UDC 342.41:321.7(497.11)"20""
Manuscript received: 04.09.2014.
Accepted for publishing: 30.09.2014.
Original scientific paper

Serbian Political Thought
No. 2/2014,
Year VI, Vol. 10
pp. 69-87

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Serbia in Constitutional Limbo: Democracy Without Constitutionalism [3]

Abstract

The paper addresses the problem of the constitutionalisation of the Serbian polity. The analysis in the paper goes in three parts. Part one examines whether there was a "window of constitutional opportunity" in Serbia after 2000, and we examine which peculiarities of the Serbian democratic tradition have burdened the constitutionalisation process. In part two we explore the weaknesses of the constitution of 2006. We examine the strategy of the constitutional continuity, as well as the procedural and substantive defects of the constitution which have led to its low legitimacy. In the final part we outline the incapability of the constitution to frame the political process, to limit the political power and to channel it into democratic institutions.

Almost 14 years after the overthrow of Milošević and the initiation of the democratization process Serbia has not manage to substantially constitutionalize the polity. Despite the adoption of a new constitution in 2006, the bad tradition of façade-constituality was not broken. The over-hasty adoption of the constitution had led to violation of the procedure and to mixed quality of the constitutional provisions. From the very start the democratic legitimacy of the constitution was low, and it showed no capacity to channel the political power.

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3 Paper presented at the Workshop 10: The Constitution and Illiberal Democracies at the IX World Congress of Constitutional Law (Oslo, 16-20 June 2014). http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/

The political players have shown no willingness to submit government actions to objective and impersonal rules. Furthermore, almost every stakeholder perceives the constitution as an interim act needed to be changed, which additionally undermines the authority of the constitution. Under such circumstances, the constitutional issue remains latently opened and the state is in a latent constitutional crisis. This corresponds with the specific para-constituality of the Serbian order in which the constitution is just a façade, and the power is not rooted in the state institutions but in the political party oligarchies. The constitution has not managed to diminish this dualism (nor was this the intention of the constitutional maker) and the democratization process in Serbia got stuck in some form of a pluralistic party state.

Keywords: constitution, democracy, democratic transformation, Serbian Constitution, partocracy.

Introduction

Six years after the electoral revolution and the overthrow of Milošević in 2000, a new constitution was adopted in Serbia. However, the rationale for the adoption of the constitution was not to establish a constitutional framework for a democratic order based on the rule of law, but rather a "state reason" of guaranteeing the sovereignty over Kosovo. Furthermore, it was because the adoption of the constitution was neither a result of a comprehensive public debate nor a reflection of a consensus on basic principles and values of the democratic polity that the constitution's legitimacy was placed in doubt. With this constitution the tradition of a façade-constitutionality in Serbia continues. The constitution has no authority to institutionalize political decision making and to "force" political actors to submit government actions to objective and impersonal rules. Given that the constitution is perceived as an interim act that does not meet the needs of the polity and the society and thus should be changed, the constitutional debate is reduced to a matter of a daily politics and the constitutional crisis is latent.

There are three parts to the analysis in the paper. Part one examines whether there was a "window of constitutional opportunity" in Serbia after 2000, and we examine which peculiarities of the Serbian democratic tradition have burdened the constitutionalisation process. In part two we explore the weaknesses of the constitution of 2006. We examine the strategy of the constitutional continuity, as well as the procedural and substantive defects of the constitution which have led

to its low legitimacy. In the final part we outline the incapability of the constitution to frame the political process, to limit the political power and to channel it into democratic institutions.

The Constitution and the Serbian Democratic Transition: Was there a Window of Constitutional Opportunity?

The adoption of a new constitution is one of the milestones of the institutionalization of democracy after the breakup of the autocratic regime. The most favorable moment for the adoption of a new democratic constitution lays immediately after the break of the old regime. At this moment the "window of constitutional opportunity" is opened widest, since some problems that inevitably occur in further phases of the transitional process are still not virulent. The satisfaction and the glory caused by the overthrow of the non-democratic regime are high and the impetus for establishing a democratic order is strong. The consensus among the democratic allies is at this stage still stable, and they are willing to put back their particular interest for the sake of ideals of the constitutional basis for the future (Rüb, 1996: 52). Since social cohesion in this moment is high, it offers a possibility for the new constitution to be more inclusive. If however the constitutionalisation process takes too long, and the shortly opened window of constitutional opportunity closes, chances for the phase of the institutionalization of democracy to produce desired goals will decrease. With time the euphoria of the victory dwindles as well as the impetus for the cooperation among the "democratic" forces caused by the fight against the old regime as a common enemy. Formerly allied regime opposition becomes mutual political opponent. The hesitation in the constitutionalisation process implicates the danger for the constitutional debate to degrade to the daily political struggle in which the political actors use this debate to promote their political programs instead of focusing on the universal acceptable framework for the future democratic order (Dimitrijević 2004: 70). Under these circumstances the constitution becomes an object of political struggle whereas the constitution becomes merely an instrument for securing or widening the political power positions (Rüb 1996: 52).

With the overthrow of Milošević the necessary precondition to dissolve the authoritarian regime and to initiate the democratization

process was met. On October 5, 2000, thousands of Serbian citizens in massive protests demanded that Milošević accepted the results of the elections and stepped down from the presidential post. Yet the overthrow of Milošević was not the result of a pure revolution, but it was a complex mix of a government change in democratic elections, a civic uprise, and a specific pact between the elites. This mix determined the quality of the regime change and consequently the process of the democratic transition. One of the most significant failures of the regime change in Serbia initiated in October 2000 was the lack of the constitualisation of the new order. Instead of the radical break with the old regime the strategy of the new political elite was to preserve constitutional and institutional continuity (Orlović 2008: 56). Yet, the constitutional continuity was not used to effectively dissolve the structures of the old regime, but in fact it preserved the ideological, political, and legal core elements of the old system (Dimitrijević 2004: 61f). Although the electoral revolution in 2000 to some extent provided a window of constitutional opportunity, there was no consensus on the issue and constitutional reform was blocked for years: It took six years to overthrow the 1990 constitution and to adopt a new one.

One of the central questions here is whether in Serbia after 2000 the window of constitutional opportunity was really opened, and if it was why this opportunity was not used. According to the above noted theoretical model, the window of constitutional opportunity is opened in a short period after the breakup of the authoritarian regime, and respectively one can state that after the overthrow of Milošević it was the right moment to set new constitutional framework for the new democratic polity (cp. Orlović 2008: 55). However, the situation was not so simple since the Serbian transition had some peculiarities which made it different from the transition processes in post-communist states.

The central specific feature of the Serbian democratic transition is the unsolved issue of the statehood. Statehood is an important precondition for a functional democratic order, and democratic reforms can only be implemented successfully within a state (Linz/ Stepan 1996: 14). In October 2000 Serbian statehood was not a clear issue, and it was not clear what should be constitutionalized. At the moment Milošević was overthrown (as the president of the Federal Republic of Yugoslavia), Serbia was a republic in a non-functional federation with Montenegro, and it had severe sovereignty deficits in

Kosovo. Any new constitutionalisation of Serbia at that time would have requested from the Serbian constitutional maker to take these circumstances into consideration and to take stand to the statehood issue. It is obvious that at that time Serbian elites were not ready to deal with the problem of the "unfinished statehood".[4] The phenomenon of the "unfinished statehood" and the constitution are deeply interconnected in Serbia, to the extent of a vicious circle: The state cannot be constitutionalized since it is not formed yet, and it cannot be formed since it is not constitutionalized. This paradox has its roots in the Serbian nationalism that cannot accept the reality of the dissolution process of the former Yugoslavia and the scope of the territory on which the power (sovereignty) of the Serbian state should apply. So, even if in the late 2000 or early 2001 when the window of constitutional opportunity was considered to be opened this was not fully the case, since it was not clear whether constitutional changes should be made at the federal level or at the level of the Serbian republic. In this respect, the constitutional changes in Serbia were postponed until the situation with Montenegro was resolved, and this "constitutional gap" has additionally underpinned the constitutional continuity. As the federation was, under the great pressure of international community, reformed into the State Union of Serbia and Montenegro in 2003, this has formally provoked the opportunity to reconsider the constitutional issue in Serbia but this opportunity was neglected. Although the Law on Implementation of the Constitutional Charter of the State Union of Serbia and Montenegro set a clear and time-limited obligation for the member states to harmonize their constitutions with the Constitutional Charter, neither of them complied with this obligation. As in 2006 the State Union ceased to exist, political players perceived the creation of an independent state of Serbia as constitutional opportunity, one that led to the new constitution being adopted in November 2006. Yet, this window of constitutional opportunity was not perceived as a chance for a comprehensive constitutional reform which would set a solid basis for the democratic order based on the rule of law. The adoption of the new constitution was motivated with the "state reason" and it was to a greatest extent linked to the Kosovo issue so as to constitutionally

4 The idiom „unfinished state" was first used by Zoran Đinđić in his analysis of the Socialistic Yugoslavia, and Nenad Dimitijević has developed this concept in his analysis of the transformation processes in Serbia since 2000. See: Đinđić (2010); Dimitrijević (2004).

safeguard the territorial integrity of the state. The dominant ratio of the Serbian constitutional maker was to constitutionally guarantee the position of Kosovo as an autonomous province in Serbia, and thus to use the constitution as an instrument for the state reaction to the possible independence declaration (cp. Pešić 2007: 77). The linkage of the state issue and the constitutional issue has reaffirmed that as long as Serbia is facing uncertainties with regards to its statehood the constitutional issue is a "pending case". In this respect, one could argue that none of the windows of constitutional opportunity which have been opened since 2000 was really a constitutional momentum. On the other hand, one could also argue that, if the window of constitutional opportunity was even opened, it is still not closed, since the constitutional dispute in Serbia is still present.

Another peculiarity of the Serbian transition was in the specific hybrid nature of the Milošević autocratic regime. Unlike the situation in the states of the former "Eastern Bloc", the Milošević regime was not a communistic (although the majority of the previous communistic nomenclature was in place), but a hybrid authoritarian regime based on the mixture of nationalistic and socialistic ideology and on the populism. In this respect, in the late 1980s and the early 1990s Serbia had already undergone a specific "retrograde transition" in which the communistic system was declaratively rejected, with no intention to establish a democratic order, but rather a personalized rule. In line with this trend a constitution was adopted in 1990 in Serbia that was free from the communist ideology and the communist legal tradition, but that was tailored to the governing needs of one particular man. However, the constitution was only a façade and it did not have effective power to frame the political process. Nevertheless, it was perceived as a symbol of the Milošević rule and one of the main intentions of the Serbian Democratic Opposition was to change the constitution after coming into power. The pseudo liberal dimension of the constitution of 1990 was kind of a trap for the constitutionalization of the new democratic order of 2000, since it did not contain provisions which would have directly hampered political, economic, and social liberalization. The experiences of the post-communist democratic transitions have shown that these states were required to change their constitutions and free them from communist legacy in order to even initiate and enable the intended system change. The Serbian constitution of 1990 did not contain such obstacles, and the Serbian political elite of 2000, faced

with the difficulties that followed the breakup of the old regime and the establishing of the new democratic order, considered that the transition can perform under the old constitution, until the political power is not consolidated. In line with this pragmatic approach the constitutional change was not considered a priority. This attitude turned out to be problematic for two reasons. First, the constitution has remained a façade, since the political players have treated it as a necessity and it had no capacity to constitutionalize the governance. On the other hand, the whole reform process remained genuinely chaotic, since without a constitution having its function, it was impossible to create a comprehensive legal order.

The confused attitude toward the authoritarian past and the unclear concepts of the future was one of the central obstacles, or one could even argue, the central obstacle, for adopting a new constitution which would decisively break with the old regime and set a solid basis for institutionalizing a new democratic order. As Dimitijević has rightly noted, creating constitutional norms presupposes "dialectic" pondering of the past and the future; it presupposes a twofold reflection: one defining the attitude towards the past, and other defining the framework of a new order which should be achieved in the future (Dimitrijević 2007: 113f.). The opposition coalition in Serbia of 2000 was aimed primarily on the overthrow of Milošević and was fully confused about "the day after". This heterogeneous group lacked a common vision about the future of Serbia, and the coalition members had a diverse attitude toward the past (Pešić 2007: 66). Those who were eager to make a clear break with the past and to create a modern and European Serbia were in a minority (ibid.). This constellation reflected on the constitutional issue which became a conflict spot between "legalists" (those who pleaded for the strategy of legal continuity), and "reformists" (those who were for a more resolute break with the past). In the context of such social and institutional division it was impossible to create a minimal social consensus necessary for the adoption of a constitution.

Since 2000, although the window of constitutional opportunity was opened few times to different extent (immediately after the regime change, after the State Union Serbia and Montenegro was created, and in the moment Serbia became an independent state) there was no momentum in Serbia with a difference between "normal" daily politics and specific "constitutional" politics necessary to effectively seize the constitutional momentum. The constitutional issue is degraded to the

"ordinary issue", and as such it is latent. Since the constitutional question is not resolved, the state is kept in the permanent constitutional crisis in which the window of constitutional opportunity is paradoxically at the same time not fully opened, but also not fully closed. Metaphorically speaking, a constitutional momentum in Serbia is "a glass half full/ empty".

Weaknesses of the Constitution and its Legitimacy Deficit

The constitutionalisation of the new polity can go through the reinforcement of the old constitution, or its extensive amending, or through adoption of an entirely new constitution (Merkel/ Sandschneider/Segert 1996: 13). The way the old regime breaks up can be of importance for the constitutionalisation of the emerging democratic order. If the breakup is a result of a bargain between the old and the new structures, the future legal arrangements of the polity will take into the account the interest of the authoritarian elites. The people are in such cases rarely the pouvoir constituant but the constitution as an act of the consensus reflects the arrangements with the old elites. The more revolutionary breakup is more likely to lead to a legal (constitutional) framework for the new democratic polity ab novo, with the possibility to use the new constitution plausibly as an act of discontinuity. The nature of the breakup of the old regime will affect the constitutional change that can emerge either in line with the rules of the old order or fully ignoring the previous legal order. The constitutional continuity is not per se an obstacle for the transition from an authoritarian to a democratic order. The rationale behind such continuity lies in the will to perform a radical transformation in line with the legal procedures of the breaking legal order. It mirrors the principle of the rule of law: a society that aims to build a polity on this principle cannot break the binding law despite its defects. However, constitutional continuity does not imply the maintenance of the old system. The necessary changes to the old system will be implemented within the scope of the legal norms of this system. Even though the transformation in this case is evolutionary, its outreach should be revolutionary. Constitutional continuity should be short and dynamic, and the delegitimation and annulment of the old order needs to be followed by the immediate creation of a qualitatively better system. It is only in this manner that

constitutional continuity can lead to the fast and in-depth change of the old constitutional order (Dimitrijević 2004: 61f.).

In Serbia it took six years to overthrow the 1990 constitution and to adopt a new one. Political players perceived the creation of an independent state of Serbia in 2006 as constitutional opportunity, one that led to a new constitution adopted in November 2006. To some extent the constitutional amending process has been protracted since 2003 but it was more a mix of ad hoc measures than a comprehensive procedure. For that reason the prompt actualization of the constitutional issue in 2006 was surprising and motivated with the need to declaratory safeguard the constitutional position of Kosovo. The adoption of the constitution was neither a result of a comprehensive public debate nor a reflection of a consensus on basic principles and values of the democratic polity. New constitution is essential for the institutionalization of democracy since it sets legal grounds for a new democratic order. It should reflect the deepest values of the society and the basic grounds for the democratic process (Schwartz 2004: 13). It sets the legal framework for human rights protection and the model for organization and legitimation of political power. Furthermore, the new constitution should communicate with the society and offer effective mechanisms for peaceful conflict resolution. The enforcement capacity of the new constitution depends not only on legal instruments set to ensure its implementation, but also on its legitimacy. The phase of the adoption of a new constitution can underpin its legitimacy threefold: through the procedures in which the constitution is adopted, the perception of the constitution as an act of a consensus, and the wide acceptance of values and rules enacted in it. The Serbian constitution adopted in 2006 does not meet any of these requirements. It faces procedural and material weaknesses and lacks democratic legitimacy.

The constitution of 2006 was adopted in line with the amending procedure set out in the constitution of 1990. In the public discourse regarding the constitutional change after 2000 there was an intense debate about the way a new constitution should be adopted. Those who were for a more resolute break with the old regime pleaded for constitutional discontinuity and adoption of a new constitution with no procedural links with the old constitution. According to this approach the new constitution should have been adopted by a special constituent assembly. The other approach was based on the strategy of the legal and institutional continuity with the dominant argument that

the legality cannot be grounded in breaking the (constitutional) law. In the ideological background of the strategy of legalism lays the intention to perpetuate the legitimizing legacy of the old regime in order to build a modern constitutional state on the grounds of the old regime (Podunavac 2005: 15). As mentioned above, this strategy was used in post-communistic states, whereas the framework of the old legal order was used to perform the necessary changes of the old system. However these changes were evolutionary in their form, but revolutionary in their character. On the other hand, the strategy of constitutional and institutional continuity which prevailed in Serbia did not have such effects. The strategy of continuity could not be successful since the legal grounds of the old system were devastated. In many important issues Serbia was characterized with statelessness and "non-order" (ibid.) and one could rightly ask if the concept of continuity was actually grounded in a "quagmire". Furthermore, the strategy of continuity can be successful only if it does not last too long, and if the framework of the new legal order consequently replaces the old system. In Serbia, the strategy of continuity perverted from an instrument to a status, whereas it led to actual conservation of the old system. This strategy of continuity influenced the adoption of the constitution of 2006, both with regards the adoption procedures and the text of the constitution.

Not only was the constitution of 2006 adopted in line with the amending procedures of the constitution of 1990 but the implemented adoption procedure was highly problematic. For the purposes of the adoption of the new constitution the Serbian parliament has, just an evening before the day the constitution was adopted in the parliament, amended its rules of procedure and introduced a specific form of the parliamentary work named "special session". This was problematic since the constitution acknowledges only two forms of the parliamentary sessions, namely regular session and solemn session. There are few arguments that further indicate the problem: the session of the parliament was held on a Saturday which is a non-working day; the session started in the evening (8 p.m.) although the parliament usually stops its work at 6 p.m.; the MPs got the draft of the constitution just before the parliamentary session, and they had no time to get informed with the text; it is unclear if the parliamentary groups have met before the parliamentary session on which the constitution was adopted; the parliamentary committee, which has the competence to formulate the draft text of the constitution, met just an hour before the parliamentary

session in order to (formally) set the draft (until that moment the "constitutional arrangements" were performed outside the competent constitutional institutions); the work on the nomo-technical and technical editing of the constitutional text were performed even on the day of the parliamentary session; the parliamentary session lasted about an hour (in which the prime minister, the president of the republic, the president of the parliament, and the presidents of the parliamentary groups held their speeches), and there was no parliamentary debate on the text of the constitutional proposal (MPs waived their right to expression in parliament, and no modifications were proposed to the text) (Pajvančić 2006: 18). For the adoption of the constitution the compulsory popular referendum was held, which again showed some weaknesses in the adoption procedure. Here we name just few: the law on referendum did not regulate many important issues (such as financing of the campaign, the role of the media, campaign silence, independence and impartiality safeguards for the institutions which organize the referendum); the voting was held on two days which is untypical in Serbia; the accurateness of the voters registers is dubious; Albanians living in Kosovo were excluded from the process; the institutions for organizing the referendum were problematic (with regard to their structure and the way they were established); and it is doubtful if the majority vote was actually achieved (Ibidem 21ff.).

In addition to procedural weaknesses, the constitution of 2006 suffers from material weaknesses. With regards to the constitutional contents, the constitution of 2006 reflects the strategy of the continuity since this constitution did not make a genuine shift from the constitution of 1990 (Molnar 2013: 35). The concept of the constitution of 2006 follows the rationale behind the constitution of 1990, and except the wider catalogue of human and minority rights, this constitution does not contain any regulation which would signalize the break of the constitutional continuity. The constitution of 2006 is not a new constitution, but much more a redesign (partly better, but partly worse) of the constitution of the 1990 (Marković 2007: 53). This substantial discontinuity with the constitution of 1990 is missing since the rationale behind the constitution of 2006 was not to strengthen fundamental rights, institutes of democratic governance, liberal economy, and open society, but it was to stress out that Kosovo is "an integral part of Serbia". At the symbolic level the whole constitution of 2006 is charged with this "Kosovo vow". Since its first function was to (declaratory) safeguard the

Serbian sovereignty in Kosovo, its genuine function to constitutionalize the polity has remained in the background.[5]

The third layer of the constitutional weaknesses refers to its legitimacy deficit. The legitimacy of the constitution was very low from the very start. The constitution of 2006 is an octroyed constitution which excluded the citizens from its creation, and they were not able even to discuss it for a day (cp. Pešić, 2007: 77). In line with their specific needs the "rulers" have adopted the constitution for themselves (Molnar, 2013: 33). As the Venice Commission has put it, "[…] another aspect of the hasty drafting of the text is the lack of opportunity for its public discussion. This procedure was motivated by important political considerations and reflected specific difficulties in the country. Nevertheless, it raises questions of the legitimacy of the text with respect to the general public." (Venice Commission, para. 104). Not only the citizens and their representatives in the Serbian parliament were excluded from the constitutional process, but also some other social players were excluded, such as institutions of the Autonomous Province of Vojvodina, the national minority councils, unions, civil society organizations, professional organizations etc. (Pajvančić, 2006: 19f.). This legitimacy deficit maybe could have been compensated, and the authority of the constitution strengthened, if the political players would have respected it and not treated it as a mere formality or a façade. On the contrary, they were not willing to submit government actions to rules and to institutionalize political decision making, which additionally undermined the authority and the legitimacy of the constitution. The constitutional debate remained opened, since the constitution is perceived as an interim act that does not meet the needs of the polity and the society and thus should be changed.[6]

5 With respect to democratization process the most obvious weakness of the constitution lies in the nonexistence of the real separation of powers (both on horizontal and vertical level). As the Venice Commission has stated in its Opinion on the Constitution of Serbia, "the main concerns with respect to the Constitution relate, on the one hand, to the fact that individual members of parliament are made subservient by Art. 102.2 to party leaderships and, on the other, to the excessive role of parliament in judicial appointments" (para. 106). The vertical separation of powers is not consistent, "for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government will be realised or not" (Venice Commission, para. 8). For a detailed analysis of the Constitution see: Pajvančić (2009); Marković (2007); Komitet pravnika za ljudska prava (2013).

6 According to the results of one survey performed in 2012, only 10% of citizens and 5% of the members of the political elite expressed their opinion that the constitution should not be changed. The constitution was rated with the average note 2.8 (grading 1 to 5). For

Constitution and the Political Process: Defective Democracy in a Partocratic State

The goal of the democratization process is the establishment of a special democratic order in which political power is limited and accounted for by objective legal (constitutional) rules. Political power is set in democratic institutions wherein there is an institutional connection between a legal order and a political process. Law sets legal rules for democratic governance and constitutes a political process, yet lawmaking is politicized and interconnected with political action. It is in such an arrangement that a constitution gains significance for the submission of politics to law. However, a constitution is a necessary precondition for the establishment of constitutionalism, but rarely is it a sufficient condition. It is not always the case that constitutions are taken seriously or that constitutional norms always prevail in cases of conflict with political interventions (Grimm 2010: 3). Some constitutions lack serious intention to limit the rulers powers, or in some cases constitutional rules do not enjoy full primacy over the acts of government, but are legally superseded by political decisions (Ibidem: 11). The quality of a democratization process in respect to the successful constitutionalization of the political order can be measured by whether a constitution has effective power to frame the political process. The democratization process can lead to the establishment of a liberal democratic order or it can be stuck in some form of defective democracy (which can be manifested in diverse forms, such as electoral democracy, illiberal democracy, semi-democracy, façade democracy, etc.). According to the theory of Juan J. Linz and Alfred Stepan, consolidated democracy must have five interconnected and mutually reinforcing arenas. These arenas are civil society that functions on the principle of freedom of association and communication; political society that is based on free and inclusive electoral contestation; the rule of law based on the constitutionalism; the state apparatus that is organized on rational-legal bureaucratic norms, and the economic society which rests on an institutionalized market (Linz/Stepan 1996a: 7-15). According to Linz and Stepan, all significant actors, especially the democratic government and the state, must respect and uphold the rule of law (Linz/Stepan 1996a: 10). As they note, a spirit of constitutionalism

detailed results of the survey, see: "Zašto Ustav mora biti promenjen", available at: http://www.fosserbia.org/projects/project.php?id=1656 .

"entails a relatively strong consensus over the constitution and especially a commitment to 'self-binding' procedures of governance that require exceptional majorities to change" (Ibid.). Further, constitutionalism requires "a clear hierarchy of laws, interpreted by an independent judicial system and supported by a strong legal culture in civil society" (Ibid.). According to the concept developed by Wolfgang Merkel, "an embedded, liberal democracy consists of five partial regimes: a democratic electoral regime, political rights of participation, civil rights, horizontal accountability, and the guarantee that the effective power to govern lies in the hands of democratically elected representatives." (Merkel 2004: 36). Similar concept we can find at Puhle who identifies 11 criteria grouped in 5 groups: Electoral regime (consisting of elected officials, inclusive suffrage, right to run for office/full contestation, free and fair elections), Political Liberties/Public Arena (freedom of speech, of the press and of information, freedom of association), Effective Power to Govern (government by elective officials /no reserved domains), Horizontal Accountability (checks and balances), Rechtsstaat (civil rights, rule of law and judicial review/independent courts/equal access to and equality in court, rights/ protection of minorities) (Puhle 2005: 9). According to Puhle, these criteria can be effectively implemented in specific context which presupposes stateness, civil society, and socio-economic context (ibid.). These concepts plausibly show that democracy cannot be narrowed to the electoral mechanism, and that electoral democracy is not sufficient enough to characterize an order as genuinely democratic. The establishment of an electoral regime which functions along democratic lines is sufficient enough not to consider a regime as an autocratic, but if above mentioned additional criteria are not in place, such an order is a defective democracy (Ibidem: 11; Merkel 2004: 48).[7] Such an order is in specific "political gray zone" (Carothers 2002: 9), in which a political space for opposition parties and civil society, regular elections, and democratic constitutions can exist, but it suffers from "serious democratic deficits, often including poor representation of citizens' interests, low levels of political participation beyond voting, frequent abuse of the law by government officials, elections of uncertain legitimacy, very low levels of public confidence

7 Depending on which of the criteria is missing or perverted, defective democracy can have different subtypes. Merkel identifies exclusive democracy, domain democracy, illiberal democracy and delegative democracy (Merkel, 2004: 49ff), and Puhle identifies exclusive democracy, illiberal democracy, tutelary democracy, delegative democracy (Puhle, 2005: 11ff).

in state institutions, and persistently poor institutional performance by the state" (Ibid, 9f.). The central constitutional question of the quality of democracy is whether constitution can (together with other elements) produce constitutionality. Whereas liberal democracy is based on the rule of law and the supremacy of the constitution, in a defective democracy a constitution has no power to produce constitutionality. In defective democracies, most usually constitution as such is a façade and the stakeholders are not inclined to submit themselves to legal norms but pretend to be exercising their power within the constitutional framework (Grimm 2010: 3).

More than a decade after the overthrow Milošević's and despite the fact that in 2006 Serbia adopted a new constitution, the statement that "Serbia has a constitution, but it is not a constitutional state" (Pajvančić 2005: 277) is still up-to-date. Serbia is still captured in some form of para-constitutionality in which the constitution is just the façade, and the governing processes are actually displaced from the constitution. Although in the past the regimes have changed, the relation between law and politics has remained the same. Politics has never been functionally subjected to a legal framework; consequently, no power had ever unconditionally respected legality or the law (Belančić 2001: 208). The Serbian political elite showed no willingness to depersonalize governance by channeling it into the legal framework. In doing so it preserved the elements of the legal façade of the previous systems. The way political players have treated (and still treat) the constitution suggests the lack of serious intent to constitutionalize the polity. Constitutionalisation here refers to institutionalization of political power, in terms of channeling power into institutions and establishing governing mechanisms in line with constitutional procedures. In Serbia this is not the case since the effective power lies not in the state institutions but in the hands of the political (party) elites. This power constellation leads to a specific dualism of the state, whereas the "constitutional" state is just a façade or a shell whereas the real power rests in the "prerogative" state (special political structure integrated by party channels, and which does not pay attention to law, but is driven by the "state reason") (Molnar 2013: 19, 33). In the center of the "prerogative" state lay political party elites which are the genuine source of the almighty power in Serbia (Ibidem: 44) and which are the main usurpers of the state power, the state property, and the public sector in general (Pešić 2012: 174). Although Serbia has reached the level of electoral democracy, it is stuck in some form of the

"pluralistic party state". Paradoxically enough, the constitution of 2006 did not deconstruct the "prerogative" state, but it set some constitutional safeguards for the party influence on the governing process. The most controversial is Article 102.2 of the constitution which states that a deputy shall be free to irrevocably put his/her term of office at the disposal of a political party upon which proposal he or she was elected a deputy. With this norm the constitution ties the deputy to the party position on all matters at all times, and it concentrates excessive power in the hands of the party leadership (Venice Commission, para. 53). Due to the excessive role of the parliament in judicial appointments (as foreseen in Articles 147.1, 147.3 and 153.3 of the constitution), the power of the party leaderships reaches to the judicial branch. In such constellation the executive remains almost free of any effective control. Actually the control of the executive is shifted from the state institutions and formal procedures to the pseudo-formal control performed by the political party institutions. The recent reconstruction of the Serbian government has shown that the ministers are not really accountable to the parliament but to the political party boards and party presidencies. The central indicator of the partocratic state in Serbia is the party driven allocation and redistribution of the "public goods" (in the wider sense). Political parties' influence is not limited to "traditional" political positions (ministers and state secretaries) but also to all governing or management sublevels. Political parties have a decisive role in almost all appointments and even in those cases which demand the respect of the merit system. The party "prey" are not only the positions in the government and the public administration, but also the positions in the diplomacy, public companies and communal service companies, institutes, agencies, funds, medical institutions, schools, cultural institutions, etc. (Orlović 2012: 220; Pešić 2012: 186). In the context of the weak economy which is still predominantly state-driven, the political power intertwines with the economic power which additionally leads to the state capture. Furthermore, weak civil society and weak public control, in combination with the lack of democratic political tradition and democratic political culture, are not capable to counterbalance the party dominated power structure and to effectively contribute to the institutionalization of political power and its control.

Conclusion

Almost 14 years after the overthrow of Milošević and the initiation of the democratization process Serbia has not manage to substantially constitutionalize the polity. Despite the adoption of a new constitution in 2006, the bad tradition of façade-constituality was not broken. The over-hasty adoption of the constitution had led to violation of the procedure and to mixed quality of the constitutional provisions. From the very start the democratic legitimacy of the constitution was low, and it showed no capacity to channel the political power. The political players have shown no willingness to submit government actions to objective and impersonal rules. Furthermore, almost every stakeholder perceives the constitution as an interim act needed to be changed, which additionally undermines the authority of the constitution. Under such circumstances, the constitutional issue remains latently opened and the state is in a latent constitutional crisis. This corresponds with the specific para-constituality of the Serbian order in which the constitution is just a façade, and the power is not rooted in the state institutions but in the political party oligarchies. The constitution has not managed to diminish this dualism (nor was this the intention of the constitutional maker) and the democratization process in Serbia got stuck in some form of a pluralistic party state.

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