Separation of Powers and Consociational Power Sharing in Republic of Macedonia: Developments and Perspectives

Igor Spirovski[1]

Introduction

The Constitution of Republic of Macedonia was adopted on November 17, 1991. It is the first Constitution of Macedonia as an independent state and the first constitution that integrally introduced a democratic political regime. It was inevitable to undertake a constitutional modeling which would match both the primarily European standards and the specific national needs. Thus, the Macedonian Constitution is one among the numerous constitutions of new democracies in Central, East and South-East Europe which are, essentially, a result of reception of the constitutional models existent in the old democracies of Western Europe. It is a liberal, democratic constitution. Its dedication to democracy, rule of law and human rights is strongly expressed in the text. It is evident even in the list of the fundamental values of the constitutional order in a particular article, apart from their existence in the rest of the structure of the Constitution. Namely, the article 8 of the Constitution states that the fundamental values of the constitutional order are: the basic freedoms and rights of the individual and citizen, as recognized in international law and envisaged in the Constitution; the free expression of national identity; the rule of law; the separation of powers into legislative, executive and judicial; political pluralism and free, direct and democratic elections; the legal protection of property; the freedom of market and enterpreneurship; humanism, social justice and solidarity; local self-government; proper urban planing to promote a congenial human environment, as well as environmental protection and development and respect for the generally accepted norms of international law. The process of consolidation of these values and the constitutional regime in general has been, as expected, followed by various types of difficulties and a quest for improved solutions.

Apart from the guaranties of the principle of equality before the law and non-discrimination, as well as providing for judicial protection before the Constitutional Court, the Constitution contains provisions concerning substantive protection of rights of minorities, notably linguistic, cultural and educational ones. However, the Albanians in Macedonia did not find these provisions satisfactory from the very beginning. Thus, they refused to vote on the adoption of the Constitution. Later developments, although lead by governments in which the Albanian political parties participated, did not appear satisfactory enough. It was a pretext for more radical claims for new inter-ethnic arrangements. In 2001, an armed conflict broke out between the paramilitary formations of Albanians from Kosovo, later joined by the local Albanians and the Macedonian regular forces. Constitutional arrangements adopted after the cessation of hostilities is

[1] The author is judge of the Constitutional Court of Republic of Macedonia.

the main subject of this paper. Their complementarity to the existing arrangements on the separation of powers is another.

The formation of institutions and the modeling of the separation of powers were not affected by additional inter-ethnic arrangements in the Constitution. The separation of powers between the Parliament, Government and President of the Republic in the Constitution of the Republic of Macedonia is structured, basically, within the framework of parliamentary system, declining from it in certain aspects. The Government derives from the Parliamentary majority and it is accountable only to the Parliament (unicameral). The executive is two-headed, but the President of the Republic is elected in general and direct elections, and it is neither politically accountable to the Parliament, nor there is an institute of ministerial countersignature of his/her acts. There is no ground for semi-presidential classification, as the President neither has significant powers, nor presides with the Government. Judiciary is independent and no ethnically based vote for its selection existed until 2001. The Constitutional Court is a special constitutional body with competences to review the constitutionality of laws, to protect individual constitutional rights, to decide on conflict of competences between different branches of government, etc..

The introduction of consociationalism and its development

Substantive constitutional reform was made after the armed conflict in 2001, through the adoption of Amendments IV – XVIII in November 2001. These were drafted and projected as an obligation deriving from the Framework (Ohrid) Agreement - a political agreement signed by the leaders of the two main parties of ethnic Albanians, as well as of ethnic Macedonians and the President of the Republic. It was witnessed by two representatives of EU and USA. While the Agreement has been negotiated, there were still combat activities in the field. Again, the constitutional amendments were adopted in a regular procedure in the Parliament. However, there was almost no possibility to change the pre-formulated provisions in the Agreement. Their adoption by the Parliament was, in a way, 'a must', and it happened almost in a copy-paste manner.

The Framework Agreement was a response to the armed conflict not only in terms of cessation of hostilities, but it also created a model of consociational democracy which was believed to be adequate for securing the future existence of the Republic of Macedonia as a divided society along ethnic lines. The agreement defines itself as an "agreed framework for securing the future of Macedonia's democracy and permitting the development of closer and more integrated relations between the Republic of Macedonia and Euro-Atlantic community." It is said that it "would promote the peaceful and harmonious development of civil society while respecting the ethnic identity and the interests of all Macedonian citizens." Its basic principles pose two big "musts": first, Macedonia's sovereignty and territorial integrity, as well as the unitary character of the State are inviolable and must be preserved (accordingly, there are no territorial solutions to ethnic issues), and, second, the multi-ethnic character of Macedonia's society, which must be reflected in the public life. The constitutional engineering designed by the Framework Agreement clearly aimed at reconciling these two ''musts'', by

redefining the inter-ethnic relations in Macedonia and placing them in an institutional setting for power-sharing within a model of consociational democracy, based on identification of ethnic communities pursuing collective rights as political entities. The Amendments:

- rewrote of the Preamble, replacing the "Nation-State" language and, instead of referring to different ''peoples'', implying different political formula of the Constitution and of the State;[2]

- introduced conditions for another official language/s besides the Macedonian;[3]

- introduced the equitable representation of persons belonging to all communities in state organs and in other public bodies at all levels, as a fundamental value of the constitutional order;

- introduced significant increase of competences of municipalities for the purpose, mainly, of increasing the level of autonomy of ethnic communities which are in majority in such municipalities;

- introduced double-majority voting or right to veto for the minority communities in the Parliament, not only in cases of adoption of laws in specific areas and the election of certain officials and bodies, but with regard to the amending of the Constitution, as well. The right to veto, as we will see, has been extended to other instances by subsequent legislation.

Three out of four elements of the original Lijphart's consociationalism are visible: *segmental autonomy*, although at the level of municipal self-government; *proportionality*, both in the electoral system (PR d'Hondt) and in representation in public bodies and *veto right*. What is not visible, and therefore non-existent as a constitutional requirement, is a mandatory executive *grand coalition*. However, as a matter of custom and tradition, ever since 1992, governments have been created by Macedonian-Albanian party coalitions, including at least one party of Albanians. Indeed, there

[2] See: Skaric Svetomir, Siljanovska-Davkova Gordana,"Ustavno Pravo"(Constitutional Law), Univerzitet "Sv Kiril i Metodij", Praven fakultet – Skopje, 2007, p.328; They consider the Preamble as a source of multi-ethnic sovereignty. Also: Mehmeti Ermira, "Implementacija na Ohridskiot ramkoven dogovor" (Implementation of the Ohrid Framework Agreement) in: Podelba na vlasta i sproveduvanjeto na Ohridskiot ramkoven dogovor, Friedrih Ebert Stiftung, Skopje, 2008, p. 107. She emhasizes that the guaranteeing of the sovereignty and the territorial integrity is subjected to agreement and mutual consent between the relevant (ethnic) groups. Macedonians and Albanians undertake the main responsibility.

[3] According to Amendment V (on article 7) the Macedonian language is an official language on the whole territory of Republic of Macedonia and in its international relations. The second paragraph stipulates that any other language than Macedonian, spoken by at least 20 percent of the citizens is also an official language, written using its alphabet, as specified in this article,[3] which distinguish the scope of its (or their) application from Macedonian. The fact that only the Albanian ethnic community exceeds 20% of the population (25.17%) and the remaining minority communities are represented with 0.5 to 4%, shows that in a long term in Macedonia there can be only two official languages. It is also a criterion determining who is considered as a significant ethnical segment.

have not been "grand" coalitions, since not all significant parties (which is not any more considered important) within all significant communities were represented. [4] Thus, the other ethnic groups are not deemed "significant" segment (10 % in total). They do not participate in the power sharing arrangements, although they do find their place in the over-size government coalitions frequently. This "voluntary" executive power-sharing is percepted as a feature of integrationist theories[5] and it could be accepted as such in Macedonia until 2001. However, after the introducing of the right to veto, it takes the logic of consociationalism.

Segmental autonomy

One of the basic principles of the Framework Agreement, as already mentioned, is that there are no territorial solutions for the ethnic issues and that Republic of Macedonia will remain a unitary state. While excluding federalism or regionalism, the Framework Agreement pays special attention to, as its section 3 is titled, "Development of Decentralized Government." This should be attained by two main complementary measures: first, by constitutional changes and adoption of a revised Law on Local Self-Government that reinforces the powers of elected local officials and enlarges substantially their competences in conformity with the Constitution (as amended in accordance with Anex A of this Agreement) and the European Charter on Local Self-Government and reflecting the principle of subsidiarity in effect in the European Union. Amendment XVI to the Constitution and, subsequently, the said law which was adopted in 2002, enlists an enhanced original competence of the municipalities, particularly in the fields of public services, urban and rural planning, environmental protection, local economic development, local finances, communal activities, culture, sport, social security and child care, education and health care. The Law stipulates that competences of municipalities are, as a rule, complete and exclusive and they must not be taken away or restricted, except in cases determined by law. It was followed by adoption of the Law on financing of local self-government in 2004, in order to ensure an adequate system of financing, thus enabling local governments to fulfill all of their responsibilities and enhancing municipalities' own recourses of income. Second, by revision of the boundaries of municipalities, but only after a new census is completed.[6] Given the

[4] The only grand coalition, including the opposition parties at a time, was created on 13 May 2001 during the armed conflict. It lasted until 23 November 2001, three months after the conclusion of the Framework Agreement and immediately after the adoption of the Constitutional Amendments

[5] On consociationalism, integrationism and power-dividing see: Wolff, S. "Complex Power Sharing as Conflict Resolution: South Tyrol in Comparative Perspective", www.stefanwolff.com/working-papers/STCPS.pdf,2008; Raynolds, A. "Majoritarian or Power-Sharing Government,'' www.constitutionnet.org/files/reynolds majoritarian-powersharing.pdf,1999

[6] The census was conducted in 2002 and revealed the following ethnic structure of the population: Macedonians 64.8%, Albanians 25.17%, Turks 3.58%, Roma 2.66%, Serbs 1.78%, Vlachs 0.48%, Bosniaks 0.84% and other 1.04 %.

context, this is in itself sufficient to reveal the idea of creation of as much as possible majoritarian units of self-government along ethnic lines. Indeed, the Law on territorial organisation was adopted in 2004 (it survived the subsequent challenge on a referendum), gerrymandering municipalities to create more of them where ethnic Albanians are now in majority or to attain the minimum 20% of the population as a condition for a community language to become official in the municipality. To that end, for example, rural municipalities were attached to the City of Skopje (the capital and distinct unit of self-government) so that the Albanian language is also official in the operation of its organs. In addition, in order to ensure that police are aware of and responsive to the needs and interests of the local population, local heads of police are selected by the municipal councils from a list of candidates proposed by the ministry of interior, and police services reflect the ethnic structure of the population. This was achieved through hiring and training officers from minority communities and their deployment to the areas where such communities live. Needless to say, municipalities where Albanians are in majority (16 out of 84), concentrated in the western part of the country, are perceived as units of their ethnic local autonomy.

These reforms obviously brought about substantially new format of the municipalities with significant competences in socio-economic field. The two-layered structure of vertical separation (division) of powers between the center and the local government now bears a characteristic of consociational power sharing mechanism, as certain municipalities are layers of meaningful *segmental* autonomy, too. Such institutionalized separation of powers/power sharing structure now makes use of the existing protection by the Constitutional Court with its power to decide on conflicts of competence between the organs of the central and local self-government (article 110 of the Constitution, not amended), making it a complete system under the rule of law. The fact that the Law on local-self government is adopted by double majority (cross community) vote in the Parliament additionally reveals the lack of possibilities for abrogation of these arrangements, except in case of mutual agreement between ethic-party's elites at a given moment.

Proportionality

The representation of different social segments is a common feature of consociational democracies. It is applied, in principle, at all levels of government – legislative, executive and judicial - as well as at the level of different layers of authority in federal, regional or local decentralized structure. Representation in bodies of public administration (employment) is a special case of application of this consociational element. Proportionality is achieved in different ways, according to the given circumstances. In Belgium, for example, the representation of the linguistic communities in the Chamber of Representatives is attained via proportional electoral system with 11 linguistic multi-member electoral constituencies, according to their population. The dualistic Duch-French speaking structure is preserved also for the Senat, through the multiple way of its composition. In Switzerland, representation of different segments in the National Council is also attained by PR system in 26 constituencies,

corresponding to the boundaries of the 26 Cantons. In the House of Representatives of Bosnia and Hercegovina, 48 representatives are elected from the two Entities, Republika Srpska and Federation of BiH, in proportion of 1/3 and 2/3 respectively. The House of Peoples, however, comprise of 15 members, two-thirds from the Federation (including five Croats and five Bosniacs) and one-third from the Republika Srpska (five Serbs) as reserved seats, using a system of delegation. The system of reserved or guaranteed seats in the legislature is adopted in the Constitution of Kosovo of 2008, providing for 10 seats for members of the Serb community and another 10 for the other communities in the Assembly (out of 120). The Northern Ireland 108 member Assembly is elected on the basis of PR STV system, providing for adequate representation of Nationalists and Unionists, leaving almost no room for "others", although it is considered as favourable to vote-pooling.

This aspect of proportionality as consociational element in Macedonia, given the parliamentary system of government and predominance of ethnic political parties, is perceived in d'Hondt proportional representation electoral system, both for the election of the Parliament and of the Councils of the municipalities. It was introduced at the local level as early as in 1996 and it was a part of mixed majority-proportional system for parliamentary elections of 1998, becoming a sole base for parliamentary elections in 2002. It is a closed party list system without threshold with six multi-member constituencies that match the ethnic distribution of the Albanian population in Macedonia. Ethnic voting is an obvious rule leading to clear-cut results along ethnic lines. In the current term of the 120 member parliament, Albanians are represented by 29 MP-s, all of them elected from the lists of ethnic Albanian parties. Members of other minority communities entered in the parliament either as members (leaders) of ethnic parties placed on a list of established pre-electoral coalitions with Macedonian parties (4) or on the lists of basically Macedonian parties as party-members(5). Otherwise, there is no guaranteed representation of the smaller communities in the parliament and there is no possibility for their parties to win a seat acting individually, which diminishes their relative importance in the political life and makes their representation contingent on strategies of other political actors. There have been attempts to open a procedure to amend the legislation in order to guarantee 10 seats in the parliament for smaller communities, but both failed, revealing that the issue of major concern is the preservation of the decisive position and relative strength of ethnic Albanian MP-s in cases of double majority voting. This, once again, shows that smaller communities were not supposed to be a factor in the overall structure of power sharing arrangements, despite of the "multi-ethnic language" of the Framework Agreement.

Another aspect of this consociational element is clearly seen in the requirement for equitable representation of persons belonging to all communities in public bodies at all levels and in other areas of public life. It is enshrined as one of the fundamental values of the constitutionl order, along with separation of powers, human rights, the rule of law etc. (article 8 and amendment VI to the Constitution). It cannot be reduced to the principle of non-discrimination, although it is its birthplace, but requires both normative arrangements and political

effort to be implemented. This is exactly the logic of the section 4 of the Framework Agreement addressing both legislation regulating employment in public administration and authorities' action to "correct the present imbalances in the composition of the public administration". In this context, an important point of agreement between the ethnic leaders was the principle that in implementing this measure, the rules concerning competence and integrity that govern public administration will be respected. This was exactly the point of controversy that followed the adoption of the Law on public servants where provisions for lowering the criteria for employment of persons belonging to the communities were introduced, both in respect of education and passing of the state examination. The Constitutional Court upheld the constitutionality of the Law, finding that the different treatment was justifiable for impugned provisions and served the aim of realization of the equitable representation as a fundamental constitutional value and of creation of real prerequisites for employment of persons belonging to ethnic communities and the removal of the existing inequality.[7] Anyway, the increasing of the representation of non-majority population in public administration has been a matter of top political priority of the Albanian community, which sometimes favoured strange decisions[8] and negligence for the interests of other smaller communities. The importance of the equitable representation for the overall power sharing arrangements can be seen from the constitutional amendment XI that empowered the Ombudsman with a new competence to "give particular attention to safeguarding the principles of non-discrimination and equitable representation of communities in public bodies."

A particular feature of the element of proportionality in segmented societies is its implementation for the composition of highest courts. Thus, in Belgium the Constitutional Court is composed of six French-speaking and six Dutch-speaking judges; in Switzerland it is a constitutional requirement that in electing the Federal Court judges and their substitutes, the Federal Assembly will ensure that the three official languages of the Confederation are represented; the Constitutional Court of Bosnia and Hercegovina is composed of nine members (in practice, two Croats and two Bosniacs) four of which were selected by the House of Representatives of Federation of BiH, two by the Assembly of Republica Srpska (two Serbs) and the remaining three by the President of the Europen Court of Human Rights (foreigners); in Kosovo two out of nine judges are elected by majority vote of the deputies of the Assembly present and voting, but only upon the consent of the majority of the deputies of the Assembly holding seats reserved or guaranteed for representatives of the communities which are not in majority in Kosovo.

For its part, the Constitution of the Republic of Macedonia, as amended in 2001, indirectly regulated the ethnic composition of the Constitutional Court and of the Judicial Council, implying that

[7] Ruling U. br. 183/2005 of 26 January 2006, www.ustavensud.mk My dissenting opinion is attached .

[8] The Secretariat for Implementation of the Framework Agreement employed around 100 Albanians without having work for them. Employees have been receiving salaries and have been staying at home until work was found.

through double-majority vote for three members respectively, persons belonging to minority communities would be elected, which was in fact the case. As a matter of fact, even in the period before 1991 the composition of the Constitutional Court has always comprised judges from minority communities without any legally binding norm. Constitutional amendments of 2005, on the other hand, directly regulate the ethnic composition of the new format of the Judicial Council. It is now composed of 15 members:[9] eight members are elected by the judges from their own rank, out of which three must belong to ethnic communities which are not majority in Macedonia; three members by the Parliament by double-majority vote; another two by the Parliament, but on a proposal by the President, out of which one must belong to the community that is not majority in Macedonia; the remaining two are the Minister of justice and the President of the Supreme Court *ex officio.* An issue of interpretation appeared when the President proposed two members, each belonging to communities that are not majority in Macedonia. If the provision of the amendment that *one* of the proposed candidates should belong to a community is interpreted as a minimal requirement, not excluding the possibility that both candidates could belong to a community that is not majority seems problematic, since this provision of the amendment does not only provide for participation, but *creates* ethnic balance in the composition of this body, in the same way as the other provisions of the same amendment. If this interpretation is applied, then, having in mind the same language that is used, every constitutional provision for the purpose of balancing the ethnic representation could be understood in a minimalistic way, thereby affecting the weighting of double-majority vote in the Council. The only undefined ethnic structure pertains to the three members proposed and elected by the parliament, since there is only a norm for double majority voting.

Veto right

Minority (mutual) veto right as a mechanism of a power sharing system aimed at preventing a minority group to be outvoted in matters of its vital interest. It finds its place in a range of cases. In Belgium it is known as "special majority" or majority for adoption of "special" laws. It is defined in article 4 of the Constitution, originally introduced in the case of adoption of a law on changes of linguistic regions, as a majority of the votes cast in each linguistic group in each House, on condition that a majority of the members of each group is present and provided that the total number of votes in favour that are cast in the two linguistic groups is equal to at least two thirds of the votes cast. It is further applied in specific cases, such as laws on elections, composition and functioning of Community and Regional Parliaments, as well as their Governments. Similar double majority rule exist for voting procedures in the unicameral Assembly in

[9] According to replaced article 104, as amended in 2001, the Judicial Council was composed of seven members elected by the Parliament from the ranks of outstanding lawyers. Three of them had to be elected by double-majority vote i.e. by majority of the total number of MPs, within which there has to be a majority of votes of the MPs who belong to the communities not in majority in Republic of Macedonia.

Northern Ireland defined in the Good Friday Agreement (strand one, par.5) in two variants: parallel consent – majority of those present and voting, including a majority of the unionist and nationalist designations present and voting (used for adoption of specific acts) and weighted majority – majority of 60% of members present and voting, including at least 40% of each of the nationalist and unionist designations present and voting (used for acts, other then specified, challenged by "petition of concern" brought by at least 30 members of the Assembly claiming vital national interest). In Bosnia and Hercegovina majority of delegates of Croats, Serbs and Bosniacs in the House of Peoples may declare that a proposed decision, on any matter, is destructive for the vital interest of the said people, in which case the decision is adopted by majority of each ethnic members present. Unlike in Northern Irland and Bosnia and Hercegovina, in Kosovo all issues of vital interests requiring double majority vote are constitutionally pre-determined (local boundaries, competences of municipalities, laws on the use of languages and symbols, education, cultural heritage).

Likewise, in Macedonia veto right is exercised via double–majority vote, which means that a decision is made by a certain majority of MPs as a whole. Within it there must be a certain majority of votes of the MPs who belong to communities which are not in majority in Republic of Macedonia. It appears either as simple or absolute double-majority, depending on whether a majority of all, or only of the present MPs of minority communities is required. It is used for adoption of laws that directly affect culture, use of language, education, personal documents and use of symbols, as well as for adoption of specific laws on local finances, boundaries of municipalities and on local self-government. Unlike in Belgium or Northern Ireland, the body of MPs which is counted as a basis for double majority vote in the Macedonian Parliament, embraces all members of minority communities and not only the dominant one. However, the number of Albanians in the parliament (29) against the members of all other communities (9) guarantees the decisive position of their community and protection of their vital interest without the support of the member of the smaller ones. On the contrary, vital interests of smaller communities become important only if they coincide with those of the Albanian community.

This veto rule is further reflected in the Law on local-self government for the purpose of protection of the Macedonian sub-minority and other minority communities in the municipalities when matters concerning culture, use of languages and symbols of the municipality are decided (article 41).

Double-majority voting is also used for the election of Ombudsman, the three judges of the Constitutional Court (out of nine) and the three members of the Judicial Council, as specified above. This rule is further enshrined in the Law on Judicial Council and it is used for election of a judge or president of court of first instance or appellate court which is on the territory of a municipality in which 20% of the citizens speak official language other than Macedonian. The same double-majority voting applies for the election of any judge or the president of the Supreme Court (article 43).

Finally, double-majority is required for a decision to amend the Constitution, in respect of provisions relating to the rights of members of communities, including the Preamble and the articles on local-self government.[10]

Double-majority vote appeared as a controversial issue both in terms of the scope of its application and its constitutional limits. While it is clear who bears the right to veto in the parliament, the subject matter of its application is not clear at all. Indeed, it is evident that it is applied for adoption of laws expressly named in the Constitution (such are laws on local-self government, law on financing of units of local-self government), but it is not always clear which are the laws that *directly* affect culture, language, personal documentation or use of symbols. It is not only a consequence of somewhat vague language, but also of the peculiar position of the Committee for Inter-Community Relations. This body is established by the Amendment XII. It consists of 19 members among which 7 members belong to the ranks of MPs – Macedonians and Albanians and one member from each of the following communities - Turks, Vlachs, Roma, Serbs and Bosniaks, all elected by the Assembly. Apart from its consultative competences, it is also competent to decide whether the double-majority vote applies in the event of a dispute about it in the Assembly. It is a peculiar thing to have a political body such as this Committee with a task to decide legal, and, in essence, constitutional issues. However, constitutional procedural requirements for adoption of a law, including the interpretation of the conditions for their application, is a legal issue, so that this provision cannot exclude the competence of the Constitutional Court to review the formal constitutionality of any law regarding this particular requirement. That would mean, for example, that if a law is adopted without double-majority, regardless of the decision taken by the Committee, the Constitutional Court has a genuine competence to review if the law fulfils the conditions to be adopted by a double-majority i.e. to determine whether a law *directly affects language, education, personal documents and use of symbols*. Of course, it would not be unconstitutional if a law is adopted by *de facto* double-majority, although the Constitution does not require it, but it would not mean at the same time that *de facto* situation has any normative importance for the status of the law in question. The latter context raised the issue whether a law amending a law which has been adopted by *de facto* double-majority must be adopted by double-majority too, even if it dos not directly affects those particular issues. In this respect, a particular amending law was challenged before the Constitutional Court. Unfortunately, the application was withdrawn, since the ethnic

[10] The full text of the Amendment: "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 the 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 majority in the population of Macedonia."

elites agreed to address this problem by adopting the Law on Committee for Inter-Community Relations in 2007. This Law enumerates a list of around 30 laws in force which must be changed by double-majority vote. The Constitutional Court has not been in a position to determine whether some of these laws fall under the relevant constitutional amendment. Anyway, there is a strong feeling in the Albanian community that whichever law is adopted by double-majority, it must not be challengable before the Constitutional Court either on procedural or material grounds, while the mentioned application suggests that constitutional review is welcomed if a law should have been adopted by such a procedure, and it was not.

In the context of material unconstitutionality of, as we may call them, "double-majority " laws, of fundamental importance was the case in which the Constitutional Court repealed several provisions of the Law on the use of flags of communities.[11] The Court corroborated the position of the relevant constitutional amendment placing the right of use of identity symbols of the communities on equal footing regardless of their size, thus repealing a provision providing for privileged position of a community which is in majority in a municipality, and, on the other hand, intervened in provisions by which the symbolic of the State Flag is diminished by parallel use of flags of communities in circumstances where representation of undivided sovereignty of the State is at stake. The decision was followed by a strong reaction by the parties of Macedonian-Albanian government coalition at a time, resignation of two Albanian judges (one of them being the president of the Court) and unprecedented and fundamentally ungrounded proposals either to exclude the review of the constitutionality of laws adopted by double-majority, or, as a softer variant, the proposition that on the constitutionality of such laws the Court should decide by double-majority vote. Both ideas, of course, have no connection with constitutionalism and the rule of law and they call for fragmented elimination of judicial review of constitutionality or subjecting it to ethno-political considerations, which amounts to its substantive distortion. However, an initiative for constitutional reform launched in the beginning of 2010 was used by one political party of Albanians to make an official proposal to change the Constitution by introducing double-majority vote for decision-making in the Constitutional Court on constitutionality of "double-majority" laws. One such attempt was made in Bosnia and Hercegovina, proposing that a decision of the Constitutional Court should be valid only if at least one judge from each constituent people supported the decision. The Venice Commission, in its opinion CDL-AD(2005)039 strongly opposed such a proposal, finding that such veto right of judges would run counter to European standards by emphasizing that the introduction of the ethnic origin of the judge as an element of decision making, would amount to suggest that the judge does not respect judicial ethics by including into his or her considerations elements, which are outside of the scope of law as his or her sole guidance. A political element which is alien to the

[11] Decision U. br.133/2005 of 24.10.2007.

judiciary would thus be introduced into the process of judicial decision-making.

Another proposal was introducing double-majority voting in the Judicial Council with regard to decision-making on dismissal of judges. It hardly deserves any further comment, except that these proposals run contrary to the very supportive principles that serve the success of consociational democracy, namely – separation of powers and, within it, independence of the judiciary and judicial review of constitutionality. Any attempt to subject judges to their ethnic origin and not solely to the law and objective criteria for its interpretation, amounts to distortion of any democracy based on the rule of law.

Grand Executive Coalition

There is no provision in the Constitution, or in the amendments, that the Government should be formed on a basis of proportional representation of ethnic segments, yet it appeared as a top issue, both political and constitutional, after the elections in 2006, when the winning (Macedonian) party formed a Government with an Albanian party which did not win the largest number of votes among Albanian parties. As mentioned above, ever since 1992, every government in Macedonia has been formed with the participation of an Albanian party and there have been established, apparently, closer links between certain Albanian and Macedonian parties that could hint possible coalitions. It has been a matter of political strategy involving mutual interests and the question whether the government must be formed by the winning Macedonian and winning Albanian parties, as representing the two ethnic entities, could not have been posed. During the term 2002-2006, the Macedonian party named Social Democratic Alliance (SDSM) formed coalition government with Albanian Democratic Union for Integration (DUI), which emerged after the armed conflict. Macedonian conservative VMRO-DPMNE and the Democratic Party of Albanians (DPA), which had been coalition partners in the government in the previous term, 1998 – 2002, remained in opposition. VMRO-DPMNE ever since 2002 has been overtly challenging the legitimacy of Democratic Union for Integration as emerging from and comprising of members of paramilitary KLA, so that coalition with its traditional partner among Albanian parties, DPA (11 seats) in 2006 was not a surprise. However, DUI, with 18 seats in the parliament, practically requested to be in the government since it was the true representative of the will of the majority of Albanians in Macedonia. This idea of division of Macedonian-Albanian ethno-political space lives no room for cross-cutting cleavages and possible ideological coalitions and favours further reinforcing of ethnic cleavage. Is it not a sign of a legitimate interpretation of the constitutional amendments, claiming that Macedonia, indeed, is both ethnically and, therefore, politically bi-polar?[12] What happened next? After a strong multilevel pressure, in

[12] For the affirmative see: Mehmeti Ermira, ibid, supra 3, p.120; Vankovska Biljana, "The Role of the Ohrid Framework Agreement and the Peace Process in Macedonia", http://www.fzf.ukim.edu.mk/pdf/odb/vankovska/Vankovska,%20B.%20%20

2007 governing VMRO-DPMNE began negotiations with DUI, reaching the so-called "May Agreement" which resulted, among other things, in dissolution of the Parliament and premature elections in 2008, and, guess, formation of government coalition between VMRO-DPMNE as winning Macedonian party and DUI as winning party of Albanians!

The dualistic nature of these arrangements and developments, missing a third segment, does not deprive them of a consociational logic and validity. As a matter of fact, other consociational societies have dualistic executive coalitions, such as is the case with Northern Ireland and Belgium. In a similar way "others," respectively German-speaking community were not put on an equal footing in respect of functioning of the central bodies, notably concerning double-majority vote. Whether this dualism runs toward favourable outcome of the post-conflict arrangements and whether other theoretically elaborated favourable conditions for consociational democracy are at place, is another issue.[13]

Finally, the departments of the Government are distributed to ethnic parties according to certain proportional quota, including the deputy-ministries. Needless to say, ministers are accountable to their party leaders, rather than to the President of the Government. This normally entails new bargaining over the adoption of regulations and implementation of executive measures for laws that are otherwise adopted by consensus, since it is a terrain for addressing leftovers of the legislative level.

Results and perspectives

The new, post-conflict constitutional design, although formally intended to serve multi-ethnic purposes, reduces itself to creation of two *political* entities along ethnic lines, namely Macedonians and Albanians, which is predetermined by the size of the ethnic communities. In this respect, the size of a community over 20% is relevant not only for the introduction of an official language: in fact, smaller communities could not benefit substantially from these provisions, for any decision in the fields covered by double-majority vote, in principle, can be made or blocked by the biggest minority community.[14] In this respect, the remaining communities are simply "others", having "only" a minority status. Anyway, it is truism that the Framework Agreement and the Constitutional Amendments were designed to satisfy primarily the needs of ethnic Albanians and little

The%20Role%20of%20the%20Ohrid%20Framework.%20Agreement%20and%20the%20Peace%20Process%20in%20Macedonia.pdf

[13] Goio F. and Marceta I. "The pre-conditions for power sharing, inter-ethnic conflict and democracy: Macedonia and Bosnia" paper presented at Congresso nazionale della Societa Italiana di Scienza Politica, septembre 2009.

[14] There is a total of 38 MPs, out of 120, who belong to communities which are not in majority. Out of them, 29 are Albanians, belonging to three ethnic Albanian parties, 1Turk, 1 Serb, 1Roma and 1 Bosniak, each representing their ethnic parties and 5 MPs of different ethnic groups, including, Vlachs, belonging to Macedonian political parties, which are usually obliged to follow the party discipline.

room was left for the protection of smaller communities.[15] The potential of these amendments to incite developments toward bi-national state, Macedonian-Albanian nationhood,[16] is now evident. Even a potential toward federalism in a long term,[17] rather than getting back to liberal democracy, cannot be legitimately overthrown.

Power sharing system, normally, brings about an increasing importance of ethno-political leadership and places inter-ethnic agreements as true locus of political decision-making, discarding the parliament as deliberative representative body, turning it into a rubber-stamp instrument in maters which are subject to double-majority vote. As a matter of fact, informal summit decision-making began at the time of negotiating the Ohrid Framework Agreement when political leaders abandoned the Parliament as a democratic body in order to adopt fundamental decisions for the future of the country. The impact of power sharing arrangements is moreover problematic in respect of the judicial branch of government and especially in respect of the judicial review of constitutionality of legislation by the Constitutional Court, if it suggests that decision–making in these bodies should be based on ethnic identity of judges, and not solely on the law.

What is essential, however, is the fact that power sharing arrangements and the subsequent developments in the political life in Macedonia succeeded in preserving peace, which seems to be a result of mutual, although gradual and not always enthusiastic acceptance of power sharing arrangements by all political actors, giving the system an opportunity to work. In consociational power sharing arrangements peace is usually achieved at the expense of democracy, however. Now that, after nine years of implementation of these arrangements, all so-called "framework laws" have been adopted and proportional representation is near to be properly achieved, we can expect certain relaxation of inter-ethnic tensions and clearer vision about the tendencies in future developments – are there going to be more incentives for integrationism and liberal democracy or further division along ethnic lines.

***

Abstract

The original system of separation of powers in Republic of Macedonia is more composite after the introduction of the consocial model of power-sharing and consensus decision-making mainly between two ethno-political entities. It entails more complicated patterns for balancing of power, not only between the different

[15] Bieber Florian, "Podelba na vlasta i sproveduvanje na Ohridskiot ramkoven dogovor" (Power-Sharing and the Implementation of the Ohrid Framework Agreement), in: Podelbata na vlasta i sproveduvanje na Ohridskiot ramkoven dogovor, Friedrih Ebert Stiftung, Skopje, 2008, p.25.

[16] Siljanovska –Davkova Gordana,"Globalisation, Democracy and Constitutional Engineering as Mechanism for Resolving Ethnic Conflict", VII Congress of IACL, Athens, 2007, www.enelsyn.gr

[17] Vankovska , B. "The Framework Ohrid Agreement as a cradle of federalization", Transnational foundation for peace and future research", 2007, www.transnational.org/Area_YU/2007/Vankovska_Maced_structure.html

branches, but also within them, including the judicial branch of government. The new constitutional arrangements after the armed conflict of 2001 brought about a new understanding of the State and its political structure. Their explanation has been controversial, both in political and constitutional terms, as it is the potential for future developments of the constitutional order. Recent attempts to introduce new constitutional reform clearly show that there is room for further drawing of inter-ethnic lines in constitutional matters.