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# 2006 CONSTITUTION OF THE REPUBLIC OF SERBIA AS A LEGAL FRAMEWORK FOR PARTY OLIGOCRACY

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**Abstract**. *One of the fundamental problems of constitutional policy in the contemporary representative regime is that of limiting the omnipotence of political parties. Constitutional judiciary has shown itself to be unsuccessful. For this reason, the author of the article vouches for the introduction of a senate of guardians of the constitution, as the second house of the Parliament, which would rely itself on social corporations-institutions and professional trade unions.*

**Key words**: *Political party, constitutional court, senate, professional trade union.*

No matter how different they are in terms of views, goals and method, two criticisms of the Serbian Constitution adopted on 8 November 2006 as a comprehensive act, that of Professor Ratko Marković, published in "Annals" (Anali, year LIV, No.2, 2006, p. 5-46), entitled *2006 Serbian Constitution – a Critical View*, and the Opinion on Serbian Constitution of the European Commission for Democracy through Law ("The Venice Commission"), adopted on 17-18 March 2007, agree over one thing: the Constitution in question significantly weakens the institution of the independent judiciary, and thus jeopardizes the division of power principle; moreover, the Parliament (the National Assembly) is no longer the supreme state institution ("the supreme representative body and bearer of constituent and legislative power in the Republic of Serbia") since members of parliament may put their mandates to the disposal of the political parties on whose proposal they were elected. Thus, now even in accordance with the word of the Constitution, the Parliament becomes a central office for the *clearing* of leaderships of political parties and their visible and invisible supervisors and sponsors, a true political "cash machine".

In 20th century, democracy became an ideal concept. However, is liberal party oligocracy, which today takes itself to be the measure and icon of democracy, truly what it claims to be? Reputable legal and political theoreticians – those who subscribe to more than

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being mere apologists of governing ideologies – provide a negative answer to this question. Thus R. Carré de Malberg (Contribution à la Théorie générale de l'Etat, II, 1922, 349 sqq.), complaining to certain authoritative scholars of the late 19th and early 20th century that they distinguished between only two forms of government – monarchy and democracy –, pointed out that there was another such form, principally conceived by the 1789 French Revolution under the heading of "national sovereignty", "*the representative regime*". In true democracy, and only the so-called "direct democracy" belongs to this category, citizens themselves, in their entirety, comprise this essential and primary state organ, first in the sense that this totality of individuals is the source of all power exercised by the state authorities, and, second, in the sense that the will of the state in principle coincides with the will of the people. Therefrom, decisions brought by any other organ, different from the totality of citizens, may be only a secondary expression of the primary will of citizens themselves. Accordingly, it is self-explanatory that citizens are called upon to control whether such decisions are accorded with their own will. Contrary to this, the representative regime is significantly based on the view that citizens as *individuals*, just like the ruler, take no part in sovereignty, but that sovereignty lies in the collective and successive being of the "nation" or "society" in an extraindividual way. This particularly entails that, originally, national will does not at all consist of individual wills of members of a nation, citizens or the monarch. To the contrary, in the nation, the power of a general, higher will is organized, a "national will", which is to be given expression by those members of the nation who have been constituted as its "representatives", based on the organic statute of the nation. On such conditions, persons or assemblies, empowered to express national will, even if they are elected by the people, should not be regarded as organs expressing the will of citizens, just as functionaries of authorities in a representative monarchy, appointed by the monarch, cannot be viewed as organs of the monarch's personality. For this reason precisely, Carré de Malberg concludes, the French 1791 Constitution reduces citizens to those having the power to elect, without giving them means to force their representatives to accord their wills with the will of the electorate – and this means must exist in a democracy. Therefore, in the system based on this Constitution, in terms of its power of will, the assembly of representatives was exclusively the organ of the legal being of the nation-society.

Yet, already writers of articles in "The Federalist", in late 18th century, pointed out that the 1787 Constitution of the United States of America did not prescribe democracy as a form of rule. In their view, there are two forms of "popular government": "pure democracy" and "republic". While in pure democracy there is "no cure for the mischiefs of faction", so that "such democracies have ever been spectacles of turbulence and contention", republic, in which a "scheme of representation" has been established, promises to find a cure for harms against which pure democracy is helpless (The Federalist, by A. Hamilton, J. Madison, and J. Jay, Ed. by B. F. Wright, 1966, 129, sqq). The title "representative democracy", denoting a republic or a republican government came to be used in the United States of America a bit later (see: M. Diamond, in: History of Political Philosophy, Ed. by L. Strauss / J. Cropsey, 2nd Ed., 1972, 638, 651).

However, in the representative form of government, too, there may be a democratic element reflected in the *general right to vote.* This is exactly the element the great advocate of democracy, J.-J. Rousseau had in mind (Du Contrat social; ou, Principes du Droit politique, liv. III, ch. XV, in: Oeuvres complètes, III, 1966, 351 sqq), when he said: "The

English people believes itself to be free; it is gravely mistaken; it is free only during election of members of Parliament; as soon as the members are elected, the people is enslaved; it is nothing." However, it was precisely the amassment of the right to vote, which began in the second half of the 19th century, that resulted in what writers of "The Federalist" thought would vanish with the introduction of representative government; the amassment of the right to vote gave life to big, well-organized political parties, whose leaderships absorbed the power of both the electorate and the representative bodies. In the beginning of the 20th century, this tendency was superbly noticed in the work by R. Michels, (Les Partis Politiques. Essai sur les tendances oligarchiques des démocraties, 1914), whose author discovered the working of the "iron law of the oligarchic tendencies" precisely in the most democratic of political parties – the socialist ones. This law is manifested in the establishment of government by elected party leaders whom the electorate cannot control. A stern critic of Michels' positions, G. Lukács (in: Archiv für die Geschichte des Sozialismus und der Arbeiterbewegung, XIII, 1928, 309-315) contended that everything Michels' wrote about was a "description of the rise of opportunism within socialdemocracy of the age of imperialism, which came into being under the influence of the emergence and development of workers' aristocracy". The only thing is that the orthodox Marxist-Leninist Lukács failed to notice that Michels' predictions had come true in the most remarkable way precisely in the Marxist-Leninist paradise, the Soviet Russia, where such a party-bureaucratic dictatorship was established that, in terms of harshness and omnipresence, it surpassed any similar form of despotic reign the world had seen by that time.

Almost at the same time as Michaels' book, the paper of M. Ostrogorski "Democracy and the Organization of Political Parties" appeared. A vivid testimony of the importance of this text is found in the fact that the author of the famous "American Commonwealth", James Bryce, wrote a commendable preface to its American edition. Ostrogorski says the following of the way political parties are governed: "The professional politicians [in the United States of America], executed their movements, under the direction of the managers and the wire-pullers, with such uniformity and with such indifference or insensibility to right and wrong, and operated with such unerring certainty on the electorate, that they evoked the idea of a piece of mechanism working automatically and blindly, of a machine. The effect appeared so precisely identical that the term Machine was bestowed on the Organization as a nickname, which it bears down to the present day, even in preference to that of Caucus." (M. Ostrogorski La démocratie et les partis politiques, Nouvelle éd., 1912, 365.) Particularly important is the tactics of blurring the public opinion by political parties ("how public opinion is hoodwinked by the Machine"), where parties use notorious "political bandits", but where, in times of need, popular parties – the Republicans and the Democrats – even do secret favours to one another: "It is not uncommon for the part of the dummy, as confederate of the Machine, to be played by the Machine of the opposite political party. If this latter is not strong enough to get possession of the spoils, if it has no chance of carrying its ticket against the opposite ticket, it prefers to come to terms with its rival, to help it to elect its candidates, in order to get a share of the spoils as its reward. For instance, independent citizens, disgusted with the corrupt regime of a Republican, would be inclined to vote for an honest man, even if he were a Democrat. The Democratic Machine ought, one would think, to jump at this opportunity of selecting an acceptable candidate. It does quite the opposite: it chooses the candidate who is personally honorable, but a violent silverite, for whom many who would otherwise vote for a democrat will

not opt, and the like. And opposing Machines are often in close contact and agreement; they "trade" votes, do "friendly services" to one another. When formidable movement of "reformers" breaks out, the opposing party often expresses solidarity; not so much to save the threatened Machine, but to save the Machine regime, the spoils system which supports the politicians." (M.I. Ostrogorski, Democracy and the Organization of Political Parties in the United States and Great Britain, II, 1902, 384 sqq.) However, contrary to the pure positivist Michels, Ostrogorski also dealt with constitutional policy and sought a way out of this predicament. Is there such a way out?

The originator of the theory of sovereignty, Jean Bodin, defined the old Roman state as a democracy, a state of the people (estat populaire), which included not only the earlier Republic, but also the later Principate (Bodin, Les six Livres de la République, 2-e réimpression de l'édition de Paris 1583, Aalen 1977, 218 sqq., 258 sqq., 267 sqq.) This seems to stand in contradiction to the fact that, in times of the Republic, the Senate was free to deny approval of the draft law or even to cassate the law previously passed by the Popular Assembly, if provisions of such acts should offend the state constitution or divine right (Th. Mommsen, Abriss des römischen Staatsrechts, 2. Aufl., 1907, 312, 319, 326). Bodin found support for his position in the facts that: the Senate did not have commanding power; the Senators were appointed by Censors elected by the people; and the Senate was allowed to reach decisions only upon the request of the Magistrates, who were also elected by the people. Yet, from these examples one sees that there is no contradiction with the essence of democracy or a representative government if a state organ is authorized to deny the compulsory force of a law, originally produced as the expression of will of the supreme power in the state. In that respect, one should stress J. G. Fichte's theory of the state here. According to this view, "the executive" is the judge in the final instance. However, since this part of government can breach the "constituent act of rights", in two ways: 1) by not implementing the constituent act at all for a longer period of time, or 2) by the fact that the bearer of power contradicts himself or conducts serious breaches in another way; one needs to found another constituent power, supervising the former, which, when the need arises, is convened by the people. Fichte calls the bearer of this "absolutely prohibiting power" Ephores, or the Ephorate, but he also points out that this power is less similar to the ephors of the Spartan Constitution or Venetian State Inquisition, and more akin to the people's tribunes of Ancient Rome. (Fichtes Werke, herausg. von I.H. Fichte, III, Berlin 1971, 168, sqq.)

The constitutional court, or the court in general as the "keeper of the constitution", became a burning issue of scientific and constitutional-political disputes after World War One, when the Austrian Federal Constitution of 1 October 1920 (followed by the Act on the Constitutional Court of 18 December 1925), in its Articles 89, 137 sqq., prescribed that, in addition to other competences, the Constitutional Court was to decide on the unconstitutionality of laws, true, only after such proposal by the Government, but also, possibly, ex officio. Hans Kelsen, the ideologist of Austrian constitutional court functions and the founder of the "pure theory of law" called this competence of the Constitutional Court the "peak of its function as the guarantor of the Constitution" (Kelsen, Die Verfassung Oesterreichs, Jahrbuch des öffentlichen Rechts der Gegenwart, 11. B., 1922, 266). However, the euphoria of constitutional court propaganda began its reign only after World War Two, when the Fundamental Law of the Federal Republic of Germany, passed on 23 May 1949, prescribed the establishment of the Federal Constitutional Court as the

supreme representative of the judiciary and guardian of the Constitution. The organization of this court, procedure and conditions for its decisions to come into force as legal acts were all covered by the Act on the Constitutional Court, adopted on 12 March 1951, which was, by the way, often changed later on. Among other things, in accordance with the wording of the Fundamental Law, the Federal Constitutional Court was allowed to deem laws unconstitutional, to annul laws, or exercise other forms of control of the validity of legal norms (Articles 100 and 126). Anyone was allowed to file a constitutional plea before this Court by claiming that "public authority" – the legislative, the executive, or the judiciary – had breached his fundamental right or any right explicitly listed in the text of the Constitution (Art. 93, Par. 1 Point 4a.) However, the Court is also authorized to pronounce the forfeiture of fundamental rights (Art. 18), to declare nonconstitutitonality of political parties (Art. 21, Par. 2), decide on the suit whose purpose is to impeach the Federal President (Art. 61), or decide on the transfer, early retirement, or dismissal of a judge (Art. 98, Par. 2 and 5). The competence of the Federal Constitutional Court was extendable to other cases by means of a simple federal law.

In German literature on constitutional law and constitutional theory there is an almost unanimous admiration of the Federal Constitutional Court; there is discussion of its supremacy over all other constitutional bodies; of it being the "fourth power", "reserve legislator", "parliament of the excellent", "shadow cabinet", "superrevisional instance", "judicial sovereign", "countercaptain"; (see: H. Simon, in: Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, herausg. von E. Benda/W. Maihofer/H.-J. Vogel, unter Mitw. von K. Hesse, II, 1984, 1268). However, the most exhilarated supporter of the German Federal Constitutional Court was the Austrian philosopher of law and publicist René Marcic. In his view, this Court is not just a factor integrating state unity and the supreme constitutional body (Marcic, Vom Gestzesstaat zum Richterstaat, 1957, 350 sq., 358, 366), but also a panacea from the harms of party "democracy", which Marcic quite rightly diagnoses. He says (op. cit., 340): "… the monism of absolute parliamentary democracy is being replaced by a dualism in which the Areopagus and the Parliament share the rule and keep each other in the balance of power; instead of the civic rule of law and liberal democracy, there is now a democratic social state. This is the line: the state of the judge little by little replaces the state of law." What followed was a victorious conquest of the institution of constitutional court all over the world. Even a totalitarian dictatorship, such as the Socialist Federative Republic of Yugoslavia, introduced the Constitutional Court in its 7 April 1963 Constitution.

However, the Constitutional Court failed to fulfill great expectations invested into it. It was always on the periphery of constitutional struggles. Thus, in the period of agony for the SFR Yugoslavia, in the early 1990s, decisions of the Constitutional Court of Yugoslavia was "the voice of one crying in the wilderness", which no one took seriously. There are two main reasons for the failure of constitutional judiciary. First, it stands in opposition to the principle of hierarchy of legal acts. Hierarchy of legal acts must be accorded with the hierarchy of state organs proclaiming them. In a representative republic, such as Serbia, the Parliament, the National Assembly, the representative legislative body, is the supreme state organ (see: G. Jellinek, Allgemeine Staatslehre, 3. Aufl. von W. Jellinek, 1914, 555 sqq.) In such a state, the Constitutional Court can be just a lower ranking constitutional organ; indeed, in such a state, members of the Constitutional Court are as a rule elected, directly or indirectly, by legislative bodies. This is why, naturally, the law is a

higher legal act than the constitutional court decision. And this is also why a decision of the Constitutional Court to declare a law unconstitutional is often perceived as usurpation of power. Second, members of the Constitutional Court cannot occupy their position without the will of the strongest political parties in the representative body, so they have to be "their people". It is precisely in the Federal Republic of Germany that the principle of appointment controlled by political parties is strictly adhered to in choosing the judges of the Federal Constitutional Court. The procedure in question implies a kind of proportion which allows political parties represented in the Federal Assembly to influence the allocation of particular positions in the Court proportional to their strength; (see: P. Badura, Staatsrecht. Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland, 1986, 474). Yet, Marcic himself says (op. cit. 341 sq.) that "democratic legitimacy" of constitutional judiciary imposes that members of constitutional courts must have the trust of "all political parties carrying the state" (aller staatstragenden Parteien). How can one expect, then, that a justice of the Constitutional Court shall think differently from "his" party in "sensitive matters"? In our conditions, that is, in Yugoslavia and Serbia, judges of the Constitutional Court have usually been blends of marginal or marginalized politicians and experts in public law.

The Constitutional Court is, therefore, unsuitable for the role of the "guardian of the Constitution". To be sure, permanent and irrevocable judges of the Supreme Court should be authorized to also refuse to enforce provisions of ordinary laws if they contradict a clearly defined constitutional provision, and pronounce their judgment according to the word of the Constitution. For, this authorization would have the character of a single legal norm which "develops concepts" (begriffsentwicklender Rechtssatz) (E. R. Bierling, Juristische Prinzipienlehre, I. 2. Neudruck der Ausgabe Tübingen 1894, Aalen 1979, 88, sqq.), that is to say, this norm will only extend and state precisely the already existing duty of the judge to apply the norm of higher legal power when subsuming a case in question under a legal norm, if the case is regulated by two or more legal norms. On the other hand, courts should be forbidden to assess whether an act which regulates the case they are judging offends general legal principles such as "honesty and conscientiousness"(good faith), "good manners", "just law", or general constitutional principles such as fundamental rights and division of power, or even the "spirit of the Constitution". For, in implementing such general clauses (blank norms, "rubber paragraphs") the issue in question is no longer determination of current law, but indeed creation of new law; (see, for instance: J. Esser, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts, 1956, passim). And, if creation of new law, conducted "within and beside the law" (intra et praeter legem) is necessary and useful, then this creation carried out against the law (contra legem) is an usurpation of power.

The only possible guardian of the Constitution is a collegial body of approximately the same constitutional rank as the multi-party representative body, whose members are elected by principles different from those valid for the members of the representative body.

A historical representative of such a guardian of the Constitution, located in the times after the emergence of the contemporary state (after the French Revolution of 1789), was, first, the "Guardian Senate" (Sénat conservateur) from the Constitution of the French Republic of 13 December 1799. According to this Constitution, the Senate confirms or abrogates all acts submitted to it as unconstitutional by the Tribunate and the Government. Appointment is done by co-optation, but members must be elected from among proposals

submitted by the Legislative Body, the Tribunate, and the First Consul. The Senator is irrevocable, and his position is permanent. At a later stage, starting from its power to provide authentic interpretation of the Constitution, the Guardian Senate started to exercise constituent power, too. Similar to this was the role of the Senate given in the French Constitution of 14 January 1852. According to this legal act, the Senate is the guardian of the fundamental social contract (pacte fondamental) and of public freedoms, and no law was to be promulgated before being submitted to this institution. The Senate opposed the promulgation of: 1) Acts contrary to the Constitution, or acts that offended the Constitution, religion, morality, freedom of confession, freedom of individuals, inviolability of property, and the principle of irrevocability of judges; 2) Acts that could jeopardize defence of the territory. Over Senatus-Consultes, the Senate regulated: 1) The Constitution of the colonies and Algeria; 2) Anything not originally defined by the Constitution, and which is necessary for its implementation; 3) The meaning of articles of the Constitution which provided room for different interpretation. The Senate consisted of: 1) cardinals, marshals, admirals; 2) citizens which President of the Republic deemed fit to be elevated to the post of the Senator. Senators were irrevocable and their position was permanent.

The Senate of Guardians of the Constitution – let us call this body that way and not insist much on the precise title – must be a kind of another house of the Parliament, with competences similar to those that French Senators had according to 1799 and 1852 Constitutions. However, along with the spirit of the times, election of their members must be democratic. However, those elections should not be conducted in constituencies, as is the case with the party-based Parliament. They should rather be organized within corporations – professional, scientific and cultural institutions available in present day society. This society is not only a multitude of individuals, the leading idea behind multi-party parliamentarism, but it is also a cosmos of institutions, as pointed out especially by M. Hauriou and Renard (see, for instance: G. Renard, La Théorie de l'Institution. Essai d'ontologie juridique, I, 1930), and similarly by the great supporter of the idea of "social law", the sociologist G. Gurvitch (L'Idée du Droit Social, 1931). If a democratic principle is to gain its fullest expression, every citizen should have a chance to belong to one of the corporations–institutions. Schools of law should be allowed specific importance in proposing candidates for the Senate. Yet, instead of political parties, it would be trade unions that would organize the entire election for the Senate. I share the opinion of the great French theoretician of state and law, L. Duguit, that trade unions contain huge capacities for shaping the social life of the future. He says (Duguit, Traité de droit constitutionnel, I, 3-e éd., 1927, 664, sq.): "In spite of the slowdowns, blows, violence, steps in the wrong direction, the trade union movement is, I believe, essentially peaceful, very profound, very broad, very fruitful. In spite of the menacing chaos, I believe that it is not at all a means of war and social division; that, quite the contrary, it is a powerful tool of peace and unity. It is not only a transformation of the working class. Even if it has progressed for the working class more than for others, it is still extending to cover all other social classes; I hold that it strives to coordinate them into a harmonious bundle… As the family is becoming more and more separated, as the municipality is ceasing to be a coherent social group, the only venue left for 20$^{th}$ century man to find such intensive social life is that of professional trade unions."

# USTAV REPUBLIKE SRBIJE OD 2006. KAO PRAVNI OKVIR PARTIJSKE OLIGOKRATIJE

**Milan Petrović**

*Jedan od osnovnih problema ustavne politike u savremenom reprezentativnom režimu je ograničavanje svemoći političkih stranaka. Ustavno sudstvo se pokazalo neuspešnim. Zato se pisac članka zalaže za uvođenje jednog senata čuvara ustava kao drugog doma Parlamenta, koji bi se oslanjao na društvene korporacije-institucije i profesionalne sindikate.*

Ključne reči: *Politička stranka, ustavni sud, senat, profesionalni sindikat*