Constitutional Revision in Serbia: Aspects and Possible Solutions
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Abstract
The text analyses the genesis of legal and political circumstances surrounding the adoption of the Constitution of the Republic of Serbia in 2006, with particular attention to the legitimacy of the Constitution and legitimacy of all political processes in the political community which was constituted in that way. The authors highlighted legitimacy as the crucial reason for revision of the existing Constitution. The text particularly analyses three possible scenarios of constitutional revision in Serbia. The conclusion is that the best of all available solutions is to call an election for the Constituent Assembly which would then create a new text of the highest legal document of the Republic of Serbia.

Keywords:
constitution, constitutional revision, Constituent Assembly, European integration

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Introduction

On the twelfth anniversary of the beginning of political, legal and economic transition of Serbia we are still questioning its identity as an incomplete political community. In spite of the fact that the new Constitution of Serbia which was supposed to answer the question of who we are was enacted in 2006, we are still facing identity dilemmas which, as a rule, dominate in environments of a non-constitutional and non-legal state. That means that the so-called Mitrovdan Constitution does not provide answers to one of the basic questions which any constitution needs to answer - the question of identity.

One of the functions of a constitution in modern democracies is its regulatory function. It secures order in the political community and creates conditions for free mutual life of individuals regardless of the diversity of ideas, opinions and world views. This function is fulfilled when a political community which was established by the text of a corresponding constitution has a significant level of legal predictability of consequences of an action. A prerequisite for such situation is that there are no contradictions in the text of the constitution and that there is a clearly presented system of principles and values on which the community is based. In our opinion, the Constitution of Serbia from 2006 does not fulfil its regulatory function. On the contrary, the way in which it was adopted and its content which obviously does not correspond to the real-life situation contribute to the legal mess.

Another problem is the part of the Constitution which regulates the issues of human rights and limitation of authority. An extensive approach to definition of the scope of human rights and inadequate and vague terminology created a confusion which resulted in elimination of the possibility of fully respecting even basic human rights and liberties. When provisions about mechanisms of limitation of authority which are also deficient or incomplete are added to that, we can see the shortcomings of the existing Constitution in terms of another of its important functions – the function of limitation of authority.

Political processes in Serbia before the Mitrovdan Constitution was adopted indicated that it was necessary to change the Constitution of Serbia from 1990. Six years of implementation of provisions of the new Constitution from 2006 has not resulted in adequate changes. Unwillingness of political elites and their essential inconsistency in creating conditions for Serbia’s organization as a modern country resulted in an increase of political apathy among citizens and a deep crisis of legitimacy whose crucial paradigm is the result of general elections in May 2012.

Even though it was clear in 2006 that the crisis of the society and political community in Serbia will not slacken in the years to come, the problem could have been solved then to a great extent by an adequate new highest legal document which had been spoken about since political changes in 2000. Instead of becoming a document which would bring citizens together in expression of their agreement with the new foundations of political authority and instead of becoming a document which would bring citizens together, the Constitution became a cause of division along numerous lines.
the new political organization of the Republic, the Constitution, unfortunately, became an apple of discord and the cause of division along numerous lines. In that respect, decisions of the Constitutional Court of Serbia which are final and which must be respected are only a reflection of imperfection and incompleteness of the constitutional act.

Legitimacy of the constitutional act was additionally called into question by the opinion of independent observers who disclosed all irregularities in the procedure of conducting the referendum on ratification of the new constitution. Forgetting that there is no consolidation of democratic order without a legitimate procedure, political authorities from that time and most participants in the society implicitly supported something which was from the aspect of legitimacy, to say the least, a disputable constitutional act. This crisis of legitimacy quite logically resulted in the next one – decreasing interest of citizens for election processes and a large number of spoilt or blank ballots in the 2012 elections. A consequence of this apathy is the fact that a president was appointed to the office with less than 50% of votes from participating voters for the first time in history. That is another problem for both presidential candidates and for all political parties in Serbia.

That is why our analysis did not deal with questions of substance, i.e. specific solutions predicted by the Constitution, since we consider that it must be a subject of a separate public debate which would include all political subjects, representatives of autonomous provinces, constitutional experts, but also the academic community and the lay public. The focus of our analysis is exactly on the procedure which needs to be an integral part of any consolidated democracy and which would allow the deep crisis of legitimacy to be overcome.


1.1. Legal Grounds

The Referendum on ratification of the new Constitution of the Republic of Serbia was supposed to be called under the terms from the previous Constitution of 1990. That highest legal document provided that a constitutional revision could be performed if the parliament supported the new text of the Constitution by a two-thirds majority after which an absolute majority of citizens registered in the electoral roll needed to support constitutional changes in a referendum. ¹

A very common objection to the 1990 Constitution was that its revision was almost impossible since it is extremely difficult to motivate an absolute majority of citizens to give their opinion on any matter, including the most important ones. However, democratic changes which occurred in 2000 and the process of stabilization and association of Serbia to the European Union made constitutional revision necessary in order for the highest legal document of Serbia to be harmonized with European legal standards in terms of the democratic system of separation of powers and promotion of human, minority and civil rights.

However, we should point out that the referendum would probably not have been held if it had not been for Montenegro’s decision to withdraw from the State Union of Serbia and Montenegro which was also reached in a referendum and was based on Montenegro’s right from the Constitutional Charter of Serbia and Montenegro.

1.2. Political Circumstances

Political circumstances surrounding the calling of the referendum can roughly be classified into three groups: devolution of the state union, the process of stabilization and association and political promises made by the highest officials of ruling political parties in Serbia.

The State Union of Serbia and Montenegro whose life span had been limited to three years when it was founded, was dissolved in May 2006. That was a period during which there was a moratorium on calling a referendum in any of the member states. When the period expired Montenegro renewed its sovereignty, so Serbia became the legal successor of the previous state in accordance with the Constitutional Charter and in that way it renewed its sovereignty as well.

Keeping in mind that the previous constitution from 1990 was the Constitution of Serbia as a federal unit, not as a sovereign independent country, the practical necessity for revision of the text was obvious. Agreement between the government and almost all opposition parties indicated that there is a need for the text of the constitution to be adopted again instead of just making corrections to the old one.

The process of Serbia's stabilization and association to the European Union clearly imposed the need for the highest legal document to be harmonized with European standards. Therefore, it was unacceptable for the text of the constitution to still include death sentence as a form of punishment and it was necessary to extend the scope of human, civil and minority rights and give more constitutional importance to independent regulatory bodies which had been only defined by laws up to that time. That is why great political support to constitutional changes and the referendum came straight from the European Union in spite of numerous objections to the text of the constitution made by the Council of Europe's Venice Commission and in spite of the way in which the referendum was held.

Most of the ruling political parties had been promising for years that Serbia would get a new democratic constitution thanks to them. That is why the majority of key political parties during political cohabitation of the President of the Republic Boris Tadic and the Prime Minister, Vojislav Kostunica, could benefit from enactment of the new Constitution only in terms of fulfillment of their political promises. Support to constitutional changes in 2006 was given by almost all social institutions and most public figures including the patriarch.

Finally, the political moment which we will consider separately, but which actually permeated all of the above, was the issue of Kosovo's independence. Near the end of 2006 it was already clear that it was a matter of time when Kosovo would declare its independence from Serbia, so political leaders emphasized that enactment of a new Constitution whose preamble would state that Kosovo is an inseparable part of Serbia would strengthen the fight to keep Kosovo within Serbia.

The process of creation of the text of the constitution was joined by teams of the president of the Republic, Prime Minister and the biggest opposition party - Vojislav Seselj's Serbian Radical Party. There was almost no public debate on the text of the constitution, so what could often be heard in public discourse was that the voting in the referendum lasted longer than public democratic debate about it. Constitutional experts from three different teams tried to make a compromise between different perspectives on crucial issues related to organization of the state (from the position of autonomous provinces, change of the Constitution, way of electing members of parliament to state symbols).

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3 Although none of the proposers of the Constitution told the public that preamble had no legal effect.
The result of that compromise was a draft of the new Constitution of Republic of Serbia which was adopted by the National Assembly on September 30, 2006 and was the subject of the referendum held on October 28 and 29 of the same year.

### 1.3. Referendum Results

In an environment of „broad social consensus“ and with substantial manipulation with the issue of Kosovo as the crucial reason for enactment of the new Constitution of Serbia, a two-day referendum was held in which citizens were asked whether they were in favour of ratifying the new Constitution of the Republic of Serbia. Results of the referendum vote are shown in table 1.

<table>
<thead>
<tr>
<th>Voter turnout</th>
<th>3,645,517 (54.91%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pro</td>
<td>3,521,724 (53.04%)</td>
</tr>
<tr>
<td>Con</td>
<td>1.47%</td>
</tr>
</tbody>
</table>

**Table 1**

This two-day vote did not guarantee the best possible control in all polling stations. There were cases of multiple voting, voting without required identity documents, but also the fact that turnout in the last three hours of voting on the second day of the referendum was the same as during the previous day and a half.

The referendum was not preceded by the so-called referendum silence, which means that pro or con referendum agitation also lasted during the period in which citizens were still able to vote. The fact that the patriarch of the Serbian Orthodox Church went to the polls for the first time in the history of his government of the church was an additional call to the citizens to support the new constitution of Serbia.

### 1.4. The Outcome and Consequences of the Referendum

A successful referendum and official results which showed that citizens were in favour of the new Constitution allowed it to be enacted and to enter into force. The new Constitution of the Republic of Serbia was declared on November 8, 2006, in the presence of numerous foreign diplomatic representatives, representatives of all political parties, military, church and religious communities and numerous distinguished public figures.

When it comes to the 2006 referendum, we can say that it partially served its purpose. Precisely, the referendum was formally a success and the citizens (with numerous irregularities) managed to enact the new Constitution of Serbia which replaced the old Constitution from 1990. However, even though keeping Kosovo and Metohija a part of Serbia was cited as one of the main reasons for enactment of the new Constitution, the Constitution did not have any significance in practical terms and did not prevent Kosovo’s secession from Serbia.

On the contrary, in February 2008 representatives of the Albanian people in Kosovo unilaterally declared independence from Serbia and that independence was recognized by almost half of the United Nations member countries by 2012. Those countries include all members of the European Union except Romania, Cyprus, Slovakia, Greece and Spain. It was already clear back then that there were no significant practical effects of the Constitution on solution to the crisis of Kosovo, except the fact that there was a constitutional obligation of any political authority to devote itself to preservation of sovereignty and territorial integrity of Serbia.

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4 The Supreme Court of Serbia got 191 objections on implementation of the referendum procedure (www.rts.rs, November 6, 2006)
Unfortunately, the second referendum in the recent history of Serbia also did not show maturity of the political community and its democratic consolidation. Unequal representation of all those being in favour or against constitutional revision, two-day long vote without proper control, statistical estimates on specificities of referendum results and involvement of the church into a state matter *par excellance* were only some of the crucial problems which indicated that the society in Serbia in 2006 was not mature enough for a proper and direct democracy which exists in most countries of the modern world nowadays.

Seen from a distance of six years, the effects achieved by the new Constitution of Serbia are far from those which were expected at the time when it was declared. The political community did not get additional legitimacy by adoption of the highest legal document, nor is the Autonomous Province of Kosovo and Metohija today more a part of the Republic of Serbia than it was in 2006, on the contrary.

It seems that the political community is suffering from the problem of legitimacy crisis today more than it did ever before, which is also shown by the results of general elections held in spring of 2012, so constitutional revision seems as a necessary solution in order to solve this significant problem properly in the foreseeable future.

### 2. Options of Changing the Constitution

One of the main advantages of the new constitutional text which was often stated in political circles is that it can be changed much more easily than the previous Constitution of 1990. The procedure of changing the Constitution was defined by article 203 of the Constitution of the Republic of Serbia.

It precisely defines that a proposition for making changes to the Constitution can be submitted by: a third of the total number of members of the parliament, the President of the Republic, the Government of the Republic of Serbia or at least 150,000 voters.\(^5\) The National Assembly is then supposed to vote on the change of the highest legal document by a two-thirds majority, after which the new proposition of the Constitution can (in specific cases which are listed in this article it must) be put forward in the referendum to have it ratified by citizens.

Having in mind that all listed shortcomings of the existing constitutional text indicate that it is necessary to change not only the preamble, but also the part about organization of the state (precisely, organization of government), the question of position of autonomous provinces within the Republic of Serbia and to make some changes and improvements in the catalogue of human and civil rights and liberties, it is clear that a new draft of the Constitution would have to be put forward in a referendum to have it ratified by citizens.

Taking all this into consideration, as well as the aspect of European integration of Serbia, we can see three possible scenarios of changing the existing Constitution of the Republic of Serbia:

- a. change of the existing Constitution of the Republic of Serbia by amendments in order to improve it and harmonize it with international legal standards;
- b. enactment of a completely new Constitution of the Republic of Serbia after an extensive public debate and by declaring the current National Assembly of the Republic of Serbia as constituent;
- c. enactment of a completely new Constitution of the Republic of Serbia after an extensive public debate, while the Constitution would be adopted and proposed to citizens by the Constituent Assembly.

\(^5\) Constitution of the Republic of Serbia, article 203 (Official Gazette of the Republic of Serbia, No. 98/06).
2.1. Change of the Existing Constitution of the Republic of Serbia by Amendments

The current Constitution provides the possibility of making subsequent changes to it. Framers of the Constitution had in mind that the so-called Mitrovdan Constitution is an interim solution and that it would definitely need to be changed or amended due to the process of Serbia’s association and accession to the European Union, as it was the case with some other countries in the region (such as Slovenia, which had to change it highest legal document twice before it became a member of the European Union).

In order to avoid the need for calling a referendum for smaller changes and amendments to the constitutional text, framers of the Constitution stipulated that a qualified two-thirds majority is a sufficient basis of legitimacy to change those provisions of the Constitution which do not interfere with the preamble, human and minority rights and civil liberties, organization of government and mechanisms of making changes to the Constitution. Such constitutional and legal solution actually suggests that a referendum will certainly be called whenever the Constitution is changed and in whichever of its segments.

The first scenario would, in the current political circumstances, require consent of all relevant parliamentary political parties and social groups on all necessities of changing the constitutional text. The atypical reference to a part of the country in the preamble, the unnecessary list of competences of the Republic of Serbia in a country which is unitary, as well as the issue of the level of autonomy and rights of autonomous provinces (so-called substantial and non-substantial autonomy) in Serbia after the ruling of the Constitutional Court of Serbia that the Law on Transfer of Competences to the Autonomous Province of Vojvodina is not in accordance with the Constitution are only some of the burning issues about which an agreement should be made.

The key advantage of such scenario is lower political tension among political actors in Serbia and easier adoption of changes in the referendum in an atmosphere which would, as political leaders agree, be probably like the one in 2006. Parties which are against changes of the Constitution would argue that the constitution remained the same and that it was only complemented and improved by amendments during the course of time. Others would probably argue that such change of the Constitution is the only possible one in the environment of political reality.

However, such change of the constitutional text would not solve the key issue due to which, in our opinion, it is necessary to change the Constitution and that is the issue of legitimacy. Legitimacy of the 2006 Constitution is very questionable, which means that its change by amendments would still cast a big shadow on an act that is supposed to reflect the unity of all citizens and the entire country and as such be the base and the foundation of national and civic identity.

2.2. Enactment of a New Constitution by Declaring the Current Assembly as Constituent

Since a change by amendments would not contribute to legitimacy of the constitutional text which was changed in that way, the other option is to declare the current National Assembly which was constituted after general elections in May as Constituent at some point during its term.
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Such practice would not be unknown in terms of development of modern parliamentary democracy, especially if such act made by parliamentarians was based on a broad political and social consensus about the necessity of adoption of a new highest legal document of the country. The National Assembly is, *ex constitutione*, one of the authorized proposers of changes to the Constitution of the republic of Serbia, which means that such solution would be in accordance with the constitutional and legal framework of the political system in Serbia.

One of the arguments in favour of such solution could seemingly be of economic nature. Precisely, declaration of the current National Assembly as constituent would mean that the parliament has a chance to survive during its entire four-year term, so there would be no early elections in an environment of financial crisis. However, since enactment of a new Constitution would certainly require calling a referendum and direct voting by citizens on that issue, financial reasons can no longer be seen as a part of the populist excuse.

In our opinion, the key argument why the current National Assembly should not and must not be made Constituent is the question of the parliament’s legitimacy to decide on that issue. Although the President of the Republic and the National Assembly are the only directly elected political institutions in the country, the fact is that the citizens’ voting in general elections in May was much more based on their socio-economic beliefs and was more under the influence of the difficult economic situation than it was based on constitutional platforms of political parties and coalitions.

None of the political groups which nominated their lists in the elections and none of the presidential candidates primarily emphasized the necessity of changing the existing Constitution in their campaigns. Therefore it would be a kind of deception for the citizens to declare the current National Assembly as constituent. Consequently, a new Constitution would be enacted by the parliament that is not able to solve the main problem of the existing constitution - democratic legitimacy, so the legitimacy would need to be verified *post festum* in a referendum on ratification of the new constitutional act. For all these reasons, even though there had been several ideas of making the parliament constituent before the Mitrovdan Constitution was adopted, the capacity of the legislative body for that does not exist *in concreto*.

### 2.3. Enactment of a New Constitution after Calling Elections for the Constituent Assembly

Representatives of Democratic Party were the only ones in Serbia’s modern political life who occasionally highlighted that the Constitution should be adopted through activities of the Constituent Assembly, although those views were expressed very timidly shortly before the change of the 1990 Constitution. Convocation of a Constituent Assembly itself usually causes wrong associations of revolutionary times with special emphasis on a sort of revolutionary change and discontinuity with some of the previous political regimes.

However, what is important to emphasize is that the idea of convocation of Constituent Assembly is essentially based on the concept of legitimacy of the emerging constitutional text. Since this issue is not regulated by the Constitution - the 2006 Constitution has no reference of the possibility of forming a Constituent Assembly, the National Assembly of the Republic of Serbia would have to adopt the Law on Constituent Assembly. The Law would clearly define when the parliament would be dissolved and elections for the Constituent Assembly would be called, while the law could be adopted by a qualified two-thirds majority after reaching a political consensus in the parliament.

If elections for the Constituent Assembly were called, citizens would not only vote for political programs of parties, but primarily for constitutional solutions offered by political subjects in terms of territorial organization of the country, its
political and economic order or its catalogue of human and civil rights and liberties. Moreover, the electoral campaign would be the right place for a public debate with representatives of all political options and civil society about alternative constitutional solutions in certain fields, in accordance with suggestions made by the Venice Commission of the Council of Europe, the European Union and other international organizations. This is how the Constituent Assembly would provide itself the highest level of democratic legitimacy.

One of the main counter-arguments expressed by the expert and political public in Serbia is that the Constituent Assembly would be dissolved after being constituted, so new elections would have to be organized, which would cause significant costs for the country. There is an alternative in this case as well. Precisely, the Constituent Assembly can make a decision by acclamation to continue working as the highest legislative body of the Republic of Serbia in its full mandate. The Assembly would be entitled to do so thanks to the legitimacy which it got directly from citizens.

According to our estimate, the political reality will make constitutional revision in Serbia necessary in the first half of the next decade. Although it must be done in order for the constitutional text to completely be harmonized with international legal and political standards (without considering each specific new provision of such Constitution), it is necessary that this text draws its strength from legitimacy which it got from citizens.

The Constitution cannot provide answers to any of the essential questions about the organization of the state, its identity, citizens’ rights and liberties without such legitimacy, nor can it deserve to last for several centuries, deserve respect and prevent any possible attempt of seizure of power and collapse of a consolidating democracy.

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