SOME ASPECTS OF THE CONSTITUTIONAL REFORM IN SERBIA

Outstanding Questions of Constitutional Changes in Serbia

I – Introduction

Serbia is the state that has the largest number of national minorities in South Eastern Europe. Thus, Serbia can be referred to as a multiethnic, multiconfessional and multicultural state, where striking differences exist between various regions. The population of Serbia is highly heterogeneous in terms of ethnic composition. The total population of Serbia (excluding Kosovo & Metohija) is about 7.6 million, of which about 16% is accounted for by minorities. Precisely, according to the 2002 Census, Serbia had 7.5 million inhabitants, of whom 82.9% were Serbs, 3.9% Hungarians, 1.8% Bosniacs, 1.4% Roms, about 0.82% Albanians and about 9% members of other national minorities and ethnic groups. The ethnic versatility in some regions is very striking. Serbia is also characterized by the fact that many ethnic communities live in one and the same region, town and municipality. Thus, looking from the aspect of territorial and political division, it is quite possible for the majority to become the minority and vice versa. For example, the Serbs are the biggest ethnic community and they make up the majority, whereas in Kosovo & Metohija and in some parts of Serbia itself (some municipalities in the south of Serbia, in the north of Vojvodina and in Raška), they make up the minority, which is a very small one indeed at some places. This issue is made even more difficult also by the territorial concentration of the biggest minorities in the border-adjacent areas. The minorities manifest a striking need for the symbols and features that identify them (flags, anthems, native language, etc.) and the minority elites tend to organize themselves politically and control all needs of the minorities (through minority parties and associations). This points at the ongoing homogenization of the minorities and the major and more influential minorities (Albanians, Hungarians and Bosniacs) demand political and territorial autonomy, which is a misuse of the minority rights. Besides that, Serbian society is, more than in any other, a combination of different political ideologies – progressive, conservative and even retrograde – and expectations of some of its layers are quite incompatible. In this paper, we will present how multiculturalism reflects on current constitution making process and describe

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the main challenges of the “running” constitutional reform in Serbia. Undoubtedly, new constitution should be the most important device in conflict-management in segmented Serbian society and reaching social harmony in the future.

II – Essential Questions of the Constitutional Reform in Serbia

After almost 90 years of trying to find an appropriate constitutional frame for living together with other nations and states, Serbia has recently became an independent unitary state again. The latest attempt to build some kind of a community with another state was the State Union of Serbia and Montenegro, which common institutions were defined as policy coordinating mechanisms, rather than institutions of a state. However, its existence came to an end few months ago, when Montenegro used its right to call a referendum on independence. Disregarding that circumstance, the debate on the new Serbian constitution started many years earlier, back in 1995. However, there were several constitution models in Serbia since 1997: those proposed by the Belgrade Human Rights Centre (1997, 2001), Pavle Nikolic, Democratic Party of Serbia and Forum Iuris Novi Sad. Nowadays, the most relevant constitutional proposals are those made by the Government of Serbia and by the President of the State (Boris Tadic). We won’t analyze details of any of these respectable constitutional plans (although we consider them very significant and useful), but we think it is necessary to stress a democratic and normative quality of the models proposed by the Belgrade Human Rights Centre and Professor Pavle Nikolic and a political importance of those proposed by the highest organs of the State (the Government and the President). Despite the nearly general consensus on a rapid adoption of Serbia’s new constitution, this is not going to be an easy job. There are a few significant constitutional issues that require not only a constitutional consensus, but also a political compromise. The ongoing political disputes have already grown into constitutional concerns, even before the procedure for constitutional change has been initiated. There are many essential questions of the current constitutional reform in Serbia: 1) the very procedure for current constitutional change (procedure for adopting a new constitution); 2) the human rights and freedoms; 3) the system of government (especially the election of the head of state, President of the Republic, and his/her prerogatives); 4) the constitutional definition of Serbia; 5) the territorial organization of the state (decentralization, regionalization); 6) the status of Kosovo & Metohija; 7) the procedure for amending of the constitution (revision procedure). Two of these seven questions – constitutional definition of the state and territorial organization of its territory – are very relevant issues in context of multiculturalism, and will be analyzed separately. There are two reasons why the procedure provided for by the applicable constitution is not quite acceptable to key political actors. Firstly, this is a very difficult process, nearly impossible to carry out. The previous constitution maker apparently wanted to immortalize his creation by such a complicated procedure. Namely, once a two-third parliamentary majority has been won, the constitution is to be accepted by an absolute majority of Serbian voters in a referendum. This is a rigid constitutional procedure, which makes it nearly impossible to amendment the constitution and the main reason why the new constitution was not adopted immediately after the political changes of 2000. The other
reason lies in the political symbolism of constitutional discontinuity, which many political actors in Serbia still respect. But the difficult question is how to change the constitution? The earlier political advocacy (before 2005) was focused on the parliament as the best choice for the job, but it also came in two versions – one, that the current Serbian parliament should do so by a final decision made by a two-third majority, and, two, that the job should be done by a constituent assembly elected for this purpose. Nevertheless, it seems that almost all of the political elements had recently changed their opinion on this subject (constitutional discontinuity) and that the new constitution will be probably adopted according to the existing (very rigid) constitutional procedure and by reaching a wide political consensus of all the political parties in Parliament.

When it comes to basic rights and freedoms as the key elements of the rule of law, there are no big differences in opinion – the new constitution of Serbia is to regulate the matter in its entirety. There is a general consensus that Serbia must govern the basic rights and freedoms in a modern way, which requires direct constitutional guarantees and effective court protection. Particular attention will be paid to the protection of minority rights. In this entire complex, different comparative, legal and international-law standards will apply. Direct application of international treaties and contracts on human and minority rights should also be provided. However, the most advisable models in this matter are those presented by the Belgrade Human Rights Centre and Forum Iuris Novi Sad (the order is not according to values). The system of government in Serbia’s new constitution will by all means follow the principle of separation of power, but differences in terms of institutional materialization of this tenet have been noted. This is particularly true for a relationship between the legislative and executive branches of power and solutions within the Executive itself. Suggestions range from a parliamentary and chancellor model to a parliamentary model with bi-cephalous executive branch. The ongoing political disputes have been focused on the constitutional position of the President of the Republic (only one constitutional project suggests monarchy), the mode of his/her election and his/her place in the system of government. Some advocate a classical parliamentary system, in which the president would be elected by the parliament, and given representative and protocol duties only. Others argue that having in mind the fragmented party system, which is yet to be properly established, would only strengthen the government, because an unstable balance between the parliamentary majority and minority would give the government the role of an arbiter beyond the constitution and the law. Therefore they suggest a constitutional strengthen role for the President of the Republic, as an exponent of supra-party neutral power.

This is going to be the subject of broad political and expert debates on the constitutional change. The constitutional definition of Serbia is probably the most controversial question of a current constitutional reform. There is no consensus about the criterion to apply in the definition: ethnic criterion or criterion of national (citizen) sovereignty. However, the most relevant constitutional proposals define the State very differently and it will be very interesting to see the final (probably compromise) solution. The decentralization of power is the yet another hot constitutional issue. Political consensus has been reached in principle, but concrete solutions vary considerably. All of them, however, offer some concept of regionalization. Disagreements emerged over the following question: symmetrical or asymmetrical
regionalization; a degree of regionalization, i.e. a degree of autonomous competences to be given to the future regions; supervision and control of regional autonomy by central government organs; whether regions should be represented in the republican parliament directly and in what way, etc. In relation with decentralization (regionalization), a rational constitutional lacuna regarding the status of Kosovo & Metohija is needed, with or without reference to its current international legal position. Finally, according to instantaneous experience in constitutional revising, a procedure for an ending of a new constitution should be more flexible than the existing one. On the other hand, it has to be rigid enough to be able to stop „touching“ in the Constitution unnecessarily and frequently. In the other words, there is a need for finding equilibrium in a process of constitutional changing in the future. All the above mentioned constitutional spheres – protection of basic rights and freedoms, including a developed minority protection system, the system of government, territorial organization of power, along with constitutional fundamentals of a market-oriented economic system, protection of property and free enterprise should be ensured through a reliable system of constitutionality and legality. In a country in which political voluntarism ruled for decades, and where respect to laws was never the rule, but rather an exception, it is of utmost importance to set clear legal limits to political power and ensure an efficient and independent judiciary at all court instances. The general political consensus that exists in Serbia, at least verbally, is unfortunately no reliable guarantee that efficient systems of constitutionality and legality will be established. The zero point for its establishment, however, is a fair constitutional solution in the spirit of modern constitutionalism, which is beyond any doubt. Whether Serbia will be successful in this or not does not depend on the text of the constitution only. The constitution can be viable or just remain a dead letter, which depends on the future political circumstances. On the other hand, the procedure for its adoption can help us predict to a degree whether it will correspond with reality or not. The next few months in Serbia will give a clear answer to at least this question. Hence, the question of constitutional attainment of human rights concept (and minority protection as its part), especially in multicultural and multiethnic societies like Serbia, can in no way be reduced to a catalogue of human rights, the contents of each and every human right, or general questions of constitutional and legal status of human rights (their direct application, restrictions and deviations, their division, etc.), nor even to the question of their efficient constitutional protection. Apart from these questions, constitutional attainment of the human rights concept is most closely connected with constitutional definition of the state, with principles the state rests on, with certain questions of the state organization (first of all territorial), and other questions. As it is impossible to tackle even superficially here all these questions of central significance in multicultural (and multiethnic) societies, we shall dwell upon just two starting and essential questions – constitutional definition of the state and its territorial organization.

III – Constitutional Definition of the State

A frontal provision of the current Serbian Constitution of 1990 is the one defining the Republic. The Republic of Serbia is a democratic State of all citizens living within it, founded on the freedoms and rights of man and citizen, rule of law, and
social justice. Contrary to constitutional definitions of multi-national states – independent or federal units – both in the world and in our country, the Constitution of Serbia does not define the State by applying the ethnic criterion (a State of the Serbian people), but by applying the criterion of a national, namely citizen sovereignty (a State of all citizens living within it). Disregarding weaknesses of this Constitution, everyone will notice that it defines the State rather correctly. Constitutional definition of Serbia (and constitutional preamble closely connected with this definition) is undoubtedly the most controversial question of current constitutional reform. Opinions of different political parties and NGO’s are quite different about the criterion to apply in the definition: national (ethnic) or civil (non-ethnic). Accordingly, definitions at the present proposals vary from Serbia defined as „a multicultural democratic state of all citizens and peoples living in it (...)“ (Belgrade Centre for Human Rights), on the one side, to Serbia as the State of the Serbian people and all equal citizens living within it, on the other (for instance, Pavle Nikolic’s model). Both sides offer very significant arguments and it will be very difficult to find a compromise solution for the state-definition problem. It is important to stress that the future definition of the State has to be acceptable for all of its inhabitants, disregarding their nationality, confession or culture. It seems that civil definition is much closer to this aim.

IV – Territorial Organization of Serbia: Symmetrical or Asymmetrical Regionalization?

Another crucial question for functioning of the future constitutional arrangement in Serbia is its territorial organization. In the opinion polls and proposals related to the revision of the Constitution of the Republic of Serbia, which have been conducted and presented from different sides in the public life of this republic, the need for Serbia’s regionalization has often been underlined. Hence, one of the main reasons for the present ethnic tensions within Serbia is its highly centralized territorial organization under the 1990 Constitution. This is why majority of proposals for constitutional reform so vigorously argues pro designs that should provide equality of all citizens and peoples residing in Serbia. A great number of Serbian „constitutional game“ actors see regionalization as a conflict-management tool for segmented Serbian society. In their opinion, the issue of Vojvodina (and Kosovo & Metohija as well) can be and has to be resolved within the general concept of regional organization. Some constitutional experts and political organizations support the idea of a broad democratic decentralization in the form political and territorial autonomy, which is accepted for instance in Italy or Spain. It is a type of regionalization characterized by a high level of autonomy of the regions (districts, provinces), much higher than the level of autonomy of the local government units, particularly in financial aspect, and lower than the level of autonomy of the federal units, i.e. without the elements of statehood. Some models of the Constitution contain so-called asymmetric regionalization, with a special position of Vojvodina which, unlike other regions, would have legislative powers in a regionalized Serbia. This theoretical concept is empirically supported by arguments pointing to an uneven development of Serbia which has brought about huge economic and cultural differences between
specific regions. Regionalization is necessary also because it would facilitate a balanced development of Serbia, as the citizens who live in specific circumstances would know best how to improve their living standard.

On the other hand, there are many experts and politicians who disagree with the idea of regionalization. They argue that Serbia has never been a regionalized state in its whole history and that the idea of regionalized state and the studying of its advantages have not been motivated by any interior problems of Serbia, but primarily by difficulties in relation to the way the two state federation (Federal Republic of Yugoslavia, which was composed of Serbia and Montenegro) has been working. Besides that, these „constitutional architects“ notice that there is a very small number of regionalized countries in general and that regionalism brings along a number of disadvantages (such as growth of administration, new expenses and disintegrating effects). Recently, it seems that leading political parties in Serbia gave up an idea of regionalization of the whole state territory and that future territorial organization will be very similar to the existing one – asymmetrical decentralization with two provinces (Vojvodina in the north and Kosovo & Metohija in the south) and, „between“ them, non-regionalized Central Serbia. Two provinces would have their „own“ competences and (legislative and executive) institutions, while Central Serbia wouldn’t. Last but not least, major problem of current constitutional reform is to find the solution for Kosovo & Metohija problem, which would be acceptable for Serbia and for the Albanians in Kosovo & Metohija as well. Serbian government insists on resolving this problem by giving to Kosovo & Metohija „more than autonomy and less than independence“, while the Albanian political leaders supports the idea of independence as the only solution. However, Kosovo & Metohija is nowadays still under civil and military control of the United Nations and at present no serious solution for the legal status of Kosovo & Metohija is offered. This is perfectly understandable, for any attempt of such kind would prove to be a speculative one. However, as long as the re-integration of Kosovo & Metohija into the legal and constitutional framework of Serbia is in focus, it is worth mentioning that the Resolution 1244 of the Security Council of the United Nations will govern the future, if any, constitutional design.

V – Epilogue

A democratic constitution is legitimized by consensus, not only of political actors of the constitutional process, but also of the widest circle of citizens on the most important issues comprising the basis of the community in which they live. The constitutional process and the adoption process of a constitution should make it possible to reach a consensus on the fundamental issues of a political community’s structure and of the position of citizens in it. New constitution should be result of the widest social and political consensus and the greatest „trap“ in its creation could be exactly disregarding the opinion of some of the basic social or political layers. In the other words, the drafters of the constitution must always, and on every occasion, bear in mind that constitution is a supreme law of a country, which, as a rule, outliv-
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no way act of one policy or an act for one political time only. Besides that, the entire constitutional matter must be regulated by applying the proper language of a legal act and not an ideological and program-wise declaration. The epilogue in Serbia has yet to take place. But it is indeed regrettable that since 2004 there were no genuine shifts in the constitution making process in Serbia. All of the problems that existed five or six years ago have not been resolved until today. It seems that Serbian rulers always have more important things to do and the constitutional solution will wait for a „good chance“. In spite all of difficulties, everybody hopes that the new constitution will be a proper frame for all Serbian citizens (and nations, confessions and cultures as well) and a basic conflict-management tool for its segmented society.

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