

BALANCING EXTERNAL INFLUENCE AND PUBLIC PARTICIPATION IN CONSTITUTION-MAKING: LESSONS FROM BOSNIA AND SRI LANKA

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ABSTRACT

This study critically examines how external actors influence constitution-making processes, emphasizing the necessity of public participation for ensuring the long-term legitimacy and efficacy of constitutional frameworks. It contrasts the Dayton Peace Agreement's prescriptive international intervention in Bosnia (1995), which established a consociational federal structure but faced challenges due to insufficient local commitment, with Sri Lanka's 13th Amendment, influenced by external pressures despite being internally drafted. This amendment aimed to devolve power to Tamil-majority regions. However, it failed to garner support from both Sinhalese and Tamil communities, highlighting the limitations of externally driven constitutional initiatives. The study underscores the importance of balancing external influence with genuine local engagement to achieve procedural legitimacy and address complex sociopolitical dynamics, advocating for inclusive constitution-making processes that empower all internal stakeholders to foster shared political identities and sustainable peace.

Key Words: Constitutional settlement, Authoritarian, Liberal Democracy, State building, Public Participation, External Interference

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[State-building in Bosnia] was a watershed experience. Aware of the powers of the High Representative to impose laws and remove obstructive officials, both. . . Bosnian intellectuals and international observers. . . demanded that I extensively use such powers. . . 'You have to impose the right solutions', I heard repeatedly. However, to my mind, 'imposing' democracy and civil society seemed contradictory. However, during the first one-and-a-half years of my mandate, I had to act as the most interventionist high representative ever.

Wolfgang Petritsch, High Representative in BiH, 1999–2002

1. INTRODUCTION

Constitutions are not drafted in, nor do they exist in a vacuum. Internal forces and external factors also contribute to and influence the constitutional making of a state. In recent years, the nature and extent of external influence over domestic constitution-making have deviated from what they were in the past. The primary drivers of the current phase of constitution-making have been the transition from authoritarian rule to a form of broadly liberal democracy, peacebuilding in the wake of intra-state conflict, or both. Conquest and colonization are no longer options and are replaced by other external factors that affect the constitution-making process and its contents.¹ In some cases, external involvement is justified by reference to international peace and security when problems internal to a State have external effects to which a constitutional settlement is seen as a partial solution.² In these cases, external involvement may be

¹ Cheryl Saunders, 'Constitution Making in Asia' (2019) *The Chinese Journal of Comparative Law*, Vol. 7 No. 2, 254, 255.

² *ibid.*

prescriptive. In other cases, external influence comes as the extension of soft power. However, in both instances, any settlement prescribed or otherwise influenced by external forces fails at worst or is ineffective at best if it does not involve the participation of the general public.

This study delves into the pivotal question of how external influences and public participation shape the legitimacy and effectiveness of constitution-making processes in deeply divided societies. Specifically, it seeks to understand whether international involvement contributes positively or adversely to long-term stability and legitimacy. Employing a comparative case study methodology, this research focuses on two significant examples: the Dayton Peace Agreement of Bosnia (1995) and the 13th Amendment to the Constitution of Sri Lanka. By analyzing primary and secondary sources including official documents, academic articles, and reports from international organizations, the study aims to uncover the impact of external actors on constitution-making and the critical role of public participation in ensuring legitimacy and effectiveness. It also considers other pertinent cases such as the rejection of the Draft Constitution of 2000 in Sri Lanka to provide a comprehensive analysis of consensus-building efforts. Through this approach, the study aims to identify patterns that determine the success or failure of external interventions and elucidate the importance of local participation in fostering sustainable constitutional settlements.

This study also discusses the importance of public participation in any settlement imposed or impelled by external forces in light of the 13th Amendment to the Constitution of Sri Lanka and the Dayton Peace Agreement of Bosnia in 1995.

2. THE DAYTON PEACE AGREEMENT OF BOSNIA IN 1995

Bosnia and Herzegovina (BiH) provide the classic example of a prescriptive settlement to solve ethnic crises and its limitations. Whilst Bosnian society would have been worse off without the international community, it also clearly illustrates the shortcomings of a domestic settlement by international actors.³

BiH is a splinter of a failed state, the former Yugoslavia, which fragmented itself as a result of the irreconcilable agendas of national self-determination released by the downfall of the Yugoslav framework.⁴ Carl Bildt, the first international high representative to supervise the nation-building process in BiH, stated that the international intervention in BiH after Dayton seeks to 'set up a state on the basis of little more than the ruins and rivalries of a bitter war'.⁵ The central question at the end of the war could be surmised as follows:

How, after a conflict, the living together of different groups can be organized and guaranteed within the same territory, and can federalism be a means to do so while at the same time preserving the unity of state (which is often contested)?⁶

The two initial plans failed, namely, The Carrington-Cutileiro Plan, which focused on devolution, of February 1992, and the Vance-Owen Peace Plan, which emphasized the 'canonization' of Bosnia. The Owen-Stoltenberg Plan of August 1993 foresaw the division of Bosnia into three

³ Samantha Bose, 'The Bosnian State A Decade After Dayton' (2005) *International Peacekeeping*, Vol.12, No.3, 322–335.

⁴ *ibid* at 324.

⁵ C. Bildt, *Peace Journey: The Struggle for Peace in Bosnia* (London: Weidenfeld & Nicholson, 1998) 392.

⁶ Soeren Keil, *Multi-national Federalism in Bosnia and Herzegovina* (Southeast European Studies, Ashgate, 2013) 232.

units: one Bosniak, one Croat and one Serb. According to this plan, the central government would have limited powers, and the three units would have been the leading carriers of sovereignty and decision-making powers. In the end, however, Contact Group developed a Plan in 1994, which later formed the basis for the Dayton Peace Agreement in 1995. According to the Contact Group Plan, a federation of BiH would be established under American mediation, which would control 51 per cent of the total territory, and the Republic of Sparska would consist of 49 per cent of the total territory. Furthermore, the plan also envisaged strict power-sharing mechanisms at the central level to guarantee the participation and protection of all three significant ethnicities of the state.⁷ Hence, the final model adopted combined consociationalism and federal theories.⁸

The major problem with the final solution is that it was distinctly an international idea rather than a national one, as required in the proper state building in a multi-national state. For consociationalist federalism to work correctly, the multiple ethnicities it tries to accommodate must be committed towards the federal idea. Thomas Franck has described this commitment to the standard federal state as follows:

[F]or a federation to be able to resist failure, the leaders, and their followers, must “feel federal” – they must be moved to think of themselves as one people, with one, common self-interest-capable, where necessary, of overriding most other considerations of small-group interest. [...] This, then, is

⁷ F Bieber, "Ethnicity and Territory in International Peace Proposals in the Former Yugoslavia" in *Constitutional Dimensions of Cultural and Territorial Pluralism in the Balkan*, ed. J. Woelk, (The Hague: Martinus Nijhoff /Brill, 2010).

⁸ Ronald Watts, *Comparing Federal Systems* (Montreal and Kingston: McGill Queen's University Press, 2nd edn, 1999), 6.

tantamount to an ideological commitment not to the federation as means [...] but to the federation as an end, as good for its own sake, for the sake of "answering the summons of history."⁹

Similarly, Riker argues that the federal solution is a political discussion about the state's future nature of the state, and the strength of the federal state will be determined based on the strength of the participants in the negotiations, who are often local and national elites. He also lays down two main reasons for the elites to agree on a federal state *vis* external threat (e.g., foreign invasion) and the prospect of territorial expansion coupled with economic incentives through federation.¹⁰ The Dayton Agreement, however, needs to fit into this neatly, for the Bosnian federation is not an attempt to ward off foreign influence, nor is it to take advantage of economic and territorial expansion. Instead, the international actors saw federalism as the only solution to guarantee BiH's territorial integrity and manage conflict between the three major communities. Furthermore, the continued existence of BiH was seen as the optimal method to stabilize the Balkans, and the use of federalism within BiH was seen as the best way to pacify the country.¹¹ Hence, the advent of the Bosnian federation was seen as an effective way to address the war in the region and ensure that BiH continued to function as a sovereign state, making 'peace-keeping' the main goal of the federal settlement.

All of this meant that the state-building of BiH was left bereft of strong internal consideration mainly because of the lack of efficient and meaningful participation of the national actors in the constitutional

⁹ Franck, Thomas, 'Why Federations Fail' in Franck, Thomas (ed.): *Why Federations Fail: An Inquiry into the Requisites for Successful Federalism* (London University Press: London 1968) 167-200, 173-4.

¹⁰ William H. Riker, '*Federalism*', (3rd edn, Little, Brown and Company, 1964) chapter 1.

¹¹ Soeren Keil, (n 7) 127.

settlement. Indeed, the Bosnian political scientist Mirko Pejanovic has characterized the involvement of international actors as the “Internationalization of the Bosnian question”.¹² Moreover, Sumantra Bose has rightly formulated that Bosnia is “a state by international design and of international design”.¹³ Bosnia's federalism is, therefore, classified as ‘imposed’ because none of the three national groups preferred a federal solution in 1995.¹⁴

The lack of commitment to the standard federal state became apparent shortly after the Dayton Agreement. The state hardly functioned shortly after 1995 for reasons of internal disagreements, obstructions, and lack of political progress. Economic reforms and infrastructure development were hampered or blocked. The political elites of the disparate communities refused to meet, and there was no progress between 1995 and 1997, resulting in the appointment of the High Representative (HR) to oversee the civilian elements of the Dayton Peace Agreement.¹⁵ The period between 1998 and 2005 saw some progress, particularly with regard to the engagement of the political elites, but all of it broke down after 2006. Since 2006, BiH has been in a phase of permanent crisis. The local elites have blocked each other. The representatives of the Republic of Srpska, in particular, have become radical in their demeanour while the international community who laid the foundation for the federation started to withdraw.

¹² Mirko, Pejanovic, *The Political Development of Bosnia and Herzegovina in the Post-Dayton Period* (Sarajevo: Sahinpasic, 2007).

¹³ Sumantra Bose, *Bosnia after Dayton (Nationalist Partition and International Intervention)* (London : Hurst & Company, 2002), 60.

¹⁴ Soeren Keil, ‘Federalism as a Tool of Conflict Resolution: The Case of Bosnia and Herzegovina’ [2012] *Centre internationale de formation européenne*, 213.

¹⁵ C. Bildt, *Peace Journey* (The Struggle for Peace in Bosnia) (London: Weidenfeld and Nicolson 1998).

Although the European Union has been attempting to regulate and guide the new young state, it has generally failed, mainly due to a general lack of progress.

The lack of involvement of internal actors in the initial state-building still continues to have repercussions regarding the very nature of the state itself. While Bosniaks prefer centralization and liberal democracy, Serbs and Croats demand a further strict power-sharing system. Croats demand a territorial change and a third entity dedicated to Croats be recognized, while Serbs demand further autonomy and veto rights in the joint state. All of this contestation has resulted in Bosnian Serbs threatening several times secession as a last resort. Hence, although the prescriptive nature of the Dayton Agreement has ensured peace in the region for the time being, it has failed in state-building.¹⁶ In 2014, the Crisis Group of the European Union remarked that “[t]here is no consensus on where to start (the political progress), but Bosnia may have to break from its political system based on constituent peoples and their rights”.¹⁷ All agree that the fundamental problem is the lack of consensus among the BiH communities regarding the reform process and a common vision of the state.

2. THE THIRTEENTH AMENDMENT TO THE SECOND REPUBLICAN CONSTITUTION OF SRI LANKA

The 13th Amendment to the Sri Lankan constitution, which introduced a devolution scheme to Sri Lanka, also offers insight into the political settlement impelled by external actors. Although the 13th Amendment was

¹⁶ Soeren Keiln, (n 7).

¹⁷ Crisis Group, Bosnia's Future, Europe Report N 232, Available at: <http://www.crisisgroup.org>. Accessed 10th July 2024.

drafted and adopted internally by the Sri Lankan government and cannot be categorized as a prescriptive settlement in the strict sense like the Dayton Accord, the foundation of the devolution scheme illustrates the pitfalls of a political settlement influenced by external forces.

The Indo-Sri Lankan Accord of 1987, which is often overlooked by domestic scholars in discussions surrounding the viability of the 13th Amendment, laid the foundation for the devolution arrangement brought in by the 13th Amendment. Both the majority forces at the time and the minority forces – pre-dominantly spearheaded by Liberation Tigers of Tamil Eelam (from now on referred to as LTTE) vehemently opposed the devolution arrangement. The former thought that it was an attempt by the Indian government to influence the internal affairs of Sri Lanka and imprint its ideologies inside the island and involved too much power sharing, and the latter opposed it as it had moved on from the quest for internal self-determination to secession as the last resort.¹⁸ It is indisputable that the devolution scheme has been an abject failure since its inception. This paper focuses mainly on the two factors that contributed to it: external influence and the lack of meaningful local participation.

The Indo-Lanka Accord impelled the Sri Lankan state to recognize the island's North and East as the Tamils' traditional homeland.¹⁹ Moreover, it obliged the state to guarantee a power-sharing mechanism for the Tamils in the area.²⁰

The Accord itself is the result of the desperate attempt by then President J.R. Jeyawardena to curtail the armed rebellion of the Tamil militant

¹⁸ Lakmali Manamperi, 'Factum Perspective: India's grand bargain on 13th amendment continues' *Newswire* 24/10/2021.

¹⁹ Indo-Sri Lankan Accord (1987) Clause 1.4.

²⁰ *ibid*, Clause 2.

groups and the pressure put forward by the Indian government since the start of the Timpu Talks. Edirisingh states the following about the Accord:

The Indo-Lanka Accord marked the high point of Indian intervention in Sri Lanka's domestic affairs. It not only pressured the Sri Lankan government to introduce substantial constitutional and political reform, but it also laid the foundation for an active Indian military presence in the country... At the time of signing the Accord, there was strong public opposition, particularly within the Sinhalese community, to what was seen as Indian bullying.²¹

Naturally, the majority of the community of the island is negatively pre-disposed towards whatever they feel, alien or external. This was exacerbated by the fact that in the drafting process of the 13th Amendment, J.R. Jeyawardena's government chose the shortcut of the quick solution by a simple amendment instead of a lengthy deliberation on power-sharing required in a state with multi-nationalities. This is evident from the fact that the drafting itself did not involve much public participation, and the government did everything it could to avoid a referendum as it was unclear whether the Sinhalese majority would accept the devolution scheme.²² No conciliation between the majority community and minorities took place with regard to the nature of the state, the extent of the power to be shared and the scope of the settlement. Naturally, both communities felt that although the settlement was drafted internationally, it was nevertheless forced upon them, mainly due to Indian intervention. A careful reading of the 'Interim Report of the Sinhala Commission (1997)

²¹ Edirisinghe et al, *Power-Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008* (CPA 2010) 353, 354.

²² *ibid* at 360.

and the 'Report of an Independent and Representative Committee (2003)' exemplifies how the majority community feel towards the 13th Amendment in general and the Indian intervention that led to it in particular. It must also be noted that the committee that proposed the latter report was chaired and co-chaired by two retired Supreme Court justices of the island.²³

Since the end of the armed conflict in 2009, the Tamil political parties have been willing to receive the full implementation of the 13th Amendment as a bargaining point upon which future power-sharing could be developed. The majority community, however, feels that the main incentives that impelled the devolution scheme have dissipated - government lethargy to rectify the election procedure for the Provincial Councils introduced by the amendment and conduct elections.

4. THE INFERENCE

It is submitted that there is a correlation between the actors involved in political settlement and its strength.²⁴ The more external influence there is, the more likely the settlement will be focused on the short term.²⁵ This is indeed true in both BiH and Sri Lanka. In the former, it was to preserve the peace in the region. In the latter, it was to cripple the armed insurgency of the Tamil militant groups.

Neither were intended to be long-term solutions. Even if they were, the context in which the settlement was made is clear, that once the

²³ See IRC, *A Case Against A Federal Constitution for Sri Lanka* (Report of an Independent and Representative Committee 2003).

²⁴ Cheryl Saunders (n 2) 260, 261.

²⁵ *ibid.*

circumstances change, the settlements lose their purpose and efficiency.

Furthermore, long-term political settlements require ownership, a sense of belonging and legitimacy with regard to the settlement. The more public participation the settlement incurs, the more it is likely to be accepted as a long-term solution.

It is also likely to build a general consensus amongst the participating communities regarding the nature of the state they are building. On the other hand, the more external the influence is on the settlement, the more illegitimate it will be perceived by the state's general population. Sujith Chaudry says that:

Over the past decades, popular participation in constitution-making has come to be regarded as highly desirable for a number of distinct but mutually reinforcing reasons - to confer greater legitimacy on constitutions once adopted, to educate the people in the practice of democratic self-government to enable better them to be citizens and public officials in the constitutional democracy under construction, and to build a shared political identity or at least a *modus vivendi* which is a precondition to the success of new constitutional order in a divided and/or war-torn society where such an identity is absent.²⁶

Samuels observes that constitutions drafted by representative bodies or emerging in a process that involves consultation with a broad range of political and social forces are generally 'perceived as more legitimate and

²⁶ Sujit Choudhry and Mark Tushnet, 'Participatory constitution-making: Introduction' (2020), Vol. 18 ICON No. 1, 173; See also, Abrak Sathi, 'The Participation Myth: Outcomes of Participatory Constitution Building Processes on Democracy' (Print & Media, Umeå University, 2015).

hence received greater popular support.²⁷

Elster observes that participatory constitution making, although it has the benefit of granting a greater level of procedural legitimacy on constitution making, in the aftermath of a crisis is also attendant with several pitfalls, chief amongst which is the perils of a long, potentially volatile interim phase without a legitimate constitution.²⁸ While the international community and J.R. Jeyawardena's government were incentivized by this very factor of avoiding a derailed process, their decision to find a shortcut came at the expense of public participation, which rendered the settlements without much legitimacy and failed in building a shared political identity required of any power-sharing scheme.

Of course, the people can accept a settlement even in the absence of procedural legitimacy;²⁹ it is not the case in both BiH and Sri Lanka. The experience also illustrates that in a polarized and deeply divided state, acquiring subsequent legitimacy is complicated, mainly if the external forces are involved in the initial drafting of the settlement, as the communities would resent such settlement as something forced upon them. Hence, procedural legitimacy with minimal external influence remains the best possible means to arrive at a long-term settlement.

Gabriel Negretto, however, provides a traditional view regarding participation in political settlement. He states that only cooperation among disparate elected representatives in the constitution-making process is likely to improve the liberal dimension of democracy after the constitution

²⁷ Kirsti Samuels, *Constitution Building Processes and Democratization : A Discussion of Twelve Case Studies* (Geneva: IDEA, 2006).

²⁸ Jon Elster, 'Constitution-making in Eastern Europe: Rebuilding the boat in the open sea'(1993). *Public Administration* 71.

²⁹ *ibid.*

is enacted.³⁰ Even if accepted, strong external influence would negate any meaningful negotiations between the internal actors as they would feel pressured by the external forces. In BiH, even though the local elites participated in the negotiation process, their influence on the final settlement was negated by the international actors' emphasis on 'maintaining peace'. In Sri Lanka, however, pluralistic representation was willfully avoided as the government thought that would derail the quick settlement being reached and prevent it from discharging its obligations under the bilateral treaty as quickly as possible.

In addressing the influence of external actors on constitution-making, the author raises a broad but pertinent argument, acknowledging the complexity of achieving consensus in highly polarized societies. One must consider whether consensus building is realistically feasible in such contexts. For instance, the Indian intervention in Sri Lanka raises the question of whether any devolution would have occurred without external pressure, suggesting that long and arduous consensus-building processes might not always be pragmatic or effective in the face of deeply entrenched divisions. Furthermore, the need for consensus building can sometimes be manipulated to prevent solutions favorable to minorities, reflecting a strategic avoidance of addressing substantive issues. The rejection of the Draft Constitution of 2000 in Sri Lanka exemplifies the challenges of achieving consensus, where significant efforts still resulted in failure. This, alongside the 13th Amendment, underscores the complexity of constitution-making in divided societies and highlights that while external influences may lack procedural legitimacy, purely internal processes are not without their own substantial difficulties. A nuanced

³⁰ Gabriel Negretto, 'Constitution-making and liberal democracy: The role of citizens and representative elites' (2020), Vol. 18 No.1 International Journal of Constitutional Law, 206–232.

analysis should therefore consider both the limitations and potential necessity of external intervention alongside the challenges and importance of local participation in achieving sustainable constitutional settlements.

5. CONCLUSION

In the process of political and constitutional settlement in deeply divided societies, external forces will play a role. However, the extent to which the external forces influence the settlement process has a tangible effect on the legitimacy of the settlement itself. When the general population on behalf of whom the settlement is made feels that there is no procedural legitimacy and that the settlement is being prescribed or forced upon them by external forces, it is unlikely to become a basis upon which long-term solutions could be reached. As the Bosnian situation shows, such prescriptive settlements are short-term at best. Sri Lankan experience, on the flip side, shows that such a settlement could fail even to be a short-term solution. In any event, both instances show that prescriptive settlements are utterly incapable of state-building where multiple ethnicities are involved. In such instances, long and arduous consensus-building is the best solution.