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EXTERNAL AND DOMESTIC CHALLENGES AND PROSPECTS FOR TURKEY AS A REGIONAL POWER AND THE ROLE OF THE EUROPEAN UNION

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Abstract

Turkey, which has a democratic and secular political system with a predominantly Muslim population and an EU membership prospect, had an increasing influence in its region which increased its soft power. However, after the start of Arab uprisings, uncertainty in the Middle East and stall of the negotiations with the EU challenged Turkey's soft power. This article discusses challenges and prospects facing Turkey's regional power, especially since 2011. It firstly analyses the role of soft power in Turkish foreign policy and evaluates the series of soft power instruments. Secondly, it discusses the external factors challenging Turkey's regional power, particularly the role of Arab uprisings, particularly Syrian crisis and domestic challenges that negatively influence Turkey's regional power, particularly stagnation in the reform process, polarisation of the society, freedom of media and the rise of terrorism. Lastly the role of EU in Turkey's soft power in spite of its decreasing transformative power over Turkey in recent years will be evaluated.

Keywords: *Turkey; Regional Power; Soft Power; Syrian Crisis; European Union*

Introduction

Joseph Nye (2008) defined power as 'the ability to affect others to obtain the outcomes you want', with three main ways to affect the other's behaviour: 'Threats of coercion, inducements and payments and attraction that makes others what you want'. The term 'soft power'[1] was first used by Nye (2004, p. 5), who defined it as 'the ability to shape the preferences of others'. If others follow the lead of the power holder due to the power of attraction, we can speak of soft power. Soft power resources include cultural attraction, ideology and international institutions.

1) This concept was introduced by Joseph Nye in his 1989 book which is called "Bound to Lead".

Legitimacy and credibility are necessary conditions for the existence of soft power, because 'if a state can make its power seem legitimate in the eyes of others, it will encounter less resistance to its wishes' (Nye, 1990, p. 167). While 'hard power' assumes an emphasis on the agent, 'soft power' emphasises the significance of others' perceptions of the agent (Oğuzlu, 2007, p. 82-84).

Nye (2008, p. 106) argues that part of the USA's soft power comes from the openness of its society and its free press, Congress and courts that can criticize and correct government policies. While soft power was firstly introduced to counter the belief in the US' global decline, it has been also used in relation to 'the foreign policy discourse of mid-range regional powers like Turkey'. In particular, many Turkish foreign policy scholars claim that Turkey's soft power, particularly in the Middle East, has increased in the first decade of the 21st century[2] (Demiryol, 2014, p. 7).

If a country has soft power, other countries want to follow it as an example, admiring its values, level of prosperity and openness. In international politics, soft power usually depends on a country's values, the example set by its domestic policies, and its relations with others. Public diplomacy is an instrument that governments use to communicate with and attract the publics of other countries. However, it should be emphasized that 'if the content of a country's culture, values and policies are not attractive, public diplomacy that broadcasts them can not produce soft power' (Nye, 2008, p. 94-95). Nye (2008, p. 101-108) also argues that 'good public diplomacy has to go beyond propaganda'. While providing information and selling a positive image is part of public diplomacy, the latter also involves building the long-term relations that create an 'enabling environment for government policies'. In this way, public diplomacy can be used as an instrument to promote a country's soft power.

In 2003, Nye (2009, p. 160-161) introduced the concept of 'smart power' in order to counter the misunderstanding that only soft power can produce effective foreign policy. While Nye defines hard power as 'the use of coercion and payment', he defines 'soft power' as 'the ability to obtain preferred outcomes through attraction'. The major elements of soft power include a country's culture and values, so long as they

2) For further detail see Tarik Oguzlu, "Soft Power in Turkish Foreign Policy", *Australian Journal of International Affairs*, Vol. 61, No. 1, 2007; Meliha Benli Altunışık, "The Possibilities and Limits of Turkey's Soft Power in the Middle East", *Turkish Studies,* Vol. 10, No. 2, 2008.

are attractive, and its policies, if they are practised in a consistent way and perceived as legitimate and inclusive. The instruments of soft power include public diplomacy, development assistance and exchange programmes. However, he also argues that there is a necessity for smart strategies that combine the instruments of both hard and soft power. He proposes that these can be combined as 'smart-power strategies' that can be used together, although this requires 'contextual intelligence', based on realistically understanding both the strengths and limits of the country's power. Nye (2008, p.94) argues that public diplomacy is also an instrument of 'smart power', but 'smart public diplomacy requires an understanding of the roles of credibility, self-criticism and civil society in generating soft power'.

During the Cold War era and in the 1990s, Turkey was considered mostly as a 'hard power'. In the first decade of the 21st century, several internal and external developments have positively contributed to Turkey's soft power. As a secular, democratic state with a predominantly Muslim population, an official candidate of the EU since 1999, Turkey developed a growing regional influence since September 11. Especially, after the Arab Spring, there were discussions on whether Turkey's political and socio-economic transformation can provide an example or an 'inspiration' for opposition forces in the Arab world (Benli Altunışık, 2011, p. 1).

While in its first (2002-2007) term of office, the Justice and Development Party (JDP) government gave priority to the EU accession process, in its second term (2007-2011), it developed a multi-dimensional approach to Turkish foreign policy.[3] In particular, Turkey tried to contribute to regional peace through constructive engagement and mediation efforts in its neighbouring regions. Turkey's 'zero problems policy' also contributed to its soft power, including a liberal visa policy with its neighbours and increasing economic, political and cultural communication and cooperation. Turkey was constructed in the first decade of the 21st century as a 'central country'. Turkey has started to use public diplomacy to communicate with various countries, with Turkish language courses and cultural centres being established in different parts of the world. There has also been a rise in interest in Turkish language

3) For further detail see Selcen Öner, "Europeanization of Turkish Foreign Policy and Increasing Multidimensional Approach", *EurOrient, "Turquie: La Nouvelle Politique Exterieure Turque Entre Le Mythe 'Europeen' et la Nostalgie 'Ottomane'"* (The New Turkish Foreign Policy between the European Myth and the Ottoman Nostalgia"), No:35-36, 2011, p.217-236.

and culture, especially with the rising popularity of Turkish soap operas in the Middle East and the Balkans.

During the third term of the JDP government (2011-2015) the Arab Spring was the main challenge for Turkey's soft power. The strategy of promoting and projecting Turkish culture externally, is insufficient as long as hard power and uncertainty dominate in the Middle East (Benli Altunışık, 2011, p. 2-3). Turkey's soft power in the Middle East has also been challenged by other countries that perceive this region as crucial for their own geostrategic interests (Beng, 2008, p. 38). As Oğuzlu (2007, p. 95) argues, if threats and challenges to Turkey's own security continue to increase, it will lead to an increase in Turkish tendencies to revert to acting as a hard power. For example, growing tensions between Turkey and Syria, stalled negotiations with the EU, and the loss of momentum in Turkey's domestic reform process, particularly regarding freedom of speech and media, have negatively influenced Turkey's soft power. Turkey's ability to exert soft power in the Middle East is also dependent on 'undertaking necessary reforms at home to make Turkey's development attractive and persuasive to others' (Beng, 2008, p. 22). For Turkey's regional soft power to recover, will require its domestic reform process to regain its earlier momentum and improvements in its democratic credibility.

This article discusses the challenges and prospects facing Turkey's soft power, especially since 2011, during the JDP government's third term and the fourth term since 2015. It firstly analyses the role of soft power in Turkish foreign policy and evaluates the series of soft power instruments. Secondly, it discusses the stagnation in the reform process and the domestic challenges facing Turkey's soft power, particularly deficiencies in freedom of speech and freedom of press, and lastly the role of external factors which include the role of Arab uprisings, particularly Syrian crisis and the role of the EU in Turkey's soft power.

The Development of Instruments for Turkey's Soft Power

Turkey used various foreign policy tools in dealing with neighbouring regions, including public diplomacy, and developmental assistance. The primary institutional instruments of Turkey's soft power are TIKA (Turkish International Cooperation and Development Agency), which provides developmental assistance to many countries, and the Institute of Public Diplomacy, which plays a crucial role in 'promoting Turkey's image

abroad' (Demiryol, 2014, p. 9). In addition, Yunus Emre Turkish cultural centres have been established in different parts of the world, especially in neighbouring regions, to promote Turkish language and culture abroad.

In 2010 the Office of Public Diplomacy was established within the Turkish Prime Ministry. Turkey's public diplomacy has two main pillars: 'from state to society' and 'from society to society'. The first focuses on explaining Turkish government policies and activities to an international public. The second uses civil instruments, such as CSOs, research institutes, the press and universities (*Kamu Diplomasisi*, 2010) for communication activities. The goal of this public diplomacy is to increase Turkey's visibility in international public opinion. Activities involve science and technology, economy, tourism, culture, arts, foreign aid and media, which help to inform world public opinion about Turkey. By coordinating these activities, the Office of Public Diplomacy tries to support Turkey's strategic efforts to communicate and promote itself effectively internationally (*Vizyon ve Misyon*, 2010). İbrahim Kalın (2011, p. 5-10), former head of the Office of Public Diplomacy, defines public diplomacy as a platform for the implementation of soft power, arguing that its influence extends from the Balkans to the Middle East and Central Asia.

The activities of Turkish public diplomacy include conference series of 'wise men', journalist group programs, country programs, meetings with representatives of the foreign press, promotional activities, public diplomacy panels, foreign policy workshops, Europe meetings and the İstanbul Global Forum, held for the first time in October 2012 with the participation of politicians, academics, writers, journalists and artists. The conference series of 'wise men' aims to bring foreign politicians, intellectuals, journalists and specialists to Turkey, such as Seyyid Hüseyin Nasr and George Friedman, while the journalist groups program aims to invite journalists from the foreign press to Turkey so that they can attend meetings with Turkish journalists, media representatives and research institutions. The goal of meeting representatives of the foreign press in Turkey is to give them a chance to come together regularly with Turkish decision-makers, who can inform them about various policies and recent developments in Turkey. The country programmes involve meetings held abroad that aim to bring together foreign researchers and specialists on Turkey with their Turkish colleagues. Public diplomacy panels that include specialists and high-level bureaucrats are organized each month in a different Turkish city with the cooperation of the local university. Foreign policy workshops are also held in different cities and

include academics and foreign policy makers. Europe meetings involve academics and thinkers specialised on European identity and culture to conduct discussions about the future of Europe (*Faaliyetler*, 2010).

By abolishing visa requirements for citizens from neighbouring countries like Syria, Egypt, Lebanon and Iran, Turkey strengthened its soft power by increasing interactions with these countries. For example, it allowed Turkish Civil Society Organisations (CSOs) and business organisations to become more active in neighbouring regions. As a state institution operating under the Turkish Prime Ministry since 1992, TIKA is regarded as a key foreign policy instrument for increasing regional cooperation in the Middle East, Caucasus, Central Asia, Balkans and Africa (Kaya and Tecmen, 2011, p. 13). TIKA deals with a range of projects in education, health, restoration, agricultural development, tourism and industry, with Programme Offices being established in 12 other countries in 2002, before expanding to 33 offices in 30 countries in 2012. Whereas Turkey's development funds amounted to 85 million US dollars in 2002, by 2011 it reached 1.273 billion US dollars (TIKA, 2013). According to the 2013 Global Humanitarian Assistance Report, Turkey was the fourth largest humanitarian aid donor in 2012 after the USA, the EU and the UK (cited in Aydın-Düzgit and Keyman, 2014). This overseas development assistance programme is in accordance with Turkish foreign policy's rhetoric of a 'historical responsibility' towards neighbouring regions (Elman, 2013, p.3). For example, a scholarship programme was incorporated in TIKA that enables an increasing number of overseas students from Turkey's neighbourhood (Kirişçi, 2011, p. 42).

Turkey's cultural diplomacy is carried out within the scope of Turkish foreign policy under the jurisdiction of the Ministry of Foreign Affairs, although the Ministry of Culture and Tourism also participates in the promotion of Turkish culture abroad (Kaya and Tecmen, 2011, p. 18), not only to foreigners but also to Turkish communities abroad. In accordance with a multi-dimensional foreign policy, the government has implemented a multi-dimensional strategy to promote Turkey abroad, covering a broad spectrum ranging from economy and trade to culture, from social development to education and cultural diversity. In order to promote Turkey internationally, exhibitions, 'Turkey Week' and 'Year of Turkey' events and festivals are organized; Turkey also participates in each country's existing festivals and cultural events, while conferences on Turkish foreign policy are organized and promotional publications and documentaries are produced. For instance, in 2003, 2008, 2009 and

2013, a 'Year of Turkey' was proclaimed in Japan, Russia, France and China respectively. In 2009, which was proclaimed as 'Turkish Season' in France, 600 cultural, social, political, economic and scientific activities were organized, constituting the most comprehensive and longest series of events and promotion campaign realized abroad by Turkey in an EU country. Turkish Cultural Centres, established by the Ministry of Foreign Affairs, have the goal of promoting 'Turkish culture, language and art and to contribute to bilateral relations between Turkey and other countries, as well as to help Turkish citizens in their adaptation to the country in which they live'. In addition, Turkish Language and Literature Departments and Turkish courses have been established in foreign universities, supported by lecturers and technical equipment provided by Turkey (Ministry of Foreign Affairs, 2012).

As well as these initiatives, the Yunus Emre Institute was established in 2007 to promote Turkish culture, society and language abroad. It aims to conduct research to improve the promotion and teaching of Turkish culture, history, language and literature, and to support scientific studies by cooperating with various foreign organizations and informing the wider public by publicizing the results of such activities. It also contributes to the training of academics and researchers concerned with Turkish language, history, culture, art and music and provides training through certification programmes. The institute helps to establish Yunus Emre Turkish Cultural Centres to promote Turkish language, culture, arts and history in several countries. These centres promote Turkey through cultural activities, scientific projects and courses, while aiming to increase cultural exchanges with other countries (Yunus Emre Institute, 2013). The locations of the centres reflect an emphasis on the Middle East and the Balkans which fits with the common cultural heritage approach of Turkish foreign policy (Kaya and Tecmen, 2011, p. 11). Chairs for Turkish studies have also been established in prominent universities abroad to increase the number of studies on Turkey in international universities and to establish a discussion platform about Turkey in the public opinion of foreign countries. One example is the establishment of the 'Chair of Contemporary Turkish Studies' at the London School of Economics (LSE) (Ministry of Foreign Affairs, 2012).

Thus, Turkey successfully introduced several new institutions and instruments in the first decade of the 21st century that contributed to Turkey's soft power, such as the Office of Public Diplomacy and Yunus Emre Centres, especially in neighbouring regions. However, Turkey's

soft power faces several recently emerging internal and external challenges. Externally, these challenges became more obvious after the Arab uprisings, particularly after the Syrian crisis while there was stagnation in the negotiations between Turkey and the EU, domestically the challenges include the problems in the field of freedom of speech and freedom of media and the rise of terrorism.

External Factors Challenging Turkey's Soft Power

Several internal and external developments strengthened Turkey's soft power during the first decade of the 21st century. The main internal development that changed Turkish foreign policy was that the JDP Party, which has an Islamist origin, came to power in 2002, bringing with it a new political and bureaucratic elite and political agenda (Bilgin, 2008). In its first term of office, the government made Turkey's EU accession process the main priority of Turkish foreign policy, starting formal accession negotiations with the EU on 3 October 2005. Many reforms were introduced, including in the fields of minority rights, abolition of death penalty, human rights and the Kurdish issue, especially between 2000 and 2005 (which includes the pre-JDP coalition government's term in office).

During the JDP Party's second term (2007-2011), the government emphasized cultural proximity with neighbouring countries. Meanwhile, Turkey's democracy and growing economy provided a political and discursive basis for a new multi-dimensional and proactive foreign policy in addition to the country's geostrategic importance (Keyman, 2009, p. 5). The logic of JDP Party's foreign policy approach was to play a leadership role in the Muslim world while it was trying to participate in initiatives with the West, such as the Dialogue of Civilisations (Öniş and Yılmaz, 2009).

At the same time, the government attempted to construct Turkey as a 'centre' country. Thus, Turkey became more active in international organizations like the G-20, the Organization of Islamic Cooperation (OIC), and it became a temporary member of the UN Security Council for 2009-2010 period. Due to its growing economy and proactive foreign policy in various parts of the world, Turkey sometimes became referred to as a 'model country' or an 'inspiration' for other countries in the Islamic world (Keyman, 2009, p.12). Kirişçi (2011, p.35-45) argues that Turkey's 'demonstrative effect' is based on three developments: firstly, Turkey's rise as a 'trading state', which makes it more visible through trade

and investment; secondly, the diffusion of Turkey's democratization experience; and thirdly, Turkey's new foreign policy paradigm which includes policies encouraging regional integration through free movement of goods and people between Turkey and the Middle East. For example, visa requirements for Moroccan and Tunisian nationals were lifted in 2007, and for Syrian, Lebanese and Jordanian nationals in 2009. Turkey also mediated conflicts between several regional actors, and between them and the West. Inspired by the EU as an international actor, for which the term soft power is frequently used, Turkey has in turn become an inspiration for other countries, especially in the Middle East (Kahraman, 2011, p. 711). Turkey's regional and global engagements have even expanded to Africa, Asia and Latin America. However, this increasing proactivity in regions like the Middle East and the Balkans has also been criticized as reflecting a 'neo-Ottomanism' (Ulusoy, 2005, p. 245), although Kalın (2011, p. 10), the former head of the Office of Public Diplomacy, rejects such claims about Turkey's recent foreign policy; he considers these tendencies as representing a reconciliation between Turkey and its history and geography.

More recently, Turkey's self-confidence has increased by its ability to maintain economic growth during the financial crisis in the Eurozone and its proactive foreign policy. In the third term of the JDP government (2011-2015), Turkey acted more as an independent regional power in the Middle East while emphasising mutual economic interests and a common Muslim identity (Öniş, 2014, p. 5). However, Turkey's rising soft power faced challenges, especially after the Arab uprisings in that the new foreign policy paradigm, based on 'zero problems with neighbours', has had to deal with the realities of international politics (Kirişçi, 2011, p. 46), especially with respect to Syria. Whereas, at the beginning of the Arab Spring, there were discussions as to whether Turkey can be a 'model' or an 'inspiration' for those countries[4], after a while, these discussions were replaced by critiques of Turkey's over-engagement in the domestic politics of several Arab states, as it became more deeply involved in their internal sectarian conflicts.

4) TESEV's public opinion surveys in the Arab world show that Turkey has been quite attractive in the region. This attractiveness comes from a proactive Turkish foreign policy, the perception of Turkey's successful socio-economic transformation in the last decade and an increase of Turkish cultural products, particularly Turkish TV series in the region. The popularity of these series has been influential in raising the number of visitors to Turkey from Arab countries (Benli Altunışık, 2011, p. 1).

Turkey's increasingly friendly relations with Syria between 1999 and 2008, which led to the lifting of visa requirements, was one of the main examples of how Turkey's soft power was rising in the region. However, a civil war then started in Syria with the anti-government uprisings in 2011. The authoritarian political leader Basher el-Assad has been able to hold on to power, in spite of strong resistance from various societal forces (Lesch, 2013; cited in Öniş, 2014, p. 2). Currently, Turkey's relations with Syria are as securitised as they were in the 1990s, and Turkey's foreign policy towards Syria has been transformed from soft to hard power (Demiryol, 2014, p. 10). Nevertheless, at the same time, Turkey has played an important role in providing humanitarian aid and welcoming a large number of Syrian refugees. However, the JDP's proactive foreign policy has not succeeded in facilitating regime change in Syria, nor has it helped establish and maintain a democratic order in Egypt; on the contrary, it has moved more towards entangling Turkey in the region's sectarian conflicts and deeply engaging it in the domestic politics of certain Arab states (Öniş, 2014, p. 1).

In the case of Egypt, its first democratic experiment with an elected government ended with a military coup that removed the democratically-elected President Morsi and the Muslim Brotherhood from power. In Libya, the post-Qaddafi situation is very uncertain, with extreme polarization in Libyan society. Only in Tunisia have several positive steps been taken towards political liberalisation (Öniş, 2014, p. 2). Given this context, one of the main challenges for Turkey's soft power has become how to balance its relations with authoritarian and reformist regimes. This is also related to the question of which political forces will gain power during the transition process in these countries. This new context requires differential treatment of Turkey's neighbours and consideration of their local characteristics. In addition, it is now necessary to balance 'Turkey's historical/cultural and idealist vision with more pragmatism and realpolitik' (Kahraman, 2011, p. 706).

As a result of its involvement in the Arab Spring, Turkey is no longer seen as a neutral actor in the region (Akdeniz, 2013, p. 5). As Öniş (2014, p. 2) argues, Turkey has been an 'increasingly assertive regional power' in recent years, who is usually perceived as a country that takes sides in the internal problems of Middle Eastern countries. Yet, despite its foreign policy activism, Turkey's ability to influence the political transformations in the Middle East has been very limited. The over-activism of Turkish foreign policy, especially in Egypt and Syria, has

led to several criticisms both by some domestic actors, particularly the opposition parties, and within the international community. Turkey's recent interventionist and sectarian foreign policy understanding has contradicted the traditionally peaceful and non-interventionist nature of its foreign policy and its role as a mediator (Elman, 2013, p. 3).

According to the Turkish think tank TESEV's reports on the 'Perception of Turkey in the Middle East' in 2011 and 2012 (2013, p. 6), it was the most favourably-thought-of country. However, in 2013 the United Arab Emirates was the favourite (67%), followed by Saudi Arabia (60%) and then Turkey (59%). However, in 2013, Turkey is still perceived as a regional model with 51%, although Syrians had the least positive perception of Turkey as a model with 22%. Respondents viewing Turkey as a regional model emphasize its economy and democratic regime.

Thus, there are several internal and external factors that have influenced Turkey's soft power in the 21st century. The main external development is the Arab uprisings because it has made Turkey's neighbourhood more insecure, which in turn has made it harder for Turkey to act as a soft power. Another external crucial challenge is the stagnation in Turkey-EU negotiations, which has influenced the decline in the momentum of the reform process in Turkey. This has reduced Turkey's attractiveness as an 'inspiration' to other Middle East countries.

The Role of the EU in Turkey's Soft Power

After the Helsinki Summit in December 1999, when Turkey was given official candidate status, the Europeanization of Turkey, which was the priority of the JDP government's foreign policy during its first term of government (2002-2007), positively influenced Turkey's soft power, especially through the introduction of several reforms in the areas of democracy, human rights and minority rights. These reforms decreased the military's political influence and strengthened Turkish civil society. Öniş (2009, p. 8-9) argues that these reforms lead to a closer involvement of new actors in Turkish foreign policy, such as business organisations and CSOs. The EU also played its part in these reforms by providing funds for Turkish civil society projects and opportunities for new interactions between civil society in Turkey and EU member states, thereby increasing the number of Turkish CSOs and professionalisation of Turkish civil society.

However, following their launch in October 2005, the EU accession negotiations rapidly stalled because of the Cyprus issue and the resolute

opposition to Turkey's full membership by the French and German governments, who are the major motors of European integration. Till now, sixteen chapters have been opened but only one could be provisionally closed. In addition, the level of support of Turkish public opinion for the EU process has decreased in parallel with these developments.[5]

Especially during the second term (2007-2011) of the JDP government, Turkey developed a proactive multidimensional foreign policy. Although declining in recent years particularly after the economic crisis, only Turkey's relations with the EU exert transformative power over Turkey. Therefore, these relations are crucial if Turkey wants to act as a key actor for promoting democracy in its neighbouring regions (Öniş, 2014, p. 15). The Arab world started to take a closer interest in Turkey, especially after membership negotiations started with the EU, and several public opinion surveys show that Turkey's contributions to the region's stability, economic and political development are closely linked to Turkey's relations with the EU (Kirişçi, 2011, p. 34-49) and progress in the reform process in Turkey.

The Customs Union between Turkey and the EU since 1996, and the prospect of EU accession raised the competitiveness of Turkish industry and improved Turkey's position as a destination for Foreign Direct Investment (FDI). Meanwhile, there has been an increase in Turkish trade with its non-EU neighbours, which has led to a reduction in the EU's share of Turkish exports from 56% in 2002 to 38% in 2012. However, the future of the Turkish and EU economies will remain intertwined (The Independent Commission on Turkey, 2014, p. 27-31). In spite of a decline in recent years, Turkey's primary trading partner is still the EU, accounting about 40% of its total trade in 2012. The EU is also the largest foreign investor in Turkey, accounting for three-quarters of FDI inflows to Turkey (Akdeniz, 2013, p. 1).

The Arab Spring created a much more difficult foreign policy environment for both Turkey and the EU in their common neighbourhood. Developments in Turkey's neighbourhood have brought to the forefront its relations with Europe in political and security terms; the EU has become the priority for Turkey again also economically with the setbacks in economic relations with its neighbours. Thus, the acceleration of the momentum of domestic reforms and economic growth can regenerate Turkey's soft power potential (Akdeniz, 2013, p. 5).

5) For further detail, see Eurobarometer surveys.

The latest report of the Independent Commission on Turkey (2014) stated that, although the Turkish government has remained in principle committed to the EU accession process, it has seemed to attach less importance to the EU process since 2007.

While there has been an ongoing transformation processes in the Middle East, Turkey has been seen as an 'inspiration' because of having a secular democracy while having a predominantly Muslim population. One of the main sources of the legitimacy of Turkey's role as an 'inspiration' has been its domestic transformation in accordance with EU values and norms during the EU integration process (Oğuzlu, 2013, p. 11). That is, as Aydın-Düzgit and Keyman (2014) argue, it is mostly Turkey's EU membership prospect that makes it an attractive example of regional democracy.

The EU and Turkey have established a regular foreign policy dialogue which has intensified in recent years. The EU's former High Representative for Foreign Affairs and Security Policy, Catherine Ashton and Turkish former Prime Minister Ahmet Davutoğlu had regular constructive talks since 2010, on issues including the Western Balkans, Middle East and North Africa, Russia and Central Asia (The Report of the Independent Commission on Turkey, 2014, p. 43-44). In spite of the intensification of this political dialogue between the EU and Turkey concerning international issues of common interest, Turkey's alignment with relevant EU declarations and Council decisions has remained at only around 50% in recent years. There are many divergent Turkish and EU positions on key issues, such as military intervention in Egypt. On the other hand, the 'Positive Agenda' was initiated by the Commission to complement the negotiation process. In December 2012, the Commission prepared a road map for visa liberalisation with Turkey, which includes the requirements that need to be fulfilled by Turkey, including implementation of the readmission agreement. Turkey signed the readmission agreement in December 2013 and the visa liberalisation process will take place in three years' time, if the necessary steps for implementing readmission agreement will have been taken by Turkey (Akdeniz, 2013, p. 2).

Especially since the crisis in the Eurozone and stagnation in the negotiation process, the desirability of becoming an EU member has gradually decreased in Turkey, which has weakened the EU's role as an anchor of democratic reform in Turkey (Cenker Özek and Oğuzlu, 2013, p. 697). Yet, in spite of these challenges, the EU still provides the best anchor for Turkey to consolidate its democracy and improve freedoms, develop economically and increase its regional influence (Akdeniz,

2013, p. 10). Indeed, several scholars, including Keyman, Aydın and Açıkmeşe, consider that this anchor is still crucial.[6] However, Turkey also needs some positive signals from the EU because the enthusiasm of Turkish public opinion for the EU has decreased significantly in recent years. Lifting of Schengen visas for Turkish citizens could be an important positive signal. In addition, opening new chapters, especially chapter 23 on Judiciary and Fundamental Rights and Chapter 24 on Justice Freedom and Security, may help revitalize the reform process in Turkey in these policy fields, where there are still crucial deficiencies.

Domestic Challenges Facing Turkey's Soft Power

The 'image' of a country is crucial for its soft power. To improve its image, Turkey has to maintain its economic growth and develop towards a pluralist democracy. As Oğuzlu (2013, p. 12) puts it, 'soft power begins at home', adding that 'legitimacy and attractiveness abroad comes with legitimacy and attractiveness at home'. The JDP government emphasizes Turkey's internal transformation as the most important source of Turkey's soft power abroad. Turkey's ability to influence regional developments and to become an 'inspiration' for the other countries depends on its ability to continue the reform process and evolve into a pluralist democracy. Thus, Turkey's internal characteristics and its domestic transformation process play a crucial role in its soft power. Turkey's attractiveness as a source of 'inspiration' for transitional regimes in the Middle East will be influenced by whether Turkey maintains its high economic growth rates while continuing to democratize. As Oğuzlu (2013, p. 15) argues, 'plural democracy, rather than majoritarian democracy needs to take root at home'.

Moreover, inconsistencies in the government's policies and rhetoric in foreign policy and domestic politics have reduced its reliability. For example, the JDP government harshly criticized the military coup in Egypt, and was critical of EU leaders for not being equally critical and responsive. However, this high level of sensitivity and pro-democratization rhetoric towards events in other countries are not credible and consistent because of crucial deficiencies in Turkey's own democratic credentials and pluralist political order (Öniş, 2014, p. 15).

6) For further detail, see Fuat Keyman, "Globalization, Modernity and Democracy"; Mustafa Aydın and Sinem A. Açıkmeşe, "Europeanization through EU Conditionality: Understanding the New Era in Turkish Foreign Policy", *Journal of Southern Europe and the Balkans,* Vol. 9, No. 3, 2007, p. 263-274.

On the other hand, in recent years, freedom of expression and freedom of the press has narrowed in Turkey. In February 2014, for example, the Turkish Parliament passed a new Internet law which allows the telecommunications authority to block any website within 24 hours and requires all internet providers to store data on users' activities and make it available to authorities on request. While, in 2005, Turkey ranked 98th out of 178 countries in the Reporters Without Borders' Annual Index of Press Freedom, it dropped to 154th in 2013 (The Report of the Independent Commission on Turkey, 2014, p. 15). Because of all these internal problems, EU membership prospect still has a crucial role for democratization of Turkey.

The deepening polarisation in Turkey between political actors and within society also hinders the consolidation of its democracy (The Report of the Independent Commission, 2014, p. 46). Moreover, the rise of PKK terrorist attacks and DAESH terrorism in Turkey, have increased the role of security and have challenged the balance between freedom and democracy especially since July 2015. Thus, in spite of its deficiencies, the EU accession process is still crucial for Turkey for sustaining its transformation and democratisation.

Concluding Remarks

Turkey, which has a democratic and secular political system with a predominantly Muslim population and, since 1999, the prospect of EU membership, has had an increasing influence in its neighbouring regions especially during the first decade of the 21st century. The first and second JDP governments tried to contribute to regional peace through constructive engagement and mediation efforts. Turkey's 'zero problems policy' approach contributed to Turkey's soft power, which includes a liberal visa policy with its neighbours and increasing communication and cooperation in the fields of economics, politics and culture.

However, the strategy of externally promoting and projecting Turkish culture, which lies at the core of the country's soft power, is insufficient as long as hard power and uncertainty dominate in the Middle East (Benli Altunışık, 2011, p. 2-3). As Oğuzlu (2007, p. 95) argues, when threats and challenges to Turkey's own security go on, it will probably lead to an increase in its tendencies to act as a 'hard power'. Similarly, growing tensions between Turkey and Syria, the rise of terrorism, stalled negotiations with the EU, and the loss of momentum

of the reform process, particularly regarding freedoms of speech and the media, have reduced Turkey's soft power in recent years.

As Kaya (2013, p. 57-59) argues, there is a difference between the ways in which the JDP government and the pro-European groups perceive the sources of Turkey's becoming a regional soft power. The JDP emphasizes cultural and historical ties in its neighbouring regions, while pro-European groups in Turkey mostly believe that 'Turkey's growing regional influence derives from its European perspective'. As Öniş (2014, p. 14-15) argues, Turkey can have crucial influence in its region by becoming a reference point through its level of economic development and by improving its democratic credentials. Thus, Turkey's ability to act as a 'role model' for the region will depend mostly on maintaining and improving its economic situation and overcoming its democratic deficits by consolidating its democracy. Especially during the third-term of the JDP government, Turkey has implemented a more interventionist proactive foreign policy in the region with increasing self-confidence. However, Turkey's foreign policy in the Middle East after the Arab uprisings, especially towards Egypt and Syria, show the 'limits on the constructive impact of unilateral activism' (Öniş, 2014, p. 15), which indicates the importance of 'cooperative action through multilateral channels'.

The recent failed coup attempt which on 15 July 2016, shows that in spite of the polarisation in the society different parts of the society and all of the political parties represented at Turkish Parliament stood against the coup attempt. The developments after the coup attempt will be very crucial for Turkish democracy and Turkey's position as a regional power. In order to be an influential regional power which promotes peace and stability in its region Turkey needs to overcome polarisation within the society and go on the reform process particularly in the fields of freedom of speech, freedom of media and rule of law.

Consequently, there are several internal and external challenges influencing Turkey's regional power in the second decade of the 21st century. The biggest external challenges include the Syrian crisis and the growing influence of extremist Islamist groups, such as DAESH (The Report of the Independent Commission on Turkey, 2014, p. 42). One of the main domestic factors which influence Turkey's soft power is the Kurdish issue, which is also influenced by external regional developments. Secondly the integration of Syrian asylum seekers in Turkey is crucial. Thirdly the attitude of the government regarding freedom of speech, freedom of the media and individual liberties will

also influence Turkey's soft power. If Turkey can re-start its reform process in these fields then this will help Turkey move towards a more pluralist democracy. These developments would also bring a new dynamic to the stalled negotiations with the EU. Improvements in these domestic fields will improve Turkey's soft power. Thus, the EU anchor is still crucial in Turkey's transformation process for overcoming all these domestic challenges which will make Turkey more a country of 'inspiration' in its region. As Nye (2009, p. 162-163) argues, in today's world, success is not only based on 'whose army wins but also of whose story wins'. To create its own successful story, which is crucial for soft power, Turkey has to overcome its deficiencies in its democracy, improve its economic position, increase its economic growth rates and develop a more constructive, balanced, multilateral and consistent understanding of Turkish foreign policy.

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DAYTON PEACE ACCORDS TWO DECADES AFTER: CONSTITUTIONAL SETTLEMENT AS SERIOUS OBSTACLE TO THE CREATION OF A FUNCTIONAL STATE

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Abstract

Twenty-one years after entering into force of the *General Framework Agreement for Peace in Bosnia and Herzegovina* (the Dayton Agreement), it seems that the political situation in Bosnia and Herzegovina has not significantly changed. The basic achievements of the Dayton Agreement, such as stopping the war and country's democratization and institution building processes are evident, however the agreement failed to create a politically stable functional state and the united nation accepted by all its citizens. On the contrary, the agreement significantly contributed to the creation of divided society (and political community) composed of three 'constituent peoples' and others. Neither social nor political community stood the test of time. The country could not meet the requirements and standards set by the European Union, especially the constitutional reform that is claimed to be the precondition to other reforms. Then, despite agreement's significant accomplishments in the field of human rights protection it generated State political structure based on the principle of the three constituent peoples' exclusive ethnic representation, all at the expense of rights of individual.

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Introduction

In face of legal, political and ethnic challenged the state of Bosnia and Herzegovina has been under the political integration slogan, undergoing artificial institutional reanimation under the International Community's patronage. From the constitutional and legal point of views, theoretically and in practice, the Dayton Peace Agreement has

contributed towards the foundation of a sort of John Lackland's country. However, as constitutionally, legally and politically affirmed and fashioned union DPA gave the birth to the questionable state consisting of two Entities: 'republic' and a 'federation.' The union, consisting of these two Entities, is short of clear conception of a sovereign (unitary) state, a state with clear system of governance or at the end clear republican or federal state-system. Therefore, the end outcome of the DPA was the creation of a post-modern semi state without any former precedents in the history, which within the Balkan's geopolitical and geo-cultural melting pot depends strongly on the foreign political patrons offered as the only viable *modus vivendi*. The state has (was), after the forced by-pass installation in Dayton, revitalized, re-established itself as a state and re-contextualized as above all and odd union based on a principle 'one state – two entities – three constituent peoples', the principle that had been playing a key role in a long-term and constant disintegrative processes and tendencies within Bosnia and Herzegovina.

The rise of nationalism and ethno-nationalism as a result of the new world order especially faced by the East-European communist totalitarian regimes, became obstacles for the genuine democratization process of former communist countries and their societies, including Bosnia and Herzegovina. The DPA and its Constitution within it had institutionalized the ethnic nationalism. The Preamble of the Constitution of Bosnia and Herzegovina prevents the state to create the legal environment in which the power-sharing system would be organized within the civil society, whilst at the same time it favor's the ethno-nationalism and collective rights of the ethno-national-religious communities at the expense of an individual or the citizen (Anex 4, Dayton Peace Agreement). Therefore Mujkic (2008) was rightly arguing that

> the public arena in Bosnia and Herzegovina is a testing ground for collectivism that enjoys absolute freedom, subsuming the individual, to the utmost possible extent, under its abstract categories. The democracy of the three ethno-religious groups is thus no other than a democracy of oligarchies, groups of authoritarian members or ethnic groups engaged in shaping ethnic, collectivist narratives; and such a democracy is meaningless (p. 39).

Constitutional Settlement and Non-effective Institution-Building

The Constitution of Bosnia and Herzegovina defines Bosniacs, Croats and Serbs as 'constituent peoples', while 'others' and 'citizens' are

barely mentioned. The anachronistic 'constituent peoples' notion, by recognizing collective rights of ethnic groups (nations), represents rather obvious violating of *The Convention for the Protection of Human Rights and Fundamental Freedoms*, since the guiding idea of the protection of human rights was aimed at the citizen as an individual not as a member of a social/religious/ethnic/national group. The very Constitution of Bosnia and Herzegovina in Article II, Paragraph 4 introduces the principle of the non-discrimination clause, at the same time directly breaching both very Article and Article 14 of the Convention *(Prohibition of Discrimination). Ergo,* the existing concept of 'constituent peoples' as the state-building nations and the relation of it towards the constitutional and legal position of 'Others' constitutes discrimination *par excellence*. Such constitution represents the institutional discrimination of several hundreds of thousands of citizens who do not belong to 'the chosen ones', including those who opted to exercise their 'not to belong to' legitimate right. Therefore, the Constitution as main outcome of DPA incorporates the discriminatory concept that recognizes different legal/political/constitutional dimensions of Bosnian citizens, endorsed by the judgement of the European Court of Human Rights in the case *Sejdić and Finci vs. Bosnia and Herzegovina*. The 'national veto' principle, the principle of protecting the 'national interests' respectively, provides ethno-nationalistic elites across state administration almost unlimited possibilities to block the enactment of law or regulation, whenever they consider it as a breach of 'national interests' of one of constituent peoples.

The legal vacuum has been often filled in by Office of the High Representative for Bosnia and Herzegovina (OHR), which according to Annex 10 of the DPA *(Civilian implementation)* has the ultimate power. Acting in this regard discouraged the consolidation of democratic political processes in Bosnia and Herzegovina. Without any doubt, that action turned to be unavoidable tool for making the sufficient, although important step forward to efficient institution building process. However, the question is "Could the institution building be imposed?"

The national homogenization process is still alert and active obstacle on the path of the economic and political reintegration of the country and the society, with active role in the processes of decomposing the newly emerging state institutions. It appears that, as long as the ethno-national identity concept is the only (or the most potent) source of citizens' identification, and the 'constituent peoples' the constitutional category,

the state of Bosnia and Herzegovina will continue to be essentially dysfunctional in many aspects of a well-organized state. Certainly after upcoming general elections and the establishment of new government, it is inevitable to undertake a true and authentic political, constitutional and judicial review of the constitutional provisions (the entity constitutions included as well), for the purpose of the promotion of *civil* and the negation of *national/ethnic* aspects of the constitution. It seems important to emphasize that reaching this objective is emerging responsibility of both local and international political actors and leaders because there is an international and legal obligation to harmonize Bosnian legislation with European standards and, as well as, its Constitution, as described in judgment of the European Court of Human Rights. If these changes do not materialize, Bosnia and Herzegovina will risk remaining at margins of the Euro-Atlantic integrations. Certainly, any state on the path towards the European Union, including Bosnia and Herzegovina, must develop the single and functional state, well-organized government, rule of law and protection of individual rights and freedoms.

Shortcomings of the Dayton Peace Agreement

Instead of reinforcing 1000 years old statehood of Bosnia and Herzegovina, Agreement has accepted results of bloody campaign of war crimes and ethnic cleansing that took place in the period from 1992 to 1995. Instead of bringing justice to the victims and society, Agreement had frozen division of Bosnia and Herzegovina and legalized widespread discrimination of its citizens. The fighting in Bosnia and Herzegovina ended in 1995 not because of internal peace settlement and consensus but because of an intervention and pressure from the great powers. Instead of establishing the justice for victims and society, reconciliation and overcoming common suffering and destruction of lives and property, nationalist leaders of Bosnia and Herzegovina just continued the war by using different means. In that sense, it is justified to say that today's Bosnia and Herzegovina is not living in peace, but rather in state of "frozen conflict" or "absence of armed conflict." In this regard, the last twenty years had passed in ethnic struggle of reinforcing divisions, by means of different methods including politics, media, and education.

Based on the notion of the Dayton Agreement and its implications, according to Seizovic (2014) Bosnia and Herzegovina could be considered failed state. He explained that

> a *failed state* is perceived as a state that is not being successful at some of the fundamental preconditions and responsibilities of a sovereign government. There is no universal meaning, description and/or definition of such state. However, a state meeting certain criteria would be understood as a failed state. Criteria are but are not limited to the following: (1) Loss of control of its territory, or loss of the monopoly on the legitimate use of physical force within its territory; (2) Decline of legitimate power that collective decision-making is being bestowed into; (3) Incapability to provide public services and (4) Failure to enter into an interaction with other states as a full capacity member of the international community. In addition to that, general characteristics of a failing state would be, *inter alia,* weak and ineffective central government as well as extensive corruption and criminality. Bosnia and Herzegovina, in many segments of its functioning meets almost all the above listed criteria, but is very often described as democratic state, state being under reform/s and/or having modern European features within the realm of public administration, judiciary, law enforcement, etc. All things considered, one may say that on the surface, the Bosnia and Herzegovina has vastly modern European face but, is, actually a disguised failed state *par excellence* (p. 5).

Bosnia and Herzegovina is the state where there is so-called institutionalized and legalized discrimination. As a consequence of the war in Bosnia and Herzegovina (1992-1995) and unwillingly accepted peace, Dayton Agreement removed from Constitution of the Republic of Bosnia and Herzegovina the possibility for all citizens of to identify themselves as *Bosnians and Herzegovinians* (e.g. Germans in Germany), or just citizens of Bosnia and Herzegovina. in contrast newly invented categories were founded such as: "constituent peoples" (Bosniacs, Croats and Serbs) as well as "Others" (those non-constituent). Although Agreement claimed that it promoted the human rights, it introduced fundamental discrimination of all citizens of Bosnia and Herzegovina.

The first illustrative example is related to the election of a member of Presidency of Bosnia and Herzegovina (body consists of three members). The candidate is a citizen but at the same time he/she is the member of one of the three constituent peoples since Constitution provides that Presidency of Bosnia and Herzegovina is composed of one member of each constituent people. Discrimination doesn't stop even there. Serbian member of Presidency can be elected only from the entity of Republic of Srpska territory, while Bosniac and Croat members can be elected only from the citizens residing in the entity of Federation of Bosnia and Herzegovina.

The second illustrative example is the House of Peoples of Parliamentary Assembly of Bosnia and Herzegovina, which consists of 15 members, 5 from each constituent people. Serbs are elected in the entity of Republic of Srpska while Bosniacs and Croats are elected from the territory of the entity of Federation of Bosnia and Herzegovina. Consequently, discriminations is very much visible not only in the above-mentioned examples but across all spheres of cultural, educational, administrative and institutional aspects of life. Ironically, rights and freedoms set forth in *the European Convention for the Protection of Human Rights* and *Fundamental Freedoms and its Protocols* are applied directly in Bosnia and Herzegovina, having priority over all other law (according to Constitution of Bosnia and Herzegovina).

Obviously, not only so-called "Others" are discriminated but also so-called "constituent peoples", depending on which entity within Bosnia and Herzegovina citizen resides in. It was more than clear that The *Bosniakhood, Croatianhood* and *Serbianhood* cannot be limited to one or just some parts of territory. Presumption of being Bosniac, Croat or Serb does not automatically mean an association with specific part of the territory where (or used to) live members of that particular ethnicity (Seizovic, 2014, p. 23). Bosniac, Croat or Serb affiliation occurs independently of the territory where members of that particularly ethnicity live.

Denying status of constituent peoples to Bosniacs and Croats in the entity of Republika Srpska and Serbs in the entity of Federation of Bosnia and Herzegovina are both in discord with the Constitution and have no historical justification, as it is well known that Bosnia has always been a multi-ethnic society *sui generis* and paradigm of "unity and tolerance". The same pattern is applicable to "Others" on whole territory of Bosnia and Herzegovina.

Lenses of the Constitutional Court of Bosnia and Herzegovina

In order to correct constitutional discrimination, the Constitutional Court of Bosnia and Herzegovina in July 2000 requested both entities the Federation of Bosnia and Herzegovina and the Republic of Srpska to amend their constitutions in order to ensure full equality of the three "constituent peoples" throughout the state territory. Therefore, this decision partially eliminated Dayton's discriminatory elements and put an end of the idea of recognizing the right of the Bosnian Croats to establish their small state-like entity, as it required both entities to become and remain multinational. Some opponents were considering that this decision is in violation of the

Dayton Agreement while those advocating idea of a single state considered the decision a breakthrough towards further institutional improvements upon the existing Dayton political architecture that, to their opinion, had to undergo constitutional changes. Ademovic (2010) was furthermore criticizing this decision by asserting that even though the decision denoted significant step forward in recognizing the same constitutional position of all constituent peoples in every part of territory of the state, it did nothing in favor of improving the position of non-constituent population of BiH. With or without the decision, the constitutional position of the non-constituent peoples remained the same: they were still *non-constituent throughout the country* (pp. 215-140).

Discrimination and the European Court of Human Rights

In the case *Sejdić and Finci* v. *Bosnia and Herzegovina*[1], the European Court of Human Rights had established that Constitution of Bosnia and Herzegovina contains discriminatory provisions. As such, the Judgment constitutes legal and political disgrace as well as strong strike upon its international position and renommé of Bosnia and Herzegovina. In any member-state of the Council of Europe, such judgment of the highest authority for human rights would entail mobilization of all essential efforts and powers to amend the Constitution in order to make it conform it to the said judgment (Seizovic, 2014, p. 43). However, in Bosnia and Herzegovina, local politicians did nothing as to implement the European Court of Human Rights decision. Moreover

> [t]he negotiations related to future organization of the State are being held in the restaurants throughout Bosnia and Herzegovina. In a rather arrogant and unacceptable manner, political talks are transposed from Parliamentary benches to restaurants, asserting ugly connotation of a tavern-like discourse in administering the state (Ibid., p. 46)

Such unbearable indolence of ethno-national political elites[2] as well

1) European Court of Human Rights, Grand Chamber, Case *of Sejdić and Finci v. Bosnia and Herzegovina*, Applications nos. 27996/06 and 34836/06, Judgment, Strasbourg, 22 December 2009. The same judgment ECtHR rendered in two similar cases: *Azra Zornic vs. Bosnia and Herzegovina,* Application no. 3681/06*,* Judgment, Strasbourg, 15 July 2014 and Ilijaz Pilav v. Bosnia and Herzegovina,*(Application no.* 41939/07), Judgment, Strasbourg, 9 June 2016.

2) „Ethnopolitics is somewhat weird term. The meaning of word *ethnos* implies pre-political category of the *people* referring to its blood origin, heritage, tradition. [...] The ethnos is best described as *kinship*, Mujkic, Asim, *We, the Citizens of Ethnopolis,*

as complete absence of any effects as to implementation of judgment had created perception that Bosnia and Herzegovina is positioned *against* its citizens Sejdić and Finci and as well as a common view that all citizens are discriminated against. The decision had confirmed that the Constitution contains a discriminatory concept, which makes the very discrimination *institutionalized*.[3] Therefore, "the political practice in Bosnia can be rightly described as the *democracy of ethnic oligarchies,* not as *democracy of citizens*" (Mujkic, 2008, p. 18). Besides, Seizovic (2000) is explicit in declaring that

> It is obvious that "[n]ational homogenization will still remain the main obstacle to political and economic reintegration of the […] society and will be playing significant role in continuing disintegration processes throughout the country while national (ethnic) identity will very likely be almost sole identification model for the […] citizens" (p. 12).

The ethno-national affiliation as cornerstone of the political system in Bosnia and Herzegovina constitutes serious drawback to firm institutional building that is inevitable for any serious future EU member-state. Actual demographic structure of the country does not match either pre-war percentages[4] or the Dayton electoral system, which does not treat properly the number of citizens that do not consider themselves as members of constituent people, or do not want to identify themselves at all. Citizens of civic orientation are considered to be *the fourth constituent people*.[5]

Human Rights Centre of the University of Sarajevo, Sarajevo, 2008, p. 21. „In Bosnian case Ethnopolitics is very similar to *Religious nationalism*". Bosnian ethnic groups („constituent peoples") are basically formed along the religious lines as the only „striking" difference between the communities. In fact, there is a little to their ethnicity besides their „religiousness", Mujkic, Asim, *We, the Citizens of Ethnopolis,* Human Rights Centre of the University of Sarajevo, Sarajevo, 2008, p. 23.

3) In December 2009, European Court of Human Rights has declared State Constitution and Election law discriminating against Roma and Jewish population in BiH. *See:* Human Rights Watch, *Second Class Citizens: Discrimination against Roma, Jews, and Other National Minorities in Bosnia and Herzegovina* (2012), p. 2. The judgement of the European Court has not been implemented almost seven years after it had been taken.

4) Statistics show that the 1991 census national break-down was the following: 43,7% Bosniacs, 31,3% Serbs, 17,3% Croats and 7,7% of Others.

5) International Crisis Group (2012) *Bosnia's Gordian Knot: Constitutional Reform*, Policy Briefing Europe N°68 Sarajevo/Istanbul/Brussels, p. 13. There are opinions that the term „Others", „due to dominant ethnic pattern [...] refers to ethnic minorities: Roma, Jewish, Ukrainians, Czech and others that live in BiH" – *see:* Asim Mujkić, „Others – the Fourth constitutive element of strategy of democratic transformation?",

In this regard Seizovic (2014) explains that

> ethnical, cultural, traditional, habitual as well as other components of complicated BiH social *milieu* is composed of sophisticated net of *Bosnian concord of diversity*, so territorial principle taken as a base to form an opinion on somebody's ethnic affiliation has no either theoretical or practical rationalization. Thereby any idea and/or theory of "ethno-cantonisation" or any other "ethno-regionalisation", notwithstanding if it comes from "outside" or "inside", is absolutely incompatible with multiethnic concept of the BiH society and entails latent threat to survival of the State of BiH. Cantonisation, of course, might be concept of internal institutional structure of the multi-ethnic state under the condition that it is a civilized state in which any form of diversity cannot be ground for human rights violation whatsoever. On the other side cantonisation and/or regionalisation based on natural and geographical distinctiveness, as model of "de-entitetisation" of BiH seems to be the reasonable and logical constitutional solution for internal state organization of BiH (pp. 23-24).

Conclusion

The above explained and analyzed constitutional predicaments clearly indicate that Bosnia and Herzegovina, and international community along with it, will have to make important decision. There are fears that if the practice of institutionalized discrimination and legal division of the country continue it will inevitably lead to the emergence of the new conflict. Therefore, as a solution besides proper constitutional changes an attention should be directed towards social-economic, educational and cultural developments that will assure non-recurrence of violence in the future and provide sustainable economic development. Only in that way, future of Bosnia and Herzegovina can be bright and peaceful.

Accordingly, it is necessary to undertake political and constitutional restoration of the human rights protection system in Bosnia and

in Abazović, Dino et al (ed..), *Place and role of „Others" in the Constitution of Bosnia and Herzegovina and Future Constitutional Settlements for Bosnia and Herzegovina,* Social research Institute – Faculty of Political Sciences of the University of Sarajevo, 2010, p. 80.). It has to be stressed that *civic principle* of organizing state and power as well as advocating „effective" state model definitely are not inherently neutral institutional positions. Those features are being inwrought into political conflict of dominant political encampments in which the Bosniac side, at least formally, enjoys support to its political position. On the other side, Bosnian Serbs and Bosnian Croats in any such manoeuvre, which they consider rhetoric, see potential undermining of their political elite position, but also undermining the *multi-ethnic* principle.

Herzegovina through systematic review of all provisions of the Constitution aiming to affirm the civil as opposed to national basis for enjoyment of individual rights. It is indispensable to emphasize that it is not discretionary power of the state of Bosnia and Herzegovina but its obligation to its citizens and its international obligation to harmonize its legislation with European standards and create non-discriminatory legal framework and environment for its citizens. In that regard, *a non-discrimination clause,* provided for in Article II (4) of the Constitution states that

> The enjoyment of the rights and freedoms provided for in this Article or in the international agreements listed in Annex I to […] Constitution shall be secured to all persons in Bosnia and Herzegovina without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.[6]

The above citation clearly indicates that the "principle of constituent peoples" containing the exclusive connotation of "non-constituent" for none members of these groups, *per se,* constitutes discriminatory treatment against those who are "non-constituent", and others, simply depriving them of the status of citizens independent of their group characteristics. On the contrary Bosnia and Herzegovina must ensure that all citizens enjoy equal rights and freedoms in every single part of the Bosnian territory, no matter what nationality they belong to.

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CONSTITUTIONAL REFORM IN SERBIA IN THE PERSPECTIVE OF EU MEMBERSHIP: EUROPEANIZATION OF SERBIAN CONSTITUTIONAL LAW

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Abstract

This paper deals with the process of constitutional reform in Serbia in the context of European integration. Serbia has officially started the negotiations process for European Union membership, something which will require Serbia to conduct fundamental changes to its legal, economic and political system. Changes will also have to be introduced to Serbia's Constitution. These changes, ultimately, will lead to the Europeanization of Serbian constitutional law and should enable this country's smooth and transparent transition towards membership in the Union.

Keywords: *Europeanization; European Integration; Constitution; Constitutional Reform; European Union; Serbia; Enlargement*

Introduction

The prospect of membership in the European Union has a powerful transformative effect, as it invites positive democratic, political, economic and societal changes to be brought.[1] These changes entail the alignment of the acceding country's legal, economic and political system with the framework of the European Union and its legal system. This process has come to be known as Europeanization, and has gained in significance as countries that were formerly ruled by autocrats started their path of European integration. Europeanization of law, i.e. the changing of the country's legal system in the perspective of accession to the EU, is a consequence of the influence of European integration on the domestic legal systems of countries aspiring to EU membership. The constitution is by no means free from this influence, which is why we can talk about the Europeanization of a country's constitution and its constitutional law (Vorpsi, 2016, pp. 166-167).These changes emerge from the fact that the

1) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region. *EU Enlargement Strategy*. Brussels, 10.11.2015, p. 2.

EU is no ordinary international organization- rather it is a supranational *sui generis* entity, based on a set of rules embedded in its Founding Treaties, which are considered a 'constitutional charter' (*Les Verts*, Case 294/83, [1986] E.C.R.). The EU legal system is therefore considered an autonomous, independent legal order, often leading to the Union being characterized as a quasi-federal construction (Borchard, 2010, pp. 31-32).

Serbia has gone a long way from being the only Western Balkan (WB) country that was denied European perspective and the status of a potential candidate country, to having opened the negotiations with the EU and seeking to fulfill all of the obligations stemming from the accession process by the year of 2020. It has been noted, both in international[2] and domestic[3] publications, that Serbia would not be able to enter the Union with this kind of a constitutional framework. This is why Serbia has already pledged to conduct changes in some parts of the Constitution, in order to meet the criteria of rule of law and sustainability of democratic institutions. On the other hand, there are also other constitutional deficiencies that need to be addressed, if Serbia is to secure for itself a smooth and legal transition towards EU membership.[4]

Serbia's European Integration Path

Before becoming an independent state, Serbia was part of the Socialist Federative Republic of Yugoslavia (SFRY). During the Cold War, the communist bloc in Eastern Europe, as a response to the formation of the European Economic Community (EEC), established its very own organization for economic cooperation, named the Council for Mutual Economic Assistance. Nevertheless, Yugoslavia did not participate within this structure, since it had a more independent and neutral foreign policy

2) European Commission for Democracy through Law (Venice Commission).*Opinion on the Constitution of Serbia*.March 2007.

3) Antonijević, M. et al (2013).*Ustav Republike Srbije- sedam godina pravne neizvesnosti i pet prioriteta za promenu*.Beograd: YUCOM (Lawyers' Committee for Human Rights).

4) There is an intense discussion developing on whether Serbia will have to leave out the reference to Kosovo from the Preamble of its Constitution, where it is stated that Kosovo is an autonomous region within Serbia. It has been pointed to the fact that the 'erasing' of Kosovo from the Preamble is a demand that stems out of the process of comprehensive normalization Belgrade is conducting with Pristina, situated within Chapter 35 of the accession negotiations. However, this issues, although widely significant, not only for Serbia's internal affairs, but also for the international community as a whole, will not be analyzed in this paper, but only those changes that will affect Serbia's constitutional system and its constitutional law.

orientation, than the other countries of the Eastern bloc. Therefore, it had an opportunity to cooperate with the West as well, something which Yugoslavia took advantage off in 1967, when it established diplomatic and political ties with the EECas the two partiessigned the Declaration on Mutual Relations. The relations were upgraded in the early 1970s with the signing of two trade agreements which granted Yugoslavia multiple trade concessions, as well as preferential treatment on the EEC market. These relations reached their peak in 1980 with the signing of the Cooperation Agreement, which regulated not only trade and economic cooperation, but covered such issues as agriculture, traffic, science and research, etc. The further advancement of relations came in 1990 as the EEC pledged to support Yugoslavia in the restructuring of its banking and finance control system. However, with the outbreak of war in Yugoslavia, the Cooperation Agreement was suspended and the EEC, which would in this period become the European Union (EU), joined in the United Nations Security Council sanctions against Serbia (Miščević, 2009, pp. 171-175).

With the dissolution of the SFRY, Serbia and Montenegro formed a new federation- the Federal Republic of Yugoslavia (FRY). However, since the country was up until 2000 ruled by Slobodan Milosevic, there was no real possibility of reviving the relationship with the EU. On the other hand, due to conflicts on the territory of ex-Yugoslavia, the European Commission decided to envisage a new type of enlargement strategy towards this region (named the Western Balkans at this point). Having in mind the complexity of the situation in the WB, the Commission proposed a new type of a relationship within the countries of this region- the Stabilization and Association Process (SAP)- and confirmed the status of potential candidate countries to all WB states, with the exception of Yugoslavia. After the democratic revolution of 2000, Yugoslavia was admitted to the WB group and its European perspective was confirmed by the Commission (Crnić, 2016, pp. 12-13).

Problems were evident that the federal ties between Serbia and Montenegro were in trouble and that the very existence of the federation was under question. The EU stepped in, in the form of Javier Solana, then the High Representative of the Union for Foreign Policy, and the decision was taken to reprogramme the country into a state union, where it would be allowed to conduct a referendum of independence after three years have expired. That is exactly what happened, and in May 2006 Montenegro declared its independence after a successful referendum. Serbia nevertheless continued with the SAP, and in April 2008 signed the

Stabilization and Association Agreement (SAA) with the EU. New trouble followed, as the ratification process was severely prolonged, sincesome member states of the EU had considerations, mostly bilateral in nature, which induced them into not ratifying the SAA with Serbia. Despite this, Serbia decided to unilaterally implement the obligations stemming from the SAA. Finally, the SAA came into force in September 2013after Lithuania's ratification of the document (Crnić, 2016, pp. 18-19).

Montenegro's independence was also a trigger for Serbia to adopt a new Constitution. Even though it was expected that constitutional reforms are going to be performed as early as 2000, i.e. with the fall of the Milosevic dictatorship, nevertheless these changes were postponed all the way until 2006. Many politicians even stated that the constitutional order inherited from the past does not prevent the new democratic government from functioning (Antonijević, 2013, p. 12). Nevertheless, Montenegro's exit from the state union meant that the Constitutional Charter was not in effect anymore, and Serbia needed to regulate within a new constitution all of the areas previously regulated by the Constitutional Charter. This is why the government opted for the drafting process to be swift and quick, and the Constitution was drafted in a matter of weeks. However, this meant that the public was largely unaware of what was happening behind closed doors and could not express its approval or dissatisfaction with the proposed constitutional reform. After a successful referendum, the Constitution was proclaimed on the 8th November 2006.

With the slowdown in the association process, Serbia turned to making further steps in the accession process. Following the application for membership made in 2009, the European Council granted Serbia the status of candidate country in March 2012 and decided to open the accession negotiations in June 2013, while the negotiations were formally opened in January 2014 when the first Intergovernmental Conference was held.[5] Thus far, four negotiating Chapters have been opened, among which three are crucial: Chapters 23- which deals with judicial reform and human rights, 24- encompassing policies that fall within the Area of Justice, Freedom and Security- and 35- normally reserved for 'other issues', but in Serbia's case refers to the normalization of the relations between Belgrade and Pristina.

5) European Commission, Serbia Progress Report, 2014, p. 3-4.

The Reform of the Judiciary and the Prosecution

The European Commission's enlargement strategy towards WB was changed in 2012, so that the enlargement policy was re-shifted towards core issues such as rule of law, fundamental rights, strengthening democratic institutions, including public administration reform. The new approach was coined 'fundamentals first', and emerged as a need of ensuring that acceding countries are fully transformed in accordance with these core values of the EU, before they actually become full-fledged members.[6] The new approach was a consequence of the experiences the Commission acquired with past waves of enlargement which involved Central and Eastern European countries, some of which went through severe crises with regard to the stability of their democratic institutions. Thus, on a more practical level, WB countries are faced with a new structure of the enlargement process. Namely, Chapters 23 and 24, which cover core issues of rule of law, human rights and security, will be opened at the very beginning of the negotiations, and will be closed only at the very end of the process. Moreover, the Commission has introduced a mechanism, called the 'disequilibrium clause', which allows the Commission to suspend the entire negotiations process if the country does not fulfill obligations stemming from Chapters 23 and 24 (Petrović, Stojanović, Turkalj, 2015, p. 18).

The rule of law principle represents one of the key values enshrined in the EU Treaties (Article 2 of the TEU). With the reforms brought to the enlargement strategy, it is nowadays found at the heart of the accession process. Since the rule of law principle remains very broad, covering a whole range of issues, it needs to be narrowed down and operationalized in order to make it possible to assess the progress WB countries achieve in the accession process. Since most of these countries experienced significant problems with their judicial systems, which are not fully independent, but a target of political and criminal influence, strengthening the rule of law is particularly important in terms of improving the functioning and independence of the judiciary. EU primary law itself envisages the value of an independent and impartial judiciary, since the rights to fair trial is stipulated in Article 47 of the Charter of Fundamental Rights of the EU, a document which has the

6) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, *EU Enlargement Strategy*, Brussels, 10.11.2015, p. 5-6.

same legal standing as the Founding Treaties. Progress in the field of creating an independent an impartial judiciary in the WB countries is not going to be made without strong political will that will lead to tangible results.[7] In a broader sense, this means that there ought to be commitment to eliminating external influence over the judiciary and to devote adequate financial resources and training. Legal guarantees need to be put into place for fair trials.[8]

In Serbia's case, the independence of the judiciary is guaranteed by the Constitution, foremost by Article 4 which provides for the separation of powers. Serbia's version of the right to a fair trial can be found in Article 32 of the Constitution, which declared the right for every person to a public hearing before an independent and impartial tribunal. Also, Article 152 proscribes judges from entering politics. Functional immunity for judges is guaranteed by Article 151. Nevertheless, the Constitution does allow political influence: the National Assembly not only elects the President of the Supreme Court of Cassation and presidents of all other courts in the country, but it also elects to the post of a judge those persons who are elected to this position for the first time. All of this is done on the basis of proposals made by the High Judicial Council (HJC). Even though envisaged as an independent body, the HJC's composition and the election of its members reflects strong political interference, and the HJC has failed to react publicly in protection of judicial independence in cases of political interference in the work of judges.[9] The composition of the HJC is, *de facto*, entirely determined by the National Assembly: it elects 8 out of 11 members of the HJC, while the other 3 members-who are members *ex officio*- are also tied to the National Assembly: two of them also elected by the National Assembly (the President of the Supreme Court and the Minister of Justice) and one is a member of the National Assembly, in charge of the committee competent for judicial matters. Severe political interference is even more visible when it comes to public prosecutors: the National Assembly elects all prosecutors of all levels, including the State Prosecutor, even though the Constitution stipulates that the Prosecution is an independent state

7) Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, *EU Enlargement Strategy*, Brussels, 10.11.2015, p. 5.

8) European Commission. *Screening Report Serbia: Chapter 24- Justice, Freedom and Security*.

9) European Commission. *Country Report for Serbia 2015*, p. 12.

body (Article 156), and that all public prosecutors enjoy functional immunity (Article 162). Thus, the State Prosecutorial Council (SPC), which gathers all prosecutors from the country, is entirely made up of officials directly elected by the National Assembly.

Gaps that exist in the independence of the judiciary are to be addressed through the proper amending of the Constitution and, subsequently, trough adapting the current legal framework with new constitutional provisions.[10] In order to remedy the situation and to respond to all of the deficiencies the EU had identified, Serbia in its Action Plan for Chapter 23 has declared its readiness to amend the Constitution in those parts that are with concern to the independence of the judiciary and the prosecution. These changes ought to be made on the basis of analysis of European best practices, as well as a response to the criticism of the Venice Commission with regard to the 2006 Serbian Constitution. This task is to be given to a special working group for judicial reform. The final result, i.e. the adoption of the constitutional changes, is to be done in the last quarter of 2017, after which a new constitutional law (i.e. a constitutional act that implements new constitutional provisions) should be put in place.[11]

Both Serbia and the European Commission acknowledge that constitutional changes will not automatically lead to an independent judiciary and prosecution, but that changes need to take place in the legislative framework, as well as in granting greater financial autonomy to the HJC and the SPC, in order for them to conduct their affairs in an independent manner. However, constitutional changes represent the backbone of this process, without which there would be no sufficient and sustainable guarantee that there is separation of powers and the prohibition of interference of the legislative and the executive in judicial affairs.

Establishing the Constitutional Basis for Membership

One of the most urgent constitutional changes that are needed, when the accession to the EU is in sight, is the introduction of the 'integrative clause', i.e. a constitutional provision which would set forth the possibility of transferring constitutional powers to the EU. Even though the EU was created as an international organization, through the years it has moved a lot from this point, and has created structures that are unprecedented in international institutional law. It has acquired competences in various

10) European Commission, *Country Report Serbia 2015*, p. 50.

11) Ministry of Justice of Serbia.*Action Plan for Chapter 23*, p. 30-31.

fields, all of which came about through member states transferring their powers to EU institutions. The Treaty on the Functioning of the European Union (TFEU) groups these competences (Article 3-6) from those where the EU has exclusive competence, through those competences that are shared between the EU and member states, all the way to those areas where the EU conducts the coordination of state policies, and, ultimately, areas where the EU offers support and supplement actions of member states. A broad spectrum of powers which the EU enjoys entails that states pursuing a membership within this organization ought to have in place legal instrument which would govern the transfer of powers. Furthermore, as the competences of the EU increased over the decades, it seemed important to broaden the constitutional basis for the transfer of sovereign powers for those member states that already had an 'integrative clause'. An example is Germany, which, until the creation of the EU in 1993, based its participation in European integration on Article 24 of the Basic Law. Unlike Article 24, which south to legalize the internationalization of federal sovereign powers of Germany, as a consequence of the anti-nationalistic approach of the post-War era, the new Article 23 adopts the 'open statehood' approach for Europeanizing national policy fields through the transfer of competences to the EU (Arnold, 2016, pp. 1-2).

The absence of such an 'integrative clause' is evident in the Serbian Constitution, and it was noticed first of all by the Venice Commission. Nonetheless, the Venice Commission Opinion on the Serbian Constitution acknowledges that Article 97 of the Constitution could act as a possible legal basis, if an 'integrative clause' was not introduced by the accession date.[12] Article 97 (1) regulates the fields of competence of the Republic and it outlines that "The Republic of Serbia shall organize and provide for: sovereignty, independence, territorial integrity and security of the Republic of Serbia, its international status and relations with other countries and international organisations". However, it would be a leap of faith to consider this provision sufficient in establishing a legal mechanism for the transfer of sovereign powers. In order to justify this argument, one can take the example of Croatia, which changed its Constitution precisely for this reason: to introduce an 'integrative clause'. The Croatian Constitution beforehand contained a provision that allowed Croatia to enter with other countries into associations and alliances (Article 135). Despite this, it was realized that a new provision

12) European Commission for Democracy through Law (Venice Commission). *Opinion on the Constitution of Serbia*. March 2007, p. 7.

should be introduced which would explicitly refer to the transfer of sovereign powers to the EU, as well as to regulate rights and obligations that stem out of the membership status (Article 141a). Therefore, the absence of such a provision would possibly endanger Serbia's accession to the EU, since it would put into question the constitutionality of such a move, indeed because the membership in the EU cannot be equaled to membership in 'classic' international organisations.

If the issue of the 'integrative clause' is resolved, the focus moves on to the problem of relationship between the two legal systems- the European and the Serbian one. Basis for this kind of a regulation can be found in Articles 16 and 194 of the Constitution. By analyzing Article 16 it can be concluded that Serbia opts for a monist approach towards international law, considering that this provision envisages direct effect of international agreements. If this recognition of direct effect could be extended from international agreements to legislative acts of EU institutions as well, there would be no problem with accepting one of the fundamental principles of EU law- direct effect. As always, the devil is in the detail. Unlike Article 16, Article 194 does not mention that international agreements have direct effect- rather it only states that they represent a part of the Serbian legal order. Problems which emerge through simultaneously reading the two articles is something that the Venice Commission refers to in its Opinion on the Serbian Constitution. Such inconsistencies could prove problematic for proper interpretation.[13]

With the accession to the EU, not only the status of the country, but also the status of individual citizens will be affected. Namely, citizens of an acceding country will become citizens of the EU and will be afforded rights that stem from such a status. European citizenship is given to every individual who has the nationality of a member state. However, European citizenship is additional and does not replace national citizenship. Therefore, member states are still in charge of defining conditions for acquiring and loss of citizenship. However, constitutional significance of European citizenship has been emphasized by the ECJ in cases such as *Rottmann*, Case C-135/08,[2008], where it stipulated that the conditions laid down by member states should not affect the rights conferred to citizens through EU law, and that cases referring to these issues can be subject to judicial review in light of general principles of the European legal order.

13) European Commission for Democracy through Law (Venice Commission). *Opinion on the Constitution of Serbia*. March 2007, p.7.

The need for introducing special constitutional provisions for regulating rights of European citizens was recognized in the process of Croatia's accession to the EU, and a new article was introduced to the Croatian Constitution, which enumerates basic rights European citizens enjoy (Article 146).The Croatian solution in addressing this issue might be a good path for how Serbia should handle it: on the one hand, granting Serbian citizens'rights and freedoms stemming from EU law, and, on the other hand, guaranteeing other European citizens the same rights and freedoms on its territory.

Issues for Further Debate: Supremacy of European Union Law

Apart from the direct effect principle, EU law, according to the jurisprudence of the European Court of Justice (ECJ), is supreme in its interactions with national legal systems. This principle was inaugurated in a famous judgment in the *Costa v ENEL* case, and was further elaborated in *Internationale Handelsgesselschaft*, *Simmenthal* and other cases. In the *Costa* judgment, Case 6-64, [1964], E.C.R, the ECJ solved the issue of hierarchy of norms between the Union order and the national legal orders. Supremacy of Union law was founded upon the importance of its uniform application in national legal systems, as well as the fulfillment of the necessity to combat potential infringement upon the authority of this supranational order (Čavoški, 2013, p. 88). Afterwards, the ECJ went beyond what it conceptualized in *Costa*, ruling in *Internationale Handelsgesselschaft,* Case 11-70, [1970], E.C.R,that EU law takes precedence over the national law as a whole, including constitutional law. However, in taking the endeavor of introducing the concept of supremacy, the ECJ was faced with the task of determining the faith of national norms that contradict and conflict the Union legal order. The answer was found in the *Simmenthal,* Case 106-77, [1978], E.C.R, case, where the ECJ said that the principle of supremacy renders all conflicting national law inapplicable and precludes the valid adoption of new legislative measures which would be contradicting to Union law.

The Serbian Constitution, apart from adopting a monist perspective towards the relationship between international and municipal law, also accepts the notion of supremacy of international agreements over national legislation. This relationship stems from Article 194 which envisages that laws and other general legal acts must be in conformity not only with the Constitution, but also with international agreements. However,

international agreements are of lower legal value than the Constitution and must be in conformity with it, whereas the Constitutional Court is charged with ruling on the constitutionality of treaties- something which has been criticized as a possible trigger for international accountability of Serbia, since the Constitutional Court can assess the constitutionality of treaties only after they have been signed and ratified.[14]Moreover, when this constitutional solution is put side by side with EU law, other problems can be detected as well. This kind of authority of the Constitutional Court allows for the possibility for it to adjudicate the cases on constitutionality of EU Founding Treaties, as well as to interpret them. This is a clear breach of primary EU law, since the ECJ is the only institution afforded with the task of interpreting and assessing the validity of EU law, and even it cannot pass judgments on the validity of primary EU law, but can only interpret it. Even though it does happen from time to time that national constitutional and supreme courts take on cases where they interpret EU law and even impose restrictions on its effect, nevertheless these kind of situations, for the sake of legal certainty, should be dismissed as soon as possible. It should start with abolishing the *ex post* assessment of constitutionality of international agreements, which would be replaced with *ex ante* constitutional review.

Since Articles 16 and 194 of the Constitution lay the basis for creating a supra-legal effect of international agreements, and, therefore, the EU law itself, the question remains should future constitutional changes go the next step and acknowledge the supremacy of EU law over the whole of Serbian law. Supremacy of EU law has been formulated and developed in the case law of the ECJ, and, so far, it has not been codified in primary EU law (with the exception of the failed Constitutional Treaty which did contain a provision which stipulated the supremacy of EU law). Therefore, there are no specific requirements on this issue for acceding countries. Due to this, member states range from those which jealously still cling to the traditional concept of national and state sovereignty (e.g. Poland), through those member states that have positioned themselves somewhere along the concept of constitutional pluralism, which entails the acceptance of a special status for EU law, all the way to member states which have constitutionally subordinated their legal system to EU law, through welcoming the full effect of the principle of supremacy of EU law (Chalmers, Davies, Monti, 2009, pp. 190-197).

14) European Commission for Democracy through Law (Venice Commission). *Opinion on the Constitution of Serbia*. March 2007, p. 6.

Further debate should be conducted on these issues. Of course, Serbia does not face any hard conditioning as far as supremacy of EU law is concerned. There are no obstacles even if Serbia decides to keep the current constitutional solution, or even if it decides to take the path of adopting a dualist approach towards the relationship between international and municipal law. However, this could lead to dangers of conflicts between the two legal systems and would possibly, as it did in Poland, manifest itself in the form of Constitutional Court challenging many of EU acts that are not in conformity with Serbian laws. Nonetheless, at this point it would be too much to suggest that Serbia should reform its Constitution towards a broad acceptance of the principle of supremacy of EU law. The solution should, as always, be found somewhere in the middle. Namely, it could be considered that constitutional review should be arranged in the same way the legislative competences between the EU and member states is done. In the area of exclusive competences, where the legislature has no competences in passing laws anymore, the principle of supremacy of EU law should completely be accepted. Following this line of argument, the Constitutional Court should be stripped of its powers to interpret EU law and to decide upon its validity in this field. As far as shared competences are concerned, the national legislature operates only if the EU decides not to practice its powers in the given area, or if it decides to task the national legislature with the power to regulate the given area. Serbia ought to invest in applying a form of the approach guided by the constitutional pluralism doctrine, which grants EU law a special status, but within a framework of fundamental principles set forth by the Constitution, such as fundamental rights, rule of law, separation of powers, etc. This would mean that the Constitutional Court would conduct the *ultra vires* control of activities of EU institutions, i.e. check whether they are acting within their legally established lines of competence. Through such a function, the Constitutional Court should perform the task of safeguarding the principles that represents the core of the national constitutional system (Chalmers, Davies, Monti, 2009, p. 197).

Conclusion

Serbia has already pledged to adapt its Constitution in accordance with the requirements laid down in the accession process. However, the set of planned reforms is not going to be sufficient. Serbia is not only going to have to tackle the issues of safeguarding the independence and

impartiality of its judiciary and the prosecution, but it will also have to address some key constitutional issues, even those that are at the heart of a country's constitutional identity, such as the transfer of sovereign rights, supremacy and direct effect of EU law, limiting the competences of the Constitutional Court on some matter, etc. Since on many of these issues there are no hard conditions set out, nor strict rules that acceding countries have to abide by, Serbia can easily pick and choose with elements to implement and which to ignore. However, Serbia should also keep in mind that, through acceding to the Union, it is also entering a completely different international legal regime, which sits on its own rules.Conducting a wholesome change to the constitutional system could be beneficial, as it would eliminate many of the problems that could occur in cases of emergence of conflict between two legal systems jurisdictions.

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- Constitution of Croatia

- Constitution of Serbia

- Treaty on the European Union

- Treaty on the Functioning of the European Union

Case Law:

- Judgment of the Court of 17 December 1970. - *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. - Reference for a preliminary ruling: Verwaltungsgericht Frankfurt am Main - Germany. - Case 11-70.

- Judgment of the Court of 9 March 1978. - *Amministrazione delle Finanze dello Stato v Simmenthal SpA*. - Reference for a preliminary ruling: Pretura di Susa - Italy. - Discarding by the national court of a law contrary to Community law. - Case 106/77.

- Judgment of the Court of 23 April 1986, *Parti Ecologiste "Les Verts" v. European Parliament*, Case 294/83

LEGAL AND ECONOMIC ENVIRONMENT FOR FOREIGN INVESTMENTS IN BOSNIA AND HERZEGOVINA: ADVANTAGES AND OBSTACLES

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Abstract

Investment is one of the most important generators for growth and development of national economies. In case of B&H there is a great need for domestic as well as international investments. Therefore, it is necessary to improve, in the first place, the legal environment including ease of company registration, unification of rules at the state level, simplification of administrative procedures etc. It could attract more domestic and international investors to invest in important projects and to improve overall economical situation in B&H. To achieve this goal, it is necessary to meet the essential requirement for successful implementation of various reforms related to macroeconomic stability, financial and technological infrastructure, openness to international trade and transparency of political and legislative environment. *The Reform Agenda for Bosnia and Herzegovina* was adopted in 2015 and provides, among other things, the creation of conditions and appropriate environment for increase of investments and modernization of the B&H economy, with the aim of economic growth and creation of new jobs. It also assumes strengthening the rule of law, administrative capabilities and increase efficiency in public institutions at all levels of government. In order to contribute to enforcement of this document and to present current advantages and obstacles for investments in Bosnia and Herzegovina, this paper analyzed the provisions of applicable laws relating to foreign investments and economic indicators as a consequence of such legal framework and current position of B&H. Research findings indicate that the implementation of the abovementioned structural reforms is a condition sine qua non for increase of foreign direct investments in Bosnia and Herzegovina as well as for its path towards integration with the European Union.

Keywords: *Foreign Direct Investments; Legal Environment; Economic Growth; Reforms; Reform Agenda; European Union; Bosnia and Herzegovina*

Introduction

Foreign Investments are an important part of modern economies and legal systems. Domestic firms undertake most investment, but international investment can provide additional advantages beyond its contribution to capital stock. It can serve as a conduit for the local diffusion of technology and expertise, such as through the creation of local supplier linkages and by providing improved access to international markets (OECD, 2015). Foreign investment involves the transfer of tangible or intangible assets from one country to another for the purpose of their use in that country to generate wealth under the total or partial control of the owner of the assets (Sonarjah, 2010). According to the *Encyclopedia of Public International Law*, it can be also defined as a transfer of funds and materials from one country (called capital-exporting country) to another (called host country) in return for a direct or indirect participation in the earnings of that enterprise.

There have been encouraging trends in development of foreign investments in legal and economic theory. By the end of the century, foreign direct investment was being undertaken by enterprises both large and small with a wide range of concerns. The option of investing in another country has become a normal part of strategic growth plans for enterprises. Individual investors are now seeking investment opportunities outside their own currency region as a matter of course. Moreover, mutual funds make these kinds of investments available to small investors. Investment flows have increased dramatically. For many developing countries, foreign direct investment has become the most important source of capital inflows, overtaking both official development assistance and the funds made available by multilateral development banks. In developing countries, between a third and a half of private corporate investment is undertaken by affiliates of foreign corporations. Investment flows from OECD to non-OECD countries have finally become positive, with large outflows from more developed to less developed markets. Between OECD countries, traditionally the recipients of the largest amounts of foreign investment, the number of enterprises that participate and the range of projects being funded have grown dramatically (Moltke, Konard von, 2000).

Bosnia and Herzegovina has a great need for domestic as well as international investments. The current economic situation is not favorable. There are many reasons for that. The Constitution of Bosnia and Herzegovina was agreed upon in Dayton, specifically in Anex IV of the

General Framework agreement for Peace in Bosnia and Herzegovina. After the DPA adopted the constitution at the state level, it created a complicated and cumbersome structure with many administrative levels. Power is dispersed between many levels and usually exercised by administrative levels too small to fulfill its functions effectively (Brankovc, 2016).

The minimum number of regulations is enacted at the state level because of the competence of the entities for regulation in this area. Substantive provisions on the status of companies, for example, are at the entity of the Federation of Bosnia and Herzegovina, Republika Srpska and Brcko District. Procedural regulations governing the procedure for establishing the company were also adopted at the entity level, but at national level there is the Framework Law on Registration of Business Entities, which stipulates the obligation of harmonization of procedures in the entities with their procedural rules. An agreement on Stabilization and Association of Bosnia and Herzegovina with the European Union came into force in 2015, and started some reforms with the aim of harmonizing the laws of Bosnia and Herzegovina with the European Union *acquis communitarie*. This will surely be a long and difficult process due to the absence of a single legal and economic space in Bosnia and Herzegovina. The same is reflected primarily in the fact that competences in very important areas are granted to entities, which results in a large number of laws. Regulations are often different and prevent subjects from setting up the company under the same conditions and operating in the entire territory of Bosnia and Herzegovina (Sudzuka, 2016).

The legal system of Bosnia and Herzegovina in the post-war period and the period of transition is experiencing transformation in different aspects. There is no doubt that the consequences of transition reflect on the economic and legal system of Bosnia and Herzegovina. Along with solving these problems, Bosnia and Herzegovina is trying to follow modern trends in the development of economic and legal systems and to harmonize regulations of various areas with the legislations of developed countries, especially within the integrated regional community, including neighboring countries and the EU member States.

Bosnia and Herzegovina participates in the Stabilization and Association Process and is a potential candidate for EU membership. In December 2014, the EU initiated a new approach to Bosnia and Herzegovina with regards to fulfilling the EU conditions; this led to the signing of enforcement of the Stabilization and Association Agreement on the 1st of June 2015. It replaced the Interim Agreement which had

been in force since 2008. In February 2016, B&H submitted the official application for EU membership. Joining the EU will require institutions at the state level to be far more effective than they currently are. Bosnia and Herzegovina has to have strong institutions at the state level with necessary capacity and expertise to deal with the wide range of issues covered by such agreements (Brankovic, 2016).

All these abovementioned issues are closely related to the legal and economic framework for foreign investments in Bosnia and Herzegovina. Investors are interested to have good business climate in the area where they want to invest. Moreover, they are not ready to deal with complicated and long administrative procedures and very strict requirements for conducting business. The country's decentralized government structure creates a complex and multi-layered network of public institutions, administrations and regulations. It is difficult for investors, especially foreign ones, to navigate through this regulatory network, which applies to all aspects of corporate operations, including business registration, licensing and permitting, inspections and direct taxation. This regulatory burden is identified by most observers and as the greatest deterrent to foreign direct investment (UNCTAD, 2015).

This paper will give an overview of the legal framework for foreign investments in Bosnia and Herzegovina with special emphasize on regulations regarding company formation and taxes. Also, the authors will present the advantages of investing in B&H and the current position of investments.

Methodology

The most important task of this research is the study of current theoretical and practical aspects of the foreign investments as a modern model of financing and improving of modern economies, and their effects on the legal and economic system of Bosnia and Herzegovina.

Therefore, the main hypothesis can be determined as follows: Bosnia and Herzegovina has great potential for attracting and hosting foreign investments due to its favorable geographic position, natural resources and labor force. However, there are also significant obstacles for further economic development: complicated regulatory and administrative system, high rate of corruption in public administration and existence of legal particularism in regulation of different aspects of business at different administrative levels.

A number of methods will be used in the scientific research, formulation and presentation of the research results in this paper. It is necessary to combine general scientific methods and legal methods that are appropriate for this type of research. In order to realize the objectives of the research and demonstrate the hypotheses, methods for collecting the primary and secondary data will be used.

The method of analysis will interpret in detail the traditional and new approach to the foreign investments, and methods of synthesis will be used for the purpose of concretization of attitudes. The descriptive method will show the results of the research. The statistical method will be used for processing, display and analysis of data obtained in the framework of the primary research conducted. The use of this method will enable the testing and evaluation of the basic hypotheses. The compilation method will show the results of scientific research, observations, opinions and conclusions of other author with due reference to the source.

During the research of this dissertation topic, the normative method will be intensively used in all its forms. In doing so, in first place is the logical-normative method that connects all legal norms relevant to the research of the area. In second place is a formal-normative method that is used to define a hierarchy of sources, according to their legal force in order to systematize the sources that regulate foreign investment law in Bosnia and Herzegovina.

Advantages for Investments in B&H

B&H has been trying to attract foreign direct investments because of their importance for the economy of the country, growth, development and solving of unemployment problem. There are many advantages for investing in B&H from the foreign investor's point of view.

The greatest advantage for investing in B&H is its work force. Employees in B&H are well educated, skilled, have high computer literacy, and speak foreign languages. It is easy to find young well educated employees, as well as senior experienced employees, due to the current labor market situation and high unemployment rate in the country. Educated employees in B&H are much cheaper in comparison with the United States, and the EU countries. Primary research undertaken on Turkish companies which invest in B&H, in the frame of the International University project: "Bosnia and Herzegovina's

commercial relations with Turkey: The Status of B&H Economy and Recommendations for the future", in the spring of 2016, shows that the main reason for investing in B&H is the availability of educated and cheap labor. A Turkish company from the information and technology field reported that they have established a company in B&H because of the availability of young, educated people who produce software exclusively for other countries, mainly US and the EU (Ganic & Brankovic, 2016).

B&H has an abundance of water, energy and raw material. Some Turkish companies in the abovementioned project stated that they invested in B&H due to the availability of relatively cheap and accessible raw materials, electric power and water. Turkish manufacturing companies in B&H reported that raw materials were of high quality, and that there was a very good electrical supply system and an abundance of water (Ganic & Brankovic, 2016).

B&H is situated in South East Europe and has an excellent geographic position for foreign investments. Turkish exporting companies in B&H participating in the abovementioned project reported that the position of B&H was very important for them. As they export huge quantities of products to the EU market, the proximity of B&H to the EU was of great importance (Ganic & Brankovic, 2016).

Foreign investors want to invest in a country where the rule of laws is respected. The signing of the Stabilization and Association Agreement between B&H and the European Union and process of harmonization B&H's legislation with EU *acquis* is a clear sign for potential foreign investors that there is safe legal environment to invest in B&H.

B&H signed a lot of multilateral and bilateral agreements. Thanks to that, all companies that operate in B&H have the opportunity of exporting to a market of approximately 600 million people without paying any customs duties (FIPA, 2016).

Legal and Economic Environment for Foreign Investments

B&H's accelerated Economic Reform Process has contributed significantly to a greatly improved business climate. The aim of B&H is to eliminate legal and administrative obstacles for doing business in B&H, as well as to create the most attractive business environment in the South East Europe. The main goal of B&H is EU membership. Bosnia and Herzegovina is a potential candidate country for EU accession and B&H has signed the Stabilization and Association Agreement with the European Union, which is a step

toward EU membership. Bosnia and Herzegovina has signed the Central European Free Trade Agreement (CEFTA), creating a free trade zone with access to a large consumer market. Also, the process of negotiation to join the World Trade Organization is underway (FIPA, 2016).

However, it is necessary to conduct very important reforms in the legal system of Bosnia and Herzegovina, although there is a well-established legal environment for foreign investments. In July 2015, the country adopted a Reform Agenda aimed at tackling the difficult socio-economic situation. Its implementation has started meaningful progress in the implementation of the Reform Agenda necessary for the EU to consider the EU membership application of Bosnia and Herzegovina. Only a strong state can assure economic reforms (Brankovic, 2016).

With regards to the legal environment, there are a few very important fields that should be regulated properly in order to assure an adequate regulatory framework for foreign investments. Besides foreign investments themselves the regulation of company formation, taxation, privatization, concessions, social security contributions etc. are of great importance.

Legislation in the field of foreign investments in B&H includes international sources and sources of domestic law related to the matter. The first group of sources includes multilateral convention which B&H signed, accepted, and concluded bilateral agreements. The second group of sources includes the Constitution, laws and by-laws in the field of foreign investment (Ganic and Brankovic, 2016. p. 72.).

In the context of domestic legislation, it is important to stress that regulation of foreign investments is well regulated. At the state level they are regulated by the Law on the Policy of Foreign Direct Investments of Bosnia and Herzegovina (hereinafter: LPFDI) published in the Official Gazette of B&H, 17/98, 13/03, 48/10 and 22/15. The Law on the Policy of Foreign Direct Investment has been in force since 1998. It regulates the basic policies and principles of the participation of foreign investors in the economy of Bosnia and Herzegovina. The law grants foreign investors the same rights and obligations as domestic investors. The following articles of the law (The Law on the Policy of Foreign Direct Investment of Bosnia and Herzegovina, 2015) stressed out the most important rights of foreign investors as follows:

- foreign investors shall be entitled to invest, and to reinvest profits of such investments into any and all sectors of the economy of Bosnia and Herzegovina, and in the same form and under

the same conditions as defined for the residents of Bosnia and Herzegovina under the applicable laws and regulations of Bosnia and Herzegovina and the Entities and Brcko District of Bosnia and Herzegovina (LPFDI B&H. a.3)

- Subject to the provisions of this Law, and subject to other laws and treaties of Bosnia and Herzegovina and the laws of entities and Brcko District of Bosnia and Herzegovina, foreign investors shall have the same rights and obligations as the residents of Bosnia and Herzegovina.
- Bosnia and Herzegovina, entities and Brcko District of Bosnia and Herzegovina shall not discriminate with respect to foreign investors in any form, including but not limited to their citizenship, residency, religion, or the state of origin of investment. (LPFDI B&H. a.8)
- Foreign investors shall have the same property rights in respect to real estate as the citizens and legal entities of Bosnia and Herzegovina (LPFDI B&H. a. 12)
- The law makes clear that the rights and benefits of foreign investors cannot be terminated or overruled by subsequently passed laws and regulations. The rights and benefits of foreign investors granted and obligations imposed by this Law cannot be terminated or eliminated by the subsequently passed laws and regulations. If such subsequently passed laws and regulations shall have been more favorable to foreign investors, they shall have the right to choose under which regime the respective foreign investment will be governed. (LPFDI B&H. a. 20)
- Foreign investors shall have the right, for the purposes of their investments, to open accounts on the territory of Bosnia and Herzegovina in any commercial bank denominated in the national or any freely convertible currency. According to article 11, foreign investors also have the right to transfer abroad income from investments received in the form of profit, dividends, interest, and other forms (LPFDI B&H. a. 11a).
- Foreign investors are entitled to freely employ foreign nationals, with respect to the labor and immigration laws in B&H. Subject to the labor and immigration laws in Bosnia and Herzegovina, foreign investors shall have the right to freely employ foreign employees (LPFDI B&H. a. 14).

- Foreign investors are protected against nationalization, expropriation or requisition unless it is a question of the public interest.
- Foreign investment shall not be subject to any act of nationalization, expropriation, requisition or measures which have similar effects, except in the public interest in accordance with applicable laws and regulations, without any type of discrimination and against the payment of appropriate compensation. (LPFDI B&H. a. 16a)
- The only limitation to the foreign investment is related to the military equipment and media. Article 4(a) states: Notwithstanding the policy of free admission of foreign direct investment into Bosnia and Herzegovina set forth in Article 3 of this Law, foreign equity ownership of business entity engaged in the production and sale of arms, ammunition, explosives for the military use, military equipment and media shall not exceed 49% of the equity in that business entity.

There are also laws relating to foreign investments at the entities level. Foreign direct investments are regulated at the level of FB&H with the Law on Foreign Investments of FB&H published in Official Gazette of FB&H No. 61/01, 50/03 and 77/15. In RS it is regulated with the Law on Foreign Investments of RS published in Official Gazette of RS No. 25/02, 24/04, 52/11 and 68/13.

Notwithstanding that this area is well regulated, the problem is that there are too many regulations for such a small country, as a consequence of the constitutional organization.

The legal framework of company formation is also a very important aspect for the overall legal frame of foreign investments. This issue is very specific in Bosnia and Herzegovina due to different competencies of different state levels.

Formal registration of companies has many immediate benefits for the companies and for business owners and employees. Legal entities can outlive their founders. Resources are pooled as several shareholders join forces to start a company. Formally registered companies have access to services and institutions from courts to banks, as well as to new markets. And their employees can benefit from protections provided by the law. An additional benefit comes with limited liability companies. These limit the financial liability of company owners to their investments, so personal assets of the owners are not put at risk.

Where governments make registration easy, more entrepreneurs start businesses in the formal sector, creating more good jobs and generating more revenue for the government (Doing business, 2016).

The founding, operation, management and termination of businesses in B&H are regulated by the law. The Company Law of the Federation of B&H published in Official Gazette of FB&H No. 81/15 regulates such matters in FB&H and the Company Law of Republic of Srpska published in Official Gazette of RS No. 127/08, 58/09, 100/11 and 67/13 regulate such matters in RS. The current legal framework and regulations are adapted to the international standards applicable in the European Union and other developed market economies.

The following table provides an overview of the basic organizational form of the company according to the current legal framework in B&H.

TYPES OF COMPANIES	FEDERATION OF BOSNIA AND HERZEGOVINA	REPUBLIC OF SRPSKA
Unlimited Joint Liability Company (d.n.o./o.d.)	Founded by the establishment contract of 2 or more partners, domestic or foreign, natural persons only; Founders are liable to use all their assets, including personal property; There are no requirements for minimum or maximum contributions.	Founded by the establishment act of 2 or more domestic/ foreign natural and/or legal partners who commit to do certain activity under the same company name, with their own solidary liability for company commitments; There are no requirements for minimum or maximum contributions.
Limited Liability Company (d.o.o.)	Founded by the establishment act or establishment contract by 1 or more domestic/foreign natural and/or legal entities with initial capital divided in parts; A member in a limited company is liable for the value of his investment in that company; Minimum initial capital is 1,000 BAM (approx. 500 EUR).	Founded by the establishment act of 1 to 100 domestic/ foreign natural and/or legal entities; A shareholder in a limited company is not personally liable for any of the debts of the company, other than for the value of his investment in that company; Monetary part of the basic capital of Liability Company is 1 BAM (approx 0.50 EUR).
Limited Partnership (k.d.)	Company founded by the establishment contract of 2 or more domestic/foreign natural and/or legal entities; There must be at least 1 partner with full liability (including private property) and at least 1 partner with limited liability, the liability being limited by the value of his share in that company. There are no requirements for minimum or maximum initial capital.	Founded by the establishment act of 2 or more domestic/ foreign natural and/or legal entities; One person at least has unlimited liability for the company, and one person at least has liability to the amount of his investment in the company; There are no requirements for minimum or maximum initial capital.

Joint-Stock Company (d.d./a.d.)	Legal entities founded by the establishment contract of 1 or more domestic/foreign natural or legal shareholders with initial capital divided into shares; 1. Open joint-stock company is a legal entity (banks, insurance companies, or companies with minimum initial capital of 4 mil BAM (approx. 2 mil EUR) and 40 shareholders at least), whose shares may be publicly listed; 2. Closed joint-stock company is a legal entity whose shares are distributed among a limited number of shareholders. The minimum initial capital is 50,000 BAM (approx. 25,000 EUR).	Legal entities founded by the establishment contract of 1 or more domestic/foreign natural and/or legal entities with initial capital divided into a defined number of shares; 1. Open joint-stock company is a legal entity whose shares may be publicly traded, i.e. offers its shares for sale upon the open market and they are listed on the stock exchange and other public markets. Minimum initial capital is 50,000 BAM (approx. 25,000 EUR). 2. Closed joint-stock company is a legal entity whose shares are distributed among a limited number of shareholders. Minimum initial capital is 20,000 BAM (approx. 10,000 EUR).

Table 1. *Types of companies in B&H*
Source: *FIPA, 2016*

In harmonizing the laws of Bosnia and Herzegovina with EU legislation in the field of company law, as the initial phase, freedom of establishment is the most important area (SAA, art. 50-57.) It is one of the most important categories of company law in the European Union bearing in mind that represents a *conditio sine qua non* for the free movement of people, goods, capital and services. The right of establishment of natural and legal persons constitutes a legal basis for the free exercise of commercial activities on the territory of EU member states. This involves the pursuit of economic activities through an existing company or performance of such activities through the establishment of new companies. Freedom of establishment assumes that all forms of restrictions and discrimination are abolished by introducing the so-called national treatment for established companies, before the establishment of the European Union as well as the introduction of obligations phasing out of national law in the transitional period.

According to Professor Horak, establishment means the right of legal or natural persons who are nationals of a Member State of the European Union to establish a legal person or company in the territory of a Member State that is not his own, and includes the initiation and performance of independent activities. The definition of freedom of establishment resulting from the Treaty on Functioning of EU and is part of the freedom to provide services (Horak, 2013).

The legal basis for the harmonization of company law is contained in the provisions of the primary legislation of the European Union.

Company laws are incorporated primarily in the corpus of national law. Analyzing the attitude of European and national legislations, one should keep in mind several factors with regards to that national law, not only regulations, but also the case law and doctrine. Given that the matter of company law is not a static category, there is a need for continued convergence and harmonization of national law in order to achieve market freedoms, in particular freedom of establishment and movement of capital in the internal market of the EU.

In the case of Bosnia and Herzegovina, it is not easy to achieve this harmonization because of the existence of regulations on different administrative levels. That is not a problem only for approximation and accession to EU but also for all other potential and interested foreign investors.

According to the applicable laws in B&H, beside formation of a subsidiary company, foreign entities can establish a Representative Office in B&H for performing market research, informative and promotional activities and for its own representation. The Representative Office does not have the status of a legal entity, i.e. the Representative Office cannot conclude agreements on behalf its founder, except representative offices of foreign air transportation companies which can sell transportation documents in accordance with bilateral agreements and international conventions signed by B&H. The Representative Office becomes operational after entering into the Register of Foreign Representative Offices kept by the Ministry of Foreign Trade and Economic Relations with B&H.

The business environment in B&H has significantly improved in recent years. A set of new economic laws in B&H were adopted in accordance with EU standards. B&H has a well-established economic environment for foreign investment. B&H is a financially stable country, with privatization possibilities in strategic sectors, a well regulated tax system, free trade zones, and other various measures to support and facilitate in foreign investment (Ganic, M., Brankovic, A. 2016).

Recognizing the importance of creating a favorable business environment to attract investment, and given the increasing competition when it comes to attracting FDI, below, we provide an overview of the relevant legislation regulating the legal and financial environment, and tax system and employment legislation related to foreign investments in B&H:

Laws Related to Investment and Business:

- *Cleansed text of the Law on the Policy of Foreign Direct Investment of BiH* (Official Gazette of BiH No. 17/98, 13/03, 48/10 and 22/15)
- *Law on Foreign Investments of RS* (Official Gazette of RS No. 25/02, 24/04, 52/11 and 68/13)
- *Cleansed text of the Law on Foreign Investments of FBiH* (Official Gazette of FBiH No. 61/01, 50/03 and 77/15)*Company Law of the FBiH* (Official Gazette of FBiH No. 81/15)
- *Company Law of the RS* (Official Gazette of RS No. 127/08, 58/09, 100/11 and 67/13)

Laws Related to Taxes

- *Law on Value Added Tax of BiH* (Official Gazette of BiH No. 09/05, 35/05 and 100/08)
- *Instruction on Conditions for and Methods of VAT Refund to Foreign Persons of BiH* (Official Gazette of BiH No. 01/07)
- Law on Corporate Income Tax of FBiH (Official Gazette of FBiH No. 15/16)
- *Law on Corporate Income Tax of RS* (Official Gazette of RS No. 95/15)

Laws Related to Free Zones

- *Law on Free Trade Zones of BiH* (Official Gazette of BiH No. 99/09)
- *Law on Free Zones of RS* (Official Gazette of RS No. 65/03)
- *Law on Free Zones of FBiH* (Official Gazette of FBiH No. 2/95, 37/04 and 43/04)

Laws Related to Business Registration

- *Framework Law on Registration of Business Entities of BiH* (Official Gazette of BiH No. 42/04)
- *Excerpt from the Law on Registration of Business Entities of RS* (Official Gazette of RS No. 67/13 and 15/16)
- *Law on Registration of Business Entities of FBiH* (Official Gazette of FBiH No. 27/05. 68/05, 43/09 and 63/14)

- *Excerpt from the Decision on Establishment and Work of Foreign Representative Offices of BiH* (Official Gazette of BiH No. 15/03)

Laws Related to Employment:

- *Labour Law of FBiH* (Official Gazette of FBiH No. 26/16)
- *Labour Law of RS* (Official Gazette of RS No. 1/16)
- *Law on foreigners of BiH* (Official Gazette od BiH No. 88/15)

This list shows that the most of the areas relevant for foreign investments are regulated with two or more laws which are in most cases similar, but not completely equal. In the theory of law, this is called legal particularism and pluralism. This phenomenon is undesirable because it makes starting and conducting business for foreign investors very complicated. Therefore it is necessary, among all other reforms, to perform a constitutional reform in order to ensure safe place and legal environment like in other EU member states and to attract as much foreign investors as possible. That is for sure the only path for development of B&H economy and overall conditions for the normal life of its citizens.

Current Position of B&H – Data Presentation and Analysis

The 2016 *Doing Business*[1] report ranks B&H 79th out of 189 economies that were included in the rankings. Data for Ease of doing business shows that business rank of B&H has been decreasing over the period 2012 - 2014. The business situation improved in 2015 and continued improving in the year 2016. The rank in 2016 improved 3 positions compared to the previous year. (see Figure 1. on next page)

In order to better understand the position of B&H regarding business regulations, it is necessary to analyze the components of Ease of doing business. There are ten following components: Starting a business; Dealing with Construction Permits; Getting Electricity; Registering Property; Getting Credit; Protecting Minority Investors; Paying taxes; Trading across the borders; Enforcing Contracts; Resolving Insolvency.

The ranking of the components of "Ease of doing business" for B&H are presented in Figure 2. on next page.

1) The *Doing Business* project is World Bank group's project that provides objective measures of business regulations and their enforcement in 189 economies.

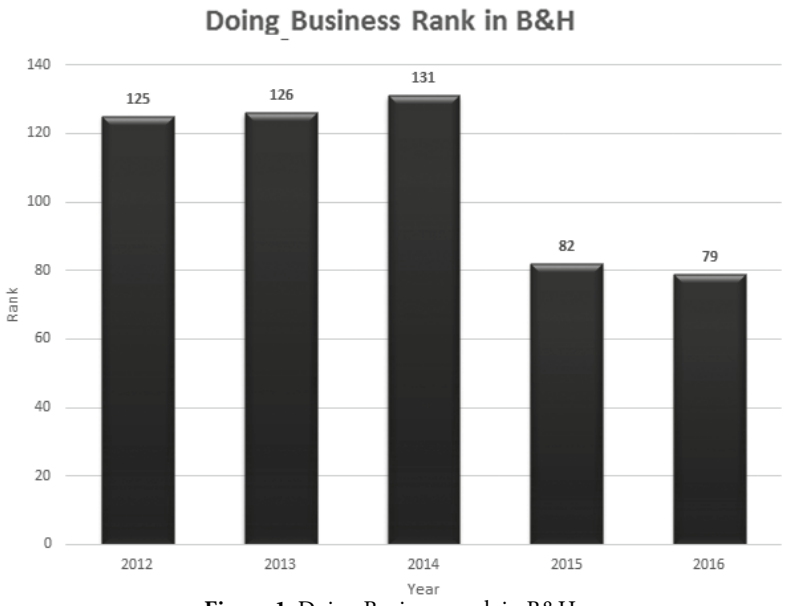

Figure 1: Doing Business rank in B&H
Source: Author's elaboration on World Bank Group Data, 2016

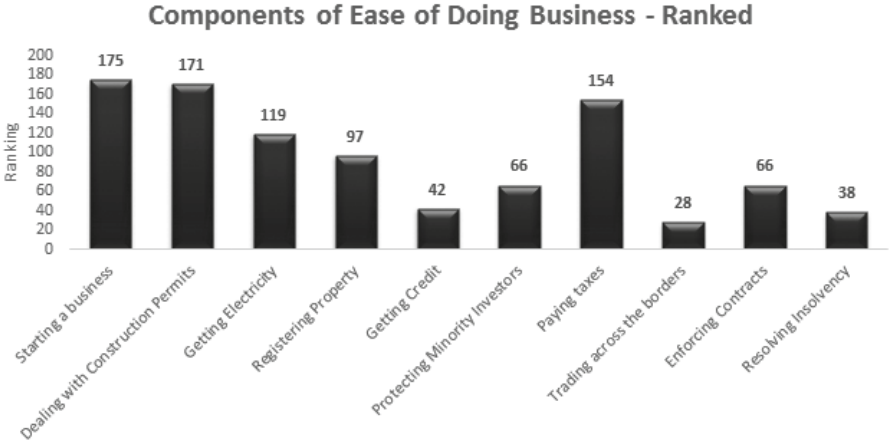

Figure 2: Components of Ease of doing Business - Ranked
Source: Author's elaboration on World Bank Group Data, 2016

The ranking of the components of "Ease of doing business" shows quite a different picture in comparison to the general rank. The worst situation is in the area of starting a new business. B&H is ranked 175th out of 189 countries regarding the start of new business. It is ten positions worse compared to the previous year.

Starting a business in B&H requires more time, money, capital and procedures than in many countries in EU and Central Asia. (see Table 2. below).

Indicator	B&H	EU&Central Asia	OECD high income
Procedures (number)	12	4.7	4.7
Time (days)	67	10	8.3
Cost (% of income per capita)	14.8	4.8	3.2
Paid-in min. capital (% of income per capita)	28	3.8	9.6

Table 2. Starting a business in B&H
Source: World Bank group, 2016

It is interesting to note that all countries of ex-Yugoslavia have a better rank than B&H. Serbia is on the 59th position, Montenegro on the 46th position, Croatia on the 40th, Slovenia is 29th and Macedonia is 12th. These countries have similar competitive advantages to B&H. They all have a well-educated workforce, raw materials, water and energy. They all have an excellent geographical position, similar to B&H. They are either members of the EU like Slovenia and Croatia or well advanced toward EU integration compared to B&H. Taking all this into account, B&H' priority should be to make reforms and improve its legal and economic environment for foreign direct investment.

Conclusion

B&H needs international investments in order to solve its economic problems, huge unemployment and enhance economic growth and development. There are many advantages for investing in B&H. In the first place, it is its well-educated and cheap work force, with language and computer skills. There is an abundance of raw material, water and energy. B&H's favorable geographic position, many bilateral and multilateral agreements, as well as advancement toward the EU make B&H a desirable destination for foreign direct investments.

However, there are also obstacles for foreign direct investments. The country's decentralized government structure creates a complex and multi-layered network of public institutions, administrations and regulations. It is difficult for investors, especially foreign ones, to

navigate through this regulatory network, which applies to all aspects of corporate operations, including business registration, licensing and permitting, inspections and direct taxation. Because of all these problems, B&H is ranked on the 79th position in World Bank's "Doing business" project, well behind neighboring countries that have similar comparative advantages to B&H.

It is necessary for B&H to improve, in the first place, its legal environment, including ease of company registration, unification of rules at the state level and simplification of administrative procedures. The phenomenon of legal particularism exists in B&H. It is undesirable because it makes starting and conducting business for foreign investors very complicated. Therefore it is necessary, among all other reforms, to perform a constitutional reform in order to ensure safe place and legal environment like in other EU member states and to attract as much foreign investors as possible. The Reform Agenda for Bosnia and Herzegovina was adopted in 2015 and should provide the appropriate environment for increase of investments and modernization of the B&H economy, with the aim of economic growth and creation of new jobs. It also assumes to strengthen the rule of law, administrative capabilities and increase efficiency in public institutions at all levels of government.

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HIERARCHY OF RULES ON INTERNATIONAL JUDICIAL COOPERATION (THE LAW OF BOSNIA AND HERZEGOVINA)

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Abstract

This study is focused on the law of Bosnia and Herzegovina with its specific problems in international judicial cooperation in criminal matters. In the international law, hierarchy of interstate agreements is accepted and recognized, although, in practice, it is not always understood in the best way. Therefore, as in the case of Bosnia and Herzegovina, domestic law is subsidiary in cases of conflicts with interstate agreements. Nevertheless, it plays an irreplaceable role, as a regulator of international judicial cooperation in support of interstate agreements by interpreting their provisions. This power of national legal provisions must be properly used.

Keywords: *Bosnia and Herzegovina; International Law; International Judicial Cooperation; Domestic Law.*

Hierarchy in International Law

In Europe, a hierarchy may exist between international instruments when one of them postulates its own primacy over others, e.g. the European Convention on Extradition. Its Article 28 reads:

> *This Convention shall, in respect of those countries to which it applies, supersede the provisions of any bilateral treaties, conventions or agreements governing extradition between any two Contracting Parties. The Contracting Parties may conclude between themselves bilateral or multilateral agreements only in order to supplement the provisions of this Convention or to facilitate the application of the principles contained herein.* (Article 26 of European Convention on Mutual Assistance in Criminal Matters and Article 43 of the European Convention on the Transfer of Proceedings in Criminal Matters contain similar rules).

At the same time, an international instrument may declare its subsidiary. The Council of Europe Convention on Cyber crime constitutes a good example. Its Article 27 regulates, in accordance with its own title,

the "Procedures pertaining to mutual assistance requests in the absence of applicable international agreements". *Per argumentum a contrario*, if an applicable international agreement exists, such as European Convention on Mutual Assistance in Criminal Matters and the Protocols thereto, the Convention on Cybercrime shall give way (Sibylle, 2003, p. 11; Erika and Vidmar, 2012).

As in the case with Article 28 of the European Convention on Extradition, Article 26 of European Convention on Mutual Assistance in Criminal Matters and Article 43 of the European Convention on the Transfer of Proceedings in Criminal Matters, this is also a formally and expressly established hierarchy but by the subsidiary Convention. However, sometimes hierarchy between international instruments may not be clearly established but occurs as a result of interpretation of some legal rule. Such a rule is Article 1F of the 1951 Convention Relating to the Status of Refugees as well. It reads:

> *The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:*
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> *(c) he has been guilty of acts contrary to the purposes and principles of the United Nations.*

Such a rule facilitates the general conclusion that in cases of conflict with the Convention Relating to the Status of Refugees is expected to give way any international extradition law, if there might be any conflict between them all. It is well known that the legal framework for the treatment of refugees and the one for extradition are related. In practice, asylum proceedings (for granting a refugee status to foreigners) and extradition proceedings interact as the former take into account the results of the latter. Findings in the extradition process may (not only in respect of crimes under Article 1F of the 1951 Convention but also for all other extraditable crimes as well) have a bearing not only on the eligibility for international refugee protection of an asylum-seeker. They are also likely to affect the already recognized asylum status. Information which comes to light during the extradition process may

also set in motion proceedings leading to the revocation of the asylum status (Sibylle, 2003, p. 99).

Additionally, asylum and extradition may seem to overlap in some sense where the person, whose extradition is sought, is an asylum-seeker, or a refugee (with an already granted asylum status). However, asylum law does not as such stand in the way of criminal prosecution or the enforcement of a sentence, nor does it exempt refugees, asylum-seekers or persons with granted asylum from extradition. As the legal framework for asylum was never intended to shield fugitives from legitimate criminal justice, this legal institution is not seen as a restriction to application of extradition law (Ibid., p. 74). Obviously, extradition results may exclude asylum but asylum results may not exclude extradition.

It is important to know that asylum law provides protection to refugees (persons with asylum status) and asylum-seekers from being extradited to countries where they may be subject to discriminatory ill-treatment. Thus, Article 33 (1) of the 1951 Convention Relating to the Status of Refugees prohibits the surrender of such persons to foreign countries „*where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*" [probability of discriminatory ill-treatment].[1]

It is noteworthy that this is the only protection of asylum law to refugees (persons with asylum status) and to asylum-seekers, and this protection is reproduced in full in extradition law. Their surrender is prohibited by Article 3 (2) of the European Convention on Extradition. This Paragraph reads:

> *Extradition shall not be granted, if …the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons* [again, probability of discriminatory ill-treatment].

Similarly, Article 34I of the Bosnia and Herzegovina Law on International Judicial Cooperation in Criminal Matters [the BiH Law on IJC] postulates that extradition shall be rejected, if requested „*for the*

1)Likewise, Article 3 of the European Convention on Human Rights prohibits torture, and "inhuman or degrading treatment or punishment". There are no exceptions or limitations on this right. It is exercisable also in extradition cases to outlaw surrender to countries where torture or inhuman or degrading treatment or punishment is probable. See Soering vs UK, (1989), ECHR (Series A) No. 161.

following purposes: criminal prosecution or punishment on the grounds of the person's race, gender, national or ethnic origin, religious or political belief".

Further on, the protective rules of extradition law not only reproduce the protection of asylum law. Being special, they also derogate it excluding its applicability in accordance with the maxim that "lex specialis derogat legi generali". It follows that the rules of asylum law, incl. the protective ones, are not applicable. *Per argumentum a fortiori*, applicability is ruled out also for Article 3 of the European Convention on Human Rights which prohibits torture, and "inhuman or degrading treatment or punishment", in general.

Hence, if a wanted person is requested by a country where s/he is likely to be subjected to discriminatory ill-treatment, it is the extradition law which would protect him/her against any extradition to that country. There are no reasons to maintain the contrary, namely: that this person is protected only by asylum law[2] and that the asylum law protection [the quoted Article 33 (1) of the 1951 Convention, in particular] derogates obligations to extradite when the wanted person might be subjected to some discriminatory ill-treatment.

Actually, it is the other way around: the protective provisions of extradition law, being special rules, derogate protective rules of asylum law, being of the same content but general in scope. Specifically, the necessary protection against discriminatory ill treatment in the countries requesting extradition comes from Article 3 (2) of the European Convention on Extradition and Article 34I of the BiH Law on IJC. It does not and cannot come from provisions envisaging granted asylum or asylum-seeking, such as: the derogated Article 33 (1) of the 1951 Convention, in particular.

Article 34B of the BiH Law on IJC is also designed and seen as a provision protecting persons with granted asylum (refugees) and asylum-seekers. It qualifies as a mandatory condition for extradition the fact that the requested person does not enjoy asylum in BiH or have not applied for it (s/he is not any asylum-seeker) in BiH at the moment the request for extradition is filed. However, there is no such condition for extradition in the European Convention on Extradition. Extradition may be excluded only by granting nationality to the wanted person (e.g. Article 6 of the European Convention on Extradition) – in addition to

2)See this unacceptable statement in "Guidance Note on Extradition and International Refugee Protection." UNHCR, Protection Policy and Legal Advice Section, Division of International Protection Services, Geneva, April 2008, p. 6.

his/her asylum status or without giving him/her any such a status. In any case, the European Convention on Extradition does not postulate that the asylum status or the asylum-seeking conduct of the wanted person is any impediment to his/her extradition.

By contrast, Article 34B of the BiH Law on IJC means that any of the two – the asylum status or even asylum-seeking - alone constitutes an impediment to extradition. This provision requires denial of extradition on the sole ground that the wanted person is a refugee (has an asylum status) or is an asylum-seeker, regardless of whether any plausible danger of his/her discriminatory ill treatment in the requesting country exists or does not exist at all.

Moreover, because Article 3 (2) of the European Convention on Extradition and Article 33E, letter "I" of the BiH Law on IJC have banned extradition to countries where danger of discriminatory ill-treatment exists, the prohibition of extradition under Article 34B of the BiH Law on IJC - on the ground that the wanted person who has an asylum status or is an asylum-seeker, is not applicable to such requesting countries. As a result, this prohibition to extradite refugees (with asylum status) and asylum-seekers is applied only to those requesting countries where no such danger exists.

Hence, if the BiH Law on IJC is applicable, in accordance with its Article 1 (1), then nothing can exclude the application of Article 34B of the BiH Law on IJC, in particular, prescribing to BiH authorities to reject any extradition of a refugee or an asylum-seeker to countries where s/he is not likely to be subjected to any discriminatory ill-treatment at all. Thus, the sole function left to the legal ground under Article 34B of the BiH Law on IJC is to hinder acceptable extradition and prevent legitimate justice from being done. This is an obvious absurd though. It virtually means that legal provisions shall not only prevent injustice but may create it as well as in the case with Article 34B of the BiH Law on IJC.

This happens because, in contrast to Article 33E, letter "I" of the BiH Law on IJC, Article 34B of the same Law envisages not only situations of possible discriminatory ill-treatment in the requesting country. This Article also expands to opposite situations where discriminatory ill-treatment in the requesting country is not likely. Moreover, in practice, it is applicable to them only. In this way, the legal ground under Article 34B the BiH Law on IJC has turned into its undesired opposite to prohibit requested country from extraditing only to countries where no danger of discriminatory ill-treatment of the potential extraditee exists at all.

Obviously, when no danger of discriminatory ill-treatment exists, the asylum status, and asylum-seeking as well, shall be irrelevant since the values protected by it would not be threatened at all, when the person (refugee or asylum-seeker) is surrendered to the requesting country for the benefit of justice[3]. Therefore, no human rights justification to refuse extradition exists in such cases. Moreover, the person shall not only be extradited, if there is no other impediment to his/her extradition, but also deprived of his/her asylum status or respectively denied such a status, even though it alone did not and could not hinder the extradition.

It follows that Article 34B of the BiH Law on IJC, which essentially postulates the contrary, should be deleted. There is no justification of having the granted asylum, and asylum-seeking either, as a separate legal ground for refusal to extradite as this Article postulates (Andre, 2014, pp. 42-50). If this provision stays, it would literally mean that once a person has been granted an asylum status, or even is an asylum-seeker only, this person shall never be extradited to any country in the world. It goes without saying that such a protection is either redundant or unacceptable.

Where no danger of discriminatory ill-treatment in the requesting country exists, Article 34B of the BiH Law on IJC only repeats the text of Article 33E, letter "I" of the same Law postulating that extradition shall be rejected, if requested „*for the following purposes: criminal prosecution or punishment on the grounds of the person's race, gender, national or ethnic origin, religious or political belief*". Since in this

3)This is the reason why in Germany no decision in asylum proceedings is binding for an extradition proceeding. The Courts, responsible for decisions regarding the admissibility of extradition, decide independently whether serious grounds exist to believe that the person subject to extradition would be threatened with political persecution in the requesting country, and that his/her extradition is therefore, not admissible. A hindrance to extradition exists in cases where there is serious cause to believe that the person sought, if extradited, would be persecuted or punished because of his race, religion, citizenship, association with a certain social group or his political beliefs, or that his/her situation would be made more difficult for one of these reasons. With this, extradition law mentions those characteristics of persecution that form the basis of the principle of "non-refoulement" in Article 33 (1) of the Geneva Convention relating to the Status of Refugees and are therefore, determinative for the grant of asylum. See Information received from states on practical problems encountered and good practice as regards the interaction between extradition and asylum procedures, *European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters*, Council of Europe, Strasbourg, 5 March 2014 [PC-OC/PC-OCMod/2013/Docs PC-OC Mod 2013/ PC-OC Mod(2013) 06rev2], p. 14

situation of possible discriminatory ill-treatment Article 33E, letter "I" prescribes the same as Article 34B of the BiH Law on IJC, the former provision makes the latter redundant.

It is even worse in the situation where no discriminatory ill-treatment is expected to take place in the requesting country. Nevertheless, Article 34B of the BiH Law on IJC prohibits even the extradition of the wanted refugee or asylum-seeker to that normal country, one that has nothing to do with the country from which s/he has escaped from.

Certainly, the prohibitive rule of Article 34B of the BiH Law to extradite refugees and asylum-seekers might be construed restrictively to avoid its unjustified application to requesting countries where no discriminatory ill-treatment is possible. However, this would mean that the prohibition would be applicable to requesting countries where doscriminatory ill-treatment is possible. In this way, the prohibitive rule of Article 34B of the BiH Law would be nothing more than a replica of the prohibition under Article 3 (2) of the European Convention on Extradition and Article 33E, letter "I" of the BiH Law. Thus, even in the conditions of such, more or less, an artificial interpretation, Article 34B of the BiH Law stays without any justification.

Normally, if the extradition of some refugee or an asylum-seeker who is likely to have committed an extraditable offence (or has not already been found guilty of such an offence) is to take place from BiH, its competent authorities shall revoke his/her granted asylum or refuse granting it rather than reject his/her extradition and eventually protect him/her from legitimate justice. Justice must be ensured because, in contrast to refusals on the grounds of own nationality – see Article 6 (2) of the European Convention on Extradition, a refusal on the grounds of asylum status (let alone on the ground of asylum-seeking), does not entail any international obligation on the requested country to prosecute and try the wanted person. It is not obliged to execute any additional request by the requested country to this effect. As a result, no justice would be done.

Undoubtedly, the fact of receiving an extradition request may not necessarily be regarded as sufficient for the revocation or not granting of the asylum status to the wanted person and for his/her surrender to the requesting country. When it comes to such persons (refugees and asylum-seekers), BiH is in the position to find an appropriate legal way to additionally require some evidence of their guilt. But if evidence

of the person's guilt is provided to BiH judicial authorities, they must surrender him/her, if no other impediment to his/her extradition exists. In the end, as regards relations of BiH with other Parties to the European Convention on Extradition, in particular, asylum may be no impediment to any extradition requested from BiH either. First of all, there is no provision in this Convention to qualify asylum as such impediment. Besides, BiH, unlike Poland (Declaration of 15 June 1993) or Rumania (Declaration of 17 July 2006), has never submitted any declaration to the Convention that persons granted asylum by its authorities shall not be extradited.

Presently, Article 1 of the Convention obliges BiH to extradite whenever the conditions for extradition are met and there is no exception for persons granted asylum in BiH – neither in the text, nor, as clarified, in any declaration or reservation of BiH to the Convention. Because international provisions override domestic rules (see Article 1 of the BiH Law on IJC), the international legal obligation to extradite based on Article 1 of the Convention cannot be derogated by whatever national asylum protection, incl. the one based on the criticized Article 34 "B" of the BiH Law on IJC.

However, the asylum issue should not be totally ignored either. On the contrary, there must be some adequate reaction to European countries, such as Poland and Romania, which make in their declarations concerning asylum the same mistake as the one of the criticized Article 34 "B" of the BiH Law on IJC. The two countries have accepted through their declarations that their authorities shall not extradite persons who have been granted asylum (refugees), regardless of whether discriminatory their ill-treatment in the requesting country is possible at all. Therefore, like Article 34 "B" of the BiH Law on IJC, the declarations of the two countries prevent their authorities from extradition even to requested countries countries where no danger of discriminatory ill-treatment of potential extraditees exists.

No doubt, such countries as Poland and Romania require a proper response. BiH, considering itself a country where no discriminatory ill-treatment is possible, including of extradited refugees (persons with asylum), could reciprocate with an own declaration. Specifically, BiH may mirror-like declare that it reserves its right to deny in the same way extradition to Poland and Romania of persons who are granted asylum, even though these two countries are not regarded as countries where discriminatory ill-treatment of anyone, incl. potential extraditees, is possible.

However, there is a milder and narrower option. It is to follow the example of Austria which with an own declaration of 07 January 1994 supported the German one of 11 October 1993 in response to the Polish. In its declaration Germany states that it:

> *considers the placing of persons granted asylum in Poland on an equal standing with Polish nationals in Poland's declaration with respect to Article 6, paragraph 1 (a) of the Convention to be compatible with the object and purpose of the Convention only with the provision that it does not exclude extradition of such persons to a state other than that in respect of which asylum has been granted.*

Presumably, this state (country) in respect of which asylum has been granted, is a country where discriminatory ill-treatment of potential extraditees is possible. Hence, Germany maintains that the Polish reservation makes sense only because and solely to the extent it repeats the ground for denying extradition under Article 3 (2) of the European Convention on Extradition, namely: that extradition shall be refused if the potential extraditee may suffer in the requesting country "*on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons.*"

Germany has not found it necessary at all to mention any other requesting countries of the same sort, although discriminatory ill-treatment of potential extraditees is possible there as well, let alone to consider requesting countries where it is not possible at all. It is true that persons with asylum, and no one else either, shall be extradited to other countries either (along with the one in respect of which asylum has been granted), if discriminatory ill-treatment is possible there. However, the legal ground to reject extradition to them is in Article 3 (2) of the European Convention on Extradition. The ground has nothing to do with the asylum status of potential extraditees and does not need any "support" from it for the denial of extradition. This is the reason why Germany has not paid any attention to such other countries where discriminatory ill-treatment is possible also.

Lastly, if BiH wants to do anything similar, it must submit a declaration with the respective rule to the European Convention on Extradition. Otherwise, if the rule is a part of the domestic law, as in the case with the criticized Article 34 "B" of the BiH Law on IJC, it would not produce the desired effect given the priority of the Convention.

International Law and Domestic Legal Provisions

Pursuant to the first provision of the BiH Law on IJC, Article 1 (1) in particular, „*This Law shall govern the manner and procedure of mutual legal assistance in criminal matters (hereinafter: mutual legal assistance), unless otherwise provided by an international treaty or if no international treaty exists*" (*International Cooperation in Criminal Matters*, 2016). Thus, following the Civil Law tradition, the BiH Law on IJC postulates the direct application of international agreements (bilateral and multilateral) in BiH[4] and its subsidiarity to them. Therefore, in case of conflict any applicable international treaty in the area of international judicial cooperation in criminal matters takes presidence over the BiH Law on IJC.

According to Article 4 (4, 5) of the BiH Law on IJC, in urgent cases requests may also be transmitted and received via Eurojust. However, Eurojust serves EU Member States and they, plus BiH as well, are all Parties to the European Convention on Mutual Assistance in Criminal Matters; most of them are also Parties to the Second Additional Protocol to this Convention as well. Hence, when it comes to mutual legal assistance in criminal matters, in general, and transmition of requests in urgent cases, including through Eurojust, in particular, these two Council of Europe legal instruments are inevitably applicable: their texts and the declarations to them made by interested Parties.

Moreover, these texts and declarations as well take precedence over any domestic law being, actually, the rules which govern the issue of communications. As the domestic law is of lower (subsidiary) legal force, it cannot be any substitute of such declarations. This is the reason why e.g. France, in order to safely use Eurojust for the transmition of certain requests, has submitted a Declaration [contained in the instrument of ratification deposited on 6/02/2012] that the requests in question „*may also ... be forwarded through the intermediary of the French national member of the Eurojust judicial co-operation unit.*"

Obviously, until BiH submits a similar declaration reproducing Article 4 (4) of the BiH Law on IJC, it would be too risky for the judicial validity of the evidence, both requested and obtained, to follow this domestic rule. To safely use Eurojust as a communication channel it

4) Most of the Common Law countries follow the opposite policy: they need "*enabling legislation*" to make international conventions and treaties part of their laws. Thus, in England international agreements are only implemented, if Parliament has passed an Act to that effect. See Brownlie, Ian. Principles of Public International Law (7th edn), Oxford, 2008, p. 45.

is strongly recommendable to BiH authorities to submit a declaration similar to the French one rather than rely on the mentioned Article 4 (4) of the BiH Law on IJC. Therefore, no domestic law in BiH has the sufficient legal power to regulate issues that fall within the subject-matter of Council of Europe legal instruments. Domestic laws can neither successfully add new rules to them within this area, nor successfully derogate their provisions. Only declarations and reservations to Council of Europe legal instruments have such necessary powers for such results. Hence, declarations to the two Council of Europe instruments are the safe and reliable way to achieve the result aimed at in Article 4 (4, 5) of the BiH Law on IJC, in particular.

At the same time, the regulative value of national law shall not be underestimated. BiH may interpret by means of its national law key legal requirements provided for in international agreements.

An appropriate example of such a requirement in need of a national interpretation is the dual criminality of the extraditable offence – see Article 2 (1) of the European Convention on Extradition.[5] Extradition in Europe is granted only in respect of offences punishable under the laws of the requesting country and of the requested country.[6] This dual criminality requirement is determined in the same way by Article 33 (2) of the BiH Law on IJC. It reads that extradition "*shall be allowed only for the criminal*

5)Dual criminality may be required also for execution of letters rogatory when it involves coercive measures. In Europe, in particular, dual criminality is required through reservations to the European Convention on Mutual Assistance in Criminal Matters for search and seizure of property, lifting of bank secrecy and/or opening of bank accounts – see the reservations of Albania, Austria, Croatia, the Czech Republic, Germany, Hungary, Slovakia, Slovenia, Switzerland. Furthermore, according to Article 2 of the Additional Protocol to the said Convention, "*in the case where a Contracting Party has made the execution of letters rogatory for search or seizure of property dependent on the condition that the offence motivating the letters rogatory is punishable under both the law of the requesting Party and the law of the requested Party, this condition shall be fulfilled, as regards fiscal offences, if the offence is punishable under the law of the requesting Party and corresponds to an offence of the same nature under the law of the requested Party. The request may not be refused on the ground that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty, customs and exchange regulation of the same kind as the law of the requesting Party*".

6) See also Hafen, Jonathan O. I*nternational Extradition: Issues Arising Under the Dual Criminality Requirement,* Brigham Young University Law Review., Vol. 1992, Issue 1, Article 4, p. 191; Available at: http://digitalcommons.law.byu.edu/lawreview/vol1992/iss1/4, accessed on 01 May 2016.

offences punishable pursuant to the legislation of Bosnia and Herzegovina and the legislation of the requesting State." However, this law does not go any further to specify in any way the dual criminality requirement.

Obviously, the BiH Law on IJC may be used to determine, first of all, how BiH authorities construe the dual criminality requirement requirement – *in concreto* (in the concrete sense) only or also *in abstracto* (in the abstract sense) as well. It would be important for other countries to know how BiH understands this essential requirement when they request this country for some extradition.

To find the better solution one should take into consideration that the extraditable offence always constitutes a crime both under the law of the requesting country and under the law of the requested country as well. In such cases, the offence meets the dual criminality requirement as it fulfills some legal description of a crime in the requesting country and also a legal description of a crime in the requested country as well.

Usually, a connection exists not only between the offence and each of the two legal descriptions which it fulfills to be an extraditable one. Also there is a connection between the two legal descriptions as well. This is, traditionally, a connection of a coincidence between the legal description of the crime in the requesting country and the legal description of the crime in the requested country. Such a coincidence may occur when the two descriptions are the same. Then, the coincidence is full. For example, the criminal offence is a theft or a murder and it is, expectedly, described in the same way in the Criminal Codes of the two countries.

The coincidence between the two legal descriptions may be a partial one only. In general, this is the coincidence between the whole and one of its parts. A typical example of such partial coincidence is the one between a consuming legal description and a consumed legal description as the former contains the latter. In such cases, to always have dual criminality, the offence shall satisfy a consuming legal description in the requesting country. This offence would inevitably fulfill the respective consumed legal description in the requested country as well: if the offence covers the whole, it would always cover any of its parts as well.

A good and understandable example of the partial coincidence in question might be the description of extortion in the Criminal Code of Macedonia and in the Criminal Code of Serbia where the former is the requesting country while the latter is the requested one. The Macedonian legal description of extortion is a consuming one because it requires

damage as well - Article 258 (1) of the Criminal Code of Macedonia, while the Serbian extortion description does not – Article 214 (1) of the Criminal Code of Serbia, appearing, as a result, a consumed legal description. Hence, when Macedonia requests extradition from Serbia in respect of some extortion, it is expected that the offence fulfills, first of all, the Macedonian description which includes required damage. Then the offence would inevitably fulfill also the corresponding Serbian description as it is the basically the same but without any requirement for damage. This is the reason why the offence which fulfills the consuming legal description in the law of the requesting country would always fulfill the corresponding consumed legal description in the law of the requested country.

In all these situations, when a coincidence between the two fulfilled legal descriptions exists, the dual criminality is *in concreto*. However, the two descriptions may not coincide but overlap only. In such a situation the dual criminality is *in abstracto* only. This dual criminality has not yet been recognized by all countries in the world.

The dual criminality in the abstract sense is subsidiary to the dual criminality in the concrete sense. Hence, this dual criminality is looked for when the legal description of the crime in the requesting country and the one of the crime in the requested country do not coincide. Most often, the two descriptions overlap when applied to the wanted person's conduct. In any case though, to have any dual criminality at all, it is always necessary that the conduct of the person in its totality satisfies both legal descriptions. For example, there is a crime in BiH called "Defiling a Grave or a Corpse"; it is in Article 379 of the Federation of BiH CC[7]. Many countries do not have any such a criminal offence but have criminalized the so-called "Hooliganism" [Bulgaria, Moldova, Ukraine, etc.] which is not a separate crime under Bosnian law. This is a crime of performing indecent acts, grossly violating the public order and expressing open disrespect for society.[8]

7) This crime is divided into two in some countries - see Articles 400 and 401 of the CC of Macedonia. However, the problem and the solution to it is the same.

8) For example, the Bulgarian text envisaging hooliganism is Article 325 of the CC. It reads: "*(1) A person who performs indecent acts, grossly violating the public order and expressing open disrespect for society, shall be punished for hooliganism by deprivation of liberty for up to two years or by probation, as well as by public censure.*
(2) Where the act has occurred with resistance to a body of authority or a representative of the public, fulfilling their obligations of preserving the public order, or where by its content it has been distinguished for its extreme cynicism or arrogance, the punishment shall be deprivation of liberty for up to five years".

In many cases the entire indecent conduct of the wanted person satisfies the legal descriptions of both crimes, namely: Defiling a Grave or a Corpse and Hooliganism. Certainly, the two legal descriptions cover different parts of the entire conduct. Nevertheless, and this is the relevant issue, both legal descriptions are satisfied. In such cases dual criminality in the abstract sense exists, if recognized by the requested country.

Given the two possible understandings of dual criminality, it is to be recommended to the BiH legislative authorities to specify what is acceptable to BiH. However, taking into account the latest developments of extradition law, it is recommendable that BiH lawmakers accept not only dual criminality in the concrete sense but also dual criminality in the abstract sense as well.

The BiH Law on IJC may also be used to officially specify on behalf of BiH the time with regard to which the existence of dual criminality is determined. It is undisputable that the deed (act or omission) in respect of which extradition is requested must be a crime in the requesting country all the time from the moment of its commission to the moment of the decision concerning the requested extradition. Otherwise, the requesting country can give no civilized justice[9] and extradition shall never be granted.

The situation with the requested country is more complicated. For countries such as Croatia, Germany and Sweden it is sufficient that the deed is a crime at the time of the decision on the incoming extradition request.[10] This is normal because extradition is a procedure mostly and for procedural laws relevant time is the one of the action or decision rather than the time of the occurrence of the fact that substantiates the respective legal proceedings. Such countries accept that dual criminality exists, even if they have criminalized the deed after its commission. It is sufficient for them that the criminalization takes place before the decision on the extradition request.

However, not all countries share the same understanding of dual criminality. For countries, such as the Czech Republic, Denmark and the UK, it is also necessary that the deed for which extradition is requested

9) See Article 15 (1) (i, iii) of the International Covenant on Civil and Political Rights.

10) See Compilation of replies to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition requests, *European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters*,, Council of Europe, Strasbourg, 5 March 2014 [PC-OC/Docs 2013/ PC-OC (2013)12Bil rev.3], p. 5-20.

was a crime at the time of its commission too.[11] Virtually, such countries require that the deed has been a crime all the time from its commission to the decision concerning the extradition and this shall be valid not only under the law of the requesting country but also under their own law as well. Otherwise, they would not accept that dual criminality exists.

It would be an appropriate step on behalf of BiH, if its legislative authorities clarify in the BiH Law on IJC the time with regard to which the existence of dual criminality is determined when BiH is the requested country. In any case, the first solution (of Croatia, Germany and Sweden) is recommendable as it takes into account the procedural nature of extradition while the second one is hardly compatible with it (of the Czech Republic, Denmark and the UK). In addition, the first of the two solutions is applicable easier. This makes it more pragmatic also.

There is also another issue that is solvable solely by the domestic law of the requested country. This is the problem whether it is sufficient that the offence, for which extradition is requested, simply corresponds to the legal descriptions of crimes in both countries, requesting and requested, or it is also necessary that none of the two legal descriptions is derogated by the legal description of some justification under the law of any of the two countries[12]. In practice, the problem occurs when the requesting country's authorities have not noticed an existing justification for the committed deed in respect of which they request extradition.

Such a justification may be envisaged even in the law of the requesting country, e.g. necessary defense. The typical situation though is when the justification, accompanying the committed deed, is envisaged only in the law of the requested country and the requesting country's authorities have not noticed it. Probably, the best example of such a justification is the so-called allowed (permissible, justified) risky act. Basically, any risk is a combination of danger and opportunity to achieve a serious positive result;

11) See Compilation of replies to the questionnaire on the reference moment to be applied when considering double criminality as regards extradition requests, *European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters*,, Council of Europe, Strasbourg, 5 March 2014 [PC-OC/Docs 2013/ PC-OC (2013)12Bil rev.3], p. 6-22.

12) Sometimes, this issue is also regarted as a criterion for the differentiation between dual criminality *in concreto* and dual criminality *in abstracto*. See Draft note on dual criminality, in concreto or in abstracto, *European Committee on Crime Problems, Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters*, Council of Europe, Strasbourg, 25 January 2012 [PC-OC/ Documents 2012/ PC-OC(2012) 02], p. 2-3.

the Chinese symbol (character) of risk best captures this duality: 危險. The existence of danger and possible harm to some values requires that the act targeting the positive result should be reasonable: the actor stands the possibility of being unsuccessful in the name of something really worth risking. When it comes to criminal law, in particular, the risky act becomes relevant when it not only causes some harm, like the one in the state of necessity, but is also unsuccessful[13].

Obviously, a requested country is hardly expected to surrender a person for prosecution, or/and execution of a punishment in respect of a conduct which is not only non-criminal but also lawful as well, as it is the case with justified deeds (as necessary defense, extreme necessity, etc.) given the "permissive" legal descriptions provided for them (Berman, 2005, p. 681 and Eser, 1976, p. 629). At the same time, it would be appropriate to send a clear message to all requesting countries' authorities that it is their sole duty to fully study and consider the law of BiH when it is the requested country. This is achievable by expressly specifying in the BiH domestic law on international judicial cooperation in criminal matters that, when determining dual criminality, existing justifications are also taken into account. Such a specification may be made in Article 33 [Extradition Allowed] of the BiH Law on IJC.

The problem with the priority of international instruments over national law appears within some bilateral treaties as well. Article 21.1, "B" of the Agreement between the former Yugoslavia (BiH is its successor) and Iraq is an appropriate example. This provision expressly postulates that extradition may be granted, if it does not contradict the internal national law of the requested country.[14] Thus, national

13) In contrast to the action undertaken in the state of necessity which must always be a successful rescue operation, the risky action in criminal law is an unsuccessful action, even though it was worth undertaking to gain something serious (experimental action) or to avoid some serious loss when no unrisky way existed to achieve the desired positive result. The legal description of allowed risk is subsidiary to the legal description of necessity.

Usually, this unsuccessful but acceptable risk is regarded as a justification of general significance. However, the idea of risk is so closely related to economic domain that some national criminal laws contemplate it only in the sphere of economy, e. g. Article 13a of the Bulgarian CC and Article 34 of the Lithuanian CC. Other national laws, e. g. Article 27 of the Polish CC, Article 41 of the Russian CC and Section 27 of the Slovak CC, codify risk in all spheres of social life (military activities, medical operations, pollution protection, sport, international relations, etc.).

14) It reads: "*Extradition shall be refused in the following cases: … (b) if the extradition is not permissible under the law of one of the Parties*."

law is given the opportunity to additionally provide an own ground for the prohibition to extradite, which to, eventually, override the general international obligation to extradite established by the same Agreement. As a result, the applicable national law of any requested country has acquired the legal force of the international agreement in prescribing grounds for refusal, at least. Obviously, this is unacceptable being contrary to the established and undisputable idea that national law is subsidiary to any international agreement.

It follows that blanket provisions shall not be used in international agreements to provide the same legal power to any national law as the rules of the international agreement itself. The legal technique materialized in blanket provisions is much more appropriate for domestic legislations. Any blanket provision of a given national law envisages specific by-law(s) to attribute it/them equal legal power as the one of the other provisions of the same national law. For example, Article 166 (1) of the BiH Criminal Code [Importing Hazardous Material into Bosnia and Herzegovina] contains a blanket provision which raises the level of the administrative rules governing the import of the said material to the level of the Code. The provision reads: "*Whoever, contrary to regulations of Bosnia and Herzegovina, imports into Bosnia and Herzegovina radioactive material or other material or waste harmful to the life or health of people, shall be punished by a fine or imprisonment for a term not exceeding three years.*"[15]

Finally, a factual hierarchy between international instruments in the penal area is also possible. Confiscation of crime-related property is a good example. For the purpose of successfully finalizing this difficult process, laws on international cooperation provide for two types of cooperation: judicial cooperation for criminal cases and purely administrative procedure for non-criminal cases designed to ensure the confiscation of criminal assets. The judicial assistance consists predominantly of execution of letters rogatory. There is no obstacle regarding their execution to collect evidence about the proceeds from investigated crimes and to use this evidence to substantiate the confiscation of these proceeds as well.

15) Article 24 (1) of the Turkish Criminal Code is another good example of a blanket provision. It reads as follows: "*No punishment is imposed for a person who complies with the mandatory provisions*". The latter provisions are given the necessary legal power to become equal to respective provisions in the same Code and, as special to them, exclude their application.

The international administrative procedure is comparatively new. It is more common between administrative agencies rather than between judiciaries of different countries. Most often, the cooperating administrative agencies are Financial Investigation Units. This international procedure is mentioned in a number of foreign countries' national laws which govern criminal assets recovery through non-criminal legal proceedings, such as: the Serbian Law on Seizure and Confiscation of Proceeds from Crime (2008), the UK Proceeds of Crime Act (2002), etc. International assistance matters are also regulated in Articles 48-59 of the Republika Srpska Criminal Assets Recovery Act (2010).

These national laws regulate the administrative requests related to criminal assets. Such requests may be used to eventually obtain information about the assets for the purpose of their confiscation. However, it should always be remembered that these requests are novelties and many countries are hesitant and even reluctant to respond to them.

Moreover, some national laws on criminal assets recovery expressly postulate that this international cooperation is rendered solely on the basis of international agreements (e. g. Article 92 of the 2005 Bulgarian Law on the Forfeiture of Criminal Assets to the Exchequer). This makes the administrative requests even less reliable. Therefore, one should comply with the following recommendation: if the same information can be obtained through both requests: the letter rogatory and the administrative request, the former should be preferred to the latter.

Administrative requests are less reliable for another important reason as well. They do not guarantee that information can be obtained in case of bank secrecy. This does not apply to letters rogatory. On the contrary, they are the truly appropriate means to obtain such information. According to Article 7 (5) of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 18 (8) of the UN Convention against Transnational Organized Crime and Article 46 (8) of the UN Convention against Corruption, *"Parties shall not decline to render mutual legal assistance ... on the ground of bank secrecy"*. Furthermore, all these Conventions postulate that mutual legal assistance ... may be requested for any of the following purposes: ...Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes – Article 7 (2) of the UN Convention against

Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 18 (3) of the UN Convention against Transnational Organized Crime and Article 46 (3) of the UN Convention against Corruption. Nothing of this sort has yet been prescribed in favor of any administrative request relating to criminal assets and their confiscation.

There is also another remarkable advantage of letters rogatory to administrative requests. It is that letters rogatory can more often be granted, even when the dual criminality requirement has not been met. To express and confirm this policy Article 46 (9) (B) of the UN Convention against Corruption expressly calls on its State Parties to consider providing such international cooperation in the absence of dual criminality, especially when the execution of the request does not involve coercive action.

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THE BALKANS AND THE EUROPEAN UNION

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Abstract

The Balkan question is both a historical and a political one. With the coming together of some European countries to form the European Union (EU); it became necessary for these countries to forge head both on the economic and the political fronts. This in essence has accentuated the gains made by these European countries but it has had its attendant ramifications. This notwithstanding, the idea of European integration on the principle of peace, common history, cultural and economic development cannot be fully realised since some sectors of Europe is neutral or isolated. The literature on the nature of such integrations especially the need for the integration of the Balkan regions should continue to be discussed and implemented. This paper however, looks at the literature from a social and political history point of view and projects the necessary turns that Europe has made and the need to come to a useful end in the discourse that leads us to observing or witnessing a united Europe whose socio-economic, political and military complex holds its own against the odds but also for the common good of humanity.

Keywords: *European Union; Europe; Balkans; Integration.*

Introduction

The roots of the European idea and the creation of the European community after the Second World War lie in the desire to prevent further war between European nations. According to Lucia (2012) one of the main goals of the original idea of European integration is defined as preserving peace in the Member States. Thus, the Europeans had seen the grave ramifications of war on the European territories.

More than two decades, the concept of a new Balkan community emerged as a counterweight to new aggressive and defensive nationalisms. The consequent idea to promote a common history of the region was also launched in political and intellectual environments,

which was the brainchild of European leaders. However, it important that the reconstruction of the Balkan history would not be a new construction to supersede the significance of national histories and the roles they play. It stands better to be a new interpretation of the national pasts based on a common Balkan cultural and institutional heritage. And it implies the introduction in history teaching of supranational elements as a counterweight to ethnocentric or even nationalistic historical narratives (Rudolph, 1992).

The clash between the historical approach and the mythological approach in the Balkans raises clear problems because it puts in contact and even in conflict two opposing political cultures (ibid.,). At the same time the situation is complicated by the fact that in the Balkans pre-industrial (tribal) societies coexist with industrial (national societies) and post-industrial (cosmopolitan) societies.

Clashes between these political cultures and the confrontational character of their relations breed terrorism, corruption, and organised crime, coupled with lack of economic development and incomplete democracy. This, according to Lowenthal (1996) is the third stage of the balkanization or rather the third balkanization, that is, balkanization after balkanization after balkanization, which makes any prospect of a stable, positive and rational order in the region even more problematic.

In the midst of all these challenges the region faces the big question of her status in the European Union (EU). The Balkan region has been in deep struggle trying to define their status in the EU. Over a decade now, various measures have been instituted to Europeanise the Balkans of which the enlargement has become a hook in the neck.

Greece in particular is becoming a burden on the EU. Greece might have failed the EU by its poor economic performance or probably the EU might have also failed Greece for refusing their own member a bailout. This is one of the pendulums hanging around the EU's neck. The recent signal that Britain is pulling out of the EU is another pendulum. The position of the Balkans in relation to the EU is an important issue for consideration and must therefore be discussed. This article discusses the possibility of Balkan integration into the EU and the impact of this integration on Balkan national politics, domestic economies, and the way forward with such a region with several national minorities. It attempts to establish the possibilities of peaceful cooperation and cohabitation among the Balkans in the EU.

Theoretical Background

The Balkan region have been engulfed in serious controversies over the definition of nationalities and citizenship. Balkanisation and Debalkanisation have taken a swipe at the regions peace, stability and economic prosperity. The European Union is currently battling with its own challenges as Britain makes moves to dismember. In the midst of this, the Balkan region still beckons for solutions to its problem of integration. The current status of the Balkan region in the eyes of the European Union still hangs around the neck of the EU. We therefore seek to make a case for the mechanistic integration of the Balkan region into the EU. We want to analyse the controversies, challenges and possibilities of the successful entry of the Balkan integration into the European Union. Therefore, this study has been conducted by reviewing research articles and key policy documents of the EU to arrive at logical conclusions on the future of the Balkans with the EU. Considerations have been given to peculiar circumstances that apply to a particular group of Balkan countries and also unique circumstances.

Anastasakis (2005), argues that "despite many negative predispositions towards the Balkans and the pejorative notion of Balkanization, there is no doubt that the region is part of Europe and that the current EU-led reform genuinely aims to bring the region back into Europe's fold." Anastasakis believes that, Europeanisation took a new turn after the fall of communism where the EU began to expand to the Balkan region. However, the EU is nearly getting tired instituting stringent measures for Europeanisation of the Balkans.

Brennan (2013) posits that The EU is now not only a direct neighbour of the Western Balkans, but also the most important economic, political and geopolitical actor in South Eastern Europe. Like Anastasakis (2005), Brennan believes that the EU in a period of "expansion fatigue" with its successive enlargements coupled with protracted economic crisis, which has enveloped the Eurozone since 2008 and has thrown the very survival of the EU into doubt. From a widely acclaimed perspective, Vesnic-Alujevic (2012) argues that the major problem effecting relations between the countries remains the public discourse on wars, which is still segregated according to partisan sides.

Grabbe et al. (2010), at the European Council on Foreign Affairs, think that the EU has been pursuing a wait-and-see policy. They argue that in the midst of a huge economic crisis, the EU leaders may be

tempted to put off any further decisions on enlargement. However, now that some of the Western Balkan countries have tested the EU's commitment by formally applying for membership, they believe the wait-and-see approach is unsustainable.

As a matter of fact, the EU has kept six of the countries of the Western Balkans–Albania, Bosnia-Herzegovina, Kosovo, Macedonia, Montenegro and Serbia – waiting for a decade. And these countries have are good examples of the EU's wait-and-see tactics. The EU has asked them to take on difficult and ambitious reforms to prepare them for membership. However, Balkan leaders are no longer even sure that the EU members really want them in the club. As a result, Grabbe et al. (2010) opines that the EU's credibility is fading in the Balkan region.

The Balkans in Europe Policy Advisory Group(Policy Paper May 2014) has indicated that the Western Balkans had experienced more than a decade without armed conflict and were eligible to accession but for the expansion fatigue (Brennan, 2013; Grabbe et al, 2010). At this point, the Western Balkans has experienced more than a decade without armed conflict. That the violence of the previous decade has taken its toll on the region, not only in terms of death and displacement, but also by delaying the region's ability to catch up with the democratization process, which began a decade earlier, has been corroborated by Brennan (2013).The Groups' assertion that controversies over the war past of post-communist Central and Eastern Europe, whilst controversies over the past continue to haunt political debates could therefore be logical.

According to Lasheras (2016) competition continues to take shape as Europe and the Balkans struggle to deal with a refugee crisis of unprecedented scale. He adds that EU has been slow to assist the countries along the Balkan migrant route and has largely failed to craft joint solutions (Brennan, 2013; Grabbe et al. 2010; Balkans in Europe Policy Advisory Group, 2014).

Lasheras continues that the crisis has in a sense reversed the traditional roles of the EU and the Balkans as the EU has become a net exporter of instability to the region. Thus, the legions of refugees who entered the Balkan region in 2015 came from a member state – Greece – and ended up being stuck in the region as EU member states further north blocked their passage. Lasheras believes that the crisis has strained bilateral relations, fuelled long-standing animosities, and strengthened illegal networks and organised crime.

Consequently, the EU's reluctance towards Europeanisation of the Balkans has become more conspicuous. Thus, out of all the Western Balkans, only succeeded in joining the Union in 2013; some 13 years after the launch of a formal process to expedite actions on integrating the Balkans. The rest of the region remains still distant from accession for the foreseeable future and some countries, for instance Turkey, has less hope due to "enemies from within". In addition to the challenges of political and economic transformation, Albania, Bosnia and Herzegovina, Kosovo, Macedonia, Montenegro and Serbia remain weak states with dysfunctional institutions, notwithstanding the considerable diversity among them.

Grigor'ev and Severin (2007) also argue that in favour of the Balkan stability as a the paramount reason for not seeing their dream come true. According to Lehne, there are several explanations for the marked differences in the progress of the West Balkan countries in the Stabilization and Association Process. *One factor* is the historical accident. Serbia and Montenegro, for instance, could only begin the process after the fall of Milosevic in October 2000, at a time when negotiations on a Stabilization and Association Agreement with Former Yugoslav Republic of Macedonia were well under way (Morari, 2012).

Grigor'evand Severin, furthermore, holds the position that the current power disequilibrium in the Balkans has a strategic character and it still has, at least in the medium term, the capacity to destabilize the entire continent of Europe. They claim that the solution for the frozen, active or latent Balkan crises is to be found at the intersection of the conflicting interests of the regional and global actors with the conflicting interests of the local actors. Grigor'ev and Severin are skeptical where the conflicting interests are placed in this circumstance?

To this extent, the Balkan dilemma is a still a problem under discussion. The issue of Balkans and the European Union have gain some level of recognition by several researchers. Some of the researchers discussed here focused on individual Balkan experiences. It is the aim of this work to present a composite picture of the fate of the entire region in their attempt to join the European Union.

The Balkans

The term "*Balkan*" comes from a Turkish word meaning "a chain of wooded mountains". The Balkan Peninsula may be defined as an area of southeastern Europe surrounded by water on three sides: the Adriatic

Sea to the west, the Mediterranean Sea (including the Ionian and Aegean seas) to the south and the Black Sea to the east. Its northern boundary is often given as the Danube, Sava and Kupa/Kolpa rivers.

The term "The Balkans" covers not only those countries which lie within the boundaries of the "Balkan Peninsula", but also include Slovenia, and Romania. Slovenia, which was part of Yugoslavia from 1919 to 1991, lies partially north of the Danube-Sava line and therefore outside the Peninsula, but prior to 1991 the whole of Yugoslavia was considered to be part of the Balkans (Ibid.,). In most of the English-speaking world, the countries commonly included in the Balkan region are: Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Macedonia, Montenegro and Serbia. Other countries sometimes included are Moldova, Romania, Slovenia, Turkey. (ibid.,).

Zemon (2010), has said some Balkans trace their heritage to Egypt. According to him Egyptian cults and their monuments were highly present in the Balkan Peninsula during the Roman Empire. He continues that some of the Egyptian monuments were brought by Roman legionnaires, officials, servants etc.

On the other hand, the Croatian Egyptologist Selem (1987) states that around that time assimilated Egyptians could be found among the Balkans citizens in provincial colonies and municipalities, as slaves or equal people, and Egyptians that are not assimilated do not accept Hellenistic-Roman forms of their gods, intending to keep their monuments in the native Egyptian language but were in a socially excluded position. Zemon stresses that this situation was characterized for "Egyptians in Salona (near Split) and near islands, belonging to the lower classes", who were probably small traders or craftsmen.

In fact, Europeanization as an identity formation project can be defined by its relationship or juxtaposition with the civilizational "other" (Anastasakis, 2005). Therefore, Zemon's position on the identity of the Balkans suggests that the Balkans might be a different 'breed' whose historical background flaws their European identity.

The issue of the Balkan Egyptians' identity, ethno-culture and history is one of the hardest scientific problems. Bearing in mind that a history is not an issue of the past, but an answer to the needs of modern life, it is also very important to find a way, how a particular historical context or tradition is used in the current process of construction of identity (ibid.,).

Often times in history, the people of the Balkans are portrayed as war-like and blood thirsty. This is because the region has recorded high

levels of instability than any other in Europe in modern times. Before World War I, the area was known as 'the powder keg of Europe' and the assassination of Archduke Franz Ferdinand is often seen as the trigger that led to the first World War which still hangs around as a matter of controversy. As to whether or not the people of the Balkans region are incapable of peace, time will surely tell.

The Balkans and the European Union

On November 1, 1993, the Treaty on European Union (also known as the Maastricht Treaty), established the modern-day European Union (EU) which encompassed the European Community. The Maastricht Treaty established the EU with three main pillars as the guiding principle: an expanded and strengthened European Community; a common foreign and security policy; and common internal security measures.

The Maastricht Treaty also contained provisions that resulted in the creation of an Economic and Monetary Union (EMU), including a common European currency which is the Euro (£). The roots of the European idea and the creation of the European community after the Second World War lie in the desire to prevent further war between European nations. One of the main goals of the original idea of European integration is defined as preserving peace in the Member States (Schuman Declaration of 1950; Vesnic-Alujevic, 2012).

And this was to be the ground preparation for a broader agenda of a buoyant and prosperous European Community. However, this prosperity was not designed for the entire European region from the onset as the Balkans for the equation. The EU was not always as big as it is today. When the European countries decided to cooperate economically in 1951, only 6 countries (Belgium, Germany, France, Italy, Luxemburg, and the Netherlands) participated. Over time, more and more countries decided to join. The EU reached its current size of member countries with the accession of Croatia in July 2013. Indeed, the journey of the Balkans to the EU has much to talk about.

At the Thessaloniki summit in 2003, the European Council declared that "the future of the Balkans is within the European Union". There was no ambiguity that this political commitment taken by EU heads of state and government—together with those of the Western Balkans—was a clear promise. It provided for a strong incentive for the societies of the Balkans by the EU and seemed to entail the promise that the future

of the region will be stable, prosperous, and within the EU. However, more than a decade later, the promise is still yet to come to fruition. Of the seven countries of the Western Balkans, only Croatia has succeeded in joining the EU (European Communities, 2005; Balkans in Europe Policy Advisory Group Policy Paper, May 2014; Grabbe et al., 2010).

Successive U.S. Administrations and many Members of the U.S. Congress have long backed EU enlargement, believing that it serves U.S. interests by advancing democracy and economic prosperity throughout the European continent. Over the years, the only significant U.S. criticism of the EU's enlargement process has been that the Union was moving too slowly, especially with respect to Turkey. Some U.S. officials are concerned that "enlargement fatigue" as well as the EU's economic and financial troubles, which have hit the countries that use the EU's common currency (the euro) particularly hard, could potentially slow future rounds of EU enlargement (Archick and Morelli, 2014; Brennan, 2013).

After five successful waves of enlargement, the European Union, despite all debates, is still poised for action to receive new members. At present, clear prospects for European Union membership have the countries of the Western Balkans – Croatia, Former Yugoslav Republic of Macedonia (FYROM), Serbia and Montenegro followed by potential candidates Albania, Bosnia and Herzegovina as well as Kosovo.

Western Balkans countries first had to extricate themselves from the shackles of colonialism. After obtaining their independence, they had to face a lot of problems that became more distinguishable along with the decision to join the European Union. The western Balkan countries have opted for Europe. The Stabilisation and Association Process (SAP) is the EU's political strategy for the European integration of the western Balkan countries, all the way through to their eventual accession. Regional cooperation amongst the western Balkan countries constitutes a key element of the SAP: constructive regional cooperation is recognised as a qualifying indicator of the countries' readiness to integrate into the EU (European Communities, 2005).

From the EU perspective, it is important to underline that Croatia is the first candidate country that actually acceded to the EU according to the 'regatta principle'. It is also worth mentioning that the Croatian accession has taken place at the moment when the EU itself is facing considerable internal problems and rising enlargement fatigue, coupled with the reformation fatigue among the countries in the region. Therefore, its accession represents an important signal that the

enlargement process has not ended (*Croatian Membership in the EU – Implications for the* Western *Balkans,* 2013).

However, the fact that the accession process has been successfully concluded opens the possibility for political elites and citizens alike to scrutinise the reforms and accession process critically and exercise additional pressure onto respective governments to intensify efforts for the reforms which is a process far from over.

The improvement of the social and economic situation of these states were noticed mainly after the Stabilization and Association Process was started by signing of the Stabilization and Association Agreements, that were adopted by European Union in the 1999 and represents the European Union's renewed long-term commitment to the region. The agreements have the mission to bring closer the Western Balkan countries to the European Union by introducing European values, principles and standards in the region and create such a favourable context for accession (Morari, 2012 cited from Serbos, 2008, p. 97).

Association Agreements are signed with Central and Eastern Europe countries and then Action Plans are prepared in the scope of these agreements. Neighbourhood Policy foresees the benefiting of neighbour countries from EU enlargement with regards to stability, security and welfare. This aim is to emphasized in the European Security Strategy approved in 2003.

Strategic aims which are indicated in the European Security Strategy Document forms the basis of which "European Neighbourhood Policy Broader Europe: A New Framework for Relations with Southern and Eastern Neighbourhood" was prepared by the Commission in March 2003 and European Neighbourhood Policy Strategy Document was published in May 2004. According to Ledge (1993), through this document, EU has put forth how close links may be provided with the countries qualified as neighbours (Karluk, 2015, pp. 57-70).

The First Stabilization and Association Agreements were signed with Former Yugoslav Republic of Macedonia on 9 April 2001 and Croatia on 29 October 2001. Both of states started the implementation of the agreements before they came into force. This is an indication of desperate Balkan countries yearning to enter the EU. The situation of the other Western Balkan countries is different, the progress being more modest. Albania signed the Stabilization and Association Agreement only in 2006, Montenegro in 2007, Bosnia and Herzegovina in 2008, as well as Kosovo and Serbia. Serbia was conferred the candidate status on

1 March 2012 (European Commission, 2012; Karluk, 2015). In 2011, a novel and more rigorous approach was proposed by the European Commission, and endorsed by the Council, building mostly on lessons from the EU's eastward expansions.

The EU's increased focus on 'good governance' criteria (such as maintenance of rule of law, independent judiciary, efficient public administration, the fight against organised crime and corruption, civil society development, and media freedom) was visible already during Croatia's accession. However, this is the most critical condition that appears most Balkans may find difficult to meet, bearing in mind that these countries are fragments of former nations and hence, young in self-governance.

Yet this new strategy was for the first time reflected in a formal manner in the framework adopted in June 2012 for negotiations with Montenegro, which foresees that Chapter 23 (on Judiciary and Fundamental Rights) and Chapter 24 (on Justice, Freedom and Security) are opened in the early stages of the talks and closed only at the very end of the process.

The same approach was then fully integrated in the EU's negotiations with Serbia, which kicked-off in January 2014, and will continue to be observed in all future accession talks with the remaining countries in the Balkans. Moreover, the heavy weight of rule of law issues can be felt now also before the actual negotiations, as was amply demonstrated, for example, by the key priorities set out in past years with a view to allowing Montenegro and Albania to advance on their respective EU paths (Stratulat, 2014).

The Way Forward

The European Union's enlargement process has entered a new phase. The completion of accession negotiations with Croatia, opening the way to membership in mid-2013, perhaps, have vindicated the policy adopted in the aftermath of the devastating Balkan conflicts of the 1990s, which aims to bring peace, stability, democracy and ultimately EU membership to the whole region. This may be good evidence for the transformational power of the EU's enlargement policy, since it provides new momentum for reform in all enlargement countries (European Commission Report, 2011).

The turbulent history of the region is the reason why the EU defines as its main priority the preservation of peace, democracy, good governance

and stability, on which basis each country builds its political and economic life. Monitoring the political climate which main characteristics are good governance, political stability and effective dialogue between the institutions within each country is extremely important for the future of the region as a whole (Aleksieva and Panayotova, 2011.

This combination of anxieties related to institutional, political and economic pressures inside the EU, as well as to daunting regional and country specific issues in the Balkans, led to a more complex mosaic of EU demands on the Balkan countries, and to a more exacting method of applying the enhanced membership conditionality. The criteria formulated by the 1993 European Council in Copenhagen remain the blueprint for accession and require any aspiring country to have stable democratic institutions, a functioning market economy and the capacity to adopt and implement the ever-larger body of EU law (the *acquiscommunautaire*).[1] However, these conditions have acquired a very precise meaning for the Balkans (Balkans in Europe Policy Advisory Group Policy Paper, 2014).

Presently, they are all declaratively representative democracies showing higher or lower levels of applied democratisation. However, there are many bilateral issues between neighbouring countries within the region. The relations between these states are still burdened by the past wars. One of the major issues that these countries need to deal with in order to advance bilateral relations, and also in order to gain access to the European Union, are border issues between the respective countries. This has been the very cause of most of their wars.

The problem with borders appeared in the context of the question of whether the post-Second World War borders should be kept or whether the situation was to be returned to the period before the Second or even the First World War, that is, before the creation of the Kingdom of Serbs, Croats and Slovenians in 1918. Countries are raising these issues because of potential profit to be gained from it in terms of, for instance, access to the open sea, roads, maritime roads, and so on (Vesnic-Alujevic, 2012).

Also, is the problem of refugees and internally displaced people. The refugee crisis has been both internal and external problem of the European Community. Greece for once produced refugees in the

1) The *acquiscommunautaire* is the accumulated body of EU law and obligations from 1958 to the present day. It comprises all the EU's treaties and laws (directives, regualtions, decisions, declarations and resolutions, international agreements and the judgments of the Court of Justice.

Balkan region recently, coupled with the refugees from the Arab spring. Another issue which is related to the past wars is the problem of the residual emotional trauma still being confronted by the citizens of these states (Vesnic-Alujevic, 2012).

For one, the EU's overall approach to the region is based on a strong security dimension, with its own repertoire of action, including various peace agreements, international agreements[2] and political agreements starting from the Stabilization and Association Process; and the multilateral Stability Pact for Southern Europe – replaced by the Regional Cooperation Council in 2008. These set additional and politically-sensitive conditions – the "Copenhagen Plus" criteria – to be fulfilled by the countries of the region before accession, when the EU has learned that its leverage was most (Balkans in Europe Policy Advisory Group Policy Paper, 2014).

A successful journey into the EU would also entail a study economic environment among the Balkans. At least for most Balkans, regional trade liberalisation is progressing. A network of bilateral free-trade agreements among the countries of the region, including Romania, Bulgaria and Moldova, has been established, thus creating a free-trade area of 55 million consumers. This sends an important signal to the investor community, which will find a market of high absorption potential for industrial and consumer goods. To reap the full benefits of trade liberalisation in the region, the free-trade agreements need to be fully and efficiently implemented. The countries of the region committed themselves to complete the network of free trade agreements (European Communities, 2005).

Trade among south-eastern part of Europe is fully in keeping with the EU perspectives of the different countries in the region, independently of where they stand on their way to membership. Trade liberalisation and facilitation isone of the pillars of the Stabilisation and Association Process (SAP): a main instrument of the SAP is the autonomous trade measures that the western Balkan countries enjoy which includes free access, without quantitative limit, to the EU market for practically all products (European Communities, 2005). This usefulness of this opportunity will be highly dependent on the Balkan's ability to produce. They should brace up for hard work; they should be prepared for high levels of industrialization to match up the European economic area; whiles been aware of the political terrain of the European communities.

2) Such as UN Resolution 1244 and the Dayton, Kumanovo, Ohrid, and Belgrade agreements, and the normalization of Serbia-Kosovo relations

Most countries who have undergone or qualifies for enlargement process have maintained overall prudent macroeconomic policies. Fiscal consolidation and the reform of labour markets remain the most urgent short-term priorities, reflecting largely similar challenges to those presently faced in the EU. More structural reforms would be needed to boost competitiveness and improve the investment climate, which will attract foreign direct investment, fostering job creation and ensuring the sustainability of growth.

Significant progress is being made on forming a regional energy market and rebuilding infrastructure. The projected south-eastern Europe regional energy market, which should provide modern and liberalised gas and electricity systems, will be key to a regional energy market based on European standards, transparent rules and mutual trust, and it will set the right environment for the optimal development of the energy sector. The agreement governing energy trade will substantially contribute to attracting investment into this strategic sector.

This new economic environment would require a comprehensive transport policy with effective cost-sharing definitions, bearing in a region that still recovering war trauma. An integrated regional transport strategy, consistent with the trans-European networks and taking into account the pan-European corridors, should be a high priority. The EU has been noted supporting projects of regional significance and regional initiatives in the areas of environmental protection, science and technology, information and communication technology, and statistics. This will be a cause worth supporting, to expedite actions towards the integration of the region.

Conclusion

In a nutshell, aspiring countries must now get a head start on rule of law reforms, develop a solid track record of results and adopt inclusive democratic processes (accommodating parliaments, civil society and other relevant stakeholders) to support their national European integration effort.

Stabilisation of the Balkan region and ensuring prudent security measures, development of sound economic policies, are paramount to successful EU integration. The Western Balkans, in particular have the responsibility to, improve the capacity of public administration, and strengthening the rule of law, including by reforming the judiciary

and combating widespread corruption present particular challenges. Progress in these areas would also be conducive to the business environment and the Balkan region would not be far from seeing their dream come true.

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URGENT REFORMS TAKING THEIR TIME IN THE REPUBLIC OF MACEDONIA

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Abstract

Since 2001, the Republic of Macedonia had gone through several waves of international and national actions, which resulted in requests of the international community, primarily by the European Union, for systemic reform processes. The first wave came with the Ohrid Agreement, which brought armed ethnic-based conflict to an end. The second one emerged due to the usual association and accession commitments of a candidate state since 2005 and implementation of the Road Map for Visa Liberalisation between February 2008 and July 2009. The third wave came out of a severe political crisis in 2015, which had revealed a series of systemic and democratic deficiencies – from illegal interception of communications and political pressure against the judiciary, to violations of media freedoms and principles of fair elections. In June 2015, a Senior Expert's Group summarised a set of recommendations for the European Commissions in a document titled: *Urgent Reform Priorities for the Former Yugoslav Republic of Macedonia*. This paper analyzes Macedonian slow path of reforms, affected by deficient inter-ethnic confidence, political tensions, decentralisation, administrative and political culture in the Macedonia and shortcomings within the of the rule of law.

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Introduction

At the time of declaration of independence, the country was economically weak and still had to establish state structures and ensure rule of law. In 1990, very few citizens of Macedonia actually believed that their republic would be able to survive the separation from Yugoslavia, due to its, at the time, systemic deficiencies but also due to the fact that Macedonian Albanians did not appear to be overly entusiastic to live in an independent state maily ruled by Macedonians, i.e. Macedonian Slavs (Richard, 2003, p. 404; Cowan and Brown, 2000, pp. 1-28; Philips, 2004, pp. 48-79).

As in other states that originated from the imploded state, Macedonia suffered from collapse of social and political cohesion, very defficient

rule of law which had directly resulted in a significant increase of criminal activities, economic system unfit for liberal market conditions, corruption and violence. Sixty-eight per cent of voters voted in favour of independence in the referendum held on 17 September 1991 (Alice, 2000, p. 142). Already in December, the European Community stated it was ready to recognise all former Yugoslav republic as independent states, under condition that they comply with political, territorial and human rights. The first blast came from the southern neighbour. Claiming that the constitutional name of the Republic of Macedonia belongs to Greek exclusive cultural heritage, it had made a series of blockages for the new born state, which, among other, resulted in withdrawal of the statement of the European Communities vital for further processes related to proper state building and development of international relations (Shea, 1997, pp. 278-311). Interim Agreement of 7 April 1993 which enabled international recognition of Macedonia as the Former Yugoslav Republic of Macedonia was to be an agreement of temporary nature. More than two decades of unsuccessful negotiations strongly indicate that no compromise is good enough for neither of the two parties involved in the name dispute. After the independence of Macedonia, except the aggravated relations with Greece, the relations of Macedonia with neighbor countries like Bulgaria and Serbia faced different challenges. The consideration of Macedonian language as a dialect of the Bulgarian language, the thesis of the Bulgarian scientists on the history and on the origin of the Macedonians and the project of 2014 of Shkup, are simply some of the components that have challenged the relations of these two neighbor countries. On the other side, the lack of the recognition of the Serbian Church about the Macedonian Church has always affected the bilateral political relations among Serbia and Macedonia (Ibid., p. 327).

The early 1990s in the new state were marked with serious lack of inter-ethnic confidence, often resulting in riots and increasing demands for increased participation of Macedonian Albanians in the state structures and insisting on a possibility for education in Albanian language, which escalated in the case of first attempt of opening the Tetovo university[1] in part of the country mainly populated by Albanians in 1994 (Bumci, 2001, p. 34-36). The state structures, at the time dominated by Macedonian

1) The University of Tetovo was formalized in January 2004, by bringing in the Law from the Parliament of the Republic of Macedonia for the foundation of the State University of Tetovo, due to the rights gained by the Agreement of Ohrid.

Slavs, surpressed the attempt. Albanians had also insisted on being allowed to use their ethnic symbols such as the flag and coat-of-arms in official communication and on personal documents. This fragile and poor state in its early days of independence also had to deal with waves of refugees from Bosnia and Herzegovina in 1992 and from Kosovo in 1999. Spring of 2001 brought along tensions not only on the border with Kosovo[2], but also between two main ethnic groups in the western part of the state, significantly populated by Albanians. The conflict ended after an extensive international intervention led by EU's representatives Xavier Solana and Lord Robertson, and US envoys Francois Leotard and James Pardew. They mediated brokering of the Ohrid Peace Agreement[3], which has been envisging introduction of Albanian language into official use and into the system of education, increase of number of Albanians in the public services and administrative decentralisation (Philips, 2004, p. 188).

With its agreement with the European Communities of January 1998, Macedonia officially commenced its formal interaction with EU structures related to Macedonian integration in to this sui generis. Soon after, the Parliament got two new committes for integration into the EU and NATO. The Parliament also adopted a strategy for EU integration. Already in February 1998, Macedonia had initiated a political dialogue with the United Kingdom Presidency of the European Union (Azizi, 2016, 144-147).

According to Philips (2004) back then in 1998, some speculated that Macedonian Slavs needed an incident, similar to the one just prior to a Summit of Balkans prime ministers on 22 and 23 February, to shift the focus away from the scandal with illegal interception of telephone calls, which was organised by the Macedonian nationalists, famously known also as Internal Macedonian Revolutionary Organisation-Democratic Party for Macedonian National Unity (VMRO-DPMNE).

In 2001 Macedonian GDP dropped by eighteen per cent and as a result the international financial institutions got involved in management of public finances in order to soften immensly negative economic effects in the country (ibid., p. 185). Same year, the World

2) In February 2001, a conflict broke out in the village of Tanuševci near the border, after Belgrade agreed with Skopje that this village of some 400 people, mainly Albanians, should be a part of Macedonia on basis of the bilateral border agreement. This agreement will remain a source of tensions between leaders of Macedonian Albanians and Slav dominated Macedonian authorities throughout 2003 as well.

3) Text of the Ohrid Peace Agreement available on: http://www.coe.int/t/e/legal_affairs/legal_co-operation/police_and_internal_security/OHRID%20Agreement%2013august2001.asp viewed on 15 September 2016

Bank, the European Union and some fourty individual donor states had committed to provide Macedonia with the total of 241 million USD for general economic development and additional 247 million USD for financing the reconstruction. The Government had expected 77 million USD less (World Bank). There was a general fear that the tensions could transform into the last war for pieces of former Yugoslavia which could be the most dangerous one, with strong spillover potential and serious regional implications.

The Rule of Law and the International Committments

Along with its usual responsibilities and committments that originated from both association and accession processes, the European Commission tasked in June 2015 the country to urgently fix serioues systemic shortcomings in the field of the rule of law and judiciary, public administration and media freedom. It is of utmost significance to focus on the rule of law part of the set of urgent reforms and the context within which the need for this has developed.

Macedonia has been an EU member state candidate since December 2005 and due to political instabilities, it is a living proof that the candidate status does not mean much if a country decides that European integration does not constantly remain the top priority of the state, regardless of immediate challenges, elections, sharp political and ethnic-based divisions and unpopular reforms that need to be made and very often. The Stabilisation and Association Agreement between the EU and Macedonia entered into force in April 2004. The Commission first recommended opening of accession nefgotiations with the country in 2009 to the European Council (ibid., p. 115).

The Ohrid Peace Agreement continues to be the main element for democracy and the rule of law. It has in one hand, provided disarmament of Albanian rebels and in the other provided education in Albanian language[4] and improved represenatation of Albanians, Roma and Turks in the civil service and law enforcement agencies. Macedonia has had very good cooperation with the International Crimes Tribunal in the Hague, which was a sumbling block for progress of many countries of former Yugoslavia on the European path. In order to cover suspects that

4) The formalization of the State University of Tetovo (2004) and the opening of the state university of Nënë Tereza in Shkup (2016) are tangible results of the Ohrid Agreement in the sphere of the education and schooling advancing of the Albanians of Macedonia.

have not been processed by the Tribunal, the Parliament adopted an authentic interpreration of the Law on Amnesty in July 2011.

The Republic of Macedonia had adopted Council Decision (2011) to support to the International Criminal Court, but the country has never withdrawn from the bilateral agreement with the United States of America of 2003, that exempts citizens of this country from the Court's jurisdiction. As this is not in accordance with the comon positions of the EU on integrity of the Statute from Rome, this country needs to harmonise its bilateral relations with this position of the European Union (Progress Report for FYRoM of 2015, p. 22).

In 2010, Macedonia had been chairing the Committee of Ministers of the Council for six months with focus on three priorities: Strenghtening of human rights, integration and respecting diversities and promotion of youth participation (Council of Europe's Press Release). To a large extent, this was a reflection of challenges that Macedonia has been facing enterally for years now and spilling over these priorities to the inter-state arena had proven to be also good for the general political climate in the country. A number of events and actions on these topics took place in the country between May and November 2010 which discussed the need for improvement of position of vulnerable groups of people, affirmation of dialogue on the Ohrid Agreement among the youth, integration of people with disabilities, religious dimension of the multicultural dialogue, etc.

Due to its increasing political instability, the European Union signed a Protocol[5] with the main political stakeholders in the country on 2 June 2015[6], putting the opposing forces in a coalition in the executive, and demanding extraordinary elections to be held. These parliamentary elections were to be held on 24 April 2016, then 5 June 2016. According to the decision reached on 31 August 2016 by Macedonian ruling political parties, the elections are to take place on 11 December 2016.

5) So-called Przino Agreement. This agreement was signed by the four leaders of the largest political parties in the Republic of Macedonia: Nikola Gruevski, Zoran Zaev, Ali Ahmeti and Menduh Thaci.

6) Text of the Protocol: https://ec.europa.eu/commission/2014-2019/hahn/announcements/agreement-skopje-overcome-political-crisis_en viewed on 20 September 2016.

Reforms for Stabilisation and Reaffirmation of the European Integration

The country previously treated some systemic anomalies that periodically reocur. The opposing Social Democrats of Macedonia, SDSM revealed in 9 February 2015 a new illegal interception affair and a number of omissions within the system of rule of law and law enforcement. The European Commission marked the period of 2014 and 2015 as the country's worst political crisis since 2001 (Progress Report for 2015 of the European Commission). Following intervention of the European Commissioner responsible for enlargement and neighbourhood policy and representatives of the European Parliament[7] in June and July, SDSM MPs rejoined the Macedonian Parliament after almost a year long boycott. The EU's involvement resulted with a conditionality set called „Urgent Reform Priorities", as developed by a group of senior EU experts (Urgent Reform Priorities Report, p. 2). Also, inter-ethnic tensions were particularly high in spring 2015, following a police intervention in part of Kumanovo populated by Macedonian Albanians, when 18 lives were lost. Among other, content of intercepted communication had revelaed strong political involvement in appointments in both the judicial system and public service.

The Senior Experts' group was led by Reinhard Priebe, a Commission official who got recently retired after having spent a significant part of his service as a political director of the European Commission for the western Balkans. The experts consulted many: relevant representatives of all three pillars - the legislative, the executive and the judicial, non-governmental organisations, lawyers, journalists and international organisations. The group identified five groups of shortcomings in the Republic of Macedonia: interception of communications, judiciary and prosecution services, external oversight by independent bodies, free elections and media freedoms (Urgent Reform Priorities report, p. 2). While the experts generally complimented quality of the legislation relevant for these areas, it has also pointed out that there is a lack of proper, objective and unbiased implementation and called for urgent changes. The Ombudsman, the State Election Commission, Directorate for Personal Data Protection, as well as other regulators and civil society organisations have been identified as the key institutions for ensuring urgent, open and transparent implementation of the recommendations. In addition, the experts insist that there should be a better oversight

7) MEPs involved were Ivo Vajgl, Richard Howitt and Eduard Kukan

over intelligence services and a truly independent judiciary. Because nature of these reforms was urgent, the experts did not see the need for setting deadlines for individual interventions and reforms.

Luan (2014) explained that when it comes to judiciary, the experts demanded true depoliticizing of appointment and promotion of judges and prosecutors, a harmonised system for measuring performance in both qualitative and quantitative terms, inappropriate elements for introduction of disciplinary measures and dismissal of judges, more precise parameters for appointment of members to the Judicial Council, consistent encouragement of pro-active role of the Judicial Council. The experts also insisted on improvement of capacity building of employees in the judicial and the rule of law segment and transparency of decisions reached within the system. Deadlocks and lengthy proceedings resulting with so called "old cases". The country's commitment to execution of al ECtHR judgments has also been highlighted.

Concerning the prevention of further cases of illegal interception of communications, the experts recommended establishment of a functioning judicial and parliamentary oversight of interception of communications. They also strongly recommended limiting mandate and competences of the Security and Counterintelligence Agency and clarification of roles of different stakeholders in the process – from the telecommunication operators and police to security and defence agencies.

According to independent monitors of implementation of the reforms, the depolarization in appointment of judges and prosecutors still did not take place and neither is the system for performance monitoring. The requirement for mending the provisions related to disciplinary measures against judges and their dismissal is also not being implemented by the Macedonian authorities. Criteria for appointments to the Judicial Council are still not improved. Capacity building and the remarks related to improvement of judicial pro-activeness are still just starting to evolve through professional and public debates. Series of actions have been undertaken on making the judicial decisions and deadlines for their implementation public and transparent, but the recommendation still needs to be completed fully.

On 12 January 2016, the Judicial Council has adopted an Action Plan for resolution of pending or so-called "old cases" and has just begun with implementation of the document. In addition, efforts on moving more quickly on execution of ECtHR judgments are increasing but are still insufficient when it comes to individual cases. It is both indicative and

worrying that only one recommendation has partially been implemented when it comes to oversight of the illegal interception of communications – functioning of a parliamentary committee responsible for oversight over the interception and work of intelligence agencies. Unfortunately, the committee sometimes does not meet for months.

Although Macedonia has a well done legal framework for independent regulators, the experts concluded this legislation is not being complied with. They called for lifting of political pressure from the regulatory and supervisory bodies, but also pro-activeness of stakeholders in the regulatory segment to react timely and appropriately to act effectively and freely. Macedonia also needs to align legislation on office of the ombudsperson with the Paris principles[8] and to make sure that the recommendations of this body are being complied with. Until fall 2016, none of these recommendations have been fulfilled.

Macedonian authorities are still to make efforts on establishment of a credible track record on high-level corruption that would involve engagement of police agencies and supervisory bodies and to improve its system for improvement of scrutiny for conflict of interest and establishment of a central registry of officials in conflict of interest. In cooperation with the Council of Europe's Group of States against Corruption - GRECO, in November 2015, the Government of Macedonia asked the Venice Commission to provide an opinion on draft law on whistle-blowers, but the law has not been adopted yet.

When it comes to strong recommendations for revision of the Law on Lustration and its implementation, recommendations of the experts related to temporal limits, safeguards against different external influences applied on articulation of reasons used as ground for lustration, nothing have not been to have this improved. However, the problematic law has been put out of force on 1 September 2015.

Concluding Remarks

The constitutional, legal and law enforcement system of the Republic of Macedonia have constantly been challenged and compromised. Having in mind its unique geopolitical position, integration of this country into the European Union has been imposing itself as a condition for continuation of its existance. The independent state of Macedonia has

8) The Paris principles available on: http://www.oikeusasiamies.fi/Resource.phx/eoa/english/hrc/principles.htx, viewed on 19 September 2016

been overwhelmed with problems of social and economic transition and numeours problems that came out of its neighouring states or simply spilled over into the country. Ethnic centrisms between both Albanians and Slavs in Macedonia have been making the whole situation even more complex. Also, fierce and radical political division of left and right wing Slavs often surface and create plenty of tensions and mutual accusations.

Greece, a member of the EU and NATO, has converted its bilateral dispute over Macedonia's constitutional name into a multilateral issue and obstacle for recognition of Macedonia as a state in international structures in which adoption of decision by concensus is rather important. Long term strategy of both EU and NATO is enlargement to the entire western Balkans and this has been accepted by Macedonia and incorporated into its strategic priorities. However, although a member of both structures, Greece has been limiting final effects of the integrations and stabilisation in the region as it has been conditioning resolution of the name dispute in its favour, without any concessions. This has been contributing to eurosceptism in the country, which inevitably in this country leads to ethno-centrism and political tensions. If the scenario of full integration of this country into the EU and NATO does not continue with positive trends, this could only bring into the picture alternative scenarios of domination of some of regional powers with their individual interests. These alternative scenarios do not have the potential to provide peace, stability and prosperity in the Balkans.

In Macedonia the time has shown that only moderate, conherent and precise related to implementation of conditionalities necessary for European and NATO integrations could bring positive trends to Macedonia and most of the Balkans. In the other hand, it has to be noted that reactive nature of international interventionism in Macedonia often questions coherency of politics of countries that aspire to join the European Union. The issues, such as the name dispute and inconsistent monitoring of implementation of effects of reforms significantly reduce positive effects of the stabilisation and association process throughout the region. Limited with mandates and budgets, international demands were often to fit realities and nature of their limited interventions, rather than doing something with both short-term immedately effects, but also systemic requirements that have long-term nature.

The Urgent Reforms, including the segment of the rule of laws and judiciary, that are being recommended by European Union group of experts do not seem to be taken as something that should be implemented

in Macedonia with strong sense of urgency. The reforms recommended are basically to bring the country back on the track of European integration and it also brings along the element of public responsibility and security. The element related to the rule of law and judiciary is one of the most crucial elements of the Criteria from Copenhagen – particularly political criteria and requirements related to the rule of law. Politization of the judicial system makes it unprofessional, fragile and open for political corruption and both ecnomic and political instability.

After fourteen months of implementation of this set of reforms, the independent monitors did not mark any of the recommendations as completed. Altough one could say that the methodology of the experts which includes absence of deadlines due to urgency of all measures is nothing but common sense, to a large extent it can be concluded that this approach did not prove itelf very productive one as the process has appeared to be slow and inert instead of the contrary.[9]

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