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WHAT SHOULD SERBIAN CONSTITUTION BE LIKE

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Abstract. *Even if it does meet all requirements set before it, this does not mean the Serbian Constitution will be ideal. De Smith claimed that there is no predefined stereotype of an ideal constitution. He believed the form and content of the constitution would depend, first, on the political balance of power at the moment in which the constitution is proclaimed, second, on the commonsensical understanding of how practically useful certain constitutional solutions are, third, on traditional patterns available to politicians and their advisors writing the constitution. DeGaulle was referring to the same thing in his famous 1946 Bayeux Speech, where he quoted the response of the wise Solon to the question of a Greek, inquiring which constitution was the best. Solon replied: "First tell me for which people and for what epoch."*

Key words: *Serbian new constitution, short constitution, normative constitution, democratic constitution, firm constitution, modern constitution.*

Leaving aside opinions on how certain issues of constitutional matter should be covered in the future Serbian Constitution, this constitution should have the following general characteristics.

The Serbian Constitution should be a **new constitution**. It should follow from the highest state power standing above other state powers, and this power is *constituting*, for it defines rules under which *constituted* powers are formed. French authors contend that constituting power assumes two forms. According to Prelot, the first one occurs when the constituting authority provides a constitution to the country which has not by then had one, or which, after the adoption of the new one, no longer has the same constitution, which now establishes rules that are not initial, yet are novel enough, since the state and the regime originate from them. This is originary constituting power.[1] In the words of Michel Henri Fabre, this authority pronounces the new constitution "in an initial, autonomous, and total manner".[2] The second form is the constituting authority which changes

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[1] M. Prélot, J. Boulouis, Institutions politiques et droit constitutionnel, Paris, 1980, p. 214.

[2] M.- H. Fabre, Principes républicains de droit constitutionnel, Paris, 1977, p. 153.

the valid constitution, according to the rules this constitution itself contains. This constituting authority stems from the constitution, which provides for it and regularizes it. This is why it is also called derivative constitutional authority, or instituted constituent power (*pouvoir constituant institué*). Its only purpose is the revision of the valid constitution.

The Serbian Constitution should be proclaimed by the constituting authority, i.e. Constituent Assembly. This requirement follows from a number of reasons. The current Constitution of the Republic of Serbia primarily had a protective purpose, although it did represent a radical discontinuation of the previous constitutional system. In the period of anticipated secession of republics of the former Yugoslav federation, it aimed to protect the Republic of Serbia, deprive its two autonomous provinces of statehood elements, and hence of their properties of secessible entities, 'constitutive elements of Yugoslav federalism', as they were called at the time. Finally, it aimed to bind the two provinces more tightly to their republic. In the meantime, this second Yugoslavia ceased to exist, and the Republic of Serbia became a member state in the state union with the Republic of Montenegro, thus forming a real union with it. As it may be, opinions of the 1990 Constitution of the Republic of Serbia are opposed: that it marked the beginning of an end to the former Yugoslavia; that it marked the end of socialism and self-rule; that, in the opinion of a university professor, it instituted the President of the Republic in such a way as to promote a Caesarean republic; that, in the opinion of a then opposition politician, the institution of the President of the Republic in this constitution was "but a symbolical position", etc. The state and political being of the country has changed, yet the constitution has remained the same. This has in turn put into question the realistic nature of the constitution.

The Serbian Constitution should be a **short constitution**. As far back as in McCulloh v. Maryland, Chief Justice Marshall pointed out that a constitution of excessive prolixity "could scarcely be embraced by the human mind" so that it would "probably never be understood by the public". And Kenneth Wheare claimed that the "basic characteristic of an ideal form of constitution is that it should be as short as possible". Asked what this constitution should contain, Wheare provided the simple response: "the very minimum, as long as the minimum is in the form of legal norms."[3] C. F. Strong laconically defined that the object of the constitution is to "limit the self-will of government, ensure the rights of those ruled over, and determine the scope of action of sovereign authority".[4] In other words, the constitution should be the principal act, rather than an omnibus act. Indeed, in classic democracies, in the written act labelled 'constitution', one never finds all the substantive rules of the constitution, but only the most important ones.

Regardless of its various properties, the constitution is primarily and exclusively a legal act containing legal provisions. As Wheare insists, it should not in any case by a manifesto, a religious confession, a proclamation of a political ideal, or a state charter. The constitution should restrict itself to the definition of legal provisions only, and should not expose opinions, aspirations, directives, or politics. If it is limited to legal provisions constituting the supreme act, this constitution will contain but a few of them – yet, they will be general and fundamental.[5] In the Constitution, there is no room for emotions or eloquence.

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[3] K. C. Wheare, Modern Constitutions, London, 1967, p. 33-34.
[4] C. F. Strong, Modern Political Constitutions, London, 1970, p. 12.
[5] K. C. Wheare, op. cit., p. 50.

Charles Beard also vouched for a short constitution, explaining: "The general provisions must remain unchanged for generations, while details must often change."[6] Brevity of a constitution accounts for another quality – its clarity. The two terms are interrelated. Our national scholar, Jovicic, insisted that the text of the constitution should be "clear, accessible, and easily understandable".[7]

In that respect, the conception of the Constitution of the Fifth French Republic seems to be the most appropriate: a short constitution, a historic declaration of human rights, whose legal validity is above that of the constitution, and organic acts. This is the theoretical constitutional model of Raimond Carré de Malberg – a short constitution which is made complete through organic acts, i.e. acts organizing the functioning of institutions which have previously been established in the constitution, acts which are, in terms of legal validity, positioned between the constitution and ordinary acts.[8]

Georges Burdeau insists on two organic act concepts, which assume different positions in the hierarchy of legal acts. According to the first one, organic acts are formally normal acts, but substantively, they are a constitution, since they regulate constitutional matter, i.e. organization and functioning of public authorities. Obviously, this fact does not result in any legal consequences. The latter position holds that organic acts are regulations standing *between* the constitution and ordinary acts in the legal system of a country. This is the meaning of the concept of organic acts in France today. Organic acts are such acts that complete and specify the constitution. They are adopted or amended in a specific procedure, much stricter than the procedure for passing regular acts.[9]

Indeed, even Tacitus glorified the property of *imperatoria brevitas*, the brevity of the emperor. A constitution should be a masterpiece of conciseness and act of impeccable, devastating logic.

The Serbian Constitution should be a **normative constitution**, in the meaning given to this category of constitutions by Karl Loewenstein. "In order for a constitution to be alive – Loewenstein says – it is not enough that it be legally well-formed; in order for it to be real and effective, it must really be upheld by all it pertains to; it must be integrated into society in the state. (…) Let us make a simple comparison: the constitution is a suit, which fits us, and which we actually wear."[10] Only a normative constitution stands a chance of being a real constitution, a constitution which is enacted in life. For this reason, the text of the constitution must be purged so as not to contain ideological provisions. Political ideologies should change, and the constitution should last. An established and long-ruling ideology is the greatest danger to a constitution and constitutional rule. At an important 1964 conference, DeGaulle stated that the constitution was "spirit, institutions, practice". A written constitution, even if this should be on a parchment, is worth only if it is enacted.

The Serbian Constitution should be a **democratic constitution**. A democratic constitution is the one in which power is limited and responsible. Kenneth Wheare claimed constitution stemmed from the conviction of limited power,[11] and Jean Gicquel said democ-

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[6] Ch. Beard, American Government and Politics, New York, 1955, p. 548.
[7] M. Jovicic, O Ustavu (About Constitution), Belgrade, 1977, p. 182.
[8] R. Carré de Malberg, Théorie générale de l'Etat, tome deuxième, Paris, 1922, p. 571.
[9] G. Burdeau, F. Hamon, M. Troper, Droit constitutionnel, Paris, 1995, p. 56-57.
[10] K. Loewenstein, Political Power and the Governmental Process, Chicago, 1957, p. 148.
[11] K. C. Wheare, op. cit., p. 7.

ratic constitution was the one "rationalizing power and state".[12] Elaborating on these thoughts, Hilary Barnett believes there is constitutionalism when power is limited, when it is divided, in a word, when the doctrine of responsible government works in practice. The same idea is supported in the often quoted sentence by Thomas Paine: "The constitution of a country is not the act of its government, but of a people constituting a government, and the power without constitution is a force without rights. (…) The constitution precedes power, power is but a creation of the constitution." And Bernard Chantebout says the constitution is not only the principal legal act in a country, but it is also an act restricting power in the state, and the power of the state in society. A constitution institutionalizes power, but also puts it into legal framework, thus restricting it.[12a)] The essence of the constitution lies in the limitation of power. This position is also taken by C. F. Strong, when he says: "Just like one says that the human body has constitution, which contains organs harmoniously functioning when the body is healthy, one can say of the state, i.e. body political, that it has a constitution, when its organs and their functions are clearly defined, and not dependent on, say, whims of a despot"."[13]

Furthering these ideas, Hilary Barnett believes there is constitutionalism when power is restricted, when it is divided, in a word, when the doctrine of responsible government works in practice.[14] It seems that the best definition of constitutionalism was given by Wheare, when he said: "The real justification for constitutions, the original idea they are based on, is that of restriction of power and request to those who rule to obey the law and legal norms." Also related to this definition is Wheare's distinction between constitutional rule and rule accorded with the constitution. Constitutional rule occurs when power is limited and responsible, and power accorded with the constitution is the power acting upon constitutional norms in such a way that it is relieved of any responsibility. This means democracy is a key condition of constitutional rule. In this respect, Wheare holds that only democracy which means freedom and equality of citizens can produce constitutional rule. Limited power, i.e. constitutional rule, can exist not only if citizens are free to vote, because the general right to vote can lead to the tyranny of the majority, minority, or only one man, but also if they are free to vote for a government alternative to the current one, and if civil rights with regard to the state are guaranteed. In that sense, democratic and constitutional rule mean the same thing. The prerequisite for democratic rule is prevention of absolute power, which is achieved through its division, both horizontal and vertical. The separation of the legislature and the executive, where the former is controlled and limited by constitutional judiciary, and the latter by parliamentary majority and strong local self-government, represents a substantial limitation to state power.

Michele Henri Fabre holds[15] that constitutional rule or constitutional regime includes four elements. First, the constitution should be the supreme legal act of a country. What it proclaims is to be unquestionable. The constitution creates a separate domain, to which power has no access. The constitution limits power **from above**. The second element is that state power must be divided. A divided power is a moderate power, a power no longer dangerous to freedom. By dividing it, one limits power from within. Division of power creates

[12] J. Gicquel, Droit constitutionnel et institutions politiques, Paris, 1997, p. 168.
[12a)] B. Chantebout, Droit constitutionnel et science politique, Paris, 1882, p. 25.
[13] C. F. Strong, op. cit., p. 12.
[14] H. Barnett, Constitutional and Administrative Law, London, 2000, p. 6.
[15] M. H. Fabre, op. cit., p. 13-14.

the best soil for the "growth of this fragile plant with the miraculous flower that we call liberty". The third element is that state power must be legal, a *de iure* power. The *de facto* power is made through revolution, illegally. The legal power theory aims to limit power at its roots. The fourth element is that power must be legitimate. A legitimate power is that which has the concord of the majority. A legitimate power becomes illegitimate once its policy fails to coincide with public opinion. The power legitimacy theory limits power **from below.**

The Serbian Constitution must be a **firm constitution**. A firm constitution is the constitution in the formal sense. Such a constitution must, first, be given in the written form, but must also inhere a specific procedure for adoption or revision, which would make it durable and protect it from facile changes. The legal validity of a firm constitution is above that of subsidiary legal acts. Charles Eisenmann was right to remark on the consequences of a firm constitution: "As the principle of legality means that only a legal act can derogate a legal act, the principle of constitutionality means that only a constitutional act can derogate a constitutional act."[16] As noted by Michele Henri Fabre, while the classical division of power refrains itself from making a distinction between powers instituted by the constitution, in the firm constitutional regime, power is segmented into constituted powers, powers constituted by the constitution, and constituting power, which institutes the constitution.[17] The rigidity of the constitution is a consequence of the distinction made between the constituent and constituting powers. The creator of the constitution is constituent power.

Firmness of a constitution is not but a formal property of this act, but also a substantial property of constitutional rule. It also means limitation to the all-power of the parliament by something extrinsic to it. Limitation of power, which is the ultimate function of the constitution, is largely achieved through a firm constitution. If there are acts that the parliament cannot pass in ordinary legislative procedure, then the parliament does not hold supreme power. In that case, there is an act higher than a regular act. This legality of the constitution, even when it is adopted by the parliament with a majority larger than usual, comes from this separate assembly, whose task is not to exercise mere legislative power, but to pass the legacy which will help exercise power, a document which will provide boundaries to ordinary legislative power. Even when the text of the constitution, upon its adoption, may be changed by the regular parliament, this will be allowed to be done only subject to specific limitations. There are constitutions whose parts or principles are even proclaimed unchangeable, where the institution proclaiming the constitution usually puts these principles under the heading "Fundamental Law".

Michel Henri Fabre holds[18] that supremacy of the firm constitution results in three legal consequences. First, that rights and freedoms proclaimed by such a constitution are unbreachable. Second, that legal acts adopted in the parliament are sanctioned, due to the control of constitutionality of legal acts. Third, that the parliament, which was granted legislative power by the constitution, cannot confer this power on to the government, which means that the firm constitution deems illegal the procedure in which bylaws assume the power of laws.

All stated above does not entail that changes of the constitution should be prevented at all costs. It only entails, to paraphrase Pierre Wigny, that the constitution is a sacred text, which should be touched rarely, and, even then, by a trembling hand.[19]

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[16] C. Eisenmann, La justice constitutionnelle et la Haute Cour constitutionnelle d'Autriche, Paris, 1928, p. 14.
[17] M.-H. Fabre, op. cit., p. 153.
[18] M.-H. Fabre, op. cit., p. 158.
[19] P. Wigny, Cours de droit constitutionnel, Bruxelles, tome premier, 1952, p. 170.

The Serbian Constitution must be a **modern constitution**. In addition to power, man should be its principal subject matter. A constitution not only regulates state power, but also solemnly proclaims positive or negative duties that the state has in relation to individuals or certain social groups. In the early decades of the 20th century already, thus, the traditional constitutional matter was breached. A constitution is not only an act which organizes the state to carry out state functions, i.e. certain functions of state power. The citizen is not only a voter. This modern understanding of the constitution is found in the definitions of constitution by well-known authors. James Brice defines the constitution as a "framework of political society, organized through and by the law, a society in which durable institutions with recognized functions and unequivocal rights are instituted".[20] For Strong, the constitution is "a series of principles that manage the authority of the government, rights of those ruled upon, and their interrelations." [21]

Even if it does meet all requirements set before it, this does not mean the Serbian Constitution will be ideal. De Smith claimed that there is no pre-defined stereotype of an ideal constitution. He believed the form and content of the constitution would depend, first, on the political balance of powers at the moment in which the constitution is proclaimed, second, on the commonsensical understanding of how practically useful certain constitutional solutions are, third, on traditional patterns available to politicians and their advisors writing the constitution.[22] DeGaulle was referring to the same thing in his famous 1946 Bayeux Speech, where he quoted the response of the wise Solon to the question of a Greek, inquiring which constitution was the best. Solon replied: "First tell me for which people and for what epoch" [23]

KAKAV TREBA DA BUDE USTAV SRBIJE

Ratko Marković

I da ispuni sve postavljene zahteve, ne znači da će Ustav Srbije biti idealan. De Smit je tvrdio da ne postoji unapred određen stereotip idealnog ustava. On je smatrao da oblik i sadržina ustava zavise, prvo, od političkih snaga koje postoje u momentu donošenja ustava, drugo, od zdravorazumskih shvatanja o praktičnoj koristi pojedinih ustavnih rešenja, treće, od tradicionalnih obrazaca dostupnih političarima i njihovim savetnicima koji prave ustav. Na istu stvar mislio je i De Gol u svom poznatom govoru u Bajeu 1946. kada je citirao odgovor mudrog Solona na pitanje jednog Grka koji je ustav najbolji. Solon je odgovorio: "Recite mi najpre za koji narod i u koje vreme."

Ključne reči: *novi ustav Srbije, kratak ustav, normativan ustav, demokratski ustav, čvrst ustav, moderan ustav.*

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[20] Quoted after C. F. Strong, op. cit., p. 11.
[21] Ibid.
[22] S. A. de Smith, Constitutional and Administrative Law, New York, 1978, p. 18-19.
[23] Discours du général de Gaulle à Bayeux (16 juin 1946), Revue française de science politique, 1, 1959, p. 188-192