Security Issues in the new Constitution of Serbia

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The Constitution is the supreme legal document of a state, security being one of its most important functions. The following text in which we are going to study how the Constitution makers of Serbia have regulated the security sector is a contribution to a non-existent public debate on the Constitution and it has been drawn up in the spirit of the most renowned Serbia tradition of having one's cloak made when it begins to rain. We will make a brief comparison between the present text of the Constitution, the 1990 Constitution, the constitutional practice in the region and international standards. The text begins with the competences of Serbia and its institutions in charge of security. We will after that analyze how the Constitution makers regulated the status of the Army of Serbia (VS) and the state of emergency. Then, we point to the solutions related to the right to conscientious objection and the right to security. Finally, the way in which Kosovo and Metohija (K/M) is treated by the Constitution does not make it the main topic of this text, but, still, owing to its relevance to security, we will cast some light on that problem as well.

Competences of the Republic of Serbia

Article 97 of the Constitution defines the competences of the Republic of Serbia. First of all, the Republic of Serbia "shall organize and provide for its sovereignty, independence, territorial integrity and security". Paragraph 2 thereof at the same time says that the Republic "shall exercise and protect freedoms and rights of citizens", that is, "constitutionality and legality". Finally, paragraph 4 states that the Republic shall organize and provide for "defense and security" both of the Republic of Serbia and that "of its citizens". "Measures in case of the state of emergency" have just been lightly touched upon here, we believe because Article 200 of the Constitution gives a thorough definition of them.

When we compare this Constitution to the 1990 Constitution, we can see that competences related to the defense and security are actually the same. The competence of the Republic "in exercising and the protection of freedoms and rights of man and citizens" has been slightly extended by recognizing, but not accurately defining, the rights of the Republic to establish liability and prescribe penalties "for violation of freedoms and rights of citizens".

The provision set out in Article 51 of the 1990 Constitution according to which the defense of the Republic of Serbia "is the right and duty of every citizen" is not incorporated in the draft text of the Constitution. But an identical provision can be found in the Constitution of the Republic of Macedonia, Article 28, stating that the "defense of the Republic of Macedonia is the right and duty of every citizens", adding, however, that the exercise of that right and duty will be regulated by law.

By omitting this provision from the new Constitution of Serbia the Constitution makers intended (not) to incorporate in the Constitution the right to conscientious objection to be discussed later on in this text. The new Constitution also lacks the provision evaluating the act of signing capitulation and recognition of occupation as treason. Let us remind you that Slobodan Milosevic violated this Article of the Constitution by signing the Kumanovo Agreement, after the NATO intervention, thereby allowing for the presence of foreign troops in the territory of the Republic of Serbia at an unlimited period of time.

The National Assembly

Article 99, paragraph 5 prescribes that the National Assembly decides on war and peace and declares state of war and emergency. Paragraph 6 of the same Article stipulates that the National Assembly supervises the work of security services. It is unclear as to why the Constitution makers provided for the Assembly supervision only over security services, and not over other elements of the security sector, for example, army, police, private security sector etc. Besides, the Assembly should not just supervise, but also control all factors of this sector. Finally, Article 99, paragraph 9 stipulates that the National Assembly adopt defense strategy. However, the Constitution has failed to mention another, more important document that Serbia needs most of all at the moment, which is the National Security Strategy. That document, from which the Defense Strategy, military doctrine and other strategic documents should derive, would, among other things, also define security challenges, risks, threats, protected values and interests of the state. Besides, the National Security Strategy should contain not only provisions on the Army, but also on other factors of the security sector. For example, Article 80 of the Croatian Constitution envisages that the Sabor (Parliament) adopt also the National Security Strategy and the National Defense Strategy.

President of the Republic

According to Article 112 of the Constitution, the President of the Republic shall, “in accordance with the Law, command the Army and appoint, promote and relieve officers of the Army of Serbia”. The difference in terminology neglecting, although it can make a difference whether the President commands, manages or administers the Army, we are of the opinion that this wording is typical of the semi-presidential system of government. The Constitutions of Macedonia and Croatia prescribe in a similar way that the President is the supreme commander of the armed forces. In addition, the Constitution of Serbia and the Croatian Constitution are identical in the sense that presidents in both states decide about appointments, promotions and relief of officers.

The Constitution makers have failed to give two answers in this field. First, what is the relation between the President of the Republic and the Defense Minister in terms of commanding the Army of Serbia. Second, the responsibility of the President is explicitly envisaged only in the event of violation of the Constitution. Who is the President of the Republic accountable to for “commanding the Army”?

Finally, the part of the Constitution related to the President has not included the National Security Council. Thereby, the Constitution makers have missed an opportunity to establish a body made up of all key civil and military decision makers. That body would then integrate the entire security community of Serbia and holistically coordinate the entire security sector. For example, Articles 86 and 87 of the Macedonian Constitution clearly provide for the establishment, the composition

and competences of this body. The present Serbian Government set up a similar body by a decree. However, that body never started to work owing to the President of Serbia's complaints against the manner of its establishment.

The Army of Serbia

The competences of the Army of Serbia, as envisaged by Article 139, are broad-based. While the provision regarding the Army's competence to "defend the country from external armed threats "is clear, the remaining part thereof "and perform other missions and tasks in accordance with the Constitution, Law and principles of international law regulating the use of force" leaves space to different interpretations. Why did the Constitution makers opted for a different solution from the one stated in the Strategic Review of Defense which clearly outlines three aims of the Army of Serbia: to defend the Republic of Serbia from military challenges, risks and security threats, to take part in building up and maintaining peace in the world and to support civilian authorities and preclude non-military security threats? We believe that this was a justifiable intention of the Constitution makers to approach the matter in a more flexible way owing to possible changes in the perception of security threats and challenges in the future.

Article 140 stipulates that the Army of Serbia may be used outside the borders of the Republic of Serbia only upon the decision of the National Assembly. That competence is not explicitly set out in Article 99 dealing with the competences of the Assembly, but it partially derives from the Assembly's competence to decide about war and peace and declare a state of war and emergency. It remains unclear, however, as to when and under what circumstances can the Army be sent outside the country. Is it only in the case of peace-keeping missions, under a UN mandate, or is there a possibility for using the Army for offensive purposes outside the framework of the international law, as is the case with the "Coalitions of the willing", for example?

Article 141 stipulates that the Army of Serbia shall be subject to democratic and civil control and that the Law on the Army of Serbia shall be enacted. This type of control is part of the civil-military relations and does not fall within the purview of the Army Law as the Constitution makers have envisaged it. It would have been better if the Constitution had provided for the Law on Democratic Civil Control of the Army of Serbia to regulate this matter. Another thing that supports the idea of enacting this law is the fact that the Constitution does not stipulate as to who will exercise democratic and civil control of the Army. Besides, there is a question as to why should only the Army be subject to democratic civil control. In addition to the Army, all those who are using force, including police, secret services, parapolice and paramilitary organizations as well as private security and military companies should be subject to this type of control.

State of emergency and state of war

The Constitution makers have rather vaguely formulated "public threat" in Article 200 without defining its actual meaning. "Public threat" presupposes the existence of the concept of "private threat" which is unknown to the authors of this text. If the concept of "public threat" has already been adopted, the law should regulate in detail the procedures and competences for establishing it. It might have been better if the solution from the 1990 Constitution had been retained, stating that the state of emergency is declared if security of the Republic of Serbia, freedoms and rights of man and citizen or the work of state agencies are threatened. A new departure of the Constitution is a detailed regulation of the institution of the state of emergency. However, the problem arises in the case the National Assembly is not able to convene and the Government has to decide on the state of emergency, that is, on the derogation from human and minority rights.

That decision then has to be verified by the National Assembly within 48 hours or at its first sitting. The problem may also arise in the situation when the Assembly can convene only after a long period of time. In that case this provision could be abused by the Government. The same applies to the declaration of a state of war.

The right to conscientious objection

The right to conscientious objection was not guaranteed by the 1990 Constitution which in its Article 45 guaranteed only the freedom of conscience. However, after the democratic changes this right was guaranteed in a by-law, that is, a 2003 Decree on Military Service. The draft of the new Constitution introduces this right in Article 45, but only implicitly, in a rather restrictive manner. Paragraph 1 thereof states that "no person shall be obliged to perform military or any other service involving the use of weapons if this opposes his religion or beliefs". It is certainly good that the Constitution makers stipulated in Article 202 that any derogation from this right will not be permitted. However, Article 45, paragraph 2 states that "any person pleading conscientious objection may be called upon to fulfill military duty without the obligation to carry weapons, in accordance with the Law".

This limitation to the right to conscientious objection is in contravention with international standards. One of the underlying principles of these standards says that persons who for reason of conscience refuse to perform armed service must have the right to an alternative service, as has been provided by the resolution 337/1967 of the Parliamentary Assembly of the Council of Europe. Besides, the alternative service must be entirely civilian in nature and the entire process of applying for that service and the performance of the civilian service should be in charge of a civilian ministry, excluding the Ministry of Defense, as is prescribed by Article 9 of the Bandres Molet & Bindi Resolution of the European Parliament. A restrictive definition of the right to conscientious objection is in contravention with the rights to conscientious objection attained so far and the practice of civilian service in Serbia. This right was not explicitly recognized by the 1990 Constitution. However, since the adoption of the Decree on Military Service in 2003, conscientious objectors were not referred to military institution to serve without weapons, but rather to civilian institutions that were, the truth to tell, selected by the Ministry of Defense. Finally, the restriction of the right to refuse carrying a weapon is in contravention with the existing practice in the region. For example, although Article 47 of the Croatian Constitution defined this right as the right to refuse participation in "performing military duties in armed forces", in practice, since 1995, the conscientious objectors had not been sent at all to perform military service without carrying weapons, but were rather referred to civilian institutions".

The right to security

Article 27 states that "everyone has the right to personal freedom and security". The remaining part of the text prescribes conditions under which a person can be deprived of liberty. But, the right to security is not mentioned anywhere else. So, it remains unclear as to what the right to security actually implies, how that right can be violated and protected. Finally, since the "right to security" has remained undefined, the motive of the Constitution makers to incorporate this right

in an article on the deprivation of liberty is unclear to us. This is why the authors of this text consider mentioning the right to security in this particular Article as redundant.

Kosovo and Metohija

The state-legal status of Kosovo and Metohija is one of the major security problems of Serbia. In response to announcements coming from one part of the international community that K/M will get independence, the authors of the Constitution decided to point out that this province is an integral part of the Serbian territory. Should K/M actually become independent, and the Constitution is confirmed at the referendum, a gap will be created between the political reality and the legal system in Serbia. The question is as to what extent the Constitution provides a possibility for bridging this gap.

K/M is being mentioned in the preamble of the Constitution, the part of the Constitution on the organization of government and the part related to territorial organization. The preamble is declarative in nature and it cannot produce any legal consequences. After it, the normative part of the Constitution related to the organization of government stipulates that the President at assuming his office shall solemnly swear “that I will devote all my efforts to preserve the sovereignty and integrity of the territory of the Republic of Serbia, including Kosovo and Metohija as its constituent part”. A rather complicated procedure, including holding of a referendum, is envisaged for amending this part of the Constitution. However, in order to amend the part of the Constitution regulating territorial organization of government, in which Kosovo and Metohija is mentioned as having substantial autonomy within Serbia, a two third majority in the Assembly would be sufficient. We believe that the authors of the Constitution have thereby intentionally provided for a possibility to adapt the Constitution to the new political circumstances and possible independence of Kosovo in future.

However, if the political elites decide not to adapt the Constitution to new circumstances, how do they intend to protect the constitutional order then? One of possible ways is to send armed forces to the territory of Kosovo and Metohija. From a legal point of view, the President of the Republic is empowered to do that without the decision of the National Assembly which, according to Article 140, can only approve sending of these troops outside the territory of Serbia. It means that the President of the Republic, in keeping with his powers stipulated by the Constitution, could lead the state into an armed conflict, without an approval of the Assembly.

Conclusion

Briefly, the Constitution of Serbia regulates the security matter better than the 1990 Constitution. The Constitution incorporates institutions of democratic civilian control and the right to conscientious objection. However, the authors of this text have concluded that certain solution have remained vague, unclear or disputable. The vague provisions are those related to the competences of the army, unclear are the terms public security and the right to security while the provision on the right to conscientious objection is disputable, to say the least.

Another opportunity to finally regulate the security sector properly by the Constitution and put it firmly under democratic civil control has been missed. If there had been more public debates about the draft, these shortcomings might have never occurred.

This way, as Prof. Vojin Dimitrijevc said, “the new Constitution of Serbia can be a good Constitution if in the hands of good lawyers and liberal minded people”. But it will be the political will of the Serbian citizens that will decide whether the Constitution will be in the hands of such people or not. “For in the hands of brave Vuk Mandusic, every rifle will be right and deadly”.[2]

[1] The authors are researches of the Belgrade School for Security Studies, a research division of the Center for Civil-Military Relations. This text has been taken from a professional journal “Security of the Western Balkans”, issue no. 2, edited and published by the Belgrade School for Security Studies.

[2] Petar Petrovic Njegos :“The Mountain Wreath”, translation by Vasa D. Mihailovich