ABOUT UNCONSTITUTIONALITY OF REFERENDUM LAW IN REPUBLIC OF SRPSKA

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SUMMARY
Constitution of B&H and the Constitution of RS. However, Referendum Law has been adopted and this issue is being formulated to civil initiative in a different way while daily political, constitutional and legal practice in the Republic of Srpska and B&H are looking for the answers to some burning questions. It is a complete absurdity to be used as an excuse, that by passing the Law on Referendum and Civil Initiative, democratic deficit in the Republic of Srpska is being reinforced, instead of these laws having key role in democracy increase. A referendum on the territory of the Republic of Srpska (about the issues in accordance with the Constitution of RS, and they are the issues within the competence of the National Assembly of RS) is legitimate only if a majority from all three peoples separately (a majority of Serbs, a majority of Croats and a majority of Bosniaks who live in RS) votes for a certain issue. The same principle is at the level of Bosnia and Herzegovina and at the level of the Republic of Srpska, since at both levels the Constitutions define three-ethnic sovereignty and constitutionality, where qualified three-ethnic majority is necessary. If the law does not contain provision on three-ethnic majority, it is contrary to the Constitution of B&H and the Constitution of RS.

INTRODUCTION

Daily events and permanent immature political altercations, between political elite of Sarajevo, associated positional and oppositional parties which are pretending, without exception, to be for "integral", indivisible, sovereign and blah blah …. on one side and those on the other side in Banja Luka, in their daily simmering have reached the point when nonsense mutually becomes so exotically evident that living voting people, besides hiding their heads into the sand for twenty years, begin to shake down the dust from their eyes and to gargle their mouths with a view to finally "scream out" what they see. Permanent lamentations of B&H nonpolitical, national intellectual elites over their weakness in doing anything say enough about them, since they really do not do anything neither they try to do something.

By way of illustration, there should be mentioned an apparent course of political elite of smaller B&H entity for so-called referendum intentions. These elites, using a frightening fact about possible disappearing of Republic of Srpska while the other one from Federation in Bosnian corpus about possible disappearing of Bosnia and Herzegovina, in fact manipulate ordinary people in whole B&H. Neither those from Republic of Srpska can legally and legitimately with valid outcome hold a referendum, nor those from Federation can legally and legitimately by ad hock actions prevent one legitimate and legal part of B&H verified by Constitution from holding a referendum which does not have any legal consequences and that is in brief, because of the reason that politically smarter and legally more mature world community has solved and sanctioned everything on time, through the Dayton Agreement, by annex 4 which forms Constitution of B&H state, but it should be just read and competently interpret. The Constitution of B&H, as a school example of an excellent legal document made according to methodological principles of Anglo-Saxon law, was written in such a way that it clearly regulates everything in its XII (twelve) Articles but only for those readers , "lawyers" who get down to reading this legal document with already created preconception what it should be about and not what it is really about.

Here we are going to focus on Preamble of the Constitution of B&H and particularly one part of the same which determines possible referendum in Republic of Srpska, on one verdict of Constitutional court of B&H from 2000. and on parts of Constitution of Republic of Srpska which directly or indirectly deal with referendum as a constitutionally legal category. Briefly, we will state constitutional provisions which unambiguously speak that each referendum organized in one bounded part of Bosnia and Herzegovina is **unconstitutional.**

THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

1. The Preamble as a whole

Based on respect for human dignity, liberty and equality,
Devoted to peace, justice, tolerance and reconciliation,
Convinced that democratic governmental institutions and fair procedures best produce peaceful relations inside pluralist society ,
Desiring to promote general welfare and economic growth through the protection of private property and the promotion of a market economy,
Guided by the Purposes and the Principles of United Nations Charter,
Committed to the sovereignty, territorial integrity and political independence of Bosnia and Herzegovina in accordance with international law,
Determined to ensure full respect of international humanitarian law,
Inspired by the Universal Declaration of human rights, the International Covenants of Civil and Political Rights and on Economic, Social and Cultural rights, and on the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic minorities, as well as by other instruments of human rights,
Recalling the Basic Principles agreed in Geneva on 08th September 1995. and in New York on 26th September 1995., Bosniaks, Croats and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby determine that the Constitution of Bosnia and Herzegovina is as follows:

a) A point at issue among the theoreticians has been whether the preamble is an integral part of the Constitution and if the constitutionality of lower acts of law can be evaluated in relation to the contents of the Preamble.

Constitutional Court of Bosnia and Herzegovina made a decision in 2000. that the Preamble is an integral part of the Constitution and that the constitutionality of acts of law can be evaluated according to the contents of the Preamble, and legal doctrines mainly accept that preambles are integral parts of all constitutions.

b) Constitutionality or statehood is a sovereign right of autochthonous people/peoples to make decisions about the state's establishment, organization, functioning and status. Bosnia and Herzegovina has three peoples as three constituent subjects in form of ethnic nations, and sovereignty is a common category, so that one people cannot act against the other two and vice versa (See the last, underlined, bolded break of the above copied Preamble of the Constitution of B&H).

c) There should also mention that historical continuity of Common sovereignty of three ethnic nations was founded on the decisions of ZAVNOBiH (Session of National Antifascist Liberation Council of B&H) in 1943. and 1944. in the sense of the following words: **"Bosnia is neither Serbian, nor Croatian, nor Muslim, but is equally Serbian and Croatian and Muslim".** Sovereignty is a common category and none of these peoples can separately consume it against the will of other peoples. Constitutionality is an equal category which applies to all levels of state authority.

THE CONSTITUTION OF THE REPUBLIC OF SRPSKA

Preamble of the Constitution of RS, first part

"Respecting the will of its constituent peoples and citizens to establish and preserve the Republic of Srpska and to base constitutional establishment of the Republic upon the respect for human dignity, freedom and equality, national equality …"

1.1 Basic provisions of the Constitution of RS, Article 1. Paragraph 4

"The Serbs, Bosniaks and Croats, as constituent peoples, Others and citizens shall participate in executing the functions of authority in the Republic of Srpska equally and without discrimination."

a) Contents of the Preamble and Article 1. of Basic provisions of the Constitution of Republic of Srpska define three peoples, as three ethnic communities, to be constituent and to execute the functions of authority in this entity equally. This constitutional provision has been in force since the decision of Constitutional court of B&H in 2000. according to which all three peoples are equal throughout the territory of Bosnia and Herzegovina. If three peoples are equal throughout the territory of the state, they are also equal at all levels of state authority, which means they are equal at the level of entity too. State authority in the country such as Bosnia and Herzegovina is a unique category ant it is executed at two levels, at the state level and at the level of entities. Elements of sovereignty and constitutionality (statehood) are the same at all levels of government bodies and at the levels of entity bodies of state authority. It is not possible that one principle of sovereignty is valid at the level of Bosnia and Herzegovina state, and completely other principle at the level of entity.

1.3. Article 70. item 5. of the Constitution of Republic of Srpska

"The National Assembly of the Republic of Srpska ……..shall call for the republic referendum."

1.4. Article 77. of the Constitution of Republic of Srpska

"The National Assembly may decide to make a decision on some issues falling within its competence after a referendum of citizens has been held."

By the aforesaid Article, referendum is defined as consultative, where citizens make a decision which is not sovereign, but the National Assembly make a decision after stated opinion of citizens. A referendum is a form of direct decision-making of sovereign constituent subject in a state (citizens or ethnic nations) on essential state issue, and decision made through referendum is sovereign and binding for all government bodies.

The Constitution of the Republic of Srpska does not treat a referendum as a sovereign category, but as a form of acquiring opinion which will be the base for making a decision by the Assembly, but there is no constitutional obligation that the Assembly has to accept the decision made through "referendum".

In essence that is not a referendum but a form of public debate where the Assembly "covers itself" with "people's will" which has previously been imposed on people through mass media.

1.5. Article 69. paragraph 2. Amendment LXXVI of the Constitution of Republic of Srpska

"The legislative power in the Republic of Srpska shall be performed by the National Assembly and the Council of Peoples. The laws and other regulations approved by the National Assembly, concerning the vital national interest issues of any of the constituent peoples, shall come into force only after their adoption in the Council of Peoples."

Council of Peoples is a part of legislative power as well as the National Assembly is a part of legislative power. Both parts together have legitimacy of complete legislative power which means that one part without the other one cannot make a legitimate decision. There is a principle of citizens' majority in the National Assembly, while in the Council of Peoples there is a principle of qualified majority of each ethnic community separately. Legislative power in the Republic of Srpska contains balance of citizen and ethnic constitutionality as a constitutional category and each decision is subjected to this principle, as well as a decision on direct statement-making of peoples and citizens.

All enactments belonging to vital national interest cannot come into force until they are adopted by all three national clubs in the Council of Peoples separately.

1.6. Article 70. Amendment LXXVII of the Constitution of Republic of Srpska, two most important items regulating the issues of Vital national interests

"The vital national interests of the constituent peoples are defined in the following manner:

-the equal rights of the constituent peoples in decision-making process; -other issues which would be treated as vital national interest issues if it is so considered by two-thirds of one of the caucuses of the constituent peoples in the Council of Peoples."

Therefore, the essence is in equal rights of three ethnic nations in decision-making and if this principle is being derogated, at the same time the basic constitutional provisions about common sovereignty and equal constituency of three ethnic nations are being derogated.

1.5. of the Constitution of Republic of Srpska, Article 135. Amendment LXXXIX

"The National Assembly and the Council of Peoples shall decide on the proposal of the act of amending the Constitution. An amending of the Constitution shall be adopted if at least two thirds of the total number of the assembly deputies and a majority of the members of the Council of Peoples from each constituent people and Others vote in favor of it."

In the Constitution amending it is again defined a qualified majority including most of the deputies from each ethnic nation separately and the Council of Peoples together with the National Assembly form constitutional (constituent) authority.

CONCLUSION

There are more provisions from the practice of the Constitutional court of B&H and international law but even those aforesaid constitutional provisions confirm that each unilateral referendum in the Republic of Srpska is unconstitutional according to the International law, the Constitution of B&H and the Constitution of RS. However, Referendum Law has been adopted and this issue is being formulated to civil initiative in a different way while daily political, constitutional and legal practice in the Republic of Srpska and B&H are looking for the answers to some burning questions.

First question:

Do the Constitution of Bosnia and Herzegovina and the Constitution of the Republic of Srpska contain provisions on referendum?

The answer is: YES

The question of referendum is contained in the Preambles of both Constitutions and in the Basic Provisions of both Constitutions. A referendum is a form of direct statement-making of the carriers of sovereignty in the state. There where the citizens are the carriers of sovereignty, a referendum is civic. There where ethnic nations are the carriers of sovereignty (and that is, beside Bosnia and Herzegovina e.g. the Republic of Kosovo etc.), a referendum is ethnic and civic. In the Constitutions of Bosnia and Herzegovina and the Republic of Srpska the carriers of sovereignty are three ethnic nations and citizens. Each legitimate referendum includes a civil three-national majority. The Constitution provisions are here unambiguous.

1. THE CONSTITUTION OF BOSNIA AND HERZEGOVINA

"Bosniaks, Croats and Serbs, as constituent peoples (along with Others), and citizens of Bosnia and Herzegovina hereby decide that the Constitution of Bosnia and Herzegovina runs:" **– the Preamble of the Constitution of B&H, last part*.**

Bosnia and Herzegovina has three peoples as three constituent subjects in the form of ethnic nations and sovereignty is a common category, so that one people cannot act against the other two and vice versa. Any of legitimate and constitutionally based decisions concerning the state organization and functioning cannot be made without consent of all three constituent peoples.

CONCLUSION

Sovereignty is a common and indivisible category of three peoples and each decision-making of one or two peoples separately is contrary to the Constitution. Any question concerning Bosnia and Herzegovina as a whole (international role, Dayton agreement, Constitution, NATO, EU and other general and basic issues of the state) cannot be the subject of decision made by one people and one entity, but three peoples throughout the state territory. A referendum of one entity and one people concerning general state issue is unconstitutional – **the Preamble of the Constitution of B&H (above stated)*.**

A referendum on essential and general state issue applying to whole Bosnia and Herzegovina can be legitimate only if the decision is reached by a majority from all three peoples separately throughout the territory of Bosnia and Herzegovina and if such decision is in conformity with international law. A referendum as a form of direct statement-making of constituent subjects in the state is first of all a constitutional and not statutory category. Law is not a primary legal source of referendum, but the Constitution is a legal source of referendum. Referendum Law which does not originate from the Constitution, but which has been written as a separate source of law outside the Constitution, is in essence an unconstitutional act.

2. THE CONSTITUTION OF THE REPUBLIC OF SRPSKA

"Respecting the will of its constituent peoples to establish and preserve the Republic of Srpska and to base the constitutional establishment of the Republic upon the respect for human dignity, freedom and equality, national equality …" **– the Preamble of the Constitution of RS, first part.**

"Serbs, Bosniaks and Croats as constituent peoples, Others and citizens shall participate in executing the functions of authority in the Republic of Srpska eaqually and without discrimination." - **Basic Provisions of the Constitution of RS, Article 1. paragraph 4.**

The Constitution of the Republic of Srpska defines three constituent and equal peoples in its Preamble as well as in the basic rule. Any of legitimate and constitutionally based decisions at the level of the Republic of Srpska

concerning the state organization and functioning cannot be made without consent of all three peoples.

CONCLUSION

A referendum on the territory of the Republic of Srpska (about the issues in accordance with the Constitution of RS, and they are the issues within the competence of the National Assembly of RS) is legitimate only if a majority from all three peoples separately (a majority of Serbs, a majority of Croats and a majority of Bosniaks who live in RS) votes for a certain issue. The same principle is at the level of Bosnia and Herzegovina and at the level of the Republic of Srpska, since at both levels the Constitutions define three-ethnic sovereignty and constitutionality, where qualified three-ethnic majority is necessary. If the law does not contain provision on three-ethnic majority, it is contrary to the Constitution of B&H and the Constitution of RS.

Second question:

Is the Referendum Law of RS Government contrary to the Constitution?

The answer is: YES

Let us see some basic provisions of the Referendum Law and civil initiative of the Republic of Srpska.

1. A problem of equality of peoples and qualified majority

"A referendum in the Republic of Srpska (hereafter called: Republic referendum) shall be announced because of the previous statement-making of its citizens, in conformity with the Constitution." **Article 2. paragraph 1. Of the Law on Referendum**

This basic provision on referendum includes the rules which are not present in the Law. For example, if it is a republic referendum, then the carriers of sovereignty in the Republic of Srpska make decisions equally. If three nations make decisions equally, then a decision is legitimate only on a model of qualified (double) majority which means most citizens comprising majority of Serbs, majority of Bosniaks and majority of Croats.

Let us see the rule of referendum majority in the Law which is in effect.

1) A referendum is valid if there vote more-than-half majority of citizens who have a voting right and who are registered in the voting roll.

2) A referendum issue has the support of citizens if more-than-half majority of citizens, who voted on referendum, has voted for it – **Article 35. Law on Referendum**

There is nowhere qualified majority, but simple more-than-half majority of citizens on the principle one man – one vote.

CONCLUSION

Article 35. of the Law on referendum is contrary to:

- The Preamble of the Constitution of B&H,
- The Preamble of the Constitution of RS,
- Article 1. of the Constitution of RS and Article 70. of the Constitution of RS
- Amendment LXXVII, provision six which states: "Equal rights of constituent peoples in decision-making process."

Article 35. of the Law on referendum is also contrary to Article 2. of the same Law. Article 2. implies constitutional equality of three peoples, while Article 35. implies engineering of a majority, one man – one vote. Therefore, the Law should be subjected in assembly procedure to amendment changes which would completely change the offered Article 35. Instead of simple majority of citizens it would be acceptable to propose qualified, double majority, on the basis of ethnic and civil balance. As possible amendment changes we give the examples:

<u>The first Amendment</u>

The new Article 35. should state:

1) A referendum at the level of entity is valid if there vote more-than-half majority of voters from all three peoples separately.
2) A referendum issue is adopted if more-than-half majority, who voted on referendum from all three peoples separately, has voted for it.

2. Problem of referendum demarcation at the levels of municipality, entity and Bosnia and Herzegovina

The valid Law does not demarcate the forms of: municipality, entity and state referendum. Entity and state referendum result from the Constitutions and they apply to three constituent peoples as carriers of sovereignty and because of that qualified (double) majority are necessary.

Municipal referendum result from the law and it applies to communal issues of the citizens who live there, so the principle of three-ethnic constitutionality is not applied here. Republic and entity referendum should be separated from municipal referendum by an amendment in the sense of stating precisely the issues which are to be solved at the level of municipality, which ones at the level of entity and which ones at the level of Bosnia and Herzegovina. The Law is obviously ambiguous, where through forms of "communal and civil" issues efforts are made "to involve" all people into possible activity of the National Assembly of RS which can follow in a completely unpredictable way.

The result of this is a very difficult issue which is contained in the following question:

Does the National Assembly of the Republic of Srpska have a right and is it allowed to overstep its constitutional competence?

At first sight the answer would be that it is not allowed. However, the answer could also be that it is allowed if a situation REBUS SIC STANTIBUS is created, essential change of circumstances, which can arise from conducted acting of entity authority.

Serbian people, under authority manipulation, can decide not to live in Bosnia and Herzegovina any more and to demand secession through referendum. The National Assembly of RS, proceeding from new circumstances, can even make decisions out of former constitutional authorities, since it "has to respect the will of people."

Until these circumstances happen, entity authority can use the Law on referendum in daily-political goals such as:

- contesting the role of world community,

- creating "legitimate screen" for the decisions made by the National Assembly of RS,
- creating controlled crisis in order to increase the capacity of political negotiation,
- realizing election campaign,
- creating virtual reality where people will not be concerned about economic issues, but about referendum.

CONCLUSION

The Law on Referendum is unacceptable until it precisely demarcates the levels of referendum: municipal, entity and level of Bosnia and Herzegovina.

3. Problem of final competence

Article 40. of the Law on Referendum of RS defines that Supreme Court of the Republic of Srpska is a body of final decision with reference to referendum. This Article is unconstitutional, since a referendum is an expression of will of the sovereign subject and it results from the Constitution as a primary source and the body of final decision should be the Constitution of RS and the Constitution of B&H, and not Supreme Court of RS. Instead of existing contents of Article 40., there should be included different contents to the same article:

The second Amendment

1) Against the commission decision from Article 38. of this Law as well as in the case when competent commission has not made a decision to the objection in obligatory time, a submitter of the objection may lodge a complaint to the Constitutional Court of RS.
2) Constitutional Court makes a decision to the complaint from paragraph 1. of this Article according to the procedure defined for the Council of Peoples of RS.
3) If the objection submitter finds out that the Constitution of B&H has been violated in referendum implementation, the objection is to be submitted to the Constitutional Court of B&H according to defined constitutional procedure.
4) Decisions of the Constitutional Court of RS and the Constitutional Court of B&H are final.

If the submitter is of the opinion that the Constitution of RS has been violated, then the Constitutional Court of RS should be referred to and its decision is final. If the submitter is of the opinion that the Constitution of B&H has been violated, then the Constitutional Court of B&H should be referred to and its decision is final. It is a matter of separated procedures.

Third question:

Should the issue of referendum and civil initiatives be defined by the same law?

The answer is: NO

A referendum is an institutional form of direct decision-making which is in function of the National Assembly of RS activity and the initiative for referendum has come "from above", from the level of authority. Civil initiative belongs to the sphere of civil society, the sphere of constitutionality, the public character of state authority, responsibilities of state authority, to the rule of law where the initiatives are raised by the citizens "from below". Civil initiative, in contrast to referendum, is not a decision-making for or against, but it contains plenty of proposals, suggestions, requirements, criticism etc. Because of the essential differences Law on civil initiative should be separate law detached from the Law on Referendum.

It is odd that the authority has been the initiator of the Law on civil initiative, by emergency procedure, without public debate and participation of civil society subject. The reason is of tactical nature, since the part of provisions on civil initiative is used to divert attention and to camouflage the goals about the referendum. For instance, "if you are against the Law on Referendum, you are against the civil initiative too, and then you are also against democratic European principles".

The third Amendment

It should be proposed that the Law on Referendum and the Law on civil initiative are separated as two single laws. Also, the Supreme Court cannot be the final arbitrator in the civil initiative, but the Constitutional Courts, and the contents of Article 52. should be changed in the same way as in Article 40. The civil initiative is a form of rule of law applying and functioning of civil society which is a constitutional category having a supremacy in the Constitution of B&H over all other constitutional rules.

Fourth question:

Has it been possible to pass the Law on Referendum and Civil Initiative by emergency procedure?

The answer is: NO

The Law on Referendum is an essential law which makes the basic constitutional provisions on the subject of constituting authority in the state operative, and it is necessary subjected to public and expert debate and it cannot be an emergency issue solving by the authority. Law on Referendum should not be proposed by the Government, but constitutional commissions of the parliament.

The Law on Civil Initiative should be proposed by the sector of civil society through broad public debate, and not the Government by emergency procedure. The way of passing such important laws by emergency procedure is against the rule of law principles, against the public and democracy in law passing.

Fifth question:

Does the Law essentially deal with referendum?

The answer is: NO

A referendum is a sovereign form of statement-making of sovereignty subject in the state and the decision made on referendum is inviolable, having legal supremacy over all other rules and it is binding for all institutions and bodies. The decision made on referendum is not subject to any additional verifications by any of institutions or bodies, since the sovereign decision of the sovereign subject is supreme.

The Constitution of RS and the Law on Referendum derogate the sovereign essence of referendum and reduce it to consultative "referendum", to the form of institutional public debate where the National Assembly makes the final decision.

Let us see constitutional rules of the Constitution of RS about referendum.

"The National Assembly …. shall call for the republic referendum; - **Article 70. item 5. of the Constitution of Republic of Srpska.**

"The National Assembly may decide to make a decision on some issues falling within it competence after a referendum of citizens has been held."- **Article 77. of the Constitution of Republic of Srpska.**

The National Assembly of RS has defined so-called controlled referendum by the Constitution.

The National Assembly "organizes" people's will when it is needed for the legitimacy of some decisions, so it "hides" behind the will of people. At the same time the National Assembly has defined control mechanisms through the Constitution, so that anything people voted for on referendum is subject to additional verification of the National Assembly which makes the final decision. For instance, people can pass a vote of non-confidence in government, but the National Assembly of RS can reject to recall the government. There is a paradox that the National Assembly is constitutionally and legally above the will of people and it makes a decision when to accept that will and when not.

CONCLUSION

a) It is a complete absurdity to be used as an excuse, that by passing the Law on Referendum and Civil Initiative, democratic deficit in the Republic of Srpska is being reinforced, instead of these laws having key role in democracy increase.

b) It is necessary that previously analyzed questions which are determined by the events over Referendum in one entity, part of the state of B&H, are understood only as an example which can be applied and can happen in any other part of B&H or in other entity or at the state level, and cause immense consequences to B&H as a state in whole and even broader.

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