RESEARCH FORUM

How to make a new Constitution: the merit and the procedure

European Movement Serbia

Belgrade, November 2013

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Abstract

The Constitution of the Republic of Serbia adopted in 2006 is still causing many problems in practice. The Constitutional Court of Serbia has difficulties in making decisions and verdicts due to conflicting legal norms and the political system remains unstable and irrational. The Constitution has never met any challenges imposed on it by the time for nearly seven years of its existence. The authors have analyzed the specific reasons for the amendment of the Constitution in three areas: the basic provisions, the catalogue of rights and the system of the state government organization. In addition, the authors explain how it is possible to carry out the procedure of constitutional revision through a factual constituent assembly. The paper represents a continuation of the authors' previous research on the necessity of the constitutional revision and the possibilities of its implementation in the Republic of Serbia.

Key words:

the Constitution, the constitutional revision, the organization of government, democratic consolidation, the Constituent

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Introduction

The political community in today's Serbia has not undergone democratic consolidation yet. Since the democratic changes in 2000, our political community, instead of democratic consolidation, based on the principle of democratic legitimacy of political processes, has been dealing with the legitimacy which is highly questionable, as well as the political processes which have occurred on such a basis. One of the main reasons why Serbia has a political community that is irrational, without an effective mechanism of mutual control of the three branches of government, with the unresolved issue of the Autonomous Province of Kosovo and Metohija and the confusing attempts to resolve it, is exactly the supreme law. Adopted with no regard for rules of good democratic procedure, the Constitution of 2006 was defined as *a temporary Constitution*, which is, as discussed in political circles, *easy to be amended*.

The draft Constitution of the Republic of Serbia in 2006 was not a result of efforts by democratic institutions, under whose constitutional jurisdiction it falls. The Committee on Constitutional Affairs of the National Assembly of the Republic of Serbia, which, in constitutional and legal terms, was competent to propose the text of a new *lex Superior* in Serbia, did not do so. In formal sense and in accordance with the provisions of the Constitution of the Republic of Serbia of 1990, a new constitution could be proposed by: the President, the Government of the Republic of Serbia, a group of one hundred thousand people or fifty deputies[1].

Deputies, being the most directly elected representatives of the people, received the draft Constitution the same day they discussed it in the Assembly, which greatly illustrates not only the superficial attitude in making the new supreme law, but also a degrading attitude towards the key institution in the development and the consolidation of democracy, and that is a legislative body. Therefore, the text of the Constitution has gained much less importance, qualitatively, regardless of the number of deputies who voted for the proposal of the new Constitution.

The reasons for the Constitution amendment are not only those concerning the adoption procedure. On the contrary, they are mostly of the merit i.e. they are related to all the shortcomings that this Constitution of the Republic of Serbia has in technical, linguistic, and, above all, in legal sense. These reasons may be conditionally classified into several categories: the basic provisions, the system of the government organization, the catalogue of human and civil rights and freedoms, and the constitutional provisions on the implementation of constitutional revision. In this study, we focused on the first three categories.

[1] Article 132 of the Constitution of the Republic of Serbia of 1990

1. Preamble and the Basic Principles of the Constitution

1.1. Preamble

Although the former Serbian constitutions, as well as the Constitution of the Kingdom of Yugoslavia, did not have a preamble, the Constitution makers, in the case of both Serbian contemporary constitutions (of 1990 and of 2006) decided to include the introductory text in the Constitution. The Republic of Serbia, in its Constitution of 1990, was defined as *a democratic state of all its citizens who live in it, based on the rights and freedoms of man and citizen, the rule of law and social justice*[1]. This concept of defining a state is both republican and civil (universalist), bearing in mind that the state of Serbia was defined as a state of *all citizens*, who are the holders of sovereignty. In 1990 the Serbian people was mentioned *only in the preamble*[2], but not in the normative part of the constitutional text.

Since Kelsen's legal doctrine, a preamble ***has not been considered a normative part of the constitutional text and has no legal effect***. That is why it is a juncture of morality, law and politics. In the case of the Mitrovdan Constitution it is clearly seen that the preamble, as well as the part defining the state, was the meeting point of three different ideologies, each having brought something to the text of the preamble itself. Thus, the people's state and the civil state, civic democracy, social justice and the European values and principles are found together, even though the Constitution itself is far away from the European principles and values.

> We believe that the amended text of the Constitution should not have a preamble.

That is why we believe that the amended text of the Constitution *should not have a preamble*, as it was the case with all previous constitutions of Yugoslavia and Serbia up to 1990, which did not affect the constitutional text, in a qualitative sense. Removing the preamble would have no effect on the government's policy to address the issue of the Autonomous Province of Kosovo and Metohija, since the so-called Brussels Agreement on regulation of mutual relations was signed between the Government of the Republic of Serbia and the Government of Kosovo and ratified in the National Assembly of the Republic of Serbia, and the entire Kosovo issue has been placed in the international arena and the arena of the international law.

The evidence that the preamble served only as a political cover and a sort of protection to the political actors is the Stabilization and Association Agreement (SAA) of 2008, which was first ratified by the National Assembly of the Republic of Serbia. The Article 225 of this international agreement, which was signed and ratified by the Serbian state, states that the SAA and conclusively the process of accession to the European Union, which was confirmed by the Brussels agreement, *shall not apply to the territory of the Autonomous Province of Kosovo and Metohija, which is under the UN Security Council Resolution 1244*. In other words, it was clear, in 2008 already, that Kosovo and the rest of Serbia would go their ways to the European Union separately.

1.2. Defining the State

Sixteen years after the Constitution of 1990 was adopted, despite the increased modernity and the changed geopolitical circumstances at global and regional level, the Constitution makers have taken a step backwards by defining the state as a community of individuals of equal rights, but

[1] Article 1 of the Constitution of the Republic of Serbia of 1990– taken from: the Constitutions of the FRY, the Republic of Serbia and the Republic of Montenegro, (1995). Belgrade: Official Gazette, p 79–115.

[2] Which emphasizes that the citizens shall adopt the Constitution resolved to establish a democratic state of the Serbian people which provides the exercise of the national rights to the members of all other nations and nationalities [...].

with an emphasis on the so-called exclusive ethnic origin[3]. Thus, the Republic of Serbia was defined as *a state of the Serbian people and all citizens who live in it, based on the rule of law and social justice, the principles of civil democracy, human and minority rights and freedoms, and the commitment to the European principles and values*[4] .

Identifying Serbia with its majority ethnic population is also present in the constitutional principle which provides that the Republic of Serbia shall develop and improve relations between Serbs living abroad and their mother country[5]. This constitutional solution was criticized for differentiating between its citizens who live abroad and not even requesting those Serbs to be Serbian nationals. However, taking into account the partial justification for such criticism, it should be noted that the entire title above that article of the Constitution reads: „ Protection of Citizens and Serbs Abroad," from which it could be inferred that the intention was not to deny the rights of those who are not ethnic Serbs, but to clearly highlight the obligation of the state to improve the relations with the Serbs abroad as well.

Bearing in mind that the concept of *citizenship* is broader than that of *ethnicity*, in theoretical and practical terms, we believe that it is necessary to define the state as the civil state, especially taking into account that the citizens are, *ex constitutione*, the holders of sovereignty, who are vested the highest authority in the state.

1.3. State Borders

The fact that the Constitution has been written in a very sloppy and superficial manner is proved by the provision on the state borders, which is essential for any country and must have called for special attention of the Constitution makers, as well as the deputies who voted for this draft Constitution. Namely, the Constitution first proclaims that the state border shall be *unique and inseparable*. Then, in the second paragraph of the same Article, it provides that the border *shall be inviolable, and it may be changed in accordance with the procedure provided for amending the Constitution*[6].

The constitutional text must be consistent in both logical and linguistic sense.

In addition to the linguistic nonsense that is obvious in this article of the Constitution, the question of legal and political consequences that this superficiality may lead to is of great importance. If it is possible to change the state borders, as required by the Constitution, according to the stipulated procedure for constitutional revision, it is not clearly stated through which of the two mentioned procedures it may be carried out. However, as in the previous case, the Article 203 stipulates that such a change requires the citizens voting in a referendum. However, the confusion does not end here, noting that one of the explicitly listed competences of the National Assembly, *ex constitutione*, is to decide on **amending the state border**[7], without specifying that such a decision shall be made *by any qualified majority voting (absolute, two-thirds or similar*).

This article should be fully linguistically and logically adjusted. There is no doubt that the right of the Constitution makers is to provide that the National Assembly may decide on changing the state border, but it is unacceptable to maintain the inconsistency as to how and by which majority such decisions should be procedurally made. In addition, if the intention of the constitution revision is to preserve the provision stipulating that the borders may not be changed, then it is unnecessary to specify such jurisdictions of the legislative body. Bearing all this in mind, the constitutional text must be consistent in both logical and linguistic sense.

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[3] Hence the new Constitution in 2006 proclaimed Cyrilllic as the official script.

[4] Article 1 of the Constitution of the Republic of Serbia of 2006.

[5] Ibid,article 13 paragraph 2.

[6] Ibid, Article 8.

[7] Ibid, Article 99. paragraph1 item 2.

1.4. Provincial Autonomy and Local Self-government

In the introductory section of the Constitution of the Republic of Serbia, which refers to the basic principles, it is provided that *the state power is restricted 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 subjected only to supervision of constitutionality and legality*[8]. Provisions concerning citizens' rights to provincial autonomy testify that the Constitution was written superficially.

Namely, although citizens' rights to these forms of restriction of state power are stipulated by the Constitution, at the same time it is established that it shall be subject to *supervision of legality*, which, as suggested by the Venice Commission of the Council of Europe in its opinion, indicates that *the law may limit the autonomy of the Provinces provided for by the Constitution.* [9]

Careful reading of the entire Constitution of Serbia, especially the part VII thereof relating to the status of autonomous provinces[10], reveals further inconsistencies.

Article 182 of the Constitution defines that *the substantial autonomy of Kosovo and Metohija* shall be regulated by *a special law which shall be adopted in accordance with the proceedings envisaged for amending the Constitution*. The Constitution maker has not specified which of the two procedures is in question, but by consequent reading of the constitutional text and Article 203 we have come to the conclusion that, due to the changes in the system of government, in addition to a qualified two-thirds majority, the ratification by the citizens in a referendum is necessary.[11] Citizens' right to establish new autonomous provinces, as well as the elimination of the existing ones, *established by citizens in a referendum, in accordance with the Law*.

Therefore, contrary to what is proclaimed in the preamble, the Constitution itself does not guarantee any substantial autonomy of Kosovo and Metohija, since whether the self-government will be realized or not depends on the will of the majority in the National Assembly of the Republic of Serbia.

As to the position of the Autonomous Province of Vojvodina, *the clause stating that the province shall receive a certain percentage of the budget of the Republic must be deleted from* the constitutional text. This norm is inappropriate to be included in a constitutional text, even the text of a constitutional law, but definitely should be a part of the Budget Law or a similar law. Although the intention was good – to protect a part of the revenue and the economic autonomy of Vojvodina – the fact is this kind of detailing in the Constitution has not contributed to the compliance with the constitutional norm itself, and it represents a rare practice in comparison to other European constitutions.

As to the position of the Autonomous Province of Vojvodina, the clause stating that the province shall receive a certain percentage of the budget of the Republic must be deleted from the constitutional text.

1.5. International Relations

Article 16 of the new Constitution which defines international relations, within the basic provisions of the constitutional text, is particularly important. In the first paragraph of this Article it is stated that Serbia shall be based on generally accepted principles of international law, which is in accordance with the constitutional solutions of most modern democracies. However, the second

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[8] Ibid, Article 12.

[9] *Opinion no. 405/2006 European Commission for Democracy through Law (The Venice Commission of the Council of Europe). Available at*: (http://www.venice.coe.int/docs/2007/CDL-AD(2007)004-srb.pdf)

[10] Due to inadequate linguistic and technical revision of the text of the new Constitution, the term referred to in the Constitution is both Province and Autonomous Province, which is unacceptable, because it allows a possibility for different legal treatment of these forms of territorial organization.

[11] Article 182 § 2 and Article 203 § 7.

paragraph of this Article states that ratified international treaties must be in accordance with the Constitution. This solution is illogical for at least two reasons. Firstly, putting the Constitution above the rules and principles of international law is not a common practice and it may suggest that the Constitution of the Republic of Serbia prevails over international treaties.

On the other hand, the Vienna Convention on the Law of Treaties provides that a state may not refer to domestic law as a reason for non-compliance with contractual obligations[12]. This fact may lead these two legal documents – national and international – into a collision, as the Constitution maker should have had in mind. Another contradiction arises from the logic of the functioning of the state and its institutions and relates to the question why someone would sign an international agreement if it does not comply with the Constitution. This inconsistency may be partly justified by the attitude that it is one of the mechanisms to prevent an authoritarian government to act contrary to the Constitution, but it is certainly uncommon in contemporary constitutional legislation.

Regarding the facts mentioned above, it may be concluded that the section on basic provisions concerning Serbian international relations could be an obstacle to its integration into a supranational organization such as, for example, the European Union. On the other hand, the Government of the Republic of Serbia has already signed some international treaties which do not relate to the territory of Kosovo and Metohija, although the Constitution provides that Kosovo and Metohija is an autonomous province within the territory of the Republic of Serbia. Thus, it could easily happen that a legal analysis by the Constitutional Court of Serbia may determine that the signed international treaties are not in accordance with the supreme law of the state. It would not cause legal consequences, but it would certainly cause incalculable political consequences and it may also undermine the international reputation of Serbia. That is why we may be certain that the Constitution maker should have taken more care about such sensitive issues such as the international relations and the international treaties.

In order to resolve all doubts and prove that the Republic of Serbia is legally and politically committed to compliance with international law, it is necessary to rewrite this constitutional norm, and one possible way would be:

Generally accepted rules of international law and ratified international treaties represent an integral part of the legal order of the Republic of Serbia and they shall be directly applied[13].

The section on foreign policy should be excluded, noting that Serbia has committed to harmonize its foreign policy with the foreign policy of the European Union, under the provisions of the SAA, so that it will be continued as Serbia approaches the European Union.

Since the Republic of Serbia is a candidate for full membership in the European Union and is in the middle of the process of accession to this international organization, we believe that it is necessary to introduce the so-called *European clause* into the Constitution. It should include the transfer of a part of the sovereignty of the Republic of Serbia to this supranational organization as well as the acceptance of the legal order of the European Union, with the prior endorsement by citizens in a referendum on the membership when the time comes.

We believe that it is necessary to introduce the so-called European clause into the Constitution.

[12] Article 27 of the Vienna Convention on the Law of Treaties. (If the constitutional Court of Serbia possibly managed to discard an international treaty which has already been signed, Serbia would have to either change the Constitution or to cancel the treaty, i.e. to withdraw from the contractual relationship provided that such a legal possibility exists in accordance with the said Convention.)

[13] Since this norm appears twice in the Articles 16 and 194 of the current Constitution, the amendment should be made in both cases.

2. The Catalogue of Human and Civil Rights and Freedoms

The highest level of agreement between the political parties that participated in drafting and adoption of the new Constitution was present in the section which defines human and minority rights and freedoms. Due to social and political changes that occurred during the period of sixteen years between the adoptions of the two constitutions, the new Constitution included an advanced catalogue of human and minority rights and freedoms, as the Venice Commission has stated in its opinion.

As to the basic principles ensuring human and minority rights, there is a noticeable progress in comparison to the Constitution of 1990, but there is also a lagging behind the Charter on Human and Minority Rights, which was an integral part of the Constitutional Charter of Serbia and Montenegro. Unlike the previous one, the new Constitution provides that human and minority rights shall be directly applied, whether they are provided by the very text of the Constitution, generally accepted rules of international law, ratified international treaties or by the law. Quite exceptionally, if it is necessary for the exercise of an individual right, the law may prescribe the manner of exercising these rights provided that it shall, in no event, affect the essence of the guaranteed right. Of particular importance is the fact that the Constitution stipulates the manner in which the provisions on the rights should be interpreted and, inter alia, it states the compliance with the practice of the international institutions which supervise the implementation of the international standards of human and minority rights. The Charter should have been complied with in case of standardization of the express prohibition of the rights abuse, since it only assumes the relevant provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms. On the contrary, the Constitution makers formulated the purpose of the constitutional guarantees of human rights, failing to even mention the prohibition of rights abuse.

The Constitution allows the restriction of the latter, establishing general rules also recognized by international instruments: that the restriction is stipulated by the Constitution, for the purposes allowed by the Constitution and to the extent necessary to meet the constitutional purpose of a restriction in a democratic society[14]. In regard with the legal practice of the European Court of Human Rights in Strasbourg, the obligation of taking care of the substance of the restricted right is emphasized, as well as the importance of the purpose of the restriction, the nature and the extent of the restriction, the relation between the restriction and its purpose and whether there is a way to achieve the purpose of the restriction by less restrictive means.

The Constitution guarantees judicial protection of human and minority rights, but unlike the European Convention it does not emphasize that the protection must be effective. The Constitution expressly recognizes the citizens' right to address international institutions in order to protect their freedoms and rights, and not those guaranteed by international instruments, but by the Constitution itself. In the case of emergency or war there may be an exception from the guaranteed human and minority rights.

The death penalty is abolished, cloning of human beings is prohibited as well as trafficking and sexual or financial exploitation of a person in unfavorable position, secret and paramilitary associations are prohibited, conscientious objection is recognized as well as the right to access information held by the state authorities, etc. For the first time at the supralegal level, the right to legal personality, the children's rights, the right to legal assistance and the autonomy of universities are ensured. The right to liberty and security, the right to a fair trial and a number of other social rights are determined in a more detailed and accurate way.

In its effort to obtain a modern catalogue of human rights and freedoms, the new Constitution is quite contradictory and confusing. It is necessary that a serious team of experts in human rights law revises certain provisions of this part of the Constitution of the Republic of Serbia.

[14] Article 20 of the Constitution of the Republic of Serbia.

In its effort to obtain a modern catalogue of human rights and freedoms, the new Constitution is quite contradictory and confusing. For example, if basic principles on human and minority rights regulate the terms and conditions of legitimate restrictions of rights, this general norm should only have been implemented in a separate section by specifying the legitimate objectives for which the restriction of the specific rights is allowed. Instead, a set of different combinations was created. It is enough to compare the provisions on the freedom of thought, conscience and religion, the freedom of opinion and expression, the freedom of the press and the freedom of association, in order to see the inconsistency in the procedure. Naturally, objectives of legitimate restriction are stated everywhere, but at some points the requirement of the legitimate restriction, i.e. the necessity in a democratic society is also added, or all the three conditions are specified, and there are also rights in respect of which only the objectives of the restriction are specified. Therefore, the Venice Commission has significantly remarked that Article 20 of the present Constitution of the Republic of Serbia „does not connect the restriction of rights and freedoms to a legitimate purpose, but to any purpose ‚permitted by the Constitution' ", and is thus beyond the framework of the European Convention on Human Rights, namely the articles from 8 to 11 of this Convention. [15]

In addition to all of this, there are pointless legal norms such as the one that *everyone shall have the freedom to decide whether they shall procreate or not* (instead of the word 'everyone' it should have been emphasized that it refers to *every woman*), as well as the non-compliance of the prohibition of discrimination under the European Convention for the Protection of Human Rights and Fundamental Freedoms, the jurisprudence of the European Court of Justice and the standards of the European Union in this area, it is necessary that a serious team of experts in human rights law revises certain provisions of this part of the Constitution of the Republic of Serbia.

3. The System of Government Organization

3.1. National Assembly

Although the text of the current Constitution of the Republic of Serbia stipulates that the National Assembly is a supreme representative body, such a claim is not legally supported. Namely, the President of the Republic is also elected in direct democratic elections, and therefore is a representative body of the same level of legitimacy as the National Assembly. This should have been taken into account during the legal and technical as well as the linguistic revision of the constitutional text.

The Parliament has been given some new constitutional jurisdictions in accordance with the changed circumstances. Thus, it is provided that it shall adopt a strategy of state defense and supervise the work of security services; it shall also ratify international treaties whose ratification is stipulated by the law; it shall decide on war and peace, declare a state of emergency and the like. At the same time, the electoral rights of a legislative body have been expanded, and, under the provisions of the present Constitution, the Civic Defender shall be elected and removed from his office by the National Assembly, while this institution has been a legal, not a constitutional category so far. In addition, it is stated that the National Assembly shall supervise the work of the ombudsman, which may significantly diminish the independence of the work of this institution. The lack of other independent and regulatory bodies such as the Supreme Audit Institution and others is also noticeable, and they should be constitutionalized, and not dependent on the law and, consequently, the political will of a parliamentary majority which is changeable.

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[15] *Opinion 405/2006 of the European Commission for Democracy through Law (The Venice Commission of the Council of Europe)*, item 28.

The greatest political as well as legal debate was held on the subject of parliamentary mandates. The question was whether a parliamentary term of office belongs to deputies or to political parties to which they were elected. Previous years of parliamentarism in Serbia have shown that it is possible that some political parties which did not even participate in the elections may appear in the parliament if a deputy becomes a member of such a party under suspicious circumstances, and they have also led to the (un)justified parties' concern for the legitimacy of the Parliament and their political interests. The Article 102 of the Constitution of the Republic of Serbia, which is currently in force, reads: „ Under the terms stipulated by the Law, a deputy shall be free to irrevocably put his/her term of office at disposal to the political party upon which proposal he or she has been elected a deputy." It is believed that this solution resulted exactly from the desire to avoid possible arbitration of the Constitutional Court in interpreting the Constitution. This norm collides with the provision of the Article 2 of the Constitution which states that citizens shall exercise sovereignty „through their freely elected representatives."

Thus, a term of office, although formally free in a legal sense, in a political sense, however, has become a requirement, with the possibility of revocation by the relevant political party. The so-called Venice Commission of the Council of Europe has declared its particularly negative opinion on this issue. It has pointed out that this solution is „a serious violation of the freedom of deputies to express their own views on the merits of a proposal or an action." [16] Since the Parliament possesses greater authority in the election of judiciary officials, the Venice Commission has expressed its concern that the justice system may be owned by political parties. Because of the aforesaid, we can say that Constitution makers have resorted to an undemocratic solution, which goes beyond the common legal practice in Europe.

The status of the deputies has also been changed to a certain extent. The Constitution provides that a deputy may not be held responsible criminally or in any other way for any expressed opinion or vote in his or her performance of their parliamentary function and, at the same time, this irresponsibility has been extended in two directions by the Constitution. Firstly, it is no longer just about criminal, but also civil and legal irresponsibility of deputies. A deputy is also protected from all verbal assaults committed outside the National Assembly as well, since it is assumed that their function shall be performed in every public appearance.

The range of those who may be authorized law proponents has also been changed to some extent. The right of every deputy, the Government, the Assembly of the autonomous province and voters to propose laws has been reserved. In the latter case, a people's initiative must be supported by at least 30,000 voters. Making these conditions for launching a people's initiative stricter is contrary to European principles, even though they are determined in the first article of the Constitution as those on which the state of Serbia shall be based. The National Bank of Serbia and the Civic Defender have been given the right to propose laws in their jurisdiction.

With the aim of contributing more to democratization of society and the political system as a whole, it is necessary to restore the constitutional norm from 1990 on the right of the citizens to participate in proposal of laws. Instead of 30,000 voters required for a people's initiative, this number should be reduced to 15,000, whereas in the case of the initiative for the amendment of the Constitution of the Republic of Serbia this number should be reduced to 100,000 voters, instead of 150,000, as defined in paragraph 1 of Article 203 of the Constitution of the Republic of Serbia.

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[16] Ibid, item 53.

3.2. The President of the Republic

Constitution makers have not defined the type of the political system in Serbia and thus left room for political power to be concentrated around personalities instead around institutions. This solution represents an aggravating factor for the consolidation of a democratic system *per se*. The Constitution stipulates that the policy shall be created and performed by the Government of Serbia, whereas the powers of the President shall be limited to a protocol and a command over the armed forces in war and peacetime conditions.

In our opinion, Article 114 of the Constitution which provides that the President shall be elected in direct elections should be changed. In parliamentary democracies the common solution is that executive power is vested in the Government which is elected by a legislative body. In presidential systems, direct election of the president would make sense, such as in the Russian Federation, the United States or France, but with limited powers of the Government and its prime minister and ministers.

The combined political system is inadequate for at least two reasons. *First*, the President of the Republic, under this Constitution, has no great powers, and, in addition to deputies, he is the only one who has direct legitimacy. This means that his political power has not been formalized through the Constitution, but it is significant in terms of legitimacy. However, in accordance with the Law on the Election of the President, a candidate may become president with less than 50% of the votes of the voters who cast the ballots, even in the second round of the election, which happened for the first time in 2012 after the general elections in May. The current head of state received less than 50% of the votes, with a voter turnout of about 46%, which makes the other aspect of his soft power, which is legitimacy, additionally questionable.

Second, statutory provisions provide that candidates for the head of state shall receive certain amounts of money for a presidential campaign. These sums often amount to millions, further burdening the state budget, which already faces problems due to public expenditures. A more practical and, in a political and economic sense, a more logical solution, is that the head of state shall be elected by an absolute majority of deputies. With a gradual change in Serbian political culture, it could lead to a consensus of the government and the opposition on the head of state, such as is the case in German political practice.

In addition to this, the current solutions have been additionally made illogical due to the possibility of recalling the President. Although the President of the Republic is elected by the citizens, there is no provision in the Constitution which provides that he shall be liable to the citizens of Serbia. On the contrary, the voters are completely excluded from the procedure of head of state's dismissal. Thus, in the section on the dismissal of the President of the Republic from office, it is stipulated that this initiative may be initiated by the National Assembly on the proposal of at least one-third of deputies. [17] The President is dismissed from the office, if such a decision is reached by a two-thirds majority of the parliament and supported by the opinion of the Constitutional Court of Serbia that the President actually violated the Constitution. Such an opinion, according to the Constitution, the Constitutional Court of Serbia must issue no later than 45 days from the date of the initiative for the dismissal of the President. The Venice Commission of the Council of Europe also considers this solution „vague", especially in „the current situation in Serbia", and because of the possibility of abuse. [18]

For all the above mentioned reasons, we believe that it is necessary to change the constitutional norms governing the manner of the election as well as the status and the mandate of the President of the Republic. The

We believe that it is necessary to change the constitutional norms governing the manner of the election as well as the status and the mandate of the President of the Republic.

[17] Article 118 of the Constitution of the Republic of Serbia.

[18] *Opinion 405/2006 of the European Commission for Democracy through Law (The Venice Commission of the Council of Europe)*, item 55.

mandate of the head of state should be five years, and he should be directly elected by the National Assembly of the Republic of Serbia. All powers of the President should be solely protocol, without the right to veto and with no exclusive right to command the armed forces in war and peace.

3.3. The Status of the Judiciary

The authority, which, since the time of Montesquieu, is of great importance for the balance and the separation of powers, is the judiciary. The independence of the judiciary in relation to other branches of power and circles of economic power is, to a great extent, a specific indicator of democratic consolidation of the state.

Most of the remarks of the Venice Commission refer exactly to the section of the new Constitution which defines the position and the role of the judiciary and its independence. The more important role of the parliament in the appointment of judges, vague and colliding provisions on the irremovability of judges, but also on the first election of judges for a period of three years, represent some of the major failures of the Constitution makers in defining the position of the judiciary.

Firstly, it is provided that *the courts shall be independent in their work and judge in accordance with the Constitution, the laws and other legal acts (when provided by the law), the generally accepted rules of the international law and ratified international treaties*[19]. It is further provided that *court decisions shall be based on the Constitution, the law, ratified international treaties and regulations based on the law*[20], and finally it is specified that *the judge shall perform the judicial function independently and be subject only to the Constitution and the law*.

All of these are issues to be considered seriously, and certainly among top priorities, if possible constitutional revision would be intended to contribute to the establishment of stable European principles and values, especially to the independence of judges and judiciary, is the reduced influence of politics and political parties and building a more stable foundation of the legal state and the state of the rule of law

3.4. Independent Regulatory Bodies

Existence of independent regulatory bodies is one of the most important European standards. Therefore, we believe that it is of utmost importance for improving the effective control of power for all the crucial independent and regulatory bodies to be constitutionalized. This would, on the one hand, provide greater independence in their work in relation to the other branches of power, but also in relation to the circles of economic and political power. On the other hand, it would also create greater legal security and strengthen the principle of the rule of law in Serbia, which is quite fragile.

Independent regulatory bodies should submit their reports periodically to the legislative body, but the possibility of the legislative body itself supervising these bodies should be seriously considered.

[19] Ibid, Article 142 paragraph 2.

[20] Ibid, Article 145 paragraph 2.

4. The Procedure of the Current Constitution Amendment

4.1. Constitutional Norms on the Current Constitution Revision

The current Constitution may be amended only in the manner prescribed by the Constitution itself in the section on constitutional revision. Article 203 of the Constitution of the Republic of Serbia stipulates that a proposal to amend the Constitution may be submitted by:

1. at least one third of the total number of deputies, i.e. 84 deputies;
2. 150,000 voters;
3. the President of the Republic;
4. the Government of the Republic of Serbia.

In comparison to the previous Constitution of 1990, the fact is that the Mitrovdan Constitution belongs to the category of the so-called *soft constitutions*, which are easier to amend. However, the amendment procedure for the supreme law of Serbia has not been defined clearly enough, leaving room for different interpretations. The procedure provides that the revision of the Constitution *may, and in some cases, explicitly must be ratified in a referendum*.

Namely, the paragraphs 2 and 3 of Article 203 of the Constitution stipulate that the National Assembly shall decide on the Constitution amendment by a qualified two-thirds majority. If the Parliament does not accept the amendment of the Constitution, it, *but only relating to the same issues*, may not be discussed for a year, *ex constitutione*. This does not mean that the procedure for the revision of the Constitution for other reasons may not be launched, so the question of the legal sense of this constitutional provision arises.

Upon the adoption of "the Act on the Constitution amendment", the National Assembly may decide the amendments to be ratified by the citizens in a referendum. Bearing in mind that our opinion is that all the above should be changed, it is necessary that citizens decide on such changes in a referendum, in accordance with the paragraph 4 of Article 203 of the Constitution.

4.2. The Factual Constituent

Although the idea of the Constituent, i.e. the Constituent Assembly would be the best one, the Constitution makers did not envisage it in defining the procedure for the Constitution amendment. At the same time, a clause that provides any new constitutional proposal must be subject to a public debate within a specified time period was included, which may lead us again into a situation that the supreme law of the state is amended *ad hoc*.

Given all of the above, there is still a legal possibility for a new constitutional proposal to be adopted by a qualified majority after new parliamentary elections are held, exactly through the constituent assembly. In fact, when calling the forthcoming parliamentary elections citizens should be informed that all the key political actors in the state intend to approach the Constitution amendment seriously in accordance with the Serbian approaching the European Union. Thus the political elite would be publicly obliged before the citizens that the new parliament assembly, which is *de facto constituent (though not de iure in a formal sense)*, and, after the adoption of a new constitutional proposal, should continue to perform its functions in accordance with its legislative, control and elective function until the end of the regular mandate, which is not unusual for modern parliamentary democracies.

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The Constituent Assembly is a way to show the citizens that there is a unity of the most important political actors in Serbia on that the state should be governed in a way which is closest to

the citizens, and that all inconsistencies and shortcomings of the previous constitution should be changed. Thus, after nearly eight years of inefficiency, instead of *mallum discordiae*, the supreme law would become an act *based on real legitimacy which the citizens would directly ratify in two ways:*

1. by their vote in parliamentary elections given to the political parties which have already announced they will enter into the process of Constitution amendment;
2. by voting in a referendum on the constitutional amendments and a new proposal of the constitutional text.

Thus, *the partial legitimacy of the current Constitution* would be completely overcome, and it would, from the shadow of its illegitimacy, finally be ratified by citizens as holders of sovereignty. At the same time, its would be of permanent, rather than temporary nature, as it was already presented to citizens in 2006 during the referendum campaign.

4.3. Public Debate vs. Debate in Public

The Constitution of 2006 did not stipulate that a public debate is required ahead of the constitutional revision. It might reasonably cause skepticism that we could get a new Constitution or revise the current one *ad hoc*, without a proper and extensive public debate. A serious public debate must fulfill certain important conditions:

1. Duration – a public debate should not be too short, as the one held in 2006, when, in fact, it did not exist. This means that it takes a minimum period of six months up to a year to determine the best solutions for regulating Serbia as a state;
2. Expertise – rather than the political approach, the opinion on constitutional amendments should be first given by the professional community, made up of the representatives of the academic community, experts in constitutional and legal issues, the political, legal and economic system and experts in human rights and civil freedoms. This, of course, does not exclude political parties, which will certainly be directly involved in the process of constitutional revision through the parliament committee on constitutional affairs;
3. The public – instead of the previous *debate in public*, a public debate should really have *a public character*. Citizens should be clearly presented and explained the constitutional solutions, supported by the media and political actors themselves, who should eventually invite citizens to support the constitutional amendments in a referendum. There are several modes which may achieve adequate public involvement – public panels, public hearings, media presentations of proposed constitutional solutions, platforms and the like.

4.4. Referendum on Ratifying Constitutional Amendments

In accordance with the current Constitution, the deadline for citizens' voting in a referendum on constitutional amendments is 60 days from the adoption of the act on the Constitution amendment by the National Assembly of the Republic of Serbia. Bearing in mind that this is the longest defined term, we believe that this deadline should be met so that it would be the maximum one possible in order to ensure the quality of the referendum campaign.

A new referendum campaign should be completely different from the previous one in 2006 in terms of quality. This means that the media must provide equal treatment to all those who are *against* constitutional changes, as well as to those who are *in favor of* constitutional amendments. Only equal participation of both sides guarantees the legitimacy of a new Constitution and would verify that democratic system in Serbia has consolidated.

Churches and religious communities should participate in the public debate on the constitutional amendments, as well as representatives of civil society. We believe that churches and religious communities should not participate in an active campaign in the process of voting on constitutional amendments, complying with the constitutional principle on a secular state and the seclusion of the state and churches and religious communities.

4.5. The New Constitution or the Amendments to the Current One?

As it has been determined by some judges of the Constitutional Court of Serbia, the present Constitution cannot be changed by the amendments. Existence of several colliding constitutional norms, inadequate linguistic and technical revision of the text, a number of inconsistencies of the political, legal and economic order constituted in such a way, are some of the main reasons of merits for *the adoption of the new Constitution*.

Bearing in mind that the procedure for the adoption of the previous Constitution was *grossly violated on several occasions*, and that it is very questionable how many people really supported the new Constitution, it is necessary to completely remove the shadow of illegitimacy of the current Constitution, and it is possible, in our opinion, only by a factual constituent assembly, an extensive public debate, and then by a free and fair referendum campaign and citizens voting in a referendum.

Amendments to the current Constitution could improve it in terms of merit, but the way in which it was originally adopted would still cast a big shadow on all the positive changes occurring within it. On the other hand, all parliamentary political parties after the election in 2012, except the Democratic Party of Serbia (DSS), endorsed the constitutional revision and they have already made a number of comments and suggestions for the Constitution amendment.

After the signing and ratification of the Brussels agreement between the Prime Minister of the Republic of Serbia and the Prime Minister of Kosovo, there was a new *constitutional moment* that should be used to change the current Constitution. Serbia is legally obliged to adopt the constitutional law on regulating the substantial autonomy of Kosovo and Metohija, and accordingly create a number of legal acts (laws and bylaws) which transfer the responsibilities to the Kosovo authorities, in accordance with the Brussels Agreement.

On the other hand, Serbia is facing the start of negotiations with the EU on its full membership, which necessarily means that the constitutional norms have to be adjusted to European legal standards and frameworks, which is common for the accession countries (e.g. Slovenia changed its constitution twice before the EU accession).

All of these are just some of the reasons why we believe that only a new Constitution, adopted in this way, can contribute to solving some practical problems, strengthening and consolidating the democratic system in the Republic of Serbia.

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How to make a new Constitution:
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Publisher

European Movement in Serbia
31 Kralja Milana St.
Belgrade
www.emins.org

For the publisher

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Design

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ISBN 978-86-82391-92-0

Belgrade, November 2013

Policy paper *How to make a new Constitution: the merit and the procedure* is written as part of the project *Awaiting the new Constitution* within the Research Forum of the European Movement in Serbia.
The project is financially supported by the Embassy of the Kingdom of the Netherlands to Serbia, as part of the MATRA Program of the Dutch Ministry for Foreign Affairs.
Research Forum of the European Movement in Serbia is supported by Think Tank Fund Program of the Open Society Foundations.