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**THE CONSTITUTIONAL LEGACY
OF THE EX-YUGOSLAV COUNTRIES
AND THEIR POTENTIAL IMPLICATIONS
TOWARDS COMMON EU VALUES,
CONSTITUTIONAL FEATURES AND
THE RULE OF LAW**

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INTRODUCTION

The constitutional legacy of the countries that are the successors of the former Yugoslavia is a very important aspect in terms of the values that they will possess and attribute to the European Union when they become part of it. The constitutional matrix, as well as the values matrix, of the countries of the European continent varies depending on the geographical location, historical development of each country, political coincidences, socio-economic form, etc.

However, even if the countries that founded the European Coal and Steel Community in 1951 had almost identical democratic origins, as the community grew and expanded through new European countries from all parts of the continent, they also developed democratic, economic and constitutional and legal divergences between them. This made the European Union in many ways a very heterogeneous formation, also from a constitutional and legal point of view.

Most of these countries share similar values, in addition to having very similar constitutional systems as a result of a common state and a common constitutional and legal system in the recent past. The key issue, however, is what constitutional legacy Albania, Bosnia and Herzegovina, Kosovo, Montenegro, Northern Macedonia, and Serbia will bring to the European Union upon their accession.

An additional dilemma arises as to whether the values specific to the Balkan countries are compatible with the values inherent in the EU Member States, such as the rule of law, democracy, individual human rights and freedoms, minority rights among others.

Hence, all the countries of the former Yugoslavia will be analyzed in terms of their constitutional systems, value systems and the characteristics they possess and which could potentially affect established European values.

The three main theses of the article are as follows: firstly, the constitutional legacy of the Western Balkan countries has a certain, but still limited, impact on common EU values; secondly, the process of Europeanization initiated by the European Union has a very subtle, sophisticated, but highly beneficial influence on the democratization processes in the Western Balkan countries with a communist past; thirdly, the concept of the rule of law is understood and applied differently in different countries, depending on democratic traditions, institutional capacity and political will.

1. CONSTITUTIONAL AND LEGAL SYSTEMS IN THE SOCIALIST FEDERAL REPUBLIC OF YUGOSLAVIA AND REPRESENTATION OF THE CONSTITUTIONAL SYSTEMS OF ITS SUCCESSOR COUNTRIES

Although the constitutional norms in the SFRY were largely considered standard and common for a socialist state, there is still a certain deficit of democracy if compared to countries with market economies and democratic systems of government. For example, the egalitarian approach characteristic of these constitutions is not in line with individual human rights and freedoms in the European Union (formerly the European Economic Community).

For example, Art. 153 of the 1974 Constitution of the SFRY reads as follows: "The freedom and rights of man and the citizen, spelled out by the present Constitution shall be realized through solidarity among people and through the fulfilment of duties and responsibilities of everyone towards everyone. The freedoms of man and the citizen shall only be restricted by the equal freedoms, rights of others and by the constitutionally-specified interests of the socialist community, as defined in the Constitution."¹

Article 155 of the Constitution states: "Working people and citizens shall have the inalienable right to self-management which enables each individual to decide on his personal and common interests in an organisation of associated labour, local community, self-managing community of interest or other self-managing organisation or community and socio-political community, and in all other forms of their self-management integration and mutual linkage."²

These two articles are quite sufficient indicators of the difference in the understanding of human rights and freedoms in socialist countries compared to capitalist ones. Namely, one of the aspects is the complete subordination of individual freedoms and human rights to the state in socialist systems such as the SFRY. Consequently, it is explicitly stated that a person's rights are limited to the interests of the "socialist community," which is unusual for democratic systems. Naturally, restrictions exist in all countries, even in the most democratic ones, but are only applicable in crisis situations such as war, epidemics, natural disasters and the like. This means that the conditions generating restrictions on an individual's rights and freedoms are specified in detail. On the other hand, in the case of the SFRY, as in other socialist countries, there is an incomplete definition of situations and categories, such as "interests of the socialist community." Such a definition can lead to extensive interpretations of the application of human rights and freedoms in practice, usually always in favor of state and public interests to the detriment of individual human rights and freedoms.

This concise historical analysis is important in terms of the consequences left by the SFRY constitutional system as a "constitutional legacy" for successor countries, namely North Macedonia, Serbia, Montenegro, Bosnia and Herzegovina, and Kosovo (excluding the analysis of Slovenia and

¹ Official Gazette of the SFRY No. 9, XXX, Belgrade, February 1974, Article 153

² Ibid., Article 155

Croatia, which have been members of the European Union since 2004 and 2013, respectively).

Of course, the constitutions of these countries in force today cannot be considered a complete anachronism, but we must also note the striking changes brought about by the wave of democratization in the 1990s, which meant a significant reorientation of their constitutional, as well as political and economic systems, from authoritarian to democratic, from planned to market economies.

2. REFORMS OF THE CONSTITUTIONAL SYSTEMS OF THE WESTERN BALKAN COUNTRIES

The influence of the socialist "constitutional legacy" on the new constitutions of the Western Balkan countries adopted in the 1990s was not large enough to have a significant impact and challenge the democratic concept and paradigm. If we analyze certain parts of the constitutions of these countries that address human rights and freedoms, we can draw the general conclusion that they have evolved in the real sense of the word.

Article 8 of the Macedonian Constitution makes a clear distinction and departure from the previous socialist regime. It reads: "The fundamental values of the constitutional order of the Republic of Macedonia are: basic freedoms and rights of the individual and citizen, recognized in international law and set down in the Constitution; free expression of national identity; rule of law; division of state powers into legislative, executive and judicial; political pluralism and free, direct and democratic elections; legal protection of property; freedom of the market and entrepreneurship; humanism, social justice and solidarity; local self-government; proper urban and rural planning to promote a congenial human environment, as well as ecological protection and development and respect for the generally-accepted norms of international law. Anything that is not prohibited by the Constitution and by law is permitted in the Republic of Macedonia."³

The differentiation is mentioned not only with regard to fundamental human rights and freedoms, but also with regard to the separation of powers, introduction of political pluralism, method of electing the government, market orientation of the economy, adoption of modern values such as the rule of law, but also under many other parameters that confirm the significant constitutional evolution achieved in the Republic of Macedonia compared to the Socialist Republic of Macedonia (as a constituent member of the former SFRY). Of course, this is also one of the main reasons why the Arbitration Committee, headed by the President of the Constitutional Council of France, Robert Badinter, assessed Macedonia as having the right (along with Slovenia) to gain independence and begin the process of accession to the European Union (then the European Economic Community).

³ Constitution of the Republic of Macedonia, 1991, Article 8

Of course, constitutional reorientation and democratization also took place in other Balkan countries. For example, Art. 15 of the Constitution of Albania reads: "The fundamental human rights and freedoms are indivisible, inalienable, and inviolable and stand at the basis of the entire juridical order. The bodies of public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realisation."⁴

Noting that fundamental human rights and freedoms lie at the core of the entire legal system, their paramount importance is clearly emphasized, without attaching their applicability to any community (socialist, capitalist or any other), i.e. these human rights and freedoms are placed on a kind of "constitutional pedestal."

Article 17, on the other hand, states: "The limitation of the rights and freedoms provided for in this Constitution may be established only by law for a public interest or for the protection of the rights of others. A limitation shall be in proportion with the situation that has dictated it. These limitations may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights."⁵

Although there are situations where a certain limit to the basic protection of human rights and fundamental freedoms is foreseen, these must be justified and, on the other hand, should not be more stringent than the measures and limitations provided for in the European Convention on Human Rights. This means that these measures and limitations are as specific as possible, listed and, to some extent, predictable.

For example, if we consider the Constitution of Kosovo (which is relatively "young" but analyzed in this context as a former entity of the SFRY) with respect to the protection of human rights and freedoms and the values it promotes, it can be observed that Art. 22 of the document lists international declarations and conventions that have a direct impact on the territory of Kosovo, and even have priority in implementation in terms of laws and regulations developed by state and public institutions in Kosovo. Thereby, the above article lists the following documents: Universal Declaration of Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedom and its protocols; International Covenant on Civil and Political Rights and its protocols; Council of Europe Framework Convention for the Protection of National Minorities; International Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of the Child; "Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment."⁶

⁴ Constitution of the Republic of Albania, 1988, Article 15

⁵ Ibid., Article 17

⁶ Constitution of the Republic of Kosovo, 2008, Article 22

All these international human rights acts are included in the constitutions of all Balkan countries, but nowhere are they mentioned directly, such as in Kosovo. The reason is the complexity of the situation in Kosovo, not only from a historical perspective of security, but also from a constitutional-legal aspect – in the case of Kosovo, the international community plays a strong paternalistic role in every sense of the word, which is reflected in the Constitution.

Kosovo is also free from the "constitutional burden" of the SFRY, as it had the status of a province, not a republic, within the Federation. Thus, free from the historical baggage of the SFRY, Kosovo relatively easily and quickly adopted in the Constitution the democratic values and principles characteristic of all democracies, certainly incorporating its specific features resulting from the overall ethnic, religious, political, economic and social background.

The Constitution of Bosnia and Herzegovina is also a very specific and complex "piece of legislation" that stemmed from the bloody conflict in the 1990s. Unlike other parts, where the content of the constitution differs from canton to canton, however, the section on fundamental human rights has uniform provisions for the whole federation. And so, the appendix to the Constitution, in the section on tools for the protection of human rights that have constitutional and legal force, names all international acts, from the 1948 Convention on the Prevention and Punishment of the Crime of Genocide to the 1994 Framework Convention for the Protection of National Minorities. It lists a total of twenty-two international documents, including those mentioned above.⁷

It is clear that the position of the international community in Bosnia and Herzegovina shares the same protectionist premises as in the case of Kosovo. The political history itself has strongly influenced the constitutional and legal system of Bosnia and Herzegovina. At the same time, it is noticeable that there is a cautious approach to the proclamation of fundamental European values, first focusing on reconciliation and peace, and then moving on to Europeanization.

The Serbian Constitution is relatively thorough when it comes to the protection of fundamental human rights and freedoms. Two articles are of particular interest for this analysis – one of them is Art. 18 that states: "Human and minority rights guaranteed by the Constitution shall be implemented directly. The Constitution shall guarantee, and as such, directly implement human and minority rights guaranteed by the generally-accepted rules of international law, ratified international treaties and laws.

The law may prescribe manner of exercising these rights only if explicitly stipulated in the Constitution or necessary to exercise a specific right owing to its nature, whereby the law may not under any circumstances influence the substance of the relevant guaranteed right. Provisions on human and minority rights

⁷ For more information see the Constitution of the Federation of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 1/1994 with all amendments

⁸ Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 98/2006, Article 18

shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.”⁸

Thus, the arbitrariness of the states – meaning the government – is almost completely excluded when it comes to fundamental human rights and freedoms. The direct application and affirmation of these rights by international documents is another guarantee that Serbia has at least nominally, legally-accepted modern European values regarding fundamental rights and freedoms.

Article 20, however, reads: "Human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right. Attained level of human and minority rights may not be lowered. When restricting human and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means.”⁹

Restrictions on fundamental human and minority rights and freedoms under the Constitution of Serbia are minimal and limited, but they must also be proportionate to the purposes for which they were established. Thus, once the stated constitutional objective has been achieved, restrictions are completely lifted.

The Constitution of Montenegro, adopted in 2007 and amended in 2013, is also modelled on the ex-Yugoslav republics. It does, however, have certain distinctive features, such as the emphasis put on gender equality in a separate article, namely in Art. 18: "The state shall guarantee the equality of women and men and shall develop the policy of equal opportunities.”¹⁰

Article 24 is [Capital letters are intentional here?] quite similar to Art. 20 of the Constitution of Serbia, reading: "Guaranteed human rights and freedoms may be limited only by the law, within the scope permitted by the Constitution and to such an extent which is necessary to meet the purpose for which the limitation is allowed, in an open and democratic society. Limitations shall not be introduced for other purposes except for those for which they have been provided for.”¹¹

Naturally, this strong resemblance comes from the decade-long shared government-legal system of Serbia and Montenegro (and previously within the SFRY).

⁹ Ibid., Article 20

¹⁰ Constitution of Montenegro, Official Gazette of Montenegro No. 1/2007 and 38/2013, Amendment I-XVI

¹¹ Ibid., Article 24

In general, the constitutions of the countries of the former Yugoslavia encompass most of the modern European values typical of the Member States of the European Union, as well as of the European Union, as a type of constitutional-legal formation. The difference lies in the ways in which they are implemented, in which there are large discrepancies in relation to European countries, as well as in their understanding, which in the Balkan countries is often broad and inaccurate and interpreted in day-to-day political terms. However, in order to finalize the transition of the constitutions of the Balkan states from totalitarian to democratic, the formulation of European values, as well as their implementation on the ground and their operation in practice, must also be respected.

3. THE VALUES OF THE BALKAN COUNTRIES AS COMPARED TO EUROPEAN VALUES

Prior to the analysis of the values of the ex-Yugoslav countries that are characteristic of their constitutional-political systems and then comparing them with the values typical of the EU Member States, it is necessary to have a brief overview of the process known as Europeanization, i.e. the determination of the level of acceptance of the normative and transformative powers of the European Union, i.e. the so-called soft power on the part of the Western Balkan countries, but also in general terms for all countries applying for EU membership.

Broadly speaking, the concept of Europeanization refers to a set of processes in which the EU's political, social and economic values become part of the logic of internal discourse, identity, political structures and public policy.¹²

The meaning of the term “Europeanization” is surrounded by considerable conceptual contradictions. In most definitions, it is seen as a process that stimulates change in political structures. One of the first definitions was proposed by Robert Ladrech, who describes Europeanization as "an incremental process of re-orienting the direction and shape of politics to the extent that EC political and economic dynamics become part of the organisational logic of national politics and policy making."¹³

Similarly, Robert Harmsen and Thomas Wilson define Europeanization as “the emergence and development at the European level of distinct structures of governance, that is, of political, legal and social institutions that specialise in the creation of authoritative European rules.”¹⁴ Maarten Wink and Paolo Graziano included integration within the EU in the very definition of “Europeanization,” calling it a process of internal adaptation to European regional integration. A fuller definition of “Europeanization,” encompassing processes, structures and actors, is proposed by Frank Schimmelfenning and Ulrich Sedelmeir, according to whom Europeanization is

¹²Radaelli, C. 2000

¹³Ladrech, D. 1994

¹⁴Harmsen, R and Wilson, R.T. 2000

“a process in which states adopt EU rules that cover a broad range of formal and informal issues and structures. This means the transposition of the EU law into domestic law, the restructuring of domestic institutions according to the EU rules; or the change of domestic political practices according to the EU standards.”¹⁵ On the other hand, Johan Olsen refers to the 'face of Europeanization' and describes it through five changes: the first change concerns the expansion of territorial boundaries, making Europe a single political space; the second one defines the development of governance institutions at the European level; the third shows the EU penetration into national and subnational systems of governance, including the distribution of responsibilities and powers between different levels of governance; the fourth describes the forms of exporting the concept of European political organization and its implementation throughout the European territory; and the fifth is the political project aimed at building a unified and politically stronger Europe.¹⁶

All these definitions and concepts justify the influence that the European Union as a single entity has on the accession candidate countries, as well as on other European countries, as manifested in its values, ideals, goals and objectives. In other words, Europeanization is a very subtle and sophisticated way of injecting the "European mentality" into all European countries, regardless of their status in relation to the European Union.

However, the impact of the EU on countries with varying political, economic and social systems, especially post-communist European countries in the period of transition, remains a poorly explored “field.” Once the Eastern Bloc disintegrated, significant differences emerged between these countries. Yet a vast majority of them shared a common aspiration for EU membership, as they saw this as a *sine qua non* condition for democratic development, economic progress and cultural achievements.

The European Union is a paradigm for the modernization of the political, economic and social systems of candidate and potential candidate countries, as well as for the process of Europeanization, which is essentially a set of steps leading to alignment of systems through processes of democratization, advertising, stabilization and institutional integration.¹⁷

The agenda of Europeanization defines the role of specific cases and contains forms of short-term, medium-term and long-term planning on political, social, economic, security and technical issues. In south-eastern Europe, the EU agenda covers matters of security and peacebuilding, border issues, reconstruction and development, as well as the post-communist transition and the EU accession agenda. Never before has the EU been involved in such a wide range of issues when dealing with candidate or potential candidate countries. The fact that the Balkan countries are entering the process with much weaker

¹⁵Schimmelfenning, F and Sedelmeirer, U. 2004

¹⁶ Olsen, J.P. 2002

¹⁷Agh, A. 1998

potential than previous candidate countries has made the management of the EU agenda that much more important. The EU, for its part, should adhere to the agreed agenda; it should abide by the same rules and standards for all states with a view to safeguarding its own achievements in terms of economic and political integration.¹⁸

The rational choice approach has led to progressive studies of Europeanization, as it explains the impact of EU membership on newly acceding States. Tanja Börzel and Thomas Risse note that Europeanization is theorized in categories of two different mechanisms: rational choice emphasizing a logic of consequences and sociological institutionalism emphasizing a logic of appropriateness.¹⁹ Schimmelfenning and Sedelmeier test rationalist institutionalism with regard to the impact of EU membership on the new Central and Eastern European member states. It was earlier discovered by them that, according to the rationalist view, international organizations are instrumental associations intended to aid the countries in the effective defense of their interests. Rationalist theories view international organizations as voluntary groups that will not be joined by members unless the result of membership itself is a net gain. Following this logic, expected individual costs and benefits determine the preferences of candidates and member states in expansion. A potential country will seek to join the EU if there is a gain from the membership.

Of course, all Balkan countries aspire to membership of the European Union because of the benefits and privileges offered by accession itself. Namely, if they were members of the European Union, all Balkan countries would be pure beneficiaries of the membership, meaning that much more would be received than invested, unlike, for example, Germany, which is the largest net investor, i.e. it invests in the European Union much more compared to what it receives.

There is no precise definition of the term “rule of law,” which means that its meaning can vary from country to country and from one legal tradition to another. In general, the rule of law can be understood as a political and legal mode whereby the law constrains the state and its powers (legislative, executive and judicial), promoting certain freedoms and establishing order and predictability in the functioning of the state. In the most general sense, the rule of law is a system intended to protect the rights of citizens against arbitrary abuses of state power. Under this understanding, the "rule of law" is considered a fundamental prerequisite and necessary element of any democratic system.²⁰

It is a broad concept that is defined either in terms of the values it is supposed to serve, the principles it is supposed to protect, the institutions that are obliged to protect it, or the procedures these institutions employ to do so. This

¹⁸Karadzowski, M. and Ilik, G. 2019

¹⁹Borzel, T. and Risse, T. 2000

²⁰Roos, S.R. 2008

multidimensional analysis reflects the volume of definitions and interpretations of this very important term, which is impossible to be defined in a precise and universally-applicable way.

For a state to be classified as a "state under the rule of law" (*Rechtsstaat*), certain basic elements and institutions must be established, such as: the separation of powers; the legitimacy of the administration – in particular, the principle of legal certainty and unity, which in particular includes the principle of reliability, the principle of the prohibition of retroactive acts and the principle of proportionality; the guarantee of fundamental rights and freedoms and equality before the law.

At the level of the European Union, the concept of the rule of law has a constitutional meaning encompassing two aspects: internal and external. The internal aspect refers to the existence of this principle in the treaties (which have constitutional force and significance) under which the European Union has been created and developed over decades, while the external one gives the rule of law the importance of a guiding principle as well as a norm (reference).

Within the constitutional framework of the EU, the rule of law is not only mentioned as a general core value, but is also used as a reference point to assess the efforts of accession candidates and as an objective of foreign policy. Viewed through the prism of national constitutional traditions, these features appear too authentic and original.²¹

There is a profound commitment to strengthening the rule of law declared by the countries that are candidates for accession to the European Union. Effective application of the law is essential for the system to function effectively, to improve security for citizens and the protection of human rights, and to successfully implement the reforms needed to prepare their economy for integration into the Union's internal market, in accordance with the economic criteria for membership of the European Union. The practice of the "rule of law" requires precise and applied measures against organized crime, fraud, corruption, arms trafficking, drugs and human trafficking. What is a "mote in the eye" for the European Union when assessing the application of this principle in accession candidate countries, however, constitutes a large discrepancy between the "European rules" adopted by the countries and their "Balkan application" in practice.

The European Union's external human rights policy is progressively focusing on strengthening third country actors (including accession candidates), specialized regional bodies and agencies, enhancing their independence and sustainability, and creating a model that encourages people to understand and assert their rights. The EU also plays an important role in funding national human rights institutions.²²

²¹Pech, L. 2013

²² EU Foreign Affairs Council, 2017

The human rights situation in the European Union candidate countries over the past decade has been assessed as relatively good in terms of a number of international factors. Each of these countries has signed a number of international human rights protection documents, including the European Convention on Human Rights. Human rights and freedoms are largely guaranteed by Constitutions, which also provides for the direct application and acceptance of ratified human rights treaties in domestic law. In addition to the general commitment to strengthening the rule of law, there are other areas in the field of human rights where intensive work needs to be done, particularly those relating to freedom of expression and the status of the media.

The highest legal acts of the countries that are candidates for adoption of the EU Constitution are a direct guarantee and direct protection of human rights and freedoms. Indeed, the constitutions of all these countries clearly affirm their democratic nature in terms of protecting and promoting human rights. By outlawing inhuman and degrading treatment of people as defined in these acts, they prohibit discrimination on the grounds of religion, race, gender, ethnic origin, social status, age, as well as capital punishment, forced labour, etc., therefore, confirming their compliance with European standards, as well as their commitment to developing, complying with and even updating these standards and laws.²³

The human rights-based approach is a key methodology for ensuring respect for and promotion of the international human rights system through development and cooperation. The European Union's practices are well coordinated and harmonized, particularly with regard to guidelines, recommendations, proposals and opinions on respect for human rights and democracy. These methods also complement the work of other global and regional organizations working on this issue.

It is essential that candidate countries develop appropriate strategies and institutional tools to put into practice the concept of protecting and guaranteeing human rights, without contradicting the aforementioned principles and methodology of the European Union. The conditions for practical implementation will be dependent on the individual capacities of each country, that is, on their systemic approach and institutional coherence.

The European Union is one of the main advocates and defenders of the universality and indivisibility of all human rights. Non-discrimination, human dignity, gender equality, strengthening women's rights, as well as children's rights. It also places greater emphasis on efforts to promote economic, social and cultural rights. At the same time, the protection of vulnerable groups is expanding, combating all forms of discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion, national minority, property, birth, disability, age or sexual orientation.²⁴

²³Karadzowski, M. 2020

²⁴ EU Foreign Affairs Council. 2017

In line with this philosophy, the EU has been a catalyst for massive legal reform across Eastern Europe; it is encouraged primarily in annual progress reports, as well as in policy criteria and parts of legislation. Some of these new regulations are essential to the functioning of modern states. However, regulations can always be improved and new ones can always be added, but the difficulty in distinguishing the difference between serious legal reform and “cosmetic legislative intervention” remains. Indeed, new laws are also often amended if defects are found in the original version.

The Balkan countries may have some of the most up-to-date and complete legal codes in Europe, but face significant challenges due to their application and the legal uncertainty that affects business, society and citizens.

Although constitutional amendments occur much less frequently compared to changes in laws, great care must still be taken in such "constitutional and legal efforts," mainly to maintain legal certainty and reliability, which is quite problematic in Yugoslavia's successor states. As mentioned earlier, the biggest problem in these countries is not their constitutional/legal physiognomy, but the practical embodiment of constitutional and legal norms, as well as their interpretation.

The possible accession of these countries to the European Union will further complicate their constitutional framework, as in certain areas they will have to give up their national sovereignty and transfer it to the supranational level in the EU. Such a complex constitutional and legal restructuring would require a very careful and thorough approach on the part of the states in order to effectively adapt to the constitutional legal system of the European Union.

According to Giorgio Repetto, in the last 15 years, the debate on the constitutionality of European law has gained great importance and broadened its scope. After the failure of the Treaty establishing a Constitution for Europe, this Constitution of the European Union in the years 2003-2005, there was a widespread scholarly discussion on the new constitutional paradigm with which they were forced to come to terms with their own ambitions. As the dream of a uniform, increasingly inclusive constitutional structure for Europe under the auspices of a political contribution from the EU faded, claims for a broader and more complex model of constitutional legitimacy came to fruition. No one denied that the EU was a leading player in this process, but the considerably weak constitutional legitimacy revealed the need for a broader framework in which EU legislation and policy itself ceased to exist, embracing a broader package of policies into a European setting and sources of legitimacy. Not surprisingly, therefore, the Council of Europe, and, in particular, its “jewel” – the European Convention on Human Rights (ECHR), together with the European Court of Human Rights (ECtHR) – have been able to play a major role in the process of reassessment on this constitutional basis.²⁶

²⁵ Nicolaidis, K. and Kleinfeld, R. 2012

²⁶ Repetto, G. 2013

Constitutional restructuring is a complex and time-consuming process for all countries that become part of the European Union, whether relatively homogeneous or heterogeneous (in terms of ethnic and religious structure). Following the breakup of Yugoslavia, the European Union faced a variety of challenges in each of the SFRY's successor countries. Given that all these countries declared membership of the European Union as one of their strategic objectives, they felt the need and the obligation to contribute to the creation of modern and democratic constitutions that embrace fundamental European values such as the rule of law, democracy, protection of human rights, protection of minority rights, etc. This task was particularly difficult in countries such as Bosnia and Herzegovina, Macedonia and Kosovo.

Constitution-building in Bosnia, Macedonia and Kosovo is a unique example of the continued intervention of a regional organization or formation in state-building and as a result of the internal conflicts that have engulfed the three countries. All three countries share similar historical legacies of the Ottoman Empire and Yugoslavia and the conflicts that emerged in each of them after the breakup of Yugoslavia, when the young developing countries were not ready to deal with the new challenges ahead. In all three cases, international actors played an important role in the unfolding of events. Heterogeneous ethnic composition, weak states and powerful diasporas played key roles in the conflicts, and peace in all three cases was achieved through foreign diplomatic and military intervention. In the three cases, a generally similar consociational approach to the constitution was adopted, with each of them differing to some extent from the ideal model of a consociational constitutional arrangement.²⁷

Bosnia has features of all the consociational principles implemented through the institutional mechanisms recommended by consociational theory. Kosovo and Macedonia have adopted all the consociational principles, but deviate somewhat from the theory, as they practice two of the four consociational principles. First, the principle of segmental autonomy was implemented in Kosovo and Macedonia not through a formal federal territorial structure, but through extensive decentralization with a formally unitary state structure. Secondly, the principle of mutual veto between Kosovo and Macedonia was limited to certain territories and implemented through several indirect mechanisms.²⁸

The constitution-making process in the post-conflict zone of the former Yugoslavia with the assistance of the European Union was an instructive case of the involvement of a regional organization in developing a constitution in a post-conflict society. These processes differ in modality and degree of participation, as well as in the specific provisions of the constitutional system.²⁹

Undoubtedly, such involvement of the EU should not be interpreted as interference in the constitutional and legal affairs of independent states, but as assistance and support

²⁷Belloni, R. 2004

²⁸Bieber, F. 2004

²⁹Galyan, A. 2014

with good intentions for the entity which the small Balkan states have the desire and determination to join. This “Constitutional paternalism” would be repugnant if it were a powerful, large and well-organized state, but for smaller countries it means "good constitutional mentoring" and professional, financial, material and technical assistance.

Reforming the concept of the rule of law requires a broader approach to social transformation and observance of norms of democratic and proper governance. Therefore, the governments of the successor states of the former Yugoslavia must: invest in education (research on justice and the rule of law), in order to provide sufficient knowledge so that the population can influence the improvement of the rule of law and be able to apply these principles on a daily basis. This approach requires cooperation with educational institutions and changes to curricula in primary and secondary schools and in higher education.³⁰

Such a systematic and consistent approach to education would certainly increase the possibility of meaningful rather than formal and palliative efforts when it comes to the rule of law. Because planting the "seeds of the rule of law" in educational institutions at all levels would undoubtedly result in the growth of healthy and functional "institutional seedlings" that would apply the concept of the rule of law in line with its original idea.

The rule of law reform is a long and potentially multi-generational process in which the social and cultural succession of transmitted norms is ultimately achieved by making sure that every accountable member of society has the skills and habits necessary to comply with them. Therefore, in order to accomplish the mission of introducing accepted norms into everyday life and the process of transforming the legal state, it is necessary to involve the broadest layers of society.³¹

This means maximum involvement of all "stakeholders" at vertical and horizontal levels, i.e. all state and public institutions at central, regional and local levels, political parties and interest groups, the non-profit sector, business organizations, etc., i.e. of all organized individuals who are directly or indirectly involved in putting the concept of the rule of law into practice, so that it is fully integrated into the "social structure" of all Balkan countries.

Of course, the rule of law as a concept is applied differently in the Balkan countries compared to countries that are members of the European Union, but also to the Union as a single entity. The main difference is that in the Balkan countries most attention is paid to the formal application of the rules, that is, only to the apparent normative satisfaction from the regulations, but not to the material changes that should arise from their enforcement. The main problem is, therefore, the effect of the application of the provisions. Such an attitude can only be changed under strong influence and pressure from the European Union.

³⁰Jano, D. and Marovic, J. 2019

³¹Marovic, J., Prelic, T. and Kmezcic, M. 2019

SUMMARY

The constitutional features of the EU Member States may vary from country to country, but, nevertheless, when it comes to the enforcement of the "public domain" arising from the founding treaties, there needs to be some uniformity and consistency in its application.

However, this division is distinguishable from the point of view of the rule of law in the application of European law, namely whether national constitutions are hierarchically superior to EU law or whether they are subject to rules of constitutional authority of the "public domain." Advocates of intergovernmental cooperation, i.e. those who favor the supremacy of national constitutions over general laws of the European Union, take one position, believing that when there is a conflict between national constitutions and international law, preference should be given to national acts because of the sovereignty that is inherent in the genesis of individual countries, while the fact of the European Union not being a state puts us in a certain subordinate "position". Another view, directly opposite to the first, is promoted by supporters of integration, federalists and other structures that always prioritize the "public domain" over national legal norms and even national constitutions.

On the other hand, a group of small countries on the Balkan Peninsula, most of which are from the former Yugoslavia, define membership of the European Union as a strategic commitment. This means that in addition to gaining the ambition, energy and constructiveness of the Union when they become members, they will also give up their constitutional principles, habits and institutional efforts that could hinder the already existing ones in the EU.

These countries are expected to have an easier time adopting integrationist, or federalist, views on the rule of European law over national constitutions, with several reasons for this. The first is political instability, which they will want to neutralize through a centralized approach from the EU as a whole, the second is economic inferiority, which they will want to compensate for with common EU (structural and cohesion) funds, and the third is the size of the countries, which means that these countries will not dare to enter into conflict with Brussels, unlike, for example, Berlin or Paris.