FACTA UNIVERSITATIS
Series: **Law and Politics** Vol. 2, N°1, 2004, pp. 67 - 85

BASIC CHARACTERISTICS AND CONTENTS OF THE 2006 SERBIAN CONSTITUION

UDC 342.4(497.11)"2006"

Dragan Stojanović

Faculty of Law, University of Niš, Niš

Abstract. *The true value and firmness of the 2006 Constitution will be visible shortly after the commencement of its enactment. In order for its liberal-democratic orientation to be fully expressed, maintained, and developed, such that it could stabilize the legal and political system of the Republic of Serbia, the legislature and constitutional judiciary will have to fully support it through their authoritative interpretations. The Constitution has established the democratic system, but that system cannot survive by itself. Depending on the enactment of the Constitution, which can be fully adequate, arbitrary, or selective, legitimacy can persevere, but also fail, as was the ease with the previous Serbian Constitution, Lack of legitimacy cannot be compensated by a demagogical interpretation of the Constitutionlity.*

Key words: *Serbian new constitution, political agreement, constitutional preamble, principles of constitution, human and minority rights and freedoms.*

On Mitrovdan 2006 the Republic of Serbia was given the supreme legal document that replaced the anachronous 1990 Constitution. In a constitutional continuity procedure, the National Assembly defined the draft of the new Constitution on 30 September 2006. The long-awaited constituent act came after a "historical compromise" of the strongest political parties. Constituent decision was supported by all parliamentary parties. All members of parliament present at the session of the National Assembly, 242 out of 250 persons, voted in favour of the new Constitution.

In accordance with the procedure for constitutional revision, the draft Constitution was submitted to a Serbian referendum, held on 28 and 29 October 2006. There was 53.04% of the electorate voting in favour of the ratification of the Constitution. The majority needed for confirming the Constitution was reached in the final hours of the referendum. The National Assembly solemnly proclaimed the text of the Constitution on 8 November 2006, Mitrovdan. On 10 November, Constitutional Act needed for effectuating the Constitution was adopted in the National Assembly, by two third majority vote.

Received December 2, 2006

1. Characteristics and Composition of the Constitution

Two remarkable characteristics single out this Constitution as a state-forming and democratic act. First, this is the first Serbian constitution since 1903 constituting Serbia as a sovereign, independent state. Serbia sacrificed its statehood in 1918 in order to create a joint country, was part of the unitary Kingdom of Yugoslavia for two decades, and then functioned as a federative unit in the six-part federal socialist Yugoslavia for more than four decades. After the collapse of SFR Yugoslavia, along with the Republic of Montenegro, for a short while, Serbia was a member state of the Federal Republic of Yugoslavia, and, even shorter, of the state union of Serbia and Montenegro. Contrary to the previous 1990 Constitution, where Serbia was a constitutive member of three unsuccessful attempts of federations or state unions, the current Constitution is accorded with the actual form of the state and Serbia's historical being. Second, this is the first constitutional document, in almost two centuries of Serbian constitutional history, that has been approved by the population in direct vote. Irrespective of all possible objections one may pose to referendum decisions, ratification of a constitution in a referendum additionally increases its democratic legitimacy. The Constitution shows itself to be a fundamental legal decision of the people and citizens of Serbia on their own political existence.

It is doubtless that, viewed by the whole of its provisions, the Serbian Constitution of 2006 becomes part of the system of liberal-democratic civil constitutionality, based on the principles of economic and political pluralism, rule of law, social welfare, and respect of human and minority rights. The Constitution explicitly accepts European principles and values, which means that democratic and pro-European orientation and Serbia's accession to the European family, without any conditions or reservations, even though the preamble does not explicitly mention accession to the EU, have been one of the primary motives and goals in proclaiming this Constitution. Viewed from such a point, there is no substantial difference between this Constitution and the constitutions of other postsocialist countries. Abolishment of 'social property' confirms that this document does not have any particular remnants of former socialist constitutionality. While the former constitution was ambiguous with regard to market economy, multi-party system and parliamentary democracy, the 2006 Constitution contains no more dilemmas on the constitutionalization of these key categories of civil society and liberal-democratic constitutionality. From a substantive point of view, the Constitution can be treated as a confirmation of partial constitutional discontinuity.

The Serbian Constitution of 2006 is essentially a compromise. It is a result of the political agreement of four leading parties in the National Assembly, during the peak of the parliamentary crisis of the government. The compromise was justified by the need for a new Constitution, such that it should confirm and, if possible, preserve Serbia's territorial integrity, strengthen Serbia's position in negotiations over Kosovo and Metohija, but also ensure political stability in the country by calling parliamentary, presidential, and local early elections.

There were two drafts providing formal and legal grounds for the new Constitution. The first one was submitted to the National Assembly by the Government in summer 2004, and the second one by the President of the Republic in January 2005. The first one was an adapted proposal for the Constitution of the leading party in the Government, Democratic Party of Serbia, and the second that of Democratic Party, which then led the op-

position democratic block. The Constitution emerged from a harmonization of these two documents, but also from taking over a number of provisions and solutions from the 1990 Constitution, which Socialist Party of Serbia has considered its own legacy. This harmonized text of two democratic parties was further amended by solutions that the strongest opposition party – Serbian Radical Party – would not abstain from. In particular, these included the constitutional preamble, the national qualification of the state, the text of the presidential oath, and the position of the autonomous province of Vojvodina.

The 2006 Constitution is significantly longer and more detailed than the previous one. While the earlier 1990 Constitution contained only 135 articles, the current one has 206 articles. The difference in size is even more pronounced if one takes into consideration the number of characters. The new Constitution contains 101,450 characters with spaces, twice more than the previous one (50,503).

The Constitution covers classical constitutional matter, so that it is not particularly original in its systematization. Largely because of this, the systematicity of the new Constitution is rather similar to that of the old one. The normative text of the Constitution, containing ten chapters, is preceded by a rather unusual preamble.

The 2006 Constitution contains the following chapters: 1) Principles of the Constitution, 2) Human and Minority Rights and Freedoms, 3) Economic System and Public Finances, 4) Competences of the Republic of Serbia, 5) Organization of Government, 6) The Constitutional Court, 7) Territorial Organization, 8) Constitutionality and Legality, 9) Change of the Constitution, 10) Final Provision.

2. THE CONSTITUTIONAL PREAMBLE

The Constitutional preamble is unusual because, apart from a concise statement of the legitimizing grounds for proclaiming the Constitution, it also contains elements with obvious binding normative effect. After the statement that the citizens of Serbia proclaim this Constitution starting from the state tradition of the Serbian people and equality of all citizens and ethnic communities, the preamble categorically asserts that the Province of Kosovo and Metohija is an inseparable part of the territory of Serbia. As the sentence ends in the guarantee that Kosovo and Metohija have the position of essential autonomy within the sovereign state, it follows that the Republic of Serbia will have an asymmetrical constitutional system, even more so since the preamble does not at all mention the autonomous status of Vojvodina.

Based on the preamble, the writer of the Constitution claims that the Republic of Serbia is based on rule of law, social welfare, principles of civil democracy, human and minority rights, and commitment to European principles and values. Insistence on these principles, which function as the fundamental law of the Constitution, especially upon the principle of civil democracy and European principles and values, implicitly confirms that the Republic of Serbia considers itself a member of the European family of nations, and that it is ready to become part of the European integration process. In this context, one should also take note of the principle according to which rules of international law and ratified international treaties are an inseparable part of the legal system of the Republic of Serbia. However, the Constitution does not contain an integrative clause, through which

the Republic of Serbia would renounce its sovereign rights with the purpose of accession to the European Union.

The constitutional preamble is not limited to the confirmation of Serbia's territorial integrity and establishment of essential autonomy for a part of its territory. It also prescribes that from such a position of the Province of Kosovo and Metohija, there follow constitutional obligations of all state bodies to advocate and protect state interests of Serbia in Kosovo and Metohija in all internal and external political relations. If one only has in mind the literal text of the constitutional preamble, one could conclude that the only or the principal goal of proclaiming the Constitution was to preserve and defend the territorial integrity of Serbia, by changing its internal territorial organization and stressing the related obligations of state bodies. This way, the preamble actually defines the upper limit, the constitutional mandate that state bodies representing Serbian sovereignty can by no means cross in negotiations over the final status of Kosovo and Metohija. Simply put, the preamble excludes the possibility that the Republic of Serbia should recognize Kosovo and Metohija as an independent state, without changing its own Constitution.

3. NORMATIVE CONTENT OF THE CONSTITUTION

The substance of the Constitution is more or less typical of constitutional acts. As compared with the previous Constitution, significant novelties are noticeable, whether in terms of the introduction of new institutions and normative solutions, or in terms of improved organization and competences of traditional state bodies. Innovations are a consequence of both the unitary nature of the state, and the determination that the substance of the Constitution should be "more democratic", closer to standards of European constitutionality.

The normative content of the Constitution consists of ten chapters. All parts of the Constitution, and every individual article, have a separate title. The most extensive parts regulate standard constitutional matter: human rights and institutions of government. In the first chapter, fundamental constitutional principles are presented, while in the last one there is just a closing provision on the proclamation and coming into force of the Constitution. One may notice certain discrepancies in terms of language and style in some chapters or individual articles, which may be attributed to the fact this act is a compromise and some solutions were agreed on in the last minute. Some constitutional norms are concise, clear and accurate enough, while others are too detailed, inconsistent, and, at first glance already, open to different interpretations. This reduces the coherency of the Constitution and its logical firmness, especially because one can notice that certain constitutional norms are unnecessarily opposed to others, or are conspicuously unclear and ambiguous. References to specific legal acts are all too common, sometimes quite superfluous, especially when stating that legal acts on certain government institutions should be passed. Therefore, very few constitutional provisions are actually directly applicable law.

3.1. Principles of the Constitution

Principles of the Constitution is the first, thematically heterogeneous part of the Constitution, which first states the fundamental principles of state system and rule of law, and also principles of interior and exterior policy of the Republic of Serbia. These include the

principle of sovereignty, of rule of law, division of power and ban on conflict of interest, party pluralism, right to autonomy and local self-government, the principle of a secular state, of equality of the sexes and, very important to the future legal system, the principle of supremacy of international law.

The second group of general provisions includes the constitutional qualification of Serbia, followed by the tokens and symbols of its statehood: the state territories and borders, the state symbols – coat of arms, flag and anthem – the capital, official language, and script.

The third group of general provisions states institutional guarantees related to the protection of citizens and Serbs abroad, protection of national minorities, and position of foreigners.

The most important novelty in this part of the Constitution deals with the qualification of the Republic of Serbia by constitutional law. Contrary to the 1990 Constitution, which defines the Republic of Serbia as the state of all citizens living in it, as most post-socialist constitutions do, the 2006 Constitution combines national and civil properties of the state. The Republic of Serbia is now defined as the state of the Serbian people and all citizens living in it. Along with the civil qualification of the state, its fundamental national and historical property is added, pointing out a special, historical role of the Serbian people in creating its own state. Irrespective of the fact the introduction of a national property into the constitutional qualification of the state does not have a mere symbolical and psychological meaning, because far-reaching legal consequences can be derived from it, it is still the citizens that remain the bearers of sovereignty – and this politically abstract term includes all ethnicities in the country.

In accordance with the constitutional qualification of the state, new state symbols of the Republic of Serbia are instituted. Actually, the Constitution has reintroduced the old symbols, those from the time of parliamentary monarchy. The coat of arms is used as a Big and Small Coat of Arms, the flag as the National Flag and the Flag of State, and the anthem of the Republic Serbia is the hymn Boze Pravde (God Bring Us Justice). The composition and use of state symbols will be covered in a specific legal act.

3.2 Human and Minority Rights and Freedoms

The second chapter of the Constitution is dedicated to the set of human and minority rights. This is quite surely the finest part of the Constitution, both in the substantive and legal/technical sense. Advancement as compared with the 1990 Constitution is obvious. A bit more than a third of the constitutional text is dedicated to human and minority rights, so that all rights and freedoms generally acknowledged by international standards are incorporated. Reservations and limitations some fundamental rights are subject to are more or less accorded with the values immanent to a democratic system. Largely, sometimes quite literally, the Constitution has taken over solutions from the European Convention for the Protection of Human Rights and Fundamental Freedoms, whose power is above that of legal acts, but also from the former Charter on Human Rights, Civil Freedoms, and Minority Rights of 2003.

The Constitution affirms the traditional set of liberal and political rights, and adds social, economic and cultural rights, partly given as subjective rights, partly as programmatic principles. Particularly impressive are the comprehensive guarantees for liberal

rights, especially in terms of freedom of personality, but also an extensive guarantee of individual and collective rights of minority communities. For the first time, the rights of children and rights of parents are instituted followed by autonomy of the university, institutions of higher education and science.

It is interesting that the constitutional catalogue of human rights and freedoms does not contain a list of civil obligations, which was a common pattern in socialist constitutions. In civil constitutional tradition, however, detailed definition of principal obligations is avoided, which is usually justified by the claim that acceptance of principal obligations could not be harmonized with the principle of direct actuality of the constitutional chapter on fundamental rights. By leaving out separate grouping of duties of citizens, the Serbian Constitution explicitly rejects the former dogmatic position on the unbreakable unity of rights and obligations. Actually, there is always the fundamental obligation to abide by the Constitution and the law. But these do not apply to man as such, but to the citizens of the state.

Before the list of human and minority rights, there is a statement of fundamental principles, representing the overall Constitutional position on their meaning, normative power, and legal effect. In this respect, the Constitution also follows well-known doctrinary positions and solutions from comparative constitutional and international law. The principle of direct exercise of human and minority rights pertains both to the constitutionally guaranteed rights, and to the rights guaranteed by the generally accepted rules of international law, international treaties and acts. The Constitution allows for to closely define the way these rights are exercised only if the Constitution explicitly calls for this or if it is necessary for the exercise of an individual right, due to its nature. The legislator is not allowed to hinder the essence of the guaranteed right, not only in defining, but much more in limiting human and minority rights. By this, the Constitution has accepted the doctrine on relevant content and the well-known teaching on the borders of borders of human rights.

The Constitution guarantees the principle of equality of citizens in the usual way, as equality before the Constitution and the law, as the right to equal legal protection, without discrimination. However, the Constitution adds another dimension to the equality principle. Forbidding any discrimination, direct or indirect, on any grounds, the Constitution excludes discrimination in the case of specific measures that the Republic of Serbia can introduce in order to achieve the full equality of persons or groups that are in a position that is substantially unequal to that of other citizens. By this, the Constitution allows for positive discrimination measures, i.e. measures of affirmative action to the benefit of certain groups of individuals, ethnic or national minorities.

The Constitution asserts that human and minority rights are given efficient judicial protection, but does not limit this protection only to institutions in the internal judiciary. A very important novelty is that now, for the first time, citizens are given the right to appeal to international institutions in order to protect their rights and freedoms guaranteed by the Constitution.

The Constitution confirms its position on human rights by setting up rules for their interpretation. Human and minority rights are interpreted in such a way as to promote values of democratic society, accorded with current international standards, and with the practice of international institutions supervising their enactment. Rules for interpreting

human rights legally bind both the legislator who shapes and limits human rights and the judiciary and any other public authority which provides for their protection.

The segment of the Constitution on Constitutionality and Legality defines limitations to human and minority rights during state of emergency and state of war. Significantly, measures for the limitation of human and minority rights are allowed only on a necessary level, and are not allowed under any circumstances in terms of a series of fundamental rights which are directly related to the human personality. Limitations on human dignity, right to life, unbreakability of physical and psychological integrity, and other fundamental human and minority rights are disallowed.

3.3 Economic System and Public Finances

The third chapter of the Constitution is entitled Economic system and public finances. The most important novelty that it introduces is a far-reaching change of property structure in constitutional law. The Constitution has finally abolished 'social property', introduced local property, and extended private property to the domain of city construction land.

Economic system is based on market economy, freedom of entrepreneurship, free competition of independent economic entities, and equality of all forms of property. The Republic of Serbia is a unified economic area with a unified market of goods, labour, capital, and services. Foreigners are equal to nationals in the market, and rights obtained by investment of capital cannot be reduced.

For the first time, the Constitution defines that the influence of the market on the position of employees is improved in the social dialogues between trade unions and employers. The social function of the state is not limited only to those measures of social policy that should mitigate the "cruel" effect of market laws, but also includes the constitutional order to the state to take care of balanced and sustainable regional development, protection of consumers, preservation of scientific, historical, and cultural heritage, and also to undertake other "social activities".

The Constitution no longer allows 'social property'. More precisely, it orders full privatization of this property. Forms of property now include private, cooperative, and public property. The last form can now be the property of the state, but also that of the autonomous province and unit of self-government (the municipality or city). All forms of property, in principle, enjoy the same legal protection.

Use and utilization of tillable land, woodland, and city construction land in private property is free. Foreign individuals and legal entities can own immovable goods, in accordance with the law or international treaty. They can also be allowed concessions on natural resources or goods of common interest.

In terms of public finances, apart from the provisions on taxes and other public revenue, the budget and public liabilities, the Constitution contains provisions on the National Bank of Serbia and State Auditing Institution. The latter is a new constitutional institution.

3.4. Competences of the Republic of Serbia

The fourth chapter of the Constitution contains only one article, and it is entitled Competences of the Republic of Serbia. It lists fields and relationships managed and se-

cured by the Republic of Serbia, where Serbia passes legal acts, ensures their enactment, and provides the judiciary. Having in mind the fact the list of these fields and relations is not complete, one could pose the question of the purpose of this part of the constitution. It seems superfluous, because even without it, the Republic of Serbia generally has full judiciary, legislature, and executive, except in those fields and relations belonging to the realm of autonomy and local self-government. If the point of this article is to explicitly define the competences of the state, and so differentiate between them and the competences of the autonomy and local self-government, then it would be more rational for this part of the Constitution to also contain the competences of the autonomous province and the local self-government. Provisions from this article actually point to the future legislative program of the Government, and do not really delimit between the competences of the state and units of autonomy and the local self-government. As it were, this legal and technical division of competences is typical of federal states or states with substantial territorial and political autonomy. It seems these provisions have been taken over from the previous Yugoslav constitutional practice automatically, which would include the texts of both Serbian 1990 Constitution and FR Yugoslavia 1992 Constitution. Possible constitutional definition of domain and scope of essential autonomy for Kosovo and Metohija would immediately require the change of this part of the Constitution.

3.5. Organization of Government

The fifth chapter of the Constitution, entitled Organization of Government defines the system of government in Serbia, central bodies of state administration, their competences and mutual relations. Starting from the principles of civil sovereignty and division of power, the Constitution opts for rationalized parliamentarianism, where the National Assembly, and, in particular, the Government are very strong. The President of the Republic embodies the unity of the state, but he is also the head of the executive. The Government is the supreme executive body. State administration is independent but, functionally, dependent on the Constitution and the law, responsible to the Government for its activities. Courts are autonomous, independent bodies of the judiciary, which is unified in the territory of the entire country. Constitutional judiciary, covered in a separate part of the Constitution, acts as a "custodian" of the Constitution, it protects constitutionality and legality and citizens' rights and freedoms. Citizens' advocate, Serbian Army, High Judiciary Council and State Prosecutors' Council are introduced as constitutional institutions.

3.5.1. National Assembly

The Constitution defines the National Assembly as the supreme representative body of constituent and legislative power. Once a supreme body of one state within a state union, the Assembly remains a unicameral parliament. It still gathers 250 members of parliament, where the Constitution now defines that the Assembly must abide by the principles of sexual equality and also host representatives of national minorities. Apart from legislative and constituent activities, the National Assembly decides on all issues directly related to state sovereignty. Its electoral and controlling rights have remained largely preserved, except for reduced authority in appointing officials of the judiciary.

The most important novelties related to the National Assembly pertain to the legal status of members of parliament, ways decisions are made, interpellation, and instances and consequences of its dissolution.

The ambiguous constitutional formula defining the nature of MP's term in office suggests that the Constitution accepts the imperative MP mandate and unlimited rotation of members of one parliamentary convocation, both of which are now almost universally abandoned. The legal position of members of parliament is thus essentially made worthless, because MPs are, not only politically, but also legally, fully subjected to the will of the political party, even though their immunity is now a bit more strongly guaranteed. In addition, the constitutional provision on the nature of MP mandate presupposes that the Constitution has opted for the proportional electoral system, especially if one relates this to the phrase used in other parts of the text, "elected lists of candidates".

The rule goes that the National Assembly reaches decisions by the so-called quorum majority. However, the Constitution allows for a number of exceptions to this rule, indeed even 22 instances where decisions are made by the majority vote of all members of parliament. Legal acts the Assembly should proclaim this way are qualified acts. One may assume that some acts are proclaimed through specific majority vote so that there should be no need for frequent constitutional revision, where legitimacy of certain legal acts could be strengthened more easily.

As for interpellation, the Constitution states that if the National Assembly is not satisfied with a Government's reply, it can initiate the interpellation procedure and end it in a vote of confidence to the Government. This practically annuls the distinction between interpellation and vote of no confidence.

Although it basically preserves the old procedure for the dissolution of the National Assembly, prompted by the joint action of the head of state and the Government, the Constitution now specifies legal effects of the early end of the Parliament's mandate. Upon the dissolution of the National Assembly, the President of the Republic is due to simultaneously call early parliamentary elections which must end no later than 60 days as of the dissolution date. The dissolution, however, does not mean that all activities of the Parliament should cease. The dismissed Assembly can carry out daily or urgent tasks by the day of the convening of the new Parliament. Another new solution forbids the dissolution of the Assembly if the vote of no confidence to the Government is in progress, and also if states of war or emergency are declared. There is an ex constitutionem dissolution introduced, i.e. the dissolution of the Assembly if it fails to elect a Government within 90 days as of its first convening.

3.5.2. The President of the Republic

One may conclude that the constitutional position of the President of the Republic, based on direct election and five-year term in office, defines this person as the guarantor of democratic transformation and state unity, but also a "moderator" who will keep balance between other supreme state bodies. The President of the Republic is the guarantor of division of power, of constitutionally established balance between the legislature and the executive and independent judiciary. This primarily includes his authority to propose the candidate for the Prime Minister and top executive and judicial officials. Such a role of the head of state has already showed to be efficient in most transition countries. Yet,

the legacy of an autocratic head of state has probably had some influence in the decision of the writers of the Serbian Constitution to be very cautious in terms of stronger presidential competences with regard to the Government. The President shares some competences with the Government, but it is obvious that his portion of the share is significantly smaller. This is quite noticeable in proclaiming state of emergency or measures limiting human and minority rights in emergency conditions. These competences are now given to the National Assembly by the Constitution, upon the proposal of the Government. Only when the Assembly cannot convene, the state of emergency is proclaimed by the "triumvirate" of government, i.e., together, the President of the Republic, the Prime Minister, and the Speaker of the National Assembly. Limitations on human and minority rights are proclaimed by the Government, with the countersignature of the President of the Republic.

Upon getting the proposal of the Government, the President of the Republic is authorized to decide whether or not he will dismiss the National Assembly. In a number of instances defined by the Constitution, the authority to dissolute the Parliament is not a discretionary right of the head of state, but rather his constitutional duty. On the other hand, in proclaiming legal acts, the President of the Republic only seemingly has the right to suspensive veto, because the act that the President of the Republic has sent back to the Assembly for another vote is still proclaimed if the majority of all members of parliament votes for it again. As the constitutional provision reads "if the National Assembly decides to vote again on the act that the President of the Republic has required to be examined once more", it follows that the presidential authority is not legally binding the National Assembly. Indeed, this is then neither suspensive veto, nor his right to request another examination.

Accorded with the sovereign nature of the state, the President of the Republic now has traditional competences of the head of state, especially those pertaining to the appointment of state representatives in foreign affairs and commanding the Army. However, in nominating ambassadors of the Republic of Serbia he is constrained by the proposal of the Government, and in commanding, appointing and dismissing officers of the Serbian Army, he is constrained by the law.

A more careful analysis shows that presidential competences are now significantly reduced or shared with the Government, i.e. dependent on its proposals. They are much closer to the competences of a head of state elected in the parliament, than the one elected directly. Some former competences of the President of the Republic with regard to the Government are lacking, for instance, his right to request that the Government state its position on certain issues. The limited competences of the President of the Republic, and the procedure for his dismissal, show that rationalization of parliamentarianism has ended to the advantage of the Government. The procedure for the dismissal of the head of state is initiated by the National Assembly, after the proposal of at least one third members of parliament. The dismissal is effective if the Constitutional Court judges that the President of the Republic has violated the Constitution, and this must be confirmed by two thirds of members of parliament in the final vote. Actually, it is realistic to expect that the procedure for the responsibility of the head of state would be initiated by the Government controlling the majority of members of parliament.

3.5.3. The Government

The Government is the bearer of the executive in the Republic of Serbia. It defines and runs policy, executes legal acts and other resolutions of the National Assembly, passes bylaws whose purpose is to execute acts, directs and harmonizes the activities of state administration, supervises the activities of the administration, and carries out other tasks defined by the Constitution and the law. The position of the Government is now significantly improved, less so due to its extended authority, and more because of the weaker competences and stronger responsibility of the head of state. However, it still needs to cooperate with the head of state, sometimes perhaps even in cohabitation, because representative and governing functions are not easily separable.

A significant novelty in the position of the Government emerges from the fact membership in it is now impossible if the person has other public positions. Not only is it impossible for an MP to also be a member of Government, but it is also impossible to be a member of the provincial assembly, local (town) council, or provincial government or executive body of the local self-government and occupy a position in the Serbian Government. This means that the Constitution has accepted the nonrepresentative government model, and this Government certainly has more latitude in dealing with the National Assembly. The Prime Minister now has more authority – he manages the activities of the Government, takes care of the unified governmental policy, harmonizes the activities of Government members, and represents the Government. However, the Prime Minister cannot change the composition of the Government without receiving formal concurrence of the National Assembly.

The Constitution now covers in much more detail the grounds for the cessation of the Government's term in office, and legal effect of the early end of its mandate, including the corresponding duties of the President of the Republic. The mandate of the Government ceases upon the vote of no confidence, dissolution of the National Assembly, and resignation of the Prime Minister. The Government whose term in office has ended can carry out only those tasks defined by the law, until the election of the new Government. It is explicitly denied the right to propose the dissolution of the National Assembly to the head of state.

In defining the political responsibility of the Government, the Constitution has almost equated political interpellation of MP's and the vote of no confidence to the Government or one of its members. Interpellation, submitted by 50 MP's, must be responded to by the Government within 40 days. If the National Assembly should not accept the response of the Government or its member by voting, the vote of no confidence shall immediately proceed. In the meantime, the Prime Minister or minister in the Government can resign. Interpellation on the same issue cannot be repeated in the following 90 days.

Vote of no confidence to the Government or its member can start upon the request of at least 60 MP's. The Constitution does not require that the proposal contain the name of the new Prime Minister, thus renouncing the well-known constructive vote of no confidence model. The National Assembly can discuss the proposal five days upon its submission at the earliest. If the Government itself has requested the vote of confidence, on its explicit demand, the vote can proceed in an ongoing session. The vote of no confidence or the resignation of the Prime Minister results in the obligation for the President of the Republic to initiate procedure for the election of a new Government, i.e. to dissolve the

National Assembly and call elections, should the Government not be elected within 30 days. A new proposal for the vote of no confidence, with the same signatories, cannot be submitted within the next 180 days.

3.5.4. State Administration

The Constitution does not introduce significant changes to the position of state administration. In principle, the administration is independent, but remains responsible to the Government for its activities. The independence of state administration does not exclude its strict abidance by the Constitution and the law. Affairs in state administration are conducted by ministries and other bodies of state administration, and its internal organization is defined by the Government.

3.5.5. Citizens' Advocate

Citizens' advocate is a new constitutional institution, functioning as an independent state body. Akin to the famous Swedish institution, the ombudsman, this person's task is to protect the rights of citizens and control the activities of the state administration and all other institutions with public authority. The only bodies exempted from his control are the National Assembly, the President of the Republic, the Government, the Constitutional Court, courts and prosecutor's offices. The citizens' advocate is elected and dismissed by the National Assembly.

3.5.6. Serbian Army

Serbian Army defends the country from external armed threats and carries out other missions and tasks, in accordance with the Constitution, the law, and principles of international law regulating the use of force. The army can be used outside the borders of the Republic of Serbia only upon the decision of the National Assembly. The Army is under democratic and civilian control, and is commanded by the President of the Republic, in accordance with the law.

The Constitution does not explicitly establish compulsory conscription, but it does acknowledge conscientious objection, allowing for a military service without bearing arms.

3.5.7. Courts

There are no significant changes in the position and constitutional function of supreme bodies of the judicial system. The judiciary is unified and belongs to courts having general jurisdiction and courts having specific jurisdiction. The highest court in the Republic of Serbia is the Supreme Court of Appeals. The Constitution reinforces the most important principles pertaining to the judiciary, primarily its unified nature, independence, compulsory public activity, trials before court divisions, the jury principle, etc. A conspicuous novelty states that courts do not try only based on the Constitution and the law, but also based on generally accepted rules of international law and ratified international treaties. The legal position of judges has been improved by the fact their position is permanent, and their appointment and cessation of their position are regulated in separate acts. Judges are also independent, they have immunity and cannot at the same time occupy any other position.

In terms of the appointment of judges and chief justices, the Constitution attempts to make a balance between the competences of the legislature and the judiciary, i.e. between the National Assembly and the High Judiciary Council. The National Assembly appoints the Chief Justice of the Supreme Court of Appeals, chief justices of courts and judges, i.e. persons appointed to those positions for the first time. The mandate of persons appointed judges for the first time is three years, and that of the Chief Justice of the Supreme Court of Appeals – five years. The High Judiciary Council elects and dismisses judges, proposes the election of judges to be appointed for the first time, proposes the election of the Chief Justice of the Supreme Court of Appeals and chief justices of courts, and takes part in the procedure for the cessation of the position of the Chief Justice of the Supreme Court of Appeals and chief justices of courts.

However, there is still no balance in the appointment of bearers of the judiciary. The High Judiciary Council is given decisive advantage, as this body is overwhelmingly comprised of persons from the judiciary, even though they are elected by the National Assembly. The High Judiciary Council not only elects "permanent" judges, but also obligatorily proposes the election of chief justices and persons appointed judges for the first time. Without this proposal, the National Assembly cannot elect anyone.

3.5.8. The High Judiciary Council

The High Judiciary Council is a new constitutional institution electing or decisively influencing the election and dismissal of bearers of the judiciary. The Constitution defines this body as an independent and autonomous institution ensuring and guaranteeing the independence and autonomy of courts and judges. The High Judiciary Council has 11 members. It gathers the Chief Justice of the Supreme Court of Appeals, Government minister in charge of the judiciary, and the chairman of the applicable Committee of the National Assembly. In addition, there are eight members appointed according to their position, elected by the National Assembly for a five year period. Elected members include six permanently appointed judges, of whom one must be from the territory of the autonomous province, and two distinguished, reputable jurists, of whom one is a lawyer and the other professor of Faculty of Law. Chief justices in courts cannot be appointed members of the High Judiciary Council.

3.5.9. Prosecutor's Office

Prosecution has not suffered significant changes in terms of overall position and constitutional jurisdiction. However, contrary to the position of judges, the Constitution no longer guarantees independence to the prosecution, except to the Deputy Public Prosecutor. The Prosecutor's Office is an independent state body pressing charges on the perpetrators of criminal and other offences, and taking measures to protect constitutionality and legality. This principled legal position can be compromised by the competences the Government has in appointing prosecutors.

The competences that the National Assembly has in terms of election of prosecutors are equal to its competences in electing judges, where the State Public Prosecutor and prosecutors are elected on the proposal of the Government, while persons elected deputy prosecutors for the first time must be proposed by the State Prosecutors' Council. The key role of the Government in electing and dismissing all prosecutors suggests that the Con-

stitution takes this position to be not only judicial, but also political and executive, irrespective of the fact that prosecutors are responsible both to the Public Prosecutor and the National Assembly. If the contrary was the case, there would be no reason for this position to be directly controlled by the Government.

Prosecutors' term in office is six years, while that of deputies elected for the first time is three years. The State Prosecutors' Council is solely responsible only for the election and dismissal of deputy prosecutors with permanent position.

The State Prosecutors' Council is a new constitutional institution, with 11 members. It gathers the Chief State Prosecutor, the minister in charge of the judiciary and the chairman of the applicable Committee of the National Assembly, and also appointed members. Out of eight members elected by the National Assembly, six are public prosecutors with permanent position, one of whom is from the territory of the autonomous province, and two are reputable jurists, one of them a lawyer, the other a professor of the Faculty of Law. The mandate of appointed members is five years.

3.6. The Constitutional Court

The Constitutional Court is a constitutional institution that has been changed the most in the new Constitution. These changes pertain both to the extraordinarily extended jurisdiction and to the composition and procedure for the election of judges. Due to the specific nature of its role, which is aimed at controlling all other institutions of power in the state, the Constitutional Court is separated from the Organization of Government. The sixth chapter of the Constitution is therefore fully dedicated to this institution, although some of its competences are, with no justification, covered in other parts of the Constitution.

In the abstract normative control procedure, the Constitutional Court has a new competence – to assess how much ratified international treaties are accorded with the Constitution, but also how much legal and other acts are accorded not only with the Constitution, but also with broadly accepted rules of international law and ratified international contracts. It has retained, even extended a bit, competences in assessing the legality of regulations and acts of non-state entities, so that the abstract control of constitutionality and legality now covers all normative acts, irrespective of who has proclaimed them.

The Constitution introduces preventive control of constitutionality of legal acts, which, at first glance, might seem like a spontaneous and surprising gift of the constituent institution to the parliamentary minority. Within seven days, the Constitutional Court is due to assess whether an act which has been voted for and not yet officially proclaimed is accorded with the Constitution. This request may be posed by at least one third members of parliament. If the act is proclaimed before the decision on its accordance with the Constitution has been made, the Constitutional Court shall continue with a regular assessment procedure. The decision reached in the procedure for preventive control has a subsequent effect, i.e. is effective as of the date of the act's proclamation. It is obvious that the postponed effect of the decision of the Constitutional Court should support the head of state to send the act back to the National Assembly, so it could rectify the error and accord the act with the Constitution. However, the most important and most immediate consequence of preventive control is that the act which has been deemed congruent with the Constitution

before its coming into force can no longer be a subject of abstract control of constitutionality.

Resolving disputes over competences is a separate competence of the Constitutional court. It includes not only disputes between courts and other state bodies, but also disputes over competences between state bodies, autonomous province and local self-government, i.e. disputes between bodies of different territorial units. Akin to its role in the federation, the Constitutional Court should work as a "guarantor" of territorial decentralization, the autonomy and the local self-government.

Deciding on constitutional appeals is the most important new competence of the Constitutional Court. This institution should this way become the ultimate instance for protecting human and minority rights and freedoms. A constitutional appeal can be filed against individual acts or actions of state bodies or organizations executing public competences, which breach or deny constitutional rights and freedoms. The condition is that other legal remedies for their protection have been exhausted or are not specified.

Apart from competences defined in the applicable chapter of the Constitution, the Constitutional Court has been given some "special" competences. This body thus decides on banning a religious community, on appeals to the decision on confirming MP's term in office, appeals to the decision on cessation of the appointment of a judge or prosecutor, preventive assessment of compliance of decisions of the autonomous province with the Constitution and the law, protection of competences of the autonomous province or the local self-government from breaches occurring due to individual acts or actions of state bodies, etc.

The Constitutional Court has 15 members elected and appointed for a nine-year period. Five judges are elected by the National Assembly, five are appointed by the President of the Republic, and five by the general session of the Supreme Court of Appeals. The National Assembly elects five judges from among ten candidates proposed by the President of the Republic, while the President of the Republic appoints five judges from among ten persons proposed by the National Assembly. The general session of the Supreme Court of Appeals appoints five judges from among ten candidates proposed at the joint session of the High Judiciary Council and the State Prosecutors' Council.

A judge of the Constitutional Court is elected and appointed from among reputable jurists. He must be at least 40 years of age, and must have had 15 years of experience in the legal procession. Tenure at the Faculty of Law is no longer an obstacle to the position of the judge in the Constitutional Court. A person can be elected or appointed judge of the Constitutional Court at most two times. Judges of Constitutional Court elect Chief Justice from among the members for a three-year term in office, by secret vote.

3.7. Territorial Organization

The seventh chapter of the Constitution contains provisions on territorial organization, i.e. on the autonomous province and local self-government. Contrary to some expectations, the Constitution did not substantially decentralize Serbia. Autonomy and local self-government have, more or less, retained the same legal status that they had in the previous Constitution and legislation, with some cautious hints at new perspectives.

In terms of autonomy, there is an open possibility for a more radical territorial recomposition of the country, towards the system of regular autonomy, with the exception of

Kosovo and Metohija, which would have 'essential' rather than 'regular' autonomy. The Constitution rejects the regionalism project, but explicitly allows for the establishment of new autonomous provinces, their abolishment or merger, in the same procedure required for the change of the Constitution. Such a proposal would be confirmed by citizens in a referendum, in accordance with the law. Territorially, Serbia could gradually introduce the regular autonomy system but, with current political balance of power, this seems hardly feasible in the near future.

From the point of view of constitutional law and politics, the reach of the constitutional provision on the abolishment and merger of provinces can be contested. Does it relate to the autonomous province of Vojvodina, i.e. Kosovo and Metohija, or would it be valid only for future, newly-established autonomous provinces? Irrespective of this dilemma, it seems that the Constitution has not formally closed the door to the regionalization process in the Republic of Serbia.

As the Constitution calls for a specific act to regulate the essential autonomy of the Autonomous Province of Kosovo and Metohija, it follows that today already, provinces with different legal status are conceived. The Act on the Essential Autonomy of Kosovo and Metohija would be passed in the procedure identical to the procedure for changing the Constitution, it would formally have constituent power, which means that the current constitutional provisions on the autonomous province are actually valid for the Autonomous Province of Vojvodina only, and for those "future" autonomous provinces. Thus, if Serbia should manage to keep Kosovo and Metohija, it would have asymmetric territorial organization, from two perspectives.

Competences of autonomous provinces in the domain of establishing law have not been changed much. The province is not allowed partial legislature, and issues of relevance to the province, which the province regulates itself, are stated in the Constitution, point by point. The list of provincial competences is now a bit longer, where the provincial establishment of law is bound to the legal acts in all domains. In accordance with the Constitution and its own Statute, the autonomous province independently defines the organization and competences of its own bodies and public services. Another novelty includes the right of the province to define the symbols of the province and way they are used.

The autonomous province is allowed financial autonomy, where it is guaranteed its autonomous income and right to the management of its own property. The budget of the autonomous province of Vojvodina must amount to at least 7% of the budget of the Republic of Serbia, where its three sevenths are used for financing capital expenditure. Protection of provincial autonomy is the responsibility of the Constitutional Court, and follows after either a request for the assessment of constitutionality and legality of acts of the state or local self-government, or a complaint against their individual acts or actions preventing the exercise of the competences of the autonomous province.

The Constitution does not change the current local self-government system. The municipality, the cities, and the City of Belgrade remain units of local government. Their territory is defined by the law. A referendum is required to change the territory of a local self-government unit, i.e. to establish or abolish such a unit. The city, with or without internal city municipalities, has the competences conferred by the Constitution to the municipality, and the law may confer other competences to the city, as well. Apart from competences regulating issues of local relevance and executing conferred tasks, the mu-

nicipality independently manages municipal property, prescribes penalties for breaching municipal regulations, and defines the symbols of the municipality. The Constitution acknowledges the right of national minorities to have proportional representation in the council of a local self-government unit.

3.8. Constitutionality and Legality

The eighth chapter of the Constitution, Constitutionality and Legality, partly corresponds to relevant the chapter of the 1990 Constitution, especially in terms of the hierarchy of national legal acts, proclamation of acts, ban on retroactive effect, legality of administration and institution of administrative litigation, as well as language in the proceedings before courts and other state bodies. The most important novelty with regard to these issues pertains to the establishment of the hierarchy of national and international legal acts. The legal system is unified and ratified international contracts and generally accepted rules of international law are considered its integral part. Hierarchically, these are above legal acts. The only act exempted from the primacy of international law is the supreme legal act, for ratified international contracts cannot be in disagreement with the Constitution.

The chapter on constitutionality and legality now includes the system in the state of emergency. Declaration of states of war and emergency is now a competence of the National Assembly. When the Assembly cannot convene, the declaration act is jointly proclaimed by the President of the Republic, the Speaker of the National Assembly and the Prime Minister. State of emergency is declared when a public threat poses a danger to the survival of the state or citizens, and it can last for at most 90 days, with a possibility of one extension, for the same period. During a state of emergency, the Government defines measures limiting human and minority rights, with the countersignature of the President of the Republic. In case of a state of war, this is done together by the President of the Republic, the Speaker of the National Assembly, and the Prime Minister. The Constitution does not allow changes of the composition or competences of state bodies during states of emergency or war.

3.9. Change of the Constitution

The 2006 Serbian Constitution is one of firm, rigid constitutions, because, in order to be changed, it requires the decision of the National Assembly confirmed by a qualified, two-third majority of all members of parliament. The parliamentary resolution on the change of the Constitution is subject to optional or mandatory confirmation in a referendum, depending on the subject of constitutional revision. The National Assembly is free to decide whether the act on constitutional change should be confirmed by the citizens if the change pertains to Economic System and Public Finances, Competences of the Republic of Serbia, the Constitutional Court, Territorial Organization and the part of Constitutionality and Legality chapter, dealing with the state of emergency and state of war. There may be a referendum, but it is not mandatory for the change of these parts of the Constitution. However, if the change pertains to other segments of the Constitution, including its preamble, the referendum is obligatory. There is no doubt that the procedure for revision is much easier than that for the 1990 Constitution, because the change of the Constitution has been confirmed in a referendum if the majority of voters turning out at the referendum has voted in favour of the change.

4. THE GENERAL ASSESSMENT OF THE CONSTITUTION

From the legal point of view, the 2006 Serbian Constitution represents a partial substantive-legal continuity with the 1990 Constitution, so that insistence on the formal and procedural regularity of its adoption was not ungrounded. Substantial equivalence of these two documents is easy to notice, by both comparing their contents and analyzing their legal and technical composition. On the other hand, differences are still very prominent, and they absolutely exclude the claim that the new Constitution simply builds on the former constitutional system. Constitutional continuity is much more formal than substantial. There is no real continuity in the procedure for proclaiming the Constitution, either. The 1990 Constitution was proclaimed by a one-party Assembly, it was de facto accepted in a kind of a plebiscite, while the 2006 Constitution represents a consensus of major political parties, which was also verified in the subsequent referendum. In addition, one would find it much easier to advocate the position that this Constitution, viewed by its provisions in toto, is much more compatible with contemporary civil constitutionality than its predecessor was. The Constitution of 2006 should constitute and affirm a state that would legally and constitutionally be a part of the unified, liberal-democratic European area. With regard to standard constitutional matter, principled coverage of human rights and institutions of government, one could not have any crucial complaints with this Constitution. It just does not contain any "pure" normative solutions, institutions or institutes that could be said to obviously contradict contemporary civil constitutionality.

In terms of details, the Constitution deserves much more acute criticism and assessment. It would not be fully wrong to claim that certain solutions deprive this Constitution of much of its value. Having in mind how much time passed between the first draft and the final adoption of the Constitution, it is surprising that some of its solutions are rather questionable, ambiguous, vague, or simply bad. For instance, preventive control of constitutionality of legal acts is completely unnecessary, because it is opposed to the abstract constitutionality control model. Particularly worrying is the unexpectedly weak constitutional provision on the nature of MP's term in office, which may contradict the nature of such mandates in European parliamentary democracies. The procedure for the election of judges and prosecutors is not fully governed by principles, either, and may suffer the criticism of being too complicated. In addition, the independence of the prosecutor's office is very much put into question due to formalized competences of the Government in appointing public prosecutors. While the autonomy and the local self-government are unconvincing at best, the openness of the Republic of Serbia to European integrations is barely hinted at. Some examples are more conspicuous than others, but the list of dubious or open issues in the new Constitution unfortunately does not end with them.

Regardless of these weaknesses and others, the 2006 Constitution can still account for all legal and political functions, as expected of every constitution. Legally, the Constitution has constituted the state and established rational rules and principles of exercising and transferring power. In addition to these, it has also introduced firm rules guaranteeing the unity of the legal system and harmonization of exercise of rights. Politically, the Constitution has limited power and subjected it to democratic control. In itself, with the whole of its legal and political functions, the Constitution provides the grounds for the legitimacy of power, introduces and maintains the fundamental consensus of governance, and the facilitated procedure for its revision enables its quicker accommodation to any future changes in the constitutional reality.

The true value and firmness of the 2006 Constitution will be visible shortly after the commencement of its enactment. In order for its liberal-democratic orientation to be fully expressed, maintained, and developed, such that it could stabilize the legal and political system of the Republic of Serbia, the legislature and constitutional judiciary will have to fully support it through their authoritative interpretations. The Constitution has established the democratic system, but that system cannot survive by itself. Depending on the enactment of the Constitution, which can be fully adequate, arbitrary, or selective, legitimacy can persevere, but also fail, as was the case with the previous Serbian Constitution. Lack of legitimacy cannot be compensated by a demagogical interpretation of the Constitution.

OSNOVNA OBELEŽJA I SADRŽINA USTAVA SRBIJE OD 2006. GODINE

Dragan Stojanović

Pravna vrednost i čvrstina Ustava od 2006, pokazaće se veoma brzo tokom njegove primene. Da bi se u potpunosti izrazila, očuvala i razvila njegova liberalno-demokratska orijentacija, koja bi stabilizujuće delovala na pravni i politički poredak Republike Srbije, neophodno je da nju svojom autoritativnom interpretacijom podrže, pre svega, zakonodavna i ustavnosudska vlast. Ustav je postavio demokratski poredak, ali se ovaj ne može sam po sebi očuvati. Zavisno od primene Ustava, koja može biti principijelna, proizvoljna ili selektivna, legitimnost se može održati, ali i izgubiti, kao što je to bio slučaj sa prethodnim ustavnim aktom Srbije. Nedostatak legitimnosti ne može se nadomestiti demagoškom interpretacijom Ustava.

Ključne reči: *novi Ustav Srbije, politički sporazum, ustavna peambula, načela Ustava, ljudska i manjinska prava i slobode.*