

**THE GOVERNMENT AND MINISTRIES,  
DE CONSTITUTIONE FERENDA**

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**Abstract.** *As for the ministries (and other bodies executing public administrative affairs) – if we vouch for a more detailed definition of constitutional principles of the structure, responsibility, and control of public administration, the key "points" in this matter would be: (1) to satisfy and protect legitimate public interest in exercising public freedoms and rights of citizens and their collectivities; (2) political responsibility of ministers and bodies they run before the Parliament (monitored by classical parliamentary supervision), and, particularly, criminal responsibility of ministers before the Constitutional Court; (3) deconcentration of state administration and its segmentation into degrees; (4) decentralization of non-state public administration; (5) constitutional institutionalization and legal enactment of the system of separate, specialized administrative judiciary, whose purpose would be to ensure a reliable, professional, and objective control of the legality of the work of public administration.*

**Key words:** *executive, government, ministries, parliamentary system of division of power, more opened and substantial decentralization, ministerial responsibility.*

INTRODUCTION

1. – *The Executive* is the power that administers and governs a given political community. It is the most palpable branch of power, the dominant operative hand of the state apparatus. When compared to the Legislature and the Judiciary, the Executive is incomparably more vivid, more active. Generally, the term 'government' has two principal meanings: (1) the government as the entire power in the country, in the sense of rule in general; (2) the government as a separate state body which – wholly or partly (together with head of state) – is granted executive power by the constitution. In this paper, I constrain myself to the government and its ministries as, organizationally, the typical executive body in the parliamentary system of classification of state and legal functions. One could say that the government is an executive body of the state which carries out its duties partly in itself,

directly, and partly over ministries, state administrative bodies. Thus, administrative power shows itself to be a derived, implementable part of the executive, to which it also belongs. It is hence logical that ministries, unipersonal state bodies, are hierarchically subordinate to the government, a collective body, often called "council of ministers".

2. – The government and ministries have hardly been given much attention in the current, rather scarce discussions on the new Serbian Constitution. At least not as an important, in any way controversial topic. Even though this body is not normatively supreme – as constituent and legislative power is, nor independent and stable – as the judiciary is (or should be), it is no secret that *the central, purest, and essentially strongest power is concentrated in the government (and ministers) by their very nature*. This is not the only reason for which constitutional coverage of the position and mission of the government deserves our attention. The most important question remains that of the relationship between the government, the parliament, and the head of state. Legal regulation of these relationships should result in, on the one hand, unhampered and efficient work of the government and, on the other, its political responsibility to the parliament from whose majority it has emerged, where each of its members should be legally responsible before courts for any breach of the constitution or the law. All this is necessary both because of the balance of powers, and because of the democratically formed civil sovereignty (formed through a procedure, through legitimate rules to the game).

3. – In the context of the present constitutional issue in Serbia, the substance of this paper is dedicated to the "close reading" of the most important provisions on the Government (and ministries) from the current Constitution. Naturally, in addition to recollection of certain foundational theoretical points (the concept, position and types of government), we provide some examples from comparative constitutional law, and also from other "national" constitutional documents and relevant projects. The purpose is to offer some, relatively new, and, I believe, more efficient and legally and culturally more updated constitutional solutions in the given field.

## I

1. – When talking about the executive, one has in mind the ideas of people's sovereignty and division of power, in particular – the representative government principle (*le gouvernement representatif*).<sup>1</sup> Naturally, the postulate of a democratic government, appointed after general election, is also part of this conception.<sup>2</sup> Basically, in representative systems, people's (civil) sovereignty is manifested in two principal ways: a) *direct* – in voting for the parliament, whether the electorate opts for concrete individuals ("the single-winner method") or for electoral lists of candidates ("the proportional method"); b) *indirect* – in forming the government, by the elected representatives (alone or allied in particular alliances).

2. – Much has been written about the Executive in general – especially on its legal position, structure, and affairs that the Government and ministries conduct<sup>3</sup> - and this has

<sup>1</sup> B. L. Duguit, *Traite de droit constitutionnel*, II, La theorie generale de L Etat, Paris, 1928, 639-660 and 660-691. and Carre de Malberg, *Cotribution a la theorie generale de L Etat*, tome II, Paris, 1922, p. 199-401.

<sup>2</sup> J-Barthelemy – P. Duez, *Traite elementaire de droit constitutionnel*, Paris, 1926, p. 52-247.

<sup>3</sup> On the affairs of the government and ministries, see extensive discussion in R. Markovic, *The Executive*, Bel-

been done on numerous occasions.<sup>4</sup> However, the curious thing is that in our area in recent years, in the wake of the Serbian constitutional reform, little has been written. The legal position and role of government in the parliamentary system could be reduced to the following simplified image: *As a rule, the Government is the supreme collective body of the executive, superordinate to ministries and responsible to the Parliament. It defines the overall direction of development of the state and society, conducts state policy, passes delegated legislation whose purpose is to aid in executing legal acts, attends to internal organization of state administration, harmonizes and supervises the activities of its ministries in appropriate domains (fields), especially in the enactment of the law.*<sup>5</sup> In the present day, one notices a disturbed balance between the parliament and the government in favour of the executive. In other words, the latter often impinges on the authority of the former.<sup>6</sup>

The structure of the government can be viewed in the analysis of three pairs of opposite types of government: (1) representative and non-representative; (2) political and technical; (3) chancellor and non-chancellor.

(1) *Representative government* exhibits personal relation with the parliament (the British model). Contrary to this, *non-representative government* is personally separated from the parliament (the French model). In other words, in the latter, a member of parliament cannot also be a member of the government.<sup>7</sup>

(2) *Political government* – both majority and minority one, is opposed to the so-called *technical government*. A *political government* gathers members of one political party, or a number of parties principally connected by a more or less coherent political program. In the latter case, this is a coalition government. However, appointment of a government often turns into an "addition" onto the will of the electorate. It is well known that in democratic systems the government stems from parliamentary majority. However, if this majority is not made in the elections – if none of the parliamentary parties or (possibly) pre-electoral coalitions *wins the majority of seats on its own* – there is no other option but to attempt a grouping of parliamentary parties after the election, so that a government is eventually made. This "search of majority" can be either successful or unsuccessful. It is widely known that the government is always a majority government as it must be supported by a majority of MPs – the parliamentary majority, if it should be appointed at all. This is why the formulation of the Serbian Constitution – indeed a typical provision in constitutional regulation and practice – reads that the President of the Republic "proposes to the National Assembly the candidate for the Prime Minister, after he has heard the opinion of majority representatives in the National Assembly" (Article 83, Paragraph 1). A quite different issue lies in the question which parliamentary party or coalition will ac-

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grade 1980, p. 82-111; V. Mratovic, N. Filipovic, S. Sokol Constitutional Law and Political Institutions, Zagreb, 1986, p. 381-384.

<sup>4</sup> I list only two most important papers: M. Jovicic, Major Constitutional Systems, Elements of a Comparative Constitutional Law, Belgrade, 1984, p. 384-400; R. Markovic, op. cit., esp. 78-81, 241-243.

<sup>5</sup> See R. Markovic, Constitutional Law and Political Institutions, Belgrade, 1995, p. 404.

<sup>6</sup> On "infringing of the executive on the legislature" see J. Stefanovic, Constitutional Law, volume I, p. 166-212; V. Kutlesic, Organization of Government, a Comparative Study of the Constitutions of Former European Socialist Countries, Belgrade, 2002, p. 25-26.

<sup>7</sup> See M. Jovicic, op. cit., p. 392; More detail on differences between the French and British parliamentary systems in S. Jovanovic, On the State, Foundations of a Legal Theory, Belgrade, 1922, p. 364-374.

tively participate in the (one-party or coalition) government, and which party will – while supporting such a government – remain outside of it (i.e. whose representatives will not directly enter the government, which does not mean they will not strongly control this government!). This is why the government which does not include representatives of two or more parties that – *together* – have parliamentary majority is called "*minority*" government. Therefore, in the so-called *minority government* the government proposed cannot be elected, and it cannot stay in office without the votes of representatives of one or more parliamentary parties who do not provide members to the government! Hence the weakened stability of this government, where duration of its term in office is unpredictable, and position of the parties supporting it without participating in it is by far more comfortable than others. Therefore, except for the national coalition government (which we discuss later), we are facing two inevitable deviations from the original will of the electorate: as it may be, citizens vote so as to participate in the government over their potentially elected "favourites". However, having elected the parties that will sit in the parliament, even those citizens who have opted for those parties (not to mention other citizens!) *no longer have any influence on the structure and concrete composition of the government – whether its members come from the parties or, sometimes, from the outside!* For, parliamentary parties and their leading representatives (who may also be members of parliament) receive tacit consent of the electorate to make the government of their own choice. This includes their right to subsequently make coalitions with other parties, in order to reach, or even strengthen, their majority in the Assembly.

On the other hand, a *technical government* is a government made up of persons who have different (sometimes fully opposing) political convictions, and who are put together in accordance with some other criterion (higher interest, imminent general danger, professional reputation, political compromise...) There are a few variants of the "technical government". It is a *party-based technical government* if it simply emerges from parliamentary majority, i.e. from the "externally" supported minority, when it is a result of the concentration of representatives of all parliamentary parties (a concentration-technical government). *Concentration (national coalition) government* is a very rare option. It is a consequence of ulterior extraordinary circumstances (e.g. "*national salvation government*"), and its heterogeneous nature annuls all useful differences between the government and the opposition. This in turn reduces the responsibility of every political party participating in the government. Often, that results in the deceleration, and sometimes blockade of delicate governmental affairs. On the other hand, *the non-party technical government* is a government gathering persons not participating in political parties, reputable individuals, experts, or state administrators. Technical government is politically unnatural, as it is always forced. In spite of strategic (and/or tactical) disagreement of its constituents, a party-based technical government is composed out of fear of common jeopardy or danger. This danger can appear as the need to preserve the integrity of the country, satisfy a public or national need that cannot be postponed, the need to prevent another political group from rising to decision-making power (this holds for the non-concentration type of party-based technical government only!). The duration of term in office of party-technical government can be predefined, bound to completing an urgent social affair. Yet, sometimes this mandate does not to be time-limited. In any case, *the initiation and properties of this government do not provide realistic chances for its long survival*. As a rule, every technical government (but expert-based) is transitory and provisional, and its purpose is to bridge the

gap before the election of a new, actual political government that would gather individuals with politically similar ideas and positions, coming from the corresponding political parties of parliamentary majority.

(3) In *chancellery* and *nonchancellery* government the criterion is the following: who is the one to decide on the persons entering the government and who are members of this government responsible to (the prime minister, the president, or the parliament). If the prime minister is the one who decides on, or at least proposes individuals to enter the government, and if these members are then responsible to the prime minister only for their activities, and if, on top of all this, *ipso iure* they share the political fate of the prime minister – this is a chancellery government. Election of the chancellor of this government means the election of the government as a whole; *mut., mut.*, applies to its dismissal.

3. – *The French Constitution* (of 1958) prescribes a strong president of the country who appoints the prime minister and, on the latter's proposal, other members of the government (Article 8). The president of the country presides the Council of Ministers, the French government (Article 8). This government is non-representative (Article 23). It defines and conducts policy in the country, governs administration and armed forces (Article 20, Paragraph 1).<sup>8</sup> The Council of Ministers is responsible to the Parliament in a procedure defined by the Constitution (Article 20, Paragraph 3, related to Art. 48-50). *German Fundamental Law* (proclaimed in 1949) defines that the Federal Government gathers the Federal Chancellor and Federal Ministers (Article 62). (By the way, from the point of view of constitutional law, the German federal head of state is incomparably weaker than his French counterpart). "The Federal Chancellor is elected by the Bundestag, without debate, upon the proposal of the Federal President" (Article 63, Paragraph 1). And "federal ministers are appointed and dismissed by the Federal President, upon the proposal of the Federal Chancellor" (Article 64, Paragraph 1). The so-called constructive confrontation principle is expressed in the following regulations: "(1) The Bundestag can declare vote of no confidence to the Federal Chancellor by electing his successor by a majority vote of its members and require that the Federal President dismiss the Federal Chancellor", and "the Federal President must comply with the request and appoint the person elected." (Article 67, Paragraph 1). "Forty-eight hours must elapse between the motion and the election." (Paragraph 2). On the other hand, "If a motion of the Federal Chancellor for a vote of no confidence is not assented to by the majority of the members of the Bundestag, the Federal President may, upon the proposal of the Federal Chancellor, dissolve the Bundestag within twenty-one days". The right to dissolve lapses as soon as "the Bundestag by the majority of its members elects another Federal Chancellor" (Article 68, Paragraph 1). "Forty-eight hours must elapse between the motion and the vote thereon." (Paragraph 2). Orders and decrees of the Federal President require for their validity the countersignature of the Federal Chancellor or the appropriate Federal minister, which does not apply to the appointment and dismissal of the Federal Chancellor (Article 58).<sup>9</sup>

<sup>8</sup> G. Belorgey, *Le Gouvernement et l'Administration de la France*, Paris, 1967; F. Luchaire – G. Conac, *La Constitution de la République française*, Paris, 1979, p. 362-403.

<sup>9</sup> Italian Constitution (of 1947, updated and amended in 2001) prescribes that the Government (Art. 92-100) is made up of "the Council of Ministers", "Public Administration" and "Auxiliary Bodies". "The President of the Republic nominates the President of the Council of Ministers and, on his proposal, the Ministers." (Art. 92, Par. 2). Additionally, the Council of Ministers must have "the confidence of both houses" (Art. 94, Par. 1). The

4. – The former *Constitution of the Federal Republic of Yugoslavia (FRY) of 1992* – before the proclamation of amendments in 2000 ("Official Bulletin of FRY", No. 23/2000) – established a classic parliamentary government, accorded with the pure chancellery principle. The text read that "the Federal Government shall be appointed when the Federal Assembly has elected the Prime Minister in the Federal Government, by the majority of votes of all federal representatives, in each of the two houses, by secret vote" (Article 101, Paragraph 3). "The Federal Prime Minister notifies the Federal Parliament on the change of the composition of the Federal Government (Article 102, Paragraph 2). "For his activities and the activities of the Federal Government, the Prime Minister of the Federal Government is responsible to the Federal Parliament" (Article 103, Paragraph 1). "Resignation of the Federal Prime Minister automatically entails the cessation of the term in office of the entire Federal Government" (Article 105, Paragraph 2). However, Amendment VIII (of 2002) abolished this chancellery mechanism. Thus, "the Federal Government has been elected if the majority of all the members of the two houses of the Federal Parliament votes for it, by secret vote." "The Federal Government shall be responsible to the Federal Parliament for its activities." "The Federal Prime Minister may propose dismissal of some members of the Federal Government", etc.

*The Constitutional Charter of the State Union of Serbia and Montenegro* (of 2003) includes as one of its institutions the Council of Ministers (Art. 33-45). The President of Serbia and Montenegro presides its sessions (Article 26, newline two). Simultaneously, he

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Constitution of the Democratic Republic of Austria (of 1920, appended in 1929, amended in 1983) contains "Chapter Three" entitled "Federal Execution" (Art. 60 etc.). The supreme bodies are the Federal President and the Federal Government (Art. 69-78). "The Federal Chancellor and, on his recommendation, the other members of the Federal Government are appointed by the Federal President" (Article 70, Paragraph 1, Sentence 1). The Constitution of Spain (of 1970) has Chapter IV "On Government and Administration" (Art. 97-107). Primarily, "The Government shall conduct domestic and foreign policy..." (Art. 97). Moreover, the President of the Government is elected by the absolute majority of votes of the Congress of Representatives" (Art. 99, Par. 3-4). "The other members of the Government shall be appointed and dismissed by the King on the President's proposal" (Art. 100). Constitution of Belgium (of 1970) dedicates eighteen articles to the government (96-114). "The King appoints and dismisses all his Ministers" (Art. 96, Par. 1). In The Constitution of the Swiss Confederation (of 2002) the third chapter reads "Federal Council and Federal Administration" (Art. 174-187). "The Federal Council is the highest governing and executive authority of the Federation" (Art. 174). "The members of the Federal Council shall be elected by the Federal Parliament after each full renewal of the House of Representatives" (Art. 175, Par. 2). The Constitution of the Republic of Poland contains Chapter VI, headed: "Council of Ministers and Public Administration" (Art. 146-162). An important provision reads that "the President of the Republic appoints the President of the Council of Ministers along with all other members of the Council of Ministers..." (Article 154, Par. 1, Sentence 2). The Constitution of the Russian Federation (of 1993, appended 1996 and 2002) contains provisions on the weak Government, as compared with the President of the Russian Federation (Art. 110-117). Thus, "the President of the Russian Federation can decide on the dismissal of the Government of the Russian Federation" (Art. 117, Par. 2). The Constitution of the Republic of Croatia (2001, updated text) contains norms on the Government (Art. 107-116), as the bearer of the executive. "If a vote of no confidence is conducted on the Prime Minister or the Government as a whole, the Prime Minister and the Government shall resign" (Art. 115, Par. 7, Sentence 1). "The Government starts its term in office on the day on which it is granted confidence by the majority of all the representatives in the Croatian Assembly" (Article 109, Paragraph 3). The vote of no confidence also implies absolute majority of votes in the Assembly (Art. 115, Par. 5). There is a mechanism that balances the power of the President of the Republic and the Government (esp. Art. 98 and 103). On the constitutional properties of the governments of former European Socialist Countries, see V. Kutlesic, *Organization of Government, a Comparative Study of the Constitutions of Former European Socialist Countries*, (Belgrade, 200), esp. p. 190-197.

is the head of state and prime minister. The Act on the Council of Ministers ("Official Bulletin of SMn", no. 21/2003), in accordance with the Constitutional Charter, defines five ministries: of foreign affairs, defence, international economic relations, internal economic relations, human and minority rights (Art. 40-45). As for election, "the President of Serbia and Montenegro proposes candidates for the Ministers in the Council of Ministers, and for the Minister of the Exterior and Defence to the Assembly of Serbia and Montenegro" (Art. 35, Paragraph 1). "The Council of Ministers is responsible to the Assembly of Serbia and Montenegro for its activities" (Article 37).

*The Serbian Constitution* (of 1990) first defines that "the Executive is conferred upon the Government" (Article 9, Paragraph 3). However, the Constitution also institutes a strong head of state, competing in legitimacy with the Parliament, since he is also elected in the general election, through direct and secret vote. "The Republic of Serbia is presented, and its state unity expressed, by the President of the Republic" (Art. 9, Par. 2). According to Article 83, in addition to some significant authorities in proposing personal candidates, he also "commands the armed forces" and has the right to suspensive veto on legal acts (Art. 84, Par. 1). According to this valid Constitution, the head of state has enormous, almost unlimited and hardly controllable power in proclaiming acts ("upon getting the opinion of the Prime Minister") and acting during states of war, imminent war, and especially during state of emergency (Art. 83, Sen. 6-8), and also in dismissing the Parliament ("upon the justified proposal of the Government"). If the last is the case, the Government's term in office "ceases" (although it "remains in office until the election of the new Government", Art. 93, Par. 9), while the head of state, on that occasion, remains constitutionally untouchable! Apart from classic executive affairs (pertaining to executing laws and managing state administration), the Government "conducts the policy of the Republic of Serbia" (Art. 90, Sen. 1). Also, in cases listed in the Constitution, the Government proposes to the President of the Republic that a state of emergency be declared (Art. 83, Sen. 8). Also, the Government has some power to propose measures during states of war and imminent war (Art. 83, Sen. 7). The Government is made up of the Prime Minister, Deputy Prime Minister, and ministers, where being a member of parliament is no obstacle to being a minister in the Government, according to the British model (Article 91). Members of the Government, *de constitutione lata*, are elected and dismissed by the National Assembly, with the majority vote from among the total number of members of parliament (Article 92, Par. 2 and Article 93, par. 7). "Resignation or dismissal of the Prime Minister necessitates the resignation of the entire Government" (Art. 93, Par. 8). "The Government against which a vote of no confidence has been proclaimed, which has resigned or whose term in office has ceased due to the dismissal of the Parliament, remains in office until the election of a new Government" (Art. 93, Par. 9). There is no ministerial countersignature on the acts of the constitutionally strong President of the Republic. In addition to the ministries, the constitution also covers other actors in state administration (Article 94): (1) from the state apparatus – administration bodies within ministries and also "special organizations"; (2) outside the state apparatus – enterprises and other organizations to whom public authority is conferred upon by the law. The Act on the Government of the Republic of Serbia further specifies provisions on the Government ("Official Bulletin of the Republic of Serbia", no. 5/91).

*The Constitution of the Republic of Montenegro* (of 1992) first claims that "government in Montenegro complies with the division of power principle, and is segmented into

legislature, executive, and judiciary (Art. 1, Par. 1), where the executive is exercised by the Government (Art. 2). The Government (Art. 91-99) is non-representative (Art. 93). Among other things, it "defines and conducts internal and external policy" (Art. 94, Sen. 1) and passes bylaws with the force of legal acts during the so-called extraordinary conditions if "the Parliament cannot convene" (Sen. 8). There are special, and rather general, provisions on actors carrying out duties from state administration (Art. 99).

5. – In the *Draft Serbian Constitution of Iuris Forum* (Novi Sad, 2002), the appointment of the Government is the task of the Assembly (p. 42, 3.1.1), where the President of the Republic shall propose the Prime Minister after consultations with representatives of all parliamentary parties. This is a non-representative government with usual, complete authority in the parliamentary division of power model (p. 43). Along with this, the election of the President of the Republic is the task of "the two houses of the Parliament..." (p. 44). The corresponding minister is responsible for the acts of the President of the Republic: the minister countersigns these, while constitutional acts are "countersigned by both the minister in charge and the Prime Minister". If the Assembly cannot convene, the decision on declaring state of emergency is made "jointly by the President of the Republic, the Prime Minister, Speakers of both houses of the Assembly, and leaders of parliamentary parties", by a two-third majority. *The Draft Constitution of the Kingdom of Serbia, by Professor Pavle Nikolic* (Belgrade, 2001) introduces the Council of Ministers as the body of the executive (Art. 147-155), which is also non-representative (Art. 149, Par. 1 of the text). Among other things, the Council conducts internal and external policy of the country and passes bylaws with the force of legal acts, on conditions defined in the Constitution (Art. 147, Par. 1-2). "The National Assembly votes on the confidence to the candidate for the President of the Council of Ministers whom the King has proposed, and to the candidates for ministers whom the candidate for the President of the Council of Ministers has proposed" (Art. 126, Par. 1). If they win absolute majority, the King shall appoint them in a separate proclamation (Par. 3). And "the vote of no confidence to the President of the Council of Ministers implies the resignation of the entire Council of Ministers" (Art. 127, Par. 3). Allegations of breach of the constitution by the President and members of the Council of Ministers during their conduction of affairs are to be settled by the Constitutional Court (Art. 157, Sen. e). *Proposal for a New Serbian Constitution*, drafted under the auspices of *Belgrade Centre for Human Rights* (Belgrade, 2001), proposes a representative government (p. 51 of the document) and head of state elected in the Parliament, who would have rather limited authority. "In order to become valid, resolutions of the President of the Republic must contain the countersignature of the Prime Minister" (p. 50). Another interesting formulation is that the Government "proposes to the National Assembly and conducts internal and external policy..." (p. 52). In the text *Basic Principles of the New Constitution of the Republic of Serbia Offered by the Democratic Party of Serbia* (Belgrade, 2002), there is a provision that the Government is "a body of the executive", in the bicephalous version of the executive. The Government "derives its legitimacy from the majority in the House of Commons, to which it is politically responsible" (p. 8). The President of the Republic proposes the Prime Minister to the House of Commons, and the Prime Minister proposes his deputies and ministers. As for the government, "its primary legal and political role is to carry out that portion of the executive which does not create cohesion and does not preserve balance between different types of power". The most important competence of the Government is to "conduct policy defined



by the House of Commons and execute legal acts and other regulations of the National Assembly" (p. 8 of the mentioned material). "A separate Act would define duties, services, and affairs incongruent with membership in the Government and facilitate the procedure for the dismissal of member of Government who has been proven to have breached this act" (p. 8). The Prime Minister and members of Government, apart from their political responsibility in the Parliament, "are also responsible for the violation of the Constitution or law, and they are criminally responsible for any offenses they perpetrate in conducting their activities. In both cases, their responsibility is judged by the Constitutional Court." If liability of the Prime Minister is found, the term in office of the entire Government shall cease (p. 9). According to the same document, the President of the Republic is elected in direct elections (p. 7). *In the Draft Constitution of the Regional Country of United Serbian States, by academician Miodrag Jovicic* (limited to "the organization of government", Belgrade, 1996), the Government (Art. 24-28) is the standard bearer of the executive – "and has the status and authority of the Government in the classic parliamentary system" (explanation following Article 24). However, he leaves open the issue of its "right... to pass bylaws with the effect of legal acts" (p. 32). The Government is elected by the House of Commons, by absolute majority of representatives. "The Government as a whole, and each of its members, are responsible to the House of Commons for their work", and "criminal responsibility of ministers is regulated in a separate act" (Art. 28). "All acts of the President of the Republic must be countersigned by the Prime Minister and applicable minister" (Art. 22). None of the drafts of the new Serbian Constitution allows for a chancellor type of government.

## II

1. – The premise that I start with in discussing the issue from the title of this text is the *parliamentary system of division of power*, in its more or less pure form – in which branches of power are at least approximately balanced. Here, the principal task is to accord the position and power of the parliament and the government. Indeed, the most significant portion of the executive should lie in the hands of the Government. This is formally defined by Art. 9 Par. 3 of the 1990 Serbian Constitution. Affairs conducted by state administration, entrusted to the ministries and their executors, are put under the auspices of the executive (Art. 94). Naturally, all of them are subordinate to the Government. All of this has been, and remains, indisputable. However, many other issues in the current Constitution require serious deliberation and substantial critical suggestions. Therefore – with all stated above in mind – I now offer some concrete proposals for changes and appendices to the supreme legal regulation of the position of the Government and ministries *de constitutione ferenda* in Serbia at the beginning of the third millennium:

(1) In terms of the *formation of the Government*, I hold a twofold constraint is necessary: *First* – the deadline for the repeated proposal of the candidate for Prime Minister, if the first candidate has not been elected in the Parliament. The Montenegrin Constitution allows ten days for this repeated proposal (Art. 92, Par. 2).<sup>10</sup> The *second* limitation would

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<sup>10</sup> See also Art. 63 Par. 3-4 of German Fundamental Law.

deal with the number of unsuccessful attempts and/or final deadline for making a Government, whether as of the end of the parliamentary election, or of the date of Parliament constitution – after which the Assembly is to be dismissed.<sup>11</sup> Again according to the Constitution of Montenegro, "The Assembly shall be dismissed if the Government has not been elected within 60 days of the date on which the President of the Republic proposed the candidate for the Prime Minister" (Art. 84, Par. 1). In the Constitution of Spain, this term is two months, "starting from the first vote for investiture" (vote of confidence). If this deadline has passed, "the King shall dissolve both Chambers and call for new elections with the concurrence of the President of the House of Representatives." (Art. 99, Par. 3-5). In the given context, the current deadline (Art. 5, Par. 2 of the Regulation Book of the Serbian Assembly) stating that "30 days after the election day" is the deadline to confirm the term of members of parliament – should henceforth be incorporated in the Constitution. In the Croatian Constitution, the same deadline is 20 days (Art. 73, Par. 2). In conclusion, *I suggest that in Serbia the Constitution itself should limit the number of attempted elections of new Governments to three, where between any two attempts no more than 15 days can elapse, while the deadline for the appointment of the Government should be at most 60 days as of the date of the confirmation of the term in office of members of parliament. At the same time, I think that the deadline for this latter activity should be reduced to 20 days as of the date of the parliamentary election (instead of 30, as is the case now).* Naturally, the reason behind these, more accurate, provisions is to enable state institutions to work more quickly and efficiently.

(2) Essentially, the "soon-to-be-replaced" Serbian Constitution implies that the *definition and conduction of foreign policy* – naturally, within the limits of a member state, which is constrained by the capacity of the State Union of Serbia and Montenegro (Art. 33, newline 1, Constitutional Charter of Serbia and Montenegro) – is not conferred upon any state body. Indeed, foreign policy is today divided between the President of the Republic (Art. 83, Sen. 4-5) and the National Assembly (the interpretation of Art. 73, Sen. 6-7). The current Serbian Constitution allows the Government to carry out only *interior policy*, indeed *ex constitutione*. Without any elaboration, my view is that the competences of the Serbian Government should be substantially extended in this respect, toward the "global definition and conduction" of internal, but also exterior policy (paying attention to the prerogatives of Serbia and Montenegro) – where some latter affairs would be transferred to the Serbian Parliament (e.g. ratification of international treaties), and even the President of the Republic of Serbia (mostly representative and ceremonial affairs turned to "the outside").

(3) Furthermore, my position is that the new Constitution should transfer the *current competences of the Serbian President in case of so-called extraordinary conditions* (Art. 83, Sen. 6-8) to the Government. These legal instruments would primarily include passing of the bylaws with the effect of legal acts, important extraordinary acts of temporary effect, liable to subsequent parliamentary verification. However, not even in these "extraordinary circumstances" should one interfere with the most elementary human rights and freedoms. For instance, these should include: the right to life, to physical integrity, respect of human personality and dignity, legal equality, freedom of thought, conscience

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<sup>11</sup> Compare also Kutlesic, op. cit., p. 190-191.

and confession, *ne bis in idem*, right to marriage. Similar provisions were available in the Constitution of the Federal Republic of Yugoslavia (Art. 99, Sen. 10-11), and limitation of human and minority rights is also constrained in the current Charter on Human and Minority Rights and Civil Freedoms in Serbia and Montenegro (2003). The latter document specifically states that "limitation measures are under no condition allowed with regard to rights guaranteed in Art. 1, 11, 12, 13, 14, 17, 19, 20, 21, 25, 26, 35, 50 and 51 of this Charter" (its Art. 6, Par. 9). On the whole, I share the opinion that substantial limitation of the competence of the head of state in Serbia – primarily to the advantage of the Government – would, *de constitutione ferenda*, be compatible with the election of the head of state in the Parliament. With this in mind, "softening" conditions for his revocation would be logical, naturally, if these are accorded with the procedure for his future election.

(4) I vouch for the preservation of the solution that "the candidate for the Prime Minister exposes his program and presents candidates for ministers to the National Assembly" (Art. 92, Par. 1), where the election of the Government requires absolute majority of votes in the Assembly (Par. 3 of the same Article in the current Constitution). Moreover, I hold that the current Constitutional provision that "the resignation or dismissal of the Prime Minister results in the resignation of the entire Government" (Art. 93, Par. 8, Sen. 2) should also remain.

(5) One of the ways to stabilize the Government is to prevent facile imposition of vote of no confidence, without a previously prepared alternative (i.e. a new Government). This would be the essence of the *constructive confrontation* principle in rationalized parliamentarianism – and such a provision should become part of the Serbian Constitution, too. The model is found in German Fundamental Law (Art. 67-8). With some modifications, the same provision is available in the constitutions of Poland, Hungary, and Slovenia.<sup>12</sup> In such a way, the fall of one Government would immediately mean the appointment of the next Prime Minister, without any interim periods.

(6) In case the Assembly is dismissed by the President of the Republic, "upon the justified proposal of the Government", in the future, a countersignature of the Prime Minister would also be required (similar to Art. 103 of the Constitution of Croatia). In general, and not only *in dismissing the Parliament, the countersignature of the Prime Minister or applicable minister in the legal acts of the President should be allowed in the Constitution.*

(7) In my view, in Serbian circumstances, in order not to allow various components of power to interfere with one another, it would be necessary to *prescribe in the Constitution that a political term in office and membership in the Government, i.e. appointment as a minister should be unmatchable* (contrary to the current provision in Art. 92, Par. 2 of the Constitution). A model example would be that of the Constitution of the French Republic (Art. 23) and the Constitution of Montenegro (Art. 93). Simply put, I am committed to the future non-representative Serbian Government, *ex constitutione*.

(8) As there is substantial danger of some individuals piling up political, party-based, and, in particular, private economic power, the Serbian Constitution should contain a provision that... *"a minister in the Government cannot have or carry out any other public job or professional activity"* (approximate, though much less refined was the sense of Art. 100, Par. 3 of the Constitution of the Federal Republic of Yugoslavia, and that of Art. 93 of the Montenegrin Constitution). *In Serbia, this prohibition must by all means be given*

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<sup>12</sup> Kutlesic, *op. cit.*, p. 194.

supreme, constitutional authority. However, in Serbia, the current corresponding "hindrance", provided in the legal act (sic!), is unjustifiably broadly and deliberately unclearly (let us not say ambiguously) formulated: "A minister cannot carry out any public, professional or other duty which is unmatchable to his function as a minister" (Art. 49, Par. 1 of the Serbian State Administration Act of 1992, underlined by Z.T.). In precise terms – and I stress this – here and today, Government officials should not in any way remain general managers and members of management boards of private and public companies (as a rule, very powerful ones, even monopolists).

(9) Additionally, the Serbian Constitution should also incorporate a mechanism that used to be part of the Constitution of the Federal Republic of Yugoslavia: "*The Federal Government may not dismiss the National Assembly if the procedure for a vote of no confidence to the Federal Government is in progress*" (Art. 83). (*Mutatis mutandis* is given by Art. 84, Par. 4 of the Montenegrin Constitution). In Serbia, as of 1990, this constitutional vacuum has been abused two times: a) by the Government and the President of the Republic in 1993; b) by the Government and the acting President of the Republic in 2003. On both occasions, the Serbian Assembly was dismissed: the first time almost immediately before the SPS Government was fired (in 1993), and the second time – just before the vote of no confidence to the Government of the "reduced" DOS (end of 2003). Contrary to this, in view of the explicit provision I am offering here – in Serbia, constitutionally, the Government would no longer be able to propose that the head of state dismiss the Parliament in case a vote of no confidence is in progress! If else, and this is tacitly allowed by the current Serbian Constitution, the dissolution of the Parliament prevents the dismissal of the Government, which emerged from this very same Parliament. In this way, the Government almost gets its "vengeance", as it "outlives the Parliament", remaining in office at least until the election of the new Government by the new Parliament!

(10) Likewise, in accordance with the principle of relative independence of branches of power, I contend that in the future it should be a *Governmental bylaw* – rather than an act passed in the Parliament (currently, Art. 94, Par. 5 of the Serbian Constitution) – that shall found and abolish ministries, manage their organization and competences. Definition of competences of individual ministries would, naturally, remain a matter within the authority of the parliament's legal acts.

(11) Principled issues of *the organization and functioning of state administration in Serbia* would be covered by legal acts, like now, in accordance with the Constitution. This should not, however, include the definition of the principles of internal organization of state administration bodies, which naturally belongs to the competences of the Government (incl. Art. 99, Sen. 5 of the current Constitution).

(12) I claim that it would be worthy to, *in accordance with the law, establish a constitutional possibility for the Government – and not just the Parliament, by legal acts – to pass such acts as to confer/transfer some affairs of state administration to non-government organizations and communities* (self-government agencies, territorial autonomies, enterprises, institutions, and other legal entities). This would not interfere with the corresponding strategic constitutional regulation: "Certain administrative competences can be entrusted to enterprises and other organizations, in accordance with the law" (Art. 94, Par. 6). (Here, the positive-legal text from Article 2, Paragraph 16 of the current State Administration Act of 1992 does not – and indeed, should not *pro futuro* – have reliable constitutional foundation: "Ministries can confer some affairs from within their competence in cases and manner allowed by the law". This provision should in the future be fully omitted!).

(13) Finally: *When temporarily there is no elected head of state, and, at the same time, the Assembly is dismissed (where its Speaker cannot act as head of state, in accordance with the Constitution!)* – the function of the head of state, *de constitutione ferenda*, should then extraordinarily be taken over by *the Prime Minister* (cf. Art. 90, Constitution of Montenegro). This would help us in the unfortunate situation, that we witnessed in late 2003, where, in addition to the "pause" in parliamentary activity there was nobody to attend to affairs of the head of state!

2. – As for the *ministries (and other bodies carrying out public administration tasks), de constitutione ferenda*, a strategic dilemma is primarily posed: Should the future Serbian Constitution follow the Croatian model (Art. 116 of the Croatian Constitution), and only set up a few directing constitutional norms (even more succinct than in the current Constitution of Serbia, Article 94) that all issues covering ministries, i.e. state and public administration, should be regulated in specific legal acts!? An alternative would imply the following: *The new Serbian Constitution should provide a detailed account and lay foundations to the organization and functionality of public administration, with a special emphasis on its mission to uncompromisingly (even using authoritative means of rule of law!) satisfy and secure democratically defined public, i.e. common interest. And this is inseparable from regular satisfaction of daily needs of citizens, enactment of their rights and freedoms in accordance with the Constitution and the law, supported by standards recognized in international law.* With regard to this second alternative – which, in local conditions, I believe should be given small advantage – one may claim the following:

(1) *Strong and multiple centralization of state administration* in Serbia is obvious. Not commenting on how appropriate the current number of ministerial positions is (hand in hand with administrative organizations and agencies of the state) – *which is not materia constitutiones* – I only shortly point out especially the following indicators of current, rigid state-administrative concentration of power:

a) The Constitution does not allow for a possible, indeed desirable, classical deconcentration of state administration: *de lege ferenda*, this means development of administrative hierarchical scale by forming higher and lower degrees of organization. It is necessary (both because of the advancement of administrative activities and because of a fuller and more persistent protection of citizens' rights and legality in general) to make hierarchical state structure more elastic – *by separating lower administrative levels from the hands of central administration: by founding organizationally separated, though centralized regional (peripheral) bodies, separate, yet subordinate to the ministries.* I remind the reader that, instead of a model so proposed, in Serbia there is a strictly internalized administrative hierarchy at hand, under the auspices of certain state administrative executors. Thus, in spite of the orthodox monocratic management of the body (supremacy of the head of department with regard to the staff, which I do not need to elaborate on here) – there is also legal regulation of "the way affairs of ministries and special organizations located out of their seats are carried out" (Bylaw with the same title, of 1992). According to this bylaw, Serbia is administratively broken down into districts – "regional centres of state administration" (see its Article 1). Districts are made of territorially enclosed sets of *internal local organizational units and applicable ministries (and specific organizations).* Theoretically, this is, on one hand, simple physical and technical deconcentration of those (same) bodies, ministries, and, on the other, a mere dislocation of their affairs, accorded with the map of Serbian districts.

b) *Decentralization of public administration itself is feeble, burdened by the network of districts*: (1) territorial decentralization pertains to municipalities, cities, and autonomous provinces (in accordance with Art. 6–7 of the current Constitution) and (2) functional decentralization is primarily aimed at public companies, public institutions, providers of public services, i.e. conductors of public services (based on Article 65, and related to Article 94, Par. 6 of the current Constitution). *Superfluous centralized foundation of secondary agents, in the present Serbian circumstances, turns these into para-state organizations, decisively dependent, not only in terms of property, on the state executive*. Even more so, since generally, and quite oppositely, independence, specialization and flexibility, with a fair measure of state surveillance of the legality of foundation and action, whose purpose is to promote and not hinder their irreplaceable, continuous social mission – are all substantial and important properties of these public bodies, where numerous modalities are possible.

Advocating a *more open and substantial decentralization of all non-state entities mentioned above, ad definitionem, especially constitutional introduction and immediate advancement of the real local self-government – which should be written down as one of constitutional principles!* - I also insist on the *extension and normative coverage of independent, self-governing field of activity of respective local communities*. Essentially, this means that central state administration competences should be reduced, in the domain of both transferred and own field of activity of those non-state entities.

As for a direct prescriptive constitutional grounds for undertaking harsh substitutive measures in the field of the own domain of non-state territorial units, it is interesting that this grounds is given by the Constitution only to bodies of territorial autonomy – and not to those of the local self-government, which should indeed be added in the new Constitution. As it were, now there is only the following statement: "If, in spite of the warning issued by the applicable national body, a body of the autonomous province does not execute the resolution or general act of the autonomous province, the national body may ensure directly that this resolution or act is executed." (Article 112).

(2) In the current Serbian constitutional system, *the institute of ministerial responsibility* is hardly mentioned. The proclamation that "the Government and each of its members are responsible to the National Assembly for their work" (Art. 93, Par. 1 of the Serbian Constitution) is absolutely insufficient, since it *inaugurates only political responsibility* (see the whole text of Article 93). However, even in the domain of political responsibility of state administration, in the current Constitution the most important means of parliamentary control should be listed: questions of members of parliament, interpellations, pleas, complaints, petitions, reports on the work of administration, etc. And the *legal responsibility of ministers, including the Prime Minister* – "for the violation of the Constitution and legal acts" – should undoubtedly become incorporated in the Constitution, while more specific provisions of this responsibility would be part of a specific legal act. A praiseworthy model for this could be the Vidovdan Constitution of the Kingdom of Serbs, Croats and Slovenes of 1921 (Art. 91-93), along with the Ministerial Responsibility Act of 1922.<sup>13</sup> Responsibility of the Prime Minister and ministers must be within the jurisdiction of the Constitutional Court.<sup>14</sup>

<sup>13</sup> See S. Jovanovic, *Constitutional Law of the Kingdom of Serbs, Croats and Slovenes*, Belgrade, 1924, p. 295-304.

<sup>14</sup> On the criminal responsibility of ministers see S. Jovanovic, *On the State, Foundations of a Legal Theory*, Belgrade, 1922, p. 386-393; More information in the monograph by Z. Loncar, *Responsibility of Ministers*,

I remind the reader that the current Serbian legal system also recognizes the responsibility of government officials (civil servants) – "the responsibility of all persons employed and appointed" in state bodies (following the Act on Employment in State Bodies of 1991). In this context, one notices that *financial responsibility takes the form of a significantly more difficult procedure for receiving compensation by the concrete official who has induced damage* (see. Art. 54-55 of this Act) – as compared with the overall regime of responsibility in civil law (after the Act on Contracts and Torts of 1978, Art. 154 and further). To be sure, along with the personal financial responsibility of the official, accorded with public law, there is also a constitutional guarantee (Art. 25 of the Constitution) on the responsibility of the state<sup>15</sup> for illegal or irregular official action. With regard to this, my view is that the Serbian Constitution unjustifiably and inexplicably lacks a "supplementary" provision, where "the injured party has the right to demand compensation directly from the person who has caused the damage, in accordance with the law" (as given in Par. 3 of former Art. 123 of the Constitution of the Federal Republic of Yugoslavia).

(3) Finally, I am convinced that conditions have long been satisfied for a *constitutional introduction* (followed, naturally, by operationalization through legal acts) *of the system of specialized, administrative judiciary in Serbia*. This should include both a number of first instance administrative courts and one Administrative Court of Serbia, as a second instance court. This should be clearly defined in the very Constitution. It is not only the well-trodden experience of foreign countries and tradition of Serbia and the first Yugoslavia that speak in favour of an administrative judiciary, *committed exclusively to administrative litigation, competent and impartial – separated from both the executive-administrative apparatus and the "rest" of the judiciary*. The same idea has at least four groups of additional strong, hardly contestable, arguments: a) to raise the standards in the protections of citizens' and collective rights and freedoms in the domain of public law (outside the jurisdiction of the Constitutional Court); b) to increase the quality of administration, closely supervised by an important, respectable, serious, and equated judicial practice; c) to disburden courts of general jurisdiction as they are now overloaded with various administrative litigations (in the context of market economy, significant frequency of relations between the private and the public domains of social life, etc.); g) to provide complementarity of administrative judicial system, within separate administrative judiciary, with the generally acclaimed principle of separation of the main functions of the state apparatus.

#### CONCLUDING REMARKS

1. – In the current Constitutional transformation in Serbia, the topic "the Government and ministries" has not been *a major issue* so far. Apart from petty politics, party rifts, or ignorance – there is no serious legal or political justification for this. To the contrary, related issues deserve full attention. Indeed, in my view, substantial improvements are

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with Specific Emphasis on Yugoslav Law (unpublished doctoral dissertation), Novi Sad, 2000.

<sup>15</sup> I hold that the constitutional "appendix" from Art. 25 of the Serbian Constitution "or organization carrying out public competences" is an unnecessary mitigation in the given context; there was no such provision in the Constitution of the Federal Republic of Yugoslavia (Art. 123, Par. 2).

needed in the constitutional coverage of the executive (leaving the head of state aside here). This text has attempted to point to at least some of them.

2. – As for the Government, *de constitutione ferenda* – starting from the orthodox parliamentary division of power principle – I vouch for two principal matters: *First*, to stabilize the position of the Government and increase its role at the expense of the head of state (especially in terms of competences during so-called extraordinary conditions, definition and conduction of foreign policy /with limitations due to current capacities of the State Union of Serbia and Montenegro/, mandatory ministerial countersignature on the acts of the head of state...) *Second* – to strengthen the political responsibility of the Government as a whole, but also that of its individual members. All this would have to be followed by immeasurably more accurate constitutional provisions than has been the case so far – starting from a more efficient election of the Government (deadlines and other limitations), incompatibility of being in the government and carrying out any other public and professional function (including that of an MP), all the way to the dissolution of the Government (where the so-called constructive confrontation institute should be introduced).

3. – As for the *ministries (and other bodies executing public administration affairs)* – if we vouch for a more detailed definition of constitutional principles of the structure, responsibility, and control of public administration, the key "points" in this matter would be: (1) to satisfy and protect legitimate public interest in exercising public freedoms and rights of citizens and their collectivities; (2) political responsibility of ministers and bodies they run before the Parliament (monitored by classical parliamentary supervision), and, particularly, criminal responsibility of ministers before the Constitutional Court; (3) deconcentration of state administration and its segmentation into degrees; (4) decentralization of non-state public administration; (5) constitutional institutionalization and legal enactment of the system of separate, specialized administrative judiciary, whose purpose would be to ensure a reliable, professional, and objective control of the legality of the work of public administration.

## VLADA I MINISTARSTVA, DE CONSTITUTIONE FERENDA

**Zoran Tomić**

*Što se pak tiče ministarstava (i drugih vršilaca poslova javne uprave) – ako se opredelimo za nešto detaljnije postavljanje ustavnih principa ustrojstva, delovanja, odgovornosti i kontrole javne uprave – ključne "tačke" bi bile: (1) zadovoljenje i obezbeđenje legitimnog javnog interesa, u procesu ostvarivanja javnopravnih sloboda i prava građana i njihovih kolektiviteta, u skladu sa ustavom i zakonom, oslonjenim na priznate međunarodnopravne standarde; (2) politička odgovornost državne uprave, preko njenih čelnika, pred Parlamentom, a pravna, krivična ministarska odgovornost pred Ustavnim sudom; (3) dekoncentracija državne uprave, podela na stepene; (4) odmerena decentralizacija nedržavne javne uprave; (5) ustavno uvođenje i zakonsko uređivanje sistema zasebnog i specijalizovanog upravnog sudstva, radi pouzdane, stručne i objektivne kontrole zakonitosti rada javne uprave.*

Ključne reči: *egzekutiva, vlada, ministri, parlamentarni sistem podele vlasti, otvorenija i punija decentralizacija, ministarska odgovornost.*