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ВТОР ДЕЛ

CAN COUNTRIES WITH IMPOSED CONSTITUTIONS BE PART OF THE EU?

Natasa Doneva*

327.8:342.4
327.8:[316.485.6:321.7(497.7)"2001"
Прегледна научна статија

Constitutions by default should be the creation and embodiment of the needs of society and the citizens. But how are the constitutions dealing with that challenge, and more importantly, how many of them are the creation of their own country, and how many are the product of foreign actors?

In this paper we will address what is in our domain of interest, and that is the international influence in the creation of national constitutions, with special reference to the so-called imposed constitutions. Furthermore, we will try to make a connection between the result from the imposed constitutions countries and the system of the so-called European constitutional law. Are the criteria for joining the European family, among other things, aimed at the parameters of the constitutional national systems? Can countries with an imposed constitution (not) be part of the big European family?

Key words: *constitutions, influences, international interferences.*

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1. Introduction

Are the states with the so-called "imposed constitution" suitable for entering the family of European constitutional law? The title itself may raise a number of dilemmas and questions. Why should there be imposed constitutions and if so, what are they? For some, the claim that all states have a unique constitution is an illusion, because the constitutions as the highest legal acts in the country undoubtedly regulate almost identical constitutional matter. From the way of organization and division of power to the sensitive part for protection of human rights and freedoms, it is a matter that has a similar content. However, it is a fact that the diversion of constitutions is present in every aspect –in the content, in the formal and procedural part ... Constitutions by default should be the creation and embodiment of the needs of their society and citizens. But how are the constitutions dealing with that challenge, and more importantly, how many of them are the creation of their own country, and how many are the product of foreign actors? Therefor, the diagram of the intertwining of the international with the national legislation must inevitably be shown.

When we talk about influence, the connection between international and domestic law, the range of things worth mentioning is very large. However, in this paper we will address what is in our domain of interest, and that is the international influence in the creation of national constitutions, with special reference to the so-called imposed constitutions. Furthermore we will try to make a connection between the result from the imposed constitutions countries and the system of the so-called European constitutional law. Are the criteria for joining the European family, among other things, aimed at the parameters of the constitutional national systems? Can countries with an imposed constitution (not) be part of the big European family?

2. Constitutional engineering

One of the reasons I decided to write about this topic is the riddle about the so-called "constitutional engineering". Constitutional engineering, even the term itself seems a bit confusing and puzzling. This new term, which actually reflects the process of drafting the constitution, is more than crucial for a strong and stable state. Namely, there are examples of states that have continuity in the application of a constitution for more than two centuries, and opposite to them examples of states that not only have discontinuity in the application of a constitution, but also extreme diversity in the constitutions that they adopt (fragile constitutions[1]?). Therefore, the inevitable question is what is the "secret formula" for the success (or the failure) of a constitution? What are the parameters and criteria for its adoption, which guarantee a long life of the constitution? These and a number of other questions can hardly be answered concisely. Creating the highest act in a country requires a multidisciplinary approach. It is ideal to bring it in a time of peaceful and stabile social situations, because in that way it ensures full involvement of the general public, expert opinions, criticisms, remarks, proposals for "remediation" of potential shortcomings ... It is simply possible to dissect virtually any constitutional provision, get in sight

[1] Fragile constitutions are those that are adopted contrary to the manner provided in the previous constitution.

into each stage of implementation, assessment of the expected results, and all that with only one goal - to create a strong, stable constitution. But in recent years and even decades we have a new paradox. The picture is more and more common when states decide (or are forced) on constitutional changes and reforms, in times of crisis, social and political instability or military confrontations. And these are situations that definitely make it impossible to see the real and essential need for constitutional corrections. Above all, one cannot abstain from the pressure that exists in such social constellations. The short period of rapid adoption of a new constitution or its amendments negates the possibility of the full real need to process all the necessary stages. On the other hand, it is understandable and common for many to adopt a constitution in such situations, given the fact that the constitution can bring drastic social news and changes in the functioning of state bodies. And those are situations (it refers to societies that are in some form of crisis) that seek rapid implementation of new constitutional ideas, who can help the recovery of society.

There is no so-called ideal, utopian constitution, but striving for an approximately good constitution should be more than enough motivation, and the idea of it is real and possible. But how applicable it is that in times of crisis social constellations, especially in post-conflict countries and with implicit international / external influences...? In fact, the influences imposed on the creation of national constitutions do not always have to come from outside, on the contrary, unfortunately, internal pressure and involvement are often overlooked. But there are also dilemmas about whether any interference has bad consequences or whether it can yield good results.

But let's go back to constitutional engineering, which "flourished" in 1989, after the end of the Cold War. A huge number of countries, on almost every continent, have faced the challenge of creating new constitutions. Most of them were the product of armed conflict, revolutions and their consequences[2]. Creating constitutions requires the involvement of multiple actors: internal (insiders) and external. The process of creating the constitution[3] should be left in the hands of internal actors as much as possible. Many experts and researchers in this field talk about the fact that the creation of constitutions is a process in which external influence / imposition is inevitable, and it can be infiltrated through advice, expertise, mediators ... The final output can be with positive or negative consequences . The IDEA International[4] report discusses the "autobiography" of several constitutions from the post-conflict period (1990), as well as the mutual influence of external forces and internal parties. (Constitution of Cambodia-1993-influence of French lawyers, Constitution of Namibia-1990 ...). On the soil of South America, this process erupted first in Brazil 1988, then in Colombia, Argentina, Peru, Chile ... In Africa, 23 out of 52 countries went through internal conflicts until 1994. Constitutional engineering had its (r) evolution and culmination point after the Cold War in 1989. As we can see in the photo below (photo 1), the trend of adopting new constitutions has increased in the 1990

[2] See more at: International IDEA; Constitution building after conflict.

[3] See more about the waves of constitution making at: Elster, J; Forces and mechanisms in the constitution-making process; 45 Duke L,J.364, 1995

[4] IDEA-International Institute for democracy and electoral assistance; Available at: https://www.idea.int/

ties. In that period Eastern Europe[5] faced a serious replacement of the Constitutions or at least their drastic modification. The new Constitutions were mostly (re) created as a result of previous conflict situations, internal confrontations, difficult transition periods, political instability, disintegration of states …

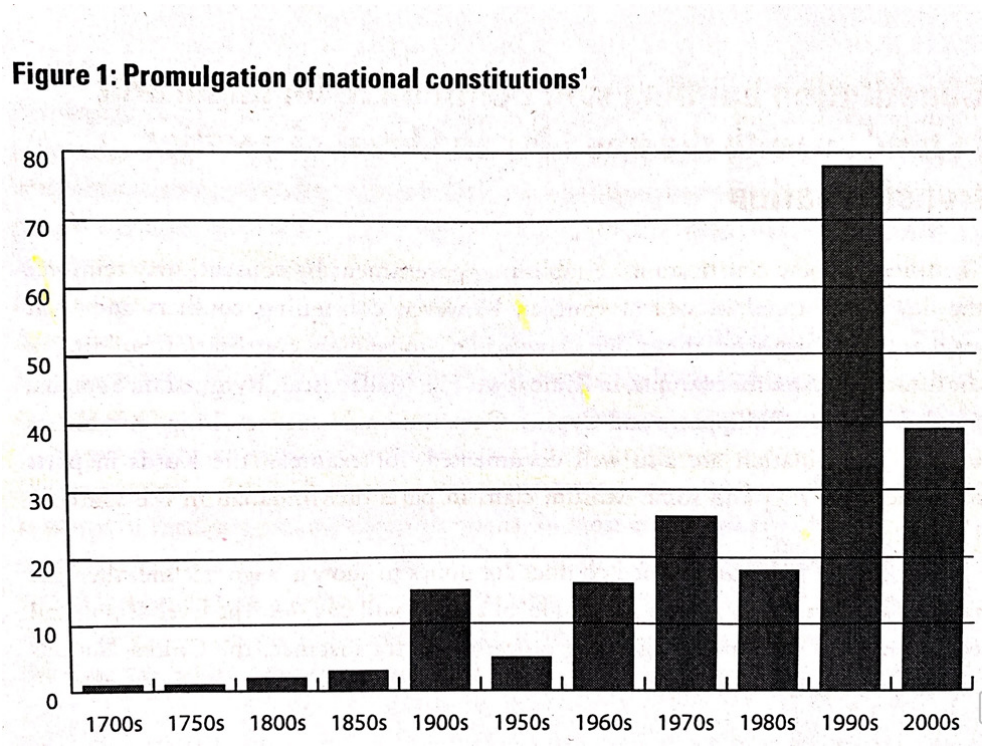

Photo 1: The rise of national constitution[67]

In the process of constitutional engineering, especially in the process of analyzing the possibility of imposed constitutions, a number of questions arise. For example: Which countries are the "best target" for the entry of external influences? Does foreign influence always has bad consequences or can it have benefits for countries facing a social crisis? What are the forms of imposition and how are they manifested? Does the impact apply to the constitutional content, the constitutional process / phases or both? What is the reaction and behavior of domestic actors in this whole picture? Do the constitutions created in this way with external influences show a better implementation / content effect compared to the other constitutions? …In order to give an appropriate answer to the multitude of these questions, we will use the analysis of certain situations that show the involvement of international

[5] Stanley N. Katz; Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience; 1993
[6] See more at: Constituiton building after conflict; IDEA, Policy Paper, 2011
[7] Constitutions Finder database at Richmond University, Virginia, USA.

forces in domestic countries. Those are the Dayton Peace Agreement and BiH, the Cypriot Constitution from the 1960s and the Gallo Plaza report, the Ohrid Framework Agreement and the Republic of Macedonia ... In this paper we will give a short briefing on the situation in these three countries and the danger of the imposed constitutions. However, a more detailed analysis of the situation in these countries and this real constitutional problem will be given in the author's further dissertation.

3. Bosnia and Herzegovina and the Dayton Peace Agreement

The Dayton Peace Agreement from the moment of signing until today is "a thorn in the eyes of the world public." But why a deal of this caliber, that was supposed to end the war in Bosnia, is mostly followed with bad reviews ?

Before we address to the Bosnian constitution, we will have to give a short history background of the situation in the country. In the photo below (photo 2) is shown the ethnic distribution in Bosnia and Herzegovina before and after the war, and how the three entities are territorially inhabited.

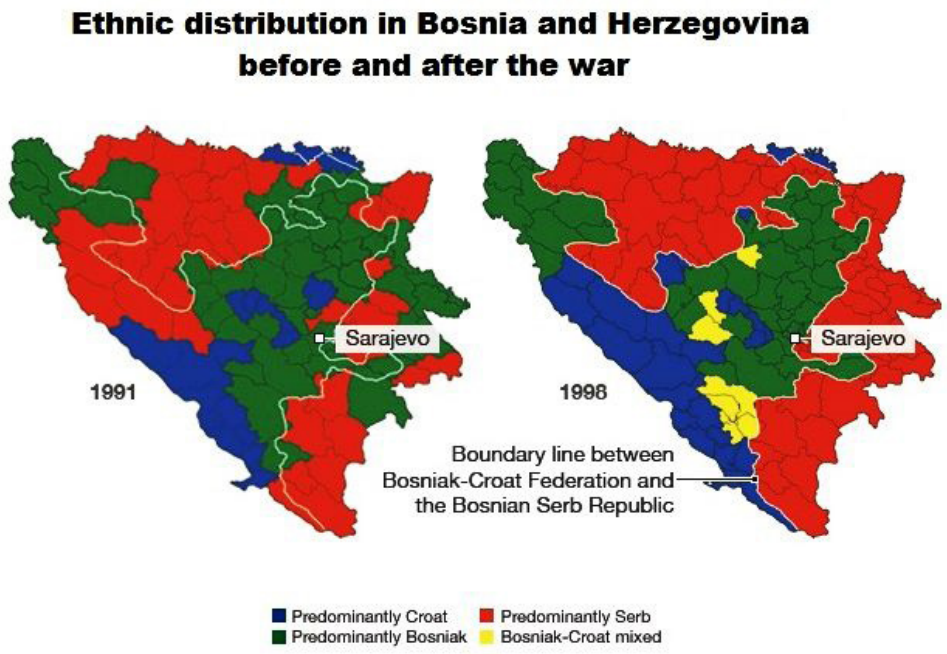

Photo 2: Ethnic distribution in Bosnia and Herzegovina before and after the war[8]

[8] Photo: https://www.pinterest.com/pin/451204456392466613/

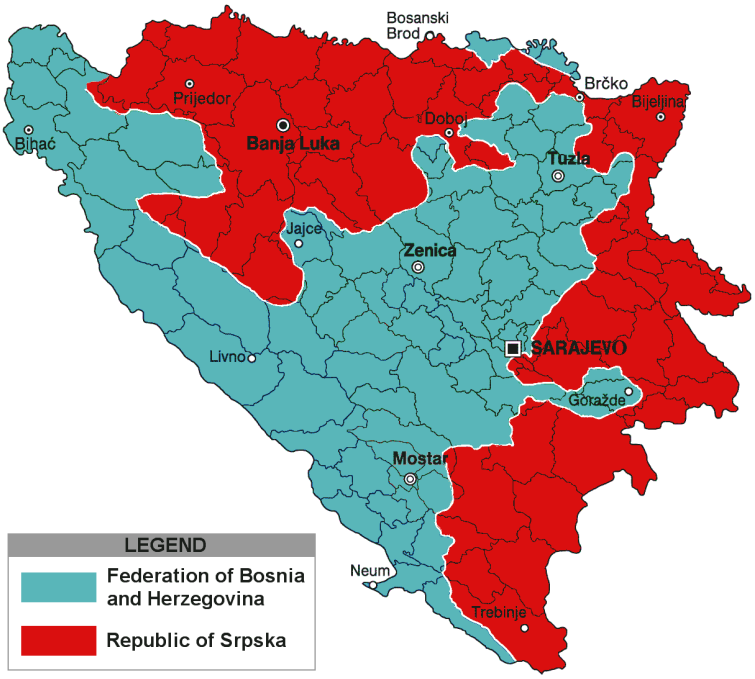

Photo 3: Bosnia and Herzegovina after the Dayton agreement[9]

The Dayton Peace Accords ended the Bosnian War (1992-1995), which was in some ways part of the disintegration of Yugoslavia. The parties to the war were the Bosnian Serbs (supported by Serbia and the JNA), the Bosnian Croats (supported by Croatia) and the Bosnian Muslim population[10]. The culmination of the war was the Siege of Sarajevo and the Srebrenica massacre.

The Dayton Peace Agreement, which has 11 annexes, regulates the political, military aspects of the peace agreement and regional stabilization. With it, BiH is a state with two main entities: the Muslim-Croat Federation and the Bosnian Serb entity (Republika Srpska). The agreement, among other things, emphasized human rights, especially the rights of refugees and displaced persons (given the consequences of the war and the disintegration of Yugoslavia, their numbers increased enormously). The signatory parties were also bound with prosecuting war crimes committed during the bloody war.

The question is what was the purpose of the signatories of the agreement: Serbian President Slobodan Milosevic (who represented the Bosnian Serbs), Croatian President Franjo Tudjman, Bosnian President Alija Izetbegovic and Bosnian Foreign Minister Muhamed Shakirbej? Is this agreement in fact a complete creation of the international forces, without any participation from the domestic actors? Opinions of experts in this field will often be found to point out that BiH is still dysfunctional

[9] Photo: https://www.mapsof.net/bosnia-and-herzegovina/dayton

[10] Previously in the multiethnic Socialist Republic of Bosnia and Herzegovina lived Bosniak Muslims (44%), as well as Orthodox Serbs (32.5%) and Catholic Croats (17%).

today and I quote: "unsustainable in the long run"[11]. The agreement produced weak central relations, too much dependence on the international scene. In fact, there are three different views on this agreement: the first group that advocates that this agreement succeeded in its originally intended goal, which is to end the war (thereby ensuring stabilization) and to ensure the coexistence of all entities. The second group argues that the Dayton Accords has completed the original goal, but it is time for change, and the agreement stands in the way of those changes. The third group is on the opinion that from the very beginning the agreement is a "bad plan" for BiH, because it is mostly the embodiment of international forces and their interests, and not the real needs of BiH.

In fact, this agreement, which ended the war, is for many a role model that should be applied in other conflict states. For the others, the same agreement is international (American) mediation that brought only chaos, disorder and frozen (stand by) war. An imposed agreement, which imposed a constitution that is characterized as "undesirable", and thus its legitimacy is questioned.

The changes that are being insisted on now, for many experts and constitutionalists, also mean constitutional changes. But in what direction will they go? Will the constitution be an effective tool this time expressing the will of the citizens of BiH?

The Dayton Accords are referred to by many as the Bosnian Constitution-Dayton Constitution, because the entire text of the 1995 BiH Constitution is part of this international instrument. The Constitution is in fact short, a preamble, twelve articles and several annexes. The first article refers to the whole framework of the constitutional agreement. Article two is reserved for human rights and freedoms. The separation of powers and competencies and relations between BiH institutions and entities is concentrated in the third article. The next three articles refer to the institutions of government (parliament, presidency, Constitutional Court ...). The Central Bank and the Finance Department are the articles before the transitional, final provisions and entry into force provisions.

Many authors point out that the negotiations for the signing of this agreement did not took place face to face, but that the American negotiators coordinated the parties with a text prepared by them[12]. It is even said that the other parties involved in this negotiation process (the so-called Contract Group - representatives from Russia, Great Britain, Germany, France and the United States) were "excluded" from the process, and only briefed on the entire course by the American side. Stakeholders point to the fact that the agreement was concluded without their real consent, entered into force with the signing without ratification, which many experts say if there was a moment of ratification probably Dayton would never have entered into force.

Proof that Dayton really did not achieve its goal, (which is to ensure long-lasting peace, coexistence of all entities), is the fact of "advocating" for the so-called RS-exit. Namely, the call of the new political crisis was the threat of the Bosnian Serbs with secession from BiH, if the foreign judges do not withdraw from the Con-

[11] More at: https://balkaninsight.com/2012/05/24/spadijer-dejton-bese-najdobroto-mozno-resenie/?lang=mk (Accessed on 17.02.2021).

[12] Ollers-Frahm,K; Restructuring Bosnia-Herzegovina: A Model with Pit-Falls; Max Planck Yearbook of United Nations Law, Vol 9, 2005, p. 179-224.

stitutional Court[13]. For the international actors, that is absolutely unacceptable. But some Bosnian Serbs politicians accuse the West for controlling Bosnia.

3.1 Bosnia and Herzegovina on the road to the EU

Bosnia and Herzegovina is not yet part of the European Union, although some neighboring countries have already joined the organization. BiH is a potential EU member state and is on the "list of countries" for further EU enlargement (see photo 4).

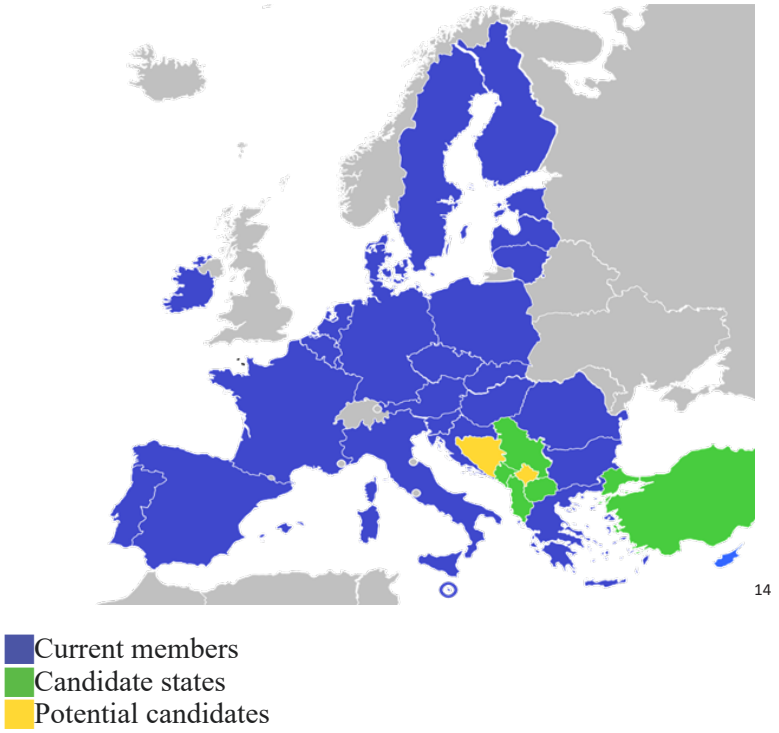

Photo 4: The enlargement of EU

[13] Goodbye Bosnia, welcome RS-Exit, Available at: https://www.dw.com/mk/%D0%B7%D0%B1%D0%BE%D0%B3%D1%83%D0%BC-%D0%B1%D0%BE%D1%81%D0%BD%D0%B0-%D0%B4%D0%BE%D0%B1%D1%80%D0%B5%D0%B4%D0%BE%D1%98%D0%B4%D0%B5-%D1%80%D1%81-%D0%B5%D0%B3%D0%B7%D0%B8%D1%82/a-52423798 , Accessed on 12.03.2021

[14] Photo is taken from: https://en.wikipedia.org/wiki/Potential_enlargement_of_the_European_Union#/media/File:European_Union_member_states_and_candidates.svg

The country is also part of the stabilization and association process. BiH submitted its initial application in 2016[1516], because previously it had to implement constitutional reforms and the whole framework of the Dayton Peace Accords. In the same year, BiH received a questionnaire from the European Commission with over 650 "questions" to complete. But even after three years, Bosnia still has not filled them all. Many media have published information about how this country is at the bottom (meaning in terms of meeting the criteria required by the EU) from the other Balkan countries seeking EU membership[17]. The Stabilization and Association Agreement required Bosnia, to implement the ECtHR judgment in the case of Sejdić and Finci v. Bosnia and Herzegovina[18], in a constitutional amendment, so that the minority in this country can participate, to be members of the Parliament as well, without any discrimination. As BiH did not fulfill all the conditions set out in the agreement in time, a so-called German-British initiative emerged, calling for the SAA (Stabilization and Association Agreement[19]) to enter into force, and then for Bosnia to fill the other stipulated conditions[20].

For many, Bosnia is a state collateral damage from the war of the 1990s (and part of the disintegration of Yugoslavia) that has yet to recover from its catastrophic consequences. But by comparison, both Croatia and Slovenia were part of the disintegration of Yugoslavia but are already members of the EU. The problem in BiH is multidisciplinary. The biggest obstacle is still the constitution, which simply does not work in reality, it is more of a "dead word on a piece of paper." The EU so far gives great support to BiH for entering in the EU family, but still is demanding reforms in almost all areas of political and legal functioning[21]. In other words, BiH must harmonize the constitution with the European criteria and ensure the normal functioning of the institutions in order for them to be able to deal appropriate with the challenges and obligations gven by the EU. Institutions must be reformed to be able to participate effectively in EU decision-making. Drastic reforms must also be implemented in the area of judiciary, electoral systems and laws, the fight against corruption and organized crime ...More efforts must be placed on asylum policy, migrants and border controls. In terms of economic criteria, the EU seeks to improve

[15] Commission Opinion on Bosnia and Herzegovina's application for membership of the European Union: Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20190529-bosnia-and-herzegovina-opinion.pdf ; (Accessed on) 10.03.2021.

[16] Key findings of the Opinion on Bosnia and Herzegovina's EU membership application and analytical report, Available at: https://ec.europa.eu/commission/presscorner/detail/en/COUNTRY_19_2778 ; (Accessed on 10.03.2021).

[17] Radio Free Europe/Radio Liberty. "Najveća povijesna nepravda: BiH u zadnjem vagonu jugoistočnog vlaka prema EU" ; Available at: https://www.slobodnaevropa.org/a/andrej-plenkovic-najveca-povijesna-nepravda-bih-u-zadnjem-vagonu-jugoisticnog-vlaka-prema-eu/25463412.html (Accessed on 10.03.2021)

[18]CASE OF SEJDIĆ AND FINCI v. BOSNIA AND HERZEGOVINA (Applications nos. 27996/06 and 34836/06) https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-96491%22]} Accessed on 10.03.2021.

[19] An association agreement is an agreement between the European Union, its member states and a non-EU country. The purpose of the agreement is to create a framework for cooperation between them.

[20] EU-Bosnia And Herzegovina Stabilization And Association Agreement In Force, Available at: https://web.archive.org/web/20170921135709/http://www.rttnews.com/2506056/eu-bosnia-and-herzegovina-stabilization-and-association-agreement-in-force.aspx?type=gn ; Accessed on 10.03.2021

[21] Key findings of the Opinion on Bosnia and Herzegovina's EU membership application and analytical report: https://ec.europa.eu/commission/presscorner/detail/en/COUNTRY_19_2778

macroeconomics, transparency in the public sector, improving the business environment.

4. Cyprus Constitution and the report of Galo Plaza

Cyprus is a country facing constant rivalry between Greek Cypriots and Turkish Cypriots. The 1960 constitution has been revised several times, but despite all efforts and involvement on the international stage (UN blue helmets), it has failed to drastically improve the tense situation. But first let's have a brief overlook and a summary of the situation in Cyprus. This constitution, it is an enacted Constitution of Cyprus, which derives its basis from the Zurich-London Agreement[22] (further "enriched" by the Treaty of Establishment[23] and the Treaty of Guarantee[24]). Although the Turks were a minority of about 18%, the constitution provided for their involvement in parliament, the government and the police. The independent Cypriot state had a Greek President and a Turkish Vice President. Executive power composed of Greek Cypriots and Turkish Cypriots, elected by their communities, with veto power. Meanwhile, the status of other minorities in Cyprus is also interesting. Only the Armenian, Maronite and Roman Catholic groups (also known as the Latin group) are recognized, and were forced to speak for one side or the other (whether they belong to the Greek or Turkish group). All these minorities declared themselves for the Christian (Greek) community. Expressing themselves in this way, these groups were given the opportunity to vote for a Greek president and Greek MPs.

However, these solutions were unsustainable on a long term for the Greek side, which offered 13 points of reconstruction, which primarily referred to the constitutional changes. After a series of vicissitudes and involvement on the international stage, the seats of the Turkish Cypriots in the House remained empty. Riots broke out between the Turks and the Greeks. EOKA[25] also intervened, as the police were unblocked and Cyprus did not have its own army. That is why the United Kingdom joined the peace negotiations.

Despite the fact that all expected that the situation will be kept under control a coup took place in Greece, and the Greek junta come to power. With the help of this government in 1974, a coup took place in Cyprus as well (similar to the one in Greece), which ousted President Makarios and brought EOKA B[26] to power.

In response, Turkey invaded the island (1974), occupying about 37% of Cyprus. That same year, Turkey demand establishing a federal state in which they would occupy 34% of the territory.

[22] The Zurich-London Agreement on the Cyprus Question is available at: https://www.embargoed.org/wp-content/uploads/2018/02/1959_London_and_Zurich_-Agreements.pdf ; Accessed on 23.02.2021.

[23] Treaty of Esteblishment, Available at: https://www.mfa.gr/images/docs/kypriako/treaty_of_establishment.pdf ; Accessed on 23.02.2021

[24] Treaty Guarantee, Available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/CY%20GR%20TR_600816_Treaty%20of%20Guarantee.pdf ; Accessed on 23.02.2021

[25] EOKA - Ethniki Organosis Kyprion Agoniston (National Organisation of Cypriot Fighters'), was a Greek-Cypriot National Organization, that fought for Cyprus union with Greece and for ending the British presence in Cyprus.

[26]EOKA - B was a Greek Cypriot paramilitary organisation formed in 1971 by General Georgios Grivas. It followed an ultra right-wing nationalistic ideology (anti-turkisg sentiment) .One of the mail goals of the organization was achieving the Enosis (union) of Cyprus with Greece.

Without waiting for the answers of their demands, Turkey made a second invasion that ended with the conquest of 37% of the Cypriot territory. The Turks expelled more than 200,000 Greeks of the conquered territories. All this led to another political coup, with which Makarios (who had previously fled to London) returned to power in Cyprus.

The war ended, leaving the island divided by a "green line" into Turkish and Greek parts (it has remained like that to this day). - That line passes through Nicosia, dividing the capital into two parts. The green line is under UN control (see picture 5), and in some places it is wide up to 10 km.

In 1974 Cyprus was de facto divided when the Turkish army occupied the northern part of the island, declaring after several years (in 1983) the independence and existence of the Turkish Republic of Northern Cyprus.

*According to the Demographic Report of the Statistical Service of the Republic of Cyprus (2011)[27] , Greek Cypriots number 71.8%, and Turkish Cypriots make up 9.5% of the population.

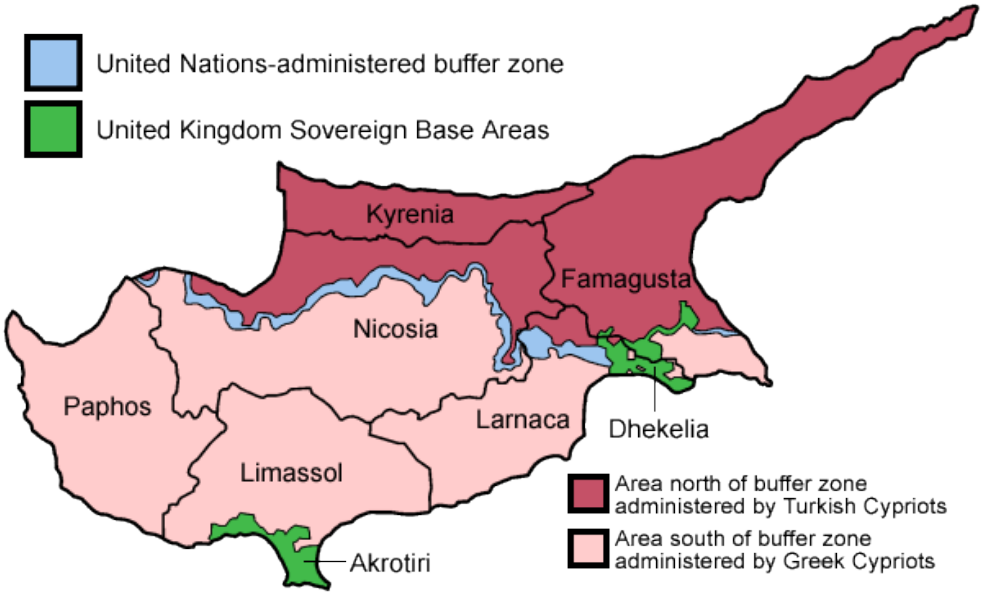

Photo 5: Control of the island by different parties, super-imposed upon the claimed administrative boundaries of the Republic of Cyprus[28].

This is a brief overture to the influential political situation in Cyprus and to the type of constitution adopted in 1960. In fact, this is the only constitution of Cyprus[29]

[27] Demographic Report of the Statistical Service of the Republic of Cyprus: https://www.mof.gov.cy/mof/cystat/statistics.nsf/census-2011_cystat_en/census-2011_cystat_en?OpenDocument ; Accessed on 23.02.2021

[28] Photo: https://en.wikipedia.org/wiki/Cyprus_dispute#/media/File:Cyprus_districts_named.png

[29] Cyprus constitution (1960), Available at: https://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$file/CY_Constitution.pdf?openelement ; Accessed

since then. It has been modified and changed fifteen times. In 1963, the Constitution collapsed due to the escalation of relations between the Greek Cypriots and the Turkish Cypriots, which resulted in the withdrawal of the Turkish Cypriots from the government, which was taken over by the Greek Cypriots. Then President Makarios[30] proposed 13 constitutional changes that reduce the privileges of the Turkish Cypriots. Normally, these proposals were rejected by the Turkish side, but despite that, they were unilaterally implemented by the Greek side.

For many experts in this field, The Cyprus constitution is not effective. Even high stands persons involved in this problem, admit that. For example, the report of Gallo Plaza[31], the UN mediator for Cyprus, speaks about all the vicissitudes in Cyprus. In part of his report [32], stands: *"Outlining the Greek Cypriot side´s positions, Plaza mentions that for Greek Cypriots the Constitution suffered from many fundamental defects, since it did not emanate from the free will of the people but was imposed upon them by virtue of the Zurich and London Agreements. One of its major defects was that its provisions promoted «political, communal segregation», and that its basic articles could not be amended. (para 65)"*

4.1. Cyprus and the EU accession

Cyprus, on the other hand, is again an interesting example of elaboration. Namely, in 2004 Cyprus became part of the EU, but in the same time, EU does not recognize the self-proclaimed Turkish Republic of Northern Cyprus[33]. That is because, the EU and all other member states recognize Cyprus as an EU member state, which is the only legitimate holder of power throughout the island. Although Cyprus de facto controls only the southern part of the island, while the northern part is under Turkish rule. But Northern Cyprus is also de jure part of the EU, because de jure is part of Cyprus. Cyprus' entry into the EU applied to the whole island. EU accession talks were conducted only with the government of the Republic of Cyprus, although a delegation of Turkish Cypriots was invited to attend the talks[34]. That offer was rejected by the Turkish side. In 2003, with the adoption of The Treaty of Accession[35], the Cyprus Protocol was adopted, according to which EU legislation (acquis) will

on 23.02.2021

[30] Makarios III was a Cypriot priest and politician, the first president of Cyprus (1960-1977).

[31] Galo Lincoln Plaza Lasso de la Vega was an Ecuadorian statesman who served as President of Ecuador from 1948 to 1952 and Secretary General of the Organization of American States. He also held a number of diplomatic posts for the United Nations. He was a mediator in the conflicts in Lebanon (1958), the Congo (1960) and Cyprus (1964–1965).

[32] See more at: Galo Plaza Report (1965) Summary, Available at: https://www.pio.gov.cy/assets/pdf/cyproblem/Galo%20Plaza%20Report%20(Sum).pdf , Accessed on 12.03.2021

[33] "The social and economic impact of EU membership on northern Cyprus", Diez, Thomas (2002). The European Union and the Cyprus Conflict: Modern Conflict, Postmodern Union. Manchester University Press. page. 187. ISBN 0719060796.

[34] See more at: Turkey and the problem of the recognition of Cyprus ; European Parliament, Policy department; Available at: https://www.europarl.europa.eu/meetdocs/2004_2009/documents/nt/553/553930/553930en.pdf ; Accessed on 12.03.2021.

[35] The Treaty of Accession (2003), is an agreement between EU member states and ten countries ((Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, Slovakia). The agreement was referring for their accession to the union.

not be applied to those territories over which Cyprus has no effective control[36]. The arguments of the Turkish side refer and call on to the Treaty of Guarantee and the constitution of Cyprus, according to which Cyprus must not be allowed membership in any organization of which Greece and Turkey are not members. According to experts, this is absolutely unacceptable, first because it comes from the Turkish side that invaded the island and occupied 37% of its territory[37].

5. The Ohrid Framework Agreement and Republic of Macedonia

The Ohrid Framework Agreement[38] is still the controversial agreement for which the debates and controversies do not stop. Signed in 2001, by Boris Trajkovski (then President of the Republic of Macedonia), Ljupco Georgievski (President of VMRO-DPMNE), Branko Crvenkovski (President of SDSM), Imer Imeri (President of PDP) and Arben Xhaferi (President of DPA). The guarantors and signatories of the agreement from the international community are also the special representatives of the negotiations: Francois Leotard, EU representative and James Pardew, US representative.

An agreement that ended armed conflicts between the Macedonian Security Forces and the paramilitary NLA-Albanian National Liberation Army.

Placed like this it sounds like an agreement that is quite solid, it ends a bloody conflict, puts an end to the disagreements, promotes a multiethnic character of the state .... But what actually foresaw the agreement, which consists of ten points and three annexes: Annex A-Constitutional Amendments, Annex B-Legislative Amendments, Annex C-Implementation and Confidence Building Measures?

Actually, we are talking about an ambivalent agreement: on the one hand an international agreement, on the other hand an agreement of an internal nature[39]. This is an international agreement thanks to the fact that it was signed by the Macedonian side (the two largest Macedonian and the two largest Albanian parties) and the EU and the US (as facilitators). However, we say that at the same time the agreement can be treated as an agreement of internal character because it is, among other things, signed by persons who do not have the right to sign international agreements (leaders of the four political parties). Analogously, this is why the agreement should be treated as an internal act, for the end of the armed conflict. Because in order to be characterized as an international agreement, all the other parameters (that need to be accomplished in order to label a piece of paper as an international agreement) should be observed.

The illusory and contradictory nature of the agreement continues in the other segments. Briefly, we will mention some of the notorious (and illusory) facts about this agreement. Namely, in Macedonia, the international agreements are ratified by the Assembly, and in this case the Assembly did not ratify the Ohrid Framework

[36] See more at: https://europa.eu/european-union/about-eu/countries/member-countries/cyprus_en , Accessed on 12.03.2021.

[37] See more at: THE CYPRUS ISSUE; Available at: http://www.hri.org/MFA/foreign/bilateral/cyprus.htm , Accessed on 12.03.2021.

[38] The Ohrid Framework agreement available at: https://www.pravdiko.mk/wp-content/uploads/2013/11/ramkoven_dogovor-3.pdf , Accessed on 13.03.2021.

[39] See more at: Skarik,S; Ustavno pravo-osmo izdanie, Kultura, page 738

Agreement. Therefore, it should not be interpreted as part of the internal legal order of Macedonia. On the other hand, there was an initiative submitted to the Constitutional Court to assess the constitutionality of this agreement, which made major changes to the Constitution. But the Constitutional Court rejected the initiative, arguing that it was not an act that could be evaluated. In defense of its position, the Constitutional Court also refers to the Law on Concluding, Ratification and Execution of International Agreements[40]. According to Article 2 of the Law on Concluding, Ratification and Execution of International Agreements, "*an international agreement within the meaning of this Law is considered an agreement that the Republic of Macedonia will conclude in writing with one or more countries or with an international organization, which establish rights and obligations for the state, in accordance with the Constitution of the Republic of Macedonia and international law, regardless of whether it is contained in one or more interrelated documents.* According to paragraph 2 of this article*, the acts concluded by authorized bodies in the Republic of Macedonia for execution of concluded international agreements, are not considered as international agreements and they do not undertake new obligations for the state.[41] "*

"*Starting from the fact that the Framework Agreement is conducted under the auspices of the President of the Republic of Macedonia and in that capacity was signed by the President, that the Framework Agreement was signed by four leaders of political parties, as well as the fact that representatives of the European Union and the United States signed the act as witnesses, it follows that the Framework Agreement is a political act of the leaders of the largest political parties in the country for getting out of the crisis. Hence, the Framework Agreement is not a legal act that can be subject to constitutional review, given the jurisdiction of the Constitutional Court determined in Article 110 of the Constitution.. .*[42] "

Also, the Ohrid Framework Agreement was concluded in English (not in Macedonian), for which there were pleanty of reactions from the Macedonian Language Council of the Republic of Macedonia, who did not accept the agreement as a valid document, because it was drafted and signed in another language[43].

All these irregularities, contradictions, dubious circumstances - only confirm the thesis of the external imposed character of the Ohrid Agreement, which amended and changed the Macedonian constitution in an enormous part. In addition to this, I quote: "*The first draft of that agreement was brought by the American ambassador to our President and he said: We talked about these documents in America - take it or leave it. This must be done or you will have a civil war. Boris Trajkovski declared that document as his plan the next day.[44][45]"*

[40] Law on Concluding, Ratification and Execution of International Agreements; Available at: https://www.pravdiko.mk/wp-content/uploads/2013/11/Zakon-za-skluchuvan-e-ratifikatsija-i-izvrshuvan-e-na-megunarodni-dogovori-22-01-1998 .pdf

[41] Article 2 of the Law on Concluding, Ratification and Execution of International Agreements.

[42] The decision of the Constitutional Court to reject the initiative to initiate a procedure for assessing the constitutionality of the Framework Agreement of 13 August 2001. Available at: http://ustavensud.mk/?p=7976

[43] Skarik,S; Ustavno pravo; 8 izdanie; Kultura, page 738.

[44] Kiro Gligorov; Ohridska senka ;NIN,2005,page55

[45] Skarik,S; Ustavno parvo, 8 izdanie, Kultura, page 738

In fact, with this agreement, in practice there has been implementation of acts that can be said to be of dubious legality and legal debatability. First, this agreement allowed the preamble of the Macedonian constitution to be changed with amendment, which is almost a sui generis procedure, because it is not a practice to change the preamble with an amendment, but most often with a change of the whole constitution. The other changes of these agreement were implemented thanks to the fifteen constitutional amendments IV-XVIII.

What actually changed this agreement? First of all, the constitutive element: By amending the preamble of the Constitution, it was determined that the constituents of the Republic of Macedonia are the citizens of the Republic of Macedonia, the Macedonian people, as well as the citizens living on its borders, who are part of the Albanian people, the Turkish people, the Vlachs , the Roma people, the Bosniak people and others ...[46] ". As prof. Galeva point, I quote "this change emphasizes the civic principle, which is still ethnically colored and distinguishes between people and parts of other nations living on the territory, which alludes that Macedonia is not home country to these parts of nations.[47]" The reason for the dissatisfaction from the Albanian side was the fact that the Constitution of SRM from 1974 provided the constitutive element of the Albanian and Turkish nationality, while the Constitution of the Republic of Macedonia from 1991 spoke about the Macedonian people as a constituent people of RM.

-Other constitutional changes refer to larger representation of Albanians in state institutions and bodies. According to some authors, these demands were understandable given the fact that in the 1990s the percentage of Albanians in state institutions was very low. However, on the other hand, the fact that an enormous part of the job seekers are semi-qualified was (and still is) ignored. Most of them are without higher education. So how can these people be employed in the public sector? The Ohrid Agreement drastically increased the number of Albanians employed in state institutions, which went to extremes, because many of the employees were unqualified and with inappropiete education for the position. This caused the emergence of so-called "phantom jobs" - employees figure on paper and get paid, but do not show up for work. The emphasis was on quantity and not on quality staff.

-Furthermore, in the series of changes brought by the Ohrid Agreement are the requirements for the use of the Albanian language in higher education. Namely, in the Republic of Macedonia, teaching in higher education institutions was conducted in Macedonian language (while teaching in one's own language was guaranteed in primary and secondary education). However, in 1995 an Albanian-language university was opened illegally in Mala Recica. Although declared illegal, it continued to operate. In 2001, the South East European University was opened in Tetovo (where you can study in Macedonian, Albanian and English).

Regarding to the use of the language of non-majority communities, I would like to add that with the adoption of the Law on the Use of Language spoken by at least 20% of the citizens in the Republic of Macedonia and in the local self-govern-

[46] Macedonian Constitution: Amandment IV, Available at: https://www.sobranie.mk/content/Odluki%20USTAV/UstavSRSM.pdf (Accessed on 26.02.2021).

[47] Galeva,J; Ustavnite prava na nemnozinskite zaednici vo RSM I nivnata primena vo praksa.

ment units[48], in the municipalities where 20% of the population speaks another language, the official language in those municipalities besides the Macedonian is also that language (that is spoken by the minority). However, what is interesting is that the websites of some of those municipalities do not have any data in Macedonian, but only in Albanian language[49], which is an absolute illusion, given the fact that these are municipalities located in Macedonia, and there is not a singal word of text writen in Macedonian language ???

- The last point I will address in relation to the pressures and demands of the Albanian people, which have been implemented in the framework agreement, are the demands for the use of flags and the change of election models. With the Law on the Use of the Flags of the Communities in the Republic of Macedonia, the communities have the right to use their flag. However, the flag of the Republic of Macedonia stands out with the other flags and must be one third bigger than the other flags. But what happens during the actual implementation of these legal provisions? In Kicevo in 2013, the Albanian flag with the same dimensions as the state flag was flown illegally[50]. In Ohrid, during the Easter holidays, an Albanian flag was flown at Samoil Fortress, for which procedure sanctions were announced[51] ...
- The Badinter rule is also a product of the framework agreement. For many this is a proper political decision-making and respect for democracy, for others an instrument of conditioning, veto and political pressure. The same applies in Amendment X, which states: "*For laws that directly affect culture, the use of languages, education, personal documents and the use of symbols, the Assembly decides by a majority vote of the MPs present, with a majority vote of those present MPs belonging to non-majority communities in the Republic of Macedonia. Disputes over the application of this provision are resolved by the Committee on Inter-Community Relations*.[52]". Here, too, can be found numerous examples of non-compliance with this rule[53].

In fact, in these few pages of text we tried to capture the true picture of the situation before and after the Ohrid Framework Agreement. Realistically, even before this agreement, the position of the non-majority communities in Macedonia was good. Some of the requirements in the Ohrid Agreement were understandable, some were moving to extremes ... However, after the implementation of the series of requirements and the constitutional and legal changes, a number of abuses of the provisions of the agreement are recorded in practice (mostly by the Albanian side). This agreement may have ended the armed conflict in 2001, but it certainly did not make a drastic change in the tense relationship that exists today. This agreement

[48] Law on the Use of Language Spoken by at Least 20% of the Citizens in the Republic of Macedonia and in the Units of Local Self-Government, Official Gazette no.101

[49] See more at: https://www.mkd.mk/makedonija/politika/ne-samo-shto-vekje-imame-dvojazichnost-tuku-i-ednojazichnost-na-albanski (Accessed on 26.02.2021).

[50] See more at: https://a1on.mk/macedonia/albansko-zname-od-shest-metri-se-vee-vo-k/ (Accessed on: 04.03.2021)

[51] See more at: https://www.pravdiko.mk/boshnakovski-zakonot-za-znamina-mora-da-se-pochituva-prekrshuvaneto-se-sanktsionira/ (Accessed on 26.02.2021).

[52] Amendment 10 of the Constitution of the Republic of Macedonia, which replaces Art. 69.

[53] More about this irregularities see at: Galeva, J; Constitutional rights of the non-majority communities in the Republic of North Macedonia and their application in practice; page 10-11.

change the Macedonian Constitution in an enormous part, it made huge changes in the Macedonian laws and in the society in general. I will finish this part of the paper by saying that this "imposed agreement" and his imposed effects on the constitution, produced more problems than solutions.

6.1 Macedonia on the road to the EU

Macedonia submitted its EU membership in 2004. One year later, the country was granted a candidate status[54]. Although the European Council notes the efforts that the country is making to improve (such as the implementation of the Ohrid Agreement, fullfilling the Copenhagen criteria ...), it is obvious that Macedonia still can not join the EU. Some experts and analysts in this field say that some of the reasons are seen at the lack of rule of law, legal uncertainty, necessary reforms in the judiciary and judicial bodies, (inconsistency) of constitutional provisions and the approach to their frequent change.

The conditions for membership[55], among others, refer to: harmonization with European standards and rules, to obtain the consent of the European institutions and member states, to obtain the consent of the citizens of the country aspiring to join the union (expressed by consent in national parliaments or through referendum). Macedonia as a country is making huge efforts to implement all the remarks made so far. However, reforms in the judiciary continue to be a black mark on the whole society. Crime, corruption, economic instability ... these are still obvious problems in the most important social pillars. The stability of the institutions that should guarantee democracy, rule of law, protection of minorities, protection of human rights, are still in the risk zone in Macedonia.

On the other hand, Macedonia conducted a referendum to change its name[56] and join the EU? But the referendum question[57], according to the author is very debatable and ambiguous. Namely, the the referendum question was: "Are you in favor of EU and NATO membership by supporting the agreement between the Republic of Macedonia and the Republic of Grecee?" Citizens may be in favor of EU and NATO membership, but not through the above mention agreement, not by changing the state name. For some of the expert public, this was a message from the Macedonian side that indicates its good intentions to end the dispute with Greece and improve neighborly relations. For other analysts, this could be described as an extreme political fiasco and a "sale of the state." Will Macedonia be the one that will take radical steps and changes in any disagreement with a certain country? Wasn't Macedonia a country that in the 90s, passed a constitutional amendment[58], due to the disagreements with Greece? So far, the biggest problem for the EU membership

[54] See more at: https://www.consilium.europa.eu/en/policies/enlargement/republic-north-macedonia/ (Accessed on: 10.03.2021)

[55] See more at: European Neighbourhood Policy And Enlargement Negotiations-Conditions for membership, Available at: https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en ; (Accessed on: 10.03.2021)

[56] The change of the name is a result of long-standing tensions between Macedonia and Greece.

[57] See more at : https://www.dw.com/mk/%D1%80%D0%B5%D1%84%D0%B5%D1%80%D0%B5%D0%BD%D0%B4%D1%83%D0%BC-%D0%BD%D0%B0-30-%D1%81%D0%B5%D0%BF%D1%82%D0%B5%D0%BC%D0%B2%D1%80%D0%B8/a-44886678 ; Accessed on 10.03.2021.

[58] See amendments 1 and 2 in the Constitution of Macedonia from 1991.

has been the veto and the problem with Greece, and the long disagreement for the state name. Now that this has allegedly been resolved (in 2019), and when everyone expects that there are no longer crucial reasons that would hinder Macedonia's path to the EU, the problem with Bulgaria has emerged[59]. Namely, now the Bulgarian side does not recognize the Macedonian language and nation as separate, but as part of the Bulgarian. In 2017, the two countries signed a friendship agreement, setting up joint commissions to resolve allegedly controversial historical and educational issues. But Bulgaria has said it will block Macedonia's path to the EU if Macedonia does not fulfill some 20 of their demands[60].

For the Western Balkan countries, in addition to the Copenhagen criteria, additional conditions for EU membership are set in the so-called 'Stabilization and Association process', which is expected to achieve regional cooperation and good neighborly relations[61].

In fact, if we approach the answers to the previously asked questions in the paper, we will note that there are no unified answers. There is a theoretical diversity in the answers given to each question by different experts. For some, the need for external interventions is seen as peace interventions, which aim to help and calm down the conflict situations. As an argument in support, they point out the fact that without it, the armed situation in the countries would certainly continue, they could even escalate far more. Thanks to their involvement, international standards have been accepted in terms of implementation of human rights and freedoms, rule of law, legal certainty ... which helped to crystallize the "normal" constitution in these countries.

On the other hand we have the facts that speak of the failure of some peacekeeping missions and attempts to help by the international scene. One million small cases in practice - Cambodia, Namibia, BiH, Cyprus, Kosovo ... Where did the help from abroad fail here? Or was it a mask for implementing someone's political game? Pre-conceived scenarios, which were produced in a given time. The puzzle of the imposed agreements - and thus the imposed constitutions - continues. Everything that happens is a piece of the puzzle that fits perfectly. Only the whole mosaic can rarely be seen ... The imposed constitutions for many are a pale picture of the past, for others a hidden reality in modern constitutionalism.

Here we would like to refer to the fact that the countries elaborated so far are not members of the European Union (except the case with Cyprus). So here is the question whether some of the reasons for that are related to constitutional and legal relations in the countries? Does the existence of imposed constitutions "block the entry" of these countries to European integration? For these questions there are several divided opinions and views, but if we look at the statistics, we will notice that almost all the countries where there was external involvement, are countries that do

[59] See more at: How to advance a European solution to Bulgaria's and North Macedonia's dispute, Available at: https://ecfr.eu/article/how-to-advance-a-european-solution-to-bulgarias-and-north-macedonias-dispute/ , Accessed on 12.03.2021.

[60] See more at: Foreign Minister Zaharieva: Bulgaria Cannot Approve EU Negotiating Framework with North Macedonia, Available at: https://www.novinite.com/articles/206579/Foreign+Minister+Zaharieva%3A+Bulgaria+Cannot+Approve+EU+Negotiating+Framework+with+North+Macedonia, Accessed on 12.03.2021

[61] COMMISSION STAFF WORKING DOCUMENT North Macedonia 2020 Report; Available at: https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/north_macedonia_report_2020.pdf, Accessed on 12.03.2021

not have a memebership in the larger and more important regional and international organizations. Does this indicate that these types of countries have to create, a constitution that meets the social and the real needs of the citizens, and after that they can hope for membership in an eminent organization? That that will be the time they get to be treated as normal, and will not be refered as a sui generis state?

7. Instead of a conclusion

Through the work of this paper (which is intended to be part of the further preparation of the author's doctoral dissertation) we want to show the theoretical picture of the creation of constitutions. In fact, here lies the basic goal that is expected to be achieved, and that is the expansion of theoretical, scientific and research knowledge for the creation of constitutions, especially in countries with post-conflict background, unstable social constellations, transitional problems ...

Systematizing the basic data that science knows until today, legal, political, historical, we try to study the entire process of creating these constitutions, but also what is important, to capture the impact that foreign actors can implement. What are the reasons or motives for which the countries themselves allow the entry of "external expertise". Especially having in mind the fact that the constitution should be embodiment to the people, is for the people and is an expression of their will. That is why the illusion follows (which we will try to answer during the writing of the dissertation), why foreign "solutions" are being accepted for our (domestic) questions? Why can't we create and find adequate solutions ourselves? Can't we or are we forced to accept someone's political game?

The lack of data on this topic and the standard "justifications" for the necessary need of external influences (because naimly post conflict states are not ready to face the challenge of creating a stable constitution on their own), will serve as a basis for establishing research, which during the completion of the picture of the imposed constitutions will be further developed and further explained.

We will try to make this paper (and the further dissertation) an enrichment in the relatively new field of constitutional engineering. To give new light to the so-called (slightly forgotten) octarian constitutions. Are they an expression of "we the people" or "we / they the international community"? The real value of the work will be achieved when with all the theoretical foreknowledge we will address the question of who has the last word in constituting the highest act in the country, especially in post-conflict countries.

During the research and writing of the dissertation we will come to the conclusion whether the post-conflict constitutions are an expression of the people's will or an instrument under internal and / or external pressure. If the result is the second option, and if it turns out that there are more negative than positive consequences, then all the solutions that could be applied in the future and all the solutions that can give a significant improvement to this unique, complex legal problem will be considered.

In fact, this constitutional phenomenon (if we can called it that way) existed in the past, it is not just a modern, today's creation. However, the way of getting involved today may be more implicit but with far deeper consequences.

In fact, what often araises interest in expert circles is whether the problem with the imposed constitutions is typical only for the so-called divided societies. Within a country, such divisions are found on different bases: religion, language, race ... Due to this diversity, it is much more difficult to reach an agreement on the functioning of the most important state bodies, and not even to mention the process of adopting the constitution. That is why in these plural societies consensual democracy begins to be applied, so that minority groups can also have the right to choose. But the real question is whether states with internal divisions are a "suitable ground" for political manipulation, or do they really need external expertise to learn the common language of coexistence? The states we elaborate in the paper are states that can be included in the group of divided societies, in which there were armed conflicts and military situations. There are three entities in BiH - Serbs, Bosnians and Croats. Tensions in Cyprus between Greek Cypriots and Turkish Cypriots. In Macedonia, the disagreements between Macedonians and Albanians ... That is why the question is did the external (imposed) solutions resolved and calmed the tensions that existed before? Although there is a multidisciplinary approach to every problem and it depends on which aspect things are perceived, I would still say that there is no room for too much discussion here. Namely, neither the Dayton Agreement solved the real problems in Bosnia, nor the imposed Cypriot constitution calmed the tensions on both sides (which even later led to invasion and the declaration of Northern Cyprus), nor was the Ohrid Framework Agreement a proper, legal, solution on the soil of Macedonia. Then the mystery remains why we had the adoption of this kind of agreements and constitutions, which did not have a good result? This question is followed by a series of answers for which there are rarely facts that will confirm them.

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