Nations and the growth of universal jurisdiction for Human Rights have developed a viable alternative or complementary way of achieving transitional justice in international courts.[267]

In a nutshell, transitional justice will most likely not be developed in any form without having any kind of local or global civil society. Certainly, once developed in some way transitional justice might be able to strengthen the rule of law of the subsequent political period. This means, that further Human Rights violations will be less socially acceptable, too, as past violations are convicted.[268] However, a successful transition to justice does not necessarily lead to an improvement in Human Rights, as the example of Brazil will show.[269]

Results

Brazil‘s example confirms that its transition to democracy has not sufficiently closed the doors to its repressive past.[270][271] The country has not been able to get rid of the legacy of the military dictatorship‘s authoritarianism.

Method

The assessment of the Brazilian case was applied by the following four basic requirements for successful transitional justice mentioned by Schallenmüller[272]:

1. the reform of political institutions

264 Brahm, E. (2006). Transitional justice, civil society, and the development of the rule of law in post-conflict societies. *International Journal Not-for-Profit Law*, *9*(4), 62-69.

265 *ibid.*

266 Brahm, ‘Transitional justice, civil society, and the development of the rule of law in post-conflict societies‘, 62-69

267 Macedo, S. (Ed.). (2006). *Universal jurisdiction: national courts and the prosecution of serious crimes under international law*. University of Pennsylvania Press.

268 Brahm, ‘Transitional justice, civil society, and the development of the rule of law in post-conflict societies‘, 62-69

269 Martín-Beristain et al., ‘Psychosocial effects of participation in rituals of transitional justice‘, 47-60.

270 Mazarobba, ‘Between reparations, half truths and impunity‘, 6-25.

271 Schallenmüller, ‘Transitional Justice in Brazil and Uruguay‘, 1-29.

272 Schallenmüller, ‘Transitional Justice in Brazil and Uruguay‘, 1-29.

2. the assertion of the right to truth and memory
3. the prosecution and sentencing of public agents who violated Human Rights
4. the economic and symbolic reparation for victims of political repression.

Furthermore, a comparative analysis of Brazil's transitional justice efforts and Bolsonaro's election 2018 will examine his rise to power as a result of the remains of military dictatorship.[273]

Post-dictatorship transitional justice efforts and results

Since the decade of Brazilian democratisation throughout the 1980s the following efforts were undertaken in order to achieve transitional justice.

1) The reform of political institutions

Even though the Ministry of Defence was established in 1999, there have been no significant reforms of the national security system so far. Due to the Amnesty Act which was created during the military dictatorship in 1979, partial amnesty was given to the exiled, imprisoned, or otherwise punished as opponents to the regime, but complete amnesty has been granted to the state officials, who committed crimes during the dictatorship.[274] As a result, publicly well-known supporters of the regime or even torturers continued to work in the public sector, such as police stations, government offices, or even elected offices. Also, the first president in 1985 was Senator José Sarney belonging to the "Arena" party, which had supported the military dictatorship.[275] The Amnesty law showed significantly more advantages for the members of the military regime.[276] However, no protest against this incomplete reciprocity was reported, as it was promised to help to return to the 'normal order'. This should also justify the ongoing repression of "subversive groups that threatened the peace and democratic institutions of the country".[277] In connection to that civil rights violations in form of torture against prisoners in police stations or arbitrary repression and arrests went on even after the Amnesty law was passed. Despite this military dictatorship's legacy none of the following civilian governments has annulled the law ever since.[278] However, the Amnesty law has been under examination by the national Federal Supreme court by the end of the first years of the 2000s.[279] In addition, the Inter-American Court of Human Rights (IACHR) and the Organisation of American States (OAS) tried to find out if international Human Rights law was violated.[280][281] Finally, the OAS has condemned the

273 Atencio, R., Schneider, N., and Schneider, A. M. (2018). Special Section on Dictatorship and Its Legacies in Brazil. *Bulletin of Latin American Research*, *37*(1), 3-4.
274 *ibid.*
275 Mazarobba, 'Between reparations, half truths and impunity', 6-25.
276 *ibid.*
277 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.
278 Schneider, N. (2011). Breaking the 'silence' of the military regime: New politics of memory in Brazil. *Bulletin of Latin American Research*, *30*(2), 198-212.
279 Mazarobba, 'Between reparations, half truths and impunity', 6-25.
280 Opera Mundi (2010). Lei da Anistia é debatida em julgamento do Brasil na Corte da OEA.
281 Mazarobba, 'Between reparations, half truths and impunity', 6-25.

law stating: "[…] the IACHR recommended the State to take all necessary measures to ensure that Law No. 6.683/79 (Amnesty Law), as well as other criminal law arrangements, [...], do not continue to represent an obstacle for the criminal prosecution of serious human rights violations, […].[282] In contrast to other countries like Chile or Argentina, the Brazilian military never made an official apology.[283] One possible explanation could be the missing public and governmental pressure and the powerful position of the military even after the dictatorship.[284]

In conclusion, the duty of the Brazilian State to reform key institutions ins still pending in order to be more accountable and democratic.[285]

2) The assertion of the right to truth and memory

Initially, the project "Brasil: nunca mais" (Brazil: never again) was unofficially established by human rights groups in order to collect and catalogue political cases that passed through the military justice system 1964 to 1979.[286] Some progress was made with the opening of the archives of the dictatorship. However, the existence and location of documents proofing the crimes conducted remained secret for decades.

Before the Truth Commission, two other commissions had already started investigations, namely the Special Commission on Political Deaths and Disappearances (1995) and the Amnesty Commission (2001).[287] In 2011, 26 years after the official end of the military dictatorship, the Brazilian government finally passed a law with the goal of creating a Truth Commission in order to investigate Human Rights violations until 1988[288] after increased pressure by relatives of disappeared victims.[289] Adding to that, international pressure by the IACHR led to the establishment of a Truth Commission, and of the National Program of Human Rights 3 (PNUD-3). The purpose of the Truth Commission was to "examine and clarify […] mass Human Rights violations committed during the period from 1946 to 1988 in order to promote 'national reconciliation"'.[290]

Besides, the identification and disclosure of general enforcement structures of the military regime should be enforced. However, owing to the national reconciliation function, it did not embody a jurisdictional nature, just as most Truth Commissions in the past. The Committee of Relatives of Dead and Missing people and other institutions though questioned these limits, the democratic deficit and a lack of transparency.[291]

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282 OAS (2016). IACHR Takes Case Involving Brazil to the Inter-American Court.
283 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.
284 Schneider, 'Breaking the 'silence' of the military regime', 198-212.
285 Mazarobba, 'Between reparations, half truths and impunity', 6-25.
286 *ibid.*
287 Nelaeva, G., and Sidorova, N. (2019). Transitional Justice in South Africa and Brazil: Introducing an Gendered Approach to Reconciliation. *BRICS LJ*, *6*, 82-108.
288 In 1988 the new constitution was announced.
289 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.
290 *ibid.*
291 *ibid.*

During its short duration of only two years particularly already existing reports and documents were examined.[292][293] Compared to other cases, there were relatively few victim cases (434 officially recognised).[294] Cooperation with the perpetrators was difficult due to the low criminal liability caused by the declaration of the constitutionality of the Amnesty Act by the Supreme Court.[295] Still, more than 140 political victims who disappeared remain missing.

The "Law of the Disappeared No. 9,140" was established according to the aim of national pacification and reconciliation already stated by the amnesty law. Its main testimony was the responsibility of the Brazilian state for "[...] the Human Rights violations committed during the military regime, namely kidnapping, imprisonment, torture, forced disappearance and murder, including violations against foreigners residing in the country".[296]

The affected families of dead and disappeared were one of the main drivers in the fight for justice during and after the dictatorship, as they were motivated by their deep desire to know about the truth, see those involved pleaded guilty and to locate the remains of their loved ones.[297] In order to commemorate the past, president Lula was the only one, who established educational programs, museums, and reports on Human Rights. Apart from the government's efforts, cultural and artistic works processed the topic of the dictatorship and fostered Brazil's transitional justice development.[298]

During history, there were many different historical narratives about the dictatorship. The most prominent is the narrative of a soft dictatorship.[299] The memory culture was rather influenced by two characteristics or the regime during the dictatorship: the superficial democratic appearance and the long ruling period with the peaceful transition in 1985. In addition to that, renowned historians, military officers, and former supporters of the regime affiliate to the positive narrative of the military regime and criticize other, negative narratives as "revanchismo" (vindictiveness) falsifying history.[300] Unlike any other Latin American country, Brazil's "collective denial" of the military past has caused a memorisation reduced to the privacy of the families who have been affected by the Human Rights violations.[301] Due to the comparatively low number of victims (in Brazil 474 dead or disappeared following official calculations; compared to 10,000-30,000 people in Argentina) the reappraisal of the military past was not

292 Mazarobba, 'Between reparations, half truths and impunity', 6-25.
293 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.
294 Nelaeva and Sidorova, 'Transitional Justice in South Africa and Brazil', 82-108.
295 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.
296 Mazarobba, 'Between reparations, half truths and impunity', 6-25.
297 *ibid.*
298 Atencio, R. J. (2013). Acts of witnessing: site-specific performance and transitional justice in postdictatorship Brazil. *Latin American Theatre Review*, *46*(2), 7-24.
299 Atencio, R., Schneider, N., and Schneider, A. M. (2018). Special Section on Dictatorship and Its Legacies in Brazil. *Bulletin of Latin American Research*, *37*(1), 3-4.
300 Schneider, 'Breaking the 'silence' of the military regime', 198-212.
301 *ibid.*

of primary concern.[302] Hence, Human Rights organisations and victim support groups struggle to gain widespread public appreciation. Until now, public opinion is highly fragmented when it comes to the military dictatorship and reacts rather indifferent to demands for justice or truth, in general.[303] Especially the economic situation in the years afterwards was described as worse than under the military rule. This might also due to the silence about the crimes and lacking resistance against the apathy regarding these crimes.
In general, the "national (re)conciliation" is the central narrative of the transitional justice efforts in Brazil.[304] The collective public memory is deeply divided but mostly dominated of people in denial of the crimes of the authoritarian past, unlike other countries in the region. The population's apathy facilitated the state's policy to silence the memory of the past.[305] Schneider[306] therefore prefers the term "dominant memory" rather than an "unmastered past".

3) The prosecution and sentencing of public agents who violated Human Rights

So far, very little has been done in order to identify, persecute and punish the suspected offenders of Human Rights violations.[307] Nevertheless the Brazilian government has been held legally responsible for the crimes committed during the military dictatorship recognising its liability, but not the liability of the agents who actually committed the crimes.

As the military dictatorship ended without new elections, there was no real debate about how to handle the legacy of the Human Rights violations which were performed during that time. Brazil's first president Sarney supported this behaviour by stating this was "not an issue on the political agenda.[308] After the Law of the Disappeared No. 9,140 which accepted the state's responsibility so families of the victims were able to request death certificates and receive compensation. However, they themselves were responsible to show prove in order to receive the attention, which often put a huge burden on the families.[309]
In 2008 there was an opportunity to reverse the immunity given to the functionaries of the military regime with the Amnesty Law. Though, the Brazilian Supreme Court dismissed it as "The decision considered the Amnesty Act as a 'historical moment' of the Brazilian 'reconciled transition' that would have enabled the 'migration from dictatorship to democracy.'"[310]

Cases of challenging the Amnesty law was quite rare as victims and their families lacked confidence in the legal system because of the atmosphere of forgetfulness and impunity, which was fostered by the military itself. As torture and murder are treated as "crimes of public initiative" in the Brazilian legal system verifies that the

302 *ibid.*
303 Atencio, 'Acts of witnessing', 7-24.
304 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.
305 Schneider, 'Breaking the 'silence' of the military regime', 198-212.
306 *ibid.*
307 Mazarobba, 'Between reparations, half truths and impunity', 6-25.
308 *ibid.*
309 *ibid.*
310 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.

system itself has contributed to the situation, as well.[311]

In 2010 the Amnesty Law was confirmed on a national level and accepted as democratically established and congruent with the non-retroactivity of laws, which in national law applied to torture.[312] However, the Universal Declaration of Human Rights was already proclaimed on 10 December 1948 by the United Nations, where torture is condemned in article 5.[313]

But yet, Brazil is the only Latin American country which has not sentenced any suspected perpetrators for crimes such as enforced disappearance torture, or murder, though trials were initiated.[314][315] The Amnesty law might be the most important achievement for transitional justice in Brazil in order to overcome past violations. However, it grants "full amnesty to military officials involved in Human Rights violations and militant opponents of the regime alike".[316]
In general, the majority of Brazilians did not claim the state to fulfil its obligations for justice.[317] In comparison to other Latin American countries, Brazil lags behind regarding the prosecution of Human Rights perpetrators and public memorisation efforts.[318] This ongoing impunity causes a threat to future abuses and clearly shows that the legacy of authoritarianism still remains untouched.[319]

4) The economic and symbolic reparation for victims of political repression

As the state acknowledged its responsibility it also paid economic compensation to the victims of the political persecution by the military regime. However, they often have been criticised.[320] The payments never fulfilled the demand, even though around 40 million *reais*[321] were paid to more than 300 victim families with an average of 120,000 *reais* per family by the Special Commission on Political Deaths and Disappearances (CEMDP).[322] Victims of political persecution insisted even more on financial compensation. In 2001 a law for the compensation for the victims was decided. The responsible Amnesty Commission received over 80,000 claims and had paid around 2.4 billion *reais* until 2010 to less than 35,000 people who granted their claims, as over 50 percent did not receive financial reparations. The reparations were mainly limited to financial compensation.[323] Especially victims of political persecution who wanted to

311 Mazarobba, 'Between reparations, half truths and impunity', 6-25.
312 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.
313 United Nations (n.d.). The Universal Declaration of Human Rights.
314 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.
315 Sikkink, K., and Walling, C. B. (2007). The impact of Human Rights trials in Latin America. *Journal of peace research*, *44*(4), 427-445.
316 Schneider, 'Breaking the 'silence' of the military regime', 198-212.
317 Mazarobba, 'Between reparations, half truths and impunity', 6-25.
318 Schneider, 'Breaking the 'silence' of the military regime', 198-212.
319 Mazarobba, 'Between reparations, half truths and impunity', 6-25.
320 Schallenmüller, 'Transitional Justice in Brazil and Uruguay', 1-29.
321 Reais is the former and current currency in Brazil.
322 Mazarobba, 'Between reparations, half truths and impunity, 6-25.
323 *ibid.*

return to their former positions were hindered to do so, as there needed to be a "public interest" in reappointing them to their old positions, which had to be vacant, too.[324] Other transitional justice mechanisms have mainly been avoided until the government of president Lula.

The rise of Bolsonaro and the election 2018

Jair Messias Bolsonaro joined the Social Liberal Party (PSL), a fairly unpopular party, in 2018 mostly to be able to qualify as a president candidate.[325] Widely perceived as a 'blank page' of corruption due to his former political insignificance proofed to be his advantage.[326] He cleverly adapted to the fragile political situation and threw his hat in the ring in the right moment. Bolsonaro coined an authoritarian and traditional leading style referring to the ultimate trustful entity in the country. Mobilizing the masses by representing a saviour to those who do not feel represented by the elite, he hit the core of a frustrated society by providing simple answers for complex questions.[327]

Among the best predictors of support for Bolsonaro, the voter's income, education, religious affiliation, and region of residence were the most important.[328] Not only those left behind by globalisation, but also the disillusioned middle class backed up the new president. However, the poor and very poor did not support him. Despite Bostoner's negative attitude against college graduates, he could score highly among them. The correlation of income and education was an important factor. Around 70 percent of the Pentecostal Christians voted for Bolsonaro, representing around a quarter of all Brazilian voters.[329] Bolsonaro could not gain sufficient votes from the poor northeast, nevertheless, he performed well in the economically strong states of the south and southeast, as well as in Brasília. [330][331]

In the context of multiple crises since 2013 for which the ruling parties were blamed, Bolsonaro's rise in politics becomes more understandable. His success was mainly influenced by the combination of three conditions that questioned the old regime's legitimacy.[332]

1) Fundamental background conditions (economic recession, corruption, and crime)

During the so-called economic miracle (1968-73) Brazil's economy was growing tremendously.[333] On the contrary, Brazil went through a severe economic crisis since 2015 involving high unemployment figures. Remembering the golden economic past, this argument was often made in favour of the military regime. Another tremendous structural problem which affected the election is the paralysing

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324 *ibid.*
325 Hunter and Power, 'Bolsonaro and Brazil's Illiberal Backlash', 68-82.
326 *ibid.*
327 Flemes, 'Wahl in Brasilien: Rechtspopulismus auf dem Vormarsch', 1-13.
328 Hunter and Power, 'Bolsonaro and Brazil's Illiberal Backlash', 68-82.
329 *ibid.*
330 Flemes, 'Wahl in Brasilien: Rechtspopulismus auf dem Vormarsch', 1-13.
331 Hunter and Power, 'Bolsonaro and Brazil's Illiberal Backlash', 68-82.
332 *ibid.*
333 Schneider, 'Breaking the 'silence' of the military regime', 198-212.

bureaucracy. Insufficient investment but high tax burden reflects the elite's missing orientation for the community welfare.[334] The dilapidated state apparatus favours the massive degree of corruption. Bolsonaro's former politically insignificant positions proved to be decisive in a country where among the members of Congress at least "one out of three members […] was under either indictment or investigation of criminal activity".[335] With the Lava Jato case, the biggest corruption case in history, voters turned their back to the establishment parties completely as they felt betrayed.

The levels of violent crime in Brazil reached alarming levels and influenced the vote in the 2018's campaign significantly. In the year before the election, Brazil counted with seventeen of the fifty most violent cities in the world. Simultaneously, 63,880 people were murdered in Brazil, resulting in a murder rate or 30.8 per 100,000 people.[336] Therefore, Bolsonaro's 'eye for an eye' policy proposals encountered positive feedback. A significant majority of the society supported his law-and-order rhetoric together with liberal weapon laws, noticing that he was nostalgically glorifying the military dictatorship.[337]

2) Political conditions

Due to the developments described above, there was a notably rising polarisation coupled with decreasing trust in the established parties. Political polarisation began in the years between 2013 and 2016, when Dilma Rousseff, the president after Lula, was suspended in an impeachment. Furthermore, a rising politicisation of judicative bodies as moral judges was observed.[338]
The political discontent was reflected in the population's support of democracy. From 2015, the satisfaction with the performance of democracy started to drop. In 2018, Brazil was the least satisfied with their democracy among all the countries in Latin America .[339] The *Latinobarómetro*[340] shows a trend (N= 1.204) with 45.8 percent being not at all satisfied with the democracy in Brazil and 43.2 percent not very satisfied. Only 7.6 percent were rather satisfied and 1.1 very satisfied.[341] At the same time, the citizens became more and more indifferent about their support for democracy. The huge amount of 40.5 percent of all respondents answered with "For people like me, it does not matter whether we have a democratic or a non-democratic regime".[342]

3. The strategic use of social media and other networks
The election in 2018 has been the first electoral campaign ever in the country, where apart from television, Social

334 Flemes, 'Wahl in Brasilien: Rechtspopulismus auf dem Vormarsch', 1-13.
335 Hunter and Power, 'Bolsonaro and Brazil's Illiberal Backlash', 68-82.
336 *ibid.*
337 Flemes, 'Wahl in Brasilien: Rechtspopulismus auf dem Vormarsch', 1-13.
338 *ibid.*
339 Hunter and Power, 'Bolsonaro and Brazil's Illiberal Backlash', 68-82.
340 Corporación Latinobarómetro is an independent private non-profit organization based in Chile, which conducts social science surveys in Latin America and is also responsible for publishing the results.
341 Latinobarómetro (2018). Satisfaction with democracy in Brazil 2018.]
342 *ibid.*

Media played a significant role.[343] Thereby Bolsonaro emphasised the army's role in combating crime forcefully and his personal story as being part of the army during the military dictatorship.[344] Lacking equal opportunities and fairness during the electoral campaign covered his marginal participation in the activities of the election campaign.[345][346] Nevertheless, a knife attack that almost killed Bolsonaro bestowed him with massive media attention and featured him as a martyr and "Messias".[347] A central motto he tends to reiterate is the right of "weapons for self-defence for everyone" as a militarisation of the society glorifying the military dictatorship. Another important strategy is his appeal to traditional Christian religious beliefs and values with the motto of "Brazilian and God over everything and everyone". Both strategies enabled him to mobilize a huge part of neglected voters.

Bolsonaro adorns himself with the nostalgia of the military dictatorship. So far, until December 2018, seven former or current military officers are part of his presidential cabinet. As an open defender of the military regime and an antagonist of minorities and Human Rights activists, that he sees as defenders of felonies' rights and "bandidagem" (English: thugs), he found an echo in Brazil's society.[348] However, most fruitful was the connection of the nostalgia of the military regime and promising safety and anti-corruption measures, especially among those who had not experienced the dictatorship, but Brazilian democracy.[349]

Despite all the victories, Bolsonaro was also widely criticised. Especially the LGBTQ-community and women increasingly rejected Bolsonaro as many of his misogynistic and homophobic statements became public, although he tried to play them down.[350]

Instead of a deep change of the elite's behaviour by establishing a new democratic political culture, Bolsonaro accomplishes to make authoritarianism to become socially accepted again.[351] In this sense, Human Rights and the rule of law in Brazil are also under threat.[352] Nevertheless, democracy and Human Rights compliance are not necessarily linked as the example of Brazil has shown throughout the past.[353]

Conclusion

In summary, transitional justice efforts in post-dictatorship Brazil have failed on all levels to re-establish a just

343 Flemes, 'Wahl in Brasilien: Rechtspopulismus auf dem Vormarsch', 1-13.
344 Hunter and Power, 'Bolsonaro and Brazil's Illiberal Backlash', 68-82.
345 Flemes, 'Wahl in Brasilien: Rechtspopulismus auf dem Vormarsch', 1-13.
346 Hunter and Power, 'Bolsonaro and Brazil's Illiberal Backlash', 68-82.
347 Reuters (2018). Brazil's evangelicals say far-right presidential candidate is answer to their prayers.
348 Waquant, L. (2003). Towards a dictatorship over the poor. *Punishment and Society*, *5*(2), 197-206.
349 Hunter and Power, 'Bolsonaro and Brazil's Illiberal Backlash', 68-82.
350 Flemes, 'Wahl in Brasilien: Rechtspopulismus auf dem Vormarsch', 1-13.
351 *ibid.*
352 Hunter and Power, 'Bolsonaro and Brazil's Illiberal Backlash', 68-82.
353 Sikkink and Walling, The impact of Human Rights trials in Latin America, 427-445.

society and the rule of law. Brazil has implemented some transitional justice mechanisms which range from financial reparations to the national truth commission, and different memorial projects under Lulas's regime. Several indicators lead to the assumption that Bolsonaro's election in 2018 was favoured by the failings in transitional justice after the military dictatorship. On the fertile ground of several simultaneous crises and a weak political competitors, Bolsonaro was able to establish his hegemony by using rhetoric and ideas glorifying the dictatorship, as well as his religious networks and Social Media. The dominant memory of a soft dictatorship and paradigm of national reconciliation concealed the actions of the past and led to public apathy and a deeply fragmented society to the extent that a return to a military dictatorship in Brazil is not unlikely. The competent but abusive use of Social Media and the influence through the rising influence of the Evangelical churches reflect a high probability of an ongoing success of Bolsonaros hegemony with possible increase of Human Rights violations and renunciation of rule of law.

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Ongoing Violence against Women in Post-War Bosnia and Herzegovina: Notes from the Field

By Ebru Demir

ABSTRACT

Bosnia and Herzegovina seems to have lost the international community's attention and not much attention has been recently paid to the ongoing justice and peacebuilding processes. Except for a few scholars,[354] the current transitional justice process and its impacts on Bosnian women are neglected. There has been little analysis with relation to what happens in the long-term in Bosnia and Herzegovina and to the survivors of wartime violence. Focusing only on rape and other forms of wartime sexual violence has resulted in impunity for many other forms of international human rights violations occurring during the war in Bosnia and Herzegovina. Economic and social rights violations, for instance, remain unaddressed. These neglected women's human rights violations continue in different and/or aggravated forms. This study aims to illustrate the ongoing violence in Bosnia and Herzegovina and recommends solutions by engaging with the interviews conducted in the country in 2017.

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[354] Janine Natalya Clark, *Rape, Sexual Violence and Transitional Justice Challenges: Lessons from Bosnia-Herzegovina* (Routledge 2018); Elissa Helms, *Innocence and Victimhood: Gender, Nation, and Women's Activism in Postwar Bosnia-Herzegovina* (University of Wisconsin Press 2013); Marie E. Berry, *War, Women, and Power: From Violence to Mobilization in Rwanda and Bosnia-Herzegovina* (CUP 2018).

Introduction

From a simplistic legal standpoint, Bosnia and Herzegovina could be considered to have provided a gender-just transitional justice process. This is because Bosnia and Herzegovina signed and ratified the major international conventions regarding women's rights, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) of 1979 and Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) of 2011. By going beyond the legal frameworks, this article aims to look at the implementation of these laws. It examines the problems which disallow the legal frameworks to come into effect.

In this study the reasons for the lack of the implementation were also analysed. Interview questions were specifically designed for the purpose of identifying the underlying reasons for the lack of implementation of the existing laws. In addition to identifying the ongoing violations of women's human rights, fieldwork data also scrutinised the underlying obstacles to the implementation of the existing laws. Interviewees coming from different backgrounds and having varied war and post-war experiences provided first-hand data for the article. Such data exposed the implementation gap and the underlying reasons for it. Varied continuing violence experiences and/or observations of the interviewees helped this article to uncover the real-life experiences of women in Bosnia and Herzegovina.

I conducted 26 semi-structured, in-depth interviews with women and men[355] who are representatives of local and international NGOs, lawyers, legal scholars, politicians, psycho-therapists, human rights activists and survivors. Since interviewing the survivors had the possibility to recreate trauma and to bring back all the saddening memories,[356] with the guidance and in accordance with the instructions of University of Sussex Research Ethics Committee, certain precautions were taken during the fieldwork.

Context-Dependent Solutions are Required.

There have been a great number of investigations into the causes of the failures in post-conflict societies. One of the crucial causes of this failure has been the neglect of the context. After the four key mechanisms of transitional justice have been identified as prosecution initiatives, truth-seeking processes, reparations programmes, and institutional reforms,[357] these mechanisms have started to be applied in all post-conflict societies regardless of the priorities, expectations, and needs of the local communities. Decisions regarding the provision of justice in post-conflict societies are too often made without consulting the society affected.[358] Erin

[355] One male and 25 female interviewees in total.

[356] *See* Elisabeth Jean Wood, 'The Ethical Challenges of Field Research in Conflict Zones' (2006) 29 *Qualitative Sociology* 373; Marie Smith and Gillian Robinson (eds), *Researching Violently Divided Societies: Ethical and Methodological Issues* (United Nations University Press 2001).

[357] *See* Ruti Teitel, *Transitional Justice* (OUP 2000).

[358] Wendy Lambourne, 'Transitional Justice and Peacebuilding after Mass Violence' (2009) 3

Daly is one of the keen supporters of the idea of 'contextuality'. Daly considers contextuality to be the primary focus of post-war justice. According to Daly,

"Each country's transitional path consists of a unique constellation of social, historical, political, economic, ethnic, racial, religious, military and other factors; these factors distinguish each transition from the others; and it is these differences in transitions that compel different institutional responses to past wrongs. What works in one place will not necessarily work in another."[359]

Interviewee 1 stressed that, in her opinion, context had not been addressed in the peacebuilding process in Bosnia and Herzegovina:

"After the war, a lot of researchers and activists came to Bosnia. They just produced a quick knowledge about peacebuilding, *as if a new life started after the conflict*. But often this quick knowledge did not work in practice. Our tradition, our culture should be included."[360]

In the same vein, Interviewee 4, a politician, emphasised that,

"Bosnia is a specific country like any other country. We have our own tradition. You just cannot come and implement the mechanisms and laws from other countries, like European countries. They will not work here."[361]

Bosnia and Herzegovina has been a country in which different justice mechanisms have been tested. International actors went to the country and "act(ed) like they know everything about Bosnia and Herzegovina".[362] However, the justice mechanisms should be applied and prioritised according to the needs and expectations of the society at stake. Since "each country's path from past to future is unique", the justice process should be appropriate to each nation's trajectory.[363] This means that if a country prefers retributive justice, trials get prioritised. Or if a country prefers to establish reconciliation and to 'forgive and forget', amnesties can be provided. Similarly, institutional reforms might be prioritised in order to guarantee non-repetition. In practice, however, it is still difficult to identify 'the context'.

When it is suggested that the country at issue should decide on its own path for justice, 'who' exactly are addressed, allowed and privileged to decide? Can we identify and concretise one single understanding of justice for a whole society? Paul Gready and Simon Robins help answering these questions. They claimed that a transition process needs to be "context-dependent, *driven by the local* and (…) *consider the diversity of understandings that might exist*".[364]

International Journal of Transitional Justice 28, 28.

[359] Erin Daly, 'Transformative Justice: Charting a Path to Reconciliation' (2002) 12 *International Legal Perspectives* 73, 77.

[360] Interviewee 1 (emphasis added).

[361] Interviewee 4.

[362] Interviewee 2.

[363] Daly (n 6) 113.

[364] Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (2014) 8 *International Journal of Transitional Justice* 339, 344 (emphasis added).

According to Gready and Robins, it is the 'local' who decide on and leads us to figure out 'the context'. These ideas are reflected in the words of Interviewee 26, a genocide survivor:

"When you approach a post-conflict community, you need to approach it with a very bottom-up approach; meaning that you analyse the local issues that they have and then you try to come up with feasible solutions: how to not only help that community but also engage them in terms of changing them and letting them be part of the change processes within their local community. (…) *At the end of the day, it is the local problems which reflect the overall situation in Bosnia and Herzegovina.*"[365]

Both the literature and the interviewees agree on the need for an inclusive peace-building process. 'Local' is, however, very ambiguous and too broad term to be a decision-maker to decide who is included. Wendy Lambourne narrowed the meaning of 'local' down by underlining that the "needs, expectations and experiences of the conflict participants – the perpetrators, victims, survivors and other members of society directly affected by the violence"[366] should play a decisive role in the peace process. The need for a victim-centred approach is repeatedly pointed out within the literature.[367] The extent to which a victim-centred approach has been applied in Bosnia and Herzegovina is, however, complicated.

Interviewee 26, as a genocide survivor herself, underlined that,

"Within my experience of working directly with victims, I observe that victim associations are not funded by international donors, not even one single organisation. Victim associations do apply for international funds from the EU, for example. Most of the time, these organisations are applying because of the issues that are affecting survivors and victims themselves. Their applications are not general in their terms as the call for the funding is. So, I can clearly say that victims' associations are not funded in the long run."[368]

So, who decides which justice mechanism is needed in Bosnian society? Who is supported and funded for their initiatives by the international community? Whose voices are heard and whose peacebuilding initiatives are considered important? The answer is clearly not these underfunded victims and witnesses' associations.

I asked the interviewees their opinions regarding the International Criminal Tribunal for the former Yugoslavia (ICTY). My concern has been to learn the extent to which the ICTY has answered Bosnian society's contextual needs. Interviewee 2 expressed that,

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[365] Interviewee 26 (emphasis added).
[366] Lambourne (n 5) 29.
[367] *See* Fionnuala Ní Aoláin, Catherine O'Rourke and Aisling Swaine, 'Transformative Reparations for Conflict-Related Sexual Violence: Principles and Practice' (2015) 28 *Harvard Human Rights Journal* 97, 141; Simon Robins, 'Towards Victim-Centred Transitional Justice: Understanding the Needs of Families of the Disappeared in Postconflict Nepal' (2011) 5 *International Journal of Transitional Justice* 75; Simon Robins, 'Challenging the Therapeutic Ethic: A Victim-Centred Evaluation of Transitional Justice Process in Timor-Leste' (2012) 6 *International Journal of Transitional Justice* 83.
[368] Interviewee 26.

"The Hague Tribunal was the most important thing which happened to this area. Imagine if we did not even have an international court … Imagine if these crimes were never documented and prosecuted … ."[369]

However, contrasting opinions have been raised with regard to the ICTY. One non-governmental organisation's (NGO) head claimed that,

"(…) giving your testimony results in nothing good for you. What is worse is that giving your testimony against the perpetrators even in The Hague results in nothing good for you. I am encouraging them [women who are wartime sexual violence survivors] to testify, to get out and to speak for their inner health, but I am not really sure if it is working. If I was a victim, I would move away from Bosnia and never come back. You cannot achieve anything; you just feel that you are only marked at the end of the day."[370]

So even though the ICTY has been considered necessary for Bosnia and Herzegovina, problems with the court exist. The interviews confirm that international criminal accountability is only "*a partial component of the larger transformative agenda of gender justice*."[371] These mechanisms are essential but remain limited in terms of providing justice for the society at stake.

It should be emphasised that there is no shared category of 'victims of Bosnia and Herzegovina'. Three ethnic groups claim to be the main victims of the war, and each of their narratives is based on the denial of the other ethnicities' victimhood claims,[372] and thus of others' 'truth'.

"If you go to Republika Srpska, they will say that they are victims. If you go to the Federation of Bosnia and Herzegovina, they will say that they are. There is no clarity about who victims are and there is no an effective system. No laws are working in the country."[373]

This lack of a shared truth is one of the biggest obstacles to the creation of a truth and reconciliation commission (TRC). The lack of a shared consensus on 'who is a victim?' prevents the creation of mechanisms which can respond to the needs of Bosnian society.

The fieldwork findings illustrated that there is no a victim group that we can mention even within one ethnic group. There are different victim groups within Bosniak victims, and there is an invisible hierarchy between them. Interviewee 26 pointed out that,

"I do not think victims and their personal experiences have been ever in the forefront in terms of dealing with the past. (…) we do not have a law against the denial of genocide in Bosnia and Herzegovina. We have a lot of

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[369] Interviewee 2.
[370] Interviewee 10.
[371] Kirsten Campbell, 'Gender Justice Beyond the Tribunals: From Criminal Accountability to Transformative Justice' (2016) 110 *American Journal of International Law* 227, 231 (emphasis added).
[372] *See* for instance Jelena Subotić, *Hijacked Justice: Dealing with the Past in the Balkans* (Cornell University Press 2009); Ivor Sokolić, *International Courts and Mass Atrocity: Narratives of War and Justice in Croatia* (Palgrave 2018).
[373] Interviewee 10.

victims of torture, but we do not have a law for mental health of the survivors. When you look at the legal aspect, victims have never been at the forefront."[374]

Interviewing different actors in Bosnia and Herzegovina enabled me to observe the divisions within 'victim' groups. This observation goes along with terminology that Tshepo Madlingozi created in the South African context. According to Madlingozi, there is a split between victims who continue to struggle for social justice and those who argue that the past must be put behind in order to focus on the future.[375] As Madlingozi argued, this "splitting of victims into 'good victims' and 'bad victims' is not unique for South Africa;" in all post-conflict societies where the oppressed (read direct victims) did not win the war, but an 'elite compromise' was reached, this "ensures that previous material and social privileges are maintained".[376] There is a need to investigate who this elite is in Bosnia and Herzegovina and who tell people to forget the past and to move on. Interviewee 26 replied:

"We always have to remind the NGOs of that 'yes, Bosnia needs to move forward, but we have to recognise the consequences of the war first'".[377]

In Interviewee 21's words, 'good victim-bad victim' split has been even more visible:

"The civil society in Bosnia and Herzegovina is seen only through NGOs; this is problematic because they are part of a certain elite. They are never going to work to risk their income in order to look for the equality for all. If the victims are not these NGOs' 'target group', then they [the women victims] are simply not included in the project."[378]

However, Interviewee 26 underlined that the 'push for moving on' comes from 'the top' to the NGOs:

"The only side which is telling people to move on is the international community and donors of the NGOs. When it comes to survivors, they are not the ones saying that 'we need to move on'. They are the ones saying that 'we still have missing persons; we are still not protected by the law'. The only side in Bosnia and Herzegovina stating that 'you need to move on' is the international community. That is very top-down. I am still searching for my grandparents and my uncle. Until they are found, I will continue searching them."[379]

In order to address the contextuality, it is crucial to identify and determine who decides what is needed in Bosnian society for a peacebuilding process. In order to make the transitional justice more context-respondent, international involvement should be minimised in the decision-making stages. The decision needs to come from bottom-up. However, as discussed, there is no 'one victim group' and a clear definition of 'local' in Bosnia and Herzegovina. The current practice isolates the direct victims and

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[374] Interviewee 26.

[375] Tshepo Madlingozi, 'Good Victim, Bad Victim: Apartheid's Beneficiaries, Victims, and the Struggle for Social Justice' in Wessel le Roux and Karin van Marle (eds), *Law, Memory and the Legacy of Apartheid: Ten Years After AZAPO v President of South Africa* (PULP 2007) pp 107-126, 111.

[376] *ibid* 112.

[377] Interviewee 26.

[378] Interviewee 21.

[379] Interviewee 26.

witnesses of the war and eliminates their expectations and needs from transitional justice process by privileging the co-opted victim groups. Such examination of the field has shown that there is a need for transitional justice scholars to deconstruct the term of 'victim'. Although it is clear that for a context-dependent and context-relevant justice process the inclusion of victim groups is essential, the practice indicates that there is a need for a further scrutiny on what is meant by 'victims'.

The Root Causes of the Violence Should be Addressed.

One of the goals of gender justice is to address the root causes of the wartime violence.[380] Transitional justice mechanisms have not usually investigated into structural inequalities that comprise a basis for armed conflicts. [381] One criticism of much of the literature is based on the argument that transitional justice theory and practice have treated the symptoms "while leaving the underlying illness to fester".[382] Instead, a transition process should "look at the communities affected by systemic violence with the aims to seek forms of justice that *break with the structures that may have led to violence in the first place.*"[383] In parallel with these purposes, during the fieldwork, my aim has been to identify these structures and to find out the extent to which these structures have been addressed and dealt with in the post-conflict reconstruction process. I asked the interviewees what they considered as the main reasons of the Bosnian war and the extent to which the transitional justice mechanisms and legal regulations managed to address the main causes of wartime violence against women.

Although domestic violence, economic violence and gender discrimination have been, among others, the complaints of the interviewees, these issues have been eventually connected to the broader problems within the society. For instance, although Bosnia and Herzegovina has signed and ratified all major international documents regarding women's rights, including the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (known as Istanbul Convention),[384] the implementation of the laws remains sporadic. The interviewees overall addressed the patriarchal norms as the fundamental reason for the lack of the implementation of the existing laws.

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[380] Gready and Robins (n 11) 339.

[381] *ibid* 346. *See also* Paul Gready, *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* (Routledge 2011).

[382] Lisa Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2008) 2 *International Journal of Transitional Justice* 331, 333. *See also* Gready and Robins (n 11) 340; Wendy Lambourne and Vivianna Rodriguez Carreon, 'Engendering Transitional Justice: A Transformative Approach to Building Peace and Attaining Human Rights for Women' (2016) 17 *Human Rights Review* 71, 72.

[383] Paul Gready *et al.*, 'Transformative Justice - A Concept Note' (October 2010) <http://www.wun.ac.uk/files/transformative_justice_-_concept_note_web_version.pdf> accessed 3 November 2020, 2 (emphasis added).

[384] Esther Garcia Fransioli, 'Annual Report on the State of Women's Right in Bosnia and Herzegovina in 2013' (2013) Sarajevo Open Centre Human Rights Papers, paper 2 <http://soc.ba/site/wp-content/uploads/2014/04/Annual-Report-on-Womens-Rights_WEB.pdf> accessed 3 November 2020, 14.

The interviewees overwhelmingly emphasised that the lack of representation of women in the parliament, named as political injustice, is a consequence of ethno-nationalist politics. They underlined that in patriarchal and ethno-nationalist settings, gender becomes the lowest priority.[385] The interviewees have made it clear that the legal regulations for gender equality remains frequently inapplicable in their everyday lives as a consequence of the structural violence, which has not been addressed by transitional justice mechanisms.

The interviewees overwhelmingly emphasised that ethno-nationalism-based divisions have been the root causes of the war and the reasons for the ongoing violence against women. Interviewee 22, a politician, highlighted that,

"We face a lot of nationalism. Political elite are ruling the country. The most important question today is 'what is your nationality?' Still, after more than 20 years, we live in our national boxes. During the elections and in pre-election campaigns, everything is centred around national identities. Religious institutions get also connected. Because here our national identity is connected to our religion. You learn by elite that being a woman and objecting to nationalist ideas is not acceptable".[386]

In Bosnia and Herzegovina, transitional justice and peacebuilding processes have not alleviated nationalism, if not aggravated. Starting from the peace agreement, the mechanisms divided the country more, instead of uniting. Dayton Peace Agreement "divided the country in two entities and one district *on the basis of ethnicity*".[387] Since the Constitution of Bosnia and Herzegovina was annexed to this peace agreement, from the constitution to all legal hierarchy is regulated under "ethnocentric citizenship"[388] regime. Although the European Court of Human Rights requested Bosnia and Herzegovina to change the Constitution and abandon ethnocentric citizenship,[389] changes are yet to come.

How does this current practice affect women? The Constitution of Bosnia and Herzegovina "does not provide for a general obligation to ensure a certain representation of the sexes (quota, proportion, or parity) in public life".[390] According to Annika Björkdahl, this constitution is on the same lines with general liberal constitutions of Western liberal democracies, although quota system for women's participation to legislative, executive, and judicial branches was a hallmark of socialist

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[385] Interviewee 7.
[386] Interviewee 22.
[387] Interviewee 26 (emphasis added).
[388] Eldar Sarjlić, 'The Bosnian Triangle: Ethnicity, Politics and Citizenship' University of Edinburgh CITSEE Working Paper Series, Working Paper 2010/06 <http://www.cas.ed.ac.uk/__data/assets/pdf_file/0004/108868/190_thebosniantriangleethnicitypoliticsandcitizenship.pdf> accessed 3 November 2020, 17. *See also* Jelena Džankić, 'The Politics of Inclusion and Exclusion: Citizenship and Voting Rights in Bosnia and Herzegovina' (2015) 22 *International Peacekeeping* 526.
[389] *See Sejdić and Finci v Bosnia and Herzegovina* Applications Nos. 27996/06 and 34836/06 (ECHR, 22 December 2009).
[390] Annika Björkdahl, 'A Gender-Just Peace? Exploring the Post-Dayton Peace Process in Bosnia' (2012) 37 *Peace and Change* 286, 295-296.

Yugoslavia.[391] The international community acted upon the idea that the war created a zero point and as Interviewee 21 pointed out "all the legal regulations with relation to gender equality prior to the war were all forgotten"[392] or basically ignored.

Alongside the Constitution, legal regulations are influential on women's rights as well. Fragmented structure created a situation in which different laws are practiced in different parts of the society. Interviewee 17 clarified the impact of this practice:

"Regarding the incrimination of domestic violence in the law, for instance, we have a huge difference between the entities. In the Republika Srpska, acts of domestic violence are incriminated dually: as a criminal act or a minor offense. This creates a huge issue. Usually, the Police and Office of the Prosecutor would characterise domestic violence as a minor offense only, which basically means lower sentences, money fines, or conditional sentencing. In the Federation of Bosnia-Herzegovina, however, domestic violence is considered and incriminated only as a criminal act. We are now trying for Republika Srpska to incriminate domestic violence only as a criminal act like the Federation."[393]

Since the peace process has been 'gender-neutral' and neglected women's rights in many areas, women from different ethnicities allied in their struggle to take their rights back. Interviewee 16, an NGO head, elaborated on this point:

"When we opened our institution, we also created a free legal aid department. More and more women started calling us about gender-based violence: these women were either victims of wartime violence or victims of domestic violence, or both. Then we made a legal research and saw that there were no legal possibilities in the existing law at that time to help those women. Then we understood that the first step we needed to take was to change the laws. But in order to amend the laws, we noticed that there were no women to approach at the Parliament for us to change things through them. Together with *other women* [women from different ethnicities] in Bosnia-Herzegovina, we fought for electoral quota for women. That was the beginning of the time when women started entering the Parliament and to be part of the post-war decision-making process."[394]

This shows, first, how important to have women in the parliament and in decision-making positions (political justice) in order to pass gender-friendly legislation and thus to provide gender justice. Second, as Interviewee 16 underlined, the struggle for women's rights in the post-conflict period have been a multi-ethnic process. Bringing quota and legislation of Law on Protection from Domestic Violence of 2005[395] has only been one of the many examples that women from all

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[391] *ibid* 296.
[392] Interviewee 21.
[393] Interviewee 17.
[394] Interviewee 16 (emphasis added).
[395] *See* Law on Protection from Domestic Violence of the Federation of Bosnia and Herzegovina (2005) <https://www.legislationline.org/topics/country/40/topic/7/subtopic/25> accessed 3 November 2020.

ethnicities fought for. As Interviewee 5, an NGO head, remarked,

"We do not have nationalism between the ordinary people. During and after the war, ordinary people did not have any problem with national identities. Only the political parties and big actors use this for political gains. Now Bosnia is, in the world, remembered with nationalism which is not true. It is about political parties, not about us. For instance, I am a Catholic woman and I am working with a young Muslim woman as my assistant here."[396]

Another interviewee's (a psycho-therapist from an NGO) words were on this line as well:

"The major problem is the political and Constitutional system. There is no nationalism problem in Bosnia. *Nationalism has been institutionalised.* Only political parties use it. We work here as a mix group, mixed with Serbs, Croats and Bosniaks."[397]

This made me question in which ways and with which means the political parties do create and reinforce ethnic divisions. The answer which came repeatedly from my interviewees was education. Interviewee 16 commented that,

"In different parts of Bosnia-Herzegovina, we are learning different histories. We are now separated through our education system. Children in Herzegovina basically learn through Croatian educational system, for example."[398]

In Bosnia and Herzegovina, the existence of 'two schools under one roof'[399] enforces different curricula for students from different ethnicities. Lack of a Truth and Reconciliation Commission (TRC) results in reinforcement of different truths for different students through these schools. In transitional justice literature, details about how to implement education reforms in post-conflict societies are underexplored.[400] The exploration of the relationship between root causes of the wars and education systems makes it necessary for scholars to explore this area further.

We Need to Go Beyond the Legal Pillar of Justice.

For gender justice, it has been claimed that there is a need for "a radical rethinking of participation in transitional justice interventions"[401] since the question of 'who is the victim?' becomes blurred in the field. I

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396 Interviewee 5.

397 Interviewee 6 (emphasis added).

398 Interviewee 16.

399 *See* Safia Swimelar, 'Education in Post-War Bosnia: The Nexus of Societal Security, Identity and Nationalism' (2012) 12 *Ethnopolitics* 161; Alessandro Tolomelli, "Two Schools Under One Roof' The Role of Education in the Reconciliation Process in Bosnia and Herzegovina' (2015) 1 *Religion, Conflict and Education (Special Issue)* 89; A. D. Tveit, D. L. Cameron and V. B. Kovač, "Two Schools Under One Roof' in Bosnia and Herzegovina: Exploring the Challenges of Group Identity and Deliberative Values among Bosniak and Croats Students' (2014) 66 *International Journal of Educational Research* 103; Janine Natalya Clark, 'Education in Bosnia-Herzegovina: The Case for Root-and-Brach Reform' (2010) 9 *Journal of Human Right*s 344.

400 Dženeta Karabegović, 'Aiming for Transitional Justice? Diaspora Mobilisation for Youth and Education in Bosnia and Herzegovina' (2018) 44 *Journal of Ethnic and Migration Studies* 1374, 1374.

401 Gready and Robins (n 11) 358.

concur with this opinion; however, the findings of the current study go beyond mere criticism of the concept of victimhood to a point where 'justice' concept becomes disputable. In fact, a critical reading of the terms of both victimhood and justice feeds each other. In transitional justice practice, who is categorised and called as victim tells us about 'our' understanding of justice. Here, I present three women's interviews in order to show how their victimhood is basically 'missed'. As a result, they have not been called and categorised as victims within the current transitional justice practice.

An interviewee emphasised the trauma she went through because of the 'fear of being raped'. She asked a very critical question: "*Who can actually approve a paper that someone is a victim of war or not?*"[402] This question is significant for two reasons. First, it challenges the perspective that pain and victimhood are measurable and visible. This illustrates how the concept of 'victimhood' in transitional justice is limited and most of the time exclusive. Second, in a post-conflict society, who will decide who the victims are is also problematic because of very obvious reason: decision-makers themselves might be traumatised. One NGO staff, previously a social worker, elaborated on this issue:

"I worked directly with sexual violence victims and perpetrators, victims of war trauma, domestic violence victims in the safe houses. Every day, I was directly involved in this topic through real life stories. As a result of this direct exposure to violence, I also became a victim myself. Working for so long with trauma was not so good for my mental health. So, I had to change my job. I think all professionals who work in this field also need to change their job in time."[403]

Then the following question becomes crucial: what if the decision-makers who approve a paper are victims of war themselves? Little is known about this issue. There is a need to understand how the conflicts mentally impact the decision-makers (judges, prosecutors, social workers, psychologists and so on) themselves. Such studies can challenge our understandings on the concepts of 'victimhood' and 'justice'.

Similarly, after the conflict in Bosnia and Herzegovina, some human rights are considered more important and their violations are prioritised by international community in funding policies. For instance, economic and social rights are of secondary importance in transition processes. This creates problems especially for women. Women become the concern of transitional justice as long as their bodily integrity is violated, meaning most of the time when and if they are raped.[404] Women's economic and social rights remain outside the scope of

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[402] Interviewee 2 (emphasis added).

[403] Interviewee 14.

[404] Some scholars criticised such an approach for reproducing orientalist and colonial views on Bosnia and Herzegovina: *See* Helms (n 1); Jasmina Husanović, 'The Politics of Gender, Witnessing, Postcoloniality and Trauma' (2009) 10 *Feminist Theory* 99; Olivera Simić, 'Challenging Bosnian Women's Identity as Rape Victims, as Unending Victims: The 'Other' Sex in Times of War' (2012) 13 *Journal of International Women's Studies* 129. *See also* Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1.

transitional justice agenda. This makes their 'victimhood' and everyday concerns unrelated and unconnected to the war. Interviewee 5 acknowledged this point by giving an example from her own experience regarding what justice means for her:

"*This is not peace. This is not justice*. If you do not have a job, if you have lower salaries than men, if you are exposed to mobbing every day, this is not peace. I remember my life in ex-Yugoslavia. We had health insurance. We had scholarships. We felt much more independent. Now, I do not feel free. When it is night, I am always at home because I feel safe at home. It was not like this before the war. The international community do not understand ordinary people."[405]

This has been one of the interviews which challenged current understandings on 'peace' and 'justice'. The other one came from Interviewee 23 who is a human rights activist:

"I was searching intensively for jobs and I have gone through maybe 50-60 job interviews at some point in my life. At every interview, I was asked, 'Do you plan to be a mother soon?' 'How can you manage both career and motherhood if you become a mother?' They never ask these questions to a man. It is not even rude in our society to ask those questions to women. If you work in the same position for several years, male members will have better opportunities just because they are males. I am deeply frustrated about our situation."[406]

Interviewee 23's words become very explanatory in terms of providing a critical reading on transitional justice. Her words also illustrate that economic and social rights could have created a transformative impact for women. Then, who is transitional justice for? Who is justice for in post-conflict contexts? Who decides on the meaning and scope of 'justice' for women? What consequences are created by prioritising some rights and deprioritising others? What is the effect of this (de)prioritisation process for women?

After carrying out her fieldwork, Wendy Lambourne notices the shortcomings of looking at the concept of justice through only one pillar and she develops a framework for transformative justice. According to Lambourne, transformative justice requires changes in the social, economic and political structures and relationships.[407] She underlines the necessity of "recognising and addressing the *multiple justice needs* and expectations of the local population".[408] This approach overlaps with the concept of 'complexity of harms'[409] or 'web of gender-based harms'[410] within the transitional justice literature. An analysis of transitional justice process from women's rights perspective results in exploration of 'multiple justice needs'. One of my interviewees expanded on this issue based upon her own

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[405] Interviewee 5 (emphasis added).
[406] Interviewee 23.
[407] Lambourne (n 5) 29.
[408] *ibid* (emphasis added).
[409] *See* Fionnuala Ní Aoláin, 'Advancing Feminist Positioning in the Field of Transitional Justice' (2012) 6 *International Journal of Transitional Justice* 205.
[410] Catherine O'Rourke, *Gender Politics in Transitional Justice* (Routledge 2013) 237.

experience with wartime sexual violence survivors:

"I worked with one of the youngest victims of rape. She was raped during the war. When I started working with her, she was really poor. There was no electricity, no water, no food, no heating in her house. She was living with her husband; he was an alcoholic and always beating her."[411]

There were other interviewees as well illustrating the complexity of the harms. When interviewees talk about their problems, these problems are not only related to only one specific human right violation. Different human rights violations emerge simultaneously; this requires simultaneous responses to these violations.

Interviewee 1, an NGO head, commented that,

"Integration of all kinds of suffering should be considered together as a reason for the increase in the violence. They cannot be separated from each other. All the needs and interests should be linked. Women are raped during the war; they were imprisoned in different concentration camps but at the same time they went through domestic violence after the conflict. They also lost their houses, jobs, education and medical support. They had huge losses. These things had long-term consequences. They lost family members. All of this suffering should be viewed as one. We cannot separate all of these sufferings. All of them are equally important."[412]

These ideas are in line with one of the main principles of international human rights law: indivisibility and interdependence of human rights under the Vienna Declaration.[413] Gready and Robins interact international human rights law with international criminal law further by claiming the indivisibility and interdependence of human rights in order to create a theory of transformative justice.[414] Integration of all human rights (not only civil and political rights) into the mechanisms of transitional justice is what both transformative justice and international human rights law propose.[415] That is why an engagement with the Vienna Declaration can provide new areas to explore for scholars.

Interviewee 12 also underlined the connections between economic justice and political justice for women:

"When it comes to empowerment, we talk about economic empowerment,

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411 Interviewee 2.
412 Interviewee 1.
413 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23 <https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx> (hereinafter Vienna Declaration) accessed 3 November 2020, para 5.
414 Paul Gready and Simon Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice' (Centre for Applied Human Rights, University of York, Briefing Note TFJ-01 June 2014) <http://www.simonrobins.com/Transformative%20Justice%20Briefing%20Paper.pdf> accessed 3 November 2020, 1. *See also* Pamina Firchow and Roger Mac Ginty, 'Indivisibility as a Way of Life: Transformation in Micro-Processes of Peace in Northern Uganda' in Paul Gready and Simon Robins (eds), *From Transitional to Transformative Justice* (CUP 2019) pp 261-280.
415 *See* for example Louise Arbour, 'Economic and Social Justice for Societies in Transition' (2007) 40 *International Law and Politics* 1.

political empowerment etc. However, sometimes I get this feeling that we are separating these issues. We are not looking at them as a whole, but more as separate problems which they are not. Because you cannot have political empowerment without economic empowerment. You cannot have productive, sustainable and successful institutional mechanisms for the prevention of gender-based violence if you do not have economic empowerment. They are all connected."[416]

Most of the NGOs I visited acknowledge the 'multiple justice needs' of their beneficiaries and support women by bringing different pillars of justice forward. They seem to be aware of that "underlying socioeconomic injustices are *both a cause and effect* of physical, material and psychological harms".[417] Most of the women's NGOs interviewed comply with the requirements of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention): in addition to providing safe houses, they also consider the other socioeconomic and psychological expectations and needs of their beneficiaries. For example, Interviewee 17 reported that,

"In the safe houses, we have psychologists in case women need any kind of help. Women in these houses can reside for a period of 6 months but there is a possibility of extension for additional 6 months. During this one year in total, we work with them in individual and group sessions. They do creative sewing in order to help their trauma of domestic violence. Meanwhile, we try to work on their economic situation after they leave the safe house. This means we try to find jobs for them. So, they would leave completely the violent society that they used to live in."[418]

I asked another NGO head where these women tend to work after they leave the safe houses. Interviewee 10 answered that,

"We mediate for their employment. For example, we opened our first social entrepreneurship and we offer cleaning services. We are having two women employed full-time and three women employed part-time. The problem is that when we say that we are offering cleaning services done by domestic violence survivors, nobody hires them. The employers are suspicious; they do not want to have these problems 'in their house', you know. That is why women from safe house get jobs mostly to clean the coffee-bars. In these coffee-bars they do cleaning at night or extremely early morning. This is very difficult if you have little kids. There is no law on this issue and without law there is not much we can do."[419]

Although I argue that such 'empowerment' might, to a certain extent, challenge the patriarchal norms and gender stereotypes, here I also need to emphasise that such initiatives are undertaken by women's NGOs only. There is no a standard law and practice all over the country. Such projects are sporadic, and away from being sponsored and led by the state.

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[416] Interviewee 12.
[417] Lambourne and Carreon (n 29) 73 (emphasis added).
[418] Interviewee 17.
[419] Interviewee 10.

Interviewee 26 demanded a victim-centred approach within such projects:

"All the health care system, education system and employment are affected by the war. Yes, we cannot deny that certain improvements have been done. But we still have internally displaced people; we still have missing persons. We still do not have a national project that focuses on the mental health of survivors."[420]

Interviewee 26 reminds the "good victim-bad victim"[421] categories here again. Although women's NGOs go beyond the legal pillar of justice, we are reminded by the direct victims of war that the question of 'who is (transitional) justice for?' should not be forgotten. It should be questioned in the current practice whether direct victims of war, for instance genocide survivors, can benefit from the help that the NGOs provide.

I would like to emphasise that my fieldwork in Bosnia and Herzegovina showed that survivors of genocide and other wartime violence have no abstract categories for human rights like we have as legal scholars. Harms are multifaceted, and violations of economic and social rights often take place simultaneously with civil and political rights violations. Abstract categories of human rights lose meaning in the field. As I have illustrated above, economic and social rights and civil and political rights violations are integrated and interconnected in the interviews and *in real lives*. When a genocide survivor mentioned impunity of perpetrators as a major problem, she also underlined the lack of mental health support for survivors of genocide.[422] She brought forward the lack of any effective legal mechanisms to deal with domestic violence, but also, she raised her concerns about how the lack of employment, housing, and education aggravates the problem of domestic violence for the genocide survivors.[423] Thus, one of the findings of my fieldwork has been that the division between human rights and (de)prioritisation of certain category of human rights need to be challenged. The indivisibility and interdependence of human rights principle of international human right law[424] needs to be more integrated into transitional justice literature.

During the fieldwork it was striking to observe that many types of human rights violations and war-related harms are still ongoing. As discussed above, the concepts of 'victimhood', 'violence', and 'justice' become blurred in the field. I concur with Walker regarding the requirement of prioritisation of 'direct victims'. However, my fieldwork has challenged this concept as a whole. As illustrated above, I heard many stories which challenge the current understandings of victimhood: Interviewee 2 talked about her trauma occurring as a result of 'the fear of being raped' when armed groups were invading their village. Interviewee 14 reported the trauma that she suffered as a social worker after listening to wartime violence experiences of women on a daily basis. Interviewee 5 commented that the current situation was not just or

[420] Interviewee 26.
[421] Madlingozi (n 22) 111.
[422] Interviewee 1.
[423] Interviewee 1.
[424] Vienna Declaration (n 60) para 5.

peaceful for her. According to her, this was not a peace situation since she was too afraid of being outside when it is dark. Although these interviews do not denigrate, challenge or compete with the pain of 'direct victims', they lead to the necessity of a further and thorough studies on the meaning of 'victimhood'.

For women, in the peacebuilding processes long-term solutions are needed. The interviews I conducted illustrate the connection between structural violence and everyday violence against women. In addition, the literature demonstrates that victims of wartime sexual violence, for example, are invariably among the most marginalised of those affected by the conflict.[425] Same violence against men and women during the conflicts might result in different and aggravated impacts for women as result of pre-existing inequalities, including socioeconomic difficulties.[426] Women are often rejected by their families and communities in case of pregnancies out of wartime sexual violence and "excluded from social and cultural life due to the stigma and shame attached".[427] Therefore, in order to meet the needs and expectations of women in the post-conflict societies, "short-term, legalistic and corrective"[428] practice of transitional justice needs to be abandoned. Transitional justice processes need to be transformative, suggesting long-term solutions and going beyond the only legal pillar of justice.

Conclusion

The interviewees highlighted how the transitional justice process in Bosnia and Herzegovina falls short of offering context-relevant solutions. The international community has been criticised for applying 'one size fits all' solutions to the society concerned. Another crucial point which both the literature and the interviewees severely criticised was the justice system which has left the root causes of the violence against women and structural violence unaddressed. On this point, the interviewees pointed out that the unaddressed causes of the violence against women (reportedly, ethno-nationalism and patriarchy) prevent the transitional justice mechanisms from working effectively in the society. Finally, the interviews echoed the need to add different pillars to the framework of 'transitional justice'. Different layers of justice are needed to be maintained in order to provide justice in post-conflict societies, such as psycho-social, political and socioeconomic justice. This point has been repeatedly remarked on in the field. The interviewees, based on their work or on their own personal experiences, highlighted the urgent need for a comprehensive approach to the term 'justice'. An 'only legal' approach to transitional justice has been disapproved of repeatedly.

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425 Ní Aoláin, O'Rourke and Swaine (n 14) 99.

426 *See* literature regarding intersectionality here: Eilish Rooney, 'Intersectionality – A Resource for Societies in Transition' (September 2010) Transitional Justice Institute Research Paper No.10-16 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1685333> accessed 3 November 2020 and *see also* Fionnuala Ní Aoláin and Eilish Rooney, 'Underenforcement and Intersectionality: Gendered Aspects of Transition for Women' (2007) 1 *International Journal of Transitional Justice* 338.

427 Lambourne and Carreon (n 29) 74.

428 Lars Waldorf, 'Anticipating the Past: Transitional Justice and Socio-Economic Wrongs' (2012) 21 *Social and Legal Studies* 171,179.

Conducting the fieldwork has enabled me to observe the problems which the current practice of transitional justice fails to address. Ignorance of a gender lens throughout the regulation of the legal mechanisms of transitional justice (trials, reparations, truth mechanisms, institutional reforms) has been repeatedly raised during the interviews. Although the criticisms have matched the existing criticisms of transitional justice, at some points the data has gone beyond the existing literature. In addition to illustrating the ongoing problems with the transitional justice process, the interviews confirmed, concretised and reinforced the need for transformative approach.

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The rule of law crisis and self-incurred immaturity

By Benjamin Nurkić and Aldina Jahić

ABSTRACT

COVID-19 pandemic challenged countries around the world to preserve public health which entailed limitations of human rights. We have seen around the world that these limitations were adopted in way that was not in accordance with the proportionality principle, which led to misuse of the state of emergency in general and the interventionism of unseen proportions. The goal of this paper is to present how Bosnia and Herzegovina, as a country in transition, faced the COVID-19 pandemic and give an overview of the events that represent human rights and freedoms violations and abuses associated with the state of emergency.

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Introduction

Since the appearance of COVID-19 which caused global pandemic, this disease in scientific, political and media discourse was named with equipollent term as "the unknown deadly enemy". Many countries around the world were tasked to protect human lives against the virus known to pose a threat against all, whereas other information was subject to speculation. Countries have used different strategies against this unknown enemy, but what is common to for each is that they all, more or less, used a lockdown as a restrictive measure in order to reduce social contacts and prevent the spread of coronavirus pandemic. Lockdown involves the limitations of numerous human rights, and since human rights are interdependent and related, the limitations on the right to freedom of movement entails the limitation on other rights: the right to freedom of movement, right of assembly, right to work, right to education, right to freedom of religion. Although COVID-19 poses a threat to human rights and governments in such extraordinary circumstances may legitimately limit and derogate from particular rights or freedoms, such limitations and derogations should be implemented in accordance with the principles of the International Covenant on Civil and Political Rights and European Court of Human Rights implying they must have legitimate purpose, be temporary in nature, balance between collective and individual interest, and follow the principle of non-discrimination. (Sadiković 2003). However, we have seen that in many countries these limitations and derogations were not adopted in accordance with these instructions. In the war against the "unknown deadly enemy" many countries experimented and entered this situation unprepared, and on the other hand this war was used for personal gain by political elite and groups which adversely affected the rights, spiritual integrity and dignity of citizens. For almost three decades Bosnia and Herzegovina has fought with all the challenges of transition: unemployment, corruption, nepotism, shortage of entrepreneurship, organized crime, rule of law deficiencies. All of these provided fertile ground to political elite which used COVID-19 as a perfect tool and excuse to once more play the card of nationalism, populism and profiteering and so inflict the final stroke to disenfranchised and resigned people.

2. WHAT WAS THE SITUATION LIKE IN BOSNIA AND HERZEGOVINA BEFORE COVID-19 PANDEMIC?

Bosnia and Herzegovina (hereinafter referred to as: BiH) is formally established under the rule of law and other democratic principles as it is laid down in the BiH Constitution Article 1(2) (Constitution of BiH, 1995). Formally, the rule of law is also an indispensable principle in governing parties' programs as well government's programs such as the Reform Agenda for Bosnia and Herzegovina 2015 - 2018 which mostly proclaims the reinforcement of this principle and among other states:
"There is a need to ensure the irreversible entrenchment of the rule of law which must be built on a foundation of concrete progress in the fight against organized crime, terrorism and corruption. All necessary institutional and operational developments will aim to provide citizens throughout BiH with a safer and corrupt-free environment. At the same time, governments at all levels in BiH will enhance their commitment to restore overall citizens' trust in rule of law institutions by developing capacities, accountability, professionalism and integrity." (Reform agenda 2015).

However, since gaining its independence, BiH could not implement the rule of law principle in

state management which can be seen every year in the Rule of Law Index report. The Rule of Law Index report 2020 shows that BiH is in the 64th place out of 128 countries where the rule of law was measured, and the lowest score was in the following categories: Constraints on Government Powers, Absence of Corruption, Open Government and Fundamental Rights (Bock et al. 2020). For BiH the rule of law is unreachable ideal which is only used formally by ruling political elite to appease international officials, manipulate the public, decorate their political speeches and secure votes. The rule of law is a principle which in democratic countries should be the highest principle which protects citizens from the arbitrary actions of the state, maintaining the citizens' rights and freedoms. However, in BiH instead of the rule of law there is the rule of political parties with their distorted outlook on nationalism and collectivism, as well as political practice in which parties delegate its members in state institutions, all of which results in the rule of law and legal state absence and creates the environment where such deviations become a norm. The first case of coronavirus infection in BiH was confirmed on 5 February, but political elite in BiH ignored warnings and indications of pandemic by being more focused, at that time, on their ethnic and nationalistic conflict.

Democratic system is sustainable and strong as its institutions (Asemoglu and Robinson 2014), and to make those institutions strong it is necessary to fulfill, among other, the principle of tripartite system which exists on the separation of powers model, the executive branch, the legislative branch, and the judicial branch, each with separate, independent powers and responsibilities, and at the same time respects rights and freedoms of its citizens. The independence of judicial branch from executive and legislative branches is a foundation for its effective, responsible conduct and respect of democratic standards, and that was the reason for establishment of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina in 2004 (hereinafter: the Council). The law on the High Judicial and Prosecutorial Council of Bosnia and Herzegovina defines the election of its members from the following institutions: the Court of Bosnia and Herzegovina, the Prosecutor's Office of Bosnia and Herzegovina, the Supreme Courts of each entity, the Prosecutor's Offices of each entity, the Brcko District of Bosnia and Herzegovina Judicial Commission, the Bar Associations of each entity, the Parliamentary Assembly of Bosnia and Herzegovina and the Council of Ministers of Bosnia and Herzegovina. The last two mandate one representative each, but they do not have voting rights in disciplinary actions, dismissals and elections of judges and prosecutors. In short, the Council elects judges and prosecutors of all BiH courts except the Constitutional Court of BiH and the Constitutional Courts of each entity, monitors work of elected judges and prosecutors, starts disciplinary procedures, etc. (Trnka 2006). We can see that the election process of the Council members and their statutory responsibilities are made so that executive and legislative branches do not have influence on election of judges and prosecutors. Although the Council was created to ensure the independence of judicial power, in reality it turned out differently.

While countries across Europe prepared for the indicated scenarios and COVID-19 pandemic by developing strategies, forming disease control centers and informing their citizens, BiH was in the middle of political crisis with blocked institutions. The Constitutional Court of Bosnia and Herzegovina made a decision on appeal from seven delegates from the Republic of Srpska Council of People from 6

February 2020 which states that Article 53 of the Law on Agricultural Land of the Republic of Srpska is unconstitutional (Constitutional Court U-8/19). This decision of the Constitutional Court of BiH caused political crisis in BiH because political elite from the Republic of Srpska (hereinafter: RS) decided to block state institutions in BiH. Specifically, RS political elite decided to withdraw from BiH governmental institutions and thus block their functioning stating that they will remain blocked until the foreign judges from the Constitutional Court are removed. In this regard, on 17 February the RS Council of People adopted the information on "anti-Dayton activities of the Constitutional Court of BiH" and conclusions on work discontinuance of RS representatives in BiH institutions until the adoption of the law on the mandate termination of foreign judges in the Constitutional Court of BiH. After that, Milorad Dodik, the Serb member of the Presidency of BiH, organized a meeting with politicians and state officials from RS who work in BiH institutions Milan Tegeltija, the president of the High Judicial and Prosecutorial Council, also attended the meeting. This type of non-institutional gathering would not raise a flag had it not been for the attendance of the Council's President, whose sole purpose is to ensure the independence of judicial power in BiH. Even more scandalous is the statement from the Council's President for the Radio Free Europe:

"I did say that according to the Law on the High Judicial and Prosecutorial Council, I am RS representative. We have obligations towards RS because of the Law on the High Judicial and Prosecutorial Council that was created by the Agreement on the transfer of certain competencies." (Radio Free Europe 2020).

It is interesting that entity representatives are not mentioned anywhere in the Law on the High Judicial and Prosecutorial Council, and nowhere does it state that the Council members are responsible for the protection of the entity. This is how BiH prepared for the pandemic, with blocked institutions and where the president of the institution responsible for the independent work of judicial power explicitly showed that his work is influenced by the executive and legislative branches in RS. Political elite, which at that moment was occupied with ethnic issues, nationalism and power struggle, ignored their duty to promptly inform their constituents and develop the most efficient strategy against pandemic.

3. THE RULE OF LAW DURING COVID-19 PANDEMIC

When COVID-19 pandemic reached Bosnia and Herzegovina, the Federation of BiH declared a state of emergency on March 16, which for consequence had the enforcement of restrictive measures thus quickly making BiH a country with the most restrictive measures implemented. RS Government made the same decision a bit later on 28 March. The wave that was brought by pandemic will surface the crisis in BiH state by the enforcement of measures which were made haphazardly and were not planned, which were against legal and constitutional principles, were not in accordance with non-discrimination principle and did not consider economic consequences. Also, many consequent events will once again show that the rule of law in BiH does not exist and that BiH as a country is not in the service of its citizens - which is the purpose of a country, but rather its purpose is in gaining and maintaining power by the political elite. In this section of the paper we will analyze the most prominent events which followed, and actions and statements of political elite and other public officials in BiH, compare them with the rule of law definitions made by political and legal philosophers, which defined the rule of law in several

different ways but essentially all were in agreement that the rule of law represents the supremacy of law over the state.

3.1 The Unconstitutionality of the Measures

One of the main elements of the rule of law is governing the country in accordance with law and not with arbitrary decisions or executive orders. John Locke in his definition of the rule of law stated:
"whatever form the Common-wealth is under, the Ruling Power ought to govern by declared and received laws, and not by extemporary dictates and undetermined resolutions."(Locke, 1993).

In that regard, BiH Government, specifically the Federation of BiH Government made decisions that were later on declared unconstitutional by the Constitutional Court of BiH. The Federal Department of Civil Protection on 20 March 2020 issued an Order No: 2.40-6-148-34/20 and on 27 March 2020 an Order No: 2.40-6-148-34-1/20 (Federation of BiH 2020). The first Order prohibits the movement to the persons younger than 18 and older than 65 on the Federation of BiH territory. The second Order extends the first order until further notice because the first Order was in power until 31 March 2020. The Constitutional Court of BiH, made a decision on the appeal of several individuals that the Orders are unconstitutional and concluded that this Order violates the plaintiff appellants' right to liberty of movement under Article II(3)(m) of the Constitution of Bosnia and Herzegovina and Article 2 of the Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms because there is no proportionality or fair balance between the measures ordered by the impugned Order and public interest in the protection of public health, since the impossibility of imposing more lenient measures has not been previously discussed and reasoned, and because the measures imposed are not strictly time-limited, nor is there an obligation of the Federal Department of Civil Protection to review and extend these measures on a regular basis only if it is "necessary in a democratic society" (Constitutional Court of BiH, 2020). Also, the Constitutional Court of BiH dismissed the appeals in the part wherein appellants request the repeal of the Order since it could jeopardize public health. Instead, the Constitutional Court decided to give the Federal Department of Civil Protection deadlines for reviewing the ordered measures in accordance with the Court's Decision. The new Order, issued on 24 April 2020 No: 12-40-6-148-143/20, prohibits movement to persons younger than 18 and older than 65, except on Mondays, Wednesdays and Fridays for persons older than 65, between the hours 09:00 and 13:00, and on Tuesdays, Thursdays and Saturdays for persons younger than 18, between the hours of 14:00 and 20:00 (The Federation of BiH 2020). Also, the validity of the new Order was until 3o April 2020.

To this day, no person from the Federal Department of Civil Protection was held accountable for the issuance of these orders which violated human rights, principle of non-discrimination and jeopardized physical and spiritual integrity of the persons covered by this Order.

3.2 Ventilators Scandal and the Rule of Law

The first test of the rule of law followed immediately after the Ventilator Scandal in which the members of governing political elite, specifically the Prime Minister of the Federation of BiH Fadil Novalić played the central role. The Ventilator Scandal (hereinafter: The Scandal) happened in the midst of pandemic when countries around the world gave the priority to the protection

of public health by purchasing ventilators and other necessary medical equipment. In such chaos around the world, the Federation of BiH through company Srebrena Malina purchased ventilators worth 10.5 million BAM from the People's Republic of China. What made the public suspicious was the fact that the purchase of ventilators was conducted through the company whose principal activity is fruit and vegetable processing and preservation. People held responsible were Fikret Hodžić, the owner of the Srebrena Malina company, Fahrudin Solak, Director of the Federal Department of Civil Protection and Fadil Novalić, Prime Minister of the Federation of BiH. The Prosecutor's Office of Bosnia and Herzegovina decided to conduct an investigation after the publication of several newspaper articles and reports. After being questioned in the State Investigation and Protection Agency, the Prosecutor's Office of BiH imposed a custodial measure which was denied by the Court of BiH and Fadil Novalić, Fahrudin Solak and Fikret Hodžić were released, pending trial. The Prosecutor's Office of BiH charged them for the following crimes: association for the purpose of committing criminal acts, money laundering, falsification of official records, abuse of position and acceptance of gifts and other benefits. Investigative procedures by the Prosecutor's Office in democratic countries established on the rule of law is a regular procedure if there is a suspicion of a criminal act, whether the suspects are ordinary citizens or highly positioned state officials in public institutions. But in this case, it was obvious that the rule of law does not exist in BiH and that its authorities do not want to be subject to legal norms. There were many reactions following the arrest of Fadil Novalić. Among first was a statement made by the Party of Democratic Action president (hereinafter: SDA), Bakir Izetbegović in which he claims the action was an attack on the Bosniaks and openly accuses the Prosecutor's Office of BiH stating:

"I am certain that there is no evidence and that there will not be any, and this is the continuation of the attack on the Bosniak leaders which started with the appointment of Gordana Tadić as the Chief Prosecutor in the Prosecutor's Office of BiH and charging several BiH Army generals." (Radio Free Europe 2020).

SDA also made a statement in which among other they claim:

"The Prosecutor's Office of BiH cannot have jurisdiction only in the parts of the country where Bosniaks predominantly live, especially it cannot be an instrument of the Croatian Democratic Union in a political conflict and used for the violent change of constitutional order in this country with unforeseeable consequences." (SDA 2020).

Albert Dicey in his work *Introduction to the Study of the Law of the Constitution*, where he first used term *the rule of law*, gave three main concepts of the rule of law and those are: no man could be lawfully interfered or punished by the authorities except for breaches of law established in the ordinary manner before the courts of land; no man is above the law and everyone, whatever his condition or rank is, is subject to the ordinary laws of the land; the result of the ordinary law of the land is constitution. (Dicey 1982). The true test of the rule of law is when laws and constitution must be applied to the public administrative authority and in that regard BiH did not pass this test. Deng Xiaoping, who led the People's Republic of China through a series of reforms and development of institutions, defined democracy as:

"Democracy is institutionalized and written in law, so that institutions and laws do not change when the leaders change or when the leaders' outlooks change" (Yongnian 1999).

That means that authority should not be dependent on one individual or a group because then we would talk about the rule of people and not the rule of law. The rule of law entails that political elite has a duty to work within the rule of constitutional law, and each action outside of this framework should be sanctioned by appropriate measures which was not the case in BiH due to the pressure of political elite on judicial system. Also, it is disputable to identify one person with institutions, since the rule of law implies institutional rule and not the rule of people.

3.3 Ignoring the Key Principles of Tripartite Branches of Government

The High Judicial and Prosecutorial Council of Bosnia and Herzegovina is also responsible for the political elite actions, since the Council jeopardized its own integrity prior to the pandemic. The integrity of the Council was mostly jeopardized, as we mentioned before, by the attendance of the President of the Council at a non-institutional meeting organized by the Serb member of the BiH Presidency Milorad Dodik, where the Council president attended as a representative of the Entity, although the Law on the he High Judicial and Prosecutorial Council of Bosnia and Herzegovina does not say that members of the Council can represent entities. The Council was formed in order to ensure the independence of judicial branch and with it empower the rule of law in BiH, but as we can see in the Rule of Law Index 2020 report, the Council does not fulfill that function. The problem is that leaders in the Council, such as the president, consider the rule of law only as a phrase and not as a true guiding principle that should be woven into each decision made by the Council. Hopefully the rule of law will be strengthened soon through the Temporary Investigative Committee of the House of Representatives of the Parliamentary Assembly of BiH tasked with the evaluation of work in BiH judicial institutions. It will investigate the conditions in BiH judicial institutions with a special emphasis on the Council's capability to participate in processes necessary for the acceptance of BiH as an EU member state. In accordance with the conclusion of the House, the Temporary Investigative Committee is tasked to conduct all necessary actions to fulfill its goals and in accordance with the Law on Parliamentary Oversight and the Rules of Procedure of the House of Representatives (Parlament.ba 2020). In this regard, the Temporary Investigative Committee was formed to evaluate the work of the Council. Milan Tegeltija's reaction to the work of the Temporary Investigative Committee depicts the non-existence of awareness and knowledge what the rule of law represents. In his statement, after the establishment of the Temporary Investigative Committee, he says:

"Conclusion of the House of Representatives of the Parliamentary Assembly of BiH to form the House's investigative committee in order to investigate the situation in judicial branch, especially in the Council, represents in essence a parliamentary supervision over the judicial branch which, as such, is not planned nor allowed by positive obligations in BiH. In this way the House of Representatives of the Parliamentary Assembly of BiH acts out of scope of BiH Parliamentary Assembly's authority and it is an interference and pressure from the legislative branch on the judiciary, and as such undermines democratic constitutional system of tripartite separation of powers." (Radio Free Europe).

Also, Milan Tegeltija in his statement said:

"Members of the Council, judges and prosecutors in BiH will not in any way participate in the work of this Investigative Committee of the House of Representatives of the Parliamentary Assembly of BiH." (Radio Free Europe).

Based on the statement of Milan Tegeltija, a person at the head of the key institution in judicial branch at the state level, we can see that the rule of law is misinterpreted by the Council's president. Tripartite separation of powers does not merely mark the independence of one branch from the other, but it also means that one branch can control the other so that no branch can abuse its power and such system is called a system of checks and balances. Judicial branch should be independent from legislative and executive branch as Montesquieu states:

When the legislative and the executive powers are united in the same person . . .there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. . .. Again there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. (Gosalbo 2010).

Also, European Commission for Democracy through Law lists a system of checks and balances as an instrumental part of the rule of law stating that it should be well-adjusted through a system of checks and balances. The exercise of legislative and executive power should be reviewable for its constitutionality and legality by an independent and impartial judiciary. A well-functioning judiciary, whose decisions are effectively implemented, is of the highest importance for the maintenance and enhancement of the Rule of Law (Council of Europe 2016). The system of checks and balances entails that each branch exercises certain powers that can be checked by the powers given to the other two branches and each branch is not allowed to exercise the powers of the other branches (Vergotini 2015). Temporary Investigative Committee was established to investigate the situation in BiH judicial institutions but that does not mean that legislative branch interferes with the work of judicial branch. On the contrary, the competence of the Committee does not jeopardize the work of the Council nor any other judicial authority. The Committee's authority is in accordance with the democratic principles where legislative branch does not overpower or interfere with the work of judicial branch, as can be seen from the list of competences in the rules of procedure that the Committee: a) conducts public hearings, b) summons and interviews witnesses from any BiH institution, c) demands from witnesses to answer all the questions and state all the facts and information, as well as those considered confidential, d) initiates liability procedure for witness who refuse to appear before the Committee and give false testimony under oath, e) requests reports from any elected and appointed official, officer or institution, f) demands auditor's help, g) asks help from the independent experts outside of BiH institutions, and uses other competences specified in the Law on Parliamentary Oversight and the Rules of Procedure of the House of Representatives (parlament.ba 2020). Listed competences do not in any aspect interfere with the work in judicial branch, so the establishment of the Temporary Investigative Committees is in accordance with democratic standards which permit one branch to check other two without interfering into each other's authority. In comparative law we can see the supervision of judicial branch by the legislative branch in the United States of America (hereinafter; US), the cradle of the rule of law as we know it today. Early in 1966, Senator Joseph C.Tydings, Chairman of the Subcommittee on Improvements in Judicial Machinery, commenced an

investigation of "the availability of and need for procedures to govern removal, retirement, and disciplining of unfit Federal judges."3 In his opening statement, Senator Tydings said:
"The purpose of these hearings is to determine whether the Federal judiciary has the necessary statutory tools to police its own house fairly, efficiently, and if not, to explore the possibility of drafting and introducing remedial legislation." (Shipley 1970).

In that context, we can see that the Council's president Milan Tegeltija, as a person responsible for the functioning of judicial branch in BiH, abuses the tripartite system in order to avoid the questioning in front of the Temporary Investigative Committee, and at the same time weakens the independence of judicial branch by subjecting himself to the decisions of legislative and executive branches in RS. We see that the Council's president does not essentially understand the tripartite system and abuses it in the worst manner, damaging the whole judicial branch in BiH.

4.3 State Interventionism and a Police State in the Name of People

It is evident that political and health institutions, key institutions in fighting infectious disease, are unprepared to fight pandemic and could collapse at any moment. One of the reasons is the fact that instead of competent and responsible individuals, ruling parties appointed their members into these institutions. Being aware of their incompetence and lack of expertise, they started implementing restrictive and repressive measures. After they forcefully locked down people, they used the conditions of this "mini dictatorship" for cheap demagogy and populism, which on the one hand was founded on the "ideals of intervention state that saves us all, taking our own personal responsibilities on itself" (Čavalić 2020) and on the other hand, the ideals of police state which punishes freedom and rewards vassalage.

The people lockdown also meant putting the economy on a stand-by, which brought long-term negative consequences that were not taken into consideration by the decision makers. Ignoring the experts' advice, Governments in BiH did not timely react and bring measures that would prevent economic disaster. Upon the FBiH Government's proposition, the Law on Mitigation of Negative Economic Consequences was adopted but a month too late because by then, tens of thousands of workers had already lost their jobs and business entities were severely affected. Negative economic consequences which will affect BiH citizens for a long time showed us the danger of state interventionism and that "economic intervention, even the piecemeal methods advocated here, will tend to increase the power of the state" (Popper 2003).

Introduction of repressive measures for the BiH citizens meant replacing the already cracked democratic state with the police state. Non-functionality of democratic institutions, state interventionism and the usage of repressive measures led to acquisition and abuse of power by the government on the one hand and the deprivation of rights and liberty to citizens on the other.
In that regard we can see the truth in Karl Popper's words who said that the state as a necessary evil whose authority should not be multiplied more than it is necessary.

Conclusion

COVID-19 pandemic poses a threat for public health and human lives which prompted many countries around the world to declare the state of emergency. Governments around the world implemented measures which meant

limitations of human rights and freedoms. However, that often also meant the abuse of the state of emergency, misuse of powers, and proclamation of ideologies which are in conflict with democratic principles and represent a threat to human rights and freedoms. BiH as a country in transition, established on the politics of ethnocentrism, provides a fertile ground for political leaders to misuse their authority in the pandemic. Their actions showed once more that there is no rule of law in BiH, democratic institutions are not functional, state interventionism is destructive for the economy, and it also showed hidden autocratic tendencies of country's political leaders to establish a police state. In general, BiH is a country whose political leaders use it to gain power and maintain status quo on the expanse of human rights and freedoms. Overall, the continuance of the rule of law crisis, abuse of human rights and freedoms, and negative economic consequences during pandemic in BiH are just another proof that the state is a necessary evil and that state interventionism is always destructive for the economy. Reflecting on these events it is impossible not to conclude that Bosnian society is in a state of "self-incurred immaturity" (Kalanj 2005) and it is necessary to reevaluate existing values and develop real democratic country and society built on liberal values of the rule of law, minimal state, and citizen and economic freedoms and individualism. Events presented in this paper should in the words of Karl Popper be "warning that if we relax our watchfulness, and if we do not strengthen our democratic institutions while giving more power to the state by interventionist 'planning', then we may lose our freedom. And if freedom is lost, everything is lost." (Popper 2003)

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The vicious circle of life on the Romanian political scene

By Raluca Colojoară

ABSTRACT

Women, you cannot live with them, you cannot live without them. Generally, access to politics has had to pass a bumpy road for woman, starting with the right to vote and ending with their entrance to become politicians in the meaning's real sense. The following paper will try to make a brief presentation of the current situation of woman in Romania within this, we shall call it, *line of work*.

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1. Introduction

First step for woman's access to politics, and we are not going to go into the „behind every powerful man lies a woman" or „the man is the head but the woman is the neck"[429] which could be translated into the idea that even the though the man was the one in power the woman that was controlling him or had the power over him was the one in power, was granting woman the right to vote which was denied, for some, until 2015[430]. Taking a look at society in general today, women have to struggle for almost every fundamental right and freedom generally recognized for everyone. Even though they are not a minority special laws, conventions and treaties were and still are being created for them to access what is considered usual on a daily basis. The implementation of these is of another struggle, not only at national level but as well at international level.

At a conference held in Sarajevo on Woman, Peace and Security the subject on the position of woman, in that moment of woman with the politics of Bosnia and Herzegovina, had been raised. During the discussions my colleague and I had the feeling that they were actually talking about Romania, we were taken back to that current reality only by the, at certain points, mention of towns of Bosnia and Herzegovina, names of politicians we were not necessarily familiar with, etc., for the rest it was all like "back home" in our own courtyard. At that time, we had as Prime Minister Ms. Viorica Dăncilă representing the Social-Democratic Party, the same party that was in power within the Parliament, that after being elected in 2016 changed many governments and was challeneged many times on the streets of many Romanian streets and not only. Ms Dăncilă was, at that time, neither very know and nor very well seen at the national level. She was considered the tool of the, at time president of the Social-Democratic Party, Mr. Liviu Dragnea, currently imprisoned for acts of corruption. As such, even though Ms. Dancila was one of the first woman that had actually power and was actually in power, unfortunately her image was not the one we would hope for a woman in this line of work. She was considered week, sometimes even called stupid, she made some diplomatic mistakes, like the one when she was in Montenegro and confused Podgorica with Pristina, but these were not the main reasons she was disliked. Mockery or judgement of any politician is made no matter if they are woman or man, young or old, her main problem was her affiliation with the Party and especially Mr. Dragnea. Unfortunately this Romanian prominent political female figure is not the only one that has such a negative image, most of them do.[431]

2. Legal framework and provisions for inclusion of woman in politics

Romania is a country of opposites. It wants to be part of any international or regional conventions, treaties, organizations etc., but when it comes

[429] Romanian proverb/saying

[430] Last country to grant woman the right to vote was Saudi Arabia in 2015, while the first one was New Zeeland in 1893.

[431] Eg. Ecaterina Andronescu, Lia Olguța Vasiliu, Gabriela Firea, Elena Udrea, etc. on the other hand there as well positive figures that even though were attacked by the opposing and tried to be smeared, like Clotilde Armand, Monica Macovei, Cosette Chirchirău, or Laura Kovesi (not a politician but a prosecutor that fought crimes crimes of corruption committed by dignitaries)

to the *de facto* implementation of the rules or recommendations with the national legal system, the lack of political will starts showing its face. As such, sometimes either the international or European legal provisions are not implemented or when they are, it is *done just to be done*, and not to actually have the legal desired impact, but only to respect the minimum legal standards, required by different international or regional organizations, mostly in our case, United Nations, the European Union and the Council of Europe.

The most important international treaty that needs to be mentioned is the Convention on the Elimination of all Forms of Discrimination Against Women (*hereinafter* CEDAW) signed by Romania on 4th of September 1980, ratified on 7th of January 1982.[432] Due to its Constitution and the European legal framework that Romania is part of, it has the obligation to implement the international legislation it is part of. As such, Romania has to act in conformity with the UN convention and is obliged to "take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:
(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;
(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.
and
Article 8
States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to participate in the work of international organizations."[433]
By the time Romania was in full process of adhering to the European Union, the latter imposed a change of view on many levels, especially on the justice system and prevention of corruption and state of law but it brought next to other legal provisions to the revision in 2003 of the in 1991 adopted Constitution and brought changes, among others, to the electoral process in a context where electoral legislation had to be harmonized with EU law. Gender equality as equal rights was included in the Constitution. Currently, article 16 of the Constitution states that: "Citizens are equal before the law and public authorities, without any privilege or discrimination. (2) No one is above the law. (3) Access to public, civil, or military positions or dignities may be granted, according to the law, to persons whose citizenship is Romanian and whose domicile is in Romania. *The Romanian State shall guarantee equal opportunities for men and women to occupy such positions and dignities*.(emphasis added)". These provisions were followed by the adoption of Law no. 202/2002 on

[432] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4&lang=en

[433] Art 7 and 8 of the UN CEDAW

Equal Opportunities between Women and Men which promulgates, at least on paper specific provisions on equal opportunities and treatment for women and men in decision making.

It is being alleged that in Romania, "equal chances and treatment between women and men are fundamental human rights principal transposed at a legislative level as well as at the level of public policies"[434]. With that in mind we would like to present certain national legal provisions. As such, Law no. 202/2002 on Equal Opportunities between Women and Men[435] in Chapter IV - Equal Opportunities between Women and Men as Regards the Participation in the Decision Making Process states in art. 22 that "(1) The local and central public authorities, social and trading companies, as well as political parties and other nonprofit organizations, carrying out their respective activities on the basis on their own regulations, shall promote and support the balanced participation of women and men in the management and the decision making process. (2) The provisions of paragraph (1) apply also to appointment of members and/or participants in any council, group of experts and other managerial and/or consultative lucrative structures and in art. 23. that "in order to accelerate the achievement of equal opportunities between women and men, the central and local public authorities shall adopt incentive measures to afford fair and balanced representation of social partners within the decision-making authorities, observing competency criteria."[436] This Law is considered to have been adopted in order to assure the legislature harmonization with the European and international regulations on this matter.

In 2006 the Romanian Parliament adopted a new law 334/2006[437] on financial support for political parties and for the election campaigns, which included a provision on a certain financial help given to political parties and election campaigns that promote woman on the election lists. The law was envisaged to enable positive measures to increase the number of woman within the decision making progress, but created a a good loophole for certain. As such, article 18 on Public finances – subventions awarded by the state paragraph 2, reads as follows "the yearly amount awarded to political parties cannot be higher than 0,04% of the incomings envisaged in the state's budget. For the political parties that promote woman on their election lists, on eligible places, the out

[434] National Agency for equality of chances between women and men, Annex no. 1, National Strategy on promotion of equality of chances and treatment between women and men and the prevention and combat of domestic violence in period 2018-2021. Piller equality of chances and treatment between women and men, p. 12 https://anes.gov.ro/wp-content/uploads/2018/06/Strategia-Nationala-ES-si-VD.pdf

[435] Adopted by the RomanianParliament on 19 of April 2002, republished, published in the Of. Journal no. 326 of 5 June 2013

[436] Law Annex to Romanian report on Beijing +15, Romania Review and Appraisal in the Commission on the Status of Women in 2009, available at http://live.unece.org/gender/National_Reports.html

[437] Adopted on 17 July 2006, republished, Current text, http://legislatie.just.ro/Public/DetaliiDocument/73672

of stat's budget given amount will be increased in proportion with the number of mandates obtained by women candidates in the elections."[438] As such, on paper and by law, the parties would receive more money from the state if they would add more woman on their list. The main purpose of these laws was to encourage a higher participation of woman in the decision making at local and state level, but it opened as well the opportunity for parties to scheme the system and convince the "beautiful sex" to have at least on paper a bigger participation knowing that they will not have a real chance to get appointed or elected.

In 2018 the Romanian Government adopted the *National Strategy on the promotion of equal chances and treatment between women and men and the prevention and combat of domestic violence for period 2018-2021*.[439] Among the points to be reached and discussed within the strategy and of importance for this paper are:

- The adoption of a national plan of action for the implementation of the entire spectrum of Security Council's resolution no. 1325 of 2000 concerning woman, peace and security
- Upon appreciation by the Committee for the CEDAW on the rising number of women participating in public and political life and the legislative initiatives for the introduction of the gen quotas in politics, the following suggestions were made:

1. For an analysis to be conducted on the causes that prevent the participation of women in public and politic life
2. elaboration of strategies for the overcome of such barriers, especially for females pertaining to ethnical minority groups.
3. the implementation of chapter 4 of Law 202/2002 and to accelerate the growth of women's representation in leading and decision making positions in public local and central administration, including through the creation of formation courses for women on leadership abilities and the adoption of temporary special measures in conformity with article 4 para. 1 of CEDAW.

Mainly, the strategy has as action direction education, meaning that young people should be educated on what gender discrimination is and how it can be prevented. Second, it strives towards preventing gender stereotypes in the young community, the working market and health and of course gender-balanced participation at decision making and how to address and approach the gender integration. Interestingly enough, this year a very controversial law was passed that was actually forbidding gender discussions in school and even universities taking us back 30 years.[440]Currently the

[438] This article has been modified in 2018 http://legislatie.just.ro/Public/DetaliiDocumentAfis/196834

[439] Adopted by Decision nr. 365/2018 published in the Official Journal of Romania, Part 1, nr. 465 of 6 June 2018. http://legislatie.just.ro/Public/DetaliiDocument/203938

[440] See, Law 1/2011 art. 1 para. 1 al. e that forbids any exchanges of informations on gender. See e.g position of UNICEF on this matter. https://www.unicef.org/romania/press-

modified article is under revision by the Romanian Constitutional Court.
Next to these, Romania adhered at the UN Campaign *HeForShe* initiated by United Nations Entity for Gender Equality and the Empowerment of Women, Romania engaging in as well in engaging girls and boys in the social, politic and economic life through mobilizing 100.000 young people in order for them to become the next Romanian leaders and learn among others how to create effective public policies.

From all the legal frameworks it could be observed that the Romanian legislator and creator of public policies wished for the country's alignment with the European Union and international policies, trying to help with the European Council's and Commission engagement into equal chances for men and woman, gender equality and promotion of women's emancipation in political and economic life, considering their promotion in the decisional process very important and of priority, so that more women succeed in occupying decisional functions at high level.[441]

Before the 2018-2020 strategy tree more strategies were put into place and implemented. The 2014-2017 strategy included next to other points to monitor the equilibrate participation of women and men in at the decisional process, carrying out of studies/analysis on the equilibrate participation of women and men in the economic, political, social and cultural decision process.[442]

3. The outcome of all the legal frameworks, strategies and legislation on gender equality – in facts and numbers
Despite of all this legislation and strategies, and the promises made by the political leaders not many women made it in the Romanian Parliament in 2016 nor in the decision making process on local level. As such, the highest percentage was 23 respectively 52 females in total representing the Social Democrat Party and the lowest 8 from the Popular Movement Party representing 8 women in total for this party. In 2015 the National Liberal Party proposed a law on the gender quotas within the political parties urging that at the local and parliament elections 30% of the persons of the lists for each party to be compiled of women.[443] Similarly, before the Parliament Elections of 2016 the National Liberal Party together with other representatives of other parties had a initiated a legislative proposal[444] on gender equality on chances between women and men concerning women participation in election at a local and central level and the established quotas within every political party, presenting the situation at that time as some political parties have, based on law 346/2006, established voluntarily quotas but only in a declarative way and no concrete actions have been

releases/unicef-position-regarding-gender-identity-schools-and-universities
[441] See e.g. the EIGE report on the 2003-2015 on gender Equality in the political decisional process
[442] Annex 1 p. 13
[443] https://www.mediafax.ro/politic/proiect-pnl-listele-de-candidati-pentru-alegeri-invalidate-daca-nu-includ-femei-in-proportie-de-30-14923322
[444] PNL proposal https://www.mediafax.ro/politic/proiect-pnl-listele-de-candidati-pentru-alegeri-invalidate-daca-nu-includ-femei-in-proportie-de-30-14923322

taken, and as such, it had been proposed, as condition for the election lists for parliamentary elections to be approved, a mandatory minimum of a 30% quota of female representation. The legislative proposal was showing that at the time 55% of the student in universities were women but even so, they were underrepresented within the decision making process alt local and central level. Currently, no change has been brought to the law article 52 of law 205/2015 does not contain a minimum quota of representation.[445] At the end of 2016 parliament elections 375 of the parliamentary mandates were occupied by men and only 90 by women, resulting in only 19,35% of female representation for women within the legislative of Romania composed out of 465 MPs.

On the 2nd of November 2020 United Save Romania Party (USR) lodged in a new proposal[446] for the change of Law 208/2015, as well as 202/2002. The legislative initiative presented the current situation that in comparison with other countries in Romania women represent only 19,4% of the persons in politics, even though we do align with the European and International legislation. Until now, Romania is in the club of the countries that is using only the voluntary gender quotas while there are other countries that do not use any quotas (e.g. Bulgaria) there are countries that use the voluntary and the by law established quotas (Croatia).[447] The proposal explains as well the need of the of quotas that among others could help, in time at the change of mentality and attitude of political parties, towards a larger acceptance of women on the decisional forum. The proposal for the legal changes are envisaged as follows: Art. 22 para 3 of law 202/2002 republished by law 326/2013 shall have a new form, and shall envisage that the "political parties shall be obliged to envisage in their statutes and internal regulations positive actions in favor if the underrepresented sex at decision level, as well as to ensure an equilibrate representation of women and men with the proposal of local elections, general and for the European Parliament, on the eligible places." Article 22 shall have a new paragraph 3^1 the component of the election lists will be established in conformity with principal of proportional representation of sexes, depending on the distribution on sexes of population at local level and national, as it is reported by the National Statistics Institute for the proceeding election year." Paragraph 3^2 will be introduced with the following text "chance equality for occupying the eligible places are assured through the composition of the election lists so that it shall contain at least 2 candidates of the same sex consecutive." And there shall be a paragraph 4 establishing that the instuitions and structures envisaged in paragraph 1 and 3 assure

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[445] See article 52 para 2, Law concerning the election of the Senate and Chamber of deputies, as well as for the organisation and functioning of the Permanent Election Authority.

[446] USR Proposal https://www.ces.ro/newlib/PDF/proiecte/2020/b634.pdf

[447] https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwjV-qyMqrLtAhXwsYsKHbXUB7QQFjACegQIAhAC&url=https%3A%2F%2Fec.europa.eu%2Fnewsroom%2Fjust%2Fdocument.cfm%3Fdoc_id%3D50074&usg=AOvVaw3utWtG8Lntp1lfCf4PMbOa , see as well USR legislative proposal, 02.11.2020

a representation percentage of at least 30% for each of the two sexes, at all the decisional levels.
Having the above mentioned strategy in mind at the 2020 Parliament Elections the number of women on the lists has not risen very much. If in 2016 27,75% (1797) out of 6476 candidates were women, in 2020, the percentage has slightly risen but not enough.[448] Unfortunately only 88 women have been elected in 2016, which was better than the outcome of 2012 when only 11,4% of the persons elected were women, but even so the gap between women and men representation remained high.

At the local elections in the last eight years a change could be observed. As such, the participation on the electoral lists in 2016 was with 1,56 higher than in 2012. For maires in 2016 out of 14.051 candidates 8,42 5 (1183) were women and for the local council 22,11% of the total of 239134 candidates were women - 52.877, while unfortunately for the county councils there was a slight decreas of 0,65 percentual points – only 3089 women entered the election race for a county council position, out of 14057 candidates resulting in only 21,97%. Within the European Parliament Romania's representation is composed of around 22% of women. As such the USR legislative proposal is trying to implement a voluntary but as well legal quota participation within the parties.

In 2020 on the other hand in comparison with the local elections where 22,9% were women, the participation percentage at the parliamentary is of 29,5 out of 7.136 candidates,[449] almost reaching the envisaged minimum target.

Though it had little impact as Marianne Mikko, head of the ODIHR special election assessment mission representative in the Romanian elections observed in her statement made after the parliamentary elections: "A complex and inconsistent legal framework covering different elections has created uncertainty about procedures and requirements. Adopting a unified election code would be a big step forward for Romania in improving its election process."[450] Nevertheless Ms. Mikko observed as well that "Gender-disaggregated data for the candidate lists was not publicly available. A research carried out by a civil society organization indicates that women candidates made up some 29.5 per cent of candidates on party lists. This was only a 1.75 per cent increase from 2016, despite a legal incentive to field woman candidates introduced in 2017. While the law provides that candidate lists should include both genders, it does not set an enforcement mechanism for non-compliance, and there was no consistent interpretation of the provision. Six registered lists did not comply with this criterion and had no women represented on their lists. Women were generally underrepresented in elected office, and parliamentary parties met by the ODIHR SEAM stated that they had no internal policies to promote women

448 https://expertforum.ro/participarea-femeilor-parlamentare/ and https://expertforum.ro/wp-content/uploads/2020/11/EFOR-candidati-alegeri-parlamentare-2020.pdf

449 https://expertforum.ro/harta-candidatilor-parlamentare/

450 https://www.osce.org/odihr/elections/472887

candidates."[451] Interestingly enough, the news media that covered Ms. Mikko's statement firstly observed her statements on the lack or poor women representation in the election process and in the general process of decision making, that there is a slow movement of including women in a higher manner in the decision making process and that the key words would be a unified election code and a higher representation of women in the election process.[452] Further on Ms. Mikko stated that it was notable that women representation was below 30% which as she observed is one of the lowest in Europe and was only slightly higher than it was in 2016.[453]

Unfortunately, the 2020 elections were a great disappointment for almost everyone involved. First because of the lowest presence ever seen, only 33,3% of the citizen with voting right voted, meaning out of 18.1919.396 people with voting right, only 6.058.625 actually voted, and out of these, around close to three million were women and only 25% of the youngster out of the total number of young people (18-34 years old) with voting right voted, and out of these the female presence was very low as well, only 24,79% of the total young women came to vote. Second, due to the low presence the socialist party, the one hated since January 2017 actually won the elections and the entry of the AUR (translation: gold) – Alianţa pentru Unirea Românilor (Alliance for the Romanian's Unification) Party, an obscure, with nationalistic going towards fascistic ideas, ruled by even more obscure persons, in the Parliament.[454] Unfortunately one of the women that is part of this party and that has won a seat in the Parliament is not the best representative of her gender. She is a very vocal lawyer, with a not that diplomatic language.

Generally reasons invoked for not voting was: I did not have with whom to vote, I could not vote where I was and dd not have the means, time wise or money wise, etc.. Due to the low number of people that actually went voting the first real reason, we can think of, is the lack of education on civic duty and the importance of the elections. Generally one person votes around 15 times in the parliamentary elections and almost as much in the presidential and local elections. As such ,one person goes around 14 times to vote his/her president and around 15 times in a lifetime to vote for the parliament and the local

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[451] ODHIR Special Election Assessment Mission, Romania – Parliamentary Elections, 6 December 2020, Statement of preliminary findings, https://www.osce.org/files/f/documents/4/9/472812_0.pdf, p. 4

[452] https://www.agerpres.ro/politica/2020/12/07/parlamentare2020-sefa-misiunii-odihr-lipsa-unui-cod-electoral-unificat-si-prezenta-redusa-a-femeilor-principalele-carente--623523 and https://www.digi24.ro/alegeri-parlamentare-2020/reprezentanta-osce-despre-alegerile-din-romania-legislatie-modificata-prea-aproape-de-alegeri-prea-putine-femei-candidat-1414057

[453] https://www.agerpres.ro/politica/2020/12/07/parlamentare2020-sefa-misiunii-odihr-lipsa-unui-cod-electoral-unificat-si-prezenta-redusa-a-femeilor-principalele-carente--623523 and https://www.digi24.ro/alegeri-parlamentare-2020/reprezentanta-osce-despre-alegerile-din-romania-legislatie-modificata-prea-aproape-de-alegeri-prea-putine-femei-candidat-1414057

[454] On this party see, https://www.euronews.com/2020/12/08/how-a-far-right-party-came-from-nowhere-to-stun-romania-in-sunday-s-election and https://www.rferl.org/a/romania-aur-right-wing-party-simion-voter-despair-nationalism/30990719.html

representatives such as Maire and local and county counsels. We stress a lot on the parliamentary elections as in Romania the Parliament is the one that proposes the prime-minister and based on this proposal that has to be accepted by the President the government, meaning the executive power, is formed. In conclusion, the Parliament who is the legislative power is the one that creates the executive. Unfortunately not even this basic rule is known by everyone nor is it being thought in school. Political science is being thought only in faculties of political sciences, administration or law, and is almost inexistant in the years before university. As such, if there is no civic and political culture or education what can we ask for from the current Romanian society? Based on a survey made by *Deutsche Welle Romania*[455], the profile of the voters were the following: the USR-PLUS party had the highest percentage of voters with university or above studies, while AUR and PSD the lowest - between 8-9%, showing us how important education is.

But who and/or what is to blame for such a low representation of women in the decisional process at local and/or national level?

Reasons for the lack of woman's participation within the Romanian political life are many. Even though in the past we were an emancipated country for those times, e.g. in 1866 Romanian Universities allowed women to be their students, and even though they did not have the right to vote they were part in the political life. The right to vote was given to them in 1918 but could have been exercised starting only with 1929. Unfortunately, even though during communism equality was sustained in many cases it was not for the right reasons, being used as a propaganda until 1989, and the promotion of women in politics was made based on a limit quota proportional with the decisional power of the communist organism. After the fall of the Communism Regime, the political representation of women fell under 6% even though due to the political change, the legislative is starting to have a real and active role in governing and conceiving the politics. The issue on the lack of female representation in the decision making process, started to be actually raised, discussed and debated, at the start of the process of adherence to the European Union. As it could have been observed from the legislative framework shortly presented before, it was not until 2002 until Romania made some real steps on this matter. Because there was no strategy on the implementation of gender equality after the fall of the communist regime in Romania, the number of the female protagonists on the governing stage of the country has dramatically and drastic fallen, and it took the country 10 years, to start implementing an education on gender equality on the work level. Because during communism women's participation on the political scene was not necessarily willing, it was as we already pointed out mandatory, but it was imposed so that the ruling party would show that they are *obeying* the international regulations and they are a very progressive party in comparison with the others. After the fall of the

455 https://www.dw.com/ro/care-e-profilul-votanților-partidelor-câștigătoare-și-cum-a-reușit-aur-marea-surpriză-electorală-interviu-spotmediaro/a-55878683

communist women started to follow their own path. They tried to be taken in account on another level, mainly to get jobs within companies, study and rise on a personal level and were not that interested in politics. It is only later, after 2000 when the interest for politics rose. As such, after the fall of the Communist Party women became more focused on their participation on the labour market and gaining more economic independence. Only a few years later they realised that in order to be able to gain all this and be somehow able to have an equal position with men they need to be more focused on the policies of gender equality and in order to reach this goal they need to actually get involved in the decision making process - politics.
Other reasons for the lack of women participation are many, starting with will and ending with possibility or opportunity. Unlike in other countries in Romania women still struggle to be taken seriously when reaching or striving to reach a higher position in their line of work. Discrimination on gender lingers at many corners, not only in professional life but as well on a personal level many women feel they are not treated as an equal, being forced to, in comparison with men, in many cases, have to work double to achieve the striven goal.

We are of the opinion that another reason that is intrinsic linked to the lack of education is the "almost" inexistent transition in Romania, leading to such a low rata of woman in politics, as it has not been thought to the new generation that emerged after communism that there is a need of female presence in politics and that their participation on this stage does not need or have to be just something rather *staged*, and that equal gender participation can bring to a balanced politic and the country change.

4. Image of women in the Romanian politics

All in all, their image is not the best one, and unfortunately we cannot blame it all only on the stereotypical view: the woman's place is at the pot and not in politics but as well on how they created and establish their image, and what their final goal was and how they managed when they actually got the "job". Usually they are seen as an extension of the man that put them in that position, being controlled by them and finally vanishing from anyone's sight, getting lost in the crowd and being remembered only as the ones that were there and did all these dishonest things, like changing laws or embezzling money.[456]

Further on we shall give some examples. Ms. Viorica Dăncilă, former Prime-Minister and at that time leader of the socialist party was the 2019 party's presidential candidate. Needless to say that almost all the votes she received were for the party itself and not for her as a politician as we already mentioned above she does not have a very good image or reputation. Since 1990 there were only 7 women that advanced their candidacy for becoming Romania's president, but none of them succeeded. It is though important to mention that some of them are still very known on the political scene. Some have a

[456] Elena Udrea, the extention of former president Traian Băsescu, Viorica Dăncilă of Liviu dragnea or Ligia Olguța Vasilescu of former president of the nationalist Romanian Party (now dead) Partidul România Mare, Vadim C. Tudor

controversial past like Ms. Udrea, who used to be a former fugitive with refugee status in Costa Rica, convicted for crimes and later on released on a technicality. There was an extradition request issued in her name and she was apprehended by Interpol together with Ms. Alina Bica – former prosecutor and ironically former chief of DIICOT, who was a fugitive as well in Costa Rica. Another female figure in the Romanian politics that need to be mentioned is Ms. Monica Macovei former prosecutor and European deputy, and mostly her image is of love or hate. In 2019 a candidate for presidency Ramona Ioana Bruynseels was ridiculed for alleging that both Romania and Russia are NATO members. As her, many other women in politics have made public statements that were incorrect or have been ridiculed for other mistakes or behaviour that they had.

We constantly stressed on the lack of education. This system is considered to have been severely crippled by the Ministry of National Education and Research, and the only way to reform it would be the implementation of a severe reform of the system which would be able to bring it towards the western system. Unfortunately the budget of this ministry is very small and it is hard to do something without money, and next to this the actual situation of a crippled education system for which is always Ms. Ecaterina Andronescu former Minister for Education blamed. The current Minister Ms. Monica Anisie, does not have a good image either, and not only because she decided to close the schools due to the pandemic and keeping the children at home impeding the parents to go to work, having an impact on their professional and personal life, or that she promised tablets for children that she never delivered, but for cancelling the olympics and semester exams. But the former is actually considered as being the one that broth the educational system to this stage, by for example easing the baccalaureate exam, the creation of many obscure universities, etc.. She has been shamed as well by a German newspaper for plagiarising her PhD thesis and finally for money loundering in a case involving Microsoft. Both of them are crippling not only the educational system but as well the Rumanian language, and neither of them were interested on a real reform, leaving it to fade. No wonder parents have to pay private classes, no wander when growing older the youngsters want to leave the country as soon as possible to study or just to leave the country and earn money.

On how women who work in politics feel when at work, the responses are not very cheerful either. First of all based on their recounter their feelings are that next to being underrepresented, they are undermined and underappreciated, discriminated and finally that within their line of work there is a lot of misogynism. It needs to be mentioned that after the 2016 elections women felt that the fields within the parliament are firstly shared between men and only after women get the opportunity to be "invited in commissions like: equality for chances or work …"[457]. This is the case of the Defence Commission where there is no women

[457] https://pressone.ro/cum-e-sa-fii-femeie-in-parlamentul-romaniei

to be found. While at work the male colleagues make inappropriate jokes and are not embarrassed to share their thoughts on how they view women. In 2017 a male deputy had a very misogynistic and discriminatory behaviour towards a female colleague from another party (a verbal fight between the socialists and the newly established party Union to Save Romania) not even the female colleagues were very upset with their male colleague's behaviour, blaming the victim of verbal attacks for inciting him. It was, and maybe still is, astonishing to observe that not many women from the parliament or in politics have taken Ms. Cosette Chichirău's side in that matter but have chosen either to be silent either to somehow turn the situation around in favour of the verbal aggressor. But, this article is not of whether he or she were right but is about what the real position women is in Romanian politics and we cannot say it is the best. We have come to the conclusion that there are two categories of women that prevail. First is the one that is striving for a real carrier in politics, built on their own and that believes that their presence could change the course of Romania's trajectory and the second one is the old school position, just being there "obedient of the master" …. . Why do we state this? Because not only are the latter being led, as far as it can be observed at work, buy the male figures of the party they belong to, but they express the views of those, even if they are against of their own beliefs.

The incident was not shared because we believe that only one side was wrong, it is not our purpose to express personal and subjective views on this matter but was detailed because it gives insides on a specific mentality. As such, even if prorogued no one showed reach how this dignitary reacted in front of the entire parliament, and neither should have his other colleagues, irrelevant of their political colour, just stand buy and not do anything. In an interview given in February 2020 the Ms. Chichirău explained that men consider women sometimes as an ornament in the Parliament and that the misogynism is as present in the Romanian Parliament as it is elsewhere in Romania, just that it is very difficult for a woman to have such a position but it is better than for other female persons that work in the public service because they lack the protection awarded to the function of deputy or senator.[458] The youngest female deputy within the Romanian Parliament, Mara Mareş, is of the opinion that the biggest discrimination she has to endure is the one of her ages, as she started her mandate when she was 24 years old, but confirms the opinion that if within the parliament there are cases of discrimination "we should think that within the society is actually worse"[459] and believes that it is irrelevant what political colour one has, the misogynistic and discriminatory behaviour is not about the power one has but about education. In agreement with the above mentioned is as well a PSD deputy Maria Mînzatu, who was surprised to observe that at such high level of representation the misogynism dose is higher then she could observe within her previous professional and political activity, and that within the Parliament "things are being separated and that a women had many times more the need of more resources in order for her to convince of the

[458] *idem*

[459] *ibidem*

seriousness of her approach or to make her voice heard"[460].

Next to the above, not many times women had legislative initiative on women's rights, harassment, children's rights, etc, but even though there was a solidarity between women from different parties, they were treated with superiority by the male deputies and ironized by them, their projects on these subjects were considered not as important and not prioritized, and sometimes as shown above, there is a lor of verbal violence. The lack of education and the existing culture in Romania that actually encourages misogynism is another reason why some female deputies feel that women are undermined.[461] Ms Presadă and Ms. Chichirău, both from USR, in opposition with Ms. Mînzatu, declare that there is actually no solidarity between women in the Parliament but exists within a Party (at least here). Mostly, the opinion is that women are either ridiculed, either objectified and even swore at when there is a conflict, and that there are always sexist remarks. It had been observed that when a women comes with an idea that is being expressed after by a man as well, it's always the man named for the idea and not the women. Unfortunately even the female representative do not realise that their vote is as important as a man's and that they have been chosen by the population just as the men. The same deputy in this case, Ms. Podaşcă observed the gap that exists when after elections deputies and senators are being divided in commissions. Respectively men go to the Budget, Economic and defence Commission, after being asked where they want to be seated, while women are send to the labour commission or equality of chances commission. Ms. Podaşcă declared in February 2020 that at that time there was no women in the Commission on Defence Matters, and that she finds it hard to find that there is no women interested in those issues, and so are we intrigued of such a case as at an MA studies on Global Security Studies for example you find many female representatives. Another person interviewed by Maria Tufan and Ioana Epure in their article "Cum e să fii femeie în Parlamentul României" [462] was Ms. Izabella – Agnes Ambrus from UDMR Party who is of the opinion that there are stereotypes that can be easily observed, like man always look at how women are dressed so they always have to preserve the formal dress-code, on certain subjects like domestic violence there is a solidarity between the women form different parties, nonetheless generally it is harder for a women the make herself heard in the Parliament. Ms. Ambrus raises as well a very good question. As she is not that concerned with the household there must be someone that does all the house chores, however how many are willing to help a women raise on a professional level? And it is true, as mostly, next to the professional life women are very involved in the household chores, because this is the mentality most Romanian women are raised with. As a conclusion Ambrus assumes that there are not enough women in the Parliament and that it is really not easy to be a women in this decision making process, and finally that if there would be a 50-50 quota of men and women in

[460] *ibibidem,* n.t.

[461] https://pressone.ro/cum-e-sa-fii-femeie-in-parlamentul-romaniei Florina Presadă

[462] „How it is to be a woman in the Romanian parliament" https://pressone.ro/cum-e-sa-fii-femeie-in-parlamentul-romaniei

this process there would be more calm and the political discourse would be more based on the construction of the future and debates that could actually project the future and encourage collaborations.[463]

All in all as it could be observed from the presented stories, women still feel undermined, and even if with time the situation gets better, the first experience recounted was that they had to struggle to make themselves visible and heard and especially taken serious. Education is actually, in the end, the strong point of any discussion. It depends on the person if he or she wants to be educated or not, and if he or she wants to keep the views as thought or wants to change.

Generally, when we speak about woman and their position into political order most of us think of it from the gender gap matter, from the discrimination point, the sociological and political implementation, etc., but few think at it from the legal point of view or even the transitional justice system that most of the Central-East European Countries had to go through. Comparing the Central-East countries to the Western ones it needs to be understood that the history and their evolution in the last three decades has been different. It can be observed that while in the western countries the participation and position of women was encouraged and not stigmatised because of their gender, in most East European Countries woman have always been regarded as the weak gender, the ones that should be concerned with getting married, having children and taking care of the household while the man, as in the real sense of patriarchate go to work and provide. As such, woman were even after the 90ies still perceived as those that do not understand politics (nor football)[464] as they are too fragile, narrow-minded, sentimental or any other way that does not fall in or comply with being a politician and being able to rule something in that area. Of course we do not sustain that everyone thinks like that. Of course woman like current female president or chancellor were given as examples to be followed and that maybe if there were more women like those in politics everywhere the world would be a better place.

5. Conclusions

To conclude, even though the present is not very optimistic when it comes to the female presence on the Romanian political stage, education is the key for change. Educating people not only during university years, and not only within political sciences, administration or law faculties – as the students have already made up their mind with following some classes on political education and inclusion but as well during high-school, and as such not only the mentality of people might be changed in the future but as well Romanian's political future as well. Female politicians like Jacinda Ardern or Sanna Martin will become with time role models for many young girls, that is if they get to be interested in this filed.

Unfortunately, the current crisis created by COVID-19 might have another very unfortunate impact on our lives, not just the health and

[463] https://pressone.ro/cum-e-sa-fii-femeie-in-parlamentul-romaniei

[464] Usually heard in Romanian households

financial one, but it might setback and "erase "recent fragile" progress towards gender equality and (…) "Unless we act now, COVID-19 could wipe out a generation of fragile progress towards gender equality,""[465] Anita Bahtia, UN representative stated that everything was achieved in 25 years could vanish in one year because of the pandemic, as women are more focused on house chores and taking care of the families, which might set them back to the '50 stereotypes.[466]

[465] UN Secretary General warned in september 2020https://news.un.org/en/story/2020/10/1074452

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