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CONSTITUTIONAL JUDICIARY AND JUDICIAL REVIEW IN THE BALKAN CONSOCIATIONAL DEMOCRACIES – A COMPARATIVE ANALYSIS OF MACEDONIAN WITH BOSNIAN EXPERIENCE¹

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Abstract

The purpose of this paper is to consider the question of examining the constitutionality in countries whose political system has elements of consociational democracy. The consociational model was traced back to the late 60s of the 20th century in the works of the American political scientist of Dutch origin, Arend Lijphart. From the mid-90s of the XX century, this model has become an extremely popular constitutional engineering within the International Community itself, which was involved in the process of post-conflict international state-building, leading to the creation of new constitutional arrangements such as the case of Bosnia and Herzegovina (BiH) and the Dayton Peace Agreement (DPA) 1995, but also the Republic of North Macedonia (RNM) following the 2001 Ohrid Framework Agreement (OFA). Therefore, the interest of this paper is to examine the position, jurisdiction, and institutional structure of judicial review bodies in these two countries of consociational democracy in Southeast Europe, by comparing Bosnia and Herzegovina's experience with that of the Republic of North Macedonia.

Keywords: Bosnia and Herzegovina, Republic of North Macedonia, constitutional court, judicial review, consociational democracy;

¹ original scientific paper

INTRODUCTION

The idea of controlling the constitutionality appears alongside the creation of the first written constitutions. But this idea, from the very launch itself, was contradictory – *from the most original, most unexpected, and most beautiful* (Tocqueville) *to a disturbing element in the scheme of democracy* (Jefferson). The principle of an independent and autonomous judicial authority as a bastion of constitutionality is already a relatively general phenomenon in contemporary political systems since there is almost no country in the world in which some form of control of constitutionality is not institutionalized (self-control by a legislator, a separate political authority, the regular judiciary, a separate constitutional court).²

This paper aims to consider the issue of the constitutional judiciary in countries whose political system contains elements of consociational democracy. Arend Lijphart, an American political scientist of Dutch descent, traced the model of consociation in the late 1960s in his works, and this theory of Consociationalism intended to regulate conflicts between segments in multiethnic and multinational societies. According to Woelk, the main idea of this model is „in a segmented society, elite cooperation shall be facilitated through the representation and participation of all groups in public life. At the same time, the autonomy of the groups shall be guaranteed regarding decisions (particularly or only) affecting them, as well as veto rights for the protection of important interests“.³ Hence, the purpose of Consociationalism is „to integrate the competing interests of the different groups into the political process and to introduce stability to a fragmented society“.⁴ Lijphart drew the empirical evidence for the theoretical elaboration of this concept from his native

² Климовски, С., Дескоска, Р., и Каракамишева-Јовановска, Т., *Уставно право и политички систем*, Скопје, Просветно дело, 2012, стр. 491, 500.

³ Woelk, J., The Constitutional Transition of Bosnia and Herzegovina between Nationalism and European Conditionality, in L. Benedizione and V. R. Scotti (Eds.), *Proceedings of the Conference Twenty years after Dayton. The Constitutional Transition of Bosnia and Herzegovina*, Roma, LUISS University Press – Polas.r.l., 2016, p. 30.

⁴ Dedić, J., What is Wrong With the Dayton Constitution and How to Fix it, *Bachelor Thesis*, Westfälische Wilhelms-Universität Münster, 2011, p. 14.

Netherlands until 1967, but also from Switzerland and Belgium.⁵ However, in his original conception for consociation, Lijphart did not touch on the issue of judicial review and the constitutional judiciary. The simple reason for this was that the political system of the countries where he identified the consociation at the earliest, or their supreme court (Switzerland) does not have the right of judicial review or it did not exist (in Belgium until 1984), or their constitution explicitly denies the power of judicial review to their courts (the Netherlands⁶).⁷

Nevertheless, in recent papers, Lijphart abandons the problem of divided societies, and he transforms his original model of consociation into a model of consensual democracy, making it relevant to any society in which pluralistic interests exist.⁸ Now, one of the important dimensions of this newer model of consensual democracy is the examination of the constitutionality of laws by the supreme or constitutional court.⁹ Consociation, in this sense, continues to be perceived as a more specific form of consensual democracy, making it still relevant to ethnically divided societies.

The concept of consociational power-sharing is often used by the International Community as a conflict management approach – especially for post-war countries – to ensure each societal group a part in a country's decision-making processes.¹⁰ That often involved the creation of new constitutional orders, as was the case in Bosnia and Herzegovina (BiH) and the Dayton Peace Agreement (DPA) 1995, but also the Republic of North Macedonia (RNM) with the 2001 Ohrid Framework Agreement (OFA). The purpose of this paper,

⁵ Krienbuehl, L., Peace With Power-Sharing: Under Which Conditions?, *Working Paper* 1, Swiss Peace, 2010, p. 9.

⁶ „The constitutionality of acts of parliament and treaties shall not be reviewed by the courts“ – Article 120 of the Dutch constitution. However, according to Adams and Van der Schyff, the Netherlands allows for judicial review of statutes in light of international treaties but not the constitution. Adams, M., & Van der Schyff, G., Constitutional Review by the Judiciary in the Netherlands: a Matter of Politics, Democracy or Compensating Strategy?, *ZaöRV*, 66, 2006, pp. 399-413.

⁷ Lijphart, A., *Patterns of Democracy: Government Forms and Performance in Thirty-Six countries*, second edition, New Haven & London, Yale University Press, 2012, p. 39, 213.

⁸ Ванковска, Б., *Политички систем*, Скопје, Бомат, 2007, стр. 153.

⁹ Lijphart, *op cit.*, p. 4.

¹⁰ Sisk. T. D., *Power sharing*, 2003

Retrieved from: http://www.beyondintractability.org/essay/power_sharing/

therefore, is to examine the question of the nature of the judicial review, precisely in these two countries that adopted consociational democracy through international constitutional engineering. For that aim, the paper is structured in a way that addresses the question of the forms of constitutional control, position, jurisdiction, and institutional structure of judicial review bodies, including through the dichotomy of domestic court composition (R. N. Macedonia) vs. hybrid (domestic-international) (BiH).

JUDICIAL REVIEW IN COUNTRIES WITH CONSOCIATIONAL DEMOCRACY

The essence of the judicial review, according to the leading theoretician of the consociational model of democracy, Arend Lijphart, consists of „an independent body that decides whether laws are in conformity with the constitution“.¹¹ But, there are cases where „parliament itself is the judge of the constitutionality of its own laws, so it can easily be tempted to resolve any doubts in its favor“.¹² However, in the contemporaneity, the countries that entrust some form of judicial review are hesitating between two approaches:

1. *The American model* foresees the existence of the so-called diffuse control of the constitutionality which is not given exclusively to one authority, and

2. *A European model* that implies the existence of a centralized system in which a key position has a separate state body authorized to protect the Constitution of the state. It is a model in which abstract and concrete, but also preventive and repressive control of the constitutionality and legality is carried out.¹³

Those countries with an institutionalized form of judicial control of constitutionality also have to resolve other important issues on the composition (number, manner, the requirements for election, duration of the mandate of judges), internal organization, competences, authorized applicants to bring out proceedings and legal action on the decisions of the courts. In this sense,

¹¹ Lijphart, *op cit.*, p. 212.

¹² Ibid.,

¹³ Karakamiševa-Jovanovska, T., Constitutional Justice in the Republic of Macedonia. Macedonian Constitutional Court – Legal Symphony or Legal Cacophony, *Iustinianus Primus Law Review*, Vol. 18, 2018, p. 2.

according to Taskovska, more or fewer trends can be noted in many countries around the world. Thus, the number of constitutional judges usually varies from 9 to 16. In terms of the election, it is usually done in the legislature on a proposal by the executive (head of state or government) or by a special authority with jurisdiction in the judiciary – a judicial council. The general condition of appointment is formal legal education, and in some countries, an additional requirement is to be a prominent member of the legal profession or to have working experience in the regular judiciary. The mandate is, as a rule, limited to 9 or 12 years, in some countries and without the right to re-election. Regardless of the numerous differences, the most common denominator regarding the issues that the constitutional courts decide in many countries in the world are: assessment of the constitutionality of the laws; the legality of the by-laws; disputes on rights and duties of the highest authorities; in federal states for disputes between the federation and its subjects; overseeing important legal and political events (elections, referendums); violation of the constitution by the highest state officials; protection of constitutionally guaranteed freedoms and rights, violated by effective individual court decisions or administrative acts. Regarding authorized applicants to bring proceedings before the constitutional court, the world practice is different and that circle ranges from the highest state officials, a group of MPs, the regular courts, the ombudsman, to every individual. The decisions of courts that evaluate the constitutionality according to the above mentioned abstract approach have an *erga omnes* effect.¹⁴

As a rule, judges in the constitutional courts of many countries in the world are citizens of the respective country „because of the doctrine of state sovereignty, it sounds almost inconceivable that a foreign citizen should serve on the bench of a national supreme court or a separate constitutional court of another country“.¹⁵ However, in the past few decades, in the process of international state-building, in some countries and for some institutions „that were to enjoy complete neutrality, a guarantor was sought to ensure their independence from ethno-political influence. That guarantor was found by hiring

¹⁴ Тасковска, Д., *Вовед во право* – прва и втора книга, Скопје, Правен факултет „Јустинијан Први“, 2013, стр. 204-5.

¹⁵ Marko, J., Foreign Judges: A European Perspective', in S. Young and Y. Ghai (Eds.), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong*, New York, CUP, 2014, p. 637.

foreign experts“.¹⁶After Dayton, international state-builders provided a similar solution for the BiH Constitutional Court. „The ontological reason for having international judges in local courts is to strengthen the impartiality, legitimacy, efficiency, and quality of domestic judicial bodies“.¹⁷

Hence, the interest of this paper is to examine the position, jurisdiction, and institutional structure of judicial review bodies in the countries of consociational democracy in Southeast Europe, which have adopted the consociation through the process of international state-building by comparing Bosnia and Herzegovina's experience with that of the Republic of North Macedonia.

JUDICIAL REVIEW IN COUNTRIES WITH CONSOCIATIONAL DEMOCRACY WITH DOMESTIC COURT COMPOSITION – THE CASE OF THE REPUBLIC OF NORTH MACEDONIA

The Constitutional Court of the Republic of North Macedonia is part of the democratic political system of the country established in 1991. However, a decade later, the Macedonian political system underwent certain changes. In 2001, as an important year for the country, „after the interethnic conflict (...), Macedonia adjusted its government structure and modes of governance in order, not only to allow for more adequate participation of minority groups in policy and decision-making, but also to strengthen their representation in politics and public administration. Most of these policy solutions were envisaged under the Ohrid Framework Agreement (OFA)“.¹⁸ Such amendments made to the Constitution at the time, according to Vankovska „combine elements of parliamentary and consociational democracy“,¹⁹ even though „and until 2001, the system contained certain elements of consociation, more through political pragmatism, rather than through systematically guaranteed and consistent

¹⁶Ademović, N., Marko, J., i Marković, G., *Ustavno pravo Bosne i Hercegovine*, Sarajevo, Fondacija Konrad Adenauer, 2012, str. 201.

¹⁷Graziadei, S., Six models for Reforming the Selection of Judges to the BiH Constitutional Court, *Working paper*, No. 14, University of Graz and University of Antwerp, 2016, p. 6.

¹⁸Risteska, M., & Šurkov, E., The Transformative Role of the Macedonian Constitutional Court, *Working Paper* 3, Sarajevo, Analitika – Center for Social Research, 2016, p. 19.

¹⁹Ванковска, *op cit.*, стр., 231.

solutions“.²⁰ Certain amendments were also made to Chapter IV of the Constitution, which refers to the Constitutional Court of the Republic of North Macedonia.

This institution has a tradition in the Macedonian political system since the period of monistic Yugoslavia when a constitutional court was introduced by the Constitution of the Socialist Republic of Macedonia of 1963. „The 1991 Constitution of the Republic of Macedonia accepts the European (continental) model of protection of constitutionality and legality because this protection is provided by a specialized body, the Constitutional Court of the Republic of Macedonia, which is a state body, and which, according to its status, does not fall under the system of division of power“.²¹

Under Amendment XV of the Constitution of the Republic of North Macedonia, the Assembly elects six of the judges to the Constitutional Court by a majority vote of the total number of Representatives, and three of the judges are elected by a majority vote of all the 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 North Macedonia.²² „In the procedure for proposing constitutional judges, several bodies are included: the President of the Republic proposes two judges, the Judicial Council proposes another two, whereas the remaining five judges are proposed by the Parliament’s Committee on Election and Appointments“.²³ The judges elected by the so-called double majority come from the ranks of the smaller ethnic communities in the country, above all the Albanian, and can be considered as a typical consociational solution in determining the composition of this important institution in the country’s political system. The judges are elected from the ranks of outstanding members of the legal profession. In the current composition of the Constitutional Court of the Republic of North Macedonia, six judges are from the Macedonian and three from the Albanian

²⁰ Ibid., p. 225.

²¹ Karakamiševa-Jovanovska, T., Different Models for Protection of Constitutionality, Legality and Independence of Constitutional Court of the Republic of Macedonia, Venice, 2011, p. 3. Retrieved from: www.venice.coe.int/WCCJ/Rio/Papers/MKD_Karakamiseva_E.pdf

²² AMENDMENT XV, Constitution of the Republic of North Macedonia

²³ Климовски и др., *op cit.*, стр. 506.

ethnic community. By Article 109 of the Constitution, the term of office of the judges is nine years without the right to re-election.²⁴

The jurisdiction of the Constitutional Court is directly established by the Constitution of the Republic of North Macedonia. According to Risteska and Šurkov „the Court competences can be broken down in three main groups: (i) *a posteriori* review, (ii) protection of human rights and freedoms, and (iii) other powers“.²⁵ According to Article 12 of the Rules of Procedure of the Constitutional Court of the Republic of North Macedonia „anyone can submit an initiative for initiating constitutionality of law and constitutionality and legality of a regulation or other common act assessment procedures“,²⁶ but according to Article 14 of the same Rules of Procedure „the Constitutional Court may itself initiate constitutionality of a law, that is constitutionality and legality of a regulation or other common act assessment procedures“.²⁷ In terms of determining constitutionality and legality – the Constitutional Court of the Republic of North Macedonia has abstract and repressive control. The actions of the Constitutional Court of the Republic of North Macedonia can be annulling (*ex tunc*) or abolishing (*ex nunc*). Its decisions are final and binding, and no legal remedies are allowed against them.²⁸

Hence, the transformation process of the political system in the Republic of North Macedonia is not completed, „so, in addition to the existing constitutional rules and elements of the consociational model, new ones are constantly being proposed“.²⁹ In this sense, the Constitutional Court is not left aside. Here we would point out the initiatives that came from the Albanian political leaders, who seek for the ‘Badinter Principle’³⁰ to be applied in the Constitutional Court for laws adopted by the Assembly according to that principle of decision-making. But former Court’s President, Branko Naumovski, negatively evaluated this initiative because it would mean voting and outvoting

²⁴ Article 109, Constitution of the Republic of North Macedonia

²⁵ Risteska & Šurkov, *op cit.*, p. 11.

²⁶ Article 12, Rules of Procedure of the Constitutional Court of the Republic of North Macedonia

²⁷ *Ibid.*, Article 14

²⁸ Климовски и др., *op cit.*, стр. 510-12.

²⁹ Ванковска, *op cit.*, стр. 232.

³⁰ A term that is colloquially used to name a double majority in honor of the prominent French lawyer, Robert Badinter, who was also involved in the work on the OFA.

in this institution. For him, that will mean introducing the policy in the decision-making process, a thing that is dangerous and has no place there.³¹

JUDICIAL REVIEW IN COUNTRIES WITH CONSOCIATIONAL DEMOCRACY WITH HYBRID COURT COMPOSITION – THE CASE OF BOSNIA AND HERZEGOVINA

The pioneering efforts of the International Community in terms of importing the consociational model by way of constitutional engineering began in the early 1990s with Bosnia and Herzegovina and the Dayton Peace Agreement, which ended the three-annual civil war in the country (1992-1995). The Dayton Agreement, according to Keil, is a mixture of strict ethnic power-sharing between Bosniaks, Serbs, and Croats on the one side and far-reaching autonomy and decentralization in an asymmetrical federal structure consisting of two entities, Republika Srpska and Federation of BiH, on the other side.³² The consociation, as a political project of passive coexistence and arrangement between the ethnic elites in Bosnia and Herzegovina, was combined with the continued involvement of the International Community embodied in its High Representative, model that strengthened the ethnic segregation in the country and eroded its sovereignty.³³ However, the High Representative was not the only international institution that was supposed to enable the implementation of the new constitutional order in BiH. Here, we should mention the BiH Constitutional Court, which was another international institution inaugurated by Dayton (1995) with a constitutional mandate. However, it should be emphasized that the Constitutional Court is a hybrid institution where the Office of the High Representative is thoroughly international in nature.³⁴

BiH has a constitutional judiciary, identical to the Republic of North Macedonia, since 1963, but „except for the continuity of BiH’s constitutional-legal subjectivity, few similarities with the former Republican Constitutional

³¹ Retrieved from: <https://makfax.com.mk/makedonija/246528/>

³² Keil, S., *Multinational Federalism in Bosnia and Herzegovina*, Farnham and Burlington, Ashgate, 2013

³³ Hromadžić, A., Bathroom Mixing: Youth Negotiate Democratization in Post conflict Bosnia and Herzegovina, *PoLAR*: Vol. 34, No. 2 Syracuse University, 2011, p. 268.

³⁴ Grewe, C., & Riegner, M., Internationalized Constitutionalism in Ethnically Divided Societies: Bosnia-Herzegovina and Kosovo, in A. von Bogdandy and R. Wolfrum (Eds.), *Max Planck of Yearbook UN Law*, Vol. 15, 2011, p. 38.

Court remained. The new constitution has brought a new constitutional court“.³⁵ The Constitutional Court of Bosnia and Herzegovina (CCBiH), as well as the majority of the countries of the former Yugoslavia (Slovenia, Republic of North Macedonia, Kosovo), consists of nine members, but its *differentia specifica* compared to other constitutional courts of the countries of the former Yugoslavia is the hybrid composition (domestic and international judges). Six of them are elected from the entity parliaments of Republika Srpska (two Serbs) and the Federation of BiH (two Bosniaks and two Croats), while the remaining three judges³⁶ are proposed by the President of the ECtHR after consultations with the BiH Presidency. The presence of international judges in BiH „has been credited with strengthening the independence and preparation of judges, the authority and quality of judicial decisions, and helping in the transition from socialist Yugoslav law to European constitutional standards“.³⁷ Another reason why this BiH Court has such a character is to „fulfill the function of *puvoir neutre* in the divided society, where constitutional policy tends to play out along ethnic lines“.³⁸ Concerning the election of domestic members of the Court, the formal procedure insists on the high legal and moral qualities of the candidates, but according to Smailagić and Keranović „it is questionable whether this criterion is best expressed in the parliamentary selection procedure, where the emphasis is on other selection criteria, whereby a few candidates have been selected without enough years of practical contact with judicial and prosecutorial institutions in their professional work“.³⁹ The appointed judges remain in the Court until the age of 70.

The responsibilities of the CCBiH are strictly regulated by the Constitution of BiH. If the competences are to be changed, the Parliamentary

³⁵Steiner, Ch., i Ademović, N., *Komentar Ustava Bosne i Hercegovine*, Sarajevo, Fondacija Konrad Adenauer, 2010, str. 623.

³⁶When it comes to these three international judges, „there is a limitation in terms of excluding the possibility of selecting judges from countries that are neighbors of BiH (Serbia, Montenegro, Croatia)“. Ademović i dr., *op cit.*, str. 201.

³⁷Schröder, A., *Der Beitrag internationaler Richter zur Entwicklung der Rechtsstaatlichkeit in Bosnien und Herzegowina*, in *ZIF*, 2004

³⁸Grewe & Riegner, *op cit.*, p. 40.

³⁹Smailagić, N., i Keranović, N., *Pravosudni sistem*, u S. Gavrić, D. Banović i Ch. Krause (Ed.), *Uvod u politički sistem Bosne i Hercegovine – Izbrani aspekti*, Sarajevo, Sarajevski otvoreni centar Fondacija Konrad Adenauer, 2009, str. 242-3.

Assembly of BiH does have to change the Constitution. These are a total of seven competences, one of which – the protection of the vital national interest – is prescribed in Art. IV of the Constitution, and the remaining six are contained in Art. VI of the Constitution.⁴⁰ The competences of Article VI/3. a), which refer to organic disputes, the abstract constitutional review, and the constitutional review of special parallel ties of entities with neighboring states, according to Ademović et al., “are quite vague and confusing”.⁴¹ The other three remaining competences referred to in Article VI of the BiH Constitution are the appellate jurisdiction (VI/3.b), the protection of the District Brčko (VI/4), and the concrete assessment of the constitutionality (VI/3.c).⁴² About competences, it should be emphasized that the Constitution of BiH has no explicit provision for the jurisdiction of the Constitutional Court to rule on the compatibility of BiH laws with the Constitution of BiH, although this follows logically from the first paragraph of Article VI (3) stating that „the Constitutional Court shall uphold this Constitution“. ⁴³ This Article of the Constitution also lists authorized applicants that can bring proceedings before the Constitutional Court,⁴⁴ and Article VI (4) states that „decisions of the Constitutional Court shall be final and binding“. ⁴⁵ Hence, in terms of judicial review, according to Karakamiševa-Jovanovska, Bosnia and Herzegovina is included in the group of countries following the European model for the protection of constitutionality and legality.⁴⁶ But, according to Stefan Graziadei, following the American model, the Court has some features of a court of last resort in concrete disputes.⁴⁷

In plenary sessions, the Constitutional Court takes decisions by a majority of votes of all the judges, and not by consensus.⁴⁸⁴⁹ Given majority

⁴⁰ Ademović i dr., *op cit.*, str. 202.

⁴¹ Ibid., str. 203.

⁴² Ibid.,

⁴³ Article VI (3), Constitution of Bosnia and Herzegovina

⁴⁴ Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity. Article VI (3) a, Constitution of Bosnia and Herzegovina

⁴⁵ Article VI (4), Constitution of Bosnia and Herzegovina

⁴⁶ Karakamiševa-Jovanovska, *op cit.*, 2011, p. 2.

⁴⁷ Graziadei, *op cit.*, p. 12.

⁴⁸ In Bosnia and Herzegovina as well as in the Republic of North Macedonia, through the ideas for voting with the ‘Badinter Principle’ in the Constitutional Court, there were

voting, judges consider the Court as one of Bosnia and Herzegovina's most federal institutions.⁵⁰ Therefore, oftentimes, „the group of international judges allied to one ethnic group can outvote the two others“.⁵¹ This was particularly true for Croat and Serb judges. It is for this reason that Bosnian Serb and Bosnian Croat politicians are looking for the transformation of the Constitutional Court from a hybrid internationalized court to a purely Bosnian Court.⁵² According to the same author, „the most straightforward option is to extend the current system by analogy. The 2:2:2 formula of ethnic parity could comfortably change in a 3:3:3“.⁵⁴

But this requires constitutional reforms that the Bosniak political elite does not agree with. Its disagreement stems from the fact that Bosniaks see the

attempts for similar initiatives, for the veto's right of judges in the decision-making process. „The Bosnian Constitutional Court asked the Venice Commission if judges could veto a decision of the Court out of the vital national interest of a constitutive people. The Commission responded negatively“. Ibid., 12-13. The Commission explained that the veto is „alien to the very nature of judicial decision-making and the principles that flow from this nature“. See: Venice Commission, „Opinion on Proposed Voting Rules for the Constitutional Court of Bosnia and Herzegovina“, (Strasbourg, 2005), para 4. This position of the Venice Commission for BiH only confirmed the correctness of the theses of the Macedonian academic community, which assessed as unfounded Albanian demands for the possible entry of the 'Badinter Principle' in the decision-making process in the constitutional judiciary of North Macedonia.

⁴⁹ Član 9 (2), Pravila Ustavnog suda Bosne i Hercegovine ("Službeni glasnik Bosne i Hercegovine", br. 94/2014 - prečišćen tekst)

⁵⁰ Savić, S., Die Staatsorganisation von Bosnien-Herzegowina, in W. Vitzthum und I. Graf/Winkelmann, (Ed.), *Bosnien-Herzegowina im Horizont Europas. Demokratische und föderale Elemente der Staatswerdung in Südosteuropa*, Tübinger Schriften zum Staats- und Verwaltungsrecht, tom 69, Berlin, 2003, s. 25-6.

⁵¹ Grewe & Riegner, *op cit.*, p. 42.

⁵² This question was once again actualized after the Constitutional Court rulings made in early February 2020, which considers all agricultural land in RS as a property of Bosnia and Herzegovina, not RS. This declared the decision of the RS Assembly to be unconstitutional, a decision adopted late last year (2019), declaring agricultural land in the RS as the exclusive ownership of the Entity. That was the reason why the RS Member in the BiH Presidency, Milorad Dodik, came forward in February with a proposal for a Law on the Election of Judges of the Constitutional Court of BiH, replacing foreign judges with domestic ones.

⁵³ Graziadei, *op cit.*, p. 14.

⁵⁴ Ibid., p. 19.

international judges as the last bastion in the BiH Constitutional Court in its attempts to begin the process of transforming BiH into a unitary state, which according to Jozo Pavković „is a predominantly collective pursuit of Bosniaks“.⁵⁵ On the other hand, „modifying the composition of the Constitutional Court could be a concession to Bosnian Serbs in light of a broader reform of the Bosnian state“.⁵⁶

CONCLUSION

The constitutional judiciary in both countries, BiH and R. N. Macedonia, has a tradition dating back to 1963 when the two states were an integral part of the former SFRY. A constitutional court was envisaged in the constitutions of the two countries, following the dissolution of Yugoslavia, with the 1995 Dayton Constitution for BiH and the 1991 Macedonian Constitution. Another common denominator of the constitutional courts of both countries can be identified by the same number of judges – 9. Both courts follow the consociational principles for completing their composition, through the principle of adequate representation of the communities, above all Albanians (in North Macedonia), and the principle of parity of the three constituent peoples (in BiH). BiH and RNM belong to the small group of countries that have no law, or constitutional law, that regulates the statutory matters related to the constitutional court because there is practically no country in the world that has a constitutional court in its political system not regulated by that kind of law. The matters concerning the court in both countries are currently regulated with an act (Rules of Procedure) of the Court.⁵⁷ The competences, in turn, are defined by the Constitution – Art. 110 in RNM and Art. IV / 3. (f) and VI. 3 and 4 in BiH. BiH and RNM followed the “Austrian” or the continental model for the protection of constitutionality and legality, a model based on the 1920 Kelsen theory. The court’s decisions in both countries do not provide consociational veto mechanisms by the DPA and OFA – the protection of the vital interest (BiH) and the ‘Badinter Principle’ (RNM).

The differences between the two constitutional courts are perceived in their composition. The OFA in the Republic of North Macedonia did not foresee

⁵⁵ Pavković, J., Bošnjaci u strahu. Srbi i Hrvati u BiH mogu ih pretvoriti u manjinu, *Večernji list*, 11. ožujka 2014.

⁵⁶ Graziadei, *op cit.*, p. 20.

⁵⁷ Karakamiševa-Jovanovska, *op cit.*, 2011, p. 4.

a hybrid (domestic-international) judiciary composition, but with Dayton, it was introduced in BiH. Another difference is the fact that the High Judicial and Prosecutorial Council of BiH is not involved in the selection of judges for the CCBiH, unlike the Republican Judicial Council of the Republic of North Macedonia, which according to Art. 105 of the Constitution „proposes two judges to sit on the Constitutional Court of the Republic of North Macedonia“.⁵⁸ In the Constitution of BiH, Art. VI. 3 (a) it is clearly stated who may bring proceedings before the CCBiH. In Chapter IV of the Constitution of the Republic of North Macedonia, which refers to the Constitutional Court, there is no Article regulating this matter. There is a difference in the mandate of the judges in both courts. In the Republic of North Macedonia, the mandate is nine years, without the right to re-election, and in BiH, up to 70 years of age. CCBiH has some classic constitutional powers in a complex state, unlike the Constitutional Court of the Republic of North Macedonia, which is an institution in a unitary state.

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