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ВТОР ДЕЛ

THE OHRID FRAMEWORK AGREEMENT: A MATERIAL AND/OR FORMAL SOURCE OF THE CONSTITUTIONAL LAW?

Biljana Vankovska*

Изворна научна статија

Статијата се осврнува на Рамковниот договор низ призма на неговата улога на материјален извор на уставното право, односно на статусот на „договор над уставот“, кој низ годините остави сериозни белези врз начинот на разбирање на вредностите на уставниот поредок и функционирањето на политичкиот систем. Почетната премиса е дека начинот и околностите во кои е усвоен Договорот, вклучително и неговото инкорпорирање во Преамбулата на Уставот, зборуваат за неговата растегливост и овозможување на толкувања согласно односот на политичките сили на сценатa, а не нужно и во контекст на уставните вредности и принципи вградени во оригиналниот уставен текст. Оттука, духот на Рамковниот договор успеа да се наметне над духот на уставот, и така да добие сопствен живот надвор од класичното сфаќање на конституционализмот за политика во граници на правото.

1. Introduction

The constitutional history of the Macedonian state is usually considered since the formation of the Yugoslav federation and along its constitutional trajectory. Some authors take a more ambitious stand referring to some older historical documents that allegedly 'prove' the continuity of some visionary ideals of the modern polity.[2] However, this text deals with the constitutional history of the modern and independent Macedonian state as of the adoption of its 1991 Constitution and its subsequent revisions that affected the political system outlook. The research issue is focused on the Framework Agreement (also known as Ohrid Framework Agreement – OFA hereafter), which has become a turning point in the development of the liberal constitutional order towards a power-sharing model, thus resulting in a hybrid constitutional and political entity. Furthermore, the 2019 constitutional amendments

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[2] For instance, one of the 'founding fathers' of the 1991 Constitution and an expert in drafting the Ohrid Framework Agreement argues the following: 'Ohrid Agreement is nothing but a return to the forgotten path of the Macedonians' struggle for statehood. In that sense, OA is a correction of the neglected part of the Macedonian state's development. […] During the 19 century, the first generation did pose the question of Macedonia as a distinct political entity in the Balkans. That generation had the concept of the OA embedded in the state idea. I am referring to the Macedonian League of 1880 and its Constitution.' See: 'Интервју со професор Владо Поповски: Охридскиот договор е враќање на заборавениот пат на македонската државност', *Online Nova TV* 21 August 2021 https://novatv.mk/intervju-so-profesor-vlado-popovski-ohridskiot-dogovor-e-vrakane-na-zaboraveniot-pat-na-makedonskata-drzhavnost/ accessed on 25 November 2021.

included the OFA in the Preamble (despite of the legally bizarre nomotechnics) due to the political and ethnic bargaining. The main hypothesis in this study is that OFA had already been a 'material source' of the constitution, which has lingered over the key political currents, and quite often, even dominated over the formal provisions of the constitutional text.

The theory usually differentiates between the formal and material notion of the constitution. The idea is to point out that the material sources of the primary document of any state usually precede its formal expression in a written form (a higher law) enacted in a special procedure by an entitled body (usually, the parliament), which cannot be altered by any ordinary law or bylaw. The material sources represent a set of basic principles and (written or non-written) norms, which regulate the crucial essential relations in the society and the state. The reality always imposes certain demands and needs for some societal, economic, or political factual relations to be constitutionalized in the primary law of the state. According to Škarik and Siljanovska-Davkova,

> 'the material sources of constitutional law are the factors under whose influence the non-written norms are created. In other words, they refer to certain positions out of which the norms of constitutional law spring out, or to the causes of social, economic, political, or ideological character, such as collective beliefs, moral demands, social needs and the value system.'[3]

The majority of modern states have opted for a written constitution, but it does not diminish the fact that the implementation in reality often faces quite a lot of contradictions and alterations. In other words, the constitution in a material sense and the formal one do not correspond with each other by default. Be it because of the 'bottom-up demands' or 'externalities' (for instance, international state-building mechanisms particularly in weak states and/or post-conflict societies), the constitutions may get new interpretations and even factual revisions that are contrary to what was *expressis verbis* defined in the constitutional text.[4]

On the other hand, it is a widespread opinion that the age of innocence of constitutionalism is over since long ago, and quite often rather than not,

> '… constitution-texts can be mere façade legitimation, mere window-dressing on actual state practice. The practice may be of one-party rule, of police torture, of corrupt and intimidated judges, of a military or militia barely if at all under civilian rule, of business practices distorted by the need for systematic bribery of officials, and so on. The question therefore remains open as to which criteria are needed for distinguishing façade or sham constitutions and which are not. Attention should of course be focused on whether constitutional rules and principles are sufficiently enforced, and, first and foremost, on the meanings that may be attached to the text both on formal grounds and in relation to its content.'[5]

[3] Светомир Шкариќ и Гордана Силјановска-Давкова, *Уставно право*, (Култура 2007), стр. 45.
[4] Discussing the factual change of the constitution, the two leading Macedonian constitutionalists conclude the following: 'One thing is written down in the constitution, antother thing is implemented in the practice.' Шкариќ и Силјановска-Давкова, *ibidem*, стр. 215.
[5] Yasuo Hasebe and Cesare Pinelli, "Constitutions", in Mark Tushnet, Thomas Fleiner and Cheryl Saunders (eds.), Routledge Handbook of Constitutional Law, London and NY: Routledge, 2013, p. 45.

The countries with no written (formal, single) constitutional text (such as the United Kingdom, New Zealand and Israel) rely on the so-called historic constitutions. In practice however it means that the constitutional power rests in a series of political customs/principles, values distilled throughout the historical (long-lasting) political process but also in a number of formal (written) documents drafted in various stages of the country's political development. For instance, the UK constitution is described as a 'living constitution' because it evolves and adapts to reflect changing social attitudes.[6] The main advantage is that these types of constitutions are dynamic, flexible and more amenable to constitutional reform unlike the states with rigid and 'hard constitutions' that are petrified and almost unchangeable. Constitutionalism however assumes unquestionable respect for certain dominant principles and values of democracy and human rights, which are beyond any written or unwritten legal revision. In other words, the state's foundations are supposed to be embedded in the social contract that preserves the continuity of a political community and the people (demos) that have decided to live together respecting the 'rules of the game' that are equally applicable to all participants in the political life.

At this point, it is important to stress that the differentiation between constitution in a material sense and a formal one is made mostly because of theoretical and methodological reasons. In reality, however, it is not only impossible but also not desirable to stick to this division. Daniel Rodriguez rightly argues that 'legal scholarship is impoverished without a rich understanding of the political and economic foundations of constitutions and the processes of constitution making.'[7] The same applies to the necessity of an open dialogue between political scientists and constitutional lawyers – something that is missing in the Macedonian academic community. It is usually believed that constitutional lawyers stick to the traditional legal discourse, guarding the temple of normative constitutional theory from inroads by positive constitutionalism and institutional exegesis, while political scientists take a wider view of constitutionalism based on a more realist and pragmatic ground. When it comes to Macedonian scholarship, obviously this dialogue has been underway due to the simple fact that the two academic fields have never been truly separated and developed on different scholarly grounds. Most of us coming from the older generations either hold PhDs in Law in spite of their research being mostly in the field of political science; or hold PhDs in Political Science gained at universities elsewhere in Yugoslavia that had established such academic programs much earlier than Macedonia. Also, it is not unusual to see the same people teaching both constitutional law and the political system. This is *de facto* the context in which Svetomir Škarik, the professor and scholar in whose honor we contribute to this collection of academic texts, worked and enriched the scholarly thought of constitutional law and constitutionalism by going far beyond the constitutional positivism. By doing so, his own attitudes and analysis have evolved along with the social and other dramatic changes that the Macedonian polity has gone through in the last three decades, since the enacting of the 1991 Constitution. It is exactly the OFA (and later on, the Prespa Agreement too) that he has analyzed continuously, and often with wavering and even contradictory positions and conclusions.

[6] One of the examples is the Marriage (Same-Sex Couples) Act of 2013.

[7] Daniel B. Rodriguez, 'State Constitutionalism and the Domain of Normative Theory', *San Diego Law Review* 37(2), 2000, p. 524.

The analysis of the significance of the OFA is often bypassed in the theoretical elaborations in the Macedonian constitutional law. It has been mainly seen as a peace treaty and (in one part only) ground for the 2001constitutional revision. However, it has been not only the letter (and the constitutional amendments) but also the so-called spirit of the OFA that has been used as a driving force in re-shaping the constitutional and political order, especially thanks to the Constitutional court's passivity and impotence but also due to the (in)direct influence of the power-sharing mechanism introduced in the entire system.

2. A Context Analysis: The Birth of the OFA

Before we turn our attention to the contextual analysis of the OFA, it seems necessary to say a few words about the constitution-making process as it took place in 1991. It was a period of dual transition from one (federal) state into another (unitary, independent one) as well as the transition from socialist to a liberal order. The 1991 constitution fits the paradigm of modern constitution-making as a phenomenon quite different from the examples characteristic of the so-called first era. It was a result of a simultaneous process that took place in the context of democratic transition, or better – it was a way out of an institutional and systemic collapse of the previous (Yugoslav) constitutional order. In essence, it was a response to the demands for a different (and more democratic) political system of a newly independent state that was born out of an ongoing civil war elsewhere in the territory of the collapsed Yugoslav federation, which means that liberal democratic order was expected to be born out of a (federal) state collapse.

#After the 2001 conflict, the Constitution was detected as *casus belli*, which practically served as justification for the violent outbreak.[8] For instance, in a short article of 2004, Denko Maleski explicitly puts a self-blame of the Macedonians ('We, Macedonians') as the main culprits for setting the whole society on the wrong tracks:

> '… in 1991 we decided on a strategy, which is typical for a state where there is no other nation but the titular. In accordance with this logic– we Macedonians voted for the Constitution by ourselves. In that way our political leaders sent the message that Macedonia belongs to ethnic Macedonians, since every state should tend to become a nation-state, and every nation should become a state. […] We, Macedonians knew what a just state is and we translated this concept into a Constitutional text, which we voted for ourselves. Briefly: a nation-state of the Macedonian people, with rights for minorities. However, the troubles of the democratic life, the troubles of a free life for everybody, not just for us, are reflected in the necessity to ask others as well. We did not do that. And when the domination of the Macedonians in Parliament blocked the process of the articulation of the interests of the Albanians into state policy, the situation spilled over in the streets. The Constitutional system, which did not have protective mechanisms for minorities, so that politics can absorb their

[8] During the International Conference entitled *Regional Cooperation, Peace Enforcement, and the Role of the Treaties in the Balkans* held in Forli, Italy, in January 2006, the author of this text addressed a question to one of the panelists, Ljubomir Danailov-Frckoski. The question read: according to his opinion, was the 1991 constitution casus belli, i.e. an act that provoked of justified the violent conflict in 2001. The panelist bypassed the question and did not give any answer.

requests and translate them into state policy, found itself in the role of crisis generator.'[9]

Any *post festum* debate or wisdom on what should/could have happened in order to avoid the undesirable outcomes are meaningful only in the context 'lessons (not) learned' endeavor. The self-blame (only on one side of the constitutional conflict), equally as blaming only the 'Other' for the events that followed, is an emotional rather than a rational enterprise. It may serve as a fuel for furthering political debate and ethno-political mobilization but it is hardly a ground for a scholarly and objective analysis of the past events. For instance, the personification of all (ethnic) Macedonians with the 1991constitution-making is not only unfair but also not a credible approach. The vast majority of laymen (of any ethnicity) did not have an idea about the constitution crafting, the models of democracy, or institutional designs of a liberal order. The constitution-making was a merely elitist endeavor, set in the hands of a few vs majority citizens (and even with the respect of the wider legal and academic community). The facts speak that even the proposals brought up during the public debate were not taken into account in the process due to the "copy-rights" claim by the expert group who had worked on the so-called pre-draft of the Constitution.[10] To expect developed democratic culture, discursive democracy and comprehensive understanding of the present but also the visions for the future in 1990/1991, during the colossal failure of the Yugoslav state and war turmoil, equals science fiction or wishful thinking.

Marx rightly argued that men make their own history, but they do not make it as they please; they do not make it under circumstances of their own choosing, but under circumstances existing already, given and transmitted from the past.[11] The legitimacy of the institutions is all about justification of the existing order and a *conditio sine qua non* for the functioning of the political system. In any democracy it is of utmost importance for the people to think of the institutions as of *opus proprium* and of themselves as political actors with full sovereignty. In the opposite case, institutions would be seen as *opus alienum* and such a political community is nothing but a dehumanized entity.[12]

To have expected a different outcome under such historical conditions would be naïve belief in normative illusionism. The then Republic of Macedonia could have not avoided typical 'children's diseases' as any other transitional state. Furthermore, the very idea that people would sacrifice their lives and the lives of their communities for a sake of a constitution is a rather bizarre though. The critics disregard a few important facts: 1) the Macedonians not only had weak statehood traditions but this was the first time in their history to face an unexpected opportunity to form an independent state and to fully exercise the right of self-determination; 2) the Albanians were reluctant with regard to the new state context awaiting a resolution of the

[9] Denko Maleski, 'The Causes of a War: Ethnic Conflict in Macedonia in 2001' (2004), no. 7-8, *New Balkan Politics* < http://www.newbalkanpolitics.org.mk/item/The-Causes-of-a-War:Ethnic-Conflict-in-Macedonia-in-2001#.YZ9oG9DMJPY> accessed 25 November 2021.
[10] Шкариќ и Силјановска-Давкова, *ibidem*, стр. 203.
[11] Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, (originally published in 1852), available at: <http://www.marxists.org/archive/marx/works/1852/18th-brumaire> accessed on 23 November 2021.
[12] Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality. A Treatise in the Sociology of Knowledge*, (Penguin Books, 1991), p. 78.

'integral Albanian Question', or at least resolution of the Kosovo issue, which was a part of their (pre- and post-Yugoslav) imagined community; 3) the desire to design a 'true' democratic model led the drafters to the constitutions of only 16 developed democracies and a 'copy-paste' method dominated in the process; 4) the Badinter Commission issued a positive opinion with regard to Macedonia's international recognition because of its liberal constitution and respect for minority rights. As elsewhere, the democratic categories 'travelled east', to quote Dvornik,[13] but there was nothing much to institutionalise except the will of a nation for an independent state, as expressed in the referendum of 8 September 1991. The political revolution was made in the name of something that was still to come.[14] At the beginning of its independent state existence, the Republic of Macedonia seemed to fit the famous assessment of Ralf Dahrendorf, at least in the first two stages: constitutional reform, he tells us, may take a mere six months, economic reform six years, but sixty years are barely enough to lay the social foundations required.[15]

However, due to a combination of internal and external factors, the Macedonian society did not have enough time for a smooth transition towards the required social foundations. To make things worse, in the first decade the state was hailed as an 'oasis of peace' by the so-called international community. The inherent state's weaknesses, the political economy of the internal conflict,[16] along with the volatile regional context, resulted in an outbreak of a violent conflict.[17] Due to the limited space for elaboration, we shall focus only on the OFA-related negotiations and its formal approval.

Not everyone had turned their blind eye to the 'elephant in the room' of the Macedonian statehood in its early days. Vasil Tupurkovski, professor and the Macedonian member in the last Yugoslav collective Presidency, was the first one to suggest the necessity of a 'new historical deal' between the Macedonians and the Albanians in the country in 1994. His ideas were dismissed as unacceptable and even treacherous. In his own words, most of his original plan was later on incorporated into the OFA.[18] It's probably far more important to mention that the international actors had also been working behind the scene. In his book, the German diplomat involved in the International conference on former Yugoslavia, Geert-Hinrich Ahrens

[13] Srdjan Dvornik, *Actors without Society. The Role of Civil Actors in the Post-Communist Transformation*, Heinrich Boell Stiftung, Publication Series on Democracy, vol. 15 (2009), p. 37.

[14] Biljana Vankovska, 'Constitutional Engineering and Institution-Building in the Republic of Macedonia (1991-2011)' in Sabrina P. Ramet, Ola Listhaug and Albert Simkus (eds.), *Civic and Uncivic Values in Macedonia: Value*

Transformation, Education and Media, (Palgrave Macmillan 2013).

[15] Ralf Dahrendorf, *Reflections on the Revolution in Europe. In a Letter Intended to Have Been Sent to a Gentleman in Warsaw* (Random House 1990), p. 100.

[16] One of the best analysis of this particular (and rather marginalized) aspect is 'Ahmeti's Village - The Political Economy Of Interethnic Relations In Macedonia', (*ESI* 1 October 2002), < https://www.esiweb.org/publications/ahmetis-village-political-economy-interethnic-relations-macedonia-0> accessed on 25 November 2021.

[17] See more in Билјана Ванковска, *Тековни перспективи во Македонија: најори за мир, демократија и безбедност*, (ФИОМ 2003).

[18] 'Vasil Tupurkovski u Intervjuu petkom: „Zapad je dozvolio rat u Jugoslaviji, sada ga ne dozvoljava"', (*BBC na srpskom* 20 March 2020) < https://www.juznevesti.com/bbc-news-na-srpskom/Vasil-Tupurkovski-u-Intervjuu-petkom-Zapad-je-dozvolio-rat-u-Jugoslaviji-sada-ga-ne-dozvoljava.sr.html> accessed on 25 November 2021.

testifies of the secretive negotiations between the representatives of the two major ethnic communities as early as 1992 in Ohrid.[19] The general public was not aware of the fact and lived in the dream of the 'oasis of peace'.[20] Only decades later, a number of diplomats, university professors and politicians reflected on the failed attempts to accommodate the Albanian demands for a binational state. According to Ahrens, there is a high degree of compliance between the 1992 working document and the final version of the OFA. It speaks more of the consistency and persistence of the Albanian demands in a longer time span rather than of the remedy that was anticipated nine years prior to the violent conflict. The participants of the negotiation process (some of whom took part in both Ohrid processes), there was no favorable climate for opening a new round of constitutional reforms that would introduce an ethnically balanced power-sharing system. Let's not forget that it was a rather euphoric time of 'the end of history' and the definite triumph of liberal (civic) democracy all over Eastern and Central Europe. The Macedonian 'founding fathers' were just following suit. On its side, the UN preventive deployment mission (UNPREDEP) equally, at least formally, put the emphasis on the external sources of war (i.e. prevention of the spilling-over effect from the north). In sum, the Republic of Macedonia was sleep-walking to the inevitable conflict, whose catalyst was the 1998-1999 Kosovo crisis and NATO intervention.

There is a widespread opinion that the OFA put an end to the internal (interethnic) conflict. Even top politicians admitted that the 1991 Constitution had 'fabric (material) defect', which had been overseen for years. In 2003, during the SDSM party congress, the then Prime Minister Crvenkovski mentioned the constitutional 'defect' for the first time, and later on elaborated further: "It is not about questioning the essence of the Constitution but it is rather acknowledging the fact that it failed to gather the necessary interethnic consent and support".[21]

The 2001 conflict was (luckily) short-lived but had a dynamic and bizarre trajectory when judged from the key international actors' statements. For instance, in February/March 2001 the NATO Secretary-General Lord Robertson as well as EU High Commissioner Solana praised 'the Macedonian functioning multiethnic democracy' and endorsed the legitimate Government to deal with the 'tugs and murderers who preferred bullets to ballots'.[22] In less than a month, having seen that the weak state was literally so impotent not to be able to effectively oppose even a paramilitary group, they took the stand about the necessity for restraint and dialogue with the rebels.[23]

What is today known and hailed as the Ohrid peace process actually had a long pre-history, even within the armed phase of the conflict.[24] Then the first one who spelled out the idea of constitutional revision was the EU High Commissionaire on Foreign and Security Policy, Javier Solana in late March 2001, for the sake

[19] Geert-Hinrich Ahrens, *Diplomacy on the Edge: Containment of Ethnic Conflict and the Minorities Working Group of the Conferences on Yugoslavia*, (Johns Hopkins University Press 2007).
[20] More about Ahrens' memories in: Манчо Митревски, *2001: војна со две лица*, (Култура 2008), p. 64-66.
[21] Quoted from Манчо Митевски, *ibid.*, p. 62-63.
[22] *The Financial Times* 8 May 2001.
[23] *New York Times*, 21 July 2001.
[24] Zhidas Daskalovski, 'The Macedonian Conflict of 2001: Between Successful Diplomacy, Rhetoric and Terror', *Studies in Post-Communism*, 2004/7.

of achieving 'better reflection of the ethnic reality in the country'. The idea was further developed by the Integrational Crisis Group, while the US State Secretary Colin Powel explicitly conveyed the idea to President Trajkovski during his visit to Washington DC in early May 2001: 'amending the Constitution should be an issue in the future'. The things were already rolling down on the ground: on 21 May the idea was formally articulated by the Albanian party PDP, while the following day in the city of Prizren (Kosovo) the OSCE special envoy (i.e. personal representative of the OSCE chairman-in-office for Macedonia) the US diplomat, Robert Frowick brought together the key Albanian representatives (Arben Xhaferi and Imer Imeri) and the military leader Ali Ahmeti to sign the so-called Prizren Declaration. The idea was to set the principles for a peace plan and an institutional re-shaping of the Macedonian state. According to the media, the three ethnic-Albanian leaders reportedly called for joint efforts to change the Macedonian Constitution to provide equal rights to the Albanian community. The three were also reported to have appealed to Macedonia's new national unity government to declare a cease-fire in the fighting with the UCK and to seek to resolve the crisis by peaceful means. Apparently, the news about the event 'sent shock waves through the government in Skopje as well as the international community'.[25] Despite the alleged outrage, it was the turning point: the armed conflict boiled down to a set of demands for a change of the constitutional order and the idea of the state, to use Barry Buzan's term.[26] All those phrases were but a euphemism for the long-anticipated constitutional reform. In order to give it internal legitimacy, i.e. to stress the alleged 'national ownership' over the peace process, ever since the representatives of NATO and EU set the framework known as 'The plan of President Trajkovski'.[27] The summer of 2001 witnessed realization of something that had begun in the 90s. The final Ohrid performance (which *de facto* took place in Skopje) represented much of a final act of the theatre that had been going on behind the scene rather than a substantial episode of a peace settlement. The constitutional experts' input was again questionable, especially in two main aspects: 1) the unclear relationship, input but also the identity of the domestic and foreign experts, and 2) the level of influence of the expert advice and (lack of) constitutional knowledge on the roughly political process based on diplomacy, compromises, pressures and unprincipled bargains. In sum, as a proverb puts it: too many cooks spoil the broth.

Under direct Western pressure, in early July the Macedonian government agreed to constitutional reforms. The 'peace envoys/facilitators' representing the 'international community' (Francois Léotard on behalf of the EU and US diplomat James Pardew)[28], presented the representatives of the

[25] Jolyon Naegele, 'Macedonia: Government, International Community Outraged By OSCE Envoy', *RFE* 25 May 2001, < https://www.rferl.org/a/1096533.html> accessed on 25 November 2021.

[26] Barry Buzan, *People, States, and Fear: The National Security Problem in International Relations*, (ECPR 2009).

[27] The US envoy in the negotiations, James Perdue admitted the fact in his memoir: "Behind the scenes, the international experts were busily drafting the initial negotiating paper to present to the parties. […] President Trajkovski approved the paper prepared by the US and EU experts and reviewed by Solana and the Quint capitals. We presented the paper on Trajkovski's behalf to the parties as a draft negotiating document on July 7." In: *Peacemakers: American leadership and the end of genocide in the Balkans* (University Press of Kentucky 2018), p. 285-287.

[28] Pardew was a former officer of US military intelligence, and Leotard a former minister of defence. According to the US and EU power centres, they could combine diplomacy and security expertise in

main political parties with a framework document to form the basis for further discussion.[29] The parties agreed to work on the document, based on an earlier proposal made by the French constitutional lawyer Robert Badinter. This proposal was used as a crown argument that an eminent lawyer suggested the power-sharing model as a solution for the Macedonian political system. However, according to his statements, one can hardly resist a feeling that either the French was misinterpreted, misinformed or he changed his mind. Badinter said:

> "This is not for me to say, but the Macedonians may have retained from this episode the impression that I was a man of legal principle and that my action did not serve the interests of such and such. So some time ago they asked me to come. I listened to them and told them what seemed to me impracticable if we really wanted to create a Constitution and not just a kind of political showcase around a constitutional revision project. - What do you think is "impracticable"? - One of the difficulties seems to me to be that the Albanians, feeling themselves an oppressed minority in the country, would like what they call a "consensual democracy". But by consensus, nothing is resolved. The rule of consensus prohibits government management in a country in addition in a difficult situation. Consensus means putting power into the hands of the minority. It can't work. We have to look for other ways to satisfy their legitimate demands. Since the disappearance of major ideological conflicts, citizens are much more concerned with democracy in their daily life than with major problems. The dimension of local democracy, very decentralizing, what I call "democracy of proximity", satisfies their need to be a little involved. So I said to my interlocutors: if you are looking for guarantees against oppression by the majority, develop direct democracy which will take into account the majority wish in the municipal authorities where you are in greater number. The more you develop grassroots democracy, the more you will meet the deep needs of citizens, and the more effectively you will solve problems.'[30]

The full text of Badinter's proposal has never been made public, nor was there any public or expert debate ever organized to discuss his general proposals (made known only in 2018 in the US envoy's memoir). In any case, the framework document was 'ready-made' by the foreign actors, whose names are still not known. The

their activities for resolution of the Macedonian conflict. Yet, the Ohrid negotiation process was supposed to be focused on a constitutional reform.

[29] Having seen the draft text, President Gligorov stated: "I am not satisfied with the Ohrid Agreement, as I have publicly said on several occasions. The first draft of that Agreement was brought to our President by the American Ambassador who said: 'for such documents in America we say – take it or leave it. This has to be implemented or you will have a civil war'. The next day Boris Trajkovski proclaimed that document as his own plan." (Kiro Gligorov, 'Ohridska senka' (*NIN* 17 July 2003), p. 55.

[30] In Badinter's own words, 'thinking within ethnic borders cannot be a qualitative and effective solution. It paralyzes administration and initiates other problems with package of advantages and privileges instead of creating common people and one joined nation. This over-ethnical approach risks to worsen what is already bad in the country.' (Robert Badinter, 'Une approche trop ethnique risquerait d'aggraver le mal actuel', (*Le Mond* le 29 juin, 2001), p. 3. Just two months later, he said that the Framework Agreement included the principles that he proposed in such a manner that he felt as if he was a co-author of the document. In the same statement to the media, however, he denied that the OFA introduced elements of consensual democracy. See: <http://listserv.acsu.buffalo.edu/cgi-bin/wa?A2=ind0108e&L=-maknws-l&P=307> accessed 7 December 2019. Given the fact there is no single official body entitled to give authentic interpretation of the OFA, no wonder its implementation has been followed by many controversies and (mis)interpretations.

negotiation process was carried out far from the public eyes and even today the list of experts and consultants is not known. There were just two independent experts hired by the President (Danailov-Frckoski and Popovski, both involved in pre-drafting of the 1991 Constitution, and none of them a constitutional lawyer. No name of an Albanian expert or intellectual has been ever mentioned, apart from the political representatives.[31] In the media interviews, then leader of DPA (Xhaferi) stated that his party used the services and advice of a hired US expert who prepared the platform for the consociational model as a part of Albanian political agenda.[32] According to him, on that ground he managed to soften Ahmeti and to convince him to abandon his original idea of secession. NLA was not allowed to sit at the negotiation table, which would have meant recognition of the legal status of a conflict party in a civil war. "You will let us deal with Ahmeti, the international community told us", said Frckoski to the media. According to him, Perdue and Leotard represented the Albanian requirements.[33]

The OFA was signed on 13 August in Skopje. Its signatories included the leaders of the four political parties represented in the Parliament, the President of the Republic and the two foreign facilitators. The next step was the implementation of the Agreement, and especially what was defined as its essence – i.e. the alteration of the constitutional order through the inclusion of the amendments already drafted in the OFA. In other words, the OFA's drafters had already taken up the constitution-making power. The MPs should have just obeed and voted for what others had agreed upon. The crux of the lingering dispute was the text of the Preamble: i.e. the definition to whom the state belongs! However, from the point of view of the external powers, constitution-making was just a nuisance of the backward people who quarrel over non-substantive matters. Thus, it was reported that at the eve of the constitution change, the NATO Secretary-General Lord Robertson had snapped telling the Macedonian journalists (reportedly, there were no journalists of Albanian origin at the meeting): "You can't feed your children with the Constitution. It's time to move on from the Constitution to bread and butter."[34] The constitutional amendments were eventually adopted but the media depicted the scene as mourning rather than

[31] In his memoir James Pardew mentions certain Lauer Miller and 'European experts' working on the OFA's solutions – but the full list of experts involved has never been fully exposed. See: James W. Pardew, *ibid*, p. 304.

[32] Interestingly, few in the Macedonian public have ever heard the name of the expert who worked for DPA, Paul Williamson, but his bio can be found on Wikipedia: "He has served as a delegation in the Dayton Agreement negotiations (Bosnia-Herzegovina), Rambouillet Agreement and Paris negotiations (Kosovo), Ohrid Agreement negotiations (Macedonia), and Podgorica/Belgrade negotiations for Serbia and Montenegro." (<http://en.wikipedia.org/wiki/Paul_Williams_%28professor%29> accessed 25 November 2021). According to the online statement of National Albanian American Council, he was hired and sent on a peace mission by them. ("NAAC Sends Constitutional Law Scholar to Macedonia on Peace Mission", <http://www.naac.org/pr/2001/06-27-01.html> accessed 27 February 2017). See also: < https://www.drpaulrwilliams.com/europe-eurasia> accessed 25 November 2001.

[33] See: 'Was there a war in Macedonia?', <http://macedoniapress.blogspot.com/2007_04_01_archive.html> accessed on 13 November 2020.

[34] *Дневник*, 26 October 2001, quoted from Мирјана Малеска, 'Болни соочувања', *New Balkan Politics* no. 3, 2003, < http://www.newbalkanpolitics.org.mk/item/Painful-Confrontations/mk#exp2> accessed on 25 November 2021.

celebratory, while the general atmosphere as expressed in the Macedonian media confirmed that the OFA was seen as an act of national humiliation, defeat and shame.[35]

3. The OFA's Impact on the Constitutional Order: The Hybrid System and Its (Un)Predictable Outcomes

The context of the constitution-making and breaking in 2001 was unprecedented, and only comparable with the Dayton Bosnia and Herzegovina, at least to some degree. What is the bottom line in both cases is the fact that the agreements tailored and imposed from abroad were successful in cessation of the violent stage of the conflict, imposed a hybrid type of constitutional and political order, addressed some of the collective ethnic grievances - but fell short of its resolution and closure of ethnic divisions.[36] If it had been a successful mechanism of conflict resolution, in two decades it would have become not so present and quoted in the public and political discourse. However, the focus of this paper is on its constitutional effects.

The OFA is hardly a peace deal and political document from the past. It has become a 'vivid' law or better law in action despite its primarily political character. Despite the original idea of full implementation within four years, its provisions and the so-called 'spirit' provided a source of endless 'creative' interpretations, let alone the fact of the OFA being a small change in the endless inter-party transactions and coalition bargaining. It is still being called upon and referred to by the politicians prevents any meaningful, critical and rational analysis of its real effects and consequences on Macedonian constitutionalism.

The OFA's only authentic version is the English one, which was/is in overt breach of Article 7 of the Constitution. According to Siljanovska-Davkova, the entire procedure was neither transparent nor democratic, while the parliament was suspended, even though Article 66 of the constitution specifies that it is continuously in session. The process of decision-making was transferred from lawful government bodies to an unconstitutional body established *ad hoc*. She defines the OFA as a quasi, 'supra-constitutional act', which even predetermined the speed of the constitutional revision to only 45 days after the signing. The Constitutional Committee and the Assembly discussed the text but were not allowed to change even a single dot. She concludes that it was a virtual procedure, the parliament turned into a caricature of itself, while sovereignty ended up as 'legal fiction' (Leon Digi).[37] Constitution is meant to be *lex superior* not only in legal terms but also in political ("by the people"). In this case, the constitution-re-making was nothing but constitution-mocking: it had been alienated from the true holders of power and people's sovereignty, while *materia constitutionis*, quite absurdly, had to

[35] Мирјана Малеска, ibid.

[36] Framework Agreement, 2001, https://www.osce.org/files/f/documents/2/8/100622.pdf, accessed on 26 November 2021.

[37] Gordana Siljanovska-Davkova, 'Globalisation, Democracy and Constitutional Engineering as Mechanism for Resolving Ethnic Conflict', conference paper, Athens: VII World Congress of Constitutional Law, 2007.

be adopted in an urgent procedure and under security threats.[38] Most knowledgeable legal experts (from pre-statebuilding era) used to warn that 'interventions in the constitutional text should be extremely rare and done with a shaking hand' (Pierre Wigny).[39] In 2001, the Republic of Macedonia has lost its constitutional independence i.e. became a state without sovereignty and faking democracy(to paraphrase David Chandler)[40]; the second time it happened during the 2019 constitutional change.[41]

The 1991 constitution went through an amendment procedure that was quite dubious, but not quite exclusive. The constitutional theory still seeks the answer to the fundamental question of when is a constitutional amendment an amendment in name alone? According to Richard Albert, reformers around the world are exploiting the forms of constitutional amendment and testing the limits of legal constraint, openly engaging in what Georges Liet-Veaux described at the height of the Second World War as '*fraude à la constitution*' (constitution fraude). He concludes that

> some of these constitutional changes are undemocratic, others are illegitimate, and still others are illegal. Yet whether they are properly defined as amendments turns on how we understand the amendment power and limits on its use. The question, then, is twofold: What is an amendment and under what conditions should we recognize its validity? [42]

In an attempt to chart terrain in the constitutional amendment process, the Venice Commission has taken a position on whether states should abide by the codified rules of amendment. In its 2009 report, it acknowledged that sometimes "irregular constitutional reform" may be acceptable considering the intended objective, for instance in the consolidation of democracy.[43] In the Macedonian case of 2001, it was a matter of 'saving a nation form war' as the international mediators argued, and ever since this mantra has never been questioned, having become a part of the official narrative. Consociationalism's starting premise is that 'ethnic divisions are resilient rather than rapidly biodegradable, and that they

[38] Just ten days prior to the adoption of the constitutional amendments, the EU and USA issued another warning: "Macedonia is under great risk of violence renewal because of the delay in the parliamentary debate". (*Дневник*, 7 November 2001).
[39] Quoted by Natalija Nikolovska and Gordana Siljanovska-Davkova, *Macedonian Transition in Defect: From Unitary towards Bi-National State*, (Magor, 2001), p. 104.
[40] David Chandler, *Faking Democracy After Dayton*, (Pluto Press, 2000).
[41] Interestingly, some constitutionalists who used to be strong critics of OFA, in the meantime evolved and got completely opposite perception arguing in favor of both inclusion of OFA in the Preamble along with the name change deal amendments in 2019. See: ‚Топ Тема на Ваша Страна: Интервју со професорот Светомир Шкариќ за уставните измени', Youtube 5 November 2018, < https://www.youtube.com/watch?v=2_2BLwyfBok> accessed on 26 November 2021. In another text, professor Skaric listed OFA along with the 1995 Interim Accord between Macedonia and Greece, as 'a deal over the Constitution'. See: Светомир Шкариќ, ‚Договорот со Грција и уставните промени', *Res Publica Blog* 14 September 2018, <https://respublica.edu.mk/mk/blog/2018-09-14-08-02-16> accessed on 26 November 2021.
[42] Richard Albert, *Constitutional Amendments Making, Breaking, and Changing Constitutions*, (Oxford University Press 2019), p. 1.
[43] Ibid., p. 25.

must be recognised rather than wished away'.[44] Consequently, they don't believe that the main groups are likely 'to assimilate, fuse, or dissolve into one common identity at any foreseeable point'.[45] Therefore, consociationalists are apt to portray themselves as 'pragmatists who, in accepting existing divisions within ethnically divided societies, strive to regulate them through complex constitutional engineering' (Kerr 2009: 209).[46]

As well known, the text of the OFA had never been a matter of public deliberation prior to its adoption by the political elites under strong international pressure. Also, the document was never either exposed to a national referendum (in order to avoid 'majorization') or ratified in the Parliament, which has created an impossible situation that for the most quoted document there was no means for authentic interpretation. Thus OFA has got its own life and dynamic, mostly at times of coalition government formation processes. Its political force overshadowed the letter of the Constitution, whose amendments have been treated as „caoutchouc norms". In any situation of potential institutional paralysis due to the mutual veto between the two major communities, law has been adjusted to the current state of affairs thus avoid falling into its 'own' crisis, and instead of changing and bending in order to enable all imposed demands and modifications.[47] The legendary impotence, silence and politicization of the Constitutional Court have greatly sustained this 'living constitution' and the political system with no preset rules of the game. Unfortunately, the legal expert and academic communities are equally silent or divided into two blocs: 'defenders' of OFA and its erratic influence on the constitutional order vs 'critics' who insist on a more rigid understanding of constitutionalism and rule of law. The former are de facto actors who have gained the 'right' to give an authentic interpretation of the letter and spirit of OFA (as alleged participants in its crafting), while the others are often demonized as enemies of peace and stability. In short, there is unquestionable 'official truth' that OFA is the best possible solution for political managing ethnic diversities not only in the country but beyond. As in the time of the 'oasis of peace', the country lives in a pipe-dream of (another) success story. Such an atmosphere prevents any theoretical, rational and objective (political, constitutional and sociological) analysis of PFA's effects.

The authors who refer to the 'spirit of the OFA' argue that in juridical terminology it would have been more appropriate to use the term "sense and purpose" of the regulations of the OFA and to give answers to current questions and challenges in light of those terms. But this is only a question of terminology. "Spirit" according

[44] John McGarry and Brendan O'Leary, *Explaining Northern Ireland: Broken Images*. (Wiley-Blackwell 1995), p. 338.

[45] John McGarry and Brendan O'Leary McGarry, 'Power shared after the deaths of thousands', in R. Taylor (ed.), *Consociational Theory*: *McGarry and O'Leary and the Northern Ireland Conflict* (Routledge 2009), p. 26.

[46] Michael Kerr, 2009. 'A culture of power sharing', in R. Taylor (ed.), *Consociational Theory,* ibid, p. 209.

[47] In the two decades-long practice there have been several similar situations, when the word-twisting and creative interpretations of the constitutional amendments served as a legal basis for ambiguous and even unconstitutional laws, such as the Law on Territorial Borders of the Municipalities, the Law on Use of the Communities' Flags, the Law on Use of Languages, etc.

to them means exactly that – sense and purpose.'[48] The key problem is that in its entirety OFA is essentially a political deal (not even agreement) concluded among the leaders of (only) four political parties. The moment the pre-drafted amendments became an integral part of the Constitution, they have gained a life of their own, apart from the 'spirit' of OFA. One would expect them to follow the spirit of the constitutional order and its values as defined in Article 8. However, in the practice the frequent referring to the 'spirit of OFA' led to a distortion of rule of law whenever necessary for alleged preservation of peace and stability. The spirit has no limits, expect the political will of powers that be.

One of the most immense problems is the collective denial of the fact that power-sharing system is in place, despite all the reiterations of alleged 'civic state' guaranteed by OFA.[49] The Macedonian polity has become an entity that encompasses two *demoi*, two 'communities' (a term embedded in the Constitution whose real effect is overshadowing participatory power of the citizens, as enacted in Article 2), while the small ethnic communities serve either as political satellites in the power battle or as décor in the so-called 'multiethnic state'.[50]

The consociation model per se involves a set of unwritten rules and principles that govern coalition politics. They are based on a specific political culture of the elites, while the citizens are marginalized and left out of the 'democratic politics'. Consociation politics gets in the business logic into running the state, while the normal politics and ideology stop being a competition but rather an attempt for managing differences. The most important decisions are usually made out of the formal institutions, in 'summits' of the elites who carry out mutual bargaining in a secretive and non-transparent manner. The greatest danger for this stabilitocracy (whose main trait is unconditional loyalty to the Western power centers)[51] is a potential awakening of the citizens, appearance one demos on the political scene. The key source of power for consociational elites is within their own ethnic 'segments', so dismantling the fragmentary notion of the polity would spell the end of their rule. Hence, the opposite parole reads: without us (and the OFA) there would be no Macedonian state at all.

[48] *Power Sharing and the Implementation of the Ohrid Framework Agreement*, (Friedrich Ebert Stiftung 2008), p. 5.

[49] Florian Bieber rightly points out the following: 'The Ohrid Framework Agreement transformed Macedonia from a self-defined nation state with an informal grand coalition arrangement into a state straddling between nation state, civic state and bi-national state with a formal power-sharing structure. [...] The reforms formally sought to enhance the civic nature of the state and shied away from explicitly referring to specific ethnic groups. At the same time, it institutes key elements of power-sharing and elevates Albanians as a community with comparable rights to the Macedonia majority...' In: *Power Sharing and the Implementation of the Ohrid Framework Agreement*, ibid. p. 17-18.

[50] 'The consociational package for managing ethnic diversity, in the form that has been applied in Macedonia, formally enables only certain groups in the society to have equal status and representation, and thus, maximum protection and recognition. The small(er) ethnic communities are only partially included in the process and are in a subordinated position to the two (more) numerous groups.' In: *Effective Political Participation of the Small(er) Ethnic Communities in Local Self-Government in the Republic of Macedonia. The Impact of the Ohrid Framework Agreement*, (Centre for Regional Policy Research and Cooperation "Studiorum" 2011), p. 76 <http://pdc.ceu.hu/archive/00006492/01/CRPRC_Studiorum_Effective_participation_of_minorities-study(ENG).pdf> accessed on 27 November 2021.

[51] Srdja Pavlovic, 'West is best: How 'stabilitocracy' undermines democracy building in the Balkans', *LSE Blog* 5 May 2017, < https://blogs.lse.ac.uk/europpblog/2017/05/05/west-is-best-how-stabilitocracy-undermines-democracy-building-in-the-balkans/> accessed on 26 November 2021.

4. Conclusion: An Agreement over the Constitution and the Hybrid Political System

Twenty years later, the OFA is fully incorporated into the constitutional text, including its preamble, next to some other historical events that symbolically speak of the people's will for a polity of their own and an independent state. It has been a strange evolution, especially bearing in mind that the Constitutional Court dismissed the initiative for the OFA's constitutional review with an argument that it was not a legal regulatory act but a mere political agreement concluded among the leaders of the political parties that formed a governing coalition. However, it can hardly sugarcoat the fact that OFA was a war (brain) child. Its inclusion in the preamble is a legitimation of use of violence for political purposes, in spite of its own provision against use of violence for such goals.[52]

In its essence, the OFA is hardly a peace agreement (bearing in mind that it never anticipated any meaningful measures of post-conflict peacebuilding and transitional justice), it is definitively not an international agreement too. As already noted, in a period of two decades a political act got fundamental/ultimate legal dimension. The 2001 amendments helped transformation of the parliamentary system into a hybrid *sui generis* parliamentary model with prevailing power-sharing elements, which often derogate the liberal values for the sake of peace and stability. The political power of the partners in the game take higher ground in interpreting and implementing the political principles of parliamentarism as well as the constitutional provisions. However, in the meantime, the OFA has often been fetishized notion almost devoid of any meaning, except as political capital on one (winning) political party born out of the guerilla war.[53]

Constitutionally and politically, one can point out Cinderella's (constitutional) outfit of the Macedonian (dis)order. The necessity of an adoption of a completely new constitution is confronted with the practical impossibility to do any move in that direction for the sake of 'peace and stability'. In other words, the genuine, inclusive and deliberative process of constitution-making is still a mission impossible. Therefore, the state lingers in limbo between imagined constitutional order and practical disorder in an overindebted, corrupted and non-functional polity (with no demos).

The theory and practice give enough examples that Lijphard's model as implemented in divided societies is either an interim remedy or is no remedy at all. Dayton Bosnia and post-Ohrid/post-Prespa Macedonia are just a couple of examples from the Balkans. The Empire in denial is certainly not going to take any responsibili-

[52]In 2001, at an international conference Teuta Arifi put it bluntly: "NLA's use of violence has proved to be an important precondition for pushing forward the political process to promote equal status for the ethnic Albanian population within the Macedonian state.' In: Conference Report *Macedonia between State Sovereignty and Ethnic Self-determination: Opportunities and Approaches for Promoting Peace* (Heinrich Boell Stiftung 24 September 2001).

[53]Арсим Зеколи, ‚Фетишот наречен Охридски рамковен договор', *Дојче Веле на македонски јазик* 12 Август 2021, < https://www.dw.com/mk/%D1%84%D0%B5%D1%82%D0%B8%D1%88%D0%BE%D1%82-%D0%BD%D0%B0%D1%80%D0%B5%D1%87%D0%B5%D0%BD-%D0%BE%D1%85%D1%80%D0%B8%D0%B4%D1%81%D0%BA%D0%B8-%D1%80%D0%B0%D0%BC%D0%BA%D0%BE%D0%B2%D0%B5%D0%BD-%D0%B4%D0%BE%D0%B3%D0%BE%D0%B2%D0%BE%D1%80/a-58838569> accessed on 26 November 2021.

ty for the iatrogenic effects of their state-building medicines.[54] The initial material/societal circumstances that imposed themselves as a material source of the 2001 constitutional changes have mutated to such a degree that even if the initial defects are eliminated, there is a vast list of new 'fabric/material defects' of the current 'patched' constitution that is unable to even get close to the notion of popular will and *un consensus fondateur*. The initial *democratic narcissism* (to quote Skaric and Siljanovska-Davkova again) is now transformed into a *monopole confortable* of two ethnic elites against the majority of the citizens who have no say in any important domain of policy-making and/or decision-making process.

The OFA was meant as a temporary solution to the problems and grievances as of the 90s, but through the years it transformed into a sacred book with numberless interpretations. The constitutional revision of 2019 only added salt to an open wound, making the imposed constitutional changes unacceptable and alienated for a significant number of citizens. The state nowadays faces a serious problem of lack of internal cohesion (especially when the promises of wellbeing linked to NATO and EU membership are withering away), both within and between the two major communities. The perfect solution, many constitutional lawyers would agree, is in the further integration and building cohesion among the citizens through the formula of constitutional patriotism. Easier said than done! For that formula to work, it is necessary to have a constitution in the Rousseauan sense of the word: There will never be a good and solid constitution unless the law reigns over the hearts of the citizens.[55] The 2021 Scientific conference of MANU devoted to the 30th anniversary of the Macedonian statehood provided a forum for a vast number of academicians and scholars, including prof. Svetomir Skaric and prof. Vlado Kambovski, who agreed over the need for a new constitution; yet few were able to give an answer on how to achieve political consensus and enough votes in a deeply divided Macedonian parliament that only reflects the deeply divided and polarized society.

[54]David Chandler, Empire in Denial. The Politics of State-Building (Pluto Press, 2006).
[55]As quoted in Денис Прешова, ‚Македонскиот уставен (не)патриотизам', *Политичка мисла* 9/2011, бр. 35, p. 41.