

UPHOLDING PEACE SETTLEMENTS THROUGH CONSTITUTIONAL REVIEW IN BOSNIA AND HERZEGOVINA, KOSOVO AND NORTH MACEDONIA

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This article examines implementation of the peace settlement compromises translated into constitutional arrangements in Bosnia and Hercegovina, Kosovo and North Macedonia. The three countries struggle with their violent past, loss of interethnic trust and political fragmentation. Consequently, the implementation of peace settlement compromises that are translated into constitutional arrangements is hampered. Through analyses of constitutional jurisprudence in three countries this study provides further insights into the effectiveness and enforcement of the constitutional choices in practice. The article concludes that international supporters in the process of negotiation of peace settlements need to revisit the international assistance in constitution-making as a part of peacebuilding projects through the lens of constitutional review practices.

Keywords: peace settlement; peacebuilding; constitutional review; Bosnia and Hercegovina; Kosovo; North Macedonia

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The views expressed here are given from a personal academic point of view and not in the official judicial capacity.

I. INTRODUCTION

The internationally-mediated peace settlements of internal conflicts envisaged enactment of constitutions, which institute a legitimate form of government, guarantee the protection of all ethnic groups, and ensure a functional government.¹ Internationally-negotiated and -designed constitutions represent a tremendous opportunity for post conflict-societies in securing lasting impacts on peace, contributing to state building, stability and quality of its democracy. However, their enforcement in practice is challenged, considering that the constitutional design agreed in the process of conflict settlements is to be implemented in societies torn by a violent past, loss of trust and ethnic division that affect the purpose and intention of these constitutional choices. Post-conflict societies struggle also with politicized judiciaries, weak or undeveloped democratic institutions, lack of legacy of human rights protections, and disagreements about whether constitutional rights commitments are in good faith.²

The positive effects of constitutional law and Constitutional Courts in managing deep ethnic, religious, or cultural divisions have been pointed out.³ However, there is a need for further comparative research of constitutional review that touches upon the heart of the peace settlements. This article contends that investigation of the jurisprudence of the Constitutional Courts of Bosnia and Hercegovina (BiH), Kosovo and North Macedonia might provide further insights into the enforcement and effectiveness of peace settlement compromises translated into constitutional arrangements. The literature on the effects of the constitutional review of internationalized constitutions in post-conflict

¹ Paris, R.; Sisk, D. T., *Managing Contradictions: The Inherent Dilemmas of Postwar Statebuilding*, International Peace Academy, 2007, <https://www.ipinst.org/wp-content/uploads/publications/iparpps.pdf> (2 January 2022) (describing state-building as “a crucial element in any larger effort to create the conditions for a durable peace and human development in countries that are just emerging from war”).

² European Union (EU) provides a detailed assessment of the state of play and the progress made by the Western Balkans and Turkey on their respective paths towards the EU. See EU progress reports on Kosovo, BiH, and North Macedonia for 2021 available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5275 (3 January 2022). Also see Waldron, J., discussing series of assumptions about the institutional and political features of modern liberal democracies affecting the judicial review: Waldron, J., *The core of the case against judicial review*, Yale Law Journal, vol. 6, 2006, pp. 1346 ff.

³ For instance, the role of the Constitutional Court of South Africa. For a detailed positive and also controversial role of Constitutional Courts in divided societies see: Issacharoff, S., *Constitutionalizing democracy in fractured societies*, Journal of International Affairs, vol. 58, no. 1, 2004, pp. 73–93.

settings is relatively young.⁴ While academic research of constitutional review in BiH and its comparison with Kosovo is progressing⁵, an extension of analyses on constitutional review in North Macedonia is opportune since the peace settlement underwent a different trajectory, resulting in far-reaching and internationally-designed constitutional amendments which are also undergoing constitutional review.⁶

The three countries studied function as a clear case of consociational power-sharing. While BiH is a federal unit, Kosovo and North Macedonia are unitary states with strong decentralization of powers. The constitutions in all three countries guarantee group specific rights, and ensure the group representation at central and local level. The Constitutional Courts in the three countries have the jurisdiction to rule on the constitutionality of legislative and procedural matters. Furthermore, the democratic procedures in place and judicial independence ensure that the constitutional courts in the three countries have meaningful authority. The key question that this article addresses is whether constitutional review of political issues dressed up as constitutional questions can live up to those peace compromises integrated in the internationalized constitutional design? Its main thrust is to undertake a comparative analysis of the constitutions and constitutional review in BiH, Kosovo, and North Macedonia,

⁴ *Ibid.*, Issacharoff, see also: Pildes, R. H., *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, in: Choudhry, S. (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford University Press, Oxford, New York, 2008. See also: Choudhry, S.; Stacey, R., *Independent or Dependent? Constitutional Courts in Divided Societies*, in: Harvey, C.; Schwartz, A. (eds.), *Rights in Divided Societies*, Hart Publishing, Oxford, 2012; McCrudden, C.; O'Leary, B., *Courts and Consociations: Human Rights versus Power-Sharing*, Oxford University Press, Oxford, 2013; McCrudden, C.; O'Leary, B., *Courts and Consociations, or How Human Rights Courts May De-Stabilize Power-Sharing Settlements*, *European Journal of International Law*, vol. 24, no. 2, 2013, pp. 477–501.

⁵ Marko, J., *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance*, *European Diversity and Autonomy Papers*, EURAC, vol. 7, 2004. See also Marko, J., *Bosnia-Herzegovina: The Role of the Judiciary in a Divided Society*, *Constitutional Review*, vol. 5, no. 2, 2019, pp.194-221. On constitutional review in Kosovo see: Hasani, E., *The Role of the Constitutional Court in the Development of the Rule of Law in Kosovo*, *Review of Central and East European Law*, vol. 43, no. 3, 2018, pp. 274-313. On the comparison of the constitutional review in BiH and Kosovo see: Grewe, C.; Riegner, M., *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, *Max Planck Yearbook of United Nations Law Online*, vol. 15, no. 1, 2011, pp. 1-64.

⁶ The Ohrid Framework Agreement was contested in its entirety in 2001. The application was rejected by the Constitutional Court of North Macedonia due to the lack of jurisdiction. Case U-no.190/2001, of 31 October 2001, para. 4.

and to assess its role and influence in bridging the ethnic divisions caused by the conflicts, as well as in ensuring efficacy and political stability.

The article selects certain elements that have been the subject of intense scholarly debate and analyses them in the dual contexts of ending conflicts and constitution-making in the three countries. In doing so, it focuses on constitution-making as a peacemaking tool (Section II), and the varying roles of international actors in constitutional design, pointing out that peace-building and constitutional architecture do not overlap neatly or easily. The three countries had a painful and difficult past, characterized by conflicts of different magnitudes and duration, the ending of which necessitated disparate levels and lengths of involvement of the international community. The three countries are undergoing state and peacebuilding process supported heavily by international community, and have committed themselves to multiethnicity and respect for ethnic diversity. The structure and contents of post-conflict Constitutions of BiH, Kosovo and North Macedonia (Section III) are analyzed in order to identify similarities and differences of the internationalized constitutional design. Here the study will point out how political compromises of the three peace settlement documents (Dayton Peace Agreement of 1995⁷, Comprehensive Proposal for the Kosovo Status Settlement (Ahtisaari Plan) of 2008⁸, Ohrid Framework Agreement of 2001⁹) were transposed, and constitutional guarantees set up, and what their adequacy with regard to the given post-conflict environment is. Then the article turns to investigate the main Constitutional Courts' jurisprudence (Section IV), primarily focusing on cases that touch upon the power-sharing and group-specific rights that were at the heart of the peace settlement compromises. The analysis of the court decisions only focuses on how courts relate to their constitutional provisions and the normative reference points they base their reasoning, and their effects on elimination of confrontational issues

⁷ Dayton Peace Agreement, General Framework Agreement for Peace in Bosnia and Herzegovina, 21 November 1995 (The Dayton Agreement). The Dayton Agreement and all related texts may be found in Office of the High Representative (ed.), *Bosnia and Herzegovina. Essential texts*, 3rd revised and updated edition, Sarajevo, 2000.

⁸ United Nations, Security Council, Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council, Addendum, Comprehensive Proposal for the Kosovo Status Settlement I-IV, 26 March 2007 (Comprehensive Proposal for the Kosovo Status Settlement). The Comprehensive Proposal for the Kosovo Status Settlement (CSP), is a status settlement proposed by former President of Finland Marti Ahtisaari (Ahtisaari Plan).

⁹ The Former Yugoslav Republic of Macedonia: Framework Agreement Signed in Ohrid, 13 August 2001 (Ohrid Framework Agreement 2001).

related to power-sharing and group rights. This article concludes by advocating for further examination of the effectiveness of international constitutionalism as a peacemaking tool through the lens of constitutional review practices.

II. CONSTITUTION-MAKING AS A PEACEMAKING TOOL

International assistance in constitution-making is not new.¹⁰ The recent trend of internationally-designed constitutions and constitution-making processes as a peacemaking tool is gaining momentum.¹¹ Constitution-making as a tool of international peacebuilding is frequently used in contemporary post-conflict, ethnically divided societies.¹² Bell states that “just when the faith in liberal institutional solutions has waned, there is evidence of an apparently countervailing rise in faith in constitutions and constitution making as a liberal democratic transition-promoting device”.¹³ Historically, the international element in constitution-making has been exemplified through the engagement of a foreign state, individual or group of international experts or/and NGOs in

¹⁰ For a historic account on constitutional drafting post-WW2 see: Moore, A. R.; Robinson, L. D., *Partners for Democracy: Crafting the New Japanese State under MacArthur*, Oxford University Press, New York, 2002, p. 432. For the German experience see: Spevack, E., *Allied Control and German Freedom: American Political and Ideological Influences on the Framing of the West German Basic Law (Grundgesetz)*, LIT Verlag, Münster, 2001, p. 592. For the implications of the “imposed constitutionalism” see generally: Choudhry, S., *Old Imperial Dilemmas and the New Nation Building: Constitutive Constitutional Politics in Multinational Polities*, Connecticut Law Review, vol. 37, 2005, pp. 933 ff.

¹¹ Ghai, Y.; Gall, G., *Constitution Building Processes and Democratization*, International Institute for Democracy and Electoral Assistance, 2006, <https://www.idea.int/sites/default/files/publications/constitution-building-processes-and-democratization.pdf> (12 January 2022).

¹² There is no agreed definition on what a divided society is. However, authors pretty much agree on all counts of what constitutes a divided society; that is: a society which presents ethno-cultural divisions, sometimes “politically salient”, that are ethnically mobilized forces, and, which threaten both, the stability of the Constitutional State, and, the coexistence of the different groups within one nation. See for instance Horowitz, L. D., *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, William and Mary Law Review, vol. 49, 2008, pp. 1213 ff. Lijphart, defined a divided society by saying what it is not; and drew a difference between: 1. culturally homogenous political communities; and, 2. plural societies, which are beset by political division. See: Lijphart, A., *Constitutional Design for Divided Societies*, Journal of Democracy, vol. 15, no. 96, 2004, pp. 96 ff.

¹³ Bell, Ch., *Introduction: Bargaining on constitutions – Political settlements and constitutional state-building*, Global Constitutionalism, vol. 6, no. 1, 2017, pp. 13-32.

the process of constitution-making after the end of conflict. In the Post-Cold War era the international element in the constitution-making relates to the involvement of international organizations that were in one way or the other involved in the post conflict territory such as the United Nations (UN)¹⁴, EU¹⁵ and other regional organizations.

The modern linkage of constitution-making with international peacebuilding efforts is a phenomenon with diverse implications.¹⁶ This is so because peacemaking and national constitutional-making have traditionally been two different processes.¹⁷ Scholars examining trends of constitution-making after internal conflicts have identified variables that contribute to the success of internationalized constitutions. Constitution-making should be “closely linked to the peace process, must not be rushed, and as far as possible, should be carefully aligned with existing legal provisions.”¹⁸ If the timing and process of constitution-making is unsuitable, then constitution-making can weaken the peace building processes, leading to temporary constitutions and potentially contributing to instability.¹⁹ Tushnet expressed skepticism of “the proposition that external observers can offer normative advice to guide the “reason and choice” of contemporary constitution makers.”²⁰ Involvement of national representatives therefore is vital for building local legitimacy for the constitution and eliminating the potential criticism that the international actors will determine the pace of the peacebuilding process and the content of the constitution.²¹

¹⁴ United Nations, Guidance Note of the Secretary-General, ‘United Nations Assistance to Constitution-Making Processes’ (April 2009).

¹⁵ Galyan, A., *Learn as We Go: The European Union’s Involvement in Constitution Building in the Post-conflict Western Balkans*, International Institute for Democracy and Electoral Assistance, 2014, <https://www.idea.int/sites/default/files/publications/the-european-unions-involvement-in-constitution-building-in-the-post-conflict-western-balkans.pdf> (3 March 2021).

¹⁶ On the importance and the link of constitutional order for international peace and security see: Maia, C.; Ayissi, A., *Peace Through Constitution: The Importance of Constitutional Order for International Peace and Security*, African Yearbook of International Law, vol. 19, 2011, pp. 201 ff.

¹⁷ Choudhry, S., *Ackerman’s higher lawmaking in comparative constitutional perspective: Constitutional moments as constitutional failures?* International Journal of Constitutional Law, vol. 6, no. 2, 2008, pp. 193 ff.

¹⁸ Ludsin, H., *Peacemaking and Constitution-Drafting: A Dysfunctional Marriage*, University of Pennsylvania Journal of International Law, vol. 33, no. 1, 2011, p. 239.

¹⁹ Jackson, C. V., *What’s in a Name? Reflections on Timing, Naming, and Constitution-Making*, William and Mary Law Review, vol. 49, 2008, pp. 1249 ff.

²⁰ Tushnet, M., *Some Skepticism About Normative Constitutional Advice*, William and Mary Law Review, vol. 49, 2008, pp. 1473 ff.

²¹ Hart, V., *Democratic Constitution Making*, Special Report 107, United States, Institute

Samuels points out that despite different historical, institutional and political contexts, a participatory and inclusive constitution-making process positively affects the overall sustainable transition to democracy.²²

However, some argue that the goals of constitution-drafting, as a tool to stop ongoing violence, are different from the goals of peacemaking and that their merger is not appropriate. Ludsin specifically questions “whether too much pressure is being placed on constitution-drafting by expecting it to create peace while designing a stable foundation for the state.”²³ Haiti’s and Liberia’s constitutions have had destabilizing effects, through the merger of participatory constitution-making with post-conflict peacemaking.²⁴ In Afghanistan, Constitution-drafting failed as a peacemaking tool because the constitution-making process was defective.²⁵ In the Solomon Islands, Iraq, Chad, and the Republic of the Congo constitution-making generated violence.²⁶

Internationalized constitution-making as a peacebuilding tool is criticized for impacting state sovereignty, since it legitimizes a high degree of external involvement in the drafting and implementation of the constitutional document. These constitutions are created in, and reflect, an environment of high or even complete dependence on outside support to build an internal legal order.²⁷ In

of Peace, 2003, <https://www.usip.org/sites/default/files/resources/sr107.pdf> (13 January 2022).

²² This paper explores 12 cases of constitution-building undertaken during times of transition from civil conflict or authoritarian rule during the last fifteen years. The cases are diverse in context, constitution building approach, constitutional culture and knowledge, and outcome. See: Samuels, K., *Constitution Building Processes and Democratization: A Discussion of Twelve Case Studies*, International IDEA, 2004-2005, <https://www.idea.int/sites/default/files/publications/constitution-building-processes-and-democratization.pdf> (18 January 2022).

²³ Ludsin, *op. cit.* (fn. 18), p. 241.

²⁴ Samuels, K., *Post-Conflict Peace-Building and Constitution-Making*, *Chicago Journal of International Law*, vol. 6, no. 2, 2006, pp. 663 ff.

²⁵ Widner, J., *Constitution Writing and Conflict Resolution*, United Nations University, Research Paper no. 2005/51, 1, 2005, http://www.wider.unu.edu/publications/working-papers/research-papers/2005/en_GB/rp2005-51/ (13 January 2022).

²⁶ For instance, in Iraq during August 2005, when most of the Constitution was written, there were 70 insurgent attacks daily, 282 Iraqi military and police killed, between 414 and 2,475 civilians killed, 27 multiple fatality bombings, 23 kidnappings of non-Iraqis, and 3,000 insurgents detained or killed. Ludsin, *op. cit.* (fn. 18), p. 255. For unrest in Congo see: L.A. TIMES, *39 Killed in Clashes in Eastern Congo*, 26 December 2005, <https://www.latimes.com/archives/la-xpm-2005-dec-26-fg-congo26-story.html> (10 November 2021). On the troublesome constitutional making in Haiti and Liberia see Samuels, *op. cit.* (fn. 22).

²⁷ “Ayatollah Ali Sistani’s fatwa of June 26, 2003. This Legal opinion declared that

internationalized constitutions, self-determination was realized in such a way that the international actors effectively became a part of the 'self', creating the internationalized *pouvoir constituant*.²⁸ Feldman states that there is something theoretically and practically distinctive about imposed liberal constitutionalism today as "it takes place against a backdrop of widespread commitment to democratic self-determination."²⁹ He further observes that in the former Yugoslavia, East Timor, Afghanistan, and, Iraq, interim or permanent constitutions have been drafted under conditions of *de facto* or *de jure* occupation.³⁰ Despite evident local participation³¹, substantial intervention and pressure was imposed from outside to produce constitutional outcomes ideated by international actors, including NATO, the United Nations, and international NGOs, as well as foreign states like the United States and Germany.³²

In BiH, the Dayton Agreement was drafted and finalized by international actors and only signed by state representatives. The highly exclusive negotiations without direct participation of primary parties to the conflict, seems to have detrimental impact on the legitimacy and ownership of the peace process.³³ The Dayton Peace Agreement was pushed by the devastating situation on

"the occupying forces of Iraq not even appoint the participants in a constitutional drafting body, which must instead be chosen by a democratic election and must submit any draft constitution to a popular referendum for ratification must." Cited and translated in: Feldman, N., *Imposed Constitutionalism*, Connecticut Law Review, vol. 37, 2005, pp. 857 ff.

²⁸ *Ibid.*, p. 867. See also on the comparative and conceptual perspective of the processes of international constitution-making including the questioning of the internationalized *pouvoir constituant*: Dann, P.; Al-Ali, Z., *The Internationalized Pouvoir Constituant – Constitution-making under external influence in Iraq, Sudan and East Timor*, Max Planck Yearbook of United Nations Law, vol. 10, 2006, pp. 423 ff.

²⁹ Feldman, N., *What We Owe Iraq: War and the Ethics of Nation Building*, Princeton University Press, Princeton, 2004, p. 176.

³⁰ *Ibid.*

³¹ Binder, D., *Balkan Factions Begin New Talks*, N.Y. TIMES, 3 January 1993, § 1, at 1 (describing local participation in the drafting of a constitution for former Yugoslavia); Gall, C., *New Afghan Constitution Juggles Koran and Democracy*, N.Y. TIMES, 19 October 2003, § 1, at 3 (discussing Afghan public participation in constitutional drafting).

³² Lewis, A., *Truth and Its Effects*, N.Y. TIMES, 13 November 1995, A29 (describing the United States submitting a draft constitution for Bosnia during the Dayton peace accords).

³³ On a detailed account on the process of negotiations of the Dayton Agreement see: Kostic, R., *Reconciling the Past and the Present – Evaluating Dayton Peace Accords 1995*, Department of Peace and Conflict Research, Uppsala University, Uppsala, 2009, p. 32.

the ground that affected also the contents of the constitution which is termed to be “based on a political compromise which mirrored the military situation on the ground in terms of a cease-fire arrangement”.³⁴ Moreover, the Dayton Constitution entered into force without any parliamentary ratification process, nor is the authentic English text officially translated into any of the three official languages in use in BiH.³⁵ This level of involvement of the international community in constitution-drafting and also the overall constitutional engineering in BiH in practice seems to be challenging. Consequently, the debate over constitutional reform has featured prominently in BiH since the early 2000s.³⁶ Considering that the “reforming the irreformable is the constitutional conundrum of the Dayton regime”, employment of the “participatory constitutionalism” is seen as the possible solution for unavoidable reform of the Dayton constitution.³⁷

In Kosovo, international actors were heavily involved from day one of the drafting process of Kosovo’s Constitution, starting with the identification of potential members of the constitutional Working Group foreseen by the Ahtisaari Plan. Tunheim (an American judge who was part of the commission that drafted the constitution of independent Kosovo, in 2009) states that Serbs were part of the meetings and that the commission took care to secure Kosovo Serb input into the constitution.³⁸ Although, there was international, and especially US, input by facilitating dialogue between the various minority groups, the Working Group retained control of the drafting itself. The key decisions about the internationalized nature and the contents of the constitution had already been made in the Ahtisaari Plan. The Plan also foresaw ‘international supervisory structures’ for the initial period of Kosovo’s independence, and laid

³⁴ Chollet, D., *The Road to the Dayton Accords: A Study of American Statecraft*, Palgrave Macmillan, London, 2005, pp. 272 ff.

³⁵ Marko, *op. cit.* (fn. 5), p. 204.

³⁶ In its opinion, the Venice Commission in 2005 stated that “the Dayton constitution is not sustainable, as it contradicts the foundations of a workable State, but to amend it is extremely difficult...”. European Commission for Democracy through Law (Venice Commission), Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, CDL-AD (2005) 004, 11 March 2005.

³⁷ Palermo, F., *Is participation a possible way out of the constitutional conundrum?* Oslobođenje, 22 November 2021, <https://www.oslobodjenje.ba/dosjei/teme/is-participation-a-possible-way-out-of-the-constitutional-conundrum-709816> (12 March 2022).

³⁸ Tunheim, J., *Rule of Law and the Kosovo Constitution*, Rule of Law Symposium, Minnesota Journal of International Law, vol. 18, 2009, pp. 371 ff.

out detailed provisions for its constitution and various aspects of government.³⁹

In North Macedonia, international involvement in constitution amendments followed a different trajectory pushed by the political developments on the ground. In 2001, the eight-month conflict between ethnic Albanian uprising forces⁴⁰ and Macedonian police and security forces displayed the long-lasting silent interethnic animosities. The U.S. and European involvement headed the signing of the Ohrid Framework Agreement, which defined constitutional reforms that aimed at the enhancement of the rights of the ethnic Albanian minority. The Ohrid Framework Agreement was signed on 13 August 2001 in Skopje by the Macedonian and Albanian leaders and US and EU mediators.⁴¹ The Agreement provided for a detailed description of the processes and provisions of future constitutional reformation and amendment. This detailed readymade document did not provide much space for local input and for an all-inclusive drafting process.⁴²

Democratic theory tends to focus on the consent of the governed to democratic procedures.⁴³ If the constituent peoples do not accept a constitution as a legitimate exercise of power, then they are unlikely to consent to its governance, undermining the legal order that was created and any culture of constitutionalism. In practice, although there was no demonstrative rejection of the entirety of internationalized constitutions, there was however discontent and

³⁹ Comprehensive Proposal for the Kosovo Status Settlement, *op. cit.* (fn. 8).

⁴⁰ Ohrid Framework Agreement was signed by Boris Trajkovski the (then) President of the Republic of Macedonia and the main Macedonian political party leaders: Ljubco Georgievski President of the VMRO-DPMNE and Branko Crvenkovski President of the Social Democratic Union, and the Albanian Political Party leaders, Arben Xhaferi President of the Democracy Party of Albanians, Imer Imeri President of the Party for Democratic Prosperity. The signing of the agreement was witnessed (signed) by François Leotard (EU) and James Pardue (USA). See Ohrid Framework Agreement, *op. cit.* (fn. 9).

⁴¹ The National Liberation Army (Ushtria Çlirimtare Kombëtare, UÇK), is an ethnic Albanian Macedonian insurgency organization. For an investigation of the UCK, its goals, activities and leadership, see: Ash, T. G., *Is There a Good Terrorist?* New York Review of Books, 29 November 2001, <https://www.nybooks.com/articles/2001/11/29/is-there-a-good-terrorist/> (10 March 2022).

⁴² Andonovski, S., *The Effects of Post-conflict Constitutional Designs: The “Ohrid Framework Agreement” and the Macedonian Constitution*, Croatian International Relations Review, vol. 24, no. 81, 2018, p. 3. See also: Kim, J., *Macedonia (FYROM): Post-Conflict Situation and U.S. Policy*, CRS Report for Congress, <https://fas.org/sgp/crs/row/RL32172.pdf> (3 December 2021).

⁴³ McAfee, B. T., *The Constitution as Based on the Consent of the Governed – Or, Should We Have an Unwritten Constitution?* Scholarly Works, vol. 80, no. 530, 2001, pp. 1245 ff.

rejections in some countries.⁴⁴ Often the internationally-agreed constitutional arrangements are not being implemented as they do not represent the “*materia*” of the society for whom the constitution was drafted.⁴⁵ Considering all the implications and debate surrounding international assistance in constitution-making, the substantive governance arrangements, constitutional human and community protections agreed through international constitution-making provide an external solution for the internal conflict. As such, the legitimacy of internationalized constitutions is functional, as they set out arrangements to end violent conflicts such as in BiH, to conclude international administration and facilitate the transition to final status in Kosovo, or to prevent escalation of a conflict in North Macedonia. However, we need to bear in mind that “at least since the late eighteenth century, constitutions have been understood as emanations of the will of “the People”, as the ultimate expression of an inherent popular sovereignty.”⁴⁶ International supporters should utilize the theoretical frameworks of “constituent power, accounts of constitutional foundations blended on notional or conceptual “descriptions” of the People, which anchor the political legitimacy of constitutional orders”.⁴⁷ Avenues of internally (constitutional drafters) and externally (public) participatory systems need to be explored that will lead to constitutional documents that establish an effective governance system, are domestically legitimate, and have significant public support. There are already a number of possible sources of inspiration and practices to learn from in designing a participatory process that could lead to inclusive constitutional proposals.⁴⁸ International supporters need simultaneously to concentrate on the content of the constitution and also on how the content is being agreed upon.

⁴⁴ Feldman, *op. cit.* (fn. 27) and Feldman *op. cit.* (fn. 29).

⁴⁵ Hasani, *op. cit.* (fn. 5), pp. 274 ff.

⁴⁶ Choudhry, S.; Tushnet, M., *Participatory constitution-making: Introduction*, International Journal of Constitutional Law, vol. 18, no. 1, 2020, pp. 173-178.

⁴⁷ *Ibid.*

⁴⁸ Gluck, J.; Brandt, M., *Participatory and Inclusive Constitution Making, giving voice to the demands of citizens in the wake of the Arab spring*, United States Institute of Peace, 2015, <https://www.files.ethz.ch/isn/188062/PW105-Participatory-and-Inclusive-Constitution-Making.pdf> (12 March 2022).

III. STRUCTURE AND CONTENTS OF POST-CONFLICT CONSTITUTIONS

Having a specific political role in constructing and enabling a political settlement, internationally designed constitutions frequently institutionalize mechanisms of a power-sharing consociational democracy and territorial autonomy, striving for adequate balance of accommodation of ethnic diversity and integration.⁴⁹ Lijphart states that in ethnically divided societies torn by violent conflicts the “interests and demands of communal groups can only be accommodated by strong power-sharing institutions and arrangements.”⁵⁰ Through recognizing the existence of the ethnicity in society, the ‘accommodationists’ support the idea of power sharing on the basis of it.⁵¹ This then allows ethnicities to have a reserved place in the executive branch, certain rights of veto, cultural autonomy, and other representative and participation arrangements. In contrast, the ‘integrationists’ advocate for a statebuilding model that is not divided on ethnic cleavages, advocating for creation of public identity that stands above ethnic cleavages issue of regulation of societal divisions.⁵² Integrationists argue that through placing the state’s governance above ethnic cleavages, the ethnic cleavages will be reduced and a political identity and awareness that is free of strictly ethnic targets will be established. According to integrationists, political parties and institutions must be representatives of a single public identity which does not belong to any ethnicity or societal cleavage but is rather above such

⁴⁹ Lijphart, A., *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*, Routledge, London, New York, 2008, p. 305. See also: Yash, P. G. (ed.), *Autonomy and Ethnicity: negotiating competing claims in multi-ethnic states*, Cambridge University Press, Cambridge, 2000, p. 312.

⁵⁰ Lijphart, *op. cit.* (fn. 12), p. 96.

⁵¹ The accommodationist model has been coined by Arend Lijphart in his works: Lijphart A., *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*, University of California Press, Los Angeles, 1968. Later the concept was further developed in: Lijphart, A., *Consociational Democracy*, *World Politics*, vol. 21, no. 2, 1969, pp. 207-225; Lijphart, A., *Democracy in Plural Societies*, Yale University Press, New Haven, 1977; Lijphart, A., *Consociation and Federation: Conceptual and Empirical Links*, *Canadian Journal of Political Science*, vol. 12, 1979, pp. 499-515; Lijphart, A. (ed.), *Conflict and Coexistence in Belgium: the Dynamics of a Culturally Divided Society*, Institute of International Studies, University of California, Berkeley, 1981; Lijphart, A., *Thinking about Democracy. Power-sharing and Majority Rule in Theory and Practice*, Routledge, New York, 2008.

⁵² McGarry, J.; O’Leary, B.; Simeon, R., *The Integration-Accommodation Debate: An Outline*, in: Choudhry, S. (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford University Press, Oxford, 2008, pp. 41-88.

divisions and prevails over them.⁵³

Notwithstanding the competing theoretical models of regulation for divided societies, consociationalism as a framework of government that can mitigate ethnic tensions and even encourage reconciliation through power sharing arrangements along ethnic lines remains the most used theoretical framework of constitutional design in post-conflict ethnically divided societies. Although, the typology of consociational debate since it was first coined is widened, variables and elements for its stability have been identified, and its definition has been modified. Still, the core elements of the concept – mainly inter-elite cooperation and the politics of accommodation – remained unchanged and prescribed in constitutional design of post-conflict ethnically divided societies. At the same time, the practical consequences of constitutionalizing consociationalism in multiethnic states have also been pointed out. They relate to alleged poor democratic quality, institution of complicated policy-making process, clientelism, and reinforcement of the socio-cultural divisions.⁵⁴ Horowitz states that consociationalism requires leaders to parcel out sovereign power to ethnic groups in divided societies, and that the majority coalitions result in weak oppositions.⁵⁵ According to Horowitz “once one party organizes along ethnic lines, others are inclined to follow suit.”⁵⁶ These ethnic parties “preempt the organizational field” and tend to “crowd out parties founded on other bases.”⁵⁷ Thus, the political landscape is defined solely by ethnicity and then by variations within those ethnicities. There is little crosscutting and participation across ethnic lines politically. Consequently, according to Horowitz, political organization in post-conflict settings results in “stable parties” but “unstable politics”.⁵⁸ Although, consociationalism ensures the representation of ethnically based parties in proportion to their underlying votes, this hardly can guarantee conciliatory results.⁵⁹ The following section explores the power-sharing features of the con-

⁵³ For the integrationist approach regulation of ethnical divisions, see: Horowitz, D., *A Democratic South Africa? Constitutional Engineering in a Divided Society*, University of California Press, Los Angeles, 1991; see also McGarry, J.; O’Leary, B., *Iraq’s Constitution of 2005: Liberal Consociation as Political Prescription*, *International Journal of Constitutional Law*, vol. 5, 2007, pp. 670-698.

⁵⁴ Bogaards, M., *Consociationalism and Centripetalism: Friends or Foes?* *Swiss Political Science Review*, vol. 25, no. 10, 2019.

⁵⁵ Horowitz, L. D., *Constitutional Design: An Oxymoron?* in *Designing Democratic Institutions*, NYU Press, New York, 2000, pp. 253-284.

⁵⁶ Horowitz, L. D., *Ethnic Groups in Conflict*, University of California Press, Berkeley, 1985, p. 306.

⁵⁷ *Ibid.*, p. 334.

⁵⁸ *Ibid.*, p. 338.

⁵⁹ *Ibid.*, p. 259.

sociational democracies, mainly proportionality, grand coalition, mutual veto, and segmental autonomy⁶⁰ in the constitutional arrangements of BiH, Kosovo and North Macedonia in order to exemplify how the contents of the respective constitutions reflect the international conflict settlement compromises. It also assesses their efficacy in bridging the ethnic divisions and political stability, considering the existing theoretical framework and debate, and drawing out lessons learned.

IV. SELECTED STATES AS THE EXAMPLES

1. Bosnia and Hercegovina

In BiH, the 1995 Dayton Peace Agreement preserved the Bosnian state by creating a consociational confederation of two autonomous 'Entities' and three peoples, with a complicated system of power-sharing structures to be supervised by an international governor (the High Representative) with wide-ranging authority. This arrangement is provided in the Preamble (Annex 4 of the Dayton Constitution) which sets out "Bosniacs, Croats and Serbs, as constituent peoples (along with Others) ...". Article IV. I, regulates that the "House of Peoples", the upper body of parliament, comprises of five Croats, five Bosniacs and five Serbs. Another regulation of the governance structure is found in Article V, where the Presidency is made up of three members: a Bosniac, a Croat and a Serb. Article V. 4. b. provides for proportional participation of constituent peoples in the process of nomination of ministers and their deputies for the Council of Ministers. Although Article I. 1. ensures the legal continuity of the Republic of Bosnia and Herzegovina, Articles I. 1. and I. 3. of the Constitution establish that the Republic will be composed of two entities: Republika Srpska (RS) and the Federation of Bosnia and Herzegovina. Authorities, and relations between the institutions of Bosnia and Herzegovina and its Entities are regulated by Article III. 1. which sets out that responsibilities related to "foreign policy, foreign trade policy, customs policy, monetary policy, international and inter-Entity criminal law enforcement and regulation of inter-Entity transportation, are in the jurisdiction of the national organs". The general part of paragraph 3 of Article III. provides that "governmental functions and powers not expressly assigned in this Constitution to the institutions of Bosnia and Herzegovina" are within the jurisdiction of the entities. The two entities retain the authorities for internal and external security to be provided by police and military structures based on Article III. 2. and 3.

⁶⁰ Lijphart, *op. cit.* (fn. 49).

The human rights guarantees and mechanism for their implementation is provided broadly in Annex 6. The rights and freedoms provided in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its Protocols, as well as a range of international human rights instruments, are directly applicable by the virtue of Annex 6, which lists thirteen rights among the rights provided by the ECHR and the listed International Agreements.⁶¹ Article XIII. of the Agreement also points out the need for non-governmental organizations and international organizations' activism in protection and promotion of human rights.

These constitutional arrangements and the Dayton Peace Agreement have been intensely criticized. Despite infusion of ethnic representation in the governance structures and decentralization of powers in local and central levels/entities, the practical implementation of these 'creative' governance modalities is hampered by the continuous ethnic separation, resulting with a dysfunctional operation of the national organs. Consequently, the Parliament and the Presidency often cannot comprehend their constitutional responsibilities – in particular the lawmaking authority. Consequently, the High Representative often stepped in through extensive interpretation of his powers and promulgated legislation instead of the Parliament.⁶² Instead of bridging the societal divisions, they furthered decentralization and instability of the state, resulting in 'the weakest federal system in the world'.⁶³ Consequently, these constitutional arrangements framed a system of government for a truly unstable and 'fragile

⁶¹ The 13 listed rights: (1) the right to life; (2) the right not to be subjected to torture or to inhuman or degrading treatment or punishment; (3) the right not to be held in slavery or servitude or to perform forced or compulsory labour, (4) the right to liberty and security of person; (5) the right to a fair hearing in civil and criminal matters, and other rights relating to criminal proceedings; (6) the right to private and family life, home and correspondence; (7) freedom of thought, conscience and religion; (8) freedom of expression; (9) freedom of peaceful assembly and freedom of association with others; (10) the right to marry and to found a family; (11) the right to property; (12) the right to education; (13) the right to liberty of movement and residence.

⁶² Marko, *op. cit.* (fn. 5), p. 6. On the legal bases and extensive powers of the OHR see: Banning, T., *The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment*, Göttingen Journal of International Law, vol. 6, no. 2, 2014, pp. 259 ff. On the need to strengthen the of the house of Representatives and Council of Ministers, *op. cit.* (fn. 36).

⁶³ Marko, J., *Constitutional Reform in Bosnia and Herzegovina*, European Yearbook of Minority Issues, vol. 5, 2005-2006, pp. 207 ff.

democracy'.⁶⁴ The Dayton Constitution's 'ethnic sovereignty'⁶⁵, and the power-sharing mechanisms have been assessed as discriminatory and in conflict with human rights protections.⁶⁶ The aforementioned arrangements are associated less with peace than with dysfunction.⁶⁷ The extensive criticism and call for reforms of the Dayton arrangements continue in academic and policy debates, emphasizing the need to revisit the entire constitutional order.⁶⁸ There is a need for "clarifying group rights, individual and minority rights, and mechanisms for protecting the 'vital national interests' of Bosnia's constituent peoples, reforms to strengthen the government and the powers of the prime minister, reduce the president's duties, and streamline parliamentary procedures".⁶⁹ The objective of the reform is to transform the Dayton Agreement into a functional institutional framework that prepares the country for both international withdrawal and EU integration.⁷⁰

2. Kosovo

In Kosovo, the Ahtisaari Plan did not comprise a constitution. Its Annexes prescribed detailed procedural and substantial prescriptions for constitution-making in the independent Kosovo. The 'constitutional, economic and security provisions . . . aimed at contributing to the development of a multi-ethnic, democratic and prosperous Kosovo'⁷¹, were transposed elegantly to the

⁶⁴ Issacharoff, S., *Fragile Democracies: Contested Power in the Era of Constitutional Courts*, Cambridge University Press, Cambridge, 2015, pp. 312 ff.

⁶⁵ Yee, S., *The New Constitution of Bosnia and Herzegovina*, *European Journal of International Law*, vol. 2, 1996, pp. 176 ff.

⁶⁶ *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06 ECHR 2009; similarly, in *Zornić v. Bosnia and Herzegovina*, no. 3681/06 ECHR 2014.

⁶⁷ Wilson Center, Global Europe Program Working Group on the Western Balkans, *Fixing Dayton: A New Deal for Bosnia and Herzegovina Report and Recommendations*, No. 1, November 2020, available https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/GE_201116_report%201_v2%20%281%29.pdf (10 November 2021).

⁶⁸ See for instance: Wilson Center, Debate Series, *Wither Bosnia? A "New Deal" for Destabilizing the Bosnian Peace*, Hayden, M. R., 2 March 2021, <https://www.wilsoncenter.org/article/whither-bosnia> (10 November 2021).

⁶⁹ Hays, D.; Crosby, J., *From Dayton to Brussels Constitutional Preparations for Bosnia's EU Accession*, United States Institute of Peace, Special Report 175, October 2006, https://www.usip.org/sites/default/files/resources/SRoct06_2.pdf (17 November 2021).

⁷⁰ *Ibid.*

⁷¹ Comprehensive Proposal for the Kosovo Status Settlement, *op. cit.* (fn. 8).

new Kosovo Constitution.⁷² Unlike BiH, Kosovo is a unitary state, governed by central- and municipal-level institutions.⁷³ The basic provisions of the Constitution confirm that “Kosovo is a democratic state based on the equality of its citizens and the rule of law”. The sovereignty of the state stems from its people. Article 1 (3) of the Constitution states that “The Republic of Kosovo shall have no territorial claims against, and shall seek no union with, any State or part of any State” as already set in Article 1.8. of the Ahtisaari Plan.

The Constitution of Kosovo contains far more rigid power-sharing arrangements than that of BiH.⁷⁴ The minority community representation in the Assembly is secured through reserved seats and the weight of their votes in legislative procedures. Out of the 120 Assembly seats, 20 are reserved for minority communities: Article 64 (2) sets out that at least ten seats are reserved for the Kosovo Serb community, and another ten are guaranteed to other communities, including Roma, Ashkali, Egyptian, Bosnian, Turkish, and Gorani. The weight of community voting in the legislative process prevents majoritarianism since the deputies holding the reserved seats control the amendment of the Constitution. Any constitutional amendment requires the approval of two-thirds (2/3) of MPs, as well as the approval of two-thirds (2/3) of the deputies occupying reserved or guaranteed seats of the Kosovar minority communities.⁷⁵ The adoption, amendment or repeal of laws of ‘vital interest’ requires the “majority of the Assembly deputies present and voting and the majority of the Assembly deputies present and voting holding seats reserved or guaranteed for representatives of Communities that are not in the majority”.⁷⁶ The laws characterized as being of vital interest directly concern the communities’ rights; they are exhaustively listed in the Constitution and may not be submitted to a referendum.⁷⁷

⁷² Constitution of the Republic of Kosovo with its amendments, 9 April 2008, Official Gazette, available at <https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702> (17 December 2021). (Kosovo Constitution). Kosovo Constitution, Articles 1 and 4.

⁷³ Kosovo Constitution, Articles 1 and 4.

⁷⁴ Korenica, E; Doli, D., *The Politics of Constitutional Design in Divided Societies: The Case of Kosovo*, Croatian Yearbook of European Law & Policy, vol. 6, no. 6, 2010, pp. 265 ff.

⁷⁵ Kosovo Constitution, Art. 65 (2).

⁷⁶ Kosovo Constitution, Art. 81.

⁷⁷ Article 81 of the Kosovo Constitution, sets out that the laws of vital interest are: “(1) Laws changing municipal boundaries, establishing or abolishing municipalities, defining the scope of powers of municipalities and their participation in intermunicipal and cross-border relations; (2) Laws implementing the rights of Communities and their members, other than those set forth in the Constitution; (3) Laws on the use of language; (4) Laws on local elections; (5) Laws on protection of cultural

The broad coalition government and proportional representation are further secured through communities' presence on government ministries, the Constitutional Court, Supreme Court, and the office of the Ombudsperson, through specified quotas.⁷⁸ The Constitution of Kosovo guarantees the participation of at least two ministers and four deputy ministers in the government for the Kosovo Serb community and other non-majority communities.⁷⁹ If the government has more than twelve ministries, then that number is enlarged by another (one) minister and two deputy ministers from a Kosovo non-majority community.⁸⁰ Proportional political representation of communities is also applied in the leadership of the Assembly, as the Constitution requires the election of two vice presidents from the ranks of MPs representing communities, of which one should belong to the Serbian minority and the other to other non-majority communities.⁸¹

Kosovo's Constitution contains very strong human rights protections. Chapter II contains 35 articles on Fundamental Rights and Freedoms. Chapter III extensively sets out the Rights of Communities and Their Members. The Chapter III community rights and participation were initially foreseen in the Ahtisaari Plan (in its Chapter II) as the central element for protecting and promoting the rights of all people and communities in Kosovo, including the protection of their culture, language, education, and community symbols.⁸² Article 22 provides for direct applicability of international human rights instruments: in case of conflict, they have priority over other laws or government acts. Article 53 provides for an additional standard, stipulating that the rights guaranteed in the constitution "shall be interpreted consistently with the decisions of the European Court of Human Rights". This high level of minority protection is in line with or even exceeds the standards applied in other European countries. However, their practical implementation remains a challenge.⁸³ As discussed,

heritage; (6) Laws on religious freedom or on agreements with religious communities; (7) Laws on education; (8) Laws on the use of symbols, including Community symbols and on public holidays".

⁷⁸ Kosovo Constitution, Arts. 96, 103, 133.

⁷⁹ Kosovo Constitution, Arts. 64 and 96.

⁸⁰ Kosovo Constitution Art. 96 (3).

⁸¹ Kosovo Constitution, Art. 67 (4).

⁸² Chapter II, Ahtisaari Plan, The Rights of Communities and their members. Comprehensive Proposal for the Kosovo Status Settlement, *op. cit.* (fn. 8).

⁸³ Lantschner, E., *Protection of Minority Communities in Kosovo: Legally Ahead of European Standards – Practically Still a Long Way to Go*, Review of Central and East European Law, vol. 33, 2008, pp. 452 ff.; Istrefi, R., *The Multicultural Agenda as a Part of Peace and State Building in Kosovo: Fictional Peace or Sincere Efforts*, Croatian and Comparative Public Administration, vol. 18, no. 1, 2018, pp. 31 ff.

the government structure under the Kosovo Constitution is truly set up along consociational lines first laid out in the Ahtisaari Plan. The Constitution upholds elements of consociationalism and it provides a structure for the balance between the inclusion and accommodation of community interests and the use of universal human right protections. Despite the constitutional structure, legitimacy, and enforcement elements in place, internal ethnic cleavages exist in particular relating to the Northern part of Kosovo which affect the balance of the arrangements in theory and in practice.

3. North Macedonia

In North Macedonia, the constitution was amended in November 2001, based on Annex A of the Ohrid Framework Agreement.⁸⁴ The approved amendments to the Constitution “set forth tangible goals, benchmarks and confidence building measures to be implemented in order to rectify those conditions that led to the hostilities, fighting and general unrest” of 2001.⁸⁵ The constitutional amendments reworded the Preamble, reformed the voting procedures, enhanced the institutional representation of minorities, granted rights for the official use of languages, religious organizations, cultural heritage, the functioning of fundamental institutions, and local self-government. Through Amendment 4, the reformed preamble modified the notion of the national state by including “equality and coexistence” of other communities. Through a mix of civic and ethnic character, it divided citizens in two categories: the Macedonian People, and other citizens who live within the boundaries of the state and who are part of the Albanian, Turkish, Serbian, Vlach, Roma, Bosnian or other nationalities. Related to the voting procedure, Amendment 18 established a new form of minority veto. Within the minority communities’ spheres of interest, Amendment 18 presented an obstacle to the absolute majority vote (50% of MPs plus one) and the qualified majority vote (two-thirds of MPs). In practice,

⁸⁴ Constitution of the Republic of Macedonia was adopted by the Assembly of the Republic of Macedonia on 17 November 1991. The whole text in English is available online at the Assembly’s website: <http://www.sobranie.mk/en/default.asp?ItemID=9F7452BF44EE814B8DB897C1858B71FF> (12 January 2022). The Constitution was published in the “Official Gazette of the Republic of Macedonia” (OGRM) no. 2/91 of 22 November 1991, while the Amendments to the Constitution were published in OGRM nos. 1/92, 31/98, 91/01, 84/03, 107/05, 3/09 (correction in no. 13/09), and 49/2011 (Constitution of North Macedonia).

⁸⁵ Organization for Security and Co-operation in Europe (OSCE), 18 November 2002, Spillover Monitor Mission to Skopje, Police Development Unit, “Background Paper”.

these amendments require that a law which affects the minority communities shall require a two-thirds majority vote of the total number of representatives.⁸⁶ With the Amendment 5 of the Constitution, the minority languages used by more than 20 per cent of the population shall receive official status, and speakers of these languages shall have the right to be provided public services, primary, secondary and university level education, as well as any judicial proceedings in their native language. The threshold for usage of the second official language in ethnically sensitive domains was thus decreased from the former 50 percent of the respective ethnic community in a given self-government unit. The past demands for an equitable representation in public institutions were addressed with Amendment 6 that was largely transposed from Paragraph 4.2. of the Ohrid Agreement.⁸⁷ Consequently, the amendment set out the constitutional guarantees for equitable access to public administration jobs for all communities. Amendments 7 and 9 of the Constitution enhanced the protections of freedom of religious thought and expression of religious beliefs. Given the sensitivity of religion and historical heritage, implementation of Amendments 7 and 9 will contribute to the improvement of relations between religious communities, their communication and mutual influences, as well as assisting attempts to overcome disagreements and misunderstandings. The communities' diversity and their historical and cultural heritage are furthered by establishment of the institutional fora for interethnic dialogue such as the Inter-Community Relations Committee – a standing body of the Assembly based on Amendment 12.⁸⁸ The Committee's main obligation is examining the

⁸⁶ Constitution of North Macedonia, Amendment XVIII, 1. A decision to amend the Preamble, the articles on local self-government, Article 131, any provision relating to the rights of members of communities, including in particular Articles 7, 8, 9, 19, 48, 56, 69, 77, 78, 86, 104 and 109, as well as a decision to add any new provision relating to the subject-matter of such provisions and articles, shall require a two-thirds majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives who belong to the communities not in the majority in the population of Macedonia. Constitution of Macedonia, <https://www.wipo.int/edocs/lexdocs/laws/en/mk/mk014en.pdf> (20 November 2021).

2. With this amendment a new paragraph is added to paragraph 4 of Article 131 of the Constitution of North Macedonia.

⁸⁷ Paragraph 4.2. of the Ohrid Agreement stipulated that “Laws regulating employment in public administration will include measures to assure equitable representation of communities in all central and local public bodies and at all levels of employment within such bodies, while respecting the rules concerning competence and integrity that govern public administration.”

⁸⁸ Based on the Amendment 12 in 2002 a Decision was adopted for Setting up an Inter-Community Relations Committee, and in year 2007 the Law on Inter-Communi-

issues related to inter-community relations and providing proposals for their solution. The establishment of Inter Community Relations Committees is a legal obligation for all municipalities, based on the 2002 Law on Local Self-Governance. The municipal Committees contribute to the protection of ethnic identity and interests of ethnic groups; in addition, they provide a forum where local people can address and ensure their direct communal interests, thus also contributing to the peaceful and harmonious development of society.⁸⁹ Amendments 16 and 17 provide for a transformation of the voting procedure and functions of the local self-government. These two amendments enhance the possibilities that the voice of the respective communities is heard and that their recommendations are presented on matters of their concern within the municipality where they live.

The above-described constitutional amendments in North Macedonia have brought positive effects as foreseen in the major aspects of the Agreement, in terms of decentralization, equitable representation, use of languages, education, non-discrimination and rights of communities with less than 20% share of population.⁹⁰ The amendments “contributed to an increase in citizens’ institutional trust levels, especially in the case of ethnic Albanians”.⁹¹ However, the constitutional amendments have not been spared from criticism either. In practice, they did not resolve some concrete issues in order to maintain the country’s unity and carry its Euro-Atlantic integration forward.⁹² The amendments do not provide incentives for extensive intercommunity cooperation, and they neglect protections for other ethnic groups.⁹³ It has been stated that

nity Relations Committee (Official Gazette of the Republic of Macedonia, No. 150 of 12.12.2007). See Inter-Community Relations Committee, <https://www.sobranie.mk/inter-community-relations-committee.nspx> (24 November 2021).

⁸⁹ The scope and legal bases of the municipal Committees for InterCommunity Relations are regulated by the Law on Local Self-Government 2002, Article 55.

⁹⁰ See generally, European Institute of Peace, *Ohrid Framework Agreement Review on Social Cohesion*, Skopje, 2015, <https://www.eip.org/ohrid-framework-agreement-review-on-social-cohesion/> (23 March 2021). For a nuanced approach see however: Marolov, D., *Understanding the Ohrid Framework Agreement*, in: Ramet, S. P.; Listhaug, O.; Simkus, A. (eds.), *Civic and Uncivic Values in Macedonia*, Palgrave Macmillan, London, 2013, pp. 134-154.

⁹¹ Aleksovska, M., *Trust in Changing Institutions: The Ohrid Framework Agreement and Institutional Trust in Macedonia*, *East European Quarterly*, vol. 43, no. 1, 2015, pp. 55-84.

⁹² Bajrami, D.; Iseni, A., *The Challenge of (non) Implementation of the Ohrid Framework Agreement in the Republic of Macedonia*, *European Scientific Journal*, vol. 10, no. 10, 2014, pp. 203-218.

⁹³ Galyan, *op. cit.* (fn. 15).

these arrangements further sustain the decades-long split and segregation, and further political polarization.⁹⁴

V. GUARDING PEACE SETTLEMENTS THROUGH CONSTITUTIONAL REVIEW

Constitutional Courts can have a significant and sometimes decisive role in ensuring a country's transition.⁹⁵ Furthermore, the consequences of judicial intervention in post conflicts settings when political elites of communities clash on vital interests, have been pointed out.⁹⁶ Notwithstanding the potentially ambiguous role of Constitutional Courts, their potential for opening up, liberalising, and “unwinding” consociational institutions is apparent.⁹⁷ On a conceptual level, normative power-sharing and constitutional review appear to be closely linked to each other, since judicial review appears to be among the core features that come together with power-sharing settlements and constitutional review.⁹⁸ Literature suggests that institutions that handle rights-based litigation in consociations – mainly constitutional courts – should employ a modest, context-sensitive approach when consociational arrangements are being contested on the grounds of equality and human rights provisions.⁹⁹ But can Constitutional Courts actually embrace this approach in practice? In BiH, Kosovo and North Macedonia, soon after the enactment and constitutional amendments, the constitutional courts were faced with claims concerning political and legal

⁹⁴ European Commission for Democracy Through Law (Venice Commission), Opinion on the Seven Amendments to the Constitution of “The Former Yugoslav Republic of Macedonia”, Opinion N° 779 / 2014, 13 October 2014.

⁹⁵ McCrudden, O’Leary, *Courts and Consociations, or How Human Rights*, *op. cit.* (fn. 4), pp. 487 ff.

⁹⁶ Issacharoff, *op. cit.* (fn. 3); Pildes, *op. cit.* (fn. 4).

⁹⁷ *Ibid.*

⁹⁸ Sweet, S. A., *Constitutional Courts*, in: Rosenfeld, M.; Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012. In the case of BiH and Kosovo, the peace settlements foresaw the establishment of constitutional courts from anew, detached from earlier courts. In North Macedonia, the Constitutional Court has been a part of the country’s democratic system since 1991, with certain changes in 2001. On the establishment and functioning of the Constitutional Court in BiH see: Marko, *op. cit.* (fn. 7). On the establishment of the Constitutional Court of Kosovo see: Hasani, *op. cit.* (fn. 5). On the reform and functioning of the Constitutional Court of North Macedonia see: Andonovski, *op. cit.* (fn. 42).

⁹⁹ Issacharoff, *op. cit.* (fn.3); McCrudden, O’Leary, *Courts and Consociations, or How Human Rights*, *op. cit.* (fn. 4), pp. 487 ff. *op. cit.* (fn. 95)

questions at the heart of the conflict settlements. In BiH, the first claims related to governance structures were brought in 1999. At the request of Mirko Banjac, the then-Deputy Chair of the House of Representatives of the Parliamentary Assembly of Bosnia and Herzegovina, the Court went on to evaluate the constitutionality of the Law on the Council of Ministers of BiH and the Ministries of BiH (Official Gazette of Bosnia and Herzegovina, No. 4/97), which established two Co-Chairs and a Vice-Chair of the Council of Ministers.¹⁰⁰ In its decision in the case U-1/99 from 14 August 1999, the Court concluded that the provisions of that law were not in conformity with the Constitution of Bosnia and Herzegovina.¹⁰¹ The Court declared that “not only the post of Co-Chair as introduced on the basis of ethnic considerations, but also the post of Vice Prime Minister who would have the power to nominate ministers from ‘his’ own ethnic group – a situation clearly contrary to the wording and principles of the Constitution – were indeed unconstitutional.”¹⁰² The Court reiterated that the Constitution has explicitly established the position of the prime minister-designate authorized to appoint the ministers in accordance with Article V (4) of the Constitution.¹⁰³ In reviewing cases related to ethnic symbols such as flags, coats of arms, anthems of entities, and their display in cantons and municipalities, the Court declared their unconstitutionality in situations where the respective symbols did not consider and did not represent the culture and history of other constituent peoples. On 12 April 2004, Sulejman Tihić, then Chairman of the Presidency of Bosnia and Herzegovina, requested the review of constitutionality of Articles 1 and 2 of the Law on the Coat of Arms and Flag of the Federation of Bosnia and Herzegovina (Official Gazette of the Fede-

¹⁰⁰ Constitutional Court of Bosnia-Herzegovina, Case U-1/99, 14 August 1999 (Decision). The applicant requested an evaluation of the constitutionality of the Law on Ministers and Ministries, claiming that “Article 6, paragraphs 1 and 2 of the Law on Ministers and Ministries were in contravention of Article V, item 4 of the Constitution of Bosnia and Herzegovina, since item 1 uses the term Co-chair appointed by the Presidency of Bosnia and Herzegovina, and item 2 starts with the function of Vice-chair, which is not foreseen by the Constitution of Bosnia and Herzegovina, and that it is evident that the Law is not consistent with the Constitution of Bosnia and Herzegovina, challenged all the provisions of the Law which define the Co-Chairs and the Vice-Chair of the Council of Ministers, and not only Article 6”.

¹⁰¹ *Ibid.*, in its Decision the Court “established that Articles 3, 5, 6, 7, 9, 10, 11, 12, 13, 15, 19, 20, 21 item 3, 22, 24, 25, 26, 27, 28 and 29 of the Law on the Council of Ministers of Bosnia and Herzegovina and the Ministries of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No. 4/97) are not in conformity with the Constitution of Bosnia and Herzegovina”.

¹⁰² *Ibid.* (Reasons).

¹⁰³ *Ibid.* (Reasons).

ration of BiH No. 21/96 and 26/96), Articles 1, 2 and 3 of the Constitutional Law on the Flag, Coat of Arms and Anthem of the Republika Srpska (Official Gazette of the Republika Srpska No. 19/92), Articles 2 and 3 of the Law on the Use of Flag, Coat of Arms and Anthem (Official Gazette of the Republika Srpska No. 4/93) and Articles 1 and 2 of the Law on the Family Patron-Saint's Days and Church Holidays of the Republika Srpska (Official Gazette of the Republika Srpska No. 19/92). In two partial decisions in 2006, the Court found that the coat of arms and flag of the Federation of BiH, and coat of arms, anthem, family patron-saint days and church holidays of Republika Srpska were unconstitutional.¹⁰⁴ The Court also dealt with a considerable number of cases where names of cities were entirely changed, renamed, amended or had ethnic prefixes added.¹⁰⁵ In the case U-44/10 related to the renaming of various cities in RS adding the Serb identity, the Court extended its interpretation by finding that adding an ethnic (Serb) prefix was not in conformity with Article II(4), in conjunction with Articles II(3) and II(5) of the Constitution of Bosnia and Herzegovina.¹⁰⁶ In case U-8/04 from 25 of June 2004 related to education, the Court found that the framework of the law on higher education was destructive towards the interests and rights of the Croat People.¹⁰⁷ Considering whether the

¹⁰⁴ Case U-4/04, 31 March 2006 and U-4/04, 18 November 2006. The Court stated "The Constitutional Court concludes that it is the legitimate right of the Bosniac and Croat people in the Federation of BiH and the Serb people in the Republika Srpska to preserve their tradition, culture and identity through legislative mechanisms, but an equal right must be given to the Serb people in the Federation of BiH and Bosniac and Croat peoples in Republika Srpska and other citizens of Bosnia and Herzegovina. The Constitutional Court further holds that it cannot consider as reasonable and justified the fact that any of the constituent peoples has a privileged position in preservation of tradition, culture and identity as all three constituent peoples and other citizens of Bosnia and Herzegovina enjoy the rights and fulfil obligations in the same manner as provided for in the Constitution of Bosnia and Herzegovina and Constitutions of the Entities. Moreover, it is of a particular importance the fact that the identity of the constituent peoples, education, religion, language, fostering culture, tradition and cultural heritage are defined in the Constitution of the Federation of BiH and Constitution of the Republika Srpska, as the vital national interests of the constituent peoples". For review of the issue of ethnic symbols such as flags, coats of arms, anthems of entities, and their display at the level of RS, see e.g., Case Uv-4/07, 25 July 2007 (melody of anthem), Uv-3/08, 22 December 2008 (coat of arms and the text of anthem), Case Uv-5/11, 20 September 2011 (orthodox New Year).

¹⁰⁵ Feldman, D., *Renaming cities in Bosnia and Herzegovina*, International Journal of Constitutional Law, vol. 3, no. 4, 2005, pp. 649–695.

¹⁰⁶ Constitutional Court of Bosnia-Herzegovina, Case U-44/01, 27 February 2004.

¹⁰⁷ Constitutional Court of Bosnia-Herzegovina, Case U-8/04, 25 June 2004. For the

“vital interests” condition was correctly applied in the respective parliamentary legislative process, the Court declared that “the contested proposal of a Framework Law on Higher Education in BiH was destructive of the vital interest” - not only did it not guarantee university instruction in the Croatian language, but the contested proposed act (Framework Law on Higher Education in BiH) also did not provide for equality of all the three languages and “thereby [hindered] access to higher education for members of all the constituent peoples and others in order to counterbalance segregation in this field.”¹⁰⁸ By contrast in the case U-26/13 of 26 March 2015 the court found that the legal framework governing primary and secondary education was not in contravention of the provisions of Article II(1), Article II(4) and Article II(3)(b) of the Constitution of Bosnia and Herzegovina and ECHR standards.¹⁰⁹

In the landmark case U-5/98-I, II, III and VI (January–August 2000), various provisions of the entity constitutions were contested by Alija Izetbegović, who was at the time Chair of the Presidency of Bosnia and Herzegovina. The applicant requested an evaluation of the consistency of the Constitution of the Republika Srpska and the Constitution of the Federation of Bosnia and Herzegovina with the Constitution of Bosnia and Herzegovina.¹¹⁰ The Court dealt with the questions of the legal status of entities; the legal nature of the Constitution of BiH; prohibition of discrimination; equality of constituent peoples; status of the Orthodox Church in RS; and equality of language and script. In its four partial decisions, the Court declared that “Article 68, paragraph 16 as amended by Amendment XXXII, Article 7, paragraph 1 and Article 28, paragraph 4 of the Constitution of Republika Srpska and Article I(6)(1) of the Constitution of Federation of BiH are unconstitutional.”¹¹¹ The Court’s interpretation of the constitutional category of the “constituent peoples”¹¹², “the

level of FBiH, see: Case U-28/04, 3 November 2004.

¹⁰⁸ *Ibid.*

¹⁰⁹ Constitutional Court of Bosnia-Herzegovina, Case U-26/13, 26 March 2015.

¹¹⁰ The request was submitted on 12 February 1998 and supplemented on 30 March 1998 when the applicant specified which provisions of the Entities’ Constitutions, he considered to be unconstitutional.

¹¹¹ Constitutional Court of Bosnia-Herzegovina, Case U-5/98-I, 28, 29 and 30 January 2000; Case U-5/98-II, 18 and 19 February 2000; Case U-5/98-III, 30 June and 1 July 2000; U-5/98-VI, 18 and 19 August 2000.

¹¹² *Ibid.*, para 26. The Court stated “[T]he provisions of the Preamble are thus a legal basis for reviewing all normative acts lower in rank in relation to the Constitution of BiH for as long as the aforesaid Preamble contains constitutional principles delineating [...] spheres of jurisdiction, the scope of rights or obligations, or the role of the political institutions. The provisions of the preamble are therefore not merely descriptive, but are also invested with a powerful normative force thereby serving as

multiethnic state structure”¹¹³ and” the equality of constituent peoples”¹¹⁴ is considered “to be a part of the ‘unwinding canon’”.¹¹⁵ Consequently, “legally at least, it removed the idea of entities, or other political and territorial formations, as an ethnic basis that can be justified in any form”.¹¹⁶

Notwithstanding the constitutional review of disputes arising within the power-sharing arrangements and group rights, the legal problems and conflict surrounding power-sharing arrangements and individual human rights surfaced in the landmark case *Sejdić and Finci v. Bosnia and Herzegovina* (27996/06 and 34836/06), where electoral regulations based on ethnic terms resulted in individual discrimination. Dervo Sejdić and Jakob Finci, both citizens of BiH, who are respectively Roma and Jewish by their ethnicity, wanted to stand for elected office. However, the Central Election Commission stated that they were ineligible to stand for election to the Presidency and the House of Peoples of the Parliamentary Assembly because of their ethnic origins. Applications were submitted to the European Court of Human Rights in 2006.¹¹⁷ The applicants

a sound standard of judicial review for the Constitutional Court [...]”.

¹¹³ *Ibid.*, paras. 54-57. “[E]lements of a democratic state and society as well as underlying assumptions – pluralism, just procedures, peaceful relations that arise out of the Constitution – must serve as a guideline for further elaboration of the issue of the structure of BiH as a multi-ethnic state [...]”.

¹¹⁴ *Ibid.*, paras. 60-61. “Territorial delimitation [of Entities] must not serve as an instrument of ethnic segregation – on the contrary – it must accommodate ethnic groups by preserving linguistic pluralism and peace in order to contribute to the integration of the state and society as such [...] Constitutional principle of collective equality of constituent peoples, arising out of designation of Bosniacs, Croats and Serbs as constituent peoples, prohibits any special privileges for one or two constituent peoples, any domination in governmental structures and any ethnic homogenization by segregation based on territorial separation [...] [D]espite the territorial division of BiH by establishment of two Entities, this territorial division cannot serve as a constitutional legitimacy for ethnic domination, national homogenization or the right to maintain results of ethnic cleansing [...]”.

¹¹⁵ Kulenović, N., *Court as a Policy-Maker? The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation*, Analitica, Working Paper 5/2016, p. 32.

¹¹⁶ *Ibid.*

¹¹⁷ Referring to two cases of the Constitutional Court of Bosnia and Herzegovina, decisions U-5/04 of 31 March 2006 and U-13/05 of 26 May 2006, concerning a challenge to the restricted membership of the Presidency and House of Peoples. The applicants claimed that “there are no available, sufficient and effective domestic remedies to redress their complaints as the interferences with their rights under the ECHR emanate from clear, unequivocal and unambiguous provisions contained in the Constitution of BiH which are not capable of challenge before the courts in BiH.” See *Sejdić and Finci v. Bosnia and Herzegovina*, *op. cit.* (fn. 66), paras 29-30 (Ad-

claimed that they were prevented by the Constitution of Bosnia and Herzegovina from being candidates for the Presidency and the House of Peoples of the Parliamentary Assembly solely “on the ground of their ethnic origins, since these positions are reserved for members of the so-called ‘constituent’ peoples, i.e. Bosniacs, Serbs, and Croats, as part of the Dayton peace settlement”.¹¹⁸ The Grand Chamber of the European Court of Human Rights found that “the applicants’ continued ineligibility to stand for election to the House of Peoples of BiH lacked an objective and reasonable justification and was therefore discriminatory, in breach of Article 14 taken in conjunction with Article 3 of Protocol 1.”¹¹⁹ The Court also held that there had been a “violation of Article 1 of Protocol 12 as regards the applicants’ ineligibility to stand for election to the Presidency of BiH.”¹²⁰ The court found that “while the urgent need to restore peace at the time of the agreement could explain the absence of representatives of other communities at the peace negotiations, the maintenance of the current system fifteen years after the fact no longer satisfied the requirement of proportionality.”¹²¹ This landmark (and highly debated) decision is of high relevance as it reveals the conflicting purposes of the peace agreements and the human rights of individuals. The decision should be utilized by international supporters in the future as comprehensive ground for rethinking the compatibility of peace-making mechanisms with the fundamental human rights principle. To date the implementation of this landmark ruling seems unrealistic as it requires constitutional changes which produce additional complications.¹²²

In Kosovo, one of the first ethnic identity-related and much-debated cases was the “Prizren Municipality Emblem”.¹²³ The case was initiated by the Deputy Chairperson of the Municipality of Prizren on the basis of a complaint that the municipal logo did not represent the values and ethnic identities of other communities living in multiethnic city of Prizren, but solely those of the Albanian majority. In its decision of 18 March 2010, the Court relied in particular on Article 3 (Equality before the Law), Article 7.1 (Values), Article 58

missibility).

¹¹⁸ *Ibid.*, para. 2.

¹¹⁹ *Ibid.* para. 5.

¹²⁰ *Ibid.*, para. 7.

¹²¹ *Ibid.*, para. 45.

¹²² See for instance the dissenting opinion of Judge Bonelli where he stated that the BiH constitution cannot be changed without a revision of the Dayton Peace Agreement. *Ibid.*, Dissenting Opinion of Judge Bonello.

¹²³ Constitutional Court of Kosovo Case KO 01/09, 18 March 2010. All decisions with concurring and dissenting opinions are also published on the webpage of the Constitutional Court of Kosovo: <https://gjk-ks.org/en/decisions/> (3 September 2021).

(Responsibilities of the State) and Article 59 (Rights of Communities and their Members) of the Constitution and banned the usage of the coat of arms of the Municipality of Prizren since “it was not in conformity with the principle of multiethnicity, constitutional values, collective participation and identity protections”.¹²⁴ The court decided that the municipalities’ logos should reflect respect for all citizens, regardless of the ethnic composition of the municipality in question. Consequently, “[w]hen the Municipality decided to proceed with the emblem promoting the Albanian heritage and tradition without regard to the other Communities it infringed their statutory and constitutional rights”.¹²⁵

The case that raised a number of controversies relates to the decision on the review of the Principles of the Association of Serb Majority Municipalities.¹²⁶ In this case, the Court reviewed the conformity of Principles of the Association of Serb Majority Municipalities with Article 3 (Equality Before the Law), Paragraph 1, Chapter II (Fundamental Rights and Freedoms) and Chapter III (Rights of Communities and Their Members) of the Constitution of the Republic of Kosovo.¹²⁷ The Court clarified that it has no jurisdiction to review the Brussels Agreement on the principles itself as a legal act. It affirmed that, based on the First Brussels Agreement, the Government of Kosovo was legally obliged to proceed with the establishment of the Association.¹²⁸ Evaluating the chapters of the Principles against Kosovo’s constitutional standards, the Court concluded that the Agreement on the Principles of Association violated the Constitution, specifically the principle of equality before the law, fundamental rights and freedoms, and the rights of communities and their members.¹²⁹

¹²⁴ *Ibid.*, paras. 12-83.

¹²⁵ *Ibid.*, para 46.

¹²⁶ The Article 6 of the Ahtisaari Plan provides for local self-government and that municipalities “shall have the right to inter-municipal and cross-border cooperation on matters of mutual interest in the exercise of their responsibilities.” The Plan’s Annexes expand on these - Annex I (Article 8.3) give municipalities the right to local sources of revenue and (8.4) to “inter-municipal and cross-border cooperation in the areas of their own and enhanced competencies.” Comprehensive Proposal for the Kosovo Status Settlement, *op. cit.* (fn. 43). The original text of the Agreement on the Association of the Serb Municipalities is available at: http://eeas.europa.eu/statements-eeas/docs/150825_02_association-community-of-serb-majoritymunicipalities-in-kosovo-general-principles-main-elements_en.pdf (3 June 2021).

¹²⁷ Constitutional Court of Kosovo, Case KO 130/15, 23 December 2015. Case KO 130/15 was submitted by the then President of the state Atifete Jahjaga to review the constitutionality of the EU mediated agreement on the principles for the Association reached between the governments of Kosovo and Serbia of 19 April 2013 (Brussels Agreement).

¹²⁸ *Ibid.*, paras. 112-113.

¹²⁹ *Ibid.*, paras. 120-171.

To date, the decision on the “Dečani Monastery” case remains the most debated one.¹³⁰ The claim in this case related to the disputed ownership of land that was donated by the Serbian government to the Monastery in 1997. The Applicant, Visoki Dečani Monastery, requested the constitutional review of two Decisions from 12 June 2015 (nos. AC-I-13-0008 and AC-I-13-0009), issued by the Appellate Panel of the Special Chamber of the Supreme Court of the Republic of Kosovo on matters relating to the Privatization Agency of Kosovo. The Appellate Panel of the Special Chamber decided (nos. AC-I-13-0008 and AC-I-13-0009) on the property dispute between the Applicant and third parties in favor of the Applicant and that the decision had become final *res judicata*. The third parties, meanwhile, filed appeal with the Appellate Panel which approved the appeal of the third parties and concluded that the appeal was founded. It annulled the previous decisions on the matter and found that the Special Chamber was not competent to adjudicate the matter. Relying on violation of the principle of *res judicata* by the Appellate Panel, the applicant claimed that rights under “Articles 24 (Equality Before the Law), Article 31 (Right to Fair and Impartial Trial), Article 32 (Right to Legal Remedies), Article 46 (Protection of Property), Article 54 (Judicial Protection of Rights) of the Constitution, and Article 13 (Right to Legal Remedies) of the ECHR” have been violated.¹³¹ Constitutional Court issued its decision on 20 May 2016, asserting that the Appellate Panel violated the principle of judicial security and denied to the Applicant a fair and impartial trial because it used the appeal procedure to annul previous decisions and it had referred the original contest of property again to the regular courts. The Court concluded that there was a violation of Article 31 of the Constitution in conjunction with Article 6(1) of the ECHR.¹³² With this decision, the monastery’s right to the disputed land was once again confirmed since the disputed decisions of Supreme Court (nos. AC-I-13-0008 and AC-I-13-0009) were declared by the Court as being *res judicata*.¹³³ However, to date, the Constitutional Court decision has not been implemented.

The Constitutional Court in North Macedonia decided twice in the case of

¹³⁰ Constitutional Court of Kosovo, Case KII32/15, 20 May 2016.

¹³¹ *Ibid.*, para. 3.

¹³² Every year on the date of the Constitutional Court ruling, international diplomats in Kosovo (in particular, the US embassy and the head of the EU Office in Kosovo) urged the Kosovo authorities to implement this decision reached by the Constitutional Court. See: Morina, D., *Kosovo Ignores Call to Enforce Monastery’s Land Claim*, Balkan Transitional Justice, 21 April 2017, <https://balkaninsight.com/2017/04/21/kosovo-govt-stays-silent-over-eu-calls-on-monastery-land-04-21-2017/> (3 December 2021).

¹³³ *Ibid.*, Decision Chapter IV.

the usage of national symbols, mainly use of national flags.¹³⁴ After the constitutional amendments, the issue of usage of national symbols was brought to the Constitutional Court in form of a request for assessing the constitutionality of the Law of the Use of Flags of Communities in the Republic of Macedonia of 2005 – a law based on section 7.1 of the Ohrid Framework Agreement. Several citizens and political parties asked the Court to assess the constitutionality of that law (published in the “Official Gazette of the Republic of Macedonia”, no. 58/2005), both partially and in whole. They alleged that any hoisting of another country’s flag on the territory of the Republic of Macedonia violated its unitary character and sovereignty, as guaranteed by the Constitution.¹³⁵ The Court stated that “The choice of another state’s flag, as a symbol of the identity and special characteristics of communities that do not form part of the majority in the Republic of Macedonia, does not breach the Constitution. Such a flag would not pose a threat to the sovereignty and territorial integrity of the Republic of Macedonia, if its use simply demonstrates the fact of ‘belonging’ to a particular community.” However, it also stated that the “legislation on the use of flags by members of communities within the Republic of Macedonia allowed members of communities to use symbols based on their percentage representation within their local government area. This contravened Amendment VIII of the Constitution”.¹³⁶ The Court repealed some parts (Articles 4, 5, 6 and 8) of the Law in question, based on the “principle of non-discrimination of ethnic communities, and concluded that the “majority of population” condition provided by law is not in accordance with constitutional Amendment 8. The Court declared that the right to use their flag should not be dependent on the numerical strength of a community in a given municipality because it is not in line with Amendment 8 of the Constitution and Articles 20 and 21 of the Framework Convention for the Protection of the National Minorities.¹³⁷ Relying on international standards and also on constitutional provisions (Article 5), the court stated “the flag is one of the state symbols through which are expressed

¹³⁴ The first case related to the use of national symbols, that of flags is the case, U. no. 52/97, where the court in its final decision, repealed Art. 140 of the Statute of the Municipality of Gostivar, arguing that the municipality does not have the right to regulate the use of flags, according to Art. 48 of the Constitution. See: Constitutional Court of North Macedonia, Case U. no. 52/97, on the review of the Statute of municipality of Gostivar, 11 November 1997. All decisions with concurring and dissenting opinions are published on the webpage of the Constitutional Court of North Macedonia http://ustavensud.mk/?page_id=5267&lang=en (3 December 2021).

¹³⁵ Constitutional Court of North Macedonia, Case U. no 133/2005, 24 October 2007.

¹³⁶ *Ibid.*, para. 102.

¹³⁷ *Ibid.*, para. 103.

the state sovereignty and territorial integrity of the Republic of Macedonia, whereby the hoisting of the state flag and its use in general symbolises belonging to certain state in which manner state identity and state characteristics are expressed. The use or hoisting of the flag of the members of the communities is aimed at symbolizing the belonging to certain community for the purposes of expressing the identity and specifics of that community.”¹³⁸ The Constitutional Court’s decision did not widen circle of national minorities that could fly their flags (meaning, Albanian *plus* others), but it *denied* the right to fly the minority flag/present emblems to the Albanian minority (in localities where it is a majority of population) *but allowed the right for* other minorities as well to display their national symbols. This court ruling has caused a lot of resentment on the part of Albanian political leaders, resulting with resignation of the two Albanian Constitutional Court justices.¹³⁹ It has been considered that the communities’ rights of using their national flags set out in section 7.1 of the Ohrid Framework Agreement and the specific law were limited.¹⁴⁰ Some state that with this ruling the “constitutional court extremely ignored this Agreement as primary formal source of Constitutional law of the country”¹⁴¹, because this document “is the foundation for the interpretation of 2001 Constitutional Amendments”.¹⁴²

Municipal decentralisation of powers as a primary component of the Ohrid Framework Agreement went under the review of the Constitutional Court of North Macedonia. Specifically, the special voting procedures introduced by Article 5 of the Ohrid Framework Agreement and enshrined in Article 69.2 of the amended Constitution referred to as ‘double-majority’ or ‘Badinter’ were contested issue. This special voting procedure provides that the constitutional amendments and certain legislation¹⁴³ cannot be approved without a qualified

¹³⁸ *Ibid.*, paras. 105-110.

¹³⁹ Risteska, M.; Shurkov, E., *The Transformative Role of the Macedonian Constitutional Court*, Analitika – Center for Social Research, 2017, pp. 41-42, <http://www.crpm.org.mk/wp-content/uploads/2017/01/Constitutional-Court-Macedonia.pdf> (13 December 2021).

¹⁴⁰ Walsh, D., *Constitutional courts as arbiters of post-conflict territorial self-government: Bosnia and Macedonia*, *Regional & Federal Studies*, vol. 29, no. 1, 2018, p.77.

¹⁴¹ Shasivari, J., *The Past and the Present of the Constitutional Systems of the Republic of Macedonia in Terms of the Position of Albanians*, *European Scientific Journal*, vol. 9, no. 17, 2013, p.196.

¹⁴² *Ibid.*, in fn. 37, citing Skaric Svetomir, Ohrid Agreement and Minority Communities in Macedonia, p. 96.

¹⁴³ Article 52 of the Ohrid Framework Agreement reads “5.2. Laws that directly affect culture, use of language, education, personal documentation, and use of symbols, as well as laws on local finances, local elections, the city of Skopje, and boundaries

majority of two-thirds of votes, within which there must be a majority of the votes from those claiming to belong to non-majority communities. Two cases are of relevance here, both of which concerned the voting procedure for enactment of specific laws and their conformity with the Law on Local Self-Government.¹⁴⁴ In case U. no. 42/2007, it was argued that the Law on Police must be adopted using the double majority ‘Badinter principle’, requiring the votes of both the majority of all MPs and the majority of deputies from non-majority communities (i.e. from non-ethnic Macedonians).¹⁴⁵ In assessing the constitutionality of the enactment of the Law on Police and its compliance with the Law on Local Self-Government, the Court decided that “the procedure used to adopt the Law on Police was not unconstitutional as had been alleged”. In its legal reasoning the Court argued that the “Law did not require such a procedure to pass as it did not address any of the issues which the Constitution specifies that require such a majority: ‘culture, use of language, education, personal documentation, and use of symbols’.”¹⁴⁶ The Court ruled that “according to Article 110 of the Constitution it was not competent to assess whether the Law on Police was consistent with the Law on Local Self-Government as it was not empowered to evaluate the mutual congruity of laws as a whole, as well as the mutual congruity of individual provisions of the laws”. In another case, U. no. 104/2007, the Court assessed the claim that the Law on Property Taxes was unconstitutional.¹⁴⁷ Its decision actually ensured that municipalities continued to enjoy competencies regarding setting tax rates which were established by that new Law. In its reasoning, the Court directly referred to the constitutional right to local self-government and the Law on Local Self-Government, underlining a commitment to respecting the principle of decentralization.¹⁴⁸

From the above analyses it is evident that the role of Constitutional Courts in implementing peace settlement compromises through constitutional review differs. In securing the implementation of the peace settlement and constitutional guarantees, the Constitutional Court in BiH has catalyzed constitutional transformation in cases that dealt with the state structure and the political regime in the country. The Court’s jurisprudence shows that it is activist, in

of municipalities must receive a majority of votes, within which there must be a majority of the votes of the Representatives claiming to belong to the communities not in the majority in the population of Macedonia.”

¹⁴⁴ See *supra*.

¹⁴⁵ Constitutional Court of North Macedonia, Case U. no. 42/2007.

¹⁴⁶ *Ibid.*, para. 4.

¹⁴⁷ Constitutional Court of North Macedonia, Case U. no. 104/2007.

¹⁴⁸ *Ibid.*

particular in the cases that dealt with state structures and political governance. The analyzed cases show that the Court attempted to maintain links with the Dayton Agreement and consociational arrangements provided in the Dayton Constitution. But the ECHR's ruling in *Sejdić and Finci* provides a ground to revisit the peace agreement's conflict settlement compromises transposed to national constitutions in order to not contravene the international human rights standards, consequently conditioning the EU integrative efforts.¹⁴⁹ In Kosovo, the Constitutional Court in some cases demonstrated a rather restrictive and, in some cases, a more extensive judicial review. The Court's jurisprudence in Kosovo plays an important role in the transformation and enhancement of state-building and human rights protection. The analyzed court's jurisprudence contributes to the building of mutual trust, positive attitudes as well as the consideration of the community's needs and interests. However, the role of the Constitutional Court in Kosovo is hampered due to the non-implementation of the judicial decisions in practice. In North Macedonia, the constitutional review of the Ohrid Framework Agreement forms a useful contrast. In some cases, the constitutional review went contrary to the relevant provisions of the Ohrid Framework Agreement (such as the case of the Law on Use of Flags of Communities), sometimes deviated from the direct interpretation (such is the case of Law on Police), and in some cases the review was in conformity with the Ohrid Framework Agreement (such is the case on the Law on Taxes). Consequently, the role of the Constitutional Court in post-conflict North Macedonia has been termed as a transformative one¹⁵⁰, and also as displaying centralizing tendencies.¹⁵¹

VI. CONCLUSIONS

In the three countries, BiH, Kosovo, and North Macedonia, constitution-making and amendment occurred under deep involvement and close supervision of the international community. In normative terms, conflict settlements in the three cases provided for substantive standards that regulate the political processes, democratic governance and human rights which have been reflected

¹⁴⁹ European Commission, Commission Staff Working Document, Bosnia and Herzegovina 2020 Report, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy, Brussels, 6.10.2020, pp. 4-27.

¹⁵⁰ Risteska, Shurkov, *op. cit.* (fn. 132).

¹⁵¹ Walsh, *op. cit.* (fn. 133).

in the contents of constitutions. However, these normative regulations have been criticized as rendering the state governance dysfunctional in the case of BiH, as instituting very high standards in case of Kosovo, and causing further political fragmentations in the case of North Macedonia. Moreover, although constitutional review of the settlement compromises transposed in constitutional designs produced profound changes and transformations, still, interethnic relations in the three countries remain tense.

From the analyses, the article points out important lessons in relation to the constitution-making processes and the effective implementation of the constitutional arrangements. Regarding the process of constitution-making, we therefore recommend that international supporters should strive to coordinate their efforts through proactive involvement of local actors in order to make them equal partners in and ensure local ownership through internal inclusion (involving local experts in the process of drafting the contents of the constitution) and external inclusion (involving general public). Furthermore, they should ensure a participatory constitution-making process related to the effective implementation in practice of governance power sharing, minority representation and human rights guarantees. We further recommend that international experts should not neglect local practices and societal past. Imposition of external models that are not in line with societal past and local political reality may exacerbate ethnic divisions and hamper inter-ethnic relations negatively. Constitution-making, as a part of contemporary peace-making tools, should be followed by a range of internal mechanisms that will support the society to overcome the past and with it established conditions for co-living and trust building. For an effective implementation of constitutional arrangements, international support should also foresee concrete support and set clear benchmarks to be met in order to enhance integration of post-conflict societies in international systems, above all the European Union and also the Council of Europe in the case of Kosovo. This will also impact the implementation of the Constitutional Courts' decisions, and as such, enhance the role of the courts in peacebuilding process.

BIBLIOGRAPHY**Books and Articles**

- Aleksovska, M., *Trust in Changing Institutions: The Ohrid Framework Agreement and Institutional Trust in Macedonia*, *East European Quarterly*, vol. 43, no. 1, 2015, pp. 55-84.
- Andonovski, S., *The Effects of Post-conflict Constitutional Designs: The "Ohrid Framework Agreement" and the Macedonian Constitution*, *Croatian International Relations Review*, vol. 24, no. 81, 2018, pp. 23-50.
- Bajrami, D.; Iseni, A., *The Challenge of (non) Implementation of the Ohrid Framework Agreement in the Republic of Macedonia*, *European Scientific Journal*, vol. 10, no. 10, 2014, pp. 203-218.
- Banning, T., *The 'Bonn Powers' of the High Representative in Bosnia Herzegovina: Tracing a Legal Figment*, *Göttingen Journal of International Law*, vol. 6, no. 2, 2014, pp. 259-302.
- Barnett, M., *Partners in Peace? The UN, Regional Organizations, and Peace-Keeping*, *Review of International Studies*, vol. 21, no. 4, 1995, pp. 411-433.
- Bell, C., *Introduction: Bargaining on constitutions – Political settlements and constitutional state-building*, *Global Constitutionalism*, vol. 6, no. 1, 2017, pp.13-32.
- Bell, C., *On the Law of Peace: Peace Agreements and Lex Pacificatoria*, Oxford University Press, New York, 2008.
- Bell, C., *Peace Agreements and Human Rights*, Oxford University Press, Oxford, 2000.
- Bell, C., *Peace Agreements: Their Nature and Legal Status*, *American Journal for International Law*, vol. 100, no. 2, 2006, pp. 373-412.
- Bogaards M., *Consociationalism and Centripetalism: Friends or Foes?* *Swiss Political Science Review*, vol. 25, no. 10, 2019, pp. 519-537.
- Chollet, D., *The Road to the Dayton Accords: A Study of American Statecraft*, Palgrave Macmillan, New York, 2005.
- Choudhry S.; Tushnet M., *Participatory constitution-making: Introduction*, *International Journal of Constitutional Law*, vol. 18, no. 1, 2020, pp. 173-178.
- Choudhry, S., *Ackerman's higher lawmaking in comparative constitutional perspective: Constitutional moments as constitutional failures?* *International Journal of Constitutional Law*, vol. 6, no. 2, 2008, pp. 193-230.
- Choudhry, S., *After the Rights Revolution: Bills of Rights in the Postconflict State*, *Annual Review of Law and Social Science*, vol. 6, 2010, pp. 301-322.

- Choudhry, S., *Bridging Comparative Politics and Comparative Constitutional Law: Constitutional Design for Divided Societies*, in: Choudhry, S. (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford University Press, New York, 2008, pp. 3-40.
- Choudhry, S., *Old Imperial Dilemmas and the New Nation Building: Constitutive Constitutional Politics in Multinational Politics*, *Connecticut Law Review*, vol. 37, 2005, pp. 933-945.
- Dann, P.; Al-Ali, Z., *The Internationalized Pouvoir Constituant – Constitution-making under external influence in Iraq, Sudan and East Timor*, *Max Planck Yearbook of United Nations Law*, vol. 10, 2006, pp. 423-463.
- Doli, D.; Korenica, F., *Calling Kosovo's Constitution: A Legal Review*, *Denning Law Journal*, vol. 22, 2010, pp. 51-85.
- Feldman, D., *Renaming cities in Bosnia and Herzegovina*, *International Journal of Constitutional Law*, vol. 3, no. 4, 2005, pp. 649–695.
- Feldman, N., *Imposed Constitutionalism*, *Connecticut Law Review*, vol. 37, 2005, pp. 857-869.
- Feldman, N., *What We Owe Iraq: War and the Ethics of Nation Building*, Princeton University Press, Princeton, 2004.
- Ferres, C. V., *The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism*, *Texas Law Review*, vol. 2, no. 3, 2004, pp. 1-30.
- Grewe, C.; Riegner, M., *Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo Compared*, *Max Planck Yearbook of United Nations Law Online*, vol. 15, no. 1, 2011, pp. 1-64.
- Hasani, E., *The Role of the Constitutional Court in the Development of the Rule of Law in Kosovo*, *Review of Central and East European Law*, vol. 43, no. 3, 2018, pp. 274–313.
- Horowitz, L. D., *A Democratic South Africa? Constitutional Engineering in a Divided Society*, University of California Press, Los Angeles, 1991.
- Horowitz, L. D., *Conciliatory Institutions and Constitutional Processes in Post-Conflict States*, *William and Mary Law Review*, vol. 49, no. 4, 2008, pp. 1213-1248.
- Horowitz, L. D., *Constitutional Design: An Oxymoron?* in *Designing Democratic Institutions*, NYU Press, New York, 2000, pp. 253-284.
- Horowitz, L. D., *Ethnic Groups in Conflict*, University of California Press, Berkeley, 1985.

- Issacharoff, S., *Constitutionalizing democracy in fractured societies*, *Journal of International Affairs*, vol. 58, no.1, 2004, pp. 73–93.
- Issacharoff, S., *Fragile Democracies: Contested Power in the Era of Constitutional Courts*, Cambridge University Press, Cambridge, 2015.
- Istrefi, R., *The Multicultural Agenda as a Part of Peace and State Building in Kosovo: Fictional Peace or Sincere Efforts*, *Croatian and Comparative Public Administration*, vol. 18, no. 1, 2018, pp. 31-46.
- Jackson, C. V., *What's in a Name? Reflections on Timing, Naming, and Constitution-Making*, *William and Mary Law Review*, vol. 49, no. 4, 2008, pp. 1249-1305.
- Korenica, F.; Doli, D., *The Politics of Constitutional Design in Divided Societies: The Case of Kosovo*, *Croatian Yearbook of European Law & Policy*, vol. 6, 2010, pp. 265-292.
- Lantschner, E., *Protection of Minority Communities in Kosovo: Legally Ahead of European Standards—Practically Still a Long Way to Go*, *Review of Central and East European Law*, vol. 33, 2008, pp. 452-490.
- Lijphart, A., *The Politics of Accommodation: Pluralism and Democracy in the Netherlands*, University of California Press, Los Angeles, 1968.
- Lijphart, A. (ed.), *Conflict and Coexistence in Belgium: The Dynamics of a Culturally Divided Society*, Institute of International Studies, University of California, Berkeley, 1981.
- Lijphart, A., *Democracy in Plural Societies: A Comparative Exploration*, Yale University Press, New Haven, 1977.
- Lijphart, A., *Consociation and Federation: Conceptual and Empirical Links*, *Canadian Journal of Political Science*, vol. 12, 1979, pp. 499–515.
- Lijphart, A., *Consociational Democracy*, *World Politics*, vol. 21, no. 2, 1969, pp. 207–225.
- Lijphart, A., *Constitutional Design for Divided Societies*, *Journal of Democracy*, vol. 15, no. 2, 2004, pp. 96-109.
- Lijphart, A., *Thinking about Democracy: Power Sharing and Majority Rule in Theory and Practice*, Routledge, London, New York, 2008.
- Ludsin, H., *Peacemaking and Constitution-Drafting: A Dysfunctional Marriage*, *University of Pennsylvania Journal of International Law*, vol. 33, no. 239, 2011, pp. 239-310.
- Mahr, E., *Local contestation against the European Union Rule of Law Mission in Kosovo*, *Contemporary Security Policy*, vol. 39, no. 1, 2018, pp. 72-94.

- Maia, C.; Ayissi, A., *Peace Through Constitution: The Importance of Constitutional Order for International Peace and Security*, African Yearbook of International Law, vol. 19, 2011, pp. 201-227.
- Marko, J., *Bosnia-Herzegovina: The Role of the Judiciary in A Divided Society*, Constitutional Review, vol. 5, no. 2, 2019, pp. 194-221.
- Marko, J., *Constitutional Reform in Bosnia and Herzegovina*, European Yearbook of Minority Issues, vol. 5, 2005-06, pp. 207-218.
- Marko, J., *New Kosovo Constitution in a Regional Comparative Perspective*, Review of Central and East European Law, vol. 33, 2008, pp. 437-450.
- Marolov, D., *Understanding the Ohrid Framework Agreement*, in: Ramet, S. P.; Listhaug, O.; Simkus, A. (eds.), *Civic and Uncivic Values in Macedonia*, Palgrave Macmillan, London, 2013, pp. 134-154.
- McAfee, B. T., *The Constitution as Based on the Consent of the Governed - Or, Should We Have an Unwritten Constitution?* Scholarly Works, vol. 80, 2001, pp. 1245-1300.
- McCrudden, Ch.; O'Leary B., *Courts and Consociations, or How Human Rights Courts May DeStabilize Power-Sharing Settlements*, European Journal of International Law, vol. 24, no. 2, 2013, pp. 477-501.
- McGarry, J.; O'Leary, B.; Simeon, R., *The Integration-Accommodation Debate: An Outline*, in: Choudhry, S. (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford University Press, Oxford, 2008, pp. 41-88.
- McGarry, J.; O'Leary, B., *Iraq's Constitution of 2005: Liberal Consociation as Political Prescription*, International Journal of Constitutional Law, vol. 5, 2007, pp. 670-698.
- Moore, A. R; Robinson, L. D., *Partners for Democracy: Crafting the New Japanese State under MacArthur*, Oxford University Press, New York, 2002.
- Ni Aolain, F., *The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis*, Michigan Journal of International Law, vol. 19, 1998, pp. 958-1002.
- Pildes, R. H., *Ethnic Identity and Democratic Institutions: A Dynamic Perspective*, in: Choudhry, S. (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* Oxford University Press, Oxford, New York, 2008.
- Sadurski, W., *Transitional Constitutionalism: Simplistic and fancy Theories*, in: Czarnota, A.; Krygier, M.; Sadurski, W. (eds.), *Rethinking the Rule of Law after Communism: Constitutionalism, Dealing with the Past, and the Rule of Law*, Central European University Press, Budapest, 2005, pp. 9-24.

- Samuels, K., *Post-Conflict Peace-Building and Constitution-Making*, Chicago Journal of International Law, vol. 6, no. 2. 2006, pp. 663-682.
- Shasivari, J., *The Past and the Present of the Constitutional Systems of the Republic of Macedonia in Terms of the Position of Albanians*, European Scientific Journal, vol. 9, no. 17, 2013, pp. 190-206.
- Solomou, A., *Comparing the Impact of the Interpretation of Peace Agreements by International Courts and Tribunals on Legal Accountability and Legal Certainty in Post Conflict Societies*, Leiden Journal of International Law, vol. 27, 2014, pp. 495-517.
- Spevack, E., *Allied Control and German Freedom: American Political and Ideological Influences on the Framing of the West German Basic Law (Grundgesetz)*, LIT Verlag, Münster, 2001.
- Sweet, S. A., *Constitutional Courts*, in: Rosenfeld, M.; Sajó, A. (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, Oxford, 2012, pp. 816-830.
- Tunheim, J., *Rule of Law and the Kosovo Constitution*, Rule of Law Symposium, Minnesota Journal of International Law, vol. 18, 2009, pp. 371-379.
- Tushnet, M., *Some Skepticism About Normative Constitutional Advice*, William and Mary Law Review, vol. 49, 2008, pp. 1473-1495.
- Vijaya, S., *United Nations Constitutional Assistance Projects in Comprehensive Peace Missions: An Inventory, 1989-2011*, International Peace Keeping, vol. 19, no. 1, 2012, pp. 93-113.
- Waldron, J., *The core of the case against judicial review*, Yale Law Journal, vol. 6, 2006, pp. 1346-1406.
- Walsh, D., *Constitutional courts as arbiters of post-conflict territorial self-government: Bosnia and Macedonia*, Regional & Federal Studies, vol. 29, no. 1, 2018, pp. 67-90.
- Weller, M., *Contested Statehood: Kosovo's Struggle for Independence*, Oxford University Press, New York, 2009.
- Yash, P. G. (ed.), *Autonomy and Ethnicity: negotiating competing claims in multi-ethnic states*, Cambridge University Press, Cambridge, 2000.
- Yee, S., *The New Constitution of Bosnia and Herzegovina*, European Journal of International Law, vol. 2, 1996, pp. 176-192.

Strategic Documents and Legal Expertise

European Commission for Democracy through Law (Venice Commission) Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative, CDL-AD (2005) 004, Venice, 11 March 2005.

European Commission for Democracy Through Law (Venice Commission), Opinion on the Seven Amendments to the Constitution of “The former Yugoslav Republic of Macedonia”, Opinion N° 779 / 2014, 13 October 2014.

European Commission, Commission Staff Working Document, Bosnia and Herzegovina 2020 Report, Accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2020 Communication on EU Enlargement Policy, Brussels, 6 October 2020, pp. 4-27.

European Union Progress Reports on Kosovo, BiH, and North Macedonia. All EU progress reports are available at: https://ec.europa.eu/commission/presscorner/detail/en/IP_21_5275 (3 January 2022).

Reports and Policy Papers

European Institute of Peace, *Ohrid Framework Agreement Review on Social Cohesion*, Skopje 2015, available at: <https://www.eip.org/wp-content/uploads/2020/07/OFA-Review-on-Social-Cohesion-Executive-Summary.pdf> (23 March 2021).

Galyan, A., *Learn as We Go: The European Union's Involvement in Constitution Building in the Post-conflict Western Balkans*, International Institute for Democracy and Electoral Assistance, 2014, <https://www.idea.int/sites/default/files/publications/the-european-unions-involvement-in-constitution-building-in-the-post-conflict-western-balkans.pdf> (13 November 2021).

Ghai, Y.; Gall, G., *Constitution Building Processes and Democratization*, International Institute for Democracy and Electoral Assistance, 2006, <https://www.idea.int/sites/default/files/publications/constitution-building-processes-and-democratization.pdf> (12 January 2022).

Gluck, J.; Brandt, M., *Participatory and Inclusive Constitution Making, giving voice to the demands of citizens in the wake of the arab spring*, United States Institute of Peace, 2015, <https://www.files.ethz.ch/isn/188062/PW105-Participatory-and-Inclusive-Constitution-Making.pdf> (12 March 2022).

- Hart, V., *Democratic Constitution Making*, Special Report 107, United States Institute of Peace, 2003, <https://www.usip.org/sites/default/files/resources/sr107.pdf> (13 January 2022).
- Hays, D.; Crosby, J., *From Dayton to Brussels Constitutional Preparations for Bosnia's EU Accession*, United States Institute of Peace, Special Report 175, October 2006, https://www.usip.org/sites/default/files/resources/SRoct06_2.pdf (17 November 2021).
- Kim, J., *Macedonia (FYROM): Post-Conflict Situation and U.S. Policy*, CRS Report for Congress, 17 June 2005, <https://fas.org/sgp/crs/row/RL32172.pdf> (3 December 2021).
- Kulenović, N., *Court as a Policy-Maker?: The Role and Effects of the Constitutional Court of Bosnia and Herzegovina in Democratic Transition and Consolidation*, Analitica, Working Paper 5/2016.
- Kostic, R., *Reconciling the Past and the Present – Evaluating Dayton Peace Accords 1995*, Department of Peace and Conflict Research, Uppsala University, 2009.
- Marko, J., *Five Years of Constitutional Jurisprudence in Bosnia and Herzegovina: A First Balance*, European Diversity and Autonomy Papers, EURAC, vol. 7, 2004.
- Organization for Security and Co-operation in Europe (OSCE). 18 November 2002. Spillover Monitor Mission to Skopje, Police Development Unit. “Background Paper”.
- Paris, R.; Sisk, D. T., *Managing Contradictions: The Inherent Dilemmas of Postwar Statebuilding*. International Peace Academy, 2007, <https://www.ipinst.org/wp-content/uploads/publications/iparpps.pdf> (2 January 2022).
- Risteska, M.; Shurkov E., *The Transformative Role of the Macedonian Constitutional Court*, Analitika – Center for Social Research, 2017, <http://www.crpm.org.mk/wp-content/uploads/2017/01/Constitutional-Court-Macedonia.pdf> (13 December 2021).
- Samuels, K., *Constitution Building Processes and Democratization: A Discussion Of Twelve Case Studies*, International IDEA, 2004-2005, <https://constitutionnet.org/vl/item/role-constitution-building-processes-democratization-case-studies> (18 January 2022).
- United Nations, Guidance Note of the Secretary-General, ‘United Nations Assistance to Constitution-Making Processes’ (April 2009).

- Widner, J., *Constitution Writing and Conflict Resolution*, United Nations University, Research Paper no. 2005/51, 1, 2005, http://www.wider.unu.edu/publications/working-papers/research-papers/2005/en_GB/rp2005-51/ (13 January 2022).
- Wilson Center Debate Series, *Wither Bosnia? "New Deal" for Destabilizing the Bosnian Peace*, by Hayden, M. R., 2 March, 2021, <https://www.wilsoncenter.org/article/whither-bosnia> (10 November 2021).
- Wilson Center, Global Europe Program Working Group on the Western Balkans, *Fixing Dayton: A New Deal for Bosnia and Herzegovina Report and Recommendations*, No. 1, November 2020, https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/GE_201116_report%201_v2%20%281%29.pdf (10 November 2021).

Blogs and News Articles

- Ash, T. G., "Is There a Good Terrorist?" *New York Review of Books*, 29 November 2001 <https://www.nybooks.com/articles/2001/11/29/is-there-a-good-terrorist/> (10 March 2022).
- Binder, D., *Balkan Factions Begin New Talks*, N.Y. TIMES, 3 January 1993.
- Gal, C., *New Afghan Constitution Juggles Koran and Democracy*, N.Y. TIMES, 19 October 2003.
- L.A. TIMES, *39 Killed in Clashes in Eastern Congo*, 26 December 2005.
- Lewis, A., *Truth and Its Effects*, N.Y. TIMES, 13 November 1995.
- Morina, D., *Balkan Transitional Justice, Kosovo Ignores Call to Enforce Monastery's Land Claim*, 21 April 2017, <https://balkaninsight.com/2017/04/21/kosovo-govt-stays-silent-over-eu-calls-on-monastery-land-04-21-2017/> (3 December 2021).
- Palermo E., *Is participation a possible way out of the constitutional conundrum?* *Oslobodjenje*, 22 November 2021, <https://www.oslobodjenje.ba/dosjei teme/is-participation-a-possible-way-out-of-the-constitutional-conundrum-709816> (12 March 2022).

Sažetak

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PROVEDBA MIROVNIH SPORAZUMA U USTAVNOSUDSKOJ PRAKSI U BOSNI I HERCEGOVINI, KOSOVU I SJEVERNOJ MAKEDONIJI

U ovom se članku analizira provedba mirovnih sporazuma koji su preneseni u ustavne poretke u Bosni i Hercegovini, Kosovu i Sjevernoj Makedoniji. Ovim su državama zajednički problemi koji proizlaze iz proteklih sukoba, gubitka međuetničkog povjerenja i političke fragmentiranosti. Sve to otežava provedbu dogovora iz mirovnih sporazuma koji su preneseni u njihove ustavne poretke. Analizirajući ustavno sudovanje u te tri države, ovaj rad prikazuje učinkovitost i provedbu ustavnih odluka u praksi. Autorica zaključuje da međunarodni pomagači u procesu pregovora o mirovnim sporazumima moraju ponovno promisliti o međunarodnoj pomoći u pisanju ustava, kao dijelu mirovnih inicijativa, a sve kroz prizmu sudske prakse u kontroli ustavnosti.

Ključne riječi: mirovni sporazum; izgradnja mira; ustavna tužba; Bosna i Hercegovina; Kosovo; Sjeverna Makedonija

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