

OBSTACLES TO THE REACHING A FINAL AND BINDING AGREEMENT BETWEEN KOSOVO AND SERBIA: KOSOVO PERSPECTIVE

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Abstract

The aim of this paper is to single out key political and constitutional obstacles standing in the way to a successful dialogue between Kosovo and Serbia. With this aim in mind, the author singles out two of the key obstacles, one of political and the other of constitutional nature, and gives reasons for their existence. In particular, there are reasons of political nature, while those having a constitutional nature seem to be more general and relate to every single constitutional democracy. The paper gives a brief analysis of the past of the Serbian nationalism and its current effects. At the same time, it makes comparisons with the current situation in Kosovo and the lack of political and constitutional legitimacy of those negotiating in the name of Kosovo. At the end of the paper, the readers will find conclusions stating that Kosovo is facing serious obstacles as a result of the lack of political cohesiveness and consensus among its key political forces as well as a lack of clear constitutional mandate of those who have so far been negotiating in the name of Kosovo. That mandate and the legitimacy should come from the Assembly of Kosovo as they do not belong to the head of state of Kosovo or anyone else

Key words: dialogue between Serbia and Kosovo; negotiation between the parties; political cohesiveness and constitutional mandate; constitutional legitimacy; consociational democracy; legally binding agreement.

Introduction

In regard to the conclusion of a legally binding agreement between Kosovo and Serbia there are several obstacles. In fact, the obstacles present themselves as twofold: one of them is of political nature while the other of constitutional one. Taken together they form a serious barrier to reaching a durable agreement. If these two barriers are not adequately addressed, there is a real risk that Kosovo may serve as a destabilizing factor in the region and beyond, in particular if a solution is imposed dividing Kosovo further along ethnic lines. In that case, Kosovo for sure will have a destabilizing effect in other areas of Europe, as well as in addition to the wider Balkan region.

The above is true from the Kosovo perspective, needless to say, not the Serbian one. If we would be discussing the issue from the Serbian perspective then we would have to deal with other obstacles, an approach stretching far beyond the scope of this paper.

Obstacles from the first group being of a political nature, entirely extra-constitutional, are related to political dynamics within Kosovo and the political legitimacy of those alleging to possess a constitutional mandate to negotiate and decide in the name of Kosovo. Those who claim such a mandate argue that it stems from the Constitution of Kosovo (“Constitution of 2008”) and their “courage and bravery” as former guerrillas who fought the regime of the Serbian dictator Slobodan Milosevic. The latter, by default, means that these people believe to be the only ones in Kosovo to have a political legitimacy to negotiate and reach a historic agreement with Serbia since they represent the former guerrilla fighters who fought the war against Serbia. A key figure among this group of claimants is the current President of Kosovo, Hashim Thaçi; he believes that in a Weberian sense, the war legitimacy gives him and his group an unlimited legitimacy to negotiate and decide in the name of Kosovo. The object of this negotiation and decision, it should be stressed out clearly, is Kosovo’s national and territorial identity and integrity as enshrined in its Declaration of Independence of 17 February 2008.

Obstacles from the second group, being of a constitutional nature, have to do with very nature of constitutional democracy applicable to Kosovo. This democracy has two features: first, it is of a consociational type of parliamentary democracy as far as its internal logic is concerned; second, this type of democracy is based on the separation and balancing of powers in which the head of state serves exclusively as the head of state , not the head of the executive. This second feature in particular, as a matter of principle, severely limits the prerogatives of the head of state to negotiate and conclude agreements, for the implementation of which the executive branch of the government is constitutionally in charge.

I Obstacles of Political Nature

1. Basic Characteristics of the Relationship Between Kosovo and Serbia: An Overview

The relationship between Kosovo and Serbia forms part of the complicated problems and issues in today’s Europe. There are many reasons for this state of affairs, but in our view two among them stand out: firstly, it is the Serbian myth over Kosovo and the second is a result of this myth and has to do with the nature of the Serbian nationalism and its rigid structure.

For Serbs, since the birth of their nationalism in the 19th century, Kosovo and the myth over it has served as a guiding principle of their foreign and internal policies. There is no war that Serbs have waged in the recent past where the Myth of Kosovo did not serve as a war policy and the very aim of it indeed. It goes without saying that some of the wars the Serbs waged were lost, in particular those waged without Allies (e.g. the war with Bulgarians in 1885); other

wars , those, that were waged with allies, the Serbs emerged victorious in all of them. The last types of wars dominate the military history of Serbia.

This foreign policy behaviour of Serbia has been conditioned throughout history by its internal dynamics developing within the society and its state establishment. Seen from this perspective, such foreign policy did not allow the Serbs to develop a vibrant democracy at home, much in the same manner as it had been the case with the French and their Algeria policy until general De Gaulle bravely embarked on a path to solving the Algerian issue. In this sense, the Myth over Kosovo served as a real driving force defining key Serbian foreign and internal policy goals and objectives throughout their modern history. It did not matter, as it does not at present, that the Myth over Kosovo is based on fake and unreal assumptions, not having any real historical corroboration at all. This is, in fact, the very essence of every myth. What matters is that even genocide on the territory of former Yugoslavia is attributed to the realization of the Myth over Kosovo.

The second reason explaining the complexity of the Kosovo-Serbia relations is related to the mental position of the Serbian nationalism, that is, its imperial mental state as it was said by famous Serb historian Latinka Perović. As such it exists mainly as a result of the role and position of the Serbian Orthodox Church (SPC) in the Serbian society. This church has been and still remains a reservoir and repository for cultivating the idea of the Serb martyrdom and the revenge of Kosovo since its loss in the famous Battle of Kosovo against the Ottomans (1389). Ever since, this battle, the idea of a forceful retaking of Kosovo from the Ottomans, whose identity in the meantime passed onto local Albanians and other Balkan Muslims, became a defining feature of the Serbian policies, both internal and external. In other words, the idea of a forceful retaking of Kosovo and its revenge was preserved among the clergy and the Church as a very important institution of the Serbian national identity. This fact is connected with the social structure and the very origins of this clergy and its social status: it emerged and developed from among the ranks of the lower classes of the Serbian peasantry and was supported by a very thin elite that itself belonged to the same social class as clergy. This symbiosis produced a very rigid nationalism among the Serbs and had contagious effects in Kosovo among its majority Albanian population and its nationalism. In fact, the Kosovo elite and its nationalist reasoning during the early seventies and onwards of the '20 century is nothing but a reproduction of the basic social tenets of Serbian nationalism, with one difference: Albanians did not have a national institutions like the SPC to forge a separate and consolidated national spirit. Albanian language was the only cohesive factor, but not enough as to counteract the Serbian offensive against Kosovar local elite and its aspirations. This is another issue to which we shall not further stick to until another opportunity. Let's now turn again to the issue of the role and position of the SPC in Serbian nationalism.

The SPC factor explains a lot about the nature of the Serbian loyalty towards the national cause and the Serbian imperial project, making it different from other nationalisms in the Balkans of the Ottoman era: while Albanians served under the Ottomans as a sort of Cossacks of their empire, and Armenians and Jews as their financial and cultural brain and a progress, the Serbs through the SOC pursued different path. Alongside with the Bulgarians and Greeks, the Serbs through their national church managed to preserve the basic national institutions of customary law, making use of them in the 19th century for the purpose of their national rebirth and consolidation. This fact is a parameter against which one could evaluate their current state of affairs in the Kosovo - Serbia relations as a result of the fact that the key institutions of the SPC are located in Kosovo, despite all transformations that the SPC has undergone in recent decades. The transformation, however, is a result of external factors stemming from the balance of international forces in recent decades, something we have seen in the recent past: during the Balkan Wars, Serb nationalism went with all its force and ferocity against the Balkan Muslims and engaged in an extensive policy of ethnic cleansing, enjoying full support of the European political establishment of the time. Something similar happened during the First World War: Serbs emerged as victorious siding with the victors and not because of their war efforts, which were very negligible at best. The same scenario was repeated in the first years following the collapse of former Yugoslavia when Serbs of Milosevic engaged in the extensive policy of ethnic cleansing.

In pursue of their imperial projects, Serbs have committed grave mistakes. This was noticed by the Serbian national politician of the time of the Balkan Wars, Nikola Pasic: instead of going for the realization of their imperial project of Greater Serbia, Serbs went for the implementation of quite a different and megalomaniac South Slavic Project, that is, the project of Yugoslavia. In the north of Yugoslavia, there was even then a more progressive cultural milieu, a fact that burdened the relations of Serbs with the other Yugoslavs. New power holders in Belgrade did not realize that they had over their shoulders not the realization of their imperial project but the burden which was to be carried on by them. In this new context, that is, in the context of Yugoslavia, Kosovo and Albanians started to serve as a new force to be reckoned with by other anti-Serbian imperial forces of Yugoslavia. For this reason, with the change in international constellations to the disfavour of Serbia and its ally Russia, the Serbs would face severe repression and violence at the hands of their neighbours. That violence in the South of former Yugoslavia was disorganized and chaotic as a result of the cultural and political level and low education of people nourishing anti-Serb sentiments. In the north of Yugoslavia, the situation was different, however: the violence was entirely organized and centralized much in the same manner the world has seen in the concentration camps of the Nazi Germany.

The collapse of Yugoslavia heavily reflected in the relations between Kosovo and Serbia. During the Communist era Kosovo did not have an impact in the internal dynamics of the Yugoslav state, which were formed and dominated mainly by the Serbs and Croats. The overall policy of the Yugoslav state before the downfall of the Serb communist leader Alexander Rankovic in 1966, who led the very repressive policies against the Albanians and Muslims in Yugoslavia, had been of a Stalinist type: non-Slavic nations were seen as an unwelcome element destroying internal social and state cohesion of the new Slavic states formed with the advent of Communism.

2. Renewal of the Serb Nationalism by Slobodan Milosevic and Beyond

On the eve of the end of the Cold War and the collapse of Communism, in Belgrade emerged a strong populist movement led by a person who would soon become Serbia's dictator leading the Serbs into abyss much in the same way Hitler did with Germans. Serbian elite construed Milosevic as a temporary phenomenon who would finish "dirty job" in the Serbian political scene, that is, hoping that he would purge the scene from former communist cadres with his populist policies relying on social and national discontent of the Serbian masses. Among Serbian national discontent, Kosovo ranked the highest: it was seen as a symbol of their suffering and humiliation during the Communist era at the hands of Tito and its vision of Yugoslavia. In this regard, Milosevic was seen as a saviour.

This hope of the Serbian elite, that is, a hope for an idealized Serbian society with Kosovo back within its borders and the purge of the old Communist cadres raised during Tito's times would cost the Serbs and Serbian society a lot. Not only the Serbs lost all the territories they claimed to have been theirs as a result of their wars won in the past, but as well they suffered a lot and became tragic victims of Belgrade's policies against their neighbours. Serbs lost their privileged position they enjoyed vis-a-vis other former Yugoslav republics, including Kosovo, once and forever. This defeat of the Serbian imperial project occurred not because Serbs lacked military might and force to project outside their borders, but because of the radical change in the international balance of forces, a fact that Serbs did not realize when they decided to rally behind Milosevic during the last years of Yugoslavia. New international balance of forces did not favor Serbia and its national interests in the manner Milosevic had framed them. Following the collapse of Communism, a new balance was constructed favouring a moderate balance of power among all Balkan nations. No nation would enjoy any military or other disproportionate superiority towards the others in the Balkans. The turning point in this sense ushering in a new balance of forces among Balkan nations was the Dayton Peace Accords (November 1995). With Dayton, a new era ushered in: the Muslims of the region would serve not as an object to be

repressed but as an active subject and participant in the new balance of forces in the region and as a cultural asset of Europe. This approach serves as a corner stone of stability and prosperity of the Balkans.

One of the main remarks against the policies pursued by Milosevic was his anti-Western orientation. This does not mean, however, that he was sincerely pro-Russian. In fact, he used Russia to pit it against Americans and the West. This is confirmed by Richard Holbrooke in his memories noting that Milosevic had confessed to him that Russians are good just for trade of iron and raw materials, nothing else. In this sense, Alexander Vučić is not much different from him: military bases in Serbia, in an area where the West is challenged daily on security matters, represents nothing but a blackmail of the West. In fact, military bases in Serbia serve to send a message to the West that Serbia is a serious and indispensable factor in the region and that she will rebel if it does not get what it wants in its dialogue with Kosovo. This, however, is a misrepresentation of the weight of Serbia: as noted, in the Balkans there is not, and it seems there shall not be in the near future, a preponderant power to dictate the external powers in its favour. In this sense, a general denominator of Serbian internal and foreign policy is nothing but its Euro-Atlantic orientation. There is little perspective for Serbia and any other nation in the Balkans, outside the Euro-Atlantic political, security and cultural area.

The only aspect in which Alexander Vučić might be right is his theory about Kosovo as a security threat to Serbia. But it is highly unlikely that Russian military presence in Serbia is Kosovo related. This holds true taking into account the fact that NATO presence in Kosovo is not in an offensive posture but as a factor of stability, alongside with its presence in Bosnia-Herzegovina and elsewhere in the Balkans apart from Serbia. It is Serbia that is the only state that has Russian military bases while all others in a direct or indirect way have NATO military bases and presence. This means that it is not Kosovo, but Russian security interests which stand behind Serbian foreign policy goals. This is so despite the fact that in civilian terms, the Serbian society is strongly in favor of Euro-Atlantic integration of their country. NATO's presence in the Balkans has quite different aims from that of Russia: its presence in the Balkans is of an utmost importance for political stability, social, economic and cultural progress of the region as a whole. This is not the whole story, however: the Balkan nations should understand that NATO's presence is a necessary but not sufficient factor for their overall progress and prosperity. They should themselves redefine their destiny and relations among themselves, that is, the Balkan nations should themselves decide about the model of living and coexistence in their common region. In this sense the Kosovo-Serbia dialogue that has started seven or so years ago should be seen, despite the fact that the overall atmosphere among two nations is as strenuous and poisonous as it was a century ago..

3. Final and Legally Binding or a Framework Agreement With the Aim of Taming and Restraining Respective Nationalisms

Such an atmosphere, created in a region with a huge military presence of the West and tangible incentives and promises of the EU for both parties, did not manage to produce more than a technical dialogue ending up in few framework agreements mostly having a non-self-executing nature. In fact, all agreements reached in Brussels between Kosovo and Serbia through the mediation of the EU have had horizontal effects mainly , that is, their legal force and practical destiny has been left to the mercy of local actors who signed them.

There are several factors leading to such a situation with Kosovo-Serbia framework agreements. First among them is the fact that Serbia considers Kosovo as its own integral part. This is a very serious obstacle to any progress towards reconciliation. This stands, in essence, because of the fact that agreements produced in Brussels have been of a dubious nature as they used a very general and imprecise terms and phrases. This situation could not have been better if one takes into account the political situation and Serbian mindset when the dialogue in Brussels started years ago. Anything apart from a technical type of dialogue with Kosovo would have been suicidal for the political establishment in Belgrade.

The above is not, however, a key reason for this state of affairs in the relationship between Kosovo and Serbia. There are other reasons, too. They relate to the internal political and other dynamics developing within respective societies of Kosovo and Serbia at present.

Among the first are those circumstances that both Serbs and Albanians have displayed during the dialogue process in Brussels. While those who negotiated and signed in the name of Serbia increased and further enlarged their scope of legitimacy, in Kosovo the opposite happened: Kosovo negotiators lost that little legitimacy they had enjoyed until then as a result of the fact that they were seen as persons making unjust concessions to the Serbs going well beyond the stipulations of the Ahtisari Plan. Why is this so as far as the Serbian side is concerned?

A. Vučić and his collaborators prepared the Serbian society in advance for any future dialogue and eventual concession to Kosovo in case a need for it emerged. In this sense, the symbolic rhetoric of the Serbian establishment has been “Europe and the West, employment and prosperity or facing backwardness”. In order to pursue his agenda, A. Vučić opened an internal dialogue among all strata of the Serbian society, explained to them that foreign investments would ensue in case Serbia settles the Kosovo issue . This approach was meant to

render the issue of Kosovo as a collective responsibility of whole Serbian society, a very wise move as it consolidated the cohesion of the Serbian society to the maximal point.

This is not the case with Kosovo: President Hashim Thaçi spent all of his political legitimacy negotiating with Serbia . It did so for two reasons. In first place, he signed agreements and other arrangements which in most cases never got implemented; and, second, for the most part the dialogue was conducted by persons authorized by him, devoid of any political legitimacy within Kosovo political spectrum as well as among general populace (e.g. former chief negotiator Meme Edita Tahiri). When the time came for the implementation of the reached agreements and other arrangements, President H. Thaçi realized that he had spent all of his legitimacy in his efforts to convince Kosovo Albanians that negotiations in Brussels were in Kosovo's favour and that Kosovo was winning an upper hand against Serbia. The situation was quite the opposite: the Agreement on the Formation of the Association of the Serb Majority Municipalities of Kosovo (hereinafter referred to as the "Association Agreement") falsified his and the theory of his proxy negotiator Meme Edita Tahiri as far as advantages and benefits of Kosovo were concerned. In fact, Kosovo gained nothing tangible as none of the commitments regarding Kosovo's integration into international community were respected: Serbia still continues to this day to obstruct any step of Kosovo for a membership into international structures, no matter how politically irrelevant they might be (such as those dealing with sport and culture)

Such an internal situation in the society of Kosovo, that is, a situation of total delegitimizing of its negotiators has not changed as of yet. This state of affairs , in fact , became worse following the resistance by Kosovars for the ratification of the demarcation agreement with Montenegro. Ever since few legitimate leaders remained in Kosovo to pursue a credible negotiation and dialogue with Serbia with the purpose of achieving a lasting solution on the relations between two countries. It is very unlikely that in the near future there shall emerge someone with credible legitimacy to negotiate and dialogue with Serbia. It is well known that a precondition for a successful negotiation is the possession of political legitimacy and credibility by those who undertake commitments during the negotiating process so that they can deliver on promises and commitments undertaken. In Kosovo for the moment such a personality does not exist, which is not the case with Serbia.

In Serbia, Aleksandar Vučić has consolidated his political legitimacy through the socialization of the Kosovo dialogue, making it a general Serbian agenda. In this context, Serbian military bases are seen, in the eyes of the ordinary Serbs, as a guarantor and hope to the effect that Serbia is not alone in the process of dialogue with Kosovo.

As for the external factors, it is worth mentioning at the outset that European appeal has different connotations and mobilizing force in Kosovo and Serbia. While in Serbia, Europeanization means a heavy gravitational pull as a result of historical circumstances, this is not the case with Kosovo. In Serbia it is quite normal to be pro-European as it did have a huge impact throughout the history of realization of the Serbian imperial project during the last century and a half, until the war of 1999 of the West against the Serbian regime of dictator S. Milosevic. In this European positive perception among Serbs falls as well a very strong pro-Russian policy of the Serbian regime, as a result of the fact that the Russian foreign policy goals during the formation of the Serb national state and the realization of its imperial ambitions have been in the same line with it. In fact, there is no difference with Serbian policy goals and that of the Tsarist Russia as the latter used the Serbs and other South Slavic nations of the Balkans to pursue its hegemonic, anti-German and anti-Austrian ambitions in the region we live in.

On the other side, Albanian historiography has incessantly forged a myth of Europe as an evil structure with an anti-Albanian inclination. Europe is seen, in other words, as a source of Albanian suffering, victimization and tragedy. This is, of course, not true at all. This discourse about Europe was born as a result of inability of the Albanian historiography to explain, in scientific terms, international relations and the balance of forces on the international plan at a given time and moment as well as a result of the need of the Communist elite in Albania to legitimize itself through the creation of a permanent enemy called Europe.

The above is an objective obstacle that renders impossible any successful negotiation with Serbia in the format in which it has been conducted so far. In order for it to be a successful, the current format of dialogue and negotiation between Kosovo and Serbia has to change and take into account the internal political dynamics of Kosovo and political legitimacy of its negotiating team as well as the position and perceptions of the international factor who has been serving as guarantors of the new state and constitutional identity of Kosovo.

Internal political circumstances in Kosovo and their dynamics can be fixed only through a new political compact among key political forces and civil society of Kosovo. This cannot be done using the current constitutional and legal electoral system. This is so due to the fact that the election system in Kosovo is designed to further develop the consociational democracy installed in the country after the war. This new political compact should serve the purpose of political re-legitimizing of political forces in Kosovo since it cannot be achieved through electoral processes as the electoral system is not designed for legitimizing of political forces other than for the purpose of governing the country. Other options that are led by the Government of Kosovo trying to form through a proposal of a negotiating team with Serbia are

nothing but an illusion: it is political forces themselves who should reach a consensus via a new compact among them.

As far as external dynamics are concerned, for the sake of regional and wider stability all sides, European, Serbs and Albanians alike should ask for American help and partnership in order for them to mediate Kosovo – Serb dialogue and serve as one of its key guarantors. Any other way is likely to only represent a waste of time and efforts as Americans are the only credible actor to impose solutions arrived at by the parties at the end of the negotiating process. They are the ones who have the heaviest leverage on Albanian side. As for the Serbian side, European influence is very credible and the leverage can be increased through concerted efforts by other actors as well, including the Russians. Why ask Americans for help then?

The main reason is the fact that the USA at present have many problems as they are involved in many issues around the world. For this reason, dealing with the Kosovo-Serbia dialogue makes sense for them only when both parties and Europe send a clear signal and message of their willingness to seriously engage in dialogue with the aim of reaching a legally binding agreement and implementing the same in good faith. If this is the case, then Americans can serve the purpose of guaranteeing the deal as they are the only ones who have means and global power to enforce the commitments willingly entered into by the parties. This would mean the partnership of the both sides of the Atlantic in the solution of a Kosovo-Serbia dialogue. Euro-Atlantic partnership has always been successful when it has been sincere and conducted through concerted efforts of its actors.

The key factor is, it goes without saying, the parties themselves: if the parties are willing to reach a negotiated settlement of the disagreements of all sorts, then guarantors as described above would have a very easy task. While for external actors peace and stability is of a paramount importance, apart from Russians who seem to have different stakes, for the parties themselves reaching a legally binding agreement would mean economic and social progress and full integration into Euro-Atlantic structures.

Only by pursuing this path can an agreement of a legally binding nature be achieved, with the mediation of three foreign actors, America and Europe with Russians playing a role in it as well. Such an agreement should have clear provisions on mechanisms, timing and guaranties for its own implementation, including sanctions for those who are singled out for misbehaviour and obstruction during the implementation process. Agreements reached until now between the two countries have had a horizontal effect and little appeal among ordinary citizens: the new one, legally binding agreement, should be of a vertical nature, integrate all other agreements reached previously so that ordinary citizens will understand that Kosovo and

nationalist agendas are closed while progress and prosperity in its Euro-Atlantic model lays ahead for all.

II Obstacles of a Constitutional Nature

Obstacles of this nature have to do with the role and position of the head of state of Kosovo according to the Constitution. Kosovo this year celebrated the first decade of its constitution. While in the Vienna talks leading to the independence of Kosovo there was no constitution or any legal act to frame the mandates of the Kosovo negotiating team, at present there are clear constitutional provisions limiting the prerogatives of the head of state in Kosovo to negotiate issues in connection with article 18.1 of the Constitution, that is, issues of peace, political and military alliance, borders and territory, foreign debt, human rights.

Kosovo, in line with the above, during its ten years of development as a state with a constitution has progressed a lot in terms of constitutionalism: its Constitutional Court has toppled two presidents, one speaker of the Assembly, mayors of municipalities in Kosovo, chief public prosecutor, presidents of the highest courts of the country and the like. There is no situation in which politicians and citizens alike do not refer to the Constitution of Kosovo as a reference point for solving their daily problems, including in the matter of human rights and fundamental freedoms. In other words, in Kosovo more than in any other country in the region the judicialization of politics and daily life has occurred, and that to the highest degree ever seen in the Balkans. This includes the Kosovo – Serbia dialogue: since its inception, the Constitutional Court has ruled on many aspects of the dialogue.

The final phase of the dialogue seemed to have started in April of 2018 with statements of the head of state of Kosovo saying that the swap of territories between two countries is an option for the achievement of a legally binding agreement between two countries. As soon as this happened, the media, civil society and the opposition rallied firmly against the move of the President of Kosovo who claimed for himself a constitutional mandate to negotiate and decide issues from article 18.1 of the Constitution. In Kosovo, according to Articles 4 and 83 of the Constitution, the President of Republic is the head of state, not the head of the executive. The issues from Article 18.1 of the Constitution, however, are not within the list of competences of the head of state as they deal with territory, political and military alliances, foreign debt, human rights and the like. Even in constitutional democracies with a presidential and semi-presidential regime such issues are not the matter for the head of state but for the representative of the sovereign, that is, the national parliaments. In other words, issues we are discussing, that is, the territory and borders, political and military alliances, foreign debt, human rights etc., represent

a constitutional prerogative of the representative organ of a sovereign people – the national parliament. Constitutional limits to negotiate and decide on issues regarding national territory and borders, political and military alliances, foreign debt, human rights and the like exist in every constitutional democracy. In countries where the head of state is at the same time the head of the executive, the situation is slightly different favouring the head of state in terms of her/his constitutional right to deal with the above mentioned matters, but only at the negotiating stage. This will be discussed in the following line..

1. Constitutional Limits in Parliamentary Democracies

In Kosovo as in other constitutional parliamentary democracies, be they a republic or monarchy, the President of the Republic is defined as the head of state, not the head of the executive, which is in the hands of Government of Kosovo. With the head of state is understood, according to traditional precepts of constitutional law, the highest official in the state representing the constitutional and legal unity of people and state and serving as guarantor of the stability and normal functioning of state and other public institutions. In this capacity, in line with the traditional precepts of constitutional law, she/he serves as a representative of the state domestically as well as internationally. In the Constitution of Kosovo these characteristics of the head of state are to be found in Articles 4 and 83..

In Kosovo, like in other parliamentary democracies, the head of state does not belong to any of the three separate powers – legislative, executive and judiciary. None of the thirty (30) competences of the President of Kosovo enumerated in Article 84 of the Constitution has an autonomous nature and they do not belong to any of the three state powers. These competences of the President of Kosovo serve to secure and guarantee normal functioning and stability of state and other public institutions. In addition to these two features, none of these competences have an active or executive nature: executive competences belong to the Government. This is not the case with countries belonging to the presidential and semi-presidential constitutional systems, an issue to be discussed in the following paragraphs.

Notwithstanding the fact that in presidential and semi-presidential systems the head of state has some powerful executive prerogative, in matters of territorial and borders, military and political alliances, foreign debt, human rights and the like, the situation is not that much different with parliamentary systems. It suffices to compare countries such as the USA, France, Poland, Romania etc., belonging to the above noted presidential and semi-presidential systems. In both systems, above-noted issues belong to the national parliaments, while the head of state plays an important role in triggering the debates over them. This is not the case in parliamentary democracies, where the head of state is a symbolic figure and the highest official

in the state possessing only negative and neutral powers serving to balance the three other (classical) separated powers. In the case of Kosovo, this is made clear by the provisions of Article 18.1 of the Constitution.

In earlier times, the prerogative over territory and borders, political and military alliance, foreign debt and the position of citizens and the like belonged to the King or Queen. With the advent of constitutional monarchies this situation has changed: during the 19th century it was about to crystallize the rule according to which power did not have a divine roots. One of the consequences of this rule was that the territory did not belong any more to the King or Queen but to the state, that is, territory was considered to be one of the elements of the sovereign statehood. This meant that the territory was not a private property of the King or Queen but an essential element of statehood. This has not changed ever since and is reflected in every constitution of a sovereign and independent state, no matter the system of government. On the issue of state territory in every single constitution exists a very stringent and transparent set of rules limiting the power of any state organ to change its status and destination. The key aspect of this limitation is that the prerogative over national territory and borders rests firmly with national parliaments as representatives of the will of a sovereign people.

In what follows is our analysis of some of the parliamentary systems of some of the EU member states, that is, the analysis of the constitutions of some of them in terms of the nature of the special prerogatives in order for us to see to whom they belong and whether the head of state has any say in them.

Among the EU parliamentary democracies, in which the head of state is elected by the national parliament, we present the following provisions of their constitutions limiting severely the head of state to discuss and decide on issues noted above (territory and borders, military and political alliances, foreign debt and human rights and the like) :

- provisions of Article 50 paragraph 1 (point 1 & 2) and Article 68 paragraph 1 of the Constitution of Austria;
- provisions of Article 84 paragraph 9 and Article 85 of the Constitution of Bulgaria;
- provisions of Article 2 paragraph 4, Article 8 and 81 paragraphs 1 (point 8) of the Constitution of Croatia;
- provisions of Article 11 in connection with Article 49 of the Constitution of Czech Republic;
- provisions of Article 94 paragraph 2 of the Constitution of Finland;
- provisions of Article 29 paragraph 5 of the Constitution of Ireland; and so on and so forth.

The situation is not any different in EU countries with parliamentary system in which the head of state is elected by national parliaments. From these cases it can be seen very clearly that the head of state has no constitutional mandate to negotiate and decide over the issues having to do with territory, peace and war, military and political alliances , foreign debt , human rights and other related issues. That this is so, it is said in the constitutional provisions of the countries as follows:

- provisions of Article 50 paragraph 2 of the Constitution of Germany . Furthermore , Article 20 paragraphs 2 & 3 of the Constitution of Germany say that referendum plus two third majority is required even for internal changes in borders having to do with lands (federal units in Germany);
- provisions of Article 28 paragraph 2 in connection with Article 36 | paragraph 2 of the Constitution of Greece require votes of two third majority of Greek parliamentarians for issues touching national interest and the cooperation with other countries;
- provisions of a single Article 80 of the Constitution of Italy leave no doubt as to the fact that issues such as international treaties on borders, foreign expenditures and other issues touching upon national interest are within the exclusive jurisdiction of the national parliament. Not only this! Article 87 paragraph three point 5 of the Constitution of Italy says that the President of Republic of Italy has the right to ratify an agreement only after receiving an approval by the national parliament.
- provisions of Article 9 paragraph 4 (under “a”) of the Constitution of Hungary in the same manner like the Italian Constitution provides that parliament has to give assent to ratification of agreements by the President of Republic; and so on and so forth.

2. Constitutional Limits in Semi-Presidential Systems

The situation is not any different in semi-presidential systems as far as the issue of territory and borders, military and political alliances, foreign debt , human rights and the like is concerned. The only difference is that in these systems of government national constitutions may allow the head of state the right to use military and other force to avoid an imminent threat to national security, while in time of peace the above-mentioned issues are an exclusive prerogative of the representatives of the sovereign, that is, the national parliament.

In what follows are some of the constitutional solutions of the EU countries with semi-presidential systems:

- provisions of Article 53 of the Constitution of France;

- provisions of Article 10 in connection with Article 138 paragraph 1 of the Constitution of Lithuania;
- provisions of Articles 115.5 in connection with Article 161 (under "i") of the Constitution of Portugal, and so on and so forth.

In none of these provisions noted above can one find even the slightest doubt to the effect that the head of state could negotiate and decide on issues of territory and borders, military and political alliances, foreign debt, human rights and the like. In no constitution of semi-presidential systems of EU countries, in other words, can one find any provisions authorizing negotiation or decision by the head of state in respect of international agreements or treaties that have as an object territory and borders, military and political alliances, finances and foreign debt, human rights and the like.

3. Constitutional Limits in Presidential Systems

The only country in the EU having a presidential system is the Republic of Cyprus. This country resembles the case of Kosovo as to its type of democracy: in both cases there exists a consociational type of democracy in which social and other cleavages of society are further encouraged in order to promote harmony and social cohesions within the state. This aspect of the Cyprus democracy we shall not discuss today, leaving it for another time. The object of our discussion is the presidential system of this country. Although the President of Cyprus has executive powers, she/he cannot negotiate or decide on issues having to do with territory and borders, military and political alienates , foreign debt, human rights and the like. Alongside with the Council of Ministers, the President can sign and conclude international agreements that are of similar nature with those foreseen in Article 18.2 of the Constitution of Kosovo, that is, agreements not having to do with borders and territory, military and political alliances, foreign debt, human rights and the like. The latter are under exclusive prerogative of the national parliament of Cyprus while the former have an administrative and technical nature implementing an earlier agreement, treaty or any other duly undertaken international obligation ratified by the national parliament.

In other words, as far as the territory and borders, military and political alliances, foreign debt , human rights and the like are concerned national parliaments are an exclusive sovereign . It goes without saying that the negotiation over those issues is conducted by the Council of Ministers with the express approval of the national parliament.

Last but not least, like with Article 18.1 of the Constitution of Kosovo, there is a need for parliamentary approval through ratification of any agreement or treaty having to do with the

territory and borders, military and political alliances, foreign debt, human rights and the like. As one can see from this discussion, in the Republic of Cyprus as well the head of state has no autonomous powers on issues of territory and borders, military and political alliances, foreign debt and finances, human rights and the like. This is made very clear in provisions of Articles 50 and 57 paragraph 3 in connection with Article 169 paragraphs 1 and 2 of the Constitution of Cyprus.

4. Constitutional Solutions in Kosovo's Neighbourhood

In the countries within Kosovo's neighbourhood, which are without exception parliamentary democracies, the issues under discussion are not different from all cases described above. In other words, issue of territory and borders, military and political alliances, foreign debt and finances, human rights and the like belong to the prerogative of the national parliaments. Let us see how this looks in the countries bordering Kosovo.

- provisions of Article 121 paragraph 1 of the Constitution of Albania regulate in an unambiguous manner the above-matters, leaving to the national parliament the sole prerogative to authorize and regulate the negotiating and ratification of any international agreement or treaty dealing with the above matters;
- in Macedonia, the only country in the region giving a right to certain number of parliamentarians to propose the entry into union with other states, in provisions of Article 120 paragraph 2 of its Constitution says similar things with the Albanian Constitution. The acceptance of the above proposal made by parliamentarians, however, is done through two thirds of the members of the national parliament plus a decision by referendum which has obligatory nature.
- provisions of Article 99 paragraph 1 (points under 1 & 2) of the Constitution of Serbia are not any different from two above-mentioned constitutions of the Kosovo neighbours. Even more, one of its neighbours, Montenegro , has no provisions on territorial changes as a result of self-understanding that those changes can occur only through the consent of the national parliament or via referendum.

The situation on the other side of the Atlantic is not any different as well: in the United States, the staunchest supporter of Kosovo, there is a difference between international agreements and international treaties. The latter are understood as international instruments concluded with a foreign power or other subjects of international law and relations having to do with territory and borders, military and political alliances, foreign debt and finances, human rights and the like. That is, they have to do with all aspects touching upon national sovereignty

or its limitations. International agreements represent all other instruments that can be concluded by the head of state or persons authorized by him/her, having an explicit constitutional authorization, congressional authorization or any authorization based on international law . These agreements do not have the nature and status of international treaties having to do with the above-noted matters. For international treaties, as opposed to international agreements, the advice and consent of the US Senate is required based on Article II, section 2 , clause 2 of the US Constitution.

5. New Constitutional Mandate and Legitimacy of the Negotiating Team

Seen from the above, it clearly emerges that the Kosovo side of the delegation led by the President of Kosovo does not possess clear political and constitutional legitimacy. This is a result of the main conspicuous features of the constitutional system of Kosovo, modelled after the Western precepts of constitutionalism. These features relate to the following:

- first, issues of national sovereignty over territory and borders are an exclusive prerogative of the representatives of the people the single and only sovereign, that is, the national parliament of the country;
- second, no single state organ but the national parliament of Kosovo is authorized to negotiate and decide over the issues from Article 18.1 of the Constitution;
- third, issues from Article 18.1 of the Constitution touch upon the very essence of the national and constitutional identity of modern Kosovo, which require at any stage the consent of the two third majority of the members of the national parliament;
- fourth, for issues from Article 18.1 of the Constitution there can be decision-making through a national referendum only if there are new changes in the Constitution allowing for such a possibility; at present, no such possibility exists and this cannot be done through the ordinary legislations; only the Constitution can foresee the form, issue and content of the national referendum relating to matters from Article 18.1 of the Constitution;
- Least but not last, nowhere and at no time in a parliamentary democracy such as Kosovo can the head of state be authorized to ask the people a question through referendum: that prerogative belong only to the representative of the nation, that is, the parliamentarians as a whole (the national parliament).

From the above, it clearly emerges that the only reference point to solve the issue of legitimacy and the mandate to negotiate with Serbia over issues from Article 18.1 of the Constitution is the new process of re-legitimizing or re-mandating of the new team or the same

team through the national parliament. Outside the provisions of the Constitution the negotiation and dialogue with Serbia cannot be valid and effective.

Without a clear mandate from the national parliament through an **ad hoc** decision mandating and legitimating a group of people to negotiate and dialogue with Serbia, with clear terms of reference, anything else short of it represents a lack of legitimacy and international and constitutional legal validity. This is so because there is at stake a national interest of the country for which all are authorized to be concerned and have their say through elected representatives. Not a single organ has this right but the Assembly of Kosovo, to authorize and form a negotiations team to conduct a dialogue with Serbia, with a clear mandate and terms of reference.

Conclusions

In this paper, we have discussed the issue of obstacles in the negotiating process between Kosovo and Serbia. This is a discussion from the perspective of Kosovo.

During our analysis we have come to some conclusions as to the key obstacles staying in the way to a successful dialogue between the two countries. The first set of obstacles identified by us is political in nature and relate to the disadvantages of the Kosovo side in the dialogue. As we all know, so far the dialogue with Serbs from the Kosovo side has been conducted by Mr. Hashim Thaçi , first as Prime Minister of Kosovo and then (currently) as its President.

In both situations, Mr. Hashim Thaçi has been facing problems of political legitimacy. This is not the case with Mr. Alexander Vučić negotiating in the name of Serbia. While the Kosovo side faces the lack of political unity and cohesiveness, the Serbian side has made sure that it previously discusses the Kosovo issue with all actors of Serbian society. In particular, the role and position of the SPC has been influential as well as the role of the Serb intellectuals, with whom Serbian President has opened an internal dialogue long time ago, after he took power as the head of state in Serbia. This is not the case with the Kosovo president, which is facing a very strong opposition to the idea of negotiation with Serbia having a swap of territories as a leverage to obtain the full recognition of Kosovo's statehood and its integration within the UN and all international bodies. No internal dialogue has ever been tried by Mr. Hashim Thaçi with the aim to achieve an internal cohesion and maximal consensus within political forces of Kosovo.

The second set of serious obstacles which sits in the way to a successful dialogue between Kosovo and Serbia is constitutional in nature: while in the Serbian Constitution Kosovo

is an internal part of its sovereign territory, in Kosovo Serbia is seen as a foreign country with whom there needs to be a negotiation but with a condition that it apologizes and admits the crimes and atrocities committed in Kosovo during the last war. In fact, the Kosovo side sees the Ahtisaari Plan as a concession made to Serbia since it gave a veto role to the local Serbs in matter of their ethnic interest. In both constitutions, however, there are clear provisions which ban any of the leaders to negotiate and decide on issues of territory and borders among two countries. This is a real obstacle, in particular on the side of Kosovo as it is now in a different position compared to the Vienna talks that led to the declaration of independence of Kosovo on 17 February 2008. According to the Constitution of Kosovo, its Article 18.1, none of the state organs but the national parliament has the right to negotiate and decide about the issues of territory and borders, military and political alliances, foreign debt and finances, human rights and the like. These issues can be discussed, negotiated and decided upon only through an explicit authorization by the parliament of Kosovo. This standard exists elsewhere in constitutional democracies on the both sides of the Atlantic, whatever their system of governance.