

THE DAY AFTER: ON THE CONSTITUTION



Editor
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 **FONDATION FOR
LIBERAL PUBLIC
POLICY**

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Finis est origo omnis novae vitae
(The end is the beginning of every new life)
Anonymous

EDITORIAL

The current political and social crisis in Serbia has led to a situation that could be described as “a Constitution outside constitutional law.” It unequivocally indicates the need for Serbia to adopt a new constitution in order to restore democratic legitimacy.

Many developments over the past two decades have created the need for a new cornerstone of Serbian statehood, both in substantive and procedural terms. Democracy remains suspended in the absence of a state with a clearly defined territory, institutions that uphold the separation of powers, and respect for the rule of law.

The wandering of Serbian constitutionalism in search of a sustainable legal form escalated particularly in the circumstances that emerged in late 2024, following the tragedy in Novi Sad, in which sixteen innocent bystanders lost their lives as a consequence of political opportunism and systemic corruption.

Foundation for Liberal Public Policy organized and held the Round Table “On the New Constitution” in Belgrade on 8 May 2025. This volume contains edited contributions based on presentations delivered by the participants: Prof. Dr. Irena Pejić, Prof. Dr. Bogoljub Milosavljević, Dr. Milan Marković, and Prof. Stevan Lilić. The volume also includes the co-authored contribution “On Constitutional Issues and the Day After” by Prof. Stevan Lilić and MSc Danijel Pantić, inspired by a presentation delivered at the Faculty of Law in Belgrade on 24

February at the invitation of the “Students in Blockade” movement of this Faculty.

Members of Parliament from the Movement of Free Citizens, Pavle Grbović and Vladimir Pajić, also took part in the discussion at the Round Table.

This volume is the Foundation for Liberal Public Policy’ contribution to the so-called “day after,” when all legitimate stakeholders will be able to engage in open dialogue and work toward a consensus on a new constitutional order for Serbia.

A new Constitution, the adoption of which will mark the restoration of the exalted values of justice and the rule of law, will only be possible through broad consultations and citizen participation, thereby enabling the new supreme legal act to endure on the basis of a broad platform of legitimacy.

MSc Danijel Pantić

MSc Danijel Pantić*
Prof. Dr. Stevan Lilić**

CONSTITUTIONAL REQUIREMENTS FOR THE RESTORATION OF SUSPENDED DEMOCRACY IN SERBIA

DOES THE CONSTITUTION OF SERBIA FUNCTION OUTSIDE CONSTITUTIONAL LAW?

Do arbitrary political decisions made by the highest state institutions
abolish the existing constitutional postulates of the balance
and control of powers?

Starting Premises

It is evident, as was unequivocally demonstrated by the recent parliamentary and local elections held in late 2023 and in mid-2024 respectively, that the key constitutional preconditions and fundamental democratic values in Serbia have been suspended by the ruling political regime. Growing public dissatisfaction and numerous civic protests, particularly the mass student blockades of universities across Serbia following the deaths of innocent bystanders at the recently reconstructed and allegedly “safe” railway station in Novi Sad in November last year, more than clearly indicate that Serbian

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society urgently requires what may generally be described as a “reset to the original premises” of suspended democracy within the broadest possible substantive and temporal framework.

A populist approach to the legitimization of the political regime is clearly discernible, whereby, outside the framework of the Constitution in force, the President of the Republic, despite lacking executive constitutional powers, has unconstitutionally been presented as the center of the overall power exercised by an usurped and authoritarian alienated government. This is significantly reinforced by the manner of the President’s election, which is conducted through direct popular vote. In Serbian political life and constitutional practice, it is noteworthy that presidential elections are the only elections in which citizens vote directly for proposed candidates, whereas all other elections involve voting for party lists (for legislative representative bodies at all levels: state, provincial, and local self-government). As a consequence, the elected President of the Republic enjoys considerable legitimacy and, until recently, also served in practice as the formal leader of the ruling party, which further enabled the President to influence the selection and composition of the Government, while simultaneously providing the ruling party with the support of a President who, under the Constitution, represents all citizens and therefore symbolizes so-called state unity (thereby transforming the democratic principle of the separation of powers *de facto* into an authoritarian system of personal rule). In other words, the ruling party (the Serbian Progressive Party – SNS), as a dominant “catch-all” party, secures for itself an *a priori* and disproportionate advantage at all electoral levels through the active support of the President of the Republic during election campaigns at every level. Thus, for example, the President of the Republic appears as the named leader of an electoral list in local elections despite not being a candidate for a seat in a municipal or city assembly. From a comparative perspective, this is an inappropriate and undemocratic practice that amounts to an abuse of political office.

Where should one begin, and how can the massive entropy generated by arbitrary, unlawful, and unethical political decisions, which have trapped the public interest, public institutions, and public offices in a vicious circle of suspended democracy, be neutralized? The

answer may be easier and closer at hand than it first appears. Let us begin from the “zero point” of the legal and political system

Above all, the restoration of suspended democracy in Serbia requires a re-examination of the existing constitutional framework, the Constitution itself, as well as those constitutional foundations that could effectively contribute to the much-needed restoration of democracy in Serbia.

Political life in Serbia is marked by a lack of political consensus, without which accession to the European Union is unlikely, given that EU membership is a strategic objective requiring a long-term commitment. Yet the practice of the current regime has been characterized by the systematic promotion of polarization between “us” and “them” (the so-called “internal enemies of the state”), a pattern that has persisted since the Serbian Progressive Party (SNS) came to power in 2012. The latest manifestation of this trend is the proposal of “foreign agent” laws modeled on legislation introduced in Russia under Vladimir Putin and Belarus under Alexander Lukashenko. These measures are intended to stigmatize civil society organizations and restrict their activities, despite their role as independent actors within a democratic system. In other words, the opposition and, increasingly, civil society itself are not regarded as legitimate components of the political system or as essential elements of a liberal-democratic order that serves as a check on governmental power. Instead, they are portrayed as hostile forces that threaten the authorities, largely because they represent a potential alternative to the existing ruling structure.

Existing Constitutional Frameworks

In this context, it is necessary, within the framework of the current Constitution, to address these questions *sine ira et studio*, that is, impartially, and to accept the conclusions to which an objective analysis may lead, even when we may subjectively regard them as unattainable or unlikely.

The central and essential question concerning the existing constitutional framework in Serbia is whether the current Constitution of Serbia remains politically and legally functional, either in whole or in part. What is at issue is a series of political, legal, social, and value-

based “realities” that have prompted the opening of the sensitive question of the “delegitimization” of the existing constitutional framework, as well as of the Constitution of Serbia of 2006 itself. This includes, *inter alia*, issues relating to the value-based contamination of the public interest, public institutions, and public offices; the political usurpation of the institutions of the constitutional system; the sustainability of the current Constitution of Serbia in the context of the “normalization of relations” between Belgrade and Priština, and the fact that Kosovo constitutes an area of special jurisdiction; distortions and manipulations within the electoral system; unequal economic development among individual regions; drastic disproportions in the territorial organization of the Republic; excessive centralization and the neutralization of the original powers of local self-government units, and so forth. All these phenomenological forms have manifested themselves and have been scientifically recognized as an “effective phenomenon” of the legal system during the past nineteen years, since the current Constitution entered into force.

Bearing this in mind, the conditions are now in place for the Constitution of the Republic of Serbia, after almost two decades, to be amended and brought into line with changing social and political realities, as well as with new legally relevant developments. A new vision of the political community is needed, because a constitution is far more than merely the supreme legal act. It is a document which, as the foundation of a democratic system of values, provides the framework for social life and shapes the legal order and, consequently, the most important social relations. The value-based and identity-related principles around which the broadest possible consensus of all significant social actors is to be built, including political parties, civil society organizations, employers’ associations, trade unions, religious communities, and others, underscore the importance of the process of drafting and adopting a new constitutional text, one that seeks not only to reflect and define existing realities but also to set out a vision of a new and more progressive social order toward which democratic forces in contemporary Serbia aspire. In this process, the substantive constitutional solutions and the process through which they are achieved are equally important.

Reconstruction of the Electoral System

It is more than evident that a profound reconstruction of the existing constitutional and statutory framework of the electoral system is necessary at all levels, not only with regard to general elections, both parliamentary and local, but also concerning the appointment and election of the highest judicial, anti-monopoly, and anti-corruption bodies and agencies. Two fundamental conditions are essential in any reform of the electoral system. The first condition concerns the principle of “who is my representative?” Citizens should be able to vote directly for the individuals they wish to elect, in accordance with their political preferences, rather than having candidates selected behind closed doors by party committees, executive boards, or other party bodies.

The second condition concerns the constituency represented by a member of parliament, because under the current system a representative from city “X” is accountable primarily to the party leadership rather than to the local community or region. In this context, key questions include the choice between a direct and a proportional electoral system; the election of the President of the Republic by Parliament; the direct election of mayors and municipal presidents; the establishment of transparent procedures for the appointment of constitutional court judges and members of other judicial bodies and public institutions; and the introduction of mechanisms for effective legal and practical oversight of ministers by the Prime Minister, of the Government by Parliament, and, above all, of members of parliament by citizens through elections.

Special attention should be devoted to the constitutional framework and statutory prerequisites necessary for establishing an effective and, above all, “fair” system of candidacy and procedural electoral mechanisms for the election of members of parliament, deputies to the provincial assembly, and councilors in city and municipal assemblies of local self-government units. It is of great importance to establish an electoral system which, on the one hand, enables citizens to choose *ad nominam* (by name and surname) an individual candidate and, on the other hand, to choose *ad rem* (according to political platform) among

the options represented by the electoral lists of political parties and coalitions. In this respect, existing statutory and procedural solutions from the European and regional environment may serve as reference models, for example those of Slovenia, particularly since that country is a member of the European Union, belongs more broadly to the Western Balkans region, and formerly formed part of the Yugoslav state.

Under current practice, certain constitutionally prescribed mechanisms of direct democracy have been degraded: referendums and popular initiatives have been discouraged and neglected, which further demonstrates the suspension of democratic values. Numerous key issues, such as mandatory military service, the introduction of a solidarity tax, agreements additionally regulating the status and scope of the jurisdiction of the Government in Priština, and the strategy of economic development, for example whether to permit lithium and similar mineral mining, are decided within the Government in accordance with directives issued by the President of the Republic. Such decisions are later verified by acclamation through the parliamentary majority. At the same time, the only referendum held during the past decade, in which only approximately one third of registered voters participated, concerned constitutional amendments in the field of the judiciary adopted in accordance with obligations arising from the EU accession process. All of this points to a suspension of democratic forms of decision-making, whereby, from the perspective of governance, the individual performing the office of elected President of the Republic assumes the authority to decide on numerous matters falling outside the constitutional competence of that office. This so-called micromanagement has a detrimental effect on state institutions and public administration bodies, which tend to act only after receiving “instructions from above,” rather than exercising their powers independently whenever required to safeguard the public interest and uphold the law.

Amending the Existing Constitution or Adopting a New One

Having regard to the open questions concerning the constitutional framework and the restoration of suspended democracy, and from the perspective of objectively determining whether, since the adoption of the current Constitution in 2006, a “full or partial” delegitimization thereof has occurred in the meantime, two principal corrective options emerge. The first option “for the day after” would relate to the existing constitutional text and institutional constitutional framework through the amendment procedure, as was the case with the recent amendments to the constitutional provisions concerning the judiciary. This would involve “amendments and supplements to the Constitution” without altering its substantive foundations, but merely introducing certain “corrections,” for example regarding the electoral system for members of parliament, the appointment of Constitutional Court judges, and similar matters.

The second option, more radical, and probably more necessary than the first “day after” option, would involve initiating a broad socio-political process of consultations among all relevant social actors for the purpose of adopting a new constitution within the framework of a democratic and transparent “constitutional convention.” Such a convention would prepare the final version of the new constitution and submit it for adoption to Parliament, whether the existing parliament or a specially elected constituent assembly.

This opens a number of questions concerning the composition and function of the constitutional convention, with a particular challenge being how to ensure a balance between the professional factor, on the one hand, and the political factor, on the other, as well as whether the transparent procedure governing the work of such a body should result in a single constitutional draft or perhaps several alternative versions of the constitutional text, upon which the constituent assembly would deliberate and decide. With regard both to the composition of the constitutional convention and to the constituent assembly itself, questions arise concerning the legal procedure and the professional and political legitimacy underlying the selection of their members.

In this respect, comparative constitutional practice may provide valuable guidance. It is beyond dispute that the establishment and functioning of a constituent assembly require careful preparation, broad consultations, transparency in its work, and a one-time mandate. In other words, the constituent assembly dissolves once it has fulfilled the mission for which it was established, namely the adoption of a new Constitution, which simultaneously represents a new beginning and the renewal of the constitutional order of the Republic.

We believe that the option of convening a Constituent Assembly deserves particular consideration for two key reasons: (a) the current Constitution has been effectively undermined by the manner in which the President of the Republic has exercised power, resulting in institutional paralysis and the breakdown of the system of checks and balances among the legislative, executive, and judicial branches of government, leaving the Constitution and the constitutional order largely without effective protection, a situation further aggravated by the Constitutional Court's passivity and failure to act; and (b) the current Constitution was adopted pursuant to the revision provisions of the 1990 Constitution, enacted during the dissolution of the Yugoslav federation by a one-party legislature, namely the Assembly of the Socialist Republic of Serbia, which raises legitimate questions about the democratic legitimacy of Serbia's present supreme legal and political act.

Recommendations

The findings and analyses presented in this Policy Paper demonstrate, above all, the necessity of undertaking a special effort aimed at neutralizing the massive entropy generated by arbitrary, unlawful, and unethical political decisions that have trapped the public interest, public institutions, and public offices in a vicious circle of suspended democracy.

To that end, the restoration of suspended democracy in Serbia requires a re-examination of the existing constitutional framework, the Constitution itself, as well as those constitutional foundations

that could effectively contribute to the much-needed restoration of democracy in Serbia.

The key question concerning the existing constitutional framework in Serbia is whether the current Constitution of Serbia of 2006 remains, in whole or in part, politically and legally “constitutionally functional,” given that a series of political, legal, social, and value-based “realities” has prompted the opening of the question of the “delegitimization” of the existing constitutional framework. Among other things, this concerns issues relating to the loss of legitimacy of the public interest, public institutions, and public offices, as well as the political usurpation of the institutions of the constitutional system.

A new “constitutional reality” arises from the normalization of relations between Belgrade and Priština and from the fact that Kosovo constitutes an area of special jurisdiction, which particularly raises the question of the “sustainability” of the current Constitution of Serbia.

A profound reconstruction of the existing constitutional and statutory framework of the electoral system at all levels is necessary. However, such reconstruction does not relate solely to parliamentary, provincial, city, and municipal elections, but also entails a systematic reconstruction and a higher degree of transparency in other electoral procedures as well, particularly with regard to the selection and appointment of the highest judicial, anti-monopoly, and anti-corruption bodies and agencies.

For the purpose of ensuring the participation of the interested public in the processes aimed at restoring suspended democracy in Serbia, it is recommended that an expert public debate be organized in the form of public forums and round tables.

On the basis of the foregoing, it is clear that, both politically and practically, the time has come to launch a broad consultative process involving all relevant social actors with a view to adopting a new constitution through a democratic and transparent constitutional convention. Such a convention would, following extensive public consultation and expert debate, produce a broadly agreed draft constitution to be submitted to Parliament for consideration and adoption, whether by the existing parliament or, preferably, by a specially elected constituent assembly.

Prof. Dr. Irena Pejić*

CONSTITUTIONAL REVISION IN SERBIA – HOW TO REACH A CONSTITUENT ASSEMBLY?

1. INTRODUCTION

Since the adoption of the Constitution of the independent Republic of Serbia in 2006, the need for constitutional revision has been a constant topic in both political discourse and the broader public sphere. Among the numerous issues raised regarding the possible subject matter of constitutional revision, the need to harmonize the Constitution with European legislation within the framework of the Stabilization and Association Agreement (2008) was most frequently emphasized, along with the amendment of the constitutional preamble as a causal constitutional issue and a potential political solution for European integration. In addition, during election campaigns political parties pointed to the need to implement regionalization and decentralization, reduce the number of Members of Parliament, introduce the so-called parliamentary president, i.e. the indirect election of the head of state, as well as address other issues.

Although the 2006 Constitution was presented as an entirely new constitutive act of an independent and sovereign Republic, in both its formal and substantive characteristics it represented a continuation of the 1990 Constitution. It was adopted in accordance with the procedure prescribed by the 1990 Constitution, which was justified by the need to preserve constitutional continuity. However, the high level

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of political consensus regarding the proposed Constitution achieved in the National Assembly (242 Members of Parliament voted “in favor”) was not met with particular enthusiasm by the public, and the qualified majority required for constitutional amendment in the referendum (more than half of all registered voters) was reached only after two days of referendum voting by citizens.¹ Although the two-day referendum did not affect the legitimate authority of the constituent body, it did affect the contextual legitimacy of the revision procedure. A broader public debate on the constitutional project was absent because, at that moment, the state found itself in a specific political position.² The general principles, catalogue of human rights, and organizational structure of the separation of powers in the 2006 Constitution were merely an adapted version of the previous Constitution, adjusted to the need to adopt a constitutive decision at a moment when Montenegro was leaving the State Union of Serbia and Montenegro, as well as to find a political formula for the status of Kosovo and Metohija through the wording of the constitutional preamble.

Today, the question of constitutional revision has regained prominence for several reasons. The shortcomings of the existing constitutional framework and the system of separation of powers

¹ The Constitution of the Republic of Serbia was adopted by the National Assembly at its session held on 30 September 2006, while citizens voted in the referendum on 28 and 29 October 2006. Voter turnout in the referendum amounted to 54.91% of registered voters, while 53.04% of citizens voted in favor of adopting the Constitution. (Report of the Republic Electoral Commission of the Republic of Serbia, 2 November 2006, available at <http://www.rik.parlament.gov.rs/latinica/arhiva-referendumi-2006.php>).

² Following 5 October 2000 and immediately prior to the adoption of the 2006 Constitution, debates were conducted concerning constitutional continuity and discontinuity, as well as the need to establish a constituent assembly (P. Nikolić, V. Rakić Vodinelić, S. Vučetić, Z. Lutovac). See *Republika*, Vol. XVII, 2005, available at: <http://www.republika.co.rs/350-351/15.html>. See also Aleksandar Molnar, *Oproštaj od prosvetiteljske ideje ustavotvorne skupštine? O rotacionom kretanju revolucije u Srbiji* (Farewell to the Enlightenment Idea of the Constituent Assembly? On the Rotational Movement of Revolution in Serbia), 2000–2007, Edicija Reč, Fabrika knjiga, Belgrade, 2008, pp. 55–82, available at: <http://www.republika.co.rs/426-427/23.html#top>.

have become increasingly evident, as the mechanisms of checks and balances, and particularly the principle of accountability of public officials, no longer function effectively. What is emerging is a form of personal rule centered on the President of the Republic, who uses the legitimacy derived from direct election (a “plebiscitary” president) to encroach upon the constitutional powers of the other branches of government, including not only the executive and legislative branches but also the judiciary as an independent branch of authority.

At the same time, the legitimate foundation of the Constitution has been further shaken by the student and civic protests that have continued since November 2024, with clearly articulated demands directed at state authorities, primarily judicial institutions. The demand directly connected to the prosecution of those responsible for the tragedy at the railway station in Novi Sad triggered a spiral of public dissatisfaction caused by institutional incapacity and the failure to respect the Constitution and the law. Since these demands were not fulfilled, the student protest expanded and evolved into a broader form of civil disobedience. It became evident that the institutional mechanism safeguarding the constitutional guarantees of the rule of law, the separation of powers, judicial independence, and the exercise of citizens’ rights, particularly in the sphere of freedom of thought and expression, as well as the right of citizens to objective and timely information, was not functioning. Instead of leading to dialogue on existing problems and the search for solutions, the protests opened a series of questions pointing to the depth of the social crisis.

The depth and breadth of the social crisis in which Serbia currently finds itself demonstrate that there are impulses “from below” calling for constitutional amendments. The question open for discussion is whether this should take the form of a partial or comprehensive revision of the constitutional act, or the adoption of an entirely new constitution. Although adopted within a relatively short period of time, the two constitutions failed to develop among citizens what Alexis de Tocqueville described as “habits rooted in the heart,” nor did the “spirit of the constitution,” in the sense understood by Montesquieu, come to prevail in the hearts of citizens. The missed constitutional moment of 2000, the existence of two almost identical constitutional

acts since the introduction of the multi-party system in Serbia, and the permanent “swirling of spirits around the constitution” have all led to the reopening of the constitutional question “from below.” In a broad social uprising, citizens, through acts of civil disobedience, seek to protect constitutional values and symbolically demonstrate that constitutional instruments serve not the citizens, but rather the holders of power. This specific social moment, in which political preferences are not the primary issue, suggests that the time has come for the adoption of an entirely new “people’s constitution.”

The process through which this objective is to be achieved should be grounded in the existing legal framework, thereby ensuring procedural legitimacy. A constituent assembly should emerge “from below” and should be established through the instruments of direct democracy, namely by means of a referendum and popular initiative. This paper deals exclusively with the procedural aspects of establishing a constituent assembly, while the substance of any future constitutional document, should such a process be undertaken, must be determined through a broader public debate.

2. GENERAL REMARKS ON THE TECHNIQUE OF CONSTITUTIONAL AMENDMENT

First of all, it is necessary to consider the issue of the technique of constitutional amendment and supplementation in a constitution which itself regulates the procedure for its own amendment, and which differs from, and as a rule is more demanding than, the procedure for adopting laws in parliament. Hence, it must be emphasized that the distinction between the constitutional amendment procedure and the legislative procedure is substantial and qualitative in nature. The functional capacity of constituent power to regulate all matters within the state, including the issue of its own revision, in an original and autonomous manner indicates that the constituted authorities, legislative and executive, participating in the revision process must act strictly within the limits of their constitutional powers.

The first issue concerning the technique of constitutional revision relates to the procedure for amending the constitution, while the second concerns the legal form in which the constitutional amendment act is expressed.

The constitutional revision procedure may generally be reduced to three models: 1) the ordinary representative body amends the constitution through a constituent procedure; 2) a special constituent body, in the form of a constituent assembly, adopts and amends the constitution; and 3) citizens adopt and amend the constitution through a constitutional referendum. Comparative constitutional law offers numerous examples of combinations of two or more models of constitutional revision depending on the subject matter of the revision, as is also the case in Serbian constitutional law. Constitutional revision in the Republic of Serbia may be carried out in several ways depending on which part of the Constitution is to be amended. Thus, it is possible to apply a mandatory constitutional referendum, an optional constitutional referendum, and a revision procedure before the National Assembly requiring a qualified (two-thirds) majority for decision-making. A mandatory constitutional referendum applies when the constitutional amendment act concerns the following parts of the Constitution: the preamble, constitutional principles, human and minority rights and freedoms, the organization of government, the declaration of war and state of emergency, derogations from human and minority rights during a state of emergency or war, or when the procedure for constitutional revision itself is to be amended. Given that these matters encompass more than two-thirds of the content of the Constitution, it may be said that the mandatory constitutional referendum represents the rule within the revision procedure in the Republic of Serbia. Consequently, the adoption of a new constitution under conditions of constitutional continuity may be achieved only through a mandatory constitutional referendum. In all other cases, i.e. amendments to constitutional provisions not explicitly listed above, it is sufficient for the National Assembly to adopt the constitutional amendment act by a two-thirds majority, after which the constitutional revision shall be deemed legally complete. However, even in cases where the National Assembly decides on constitutional amendment, it remains

possible to call citizens to a referendum. The National Assembly may optionally call a referendum, that is, invite citizens to decide directly on the constitutional amendment. This referendum is facultative only because the Assembly itself may decide whether to submit the issue of constitutional revision to citizens for direct decision-making. However, the binding legal force of a decision adopted through an optional referendum is the same as in the case of a mandatory constitutional referendum.

Finally, there is the possibility of amending the constitution through a constituent assembly, although in political history this method has generally been used for the adoption of a first or entirely new constitution. Traditionally, the constituent assembly was organized as a constituent body established with a single task: to adopt a constitutive act, after which its function ceased. However, comparative constitutional law offers examples where constitutional revision is carried out through the convocation of a constituent assembly³, demonstrating that this specific form is not reserved exclusively for the adoption of a new constitutional act. Although the traditional understanding of constituent power views the constituent assembly as a body entrusted with a one-time task, this does not necessarily mean that the constituent assembly must be dissolved after completing its primary function. It may continue to operate as an ordinary legislature and assume the functions of a legislative body.

The second issue concerning the technique of constitutional revision relates to the form of the constitutional amendment act. From a comparative perspective, constitutional revision, i.e. the amendment and supplementation of a constitution, may be carried out in the form of amendments, in the form of a constitutional law or ordinary law, or through a special act on constitutional amendments and supplements. The form accompanying constitutional amendment is not merely a technical issue. On the contrary, the manner in which constitutional amendment and supplementation are implemented largely reflects

³ Thus, under the Constitution of the United States of America, it is possible to convene a constituent assembly for constitutional amendment at the request of two-thirds of the legislatures of the federal states, although this has never occurred in practice.

the “ideological” attitude toward constituent power and its ability either to preserve the constitution as a “revolutionary” creation or to allow the revisionary authority to intervene in the original work of the constitution-maker.

The amendment-based model of constitutional revision was developed in the United States and reflects a form of constitutional “idolization” and the creation of a “constitutional cult.” This approach seeks to preserve the original constitutional text by adding amendments to it rather than directly altering its substance. Within this model, amendments serve to supplement and develop the constitution, while concrete changes to the so-called living constitution are carried out by “extra-constitutional” actors, particularly courts, which through constitutional precedent and judicial review reconcile the “normative” with the “actual.” Constitutional amendments have the same legal force as the constitution itself and operate according to the principle *lex posterior derogat legi priori*, thereby safeguarding the work of the original constitution-maker. Not only are amendments added to the basic text of the Constitution, but they do not even refer to the constitutional articles being amended or supplemented. Fundamentally, the amendment technique of constitutional revision emerged from the need to preserve the original constitutional work and to prevent the revisionary authority from intruding into the functional attributes of constituent power.

On the other hand, the technique of constitutional revision through acts of amendment, which directly alter the original text, creates a new relationship between constituent power and the power of constitutional revision. As the constitutional text evolves over time, the revisionary power gradually loses its “revolutionary” character and comes to resemble the constituted powers. In such a case, the revisionary power operates in much the same way as legislative power, since, after numerous amendments, it is sufficient for an “impersonal” constitution-maker merely to incorporate all amendments into the original constitutional text and prepare a consolidated version of the Constitution. Although seemingly only a technical issue, the act on constitutional amendment largely derives from the “spirit of the constitution,” that is, from an attitude developed over a long period during which the supreme general legal act of the state remains in force.

Thus, the form of constitutional amendment and supplementation derives from the position regarding the legitimacy of interfering with the original work of the constitution-maker. Amendments, as a synonym for supplementing and developing the constitution, are not characteristic of the European constitutional tradition; rather, they originated within the American legal system. The term “amendment,” from the Latin *amandere*, indeed signifies alteration, change, or supplementation, but in constitutional technique it acquired an entirely new meaning developed within a system characterized by a long-standing and durable constitution, such as the American one. European states did not use this technique throughout their constitutional history following the adoption of the first civil constitutions on the continent, and today it is rarely applied even in countries that adopted new constitutions at the end of the last century.⁴

⁴ In Austria, every amendment relating to *materiae constitutionis* that is adopted by Parliament through a special procedure is enacted in the form of a constitutional law. The same technique of constitutional amendment through a constitutional law is also used in the Czech Republic and Slovakia, while in Bulgaria the applicable form is the *Law on Amendments and Supplements to the Constitution*. In the French Fifth Republic, amendments to the Constitution (1958) are enacted through a constitutional law (*loi constitutionnelle*), although this technique is not explicitly mentioned in Article 89 governing the constitutional amendment procedure. Between 1960 and 2008, a total of 24 constitutional amendments were adopted in the form of constitutional laws, with the exception of the amendment submitted to a referendum in 1962 by President Charles de Gaulle (acting under Article 11 of the Constitution), which was enacted in the form of an ordinary law. Data available from the *Conseil constitutionnel*: <https://www.conseil-constitutionnel.fr/la-constitution/les-revisions-constitutionnelles>. In Germany, Article 79 of the Basic Law (1949) expressly prescribes the use of a law on amendments and supplements: “The Basic Law of Germany may be amended only by a law which expressly amends or supplements the text of the Basic Law.” This formulation was clearly intended to ensure that constitutional amendments take the form of a law amending or supplementing the Basic Law, thereby precluding alternative methods of constitutional revision. *Basic Law for the Federal Republic of Germany* (last amended on 13 July 2017, published by the German Bundestag), Berlin, 2018, available at: <https://www.btg-bestellservice.de/pdf/80201000.pdf>.

3. HOW TO REACH A CONSTITUENT ASSEMBLY

Despite the fact that the opportunity to adopt a new Constitution under conditions of constitutional discontinuity was missed at the moment when the first independent Republic of Serbia was established, it is still possible to debate the need to lay the foundations of the constitutional order while taking into account the existing social and political reality. If public consensus were reached on the adoption of an entirely new constitutional act, or on a comprehensive revision of the current Constitution through a constituent assembly, it would first be necessary to consider the options available to citizens as the original holders of sovereignty. This objective could be achieved in two ways.

The first approach would involve amending the constitutional provisions governing the constitutional revision procedure in order to introduce a constituent assembly as an alternative form of constitutional revision.⁵ A proposal to amend the Constitution in the part relating to the revision procedure should contain the following elements: 1) the introduction of a constituent assembly into the

⁵ The constitutional revision procedure is regulated by Part Nine of the Constitution of the Republic of Serbia (2006), entitled “Amendment of the Constitution,” specifically Article 203, “Proposal for the Amendment of the Constitution and Adoption of Constitutional Amendments.” This part sets out the fundamental elements of the procedure, which may be further elaborated through legislation or parliamentary rules of procedure. The Law on the National Assembly (2010) contains no detailed provisions governing constitutional revision, apart from classifying constitutional amendment as a special procedure conducted before the National Assembly. The Rules of Procedure of the National Assembly further regulate the amendment process, albeit with certain inconsistencies. Thus, Article 48(1) provides that the Committee on Constitutional Issues and Legislation “considers the proposal for the amendment of the Constitution and the draft act on constitutional amendment,” while paragraph 2 of the same article states that the Committee “prepares the draft act on constitutional amendment.” This raises the question whether the Rules envisage two separate draft acts on constitutional amendment: one submitted to the Committee for consideration and another prepared by the Committee itself. If so, it may be inferred that some other body is authorized to prepare a draft act on constitutional amendment before it is considered by the Committee.

procedure for constitutional amendment or the adoption of a new constitution; 2) the election and mandate of representatives to the constituent assembly; and 3) the legal transformation of the constituent assembly into an ordinary legislative assembly after completion of its primary task, i.e. the amendment or adoption of a new constitution. The initiation of constitutional revision with the aim of introducing a constituent assembly into the legal system of the Republic of Serbia should originate from the citizens themselves (150,000 citizens), who would already at the initial stage of the procedure indicate both the necessity of constitutional revision and their support for a constituent assembly. In this way, the contextual legitimacy of constituent power would be established at the very beginning of the constitutional revision process.

The second possibility would be more consistent with the social will expressed through civic protests aimed at protecting constitutional values. Since the motivation for writing these lines arises “from below,” from a persistent effort to return governmental power within constitutional limits, the procedure for adopting a law on a constituent assembly would be carried out through the instruments of direct democracy. Pursuant to the fundamental principle of sovereignty (Article 2 of the Constitution), citizens could exercise their right to popular initiative (100,000 voters) and initiate a referendum (Article 108 of the Constitution) at which a decision would be made on the establishment of a constituent assembly. If a majority of citizens voted in favor of the proposal to establish a constituent assembly, i.e. to adopt a law on a constituent assembly, such law would be considered adopted on the day the referendum was held. Should objections be raised that such a procedure effectively amends constitutional provisions outside the formal constitutional revision procedure, the following arguments could be advanced in response.

Popular initiative and referendum represent expressions of the constitutional principle of popular sovereignty, whereby the true holders of constituent power exercise that power directly rather than through representative institutions. In the process of direct decision-making by citizens, all elements of the constituent process would be present, except for the intermediary role of the National Assembly and

the requirement of a two-thirds parliamentary majority that normally forms part of the constitutional revision procedure. In other words, the stage of constitutional revision in which elected representatives make decisions would be bypassed, and citizens themselves would exercise constituent authority pursuant to Article 2 of the Constitution. It should be emphasized that, under both the Constitution and the Law on Referendum and Popular Initiative,⁶ decisions in national referendums, whether constitutional or otherwise, are adopted by the same majority. Both constitutional amendments and laws submitted to a referendum are approved by a majority of those voting, without any prescribed turnout quorum. Under Serbian law, a referendum cannot fail for lack of participation, since any level of voter turnout, from one to one hundred percent, is legally sufficient for a valid referendum. Consequently, the legitimacy of a decision adopted in this manner depends primarily on the degree of public support expressed through voter participation and the outcome of the referendum.

The directly expressed will of citizens through a popular initiative calling for a referendum, followed by the holding of a referendum on the adoption of a law on a constituent assembly, is consistent with Article 2, paragraph 1 of the Constitution, which provides that “sovereignty derives from the citizens, who exercise it through referendum, popular initiative, and through their freely elected representatives.” The sequence in which these mechanisms for exercising sovereignty are listed is not merely a matter of legislative drafting technique; rather, it deeply and fully reflects the principle of sovereignty, which presupposes that citizens exercise power directly and, only where this is not possible, through freely elected representatives. Paragraph 2 of Article 2 of the Constitution explicitly prohibits the usurpation of sovereignty from citizens, providing that “no state body, political organization, group, or individual may appropriate sovereignty from the citizens, nor establish authority contrary to the freely expressed will of the citizens.” Under conditions of dominant representative democracy, this constitutional provision is usually interpreted as protecting the will of citizens

⁶ Law on Referendum and Popular Initiative of 2021 (“Official Gazette of the Republic of Serbia”, Nos. 111/21 and 119/21).

expressed through elections. However, when the principle of citizens' sovereignty is systematically connected with the instruments of direct democracy, it may be concluded that citizens and their expression of will through referendum precede elected representatives in representative institutions of government. This leads to the conclusion that an alternative path toward establishing a constituent assembly through popular initiative and referendum, grounded in the constitutional provisions on direct democracy, is fully consistent with the fundamental constitutional principle of citizens' sovereignty.

Although, in formal terms, no constitutional provision may be given priority over another, constitutional jurisprudence nevertheless requires a consistent interpretation of constitutional principles and constitutional norms in the substantive sense. In this respect, the basic provisions of the Constitution should be understood as fundamental principles forming the framework for the interpretation and application of other constitutional norms. European constitutional jurisprudence offers examples where the fundamental principles of a constitution are treated as having the force of natural law, against which other constitutional norms are then assessed.⁷ Accordingly, the constitutional provisions governing constitutional revision must also be interpreted in connection with Article 2 of the Constitution, which proclaims the principle of citizens' sovereignty and the right of citizens to exercise power either directly or through freely elected representatives. If the constitutive act is regarded as an expression of constituent power deriving from the sovereignty of citizens, then the instruments of direct democracy serve the realization of that same sovereignty. The constitutional amendment procedure should not become an obstacle

⁷ In European constitutional jurisprudence, the Federal Constitutional Court of Germany took an important early step in its judgment of 18 December 1953 concerning the constitutional principle of equality between men and women. In that decision, the Court supplemented the principle of the hierarchy of legal norms with an interpretative approach grounded in natural law principles. See T. Cole, "Three Constitutional Courts: A Comparison", *The American Political Science Review*, Vol. 53, No. 4 (1959), p. 973; W. R. von Brünneck, "Admonitory Functions of Constitutional Courts", *The American Journal of Comparative Law*, Vol. 20, No. 3 (1972), pp. 387–403.

to contextual legitimacy where, in formal terms, such legitimacy has already been achieved by the direct holders of sovereignty assuming all phases of the procedure.

4. ELECTIONS FOR THE CONSTITUENT ASSEMBLY

Elections for a constituent assembly should be based on democratic principles of free and fair elections, while also meeting the requirements of representation in terms of representing citizens both programmatically (politically) and personally.⁸

The electoral system, as well as the detailed regulation of the electoral procedure, has traditionally been a matter of statutory regulation, whereas classical constitutions addressed this issue only in principle, within the provisions concerning popular representation and citizens' voting rights. However, in the modern constitutional state, *materiae constitutionis* has undergone a certain transformation, and contemporary constitution-makers have increasingly expanded the scope of constitutional regulation to include matters that were previously left to the legislature. In a large number of European countries, the type of electoral system is determined by the constitution itself, while continental European constitutional law is predominantly characterized by the model of proportional representation, i.e. the

⁸ Debates on electoral legislation in the Republic of Serbia have continued for many years and have concerned both the electoral system and the method of seat allocation (proportional or majoritarian), as well as the protection of voting rights, the financing of election campaigns and political parties, the regularity of elections, and a range of other issues. See: D. Bursać, *Osnovi reforme izbornog sistema – slučaj Srbije* (*Foundations of Electoral System Reform: The Case of Serbia*), Institute for Philosophy and Social Theory, Belgrade, 2024; M. Jovanović, *Izborni sistem Srbije: Predlozi i kako menjati* (*The Electoral System of Serbia: Proposals and Ways to Reform It*), Foundation Center for Public Law, Sarajevo, 2015; S. P. Orlović, "Kako do boljeg srpskog izbornog sistema" ("How to Achieve a Better Serbian Electoral System"), *Collected Papers of the Faculty of Law in Novi Sad*, No. 3, 2014; Z. Stojiljković and D. Spasojević (eds.), *Preporuke za izmenu izbornog zakonodavstva u Srbiji* (*Recommendations for the Reform of Electoral Legislation in Serbia*), National Democratic Institute for International Affairs, Belgrade, 2011.

proportional electoral system.⁹ This position rests on the assumption that the fundamental principles of the representative system, such as the rule of direct and free elections, should be implemented in a state where “citizenship establishes a link within sovereignty, which is the basis of democratic institutions and political choice.”¹⁰ It may be said that a legitimate tendency within applied constitutionalism is to place emphasis on those issues that directly affect the organization and functioning of constitutional bodies within the system of separation of powers. The constitutional adoption of a proportional electoral system in many countries reflects the view that minority interests and perspectives must be represented in a modern state, particularly through the state’s obligation to adopt affirmative measures aimed at protecting minority groups.

If any criticism can be directed at this tendency in the modern constitutional state, it concerns not the constitutionalization of the electoral system itself, but the potential gap between the electoral model in practice and the constitutional principles on which popular sovereignty is founded. Just as political parties constitute an essential element of the constitutional organization of power, the broader political framework is equally important for the functioning of representative democracy. The advantages of proportional representation may be undermined by the particular design of electoral lists or electoral districts. For this reason, every element of the electoral system must be carefully considered when shaping electoral legislation, with due

⁹ The proportional electoral system is regulated in the following European constitutions: Article 26 of the Constitution of Austria (1929); Article 62 of the Constitution of Belgium (1970); Article 18 of the Constitution of the Czech Republic (1992); Article 31 of the Constitution of Denmark (1992); Article 54 of the Constitution of Greece (1975); Article 53 of the Constitution of the Netherlands (1983); Article 59 of the Constitution of Norway (1814); Article 96 of the Constitution of Poland (1997); Article 116 of the Constitution of Portugal (1976); Article 68 of the Constitution of Spain (1978); Article 8(3) of the Constitution of Sweden (1975); Article 149 of the Constitution of Switzerland (1999); and Article 16 of the Constitution of Ireland (1937).

¹⁰ J. C. Masclet, *Droit électoral*, Paris: Presses Universitaires de France, 1989, p. 14.

regard for the principle of popular sovereignty and the constitutional protection of human rights.

Unlike majority elections, in a proportional representation system each voter's vote carries equal weight, and only a small number of votes fail to be reflected in the final electoral outcome. This system demonstrates a high degree of proportionality between the number of votes received and the mandates allocated, i.e. the level of representation achieved by all participants in the electoral contest. Such accuracy of representation promotes fairness, which, in a broader sense, is embodied in the constitutional principle of direct and free elections. The advantages of proportional elections are particularly evident in relation to the representation of minority groups, thereby providing additional guarantees for the affirmative measures undertaken by states in accordance with the constitution.

On the other hand, majority elections are personalized elections, in which personal voter preference is placed in the foreground rather than precise representation. They do not necessarily reflect the will of the electorate in terms of programmatic or political orientation, but they introduce a personal element into the electoral system that fosters a deeper relationship between the voter and the elected representative. Thus, despite all the shortcomings associated with this system, one may still point to the positive aspect of personal elections in terms of developing relationships of trust and creating representation by respected and distinguished individuals.

Viewed through the lens of constitutional democracy, the best electoral model is the one that most directly and accurately ensures the realization of the will of the citizens. However, although the purpose of elections is to collect the individual preferences of voters and transform them into an electoral outcome, no electoral model can mechanically convert individual preferences into a collective choice. For this reason, the selection of an electoral model requires consideration of the advantages of both majority and proportional elections, i.e. both personal and programmatic forms of representation. We are therefore inclined toward a solution under which a mixed electoral model would be established for the constituent assembly, allowing voters to choose both individual candidates and programmatic or party

lists. The introduction of a personal vote into a proportional electoral system would create conditions for fair representation and advocacy of all citizens and all political options.

5. CONCLUDING REMARKS

Given that the opportunity to adopt an entirely new constitution under conditions of constitutional discontinuity was missed both after the political changes of 2000 and again in 2006, when the “first” independent Republic was established, the social crisis in which the state currently finds itself points to the need for constitutional revision. The demands raised during the protests and the civil disobedience demonstrated by citizens reveal both an attachment to constitutional values and a desire to protect them. At the same time, the institutional incapacity and the personal rule exercised by the President of the Republic under the framework of the current Constitution suggest that amendments to the existing constitutional act would not be sufficient to realize the social will that has been expressed. For this reason, the adoption of an entirely new constitution by a constituent assembly may be regarded as a symbolic imperative that transcends political preferences and party politics.

An open question remains whether one should insist on discontinuity or continuity in the exercise of constituent power. In our view, the arguments in favor of preserving constitutional continuity are strong, which is why the procedure for establishing a constituent assembly is grounded in the Constitution of Serbia itself. One possibility would be to conduct the procedure in the manner prescribed by the constitutional provisions governing constitutional revision. Another possibility would be to apply the instruments of direct democracy, which is entirely consistent with the constitutional principle of citizens’ sovereignty. On the basis of a popular initiative calling for a referendum (100,000 citizens), a referendum would be held at which citizens would adopt a law on a constituent assembly.

The referendum deciding on the law on a constituent assembly should also provide citizens with an opportunity to express their

views on the model of the electoral system. The act amending the Constitution, or the law on a constituent assembly adopted by citizens in the referendum, could regulate the method of electing representatives to the constituent assembly. One of the issues raised by citizens during the social uprising concerns the legitimacy of the National Assembly, which has been undermined not only by public dissatisfaction with various forms of illegality during elections, but also by the manner in which the general will of citizens is translated into political options. Proportional elections with closed electoral lists in a Republic functioning as a single electoral constituency have strengthened political representation, i.e. the representation of political parties, while neglecting every form of personalized representation. The need to reform the electoral system also arises from the weakening of the relationship between elected representatives and citizens, in contrast to strong party ties that have led to the complete deformation of the free parliamentary mandate.

3. The act amending the Constitution, or the law on a constituent assembly, should include a mandatory public debate on the draft Constitution, which has consistently represented a weak point in national legislation. Serbia's short constitutional history since the 1990s demonstrates that the general public has almost never been involved, while the professional community has often been included merely to simulate an extra-parliamentary debate during the adoption of constitutions or laws. Combined with popular initiative and referendum, public debate could ensure more meaningful direct participation of citizens in public affairs and strengthen public awareness of the necessity and purposefulness of direct democracy.

Prof. Dr. Bogoljub Milosavljević*

PROPOSALS FOR CONSTITUTIONAL REVISION AIMED AT LIMITING AUTHORITARIAN RULE

This contribution presents a number of proposals for new constitutional solutions aimed at creating a more appropriate constitutional framework for more effective citizen participation in the political process and more accountable government. The basic premise underlying these proposals is that the relevant provisions of the 2006 Constitution of the Republic of Serbia (hereinafter: the Constitution) contain significant shortcomings which have contributed to a broader stagnation of democratic development, the growing distance between citizens and political decision-making, limited public oversight of government institutions, the erosion of the separation of powers through the dominance of the executive over the legislative and judicial branches, the concentration of power within the leadership of the ruling political party (partocracy), and the marginalization of the values of the rule of law and human rights. More broadly, the Constitution contains structural weaknesses that have facilitated persistent and serious departures from the constitutional order, including the open exercise of an autocratic style of governance. As a result, the Constitution has failed to fulfill the fundamental purpose of constitutionalism: to limit political power in the name of individual freedom and democratic self-government. The proposals are accompanied by brief explanations and grouped into three areas: the political system, territorial organization,

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and the security sector. In addition, brief reference is made to a number of unsound or outdated solutions contained in the current Constitution. In this context, a preliminary question arises as to whether a complete constitutional revision should be proposed (the adoption of a new and comprehensive constitutional act), or whether preference should be given to partial constitutional revision (a limited amendment of the existing constitution aimed only at changing its “critical” provisions). Although partial revision may appear easier to implement, a new constitution seems to be the preferable option, both because of the flawed manner in which the current Constitution was adopted (as the product of political compromise and without public participation in the drafting process) and, even more importantly, because the Constitution does not correspond to political reality and has proved ineffective in practice.

I. POLITICAL SYSTEM

1. National Assembly

1.1. The composition of the National Assembly is fixed by the Constitution (Article 100, paragraph 1) at 250 Members of Parliament, which is irrational both functionally and budgetarily, since members of each parliamentary group speak and act in the same, pre-arranged manner. It is proposed that the existing *numerus clausus* be abandoned and that the number of Members of Parliament instead be determined proportionally to the number of voters, or by prescribing a minimum and maximum number of representatives, or through another model found in comparative constitutional solutions, with the understanding that the current number of representatives should in any case be significantly reduced, if not cut in half altogether.¹

¹ Note: In January 2011, the Serbian Progressive Party submitted an initiative, supported by more than 300,000 signatures, to amend the Constitution and reduce the number of Members of Parliament from 250 to 125. However, the party withdrew the initiative the following year. During a public debate organized by the Action Group for Changes to the Political System in July 2015, a representative

1.2. Having regard to the established practice of the National Assembly, it is necessary to prescribe that at least a majority of Members of Parliament must be present at its sittings as a condition for their conduct (opening, continuation, and conclusion). Under Article 105, paragraph 1 of the Constitution, the presence of a majority of Members of Parliament is required only for decision-making (which takes place on the so-called “voting day”), but not during sittings at which no decisions are adopted, i.e. when debates and consideration of agenda items take place. The relevant constitutional provision could read as follows: “The National Assembly may sit if a majority of Members of Parliament are present.” This issue would be regulated in greater detail by the Law on the National Assembly and the Rules of Procedure of the National Assembly (interruption of sittings due to the loss of quorum, etc.).

1.3. Although numerous in composition, the National Assembly does not appear as a representative body of citizens, but exclusively as a representative body of political parties. Since political parties in Serbia generally lack internal democratic organization, it follows that the National Assembly has effectively been reduced to a body representing and advocating the interests of party leaderships. This major deficiency in its functioning is primarily connected with its composition and the method of electing Members of Parliament. As regards composition, improvements could be achieved through the introduction of bicameralism, although such an important issue would require a more comprehensive examination (the type of second chamber – whether senatorial, socio-economic, or territorially representative; whom such a chamber would represent; the division of powers between the chambers; the issue of conflicts between chambers; etc.). The author of this contribution finds the idea of electoral system reform more acceptable than the introduction of a second chamber. A proposal in this regard is presented in the section dealing with the electoral system.

of the Socialist Party of Serbia proposed several constitutional amendments, including reducing the number of Members of Parliament from 250 to 190, based on the cube root of the country's total population.

1.4. One of the possible ways to improve the work of parliament and strengthen its role as the holder of legislative power and the highest state authority would certainly involve more precise constitutional regulation of the powers and obligations of the National Assembly in exercising oversight over executive authorities (parliamentary oversight).

1.5. The improvement of the legislative process largely depends on the transparency of that process and the inclusion of the public within it. For this reason, citizen participation in the processes of proposing, drafting, and deciding on legislation before the National Assembly (popular initiative, public hearings on draft laws, referendum), as well as participation in the oversight of public authorities, is one of the issues to which a new constitution should devote considerably greater attention than the current Constitution does. Among other things, the required number of voter signatures for a popular initiative could be reduced to 15,000, while the number required for a constituent initiative could be reduced to 100,000. It is equally important to limit the scope for adopting laws under urgent procedure. It would also make sense to introduce a constitutional provision requiring public debate on laws of greater importance.

2. President of the Republic

2.1. The constitutional powers vested in the President of the Republic would be more compatible with an indirect rather than direct method of election. It is therefore proposed that the President henceforth be elected by the National Assembly by a two-thirds majority. The National Assembly should likewise be able to remove the President from office before the expiration of the mandate by the same majority. As regards removal from office, the Constitution should clearly regulate the relationship between a decision of the Constitutional Court establishing a violation of the Constitution by the President of the Republic and the further course of the removal procedure before the National Assembly. Namely, Article 118 of the Constitution implies that a President for whom the Constitutional Court has established a constitutional violation may nevertheless

remain in office if the National Assembly fails to secure a two-thirds majority for removal. Conversely, the National Assembly could remove the President despite a decision of the Constitutional Court finding no constitutional violation. The proposed change in the method of electing the President of the Republic is necessary because of the obvious imbalance between the President's limited constitutional powers, on the one hand, and the method of election, which confers strong legitimacy and opens the way for an unconstitutional shift from a parliamentary to a semi-presidential system, on the other. Conversely, if presidential powers within the executive branch were strengthened at the expense of the Government, thereby introducing a semi-presidential system, the existing method of election by popular vote would be appropriate. However, such a solution is not proposed because of the commitment to a parliamentary model of government.

2.2 In addition to the incompatibility of the office of President of the Republic with the performance of another public office or professional activity (Article 115 of the Constitution), the Constitution should also provide that the President may not be a member of a political party (as already prescribed by Article 55, paragraph 5 of the Constitution for certain other office holders and members of the police and armed forces). This issue has been controversial ever since the 1990 Constitution of the Republic of Serbia, and it appears that retaining the position of party leader grants both the presidential office and, simultaneously, the political party that the President continues to lead, a constitutionally impermissible concentration of political power. Even more seriously, the office of the President of the Republic is thereby unconstitutionally transformed into the office of the president and representative only of that segment of citizens belonging to the President's political party, while at the same time turning the President into a political opponent of the majority of other citizens. In this connection, electoral legislation, and perhaps even a constitutional provision, should also prohibit the President of the Republic from engaging politically in favor of a particular political party, whether by serving as the holder of a party electoral list in parliamentary or local elections, or through participation in election campaigns. If this were to be regulated constitutionally, the provision could stipulate that, in

addition to not being a member of a political party, the President may not participate in electoral or other political activities of individual parties or coalitions, nor publicly act in favor of or against specific political parties or coalitions.

2.3. The passive voting right of candidates for President of the Republic could be conditioned upon a minimum age requirement of, for example, 40 years of age. In support of such a requirement, in addition to comparative constitutional practice, stands the age threshold prescribed by the Constitution for judges of the Constitutional Court (Article 172, paragraph 5).

2.4. Command over the Armed Forces of Serbia, along with the appointment, promotion, and dismissal of officers of the Armed Forces of Serbia, as well as the special powers exercised during a state of emergency and wartime, constitute important constitutional powers of the President of the Republic. However, these powers, along with chairing the National Security Council, confer particular significance upon the office of the President in practice and objectively make it more important (as the central figure of security power), and consequently politically more powerful, than appears from the overall context of the President's remaining constitutional powers. Proposals relating to this issue are presented in the section of this text dealing with the security sector.

3. Electoral System

3.1. The Constitution does not regulate the type of electoral system, while the existing method of electing Members of Parliament has, in all parliamentary elections held so far, proven inadequate and highly susceptible to electoral manipulation. Among the various proposals for improving the electoral system that have been presented to the public, the so-called personalized proportional electoral system appears to be the most acceptable. Under such a system, representatives would be elected in single-member electoral districts (as many districts as there are parliamentary seats), with each authorized nominator (a political party, coalition of parties, or group of citizens) nominating one candidate in each electoral district. The votes cast for candidates would then be aggregated, and mandates allocated to the candidates

receiving the highest number of votes. An open question remains whether the type of electoral system should itself be determined by the constitutional text, i.e. whether the Constitution should regulate more than the basic principle that Members of Parliament are elected under a proportional system. This is important because such a constitutional provision could in the future prevent not only the introduction of a purely majoritarian electoral system, but also any form of mixed electoral system.

3.2. Another issue that should be regulated by a new constitution concerns the central (state) electoral body (commission). This body should be established as a professional body of a permanent and independent character, composed without members of political parties.² All the shortcomings demonstrated by the current model of the Republic Electoral Commission provide sufficiently convincing arguments in favor of the proposed solution.

3.3. Local elections (for municipal councilors), just like parliamentary elections, should also be regulated in a new manner, in principle according to the same type of electoral system (the so-called personalized proportional electoral system). This is necessary in order to break the absolute dependence of local councilors on party headquarters and establish a more accountable relationship between councilors and their voters.

3.4. Article 191, paragraph 4 of the Constitution provides for the indirect election of local executive authorities. However, there are many arguments in favor of the direct election of mayors and municipal presidents, as evidenced by the widespread use of this model in European countries. Legislation should establish a mechanism for overcoming potential deadlocks in relations between local executives and local assemblies (such a mechanism could be regulated by statute and would correspond to the constitutional mechanism governing relations between the Government and the National Assembly). The absence of such a mechanism was, in fact, the key reason for abandoning direct elections.

² One such draft law was prepared in 2009, but was not accepted by the Government.

II. TERRITORIAL ORGANIZATION

1. Regionalization or Two-Tier Local Self-Government

1.1. Given that the majority of unitary European states have regions, the issue of the regionalization of Serbia is one of the questions that should be considered in the process of preparing a new constitution. If consensus is reached on the introduction of regions, i.e. on the preparation of new constitutional solutions concerning regions, it will be necessary to choose one of several possible regional models that would be suitable for domestic circumstances. Regionalization also implies preserving the guarantees of provincial autonomy, i.e. its special status.

1.2. An alternative to regionalization could be the introduction of a second tier of local self-government, which could at the same time have a regional character. The need for a second tier of local self-government or for regions appears entirely justified, particularly in view of the high degree of centralization of power. The long tradition of the existence of a second tier of local self-government (from the beginnings of the restoration of Serbian statehood until 1990) also supports its reintroduction. Such a solution would contribute to strengthening inter-municipal cooperation and reducing the current model of autarchic behavior among municipalities.

1.3. The existing monotypic (uniform) model of local self-government, which rigidly insists on identical competences and identical institutions for all units of local self-government (regardless of significant quantitative and other differences among them), has, according to numerous analyses, become a limiting factor for the functioning and development of local self-government. In this regard, two issues could be regulated by a new constitution: 1) different competences for municipalities and cities; and 2) the obligation for municipalities unable to exercise their constitutional competences independently to associate with other local self-government units. It would also make sense for the Constitution to prescribe that the Republic of Serbia, when delegating (entrusting) certain responsibilities to municipalities, must take into account the municipalities' actual capacity to perform such responsibilities.

2. Local Political System

2.1. The local political system, as currently defined by the Constitution, may be regarded either as a parliamentary system or as an assembly system, and domestic constitutional law scholarship remains divided on this issue. A new constitution should clearly establish that relations between authorities within units of local self-government (as well as within autonomous provinces) are likewise to be organized according to the parliamentary model.

2.2. As the level of government closest to citizens, local government should logically be the level at which citizen participation is most fully realized (in comparison with higher levels of government). The European Charter of Local Self-Government was amended in this direction in 2009. In Serbia, however, local authorities depend exclusively on central authorities, bear no accountability toward citizens, and consequently have little incentive to involve citizens in the exercise of local governmental functions. One possible solution, in addition to the direct election of mayors and municipal presidents and changes in the method of electing councilors, could be the constitutional determination of a category of issues on which local authorities may not decide without prior consultation with citizens

2.3. The status of city municipalities has not been adequately regulated, particularly with regard to the city municipalities within the City of Belgrade. They are not recognized by the Constitution as units of local self-government, even though most of them have larger populations than the majority of municipalities in Serbia, while some are more populous than most other cities. One possible solution could move in the direction of granting the City of Belgrade the status either of a region or of a second-tier unit of local self-government.

2.4. Local community self-government in the form of local community units has been constitutionally neglected and reduced by legislation to a formal and dysfunctional structure, despite the fact that it could be affirmed as an important mechanism for citizen participation in the management of local public affairs. In the provisions of a new constitution regulating citizens' right to local self-government, it could be prescribed that this right is exercised not only directly and indirectly,

but also through the organization of citizens into local community units and through other forms established by law.

III. SECURITY SECTOR

1. National Security Strategy and the National Security Council

1.1. The Constitution provides (Article 99, paragraph 1, item 9) that the National Assembly adopts the Defense Strategy, but it does not provide for the adoption of the higher strategic document – the National Security Strategy. This issue is currently regulated by statute in a manner that appears neither adequate nor consistent with the outdated military-centered concept of security, particularly because the drafting of the National Security Strategy has been entrusted to the Ministry of Defense. The adoption of this strategy should therefore be incorporated into the text of a new constitution.

1.2. Similarly, the Constitution does not provide for the existence, composition, or role of the National Security Council, a body established by statute. Given the objectively significant role of this body in directing the work of the state security sector, as well as the fact that it is chaired by the President of the Republic, there are strong reasons for the basic position and character of its role (advisory and coordinative) to be regulated by a new constitution.

2. Police and Security Services

The police are explicitly mentioned in the Constitution in only one provision, namely Article 55, paragraph 5, which establishes that members of the police may not belong to political parties. The security services are likewise mentioned only once – in Article 99, paragraph 1, item 6, which provides that the National Assembly supervises the work of the security services. The following additional issues concerning the police and security services could be regulated by a new constitution: 1) that the police and security services are subject to democratic and civilian control (currently this issue is regulated only with respect to the Armed Forces of Serbia); 2) that members of the security services

may not belong to political parties (this issue is currently regulated by statute); and 3) that the work of the police and security services is based on the principles of professionalism, political impartiality, and neutrality. Furthermore, if the Constitution already provides for the authority of the National Assembly to supervise the security services, the same reasoning could also apply to parliamentary oversight of the police (as well as the Armed Forces of Serbia

3. State of Emergency

3.1. The Constitution does not contain a delegated authorization empowering the National Assembly to regulate matters relating to the state of emergency in greater detail by statute. Following the repeal of the 1991 Law on Measures in Case of a State of Emergency, the subject matter of the state of emergency has been regulated only superficially by the Law on Defense. This gives rise to the conclusion that every state of emergency has effectively been assigned a military character and that military authorities are given precedence over civilian authorities during a state of emergency. However, a state of emergency need not necessarily have a military character, but may instead primarily have a police character (such was the nature of both states of emergency declared in recent times). The current arrangement also makes it possible for the military to be used, even where unnecessary, for maintaining internal order and performing public security functions. At a minimum, a new constitution should provide the National Assembly with a clear authorization to regulate states of emergency in greater detail by statute.

3.2. With regard to the state of emergency, attention should also be drawn to Article 202, paragraph 1, concerning the permissible scope of derogations from human rights, which is not consistent with the European standard requiring that derogation measures be proportionate to the danger and permitted “only to the extent strictly required by the exigencies of the situation”).

IV. INADEQUATELY FORMULATED CONSTITUTIONAL PROVISIONS

The Constitution contains a number of provisions that are outdated, mutually contradictory, incomplete, improperly placed within the constitutional text, and similar. Although these are not issues of central importance, they nevertheless constitute one of the arguments in favor of constitutional revision. Several such examples include the following provisions: 1) Paragraph 2 of Article 102 regulates the so-called “blank resignation” of Members of Parliament, although this provision became obsolete as early as 2011 following the annulment of similar provisions of the electoral legislation by a decision of the Constitutional Court; 2) There is an obvious conflict between Article 105, paragraph 2, item 7, on the one hand, and Article 134, paragraph 2, on the other, since the former provides that the National Assembly lifts the immunity of members of the Government, while the latter provides that immunity issues concerning the Prime Minister and members of the Government are decided by the Government itself; 3) Paragraph 1 of Article 4 of the Constitution (“The legal order shall be unified”) clearly does not belong within the subject matter of that article, which regulates the principle of separation of powers, but rather within Article 3, which regulates the principle of the rule of law; 4) Among the competences of municipalities is included responsibility for environmental protection (Article 190, paragraph 1, item 6), while Article 74, paragraph 2 establishes special responsibility for environmental protection only for the Republic of Serbia and autonomous provinces, but not for units of local self-government; 5) In paragraph 1 of Article 193, the phrase “body of the unit of local self-government” should instead read “body of the autonomous province”; etc.

dr Milan B. Marković*

ON THE OMBUDSMAN AND THE JUDGES OF THE CONSTITUTIONAL COURT

THE OMBUDSMAN IN THE CONSTITUTION OF THE REPUBLIC OF SERBIA

The Ombudsman is an important institution in strengthening democracy, the rule of law, good governance, and the protection and promotion of human rights. Although there is no single model in the world, noticeable efforts have been made by international organizations and mechanisms to standardize various solutions relating to the Ombudsman in comparative law. The process of harmonizing legal regulations in Europe takes place under the auspices of the Council of Europe and the Venice Commission, which serves as an indispensable “assistant” in drafting various regulations. Serbia has adopted a pluralistic or decentralized model of the Ombudsman institution, consisting of an institution at the national level, a provincial ombudsman, and ombudsmen within units of local self-government. The Protector of Citizens of the Republic of Serbia is a special state authority responsible for overseeing public administration and protecting the rights of citizens.

Promotion and protection are not merely functions, but also responsibilities, and both encompass a broad field of responsibility requiring the use of a wide range of functions characteristic of national human rights institutions.

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A number of functions listed in the Paris Principles may fall within both the obligation to promote and the obligation to protect human rights. By Resolution A/RES/48/134 of the United Nations General Assembly adopted in 1993, which endorsed the Paris Principles, as well as through subsequent decisions first of the Commission and later of the United Nations Human Rights Council (A/HRC/RES/5/1 2007; A/HRC/), national human rights institutions acquired a unique status within the principal United Nations human rights forums. They were enabled to participate independently of state representatives in the work of United Nations human rights mechanisms, that is, to communicate directly with treaty bodies, special procedures, and the Human Rights Council within the framework of the Universal Periodic Review process. In order to align their institutions with the requirements of the Paris Principles, many states revised their legislation, thereby either establishing new human rights institutions or strengthening the mandate of existing ones at the domestic level. As a result, national human rights institutions have become significantly more widespread and prominent throughout the world. This trend is likely not only to continue, but also to accelerate considerably, given that the establishment of national human rights institutions in accordance with the Paris Principles has been set as one of the formal indicators for achieving the 2030 Agenda and the Sustainable Development Goals (SDG-16a).

In order for human rights to be fully guaranteed, comprehensive action aimed at both their promotion and protection is required. This means that promotion is necessary for changing attitudes and behavior. Ultimately, this inclusive approach to human rights emphasizes their universal and interdependent nature.

The institution of the Protector of Citizens was introduced into the legal system of Serbia by the 2006 Constitution. The Protector of Citizens is elected and dismissed by the National Assembly. The first Law on the Protector of Citizens was adopted in 2005, followed by a new Law on the Protector of Citizens adopted in 2021.

The Constitution of the Republic of Serbia establishes the general normative framework governing the position of the Protector of Citizens.

The Constitution regulates the institution of the Protector of Citizens within the section entitled “Organization of Government”

(Articles 98–167) and classifies it among the highest state authorities, along with the National Assembly, the President of the Republic, the Government, the Armed Forces of Serbia, state administration, courts, and the public prosecution service. According to Article 138 of the Constitution: “The Protector of Citizens shall be an independent state authority protecting the rights of citizens and supervising the work of state administration bodies, the body responsible for the legal protection of property rights and interests of the Republic of Serbia, as well as other bodies and organizations, enterprises, and institutions entrusted with public powers. The Protector of Citizens shall not be authorized to supervise the work of the National Assembly, the President of the Republic, the Government, the Constitutional Court, courts, and public prosecutor’s offices. The Protector of Citizens shall be elected and dismissed by the National Assembly, in accordance with the Constitution and the law. The Protector of Citizens shall be accountable for his or her work to the National Assembly. The Protector of Citizens shall enjoy immunity equal to that of a Member of Parliament. The National Assembly shall decide on the immunity of the Protector of Citizens. A law on the Protector of Citizens shall be adopted.” However, the Constitution also refers to the Protector of Citizens in other provisions. Thus: “judges of the Constitutional Court, judges, public prosecutors, the Protector of Citizens, members of the police, and members of the armed forces may not belong to political parties” (Article 55, paragraph 5); “within the exercise of its electoral powers, the National Assembly (...) elects and dismisses the Protector of Citizens and supervises his or her work” (Article 99, paragraph 2, item 5); “by a majority vote of all Members of Parliament, the National Assembly revokes the immunity of (...) the Protector of Citizens” (Article 105, paragraph 2, item 7); and “by a majority vote of all Members of Parliament, the National Assembly elects and dismisses (...) the Protector of Citizens” (Article 105, paragraph 2, item 14). The Constitution also grants the Protector of Citizens a special power to propose legislation (Article 107, paragraph 2): “The right to propose laws, other regulations, and general acts shall belong to every Member of Parliament, the Government, the assembly of an autonomous province, or at least 30,000 voters. The Protector of Citizens and the

National Bank of Serbia shall have the right to propose laws falling within their competence.” The first Protector of Citizens, with a five-year term of office, was elected in 2007 (and re-elected in 2012). The current Protector of Citizens was again elected by the National Assembly in July 2022 for a term of eight years, in accordance with the new statutory provisions.

Consideration should be given to constitutional provisions reflecting the Paris Principles with regard to the analysis of legislation and recommendations addressed to the Government, Parliament, and other state institutions, private organizations, and civil society; intervention in judicial proceedings; encouraging the ratification of international human rights treaties; cooperation with domestic and international organizations active in the field of human rights; as well as education and awareness-raising concerning human rights (advocacy for the protection of human rights).

The new Law on the Protector of Citizens introduced the institution of a public call into the very procedure for electing the Protector of Citizens, thereby enabling all interested persons to apply as potential candidates for the office. The public call is to be announced by the Speaker of the National Assembly and published on the website of the National Assembly as well as in one daily newspaper distributed throughout the territory of Serbia. Each parliamentary group has the right to propose its own candidate to the Committee on Constitutional Issues and Legislation, but only after the expiration of a fifteen-day period following the publication of the list of applicants who satisfy the conditions for election to office. Before determining the proposal for the election of the Protector of Citizens, the new Law obliges the Committee on Constitutional Issues and Legislation to conduct a public interview with all candidates proposed by parliamentary groups, during which candidates are given an opportunity to present their views regarding the manner and role of exercising the office of the Protector of Citizens. Under the previous version of the Law, this was merely optional, whereas it has now become a statutory obligation. If the National Assembly fails to elect the Protector of Citizens, more precisely if the proposed candidate does not receive the required majority vote of all Members of Parliament, the new Law prescribes a period of

fifteen days within which a new election procedure must be initiated. The National Assembly elects the Protector of Citizens by a majority vote of all Members of Parliament, upon the proposal of the Committee responsible for constitutional issues. If the elected candidate fails to assume office within thirty days from the date of taking the oath, this constitutes grounds for dismissal of the Protector of Citizens.

In the context of these statutory provisions, consideration might also be given to regulating the election of the Protector of Citizens – Ombudsman directly in the Constitution, while requiring mandatory consensus among all parliamentary groups, as well as the civil sector.

The Protector of Citizens is under a statutory obligation to submit to the National Assembly a regular annual report on his or her work and on the state of human rights in the Republic of Serbia. The report includes: data on activities carried out during the previous year; information on identified deficiencies in the work of administrative authorities; recommendations for improving administrative practice and the normative regulation of particular areas; proposals for improving the position of citizens in relation to administrative authorities; as well as information on the implementation of recommendations and proposals contained in previous reports. The Protector of Citizens submits this report no later than 15 March of the following year for the preceding year and publishes it in the “Official Gazette of the Republic of Serbia” and on the institution’s website, while informing the media thereof.

During the year, the Protector of Citizens may also submit special reports whenever necessary.

So far, there has been no instance in which the Protector of Citizens failed to submit the annual report to the National Assembly within the prescribed deadline, but it does happen that the National Assembly fails to consider the submitted report within the time limit provided by its Rules of Procedure.

For example, the National Assembly has still not considered the annual reports of the Protector of Citizens for 2022 and 2023, and consequently has not been able to adopt conclusions following consideration of those reports or oblige the Government of the Republic of Serbia to submit, within a specified period, a report on the implementation of those conclusions.

Consideration should therefore be given to prescribing a deadline within which the National Assembly would be obliged to consider the reports of the Protector of Citizens (both annual and special reports).

ELECTION OF JUDGES OF THE CONSTITUTIONAL COURT

The very fact that the election of judges of the Constitutional Court is regulated by the Constitution itself clearly demonstrates the importance of this issue as a key guarantee of the independence of Constitutional Court judges. A major problem lies in the fact that the current Constitution entirely fails to prescribe clearly defined criteria for the election of judges of the Constitutional Court. Namely, bearing in mind the elections of Constitutional Court judges conducted so far, as well as the conduct of certain judges acting as exponents of the ruling political elite, or their complete absence from expressing views on important issues concerning the state and society through the decisions of the Constitutional Court, there is an unavoidable need for the criteria governing the election of Constitutional Court judges to be precisely prescribed by the Constitution. The current constitutional solutions leave considerable gaps in the interpretation of the constitutionally prescribed requirements. Naturally, it is impossible to expect that constitutionally specified criteria alone would guarantee complete independence, or even the capacity required for participation in deciding upon and assessing the highest legal acts. For that, other extra-legal, i.e. social, political, economic, cultural, and other conditions would also need to be fulfilled, meaning that an appropriate social environment in which the Constitutional Court operates would have to be created. This is particularly important given that the Constitutional Court reviews the highest legal acts of the state and frequently operates at the intersection of law and politics.

The Constitution of the Republic of Serbia (hereinafter: the CRS) devotes only five provisions to the election and appointment of judges of the Constitutional Court (hereinafter: the CC). Article 172 provides that five judges of the CC are elected by the National Assembly

(hereinafter: the NA), five are appointed by the President of the Republic (hereinafter: the PR), and five by the General Session of the Supreme Court (paragraph 2); that the NA elects five judges of the CC from among ten candidates proposed by the PR, the PR appoints five judges of the CC from among ten candidates proposed by the NA, while the General Session of the Supreme Court appoints five judges from among ten candidates jointly proposed by the High Judicial Council and the High Prosecutorial Council (paragraph 3); that from each proposed list of candidates one of the elected candidates must come from the territory of the autonomous provinces (paragraph 4); that judges of the CC are elected and appointed from among distinguished jurists who are at least 40 years old and have 15 years of professional legal experience (paragraph 5); and that the same person may be elected or appointed as a judge of the CC no more than twice (paragraph 6). The solution under which each of the three branches of government participates in the procedure for selecting judges, thereby establishing a kind of system of checks and balances, while the Constitutional Court does not owe its institutional existence to any single authority, is regarded as a much stronger guarantee of its autonomy and independence, i.e. as a solution consistent with European standards achieved in this field, and one that is “difficult to criticize on the basis of serious argumentation.”

However, what requires more precise regulation in a new constitution is the definition of the term “distinguished jurist,” or alternatively its removal and replacement with another concept or evaluative criterion that would reduce discretionary assessment of candidates to the greatest possible extent. The method of proposing candidates, as well as the manner of electing and appointing judges by the three branches of government designated by the Constitution, also remains largely unclear and open to broad interpretation, with existing legal gaps being filled through analogy, for which there is sufficient capacity in domestic practice, provided negative influences and interests are excluded.

Legal scholarship has attempted in various ways to define the concept of a “distinguished jurist.” Some authors consider the requirement of being a “distinguished jurist” to constitute a legal standard whose concrete content is determined anew in each individual

procedure for the election or appointment of a Constitutional Court judge. Others consider it a matter of discretionary assessment left to the authorities responsible for selecting judges. In any event, regardless of which interpretation is adopted, it is extremely difficult to identify the true legislative intent and proceed according to one's own judgment in selecting the best candidate while remaining free from political influence and personal or individual interests. For this reason, the requirement in Article 172 of the Constitution that judges of the Constitutional Court be elected and appointed from among distinguished jurists must receive a more precise interpretation of what constitutes distinction. In addition to professional qualifications, this should include moral credibility, susceptibility to influence, personal circumstances, and similar factors, all of which may affect the judge's autonomy and independence as key elements in ensuring effective protection of the Constitution, laws, and human and minority rights.

In addition, the sparse criteria prescribed for the election of Constitutional Court judges include the requirement of having 15 years of experience in the legal profession. This criterion likewise depends on the interpretation of the term "legal profession." What is taken into account are the number of years of experience, as well as the fact that a judge of the Constitutional Court may not perform another professional or public function or occupation, except for a professorship at a law faculty in the Republic of Serbia in accordance with the law. Accordingly, when this criterion was applied to professors at law faculties in the Republic of Serbia, the Constitutional Court itself interpreted it to include professors at police academies and private faculties offering accredited study programs with groups of legal subjects, even though such institutions are not law faculties as such. An open question also remains as to how professional experience in the legal profession is established, for example through employment records. Likewise, questions arise regarding legal professionals who perform jobs that are not traditionally legal in nature but include legal tasks only to a limited extent. When speaking of the suspended democracy currently in place, one can only speculate who might be elected as a judge of the Constitutional Court solely on the basis of broad interpretations of the two existing constitutional requirements: "distinguished jurist"

and “15 years of experience in the legal profession” (in the late 1990s, for example, the President of the Constitutional Court was an economist). For these reasons, it is essential that the requirements which a candidate for judge of the Constitutional Court must satisfy be clearly defined and prescribed in new constitutional solutions, while any broad interpretation deriving from the constitutional definition must be precisely regulated by statute.

The procedure for compiling lists of candidates for the election or appointment of Constitutional Court judges is not normatively regulated. Namely, there is no procedure involving the transparent nomination of candidates through a public competition or public call, on the basis of which the professional services of the authorized proposing bodies could prepare a final list of candidates. In the case of the National Assembly as an authorized proposer, this responsibility belongs to the Committee on Constitutional Issues and Legislation. Under Article 48 of the Rules of Procedure of the National Assembly, the Committee on Constitutional Issues and Legislation considers matters relating to the election and appointment of judges of the Constitutional Court. However, it remains entirely unclear on what basis the competent parliamentary committee determines the list of candidates. It is assumed that the final list is compiled following interviews with candidates, but the manner in which the candidates themselves are selected remains highly uncertain. Where such uncertainty exists, different assumptions inevitably arise concerning the manner in which the final list of candidates for judges of the Constitutional Court is established, for example through agreements among political parties forming the parliamentary majority. Consequently, there is a possibility that the final list is determined through political bargaining rather than on the basis of the criteria of “distinguished jurist” and “experience in the legal profession.” Similarly, in the election of candidates proposed by the President of the Republic, the same criterion of political agreement may also be applied, although to a lesser extent, provided that the candidates proposed by the President formally satisfy the constitutional requirements. This represents a particular problem because the Constitution of the Republic of Serbia contains no provision regulating the manner in which the National Assembly

determines the final list of candidates, given that the lists submitted by both proposing authorities are forwarded without explanation, while the final list proposed by the National Assembly is not determined at a plenary sitting or by a majority vote of Members of Parliament.

There is a similar situation with regard to the list of candidates proposed and appointed by the President of the Republic. It is assumed that the General Secretariat of the President of the Republic, acting as the professional service of the President, prepares the proposed final list of candidates, but no prescribed procedure exists governing how the final proposal of candidates is prepared.

In both of the above cases, a possible future constitutional solution would require the authorized proposing bodies, following a public competition or public call and mandatory interviews with candidates (which could be open to the public), to compile the final list of candidates for judges of the Constitutional Court and forward it for the further procedure prescribed by the Constitution. Consideration could also be given to the question of how, on the basis of the final list, it is determined which candidates have stronger qualifications for election or appointment as judges of the Constitutional Court.

The Constitution should also prescribe the procedure by which the National Assembly of the Republic of Serbia determines the final list of candidates that it forwards to the President of the Republic.

Under the current Constitution, with regard to the judicial branch, neither the procedure for nominating candidates nor the election of Constitutional Court judges regulates how the High Judicial Council and the State Prosecutorial Council compile the shortlist subsequently submitted to the General Session of the Supreme Court for decision. This reveals another inconsistency. The High Judicial Council is the body responsible for the appointment and dismissal of judges in the Republic of Serbia. Yet, in the selection of Constitutional Court judges, it performs only a nominative role, while the final decision rests with the General Session of the Supreme Court. Equally unclear is the manner in which the High Judicial Council and the State Prosecutorial Council draw up the shortlist of nominees, since this process is not preceded by any public competition or public call for applications. It appears that members of the two councils put forward nominees at a joint

session, following which a shortlist is prepared and ten candidates are selected by a majority vote of those present. The shortlist is then submitted to the General Session of the Supreme Court, which elects five Constitutional Court judges from among the ten nominated candidates.

The assumption is that the list of candidates for judges of the Constitutional Court prepared by the High Judicial Council and the State Prosecutorial Council would consist of distinguished judges, prosecutors, attorneys, state attorneys, and other persons directly connected with the work and functioning of the judiciary. However, previous elections of Constitutional Court judges have shown that the lists not only included candidates lacking close ties to judicial work, but that such candidates were in fact elected to the Constitutional Court.

Furthermore, there are no oversight mechanisms or legal remedies available in cases where the constitutional requirements or criteria for the appointment of Constitutional Court judges are violated. Nor does the legal framework provide any procedure for challenging appointment decisions. What, for example, would happen if a candidate nominated or elected to the Constitutional Court failed to meet the minimum age requirement of 40 or lacked the required 15 years of professional experience? The same question arises where constitutional requirements concerning the representation of national minorities from the autonomous provinces or gender equality are disregarded. At present, there are no effective legal remedies, oversight procedures, or expressly established safeguards to address such situations. These issues must be resolved through future constitutional and legislative reforms.

Finally, consideration should be given to the constitutional mechanisms needed to prevent the subtle and almost invisible influence of political authorities over the work and decision-making of judges of the Constitutional Court. Namely, by the Law on Amendments to the Law on the Constitutional Court of 27 October 2023, Article 14, paragraph 1 of the Law on the Constitutional Court was amended. The previous provision stated: "The office of a judge of the Constitutional Court shall terminate upon fulfillment of the general conditions for retirement on grounds of age." The amended Article 14, paragraph 1

now provides that the office of a judge of the Constitutional Court terminates only when both conditions are fulfilled: 65 years of age and 45 years of pensionable service. Amending the Law on the Constitutional Court immediately before the beginning of the year in which the majority of judges, including the President of the Court, were due to satisfy the general conditions for termination of office, and after certain judges had already fulfilled the general retirement conditions, inevitably raises suspicions concerning possible influence over the conduct of Constitutional Court judges.

Prof. Dr. Stevan Lilić*

CONSTITUTIONAL CRISIS IN SERBIA – REVISION OF THE EXISTING CONSTITUTION OR ADOPTION OF A NEW ONE?

Socio-Political Context

Since the beginning of 2025, the situation in Serbia has been marked by a profound political, structural, social, moral, as well as institutional constitutional crisis. Following the tragedy of 1 November in Novi Sad, when sixteen innocent people lost their lives in a single moment, and as the competent authorities failed to immediately initiate appropriate proceedings to determine criminal and other forms of responsibility, protests began in Novi Sad, Belgrade, and later spread to all other cities across Serbia. These protests were followed by student protests which, above all, demanded that the competent state institutions conduct an investigation and provide full access to the construction documentation, since all circumstances indicated that the matter involved a serious act of corruption.

However, the authorities failed to provide the necessary answers regarding responsibility, while the highest state officials and institutions openly, publicly, and systematically misled citizens by claiming that no construction works had been carried out on the part of the station that collapsed. Suspicion was further reinforced by the fact that

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statements issued by various state bodies contained identical denials, both in substance and in wording. On the other hand, day by day, the facts increasingly pointed to the contrary, bringing to the surface what appeared to be a “deliberate deception” (the so-called *animus fraudis*).

This, in turn, triggered massive daily demonstrations, blockades, and protests involving tens and even hundreds of thousands of Serbian citizens. Students and protesters have been blocking university faculties and roads throughout the country, with the aim of “unblocking” the competent institutions so that they may be “reset” to perform their legally prescribed functions, duties, and responsibilities. This primarily referred to the public prosecution service, headed by a person who has remained publicly silent for years. At the same time, the students sent a clear message to the non-competent republican official, who had begun making daily public statements on the matter, that “nobody is asking him anything.” In addition to the demand that institutions be unblocked, these protests restored a lost sense of interpersonal and spiritual solidarity through the daily observance of 16 minutes of silence for the 16 victims and, most importantly, broadened and consolidated a shared value-based narrative expressed in the resolute demand: *iustitia hic et nunc* (justice here and now).

The months-long student blockades and citizens’ protests constitute a direct response to the structural crisis and the current social and political situation in Serbia. The student movement has emerged as a major force for change, particularly in light of the growing support it enjoys among the public. According to public opinion research conducted by the non-governmental organization CRTA, approximately 80 percent of citizens support the students.¹ As the survey data indicate, the increase in optimism about the country’s future is driven primarily by the energy generated by the student protests rather than by confidence in government policy or economic conditions. In the context of increasingly likely constitutional reform, particular importance attaches to the so-called Student Edict, adopted in Niš on 1 March, which, as a declaration for the restoration of freedom

¹ <https://crt.rs/ubedljiva-podrska-gradjana-srbije-studentskim-zahtevima-i-protestima/>

and constitutional government, sets out principles relating to freedom, the state, justice, youth, dignity, knowledge, solidarity, and the future. A turning point came on 15 March 2025 in Belgrade, when the authorities responded to a protest attended by several hundred thousand citizens (approximately 500,000) with excessive force, including the alleged use of a controversial and legally prohibited sonic device.

Delegitimization of the Constitution

The central and essential question concerning the existing constitutional framework in Serbia is whether the current Constitution of Serbia, in whole or in part, still functions politically and legally. What is at issue is a series of political, legal, social, and value-based “realities” that give rise to the opening of the (sensitive) question of the “delegitimization” of the existing constitutional framework, as well as of the Constitution of Serbia of 2006 itself. This segment includes, inter alia, issues relating to the value-based contamination of the public interest, public institutions, and public functions; the political usurpation of institutions within the constitutional system; the sustainability of the current Constitution of Serbia in the context of the “normalization of relations” between Belgrade and Priština and the fact that Kosovo constitutes an area of special jurisdiction; distortions and manipulations within the electoral system; uneven economic development across different regions; drastic disproportions in the territorial organization of the Republic; excessive centralization and the neutralization of the original competences of local self-government units, etc.

How can the massive entropy generated by arbitrary, unlawful, and unethical political decisions, which have trapped the public interest, public institutions, and public functions within a vicious circle of “suspended democracy,” be neutralized? One possible option is to re-examine the existing general constitutional framework and the corresponding constitutional assumptions that could effectively contribute to the restoration of impaired constitutionality in Serbia.

Starting from the premise that the current constitutional system has been “delegitimized,” since, as a safeguard (“constitution”), it failed

to prevent severe deformations of the political and institutional system, we hereby point to certain “open issues” that require a thorough and systematic approach to their resolution (regardless of whether the chosen outcome is the revision – fix it – of the existing Constitution, or the adoption of a new Constitution – clean slate): reform of the existing electoral system (“I vote for one MP/councilor and get another”); the non-transparent appointment of Constitutional Court judges (there is no procedure, only nominators; public presentation of candidates is necessary); monetary penalties (from personal sources) for failure to act (e.g., where the Ombudsman fails to submit a report to the National Assembly); regionalization of Serbia (the status of autonomous provinces – Vojvodina/Kosovo); introduction of a bicameral instead of a unicameral republican parliament and reduction in the number of MPs (House of Regions, House of Citizens); election of the President of the Republic in Parliament (thereby preventing the usurpation of executive power by the President); adjustment of the character of the constitutional law implementing the (new) Constitution, as well as other “corrections” of certain inconsistencies (e.g., court judgments should be rendered “in the name of the law,” not in the name of the people, since judges are not elected by the people’s assembly; the President of the Republic expresses not “state” but national unity, nor is the President the “head of state” or the “commander-in-chief”; it is not appropriate for the anthem of a secular state to invoke “God,” nor for the state coat of arms of the Republic to contain a crown, etc.). Finally, in the context of prospective membership in the European Union, Serbia would have to harmonize certain provisions of its Constitution with the *acquis communautaire* of the Union.

In that context, it is necessary, from the perspective of the existing constitutional framework, to raise relevant questions *sine ira et studio*, i.e., impartially, and to accept objective results that perhaps do not correspond to our subjective expectations. The preliminary issue concerns the relationship between the political legitimacy and the procedural legality of the current Constitution of Serbia, namely whether, and if so, in what respects the existing Constitution of Serbia has specifically advanced or undermined the strengthening of democratic institutions. As has been pointed out:

“Under the current populist government, the emerging constitutional democracy in Serbia is gradually being replaced by Schmitt’s plebiscitary conception of democracy and populist constitutionalism. The appeal to the ‘general will of the people’ is being used to a significant extent to undermine the institutions of constitutional democracy in Serbia, including the separation of powers, governmental accountability, and the protection of human rights.”²

Contradictions in the Adoption of the 2006 Constitution

Although a new Constitution of Serbia had been in preparation for a considerable period of time, the actual text was drafted “suddenly and unexpectedly,” and the adoption procedure was expedited. While there were no formal or procedural legal violations in the process of adopting the new Constitution, a public objection was raised that the new Constitution was the product of a political compromise among the three largest parliamentary political parties³, from which not only the broader political public, but practically the entire professional community, had been excluded. Such haste was primarily conditioned by two political reasons. First, there was an attempt to pre-empt an unfavorable outcome regarding the status of Kosovo by emphasizing in the Constitution that Kosovo was “an integral part of the State of Serbia.” Bearing in mind that the adoption of the Constitution had

² *Under the present populist rule slowly emerging constitutional democracy in Serbia has been gradually changed for Schmitt’s identitarian and plebiscitary conception of democracy and populist constitutionalism. An appeal to ‘the general will of the people’ is used to a significant extent to erode the emerging institutions of constitutional democracy in Serbia, including separation of powers, governmental accountability and human rights protection.” – Violeta Beširević, “If Schmitt were alive (...) Adjusting Constitutional Review to Populist Rule in Serbia” (www.researchgate.net/publication/341965080), p. 198.*

³ Democratic Party (DS) led by Boris Tadić, Democratic Party of Serbia (DSS) led by Vojislav Koštunica, and Socialist Party of Serbia (SPS) led by Ivica Dačić.

to be confirmed by referendum (by a majority of the total number of registered voters), this position would thereby be covered by “popular legitimacy.” Second, a particular reason for the “express” adoption of the new Constitution of Serbia was the fact that Serbia had, by default, become an independent and sovereign state when Montenegro withdrew from the State Union of Serbia and Montenegro in May 2006, and therefore, as a “new state,” Serbia also had to adopt a “new constitution.” However, the new Constitution of Serbia of 2006 was not as new as it was publicly presented at the time. The primary political objective was to adopt a new constitution that would replace the earlier “Milošević Constitution,” rather than to adopt a genuinely “substantially different” constitution in relation to the Constitution of Serbia of 1990.

In connection with these arguments, the observations made by Professor R. Marković (incidentally, the author of the 1990 Constitution of Serbia) are particularly significant. Among other things, he stated: “According to the scope and systematization of constitutional matter, the conception of the basic constitutional institutions, and the overall structure, this is not a new constitution but largely a corrected Constitution of the Republic of Serbia from 1990. In terms of normative wording, it is a combination of formulations taken from the Constitution of the Republic of Serbia of 1990, the Constitution of the Federal Republic of Yugoslavia of 1992, and the Charter on Human and Minority Rights and Civil Liberties of 2003. The formulations that were not taken from the aforementioned acts are exceptionally poorly drafted. (...) Since this Constitution is not truly new, the question arises as to why it was necessary at all. For two reasons, and both are political. At the same time, this constitutes the fundamental purpose of this Constitution. The first reason was to create a ‘distance,’ a ‘break,’ a ‘departure,’ a ‘step away’ from the ‘Milošević Constitution.’ (...) The second reason was for the Constitution to serve as an ‘electoral tool,’ as a means of securing electoral victory, to bring votes to the two parliamentary political parties from whose drafts the Constitution was composed, and, in general, to politically strengthen those parties. (DS and DSS) (...) The other two parliamentary parties (SRS and SPS) that participated in shaping the Constitution, owing to the undeniable

political skill of the DSS leadership standing behind the Government's constitutional proposal, were drawn into the final editing of a text they themselves had not drafted. Consequently, neither the credit for the new Constitution nor the benefits it was expected to produce would belong to them. In order to avoid this, information became available to the public regarding who the real authors of the most 'striking' provisions⁴ of that Constitution actually were."⁵

A constitution is not merely words on paper, but a system of values that should embody the highest ideals of freedom and inspire citizens' trust in the institutions of government. For this reason, citizens themselves must actively participate in its adoption, rather than having it "bestowed" upon them as the result of a backstage political compromise among political parties. The consequence of this is that, from the standpoint of legitimacy, the Constitution bears all the characteristics of an "octroyed" (imposed) constitution. "We have an inconsistency within the value system, and such a vessel can hardly navigate on its own and is highly vulnerable to any socio-political or economic tension or turbulence."⁶

The Question of Constitutional Revision

With regard to constitutional revision, Serbia is faced with a dilemma: whether the existing Constitution should be "repaired" through constitutional amendments (e.g., concerning regional autonomy) or whether it would be preferable simply to start "from scratch." The issue is particularly difficult in political terms, but it appears that the so-called constitutional reality (e.g., Kosovo) has outgrown the existing constitutional framework and that, instead of "repairs and patchwork

⁴ Reference is made to the then Prime Minister Koštunica (Author's note).

⁵ Ratko Marković, "The Constitution of the Republic of Serbia of 2006 – A Critical View" ("Ustav Republike Srbije iz 2006 – Kritički osvrt"), *Analiti Pravnog fakulteta u Beogradu*, br. 2, 2006, p. 5 (pp. 5–46).

⁶ RSE: 17.05.2009 (https://slobodnaevropa.org/a/press_klub_stevan_lilic/1732168.html#relatedInfoContainer)

solutions,” it would be better to make a serious effort for Serbia, through a transparent public debate (rather than merely a so-called “debate in public”) and broad social consensus, to reach agreement on a new “constitutional framework” that would define the fundamental social values (e.g., prohibition of discrimination, guarantees of workers’ rights, respect for freedoms and human dignity, regional autonomy and local self-government, etc.) and establish the foundations of an open and democratic society based on the principles of the rule of law, separation of powers, political pluralism, and free market competition.

Another issue concerning constitutional revision relates to the procedure itself, i.e., how the Constitution should be revised. A whole range of possible solutions exists in this regard. One option is to proceed in accordance with the provisions of the current Constitution governing revision through constitutional amendments, while another is to adopt an entirely new constitution through that same procedure. There are also proposals that, as was once the case in the era of constitutional monarchies, a new constitution should be adopted by a constituent assembly. However, this is currently not legally possible, because a law on a constituent assembly would first need to be enacted (and according to the practice of our Constitutional Court, the Constitution cannot be amended by statute). Lawyers and their professional associations seem to struggle most with this issue, as they remain unable to escape the vicious circle between actual reality and legal normativism. Furthermore, the question also arises as to the role of the so-called constitutional law implementing the Constitution. As has been pointed out: “In the substantive sense, a constitutional law (...) is an implementing law that may regulate only those matters which, by their content, encompass, as expressly stated in the Constitution itself, the ‘implementation of constitutional amendments.’ Namely, the content of the Constitutional Law consists of norms of a transitional character, i.e., transitional provisions, whose validity is temporally limited and which cease to apply upon the expiry of the statutory period prescribed for the transition from one constitutional state to another.”⁷

⁷ Cf. Olivera Vučić, “Constitutionality of the Constitutional Law” (“Ustavnost ustavnog zakona”), in Stevan Lilić (ed.), *Perspectives of the Implementation of European Standards in the Legal System of Serbia – Vol. 1 (Perspective*

Constitutional Contradictions Concerning the Function of the President of the Republic

One of the issues that warrants closer examination concerns two constitutional misconceptions: first, that the President of the Republic is the “head of state,” and second, that the President “embodies the unity of the state.” The first misconception relates to the theory of a dual-headed (*bicephalous*) executive, according to which executive authority in Serbia is shared between the Government and the President of the Republic. This view is incorrect, as it finds no support in the Constitution. The thesis was once advanced, as a particularly effective piece of political spin, by the constitutional law scholar Ratko Marković, despite the fact that executive authority is not divided between the Government and the President. Indeed, Marković himself participated in drafting the Constitution, which contains no provision establishing such a division of powers. Supporters of this view point to the fact that the Government proposes ambassadors while the President formally appoints them (and also confers the mandate to form a government). Yet the same logic would lead to the conclusion that the President shares legislative authority, since he promulgates laws and possesses a suspensive veto, and even judicial authority, since he has the power to grant pardons. The theory of dual-headed authority therefore fails as a legal syllogism: taken to its logical conclusion, it would imply that the President participates simultaneously in all three branches of government, a proposition that is plainly absurd.

The second incorrect thesis concerns the claim that the President of the Republic is the “head of state” exercising the “supreme state authority.” This concept was derived from the first thesis, i.e., from the claim that executive power is dual-headed because it is shared between the President and the Prime Minister. However, as in the previous case, this is likewise incorrect and has no basis in the Constitution of Serbia, since no such provision exists therein. The motive behind this political spin was to present the President of the Republic (at

implementacije evropskih standarda u pravni sistem Srbije Knj. 1), Pravni fakultet, Belgrade, pp. 118–131.

the time, Milošević) to the public as the “head of state,” i.e., as the supreme holder of state authority. Although, under the Constitution, the President is not a holder of state authority, the thesis that the President of the Republic is the head of state exercising supreme state authority is once again being particularly promoted today through pro-regime media outlets.

According to the Constitution, Serbia as a state is founded upon two basic principles: the rule of law (Article 3) and the separation of powers (Article 4).⁸ The Constitution provides for only three distinct forms of state power (as well as a number of so-called constitutional functions). State authority is exercised exclusively by three constitutionally authorized structures of state bodies: (a) legislative power is exercised by the National Assembly (Article 98), (b) executive power is exercised by the Government (Article 122), and (c) judicial power is exercised by the courts (Article 142). At the same time, this means that the Constitution has not authorized any other body or institution to exercise “state authority,” since that would imply, contrary to Article 4, the existence of more than three forms of state power. From the foregoing, it follows that the person performing the “constitutional function” of the President of the Republic does not exercise any branch of state power, and certainly not the “supreme state authority.” Consequently, it cannot be said that in Serbia the President of the Republic is the head of state. The claim that the President of the Republic is the “head of state” (and the “commander-in-chief”) represents nothing more than tabloid clichés and political spin disseminated by the current regime, intended to “throw dust in the eyes” of uninformed laypersons. In Serbia, the President of the Republic is neither the head of the state administration (i.e., the American

⁸ Cf: Stevan Lilić, “Executive Power and Administration in Parliamentary and Presidential Systems of Separation of Powers” (“Izvršna vlast i uprava u parlamentarnom i predsedničkom sistemu podele vlasti”), Vučina Vasović, Vojislav Stanovčić (eds.), *Post-Communism and Government (Postkomunizam i vlast)*, Yugoslav Association for Political Science and Faculty of Political Sciences, Belgrade, 1996, pp. 357–368; Bogoljub Milosavljević, “The Principle of Separation of Powers in the Constitution and Constitutional Practice of the Republic of Serbia” (“Načelo podele vlasti u ustavu i ustavnoj praksi Republike Srbije”), *Pravni zapisi*, br. 1, 2012, pp. 5–21.

government) nor the commander-in-chief (as, for example, President Trump is in the United States), but rather a person entrusted with a special and relatively limited function consisting of eight specifically enumerated (mostly ceremonial) competences.

In connection with the President of the Republic as head of state, a provision was at one time also inserted “through the back door” into the Constitution stating that the President “expresses state unity.” This provision (Article 111) is declaratory in nature and does not contain any authority to exercise executive power, because “embodying” unity does not in itself imply the “exercise” of any power. The provision was, incidentally, introduced into the 2006 Constitution (“copy-pasted”) from Milošević’s 1990 Constitution (Article 9). From the very beginning, this formulation was persuasively challenged within the professional community as “inappropriate and imprecise,” and particularly “caesaristic,” because it in some way implies that the President of the Republic stands above the other branches of government.

However, the most significant characteristic (*differentia specifica*) of the constitutional function of the President of the Republic lies in the fact that the Constitution expressly does not permit the President to engage in active politics. Article 115 provides that: “The President of the Republic may not perform any other public office or professional activity,” which is further confirmed by the Law on the President of the Republic (Article 9) and the Law on the Prevention of Corruption (Article 1). During the term of office, the Constitution does not permit the President of the Republic to engage in political activities, nor does it recognize the President as occupying some “supreme political position.” During an active mandate, the President of the Republic is not permitted to perform the function of president of a political party, to establish new political movements, to conduct promotional political campaigns, to organize, actively participate in, or lead political gatherings, rallies, or counter-rallies, to participate in television “political-entertainment” programs, to appear in politically promotional advertisements, or to head any electoral lists in elections in which the President is not personally participating (e.g., local elections). In that context, the President of the Republic is likewise not competent to conduct foreign policy, nor to promote stadiums and similar sports

facilities, nor to promote commercial exhibitions. Last but not least, the President of the Republic is not competent to preside over sessions of the Government of Serbia, nor to issue instructions to ministers or demand explanations from them. In order to preserve, at least to some extent, the principles of the rule of law and separation of powers, the function of the President of the Republic must be returned to the constitutional framework from which it has stepped *ultra vires*.

Constitutional Frameworks of Provincial Autonomy

A particularly important open constitutional issue concerns the constitutional contradictions of provincial autonomy.⁹ The Constitution of the Republic of Serbia (2006) establishes the general political, legal, and normative framework for provincial autonomy and local self-government. The fundamental constitutional premise of provincial autonomy and local self-government is contained in a special provision of Part One ("Principles of the Constitution"), entitled *Provincial Autonomy and Local Self-Government* (Article 12): "State power shall be limited by the right of citizens to provincial autonomy and local self-government. The right of citizens to provincial autonomy and local self-government shall be subject only to supervision of constitutionality and legality." The Constitution of Serbia distinguishes between three modalities of autonomous provinces: (a) an autonomous province with "provincial autonomy" (the Autonomous Province of Vojvodina); (b) an autonomous province with "substantial autonomy" (the Autonomous Province of Kosovo and Metohija); and (c) possible future autonomous provinces (whether with "provincial autonomy," "substantial autonomy," or some third form of autonomy).

In this regard, the Constitution provides, *inter alia*, that: "Citizens shall have the right to provincial autonomy" (Article 176); "Autonomous

⁹Cf: Stevan Lilić, "Regionalization, European Experiences, and Constitutional Contradictions of Provincial Autonomy in Serbia" ("Regionalizacija, evropska iskustva i ustavne protivrečnosti pokrajinske autonomije u Srbiji"), in Mijat Damjanović (ed.), *New Regional Policies and European Experiences (Nove regionalne politike i evropska iskustva)*, , Belgrade, 2012, pp. 121–134.

provinces are autonomous territorial communities established by the Constitution, in which citizens exercise the right to provincial autonomy” (Article 182(1)); and “The Republic of Serbia shall have the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija,” while the “substantial autonomy of the Autonomous Province of Kosovo and Metohija shall be regulated by a special law adopted in accordance with the procedure prescribed for amending the Constitution” (Article 182(2)). The Constitution further defines the competences of the autonomous provinces (Article 183) and the legal acts they may adopt (Article 185).

With regard to the systematic and coherent establishment of the principles of provincial autonomy, the definition of the status, competences, and rights of autonomous provinces, as well as the regulation of relations between autonomous provinces and the Republic of Serbia, the Constitution contains a number of contradictions that hinder a clear definition of the status of autonomy within the existing constitutional framework. This particularly concerns certain contradictions between the general constitutional principle of provincial autonomy, according to which “state power shall be limited by provincial autonomy” (Article 12), and the provision stating that “citizens shall have the right to provincial autonomy” (Article 176), on the one hand, and other constitutional provisions on provincial autonomy formulated within Part VII of the Constitution, which defines provincial autonomy as a modality of “territorial organization” (Articles 182–187), on the other. Furthermore, the Constitution repeatedly refers to “substantial autonomy,” yet nowhere defines what constitutes its substance. Finally, the question remains open as to what exactly distinguishes “provincial autonomy” from “substantial autonomy.”

Contradictions of Provincial (Territorial and Substantial) Autonomy

In the context of the incoherence of the Constitution of Serbia with regard to provincial autonomy, particular emphasis should be placed on the possibility that constitutionally established provincial autonomy

may be restricted by statute, i.e., by an act of lower legal force than the Constitution itself. Thus, the Opinion on the Constitution of Serbia formulated in March 2007 by the European Commission for Democracy through Law of the Council of Europe (the so-called Venice Commission) states: “Generally speaking, many aspects of this Constitution meet European standards and take into account the remarks made in the Venice Commission’s Opinion of 2005. However, there are some provisions which still fall considerably below these standards, as well as others which are unclear or contradictory, obviously as a result of careless drafting.” (...) “With regard to substantial autonomy, a careful reading of the Constitution, especially Part VII, clearly indicates that this substantial autonomy is not guaranteed at the constitutional level at all, since almost every important aspect of this autonomy is delegated by the Constitution to the legislator.” (...) “It is stated that this right (Article 12) limits state power and is subject only to the review of constitutionality and legality. Although this should in principle be welcomed, it is regrettable that the content of this right is not specified in the Constitution, thereby leaving almost entirely to the legislature the determination of the scope of these rights.”¹⁰

R. Marković states the following: “The constitution-makers also provided their own version of the reasons for adopting this Constitution. Thus, the first reason was to preserve Kosovo and Metohija permanently ‘within the sovereign State of Serbia,’ as its ‘integral part,’ which was expressly stated in the Constitution itself. And since the Constitution is ultimately adopted by referendum, the citizens of Serbia would thereby express, in the most legitimate manner, that Kosovo and Metohija are an ‘integral part’ of Serbia, i.e., of its territory. In this way, it was argued that participating in the referendum for this Constitution was equivalent to supporting Kosovo and Metohija remaining within Serbia, and vice versa. Had this really been the case, there would have been no need to adopt this Constitution at all, because the existing Constitution of 1990 already provided, in Article 6, that Kosovo and Metohija ‘exist’ within Serbia, while ‘the

¹⁰ *Opinion on the Constitution of Serbia*, European Commission for Democracy through Law (Venice Commission) of the Council of Europe, CDL-AD(2007)004, 19 March 2007.

territory of the Republic of Serbia is unified and inalienable' (Article 4). The difference lies in the fact that under the 1990 Constitution, the Autonomous Province of Kosovo and Metohija constituted a form of territorial autonomy, whereas under the 2006 Constitution, 'substantial autonomy' is exercised within that autonomous province. Since the status of Kosovo and Metohija is decided by the United Nations, rather than by the Constitution of the Republic of Serbia, certain Western media outlets assessed the undertaking of adopting a new Constitution as a 'fig leaf for the loss of Kosovo and Metohija.' As the second reason for adopting the Constitution, the constitution-makers cited the new state status of Serbia, which had now become an independent and sovereign state. Since a change in state status also entails a constitutional change, Serbia required a new constitution in which its new state status, different from that of sixteen years earlier, would be emphasized. This reason is indeed justified and, of all those put forward, it is the only one that is objective and credible."¹¹

The Constitution, Autonomous Provinces, the Status of Kosovo, and UN Security Council Resolution 1244

Let us consider a more detailed analysis of the relevant constitutional and other legal documents relating to the status of the autonomous province.

Constitution of the Republic of Serbia (*Official Gazette of the Republic of Serbia*, Nos. 98/2006 and 115/2021)

- (a) *Preamble*: "Proceeding from the state tradition of the Serbian people and the equality of all citizens and ethnic communities in Serbia, and proceeding from the fact that the Province of Kosovo and Metohija is an integral part of the territory of Serbia, that it enjoys the status of substantial autonomy within the sovereign State of Serbia, and that such status of

¹¹ Ratko Marković, *The Constitution of the Republic of Serbia of 2006: A Critical View* ("Ustav Republike Srbije iz 2006 – kritički pogled"), *Anali Pravnog fakulteta u Beogradu*, br. 2, 2006, p. 7 (pp. 5–46).

the Province of Kosovo and Metohija entails constitutional obligations for all state bodies to represent and protect the state interests of Serbia in Kosovo and Metohija in all internal and external political relations, the citizens of Serbia hereby adopt (...).” Thus, the Preamble refers to the Province of Kosovo and Metohija, but not as an “autonomous province”; rather, it is described as a province enjoying the “status of substantial autonomy”.

- (b) *Concept, Establishment, and Territory of an Autonomous Province* (Article 182, paragraphs 1–2): “Autonomous provinces shall be autonomous territorial communities established by the Constitution, in which citizens exercise the right to provincial autonomy. The Republic of Serbia shall have the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija. The substantial autonomy of the Autonomous Province of Kosovo and Metohija shall be regulated by a special law adopted in accordance with the procedure prescribed for amending the Constitution.” Accordingly, autonomous provinces are “territorial communities” in which citizens exercise “provincial autonomy” (but not “substantial autonomy”). However, with regard to Kosovo and Metohija, the Constitution provides that the “substantial autonomy” of the Autonomous Province of Kosovo and Metohija shall be regulated by a special law (adopted in accordance with the procedure prescribed for constitutional amendment).
- (c) *President of the Republic* (Article 114, paragraph 4): “I swear that I shall devote all my efforts to preserving the sovereignty and integrity of the territory of the Republic of Serbia, including Kosovo and Metohija as its integral part, as well as to the realization of human and minority rights and freedoms, respect for and defense of the Constitution and laws, the preservation of peace and prosperity for all citizens of the Republic of Serbia, and that I shall conscientiously and responsibly discharge all my duties.” Within this provision concerning the presidential oath, Kosovo and Metohija are referred to merely as an “integral part” of the territory of the Republic of Serbia, without the

attributes “autonomous province,” “substantial autonomy,” or “territorial autonomy.”

- (d) Proposal and Adoption of Constitutional Amendments (Article 203, paragraphs 1 and 6–7): “(...) A proposal for amending the Constitution shall be adopted by a two-thirds majority of the total number of Members of Parliament. (...) The National Assembly shall adopt an act amending the Constitution by a two-thirds majority of the total number of Members of Parliament and may decide to submit it to the citizens for confirmation in a republican referendum. The National Assembly shall be obliged to submit the act amending the Constitution to a republican referendum for confirmation if the amendment concerns the Preamble of the Constitution, the constitutional principles, human and minority rights and freedoms, the organization of government, the declaration of war and a state of emergency, derogations from human and minority rights during a state of emergency or war, or the procedure for amending the Constitution.”

United Nations Security Council Resolution S/RES/1244
(10 June 1999)

Resolution 1244, paragraph 10: “Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia (...).” This provision indicates that the people of Kosovo are to enjoy substantial autonomy “within the Federal Republic of Yugoslavia,” rather than within the Republic of Serbia.

Kosovo Declaration of Independence (17 February 2008)

Kosovo Declaration of Independence, Article 5: “We welcome the international community’s continued support of our democratic development through the international presences established in Kosovo on the basis of United Nations Security Council Resolution

1244 (1999). We invite and welcome an international civilian presence to supervise our implementation of the Marti Ahtisaari Plan and the European Union Rule of Law Mission. We also invite and welcome the North Atlantic Treaty Organization to retain the leading role of the international military presence in Kosovo and to implement the responsibilities assigned to it under United Nations Security Council Resolution 1244 (1999) and the Ahtisaari Plan, until such time as Kosovo's institutions are capable of assuming these responsibilities. (...)” Article 12: “(...) In all these matters, we shall act consistently with the principles of international law and the resolutions of the United Nations Security Council, including Resolution 1244 (1999). (...)” It is evident from the foregoing that the Declaration of Independence of Kosovo expressly refers, on several occasions, to United Nations Security Council Resolution 1244 as the international legal basis for the declaration of independence.

However, given that no special law has been enacted (in accordance with the procedure prescribed for amending the Constitution) to regulate the substantial autonomy of the Autonomous Province of Kosovo and Metohija, the legal question of so-called preclusion arises, namely whether the constitutional provisions concerning the substantial autonomy of the “Autonomous Province of Kosovo and Metohija” have any place at all within the Constitution of Serbia. This is particularly relevant in view of the fact that the “Republic of Kosovo” exists *de facto* (and, to a considerable extent, *de jure*) as a political and legal entity.

The Constitution and Serbia's Membership in the European Union

“By acceding to the European Union, the Republic of Serbia accepts that the institutions of the EU may adopt legally binding acts having the force of law which shall be directly applicable within its territory. The Republic of Serbia will participate in the adoption of such acts in the same manner as any other Member State of the EU. Furthermore, the legal order of the European Union requires that the EU acquires

have superior legal force in relation to domestic legal acts. (...) Upon accession to the EU, a state accepts the principle of the supremacy of EU law over domestic law, since this is a principle established by the Court of Justice of the European Union.”¹² In this regard, it has also been observed: “It is both sensible and, as recent experience has demonstrated, necessary to incorporate an obligation to conduct a public debate directly into the constitutional provisions governing constitutional revision, even though comparative constitutional practice offers few examples of such an approach. The only issue on which all commentators of the current Constitution are in complete agreement concerns the deficiencies of the procedure through which it was adopted, namely the complete absence of a public debate.”¹³

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¹²Vladimir Međak, *Is It Necessary to Amend the Constitution of the Republic of Serbia in the Context of Accession to the European Union? (Da li je potrebno menjati Ustav Republike Srbije usled pristupanja Evropskoj uniji?)*, EPUS, Belgrade, 2016, p. 7.

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THE DAY AFTER: ON THE CONSTITUTION

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