

The Constitution and the Issue of Transition in Serbia

Constitutional Aspects

An essential problem of the transition process in the former socialist countries of Central and Eastern Europe (as well as the Baltics) was the problem of the manner of their exit from the Communist world and the depth of the transformation to be made. In other words, it was a problem of changing the constitutional system and political regime, the economic system, as well as of the start of a general democratic transformation of these countries.

Therefore, these countries, in fact, abandoned the „socialist constitutionality” under which they had lived for several decades and, at the same time, tried to establish the democratic constitutionality, in principle according to the model of the Western democracies. This global conclusion refers to all (more precisely, almost all) former Socialist states in the mentioned regions of Europe, with the level of consistency in conducting the transition process and transformation in general varying from one country to another. This led to greater or smaller differences among them.

Furthermore, at the very start of the transition process the majority of these countries typically adopted new constitutions that differed significantly from the constitutions these countries had had in the previous, Communist period. The change in the political regime and coming of new, different political forces to power also caused a change in the character of these new constitutions so that, as observed in theory (Michel Lesage), „from a propaganda document, a fictional constitution, which hid the reality of power, it became a basic legal text, a framework of the political and social life”. Practically, these constitutions became an „instrument of transition”, the basis of realisation and development of a democratic constitutionality, fundamentally different from the one existing in the period of several decades in this part of Europe. However, this conclusion does not apply to all of these countries and a gap between constitutional proclamations and reality can also be observed in some of them. This particularly applies to Serbia (1990), the Federal Republic of Yugoslavia as a joint state of Serbia and Montenegro (1992), as well as to Montenegro (1992).

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I

1. Serbia was one of the first countries of Central and Eastern Europe that adopted its new Constitution (in September 1990). However, that Constitution was adopted by the Assembly elected in 1989 at one-party elections in the conditions of a pure one-party system and monopolistic position of the Communist League. Therefore, these elections could provide legitimacy neither to the Assembly itself nor to the adopted Constitution. In Montenegro as well, in the conditions of the absolute rule of former Communists, a new Constitution was adopted (in October 1992). Therefore, in both Serbia and Montenegro the new constitutions were the products of former Communists. This conclusion also fully refers to the Constitution of the Federal Republic of Yugoslavia as the joint state of Serbia and Montenegro (in April 1992). Incidentally, as explicitly concluded in the Serbian constitutional-legal theory, already at the time of adoption of this Yugoslav Constitution, it was (and remained) a legally void act, illegitimate at the same time, due to drastic violations of the adoption procedure and especially due to the fact that the body that adopted and proclaimed it (the old Assembly of the Socialist Federal Republic of Yugoslavia) had neither the legality nor the legitimacy to do so. Nevertheless, by the (arbitrary) will of the then rulers in Serbia and Montenegro this Constitution came into effect and was applied until this state ceased to exist.

2. Since they were the products of former Communists transformed into newly formed parties (the Socialist Party of Serbia and the Democratic Party of Socialists of Montenegro), the new constitutions were, logically, an expression of the desire of the existing ruling forces, the former Communists and their new parties, to keep and consolidate their power. This applies particularly to the Constitution of Serbia, while that desire is not clearly demonstrated in the Constitution of Montenegro. In that way, instead of becoming the „instrument of transition”, i.e. the basis of the democratisation process, these constitutions became the foundation of the regimes that became increasingly authoritarian (a desire to secede from the joint state was also increasingly manifest in Montenegro).

The new political regime in Serbia, established by the 1990 Constitution, could be qualified as a post-Communist regime, but in essence it was a covert Communist regime – it was less so by its symbols and ideological orientations and much more so by the methods of ruling and the administrators recruited exclusively from the ranks of former Communists. The entire system was, so to speak, „modelled” according to the person of the first and the last President of the Republic – Slobodan Milošević, leader of the Communist League in the last period of its existence and untouchable leader of the newly established Socialist Party of Serbia. Thus the way to the establishment of the regime of personal rule was paved by the Constitution itself.

However, the Constitution of the Federal Republic of Yugoslavia (1992) was adopted as a result of the joint desire of the rulers in Serbia and Montenegro for the centres of real power in the joint state to remain in the member Republics. This led to an establishment, by means of the Constitution itself, of an unnatural semi-confederate system on the one hand, and on the other hand – a deformed, even fictitious parliamentary system.

Therefore, the mentioned constitutions did not really have any chance to be the basis of democratisation. The transition process was thus stalled at the very beginning. This is pre-

cisely where the essential difference between these constitutions and the new (the first) constitutions in the majority of countries of Central and Eastern Europe (and the Baltics) lay.

II

1. The fall of Milošević's authoritarian regime and his deposition created an opportunity to change the situation radically. The 5 October 2000 (preceded by the elections held in September in the Federation, and followed by the elections for the National Assembly of Serbia in December 2000) did not and was not meant to present just an ordinary change of parties in power. The 5 October was meant to be both a historical and faithful event and entail a radical (revolutionary) change of the regime, the constitutional and legal system in general. That would inevitably have caused a thorough recovery of the country after nearly half a century of totalitarian Communist regime and a decade-long Milošević's disguised Communist, but idealess, authoritarian regime. A real transition process in Serbia was then to start.

The absolute condition for that radical (essential, revolutionary) change that was to follow immediately after 5 October 2000 was the adoption of a new Constitution of Serbia. The newly elected National Assembly was to proclaim itself, as proposed in the scientific circles, by its own decision a Constituent Assembly and, as such, adopt an act invalidating the ill-fated illegitimate 1990 Constitution of the Republic of Serbia (firstly) and necessary provisional constitutional acts enabling the functioning of the state (secondly) and immediately initiate the procedure for the adoption of a new Constitution (thirdly). In that manner, a radical reform would have been made possible and the way paved for a real transition.

However, this proposal was totally ignored, so the 1990 Constitution (and the 1992 FRY Constitution) continued to be in effect, as well as the former government mechanisms and the entire political regime, with partial personnel changes, with no lustration or real break with the establishment of the former regime (e.g. a number of high-ranking officials of the former regime, members of the Socialist Party of Serbia, were kept at their former high and even top positions – the President of the Republic of Serbia, elected back in 1997, the Chief of Staff, the head of the government security agency and many others). Thus there was continuity with the former regime, despite the change of the parties in power and overthrow of the leader of that regime himself.

Such an act of the new, democratic government was largely, if not primarily, caused by the launching the idea of legalism and legitimacy by a part of that new government. In essence, it was an idea of false legalism that was a veil covering certain intentions of specific circles in that new government, met with tolerance, whether intentional or unintentional, by other parts of that government. It was a fatal mistake, so, unfortunately, numerous negative consequences followed: prevention or slowdown of the adoption of certain new laws, delay of European integrations and implementation of necessary reforms and hindering and prevention of radical personnel changes in the police, security agencies, military, judiciary and other areas. In a word, the true process of consistent transition had no chance to start properly and develop to a more notable extent. In addition to all this, the escalation of the problem with Kosovo and Metohija and its secession in contravention of the international law, the problem of cooperation with the International Criminal Tribunal for Former Yu-

goslavia, the relations with the European Union, etc. inevitably had to affect the processes developing in Serbia in the political as well as the economic sphere.

2. When the mentioned consequences of this unfortunate act became unbearable and the obligation imposed by the Constitutional Charter of the State Union Serbia and Montenegro, created in the meantime instead of the former FRY, for both of these member states to adopt their respective new constitutions became effective, a decision was made (in 2003) that Serbia would adopt a new Constitution. Therefore, this decision was made with an unacceptable delay, in the conditions of disunity among the ruling democratic forces and absence of their strong majority in the National Assembly.

However, although after the adoption of this decision the adoption of the Constitution was officially proclaimed a necessary and top-priority task, the time limits for its preparation were constantly postponed and extended. All this created a chaotic atmosphere regarding the issue of adoption of the new Constitution, in which certain intentions and interests of those who had created such atmosphere were hidden from the public.

The adoption of a completely new constitution, even if with many years of delay, was and should have been absolutely indisputable. It was supposed to be the final confirmation of 5 October (2000) and everything it stood for and was supposed to stand for. For that reason, the adoption of a completely new constitution was a *conditio sine qua non* for the re-birth of a new, democratic Serbia with a clearly defined path of real transition. All the more so when having in mind that the totalitarian Communist regime carried out a complete destruction of Serbia, destroyed its statehood and democratic tradition, while Milošević's post-Communist regime brought the country to a total lack of political prospects and economic deterioration, international isolation and similar. Therefore the foundation of creating a democratic Serbia indeed is a completely new constitution. That constitution would, and should rest on the great heritage of democracy, modern constitutionality and civilisation but also on the break with the former regime.

III

1. An indisputable position of the science of constitutional law is that, in the logic of real democracy, the constitution is adopted by the government that enjoys legitimacy, because only the democracy in which the power is legitimate is a real democracy. Many years ago, Jean-Jacques Rousseau wrote that „force does not constitute right, obedience is due only to legitimate powers”. If, however, there is no legitimacy, then the proclaimed democratic principles of rights and freedom of the man and citizen, the organised democratic mechanism of government and others will become only nice political window-dressing, i.e. the political stage will become a facade hiding the rule of a usurper in the form of a party, bureaucracy or dictator. For that reason Georges Vedel said that illegitimacy makes those who rule usurpers. Hence it is easy to conclude that the illegitimacy of power is the root of any kind of authoritarian regime, including the one with a semblance of democracy. Because of all this, the key question of real democratisation of a regime indeed is the establishment of real legitimacy of power (the parliament, head of state, constitution and similar). Maurice Duverger simply said that it was a matter of finding „a logical justification of obedience to power”. This, in fact, is legitimacy.

In accordance with the presented position of the science of constitutional law and the theory of democracy in general, the first question that arose in connection with the adoption of the new Constitution of Serbia was the question of the manner of its adoption. A rather widespread opinion was that the new Constitution should be adopted by the (then) existing National Assembly, elected and constituted based on the provisions of the 1990 Constitution (which, as mentioned above, remained in effect even after 5 October 2000), under the revision procedure prescribed by that Constitution. The advocates of this viewpoint were the parties that supported the former regime, but also, unfortunately, some parties of the new democratic government. It was largely the official position at that time as well.

An opinion also appeared that, in the event of failure at the constituent referendum, which was a part of that revision procedure provided for by the 1990 Constitution, the adoption of the new Constitution would be subsequently entrusted to the Constitutive Assembly. However, an opinion, proposed with strong arguments, that the new Constitution should be adopted by a specially elected Constitutive Assembly was expressed again in the public, which was an isolated and ignored publicly submitted proposal from December 2000.

2. The issue of the adoption of a new Constitution of Serbia, as everywhere in the world after all, is not a simple technical and legal question or a question of severity of the conditions a specific procedure imposes and the possibility of meeting these conditions. In essence, it is primarily a political issue that, as was the case in Serbia, may be of crucial importance.

Putting the other elements of the constitution adoption procedure (initiative, debate, voting etc.) aside, the issue of the legislative body adopting the constitution is of primary importance. In the constitutional law theory, given the practice of over two centuries, a differentiation is made between the constitution framer that adopts the first constitution in a given country or a new constitution after revolutionary or similar radical changes and the constitution framer that only amends the existing constitution (partly or wholly). It is deemed that the former possesses the original constituent power, which means that this constitution framer is not limited, i.e. bound by anything, not even by the constitution previously in force (if it existed). In contrast to that, the latter possesses the derived constituent power, which means that it adopts (amends) the constitution in the manner prescribed by the constitution previously in force and is also possibly bound by some principles proclaimed in it.

A particularly significant, in fact a major consequence resulting from the mentioned differentiation is a break of the constitutional-legal continuity between the former constitutional system and legal order in general and the newly created system and order (the first case), or further continuity between the constitutional system and legal order existing until then and the system and order being established by the new constitution, i.e. amendments to the constitution previously in force (the second case).

In all this, one should also take into account the position of the constitutional law theory according to which the elections for constituent assembly represent a kind of constituent referendum or, as it is said, covert constituent referendum. Namely, at the elections for the constituent assembly the voters elect deputies to a representative body that has an exclusive and sole task of adopting a constitution, so by the act of electing deputies the voters opt for a future constitution that this representative body should adopt. In other

words, the voters vote (in principle) for those candidates and parties whose draft constitution they accept.

The mentioned statements support without any doubt the conclusion that the new Constitution of Serbia should have been adopted by a specially elected Constituent Assembly that would, in accordance with its character, have had the power to prescribe by itself the procedure for the adoption of that Constitution. After all, the Constituent Assembly, as a rule, appeared in times of revolutionary and similar radical changes (naturally in times of the adoption of the first constitutions in newly created states as well). The history of constitutionality has known such a practice ever since the first constitutions in the world (USA 1787, France 1791 etc.) and all the way to the modern period (Bulgaria 1991, Romania 1991, etc.), and such cases are also known in the former Yugoslavia (the Kingdom of Serbs, Croats and Slovenes 1921, the Federal People's Republic of Yugoslavia 1946).

IV

1. However, in the early 21st century in Serbia, an orientation prevailed that was originally supported by the parties of the former Milošević's regime but also, contrary to every expectation, by some democratic parties that participated in the staging of the 5 October coup, overthrow of that regime and establishment of the new democratic government. It was the orientation that the new Constitution of Serbia should be adopted by the National Assembly of the Republic of Serbia based on the provisions of the 1990 Constitution and under the revision procedure prescribed by that Constitution.

Thus, in early autumn 2006, with an unacceptable and absolutely unjustified delay of six full years after the 5 October coup, a new Constitution of the Republic of Serbia was adopted. The adoption of the Constitution in this manner presented a cardinal mistake. From the legal viewpoint, it implied the final confirmation of a further constitutional-legal continuity with the "constitutionality" of Milošević's authoritarian regime, but also of the Socialist period. By that very fact, it meant the annulment of the democratic revolutionary meaning of 5 October and of the creation of the basis for the development of real transition.

Incidentally, the negative character of the new Constitution was, unfortunately, also contributed to by the very process of its preparation and adoption in the National Assembly. Namely, the Constitution drafting process was kept behind a veil of secrecy – the public was inadequately informed of the content of the drafting process, so partial and scant information about individual provisions, positions and similar reached the public. At the same time, there were no public consultations. The final text of the Draft Constitution was exclusively a result of the agreement between the leaders of four parliamentary parties. The adoption of the Draft Constitution in the National Assembly was not at all preceded by any discussion among the deputies (the text of the Draft Constitution was delivered to the deputies several hours before the voting). Nevertheless, at the same time there is a clear impression that in terms of content (provisions, principles and similar), regardless of numerous defects and incompleteness and even some disputable provisions, this Constitution is somewhat better than the 1990 Constitution. General remarks have been made that it is too detailed in certain areas, while too vague in others. Furthermore, it is undoubtedly one of the longest constitutional texts in Europe.

On the whole, however, the constitutional provisions are of an acceptable standard as far as human and minority rights are concerned. In terms of the economic system, public finances, property relations, and organization of the government (especially the legislative branch), everything has been done very correctly. Nevertheless, no real decentralization of the country and no true independence of judiciary are provided for therein.

2. Understandably, it all had to have a negative impact on the transition process itself. Namely, the real and effective basis of a real transition must be the constitution breaking with the past in every regard (in terms of the manner of its adoption and its content), and the new Constitution of Serbia, according to everything said about it so far, is not that at all. Moreover, certain measures taken in the period after 5 October 2000 (e.g. the harmonisation of laws with the EU regulations, etc.) were not sufficient for strengthening and developing the transition process, because the Constitution of the former regime was in effect, all the more so because some other necessary moves of the new government were not made at all – a real lustration of the cadres of the former regime, before all. This trend peaked after the parliamentary elections in the first half of 2008. A coalition was formed of democratically oriented parties (headed by the Democratic Party) with the Socialist Party of Serbia, although it won only 30 seats in the National Assembly (out of 250) at the latest parliamentary elections, in a coalition with some other minor parties. Thus, Milošević's party, without renouncing either its past as the ruling party in an authoritarian regime or its leader, became also formally a part of the parliamentary majority in the Assembly and part of the Government of the Republic of Serbia. Hence, not only the constitutional-legal but also the political continuity was confirmed.

An additional „confirmation” of that continuity was also given by a special document just a few months later. It is the document entitled the „Declaration of Political Reconciliation” between the Democratic Party and the Socialist Party of Serbia (October 2008). So, it is a joint document of the strongest and generally predominant party today (the Democratic Party) in the group of the parties that at one time bitterly fought against the former authoritarian regime and the Socialist Party of Serbia, which was an absolutely ruling party, responsible (with its leader) for the fatal policy conducted in Serbia during the entire decade, in the 1990s. The expectations that the Socialist Party of Serbia will admit its responsibility for such policy, express regret and renounce its former leader in this document were not met at all, so the “reconciliation” comes down to the determination of a joint „vision” of the future of Serbia and to a political agreement for their future joint action. This way only the cooperation of these two parties established previously through the formation of the Government of the Republic of Serbia was only confirmed by this. However, in that way the past of the action of Milošević's party was „legalised”, and even a form of amnesty was granted, admittedly by just one party (the Democratic Party), but not by the entire democratic public. All this is certainly not an encouragement to transition in Serbia or to the development of democratic process, although the recent acts of the Socialist Party of Serbia have differed from its earlier activity.

Therefore, putting aside the numerous problems burdening Serbia as a state today (Kosovo and Metohija, cooperation with the Hague Tribunal, accession to the European Union etc.), the near future will show whether and how the new 2006 Constitution of Serbia and the newly formed ruling powers on the political stage will blaze a trail for a real transition.