CONSTITUTIONAL RIGIDITY IN THE COUNTRIES WITH CONSOCIATIONAL DEMOCRATIC APPROACH - A COMPARATIVE PERSPECTIVE

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Abstract

The constitution is the heart of every nation, and because of its unique, complete and prevailing nature, modifying it cannot be simple. Hence, the term constitutional rigidity which provides for the protection of the constitution from changes or makes rendering modification of the same more difficult has been introduced in science. The subject of interest in this paper is the degree of constitutional rigidity in some of the countries with consociational democracy. These are countries in which the building of a stable constitutional order and its maintenance is a challenge, since in this type of states; there is some form of ethnic and cultural diversity. In the past few decades, the international community has been seriously involved in the state building process. This often involved creating new constitutions with consociational elements in some post-conflict and deeply divided societies such as - Bosnia and Herzegovina, Republic of Macedonia, and Kosovo. It is precisely the question of the constitutional rigidity in these three newly created consociations that forms the subject of analysis in this paper.

Key words: constitutional rigidity, constitutional review, consociational democracy, index of constitutional rigidity, veto players;

INTRODUCTION

The constitution is the heart of every nation, an ultimate expression of its national identity, because it embodies the fundamental theories and definitive laws that every nation has accepted. Due to its unique, complete and prevailing nature, it cannot be easily modified (Rasch, 2008). For these reasons"
constitutions envisage protection of their contents from change by making modification difficult” (Tsebelis, 2016:3). Hence, the term for constitutional rigidity has been introduced in science, which has been described by many authors as a method for protecting the constitutions from change.

"If the constitution is the heart of a nation, then it follows that an amendment process be a triple bypass surgery. It is not a process that should be entered into lightly, but when it does occur it must be executed with the skill and precision of a master – surgeon … “(Baber, 2014: 1). Baber's message in fact supports Landau's (2013:189) contemplation according to whom the stability of the constitutional order can lead to a stable form of governance, which is the best bulwark against any form of tyranny, oppression or other undemocratic mode of behaviour.

The challenge for building a stable constitutional order is double the size in the so-called divided societies, in which there is some form of ethno-cultural diversity. In the past few decades, the international community has been seriously involved in the state building process, which often involved creating new constitutions with consociational elements in some post-conflict and deeply divided societies such as Bosnia and Herzegovina, Republic of Macedonia, and Kosovo. Arend Lijphart, the founder of the consociational model, identified several mechanisms that could be used to prevent disintegration in this type of society, among which were: the government of the grand coalition; segmental autonomy, including federalism; proportionality; and the mutual veto (see Fuh-sheng Hsieh, 2013:90). The fundamental question of the constitutional design for these countries was addressed in a way to translate the achievements of some other established consociational democracies, primarily Belgium and Switzerland2. In the constitutional orders of all these countries with consociational democracy, there is a written constitution in which the issue of constitutional review is elaborated in detail. Lijphart (1999:4), as the most prominent consociational theorist, believes that in this type of heterogeneous societies, in which as a rule there are pluralistic interests, it is logical to insist on „rigid constitutions that can be changed only by extraordinary majorities“.

The purpose of this paper is to precisely consider the question of the constitutional review and constitutional rigidity in these newly created consocialional states. For this purpose, a review to the most relevant literature on constitutional rigidity is given first, and then separately the issue of the degree of

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2 Countries on whose empirical experience Lijphart developed the consociational model in the theoretical sense.
constitutional rigidity is considered and the manner in which an amendment can be used to intervene in the constitution of each of these three selected countries, where a political system can be noted with consociational elements.

**CONSTITUTIONAL RIGIDITY – A REVIEW OF LITERATURE**

The national constitutions of all countries generally include provisions for a partial or complete amendment to the constitution while the percentage of those that do not have such a formalized provision is insignificant (van Maarseveen/van der Tang, 1978:80). Otherwise, the notion of a constitutional review can be defined as "abolishing the constitution as a whole or abolishing certain constitutional norms, replacing abolished constitutional norms with new ones, as well as supplementing the text of the constitution with other constitutional norms" (Klimovski et al, 2012: 101).

Authors like Albert (2014) think that a distinction should be made between comprehensive constitutions - if the whole constitution can be modified with the same rules, restricted - if different provisions are subject to different rules, and exceptional - where different rules are used exclusively for one provision or a set of related provisions. It should also be pointed out that the different degree of constitutional rigidity is due to "special legislative majorities, approval by both houses of bicameral legislature (even when these are asymmetrical as far as ordinary legislation is concerned), approval by ordinary or special majorities of state or provincial legislature, approval by referendum, or by specific majorities in a referendum" (Lijphart, 1999:218-19).

When we speak about special legislative majority, according to Lijphart (1999: 219), we can distinguish four most basic types of majority to change the constitution – simple, more than simple but less than two thirds (for example three fifths or simple majority but also approval on a referendum), two thirds (which is most common) and super majority – more than two thirds. But in the constitutional revision the role of political actors involved in this process is also important. Rasch and Congleton (2006:546) in this sense "create indexes of consensus and of the number of central government veto players³ or points of agreement required to secure a constitutional amendment”.

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³ According to Tsebelis (2016: 11), veto players are "individual or collective actors whose consensus is necessary to change the status quo".
Hence, "it is important to note that the model of change (revision) of the constitution is in close correlation with the adopted model of its adoption\(^4\) (...) However, even case of a change in the constitution, the rule is that the pure patterns of revision of the constitution are very rare ...“ (Klimovski et al., 2012: 103).

All the above-mentioned authors consider the constitutional rigidity as an obstacle to constitutional revisions. The rational explanation is that the degree of constitutional rigidity is greater, so the constitutional revision is less common, i.e. the relationship between them is inversely proportional, a fact that has been confirmed by numerous empirical studies of this correlation (Tsebelis 2016: 5).

**CONSTITUIONAL RIGIDITY IN NEWLY ESTABLISHED COUNTRIES OF CONSOCIATIONAL DEMOCRACY**

*Bosnia and Herzegovina* (*BiH*). The existing Constitution of Bosnia and Herzegovina is the result of "the constitution occurring in the context of diplomatic peace, by negotiations held behind closed doors, and was shaped by the immediate need to end the continuing bloodshed" (Grewe/Riegner, 2011:12), which took place in Bosnia and Herzegovina in the period 1992-1995. The constitutional development preceded the General Framework Agreement for Peace in BiH, also called the Dayton Peace Agreement (DPA), which was accompanied by 11 annexes, including Annex 4 - the Constitution of Bosnia and Herzegovina. The DPA in BiH has introduced a complex consociational system for sharing weak central government by the three separate ethnicities - Bosniaks, Serbs and Croats. Its undoubtedly positive side was that it has brought an end to the armed conflict, but it can be criticised because of its unrepresentative and non-transparent genesis and its imposing nature, which cast doubts on the internal legitimacy of the established constitutional order (Ibid., 13). It should be emphasized that the text of the BiH Constitution has never been ratified, nor adopted by the representatives of the constituent people of the country, because the former Parliamentary Assembly adopted the text, but not with the necessary majority required for constitutional changes under the previously applicable BiH Constitution. However, it was later adopted by the respective legislatures of the

\(^4\) Who can be as a model of a constituent assembly, by the regular legislative body or in a referendum by the citizens.
two entities Federation of BiH and Republika Srpska (Stainer/ Ademović, 2010: 10, 29).

The BiH Constitution, in terms of the issue of constitutional review, is quite laconic. In Article X. 1⁵, which refers to the amendment procedure, it says "this Constitution may be amended by a decision of the Parliamentary Assembly, including a two-thirds majority of those present and voting in the House of Representatives". According to Ademović et al., (2012:11), the amendment procedure to the BiH Constitution begins with a legislative decision within the meaning of Article IV/3c of the Constitution, which should be adopted in both houses of the Parliamentary Assembly of BiH - the House of Representatives and the House of Peoples. However, for the adoption of constitutional changes, the House of Representatives votes with a two-thirds majority of all present members of Parliament (MPs), which, according to the same authors, is a decision specialis, in comparison with Article IV/3c, which implies a simple majority for the adoption of legislative decision for amending the Constitution.⁶ Article X/2 deserves particular attention in the BiH Constitution, which in terms of human rights and fundamental freedoms stipulates that "No amendment to this Constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this Constitution or alter the present paragraph." According to Ademović et al., (2012) "The rights and freedoms of Article II of the BiH Constitution are protected by a special clause, the so-called clause of eternity". This clause does not apply to other human rights and freedoms beyond Article II of the BiH Constitution. Constitutional revision to amendments and supplements to the human rights and freedoms of Article II are not absolutely prohibited if their scope is to be increased and protected. However, this can be changed in a revolutionary, and therefore unconstitutional way, a pouvoir constituent, because the clause of eternity also refers to the prohibition of Article X/2 itself according to the principle of self-protection (Steiner and Ademović, 2010:895)

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⁵ Not only this article, but practically the whole Constitution of BiH, which is written according to the Anglo-Saxon technique, is quite prosaic, imprecise, inconclusive, even contradictory, and with its 12 articles is one of the shortest in the world (Blagojević, 2017)

⁶ The quorum for work in the The House of Representatives of the Parliamentary Assembly of BiH (HRPABiH) is 22, which means that the decision to approve amendments to the constitution can be passed by 15 MPs (Ademović at all, 2012:11).
Hence, it can be concluded that the BiH Constitution belongs to a group of rigid constitutions and their amendment requires a two-thirds majority. It is comprehensive, as all its parts can be changed in the same way, with the exception of Article II and X/2 for which the clause of eternity is applied, i.e. the principle of self-protection. In the procedure for amending the BiH Constitution as the veto player, which is a characteristic of some other federally configured states, including the abovementioned Switzerland and Belgium, the Upper House of the Parliamentary Assembly can be pointed out. According to Trnka (2006), constitutional changes in BiH were not adopted just through votes of the two thirds of the deputies in the House of Representatives, but also via a majority of the Bosniak delegates, Serb delegates and Croat delegates in the House of Peoples.

Macedonia. The current Constitution of the Republic of Macedonia was adopted on 17 November 1991, and after its adoption, a Decision was adopted for the proclamation of the Constitution. However, it underwent a more serious change ten years later, with the November 2001 amendment interventions that arose from the signing of the Ohrid Framework Agreement (OFA). The OFA marked the end of the conflict between the official armed forces of the Republic of Macedonia and the Albanian rebels. It was "not only the point of the deepest crisis and the possible discontinuity, but also the profound redefinition of the political system"(Vankovska, 2007:225). The OFA decisions, which were incorporated in the constitutional amendments, reformed the Macedonian constitutional order in the direction of greater presence of the consociational elements, regardless of the fact that by 2001 the system contained "certain elements of consociation, more through the political pragma, than through systemically guaranteed and consistent solutions" (Ibid.,).

These solutions are best understood in the Amendment XVIII which predicted a decision to amend the Preamble, the articles on local self-government, Article 131, any provision relating to the rights of members of communities, including in particular Articles 7, 8, 9, 19, 48, 56, 69, 77, 78, 86, 104 and 109, as well as a decision to add any new provision relating to the subject-matter of such provisions and articles, shall require a two-thirds majority vote of the total number of Representatives, within which there must be a majority of the votes of the total number of Representatives who belong to the communities not in the majority in the population of Macedonia. Such provisions were in line with the advancement of the consociational elements in the country's political system.
Hence, it can be concluded that by 2001, the Constitution of the Republic of Macedonia, in accordance with the criteria of Albert, was comprehensive because the entire Constitution could be amended with the same rules. However, after the amendments of 2001, a different rule was used exclusively for amending and supplementing these provisions for the Preamble and the articles listed in Amendment XVIII of the Constitution of the Republic of Macedonia. If we refer to the technical language of Arend Lijphart, countries in which the constitution can be changed by two thirds, would have the index of constitutional rigidity of 3.0. But after 2001, when the parts of the Constitution referred to in Amendment XVIII, which require the two-thirds majority to contain a majority of the votes of the non-majority communities in the country, the index of constitutional rigidity in the Republic of Macedonia, according to the criteria of Lijphart, would be between 3.0 and 4.0. For veto players, in the Macedonian system of constitutional review, we can speak in the context of the articles listed in Amendment XVIII of the Constitution of the Republic of Macedonia, because the amendment with the two-thirds majority should also anticipate the Badinter principle. In this way, the right to an effective veto is given to the minor communities, primarily the Albanian one.

Kosovo. The current Constitution of the Republic of Kosovo preceded several steps that were taken in the context of the negotiations on the status of this former Serbian province. With the entry into force of the Constitution of Kosovo of June 2008, this long-term international process ended with the proclamation of the independence of Kosovo by the Assembly of Kosovo on 17 February 2008 (Grewe/ Riegner, 2011:14-15).

Since the subject of analysis of this paper is the issue of constitutional rigidity in the countries with consociational democracy, this in itself raises the question of whether Kosovo can be considered as a consociational political system. Given the relationship between the Albanian ethnic community (whose share in the total population is over 90%) and other smaller communities, above all the Serbian, a relationship that does not fulfil some of the basic assumptions for implementing the consociational model, such as the balance of power between the segments, then answer is NO. Therefore, some authors are of the opinion that "due to the small size of the minority is apt to mean that the current system is unlikely to develop strong consociational features and is more likely to

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7 Which was established as institution in accordance with the Constitutional Framework for Provisional Self-Governance in Kosovo.
move toward a strong minority rights regime with a few consociational features” (Bieber, 2013:148). Undoubtedly, the Constitution of Kosovo has developed mechanisms for constitutional protection of Serbs, but also of other minorities in the new independent state. These "protective mechanisms were largely imposed upon the Albanian majority, who accepted them in exchange for independence“ (Grewe/Riegner, 2011:15). The protective mechanisms can undoubtedly be seen in the constitutional solutions that refer to the constitutional amendment in Kosovo.

"Article 144.1 of the Kosovo Constitution authorizes the three actors to initiate the constitutional amendment process, namely, the Government, the President of Republic, and one fourth of Members of Parliament (MPs)“ (Korenica/Doli, 2011:8-9). In comparison with the Constitution of the Republic of Macedonia, where there are similar solutions, it can be noted that the citizens of Kosovo are deprived of the right to raise questions for constitutional review. According to Korenica and Doli (2011:9), the revision of the Constitution in Kosovo is closed to direct participation of people, thus giving the monopolistic power to the three key institutions in the political system in the country in terms of constitutional review. Regarding the adoption of amendments to the Constitution of Kosovo, a two-thirds majority of all deputies of the Assembly is mandatory, as well as a two-thirds majority of the total number of MPs who hold reserved and guaranteed seats for the minority communities in the country (Article 144.2 of the Constitution). Such high degree of constitutional rigidity in Kosovo is very surprising, compared to BiH and the Republic of Macedonia, which have far more socio-demographic assumptions for consociation than Kosovo. But some authors believe that this has been done on purpose, in the course of constitutional changes, so that there would not be a monopoly of Serbian MPs who are the most numerous minority group in the Assembly of Kosovo⁸ (Korenica/Doli, 2011:12). The Assembly of Kosovo is the only institution that adopts the constitutional amendments, but after the President of the Assembly of Kosovo has referred the proposed amendment to the Constitutional Court for a prior assessment that the proposed amendment does not diminish any of the rights and freedoms set forth in Chapter II⁹ from Kosovo Constitution (Article 144.3).

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⁸ The Constitution of Kosovo in Article 65. 2 reserves 20 of the 120 seats in the Parliament for smaller ethnic communities, 10 of which are for the Serbian MPs.

⁹ This chapter, in particular as Article II of the BiH Constitution, has a special role because it gives the impression of a single Chapter of the Kosovo Constitution which is
From the analysis of the Kosovo Constitution, it can be concluded that the degree of constitutional rigidity in Kosovo, due to the double super majority, can be marked with the index 4.0, which Lijphart awards to countries where constitutions are changing with a majority greater than two thirds. All of its parts may be changed in accordance with the rules and procedures set forth in Article 144 of the Constitution. Representatives of non-majority communities can be seen as a potential veto player in the process of constitutional review and without their two-thirds support cannot change any provision of the Kosovo Constitution.

CONCLUSION

From the examples mentioned above, it can be concluded that a high degree of constitutional rigidity is a conditio sine qua non for countries with consociational democracy. Regarding the degree of constitutional rigidity, if the criteria of Lijphart are taken into account, Kosovo will have the highest index (4.0), because in order to be successful, the constitutional review would have to be confirmed by a double super-majority - two-thirds of all MPs in the Kosovo Assembly, including two-thirds of the MPs of the non-majority communities. The Republic of Macedonia is somewhere between the indexes 3.0 and 4.0, because for all provisions of the Constitution (with the exception of Amendment XVIII), a two-thirds majority is required, while for the articles outlined in the amendment mentioned above, the so-called double, or majority based on the Badinter principle, is required to be add in the two-thirds majority. The index of constitutional rigidity in Bosnia is 3.0 because its Constitution can be changed with a two-thirds majority.

In terms of the veto players, as was previously pointed out, bicameralism can potentially play a veto-player role in the process of constitutional changes in Bosnia and Hercegovina. In the Republic of Macedonia, we can speak of veto players in the process of amending the Constitution in the context of Amendment XVIII, which lists the parts (articles) of the Constitution for which, the two-thirds majority should incorporate the Badinter principle. In this way, the non-majority communities in the Parliament not susceptible to change, irrespective of the fact that it is not explicitly protected by a clause of eternity such as Article X/2 protects Article II of the BiH Constitution, but there is no doubt that Chapter II of the Kosovo Constitution has a higher constitutional hierarchical position (Doli/Korenica, 2010).
of the Republic of Macedonia, and most of all the Albanian community, give effective veto power, which is completely different from Kosovo where the representatives of smaller ethnic communities are potential veto players for changing any article of the Kosovo Constitution.

Regarding the constitutional rigidity, in terms of comprehensiveness, it should be noted that the constitutions of Bosnia and Herzegovina and Kosovo, are comprehensive, since the entire constitution can be amended with the same rules. In Bosnia and Herzegovina (Article IX/1) and in Kosovo (Article144.2), suggest this conclusion. But it is important to draw attention here to Article II of the Bosnian Constitution, which refers to the catalog of basic human rights and freedoms, for which the eternal clause is valid (for its inalterability), but also Chapter II of the Kosovo Constitution, which regulates the same matter, and also has a higher constitutional hierarchical position which is widely recognized. The Constitution of the Republic of Macedonia was comprehensive until the 2001 amendments (all parts could be changed by a two-thirds majority), but with the incorporation of Amendment XVIII, now a different rule is used exclusively for modification of the Preamble and the articles outlined therein, (two-thirds, with majority as defined by the Badinter principle).

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