

THE BASIC PRINCIPLE OF THE CONSTITUTIONAL STATE - The Constitution of Serbia -

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Marijana Pajvančić

Faculty of Law, University of Novi Sad, Serbia
E-mail: pajmar@pf.uns.ac.rs

Abstract. *The principle of popular sovereignty is defined in the Basic Principles of the Serbian Constitution, which provides two basic types of popular sovereignty: the direct exercise of power (in a referendum or a popular initiative) and the free election of representative bodies. The Constitution proscribes that the state bodies of authority, political parties and individuals shall neither usurp popular sovereignty nor establish government in contradiction with the free will of the people expressed in free democratic elections. The citizens' sovereignty and the free will (by which they express their sovereignty) are protected as the basic values of the constitutional system.*

The sovereignty of the state is first defined in the Preamble of the Serbian Constitution, in reference to the status of the Province of Kosovo and Metohija, where the Republic of Serbia is defined as a national state. However, this concept is differently defined in the normative part of the Constitution. The Basic Principles of the Constitution also contain legal provisions on the state sovereignty (including the state territory, state symbols, protection of citizens, the rights and the status of foreign nationals, etc). Being formal attributes of state sovereignty, state symbols are prescribed in the Basic Principles of the Serbian Constitution.

The principle of legal sovereignty and the rule of law are explicitly defined in the context of a unified legal order. The Constitution is the supreme law of the land which all other legal acts and general regulations have to comply with. There is no explicit provision that either the Constitution or the statutory legislation shall be binding, i.e. that everyone shall be obliged to abide by them, but there are explicit legal provisions on the duty of the state administration, the courts, the judiciary and the public prosecutors to abide by the Constitution and the statutory law. In the constitutional provisions, it is also possible to identify certain differences in terms of the rules defining the framework and the limitations of activities of certain bodies of authority.

The Constitution defines the rule of law principle as one of the vital and distinctive features of the legal state and the underlying principles it rests upon. The Republic of Serbia rests on the rule of law and social justice, on the principles of civic democracy, human rights and freedoms, and recognition of common European values. The legal

content of the rule of law principle includes a hierarchy of legal rules, a unified legal order, a mandatory publication of legal rules, a prohibition of the reverse effect of legal acts and other regulations (except in cases permitted by the Constitution), judicial control of the legality of the administration activities. In a broader sense, the rule of law principle includes a functional, organizational and personal separation of powers (both horizontal and vertical).

The Constitution does not explicitly define the concept of democracy but it contains a number of provisions which either directly or indirectly refer to the concept of constitutional democracy, which is clearly apparent in the constitutional provisions on the separation of powers and the observance of the Constitution and the statutory law. The repudiation of a party-run state and the reaffirmation of constitutional democracy are most apparent in the provisions prohibiting the political parties to exercise governing power directly or to submit it to their control. The most distinctive feature of the multi-party democracy is the freedom to establish political parties, recognize and acknowledge their role in shaping the political will.

Key words: Constitution, popular sovereignty, state sovereignty, sovereignty of law (rule of law), democracy.

AN OVERVIEW OF THE CONSTITUTIONAL PROCESS IN SERBIA

The Constitutional law experts have been involved in the Constitutional debate from the moment when the 1990 Constitution was adopted. Today, after the adoption of the new Constitution of Serbia (2006), an insight into the constitutional process reveals that the constitutional debate included four phases.

The first phase was characterized by a debate on the 1990 Constitution and the critical remarks on the constitutional solutions are contained in a vast number of articles, debates and studies.¹

The second phase was focused on the proposals for the new Constitutional solutions.² The subject matter of debate were the basic Constitutional principles which had to receive the basic Constitutional consensus, and the most important unresolved Constitutional issues. The first Constitutional projects published in the period from 1995 to 2000 confirm this debate: *A Rough Draft for the Constitution of Serbia*,³ *the Constitution of the Regional State of the United Serbian States*,⁴ *the Constitutional Principles for Democratic Serbia*,⁵ *Constitutional and Legal Issues of the Yugoslav State*,⁶ *Constitutionality and the Rule of Law*,⁷ *The Crisis and the Reform of Jurisdiction*⁸, etc.

¹ To mention a few: *Challenges of Parliamentarism – The Case of Serbia in the Early Nineties*, Belgrade, 1995; *Order Democracy in SRY – Problems, Possibilities and Improvement Directions*, Podgorica, 1996; *The Position of Minorities in SRY*, Belgrade, 1996; *Enforcement of Modern Democracy and Legal State in Serbia*, Belgrade, 1997; *A Citizen in the Legal System of SRY*, Belgrade, 1999; *Crises and Restitution of Law*, Belgrade, 1999, and others.

² Project of a group of authors *Proposals for new Union of former Yugoslav Republics* Belgrade, 1993.,

³ M. Pajvančić, *Serbia between the Past and the Future*, Belgrade 1995.

⁴ M. Jovičić, *The Constitution of the Regional State*, Belgrade 1996.

⁵ L. Basta at al. *Constitutional Principles for Democratic Serbia*, Belgrade 1997.

⁶ Article, *Constitutional and Legal Issues of the Yugoslav State*, Belgrade, 1999.

⁷ Article, *Constitutionality and the Rule of Law*, Belgrade 2000

⁸ Article, *The Crisis and the Reform of Jurisdiction*, Belgrade, 2001

After the year 2000, the principal debate was replaced by the debate on certain Constitutional issues and their respective solutions, published in various studies defining the contents of the Constitutional principles and the most important Constitutional institutions: *The Principles of the Constitutional Declaration*,⁹ *Serbia as a Region State*,¹⁰ *The Proposal for the new Constitution of Serbia*,¹¹ *The Constitutional Framework for the Decentralization of Serbia and the Autonomy of Vojvodina*,¹² *Regionalization Models – a Comparative Study*,¹³ *Constitutional Restructuring of SR Yugoslavia*,¹⁴ *The New Concept of the Local Government in Serbia*,¹⁵ *Regionalization of Serbia*,¹⁶ and others. The experts' attention was focused on two key issues. The first issue was the concept of the Constitution, and the second was the vertical distribution of governing powers, which was marked as a crucial Constitutional issue considering the very different attitudes to this problem.

All these Constitutional solution proposals marked the next step in the constitutional process. The debate was focused on the proposals expressed in the following studies: *Constitutional Solutions for Serbia and Yugoslavia*,¹⁷ *The Draft Constitution of the Kingdom of Serbia*,¹⁸ and *A Model of the Constitution of Serbia*.¹⁹

A more intensive inclusion of political parties into the Constitutional debate started only at the beginning of 2002, when the political parties submitted their proposals.²⁰ Other interested parties corroborated Constitutional projects elaborated by groups of experts.²¹

The third phase started in 2003. It was marked by instigating the elaboration of the new Constitution of Serbia in the National Assembly. The issue of special attention were the four legal sources;²² during the discussion, the participants identified the issues where there was a general consensus as well as the key differences among the presented solutions. The attempt to pass the Constitution failed. The work of the Constitutional Commission²³ ended when the National Assembly was dismissed by the end of 2004.

The fourth phase was marked by the adoption of the Constitution. By the beginning of 2004, the work on preparing the Constitution restarted. In addition to the proposals which had already been presented to the general public by then, the work on the Constitution in-

⁹ M. Pajvančić at al. *Principles of Constitutional Declaration*, Belgrade, 2000

¹⁰ Article, *Serbia, a Region State*, Belgrade 2000.

¹¹ M. Basta at al. *Proposal for new Constitution of Serbia*, 2000.

¹² Article, *Constitutional Framework of Serbia Decentralization and Autonomy of Vojvodina*, 2001

¹³ Article, *Regionalization Models – A Comparative Study*, Subotica, 2001.

¹⁴ Article, *Constitutional Restructuring of SR Yugoslavia*, Belgrade 2002.

¹⁵ Article, *The New Concept of the Local Government in Serbia*, Subotica, 2002.

¹⁶ Article, *Regionalization of Serbia*, Belgrade, 2003.

¹⁷ D.L. Basta at al., *Constitutional Solutions for Serbia and Yugoslavia*, Belgrade, 2000.

¹⁸ P. Nikolić, *The Draft Constitution of the Kingdom of Serbia*, Belgrade, 2001.

¹⁹ M. Pajvančić at al. *A Model of the Constitution of Serbia*, Novi Sad, 2002.

²⁰ The Serbian Democratic Party expressed their attitude to the future Constitution in *The Basic Principles for the New Constitution of the Republic of Serbia*, while the Constitution was in the elaboration phase and the details were expressed in the document *The Draft of the Constitution of Serbia* (2003).

²¹ For example, the Civic Alliance of Serbia corroborated *Constitutional Solutions for Serbia and Yugoslavia* (2000), and the Reformists of Vojvodina corroborated *A Model of the Constitution of Serbia* (2002).

²² These sources are: *Constitutional Solutions for Serbia and Yugoslavia* (L. Basta at al.); *The Draft Constitution of the Kingdom of Serbia* (P. Nikolić); *A Model of the Constitution of Serbia* (M. Pajvančić at al.); *The Basic Principles for the New Constitution of Serbia* (Serbian Democratic Party).

²³ The proposals adopted by the Constitutional Commission were published in the Paper: *Proposals for New Constitution of Serbia*, Belgrade, 2004.

cluded two additional projects: the Government's proposal and the proposal of a group of experts established by the President of the Republic with the task to prepare the Constitution draft.²⁴ Those proposals served as the basis for the elaboration of the Constitution.

After more than two years of being at a standstill, the new Constitution of Serbia was prepared within only a couple of months during the summer 2006.²⁵ The deputies of the National Assembly received the text of the Constitution in the same session when the voting process was to be performed. Consequently, there was no debate in the National Assembly. The Constitution was adopted unanimously in an extraordinary session of the National Assembly.²⁶ By altering the Rules of Procedure of the National Assembly, only a day before the Constitution was adopted, the extraordinary session was proclaimed "a special session" – which is a form of assembly unrecognized under the Constitution of Serbia. Without opening the public debate, the Constitution was submitted to a referendum. In the referendum held two days later (on 28th and 29th October), only a few minutes after the poll closing time, the President of the National Assembly congratulated to the Serbian citizens the adoption of the new Constitution. The Constitution was proclaimed in the National Assembly on 8 November 2006.

A number of experts²⁷ and several political parties²⁸ criticized the procedure for the adoption of the Constitution and some Constitutional solutions, inviting the citizens to boycott the referendum. Subsequently, four months after the proclamation of the Constitution, the Venice Commission²⁹ submitted the critical opinion on the procedure for adopting the Constitution and on some Constitutional solutions.³⁰

I. THE BASIC CONSTITUTIONAL PRINCIPLES DETERMINING GOVERNMENTAL ACTIVITY

1. Sovereignty

1.1 *The Principle of Popular Sovereignty*

The *principle of popular sovereignty* is declared in the section on the Constitutional Principles as contained in the Constitution of the Republic of Serbia.³¹ The fact that the provision on popular sovereignty has been listed among the basic principles, as well as its position among the basic principles,³² confirms that the framers of the Constitution regard this principle as one of the most important, fundamental principles of the constitutional system. The Constitution defines popular sovereignty principle in the contextual frame-

²⁴ Paper: *Proposals for the New Constitution of Serbia II*, Belgrade, 2004.

²⁵ The wording of the Constitution was prepared pursuant to the proposal of the Government. The elaboration of the wording was entrusted to two experts (one representing the Government and the other representing the President of the Republic).

²⁶ Art. 79, para. 2, of the Constitution of the Republic of Serbia from 1990.

²⁷ The critical opinions of the expert public have been published in the magazine *The Serbian Legal Review*, edition 2, No. 5/2006. The author of this paper also presented in that review her objections to the procedure of Constitution adoption and some of the Constitutional solutions.

²⁸ The Liberal-Democrat Party, the League of Social-Democrats of Vojvodina, the Social-Democrat Union.

²⁹ The Opinion of the Venice Commission was submitted on 19 March 2007.

³⁰ A section about territorial organization and a section on jurisdiction were particularly criticized.

³¹ Art. 2 of the Constitution Principles

³² This provision is placed immediately after Art. 1, defining the state of Serbia.

work of democratic constitutionality – as *a government emerging from the citizens*. The legitimacy of the government rests on the citizens' immediate support expressed in *free elections*. In addition to the rule of law, social justice, human rights and European values, the Constitution also mentions the principle of civic (*bourgeois*) democracy³³ as a cornerstone of the constitutional identity of Serbia.

There are two basic forms of exercising popular sovereignty. The first is the direct *exercise of power* (the referendum and the popular initiative). Apart from the principle provision on the referendum as a form of immediate participation of citizens in the exercise of power, the Constitution also specifies the issues which may be subject to citizens' endorsement in a referendum. In *referendum*, the citizens determine the proposal and decide on establishing, abolishing and joining of autonomous provinces³⁴ as well as on the territory of the autonomous province.³⁵ Other issues may also be decided in a referendum, if the National Assembly, upon the proposal of a competent authority,³⁶ orders a referendum.³⁷ The subject matter of a referendum may not include the obligations from international treaties, human rights legislation, financial laws, budget and the balance sheet, proclamation of the state of emergency, amnesty, and other issues pertaining to the electoral competencies of the National Assembly.³⁸ The Constitution of Serbia also recognizes the *constitutional referendum*. This referendum is *mandatory* if the revision of the Constitution refers to its preamble, basic principles, human and minority rights, government organization, proclamation of war and emergency state, deviation from human and minority rights during the state of emergency and war, and the procedure for amending the Constitution.³⁹ An *optional* referendum may be scheduled for the revision of other parts of the Constitution.⁴⁰ The direct exercise of popular sovereignty is the *popular initiative*. Apart from the general provision on popular initiative, the Constitution particularly defines the right of the citizens to propose legislation (legal initiative)⁴¹ provided that the proposal is corroborated by at least 30,000 voters, the right to propose revision of the Constitution (Constitutional initiative)⁴² if the proposal is corroborated by 150,000 voters, and the right to call for a republic referendum⁴³ if the proposal is corroborated by 100,000 voters.

The second form of exercising the sovereignty principle of citizens is characteristic for the representative system of governance. The citizens exercise it by participating *in free election of their deputies* and the representative bodies in free and direct elections.

Within the context of the popular sovereignty principle, the Constitution contains another rule (included in the general principles) which envisages the abolition of the party

³³ Art. 1, of the Constitution

³⁴ Art. 182, para. 3, of the Constitution

³⁵ Art. 182, para. 4, of the Constitution.

³⁶ Proposal may be brought by the majority of the total number of deputies and 100 000 electors (Art. 108 of the Constitution).

³⁷ Art. 99, para. 1, item 2. of the Constitution

³⁸ Art. 108, para. 2 of the Constitution

³⁹ Art. 203, para. 7 of the Constitution

⁴⁰ Art. 203, para. 6 of the Constitution.

⁴¹ Art. 107, para. 1 of the Constitution

⁴² Art. 203, para. 1 of the Constitution

⁴³ Art. 108, para. 1 of the Constitution

state. Protecting the principle of popular sovereignty, the Constitution *prohibits to the state bodies, political parties and individuals to usurp popular sovereignty, or to establish government against free expressed will of the citizens.*⁴⁴ The contents of the above-mentioned constitutional rule support the conclusion that citizens' sovereignty and free will (by which they exercise their sovereignty) is protected as one of the basic values of the constitutional order.

Serbia is not a member of the European Union. The Feasibility Study was signed in 2006. The negotiations on the Stabilization and Accession Agreement are still underway.⁴⁵ The Serbian Constitution does not contain an integration clause. Apart from the basic provision pursuant to which the Republic of Serbia is committed to *the European principles and values*, the Constitution does not contain any other rules referring to the process of EU accession or, at least, EU membership; they are mentioned only as prospective obligations.

1.2 State Sovereignty

First and foremost, the Constitution stipulates the sovereignty of the Serbian state in its Preamble⁴⁶ with reference to the status of the Province of Kosovo and Metohija which *has a status of substantial autonomy within the sovereign state of Serbia*. Accordingly, *all state bodies are obliged to uphold and protect these state interests in all internal and foreign political relations*.

Apart from this principal provision on state integrity contained in the Preamble, there are several provisions in normative part of the Constitution referring more specifically to the state sovereignty. Most of these provisions are contained in the principle provisions of the Constitution (such as the provisions on the territory, boundaries, state symbols), in the section on human and minority rights (for instance: citizenship right, freedom of movement), and in the section on the organization of government (for example: army provisions, state of emergency, state of war).

The Constitution defines the Republic of Serbia as a *national state*. However, it may be noted that the Preamble of the Constitution and the normative part of the Constitution contain slightly different definitions of the Serbian statehood. In its Preamble, the Constitution stipulates that the basic principles and the starting point for enacting the Constitution are *the state tradition of the Serbian people and the equality of all its citizens and ethnic communities*. In the normative part of the Constitution, the Republic of Serbia is defined as *a state of Serbian people and all citizens who live there*,⁴⁷ and there is no mention of its multi-ethnic character as stated in the Preamble.

The basic principles of the Constitution also include provisions on the state sovereignty, including the provisions on the territory, state symbols, protection of citizens' rights, the status of foreigners, and so on.

The Constitution determines the principle of the *sanctity* (inviolability) *of the national borders* and envisages the procedure for deciding on the alteration of the national borders.

⁴⁴ Art. 2, para. 2 of the Constitution

⁴⁵ The Government was elected on 15 May 2007.

⁴⁶ Para. 2 of the Constitution Preamble

⁴⁷ Art. 1 of the Constitution.

*The decision on the alteration of the Republic of Serbia borders is made pursuant to the procedure prescribed for amending the Constitution.*⁴⁸ However, the Constitution contains another rule pertaining to the decision on the alteration of borders. In the section on the competences of the National Assembly, it is stipulated that the National Assembly decides on the alteration of the national borders⁴⁹ by a simple majority vote.⁵⁰ There are several questions which can be raised in terms of how this issue has been stipulated in the Constitution. First, if the sanctity of the national borders is the basic principle which the constitutional status of boundaries rests upon, then the norm enabling the decision-making process on the boundaries alteration is excessive, given that the national borders are integral. Second, the inviolability of the national borders is one of the basic principles in the Helsinki Declaration of the Conference on European Security and Collaboration,⁵¹ Third, constitutional rules on the majority vote in deciding on the alteration of the national borders are different. A qualified (2/3) majority of the National Assembly is required for the adoption of the proposal to amend the Constitution⁵², whereas a simple majority⁵³ is required to decide on all issues where the Constitution does not explicitly require a qualified majority. Fourth, if the boundaries are altered pursuant to the procedure for amending the Constitution, there is a question which procedure shall be applied given the fact that the Constitution prescribes two different procedures for amending the Constitution without specifying whether the decision is made under the procedure including a mandatory⁵⁴ or an optional⁵⁵ referendum? If the criterion for resolving this issue is the consistency of constitutional provisions related to the decision on the boundaries alteration, it may be concluded that the decision on the boundaries alteration is to be made in a mandatory referendum.

The basic principles of the Constitution also include the *state symbols* as the formal attributes of state sovereignty. The Republic of Serbia has its *national coat of arms, the national anthem and the national flag*.⁵⁶ *The appearance and the use of state symbols are regulated by the law.*⁵⁷ The statutory legislation on state symbols is adopted by a simple majority vote of the members of the National Assembly. Although the legislator is entrusted to specify the appearance and the use of state symbols, the Constitution has also determined some of these issues.⁵⁸ Among other Constitutional guarantees pertaining to the national minority rights, members of national minorities are entitled to use their symbols in public places.⁵⁹

⁴⁸ Art. 8, para. 2 of the Constitution.

⁴⁹ Art. 99, para. 1, item 2 of the Constitution.

⁵⁰ Art. 105, para. 2 of the Constitution.

⁵¹ Declaration on the principles governing relations between participant states in international relationships, Conference on European Security and Collaboration, Helsinki, 1975, item III.

⁵² Art. 203, para. 3 of the Constitution.

⁵³ Art. 105, para. 2 of the Constitution.

⁵⁴ Art. 203, para. 6 of the Constitution.

⁵⁵ Art. 203, para. 7 of the Constitution.

⁵⁶ Art. 7, para 1 of the Constitution.

⁵⁷ Art. 7, para. 5 of the Constitution.

⁵⁸ The coat of arms is used as Large and Small coat of arms (Art. 7, para 2. of the Constitution), the flag is used as both popular and constitutional (Art. 7, para. 3. of the Constitution), and the anthem is "*Bože pravde*" (Art. 7, para. 4. of the Constitution).

⁵⁹ Art. 79, para. 1 of the Constitution.

The basic provisions of the Constitution also include the stipulation on *the obligation of the state to protect the rights and interests of its citizens abroad*.⁶⁰ The guarantee of this right – *the Protection of citizens and the Serbs abroad* – implies that the Constitution makes a clear distinction between these categories by using the formulation *citizen* which does not include only the Serbs but also all the members of national minorities, while the formulation *the Serbs* indicates nationality of the subject and does not include the status of the citizen. The state is obliged to have an active relationship with its citizens, not only when they live in its territory but also when they are temporarily or permanently staying abroad. The Constitution also defines the principles underlying the relation of the Serbs with the mother country, even when they do not have the status of Serbian citizens. Serbia *develops and promotes relations* of the Serbs living abroad with their mother country. The Constitution also guarantees the right of national minorities to establish, develop and maintain *undisturbed relationships and collaboration with their fellow citizens* who live outside Serbia.⁶¹

The Constitution lists the provisions on citizenship in the catalogue of human rights⁶², and does not connect it to the principle of state sovereignty. The right to *citizenship is one of the human rights*. The Constitution does not explicitly guarantee the right to citizenship but it establishes the legal grounds for *the acquisition and cessation of citizenship which is regulated by the law*.⁶³ There is an exception referring to the right of a child to acquire citizenship. *Any child born in Serbia is entitled to the citizenship of the Republic of Serbia* pursuant to the conditions prescribed in the Constitution.⁶⁴ The child born in the Republic of Serbia acquires the Serbian citizenship *if the conditions to acquire the citizenship of another country have not been fulfilled*. The Constitution guarantees a special protection to Serbian citizens. It includes the *prohibition of expelling a citizen or depriving a citizen of citizenship, as well as the right to change the citizenship*.⁶⁵ The Constitution does not contain an explicit provision on the status of national minorities as citizens of Serbia, either in the basic principles or in the rights pertaining to citizenship. The only link between the rights of national minorities and the state sovereignty is contained in the provision *on the rights of national minorities to be represented in the National Assembly pursuant to the law*.⁶⁶ The Constitution grants the *electoral rights* only to the citizens of Serbia.⁶⁷ In a single provision, the Constitution guarantees *the freedom of movement and the freedom of residence*⁶⁸ as an individual right. The freedom of movement includes the *right to leave and to return*⁶⁹ to the territory of Serbia, and *the freedom of residence implies the right to freely decide on one's place of residence*. The Constitution also provides some restrictions on the freedom of movement, residence and the right to leave the Serbian territory. However, the Constitution does not mention the right to return to the terri-

⁶⁰ Art. 13, para. 1 of the Constitution.

⁶¹ Art. 80, para. 3 of the Constitution.

⁶² Art. 38 of the Constitution.

⁶³ Art. 38, para. 1 of the Constitution.

⁶⁴ Art. 38, para. 3 of the Constitution.

⁶⁵ Art. 38, para. 2 of the Constitution.

⁶⁶ Art. 100 of the Constitution.

⁶⁷ Art. 52, para. 1 of the Constitution.

⁶⁸ Art. 39 of the Constitution.

⁶⁹ Art. 39, para. 1 of the Constitution

tory of Serbia⁷⁰ which, strictly interpreted, implies that the right to return is unlimited. The reasons for these limitations are explicitly stated in the Constitution: *conducting criminal proceedings, protection of public order and peace, prevention of spreading infectious diseases, or the defence of the Republic of Serbia*.⁷¹

The status of foreign nationals in the constitutional system and the constitutional guarantees for their protection are related to the state sovereignty. In its basic provisions, the Constitution guarantees general rights to foreigners to enjoy, *pursuant to the international treaties, all rights guaranteed by the Constitution and the law except for those rights which are guaranteed only to the citizens of Serbia*.⁷² The Constitution explicitly indicates the *electoral rights* which are the absolute privilege of Serbian citizens only,⁷³ the *right of the foreigners to enter and stay* in Serbia pursuant to a special regime prescribed by the law⁷⁴ and the *possibility of expelling a foreigner*⁷⁵ but only for the reasons and upon the procedure prescribed in the Constitution and the law. The foreigner may be expelled only *pursuant to the decision of the competent authority in a procedure prescribed by the law*, provided that the foreign national is entitled to the *appeal*; a foreigner may be expelled to some other state *only when there is no threat of persecution* on racial, sexual, religious, national or citizenship basis, membership in certain social group or association with certain political beliefs, or *where there is no threat of serious violation of human rights*.⁷⁶

1.3 Legal Sovereignty

The rule of law principle is explicitly defined in the context of the *unified legal order*, in the frame of which the *Constitution is the supreme legal document* whereas all other *laws and general acts must be in compliance with the Constitution*.⁷⁷ There is no explicit provision that the Constitution and the statutory law are legally binding but there are individual provisions on the obligation of the state administration, courts, the judiciary and public prosecutors to observe the Constitution and the laws. The *public administration* is independent but legally bound by *the Constitution and the law*.⁷⁸ The Constitutional guarantees on the court independence include provisions on the court competences as envisaged in the Constitution and the law: *the Courts shall be independent in dispensing justice pursuant to the Constitution, the law and other general acts, when it is stipulated in the law or pursuant to the generally accepted rules of international law and ratified international treaties*;⁷⁹ therefore, court decisions are based on *the Constitution and the law, ratified international treaties and generally accepted regulation adopted in compliance with the law*;⁸⁰ the judge is *subordinated only to the Constitution and the law*;⁸¹ the

⁷⁰ Art. 39, para. 2 of the Constitution.

⁷¹ Art. 39, para. 2 of the Constitution.

⁷² Art. 17 of the Constitution

⁷³ Art. 52, para. 1 of the Constitution

⁷⁴ Art. 39, para. 3 of the Constitution.

⁷⁵ Art. 39, para. 3 of the Constitution

⁷⁶ Art. 39, para. 3 of the Constitution.

⁷⁷ Art. 194 of the Constitution.

⁷⁸ Art. 136, para. 1 of the Constitution.

⁷⁹ Art. 142, para. 1 of the Constitution

⁸⁰ Art. 145, para. 2 of the Constitution.

⁸¹ Art. 149, para. 1 of the Constitution

public prosecution performs its authorities *pursuant to the Constitution, the statutory law, ratified international treaties and the regulations adopted pursuant to the law*.⁸²

In the provisions describing the framework, the limitations and the scope of activities of some government authorities, we may observe certain differences concerning the rules prescribed in the Constitution. It is obvious, for example, that the ratified international treaties the Constitution refers are a mandatory framework of activities only for some constitutional authorities (such as, the courts and the prosecution) while they are not explicitly related to the activities of other authorities (such as, the state administration).

2. The Rule of Law Principle

The Constitution defines the rule of law as one of the important characteristics of the state and the basic principle it rests upon. The Republic of Serbia *rests on the rule of law and social justice, on the principles of civic democracy, human and minority rights and freedoms, and commitment to the European values*.⁸³ The Constitution contains provisions closely defining legal and political contents of this principle and specifying its context.

The legal context of the principle of the rule of law includes several separate guarantees which primarily refer to the actions of citizens and state authorities within the framework of the Constitution and the law, subordination of the state authorities to the Constitution and the law, the uniformity of the legal system, as well as formal and basic conformity of the law and other regulations with the Constitution. The Constitution does not contain a general rule where all subjects of the state and community are obliged to act pursuant to and within the framework of the law; however, it contains particular rules on the obligation of the bodies of state authority to act pursuant to and within the framework imposed by the Constitution and the law. Most of these provisions refer to the *jurisdiction of courts*⁸⁴ and *state administration*.⁸⁵ The legal context of the rule of law principle also includes a *hierarchy of legal rules*,⁸⁶ *unified legal order*,⁸⁷ *mandatory publication of legal rules prior to their due date*,⁸⁸ *prohibition of the retroactive effect of laws and other rules* but for the exceptions allowed by the Constitution,⁸⁹ *the judicial control of legality of administration work*.⁹⁰ The legal tools for exercising the rule of law are the Constitutional provisions defining *the Constitution as the supreme legal act*⁹¹ *which all laws and other general acts*⁹² *as well as ratified international contracts*⁹³ *have to comply with*.

In a broader context, the principle of the rule of law includes functional, organizational and personal *separation of powers* among different branches of government (the horizontal separation of powers), as well as among uniform authorities established at different levels of

⁸² Art. 156, para. 2 of the Constitution.

⁸³ Art. 1 of the Constitution.

⁸⁴ Art. 142, para. 1, art. 145, para. 1, and art. 156, para. 2 of the Constitution.

⁸⁵ Art. 136, para. 1 of the Constitution.

⁸⁶ Arts. 194, and 195 of the Constitution.

⁸⁷ Art. 4, para. 1, and art. 194, para. 1 of the Constitution.

⁸⁸ Art. 196 of the Constitution.

⁸⁹ Art. 197 of the Constitution.

⁹⁰ Art. 198, para. 2 of the Constitution.

⁹¹ Art. 194, para. 2 of the Constitution.

⁹² Art. 194, para. 3 of the Constitution.

⁹³ Art. 194, para. 4 of the Constitution.

governance (the vertical separation of powers). The governing power is not only subject to limitations prescribed in the Constitution and the laws but also subject to limitations emerging from the concept of the separation of powers which prohibits different governing power to be concentrated within one body. The importance of the separation of powers is demonstrated by its position in the basic principles of the Constitution, which prescribes that the governing system rests on the *separation of powers into the legislative, the executive and the judicial power*,⁹⁴ and that *the relationship of the three branches of power shall be based on the balance and mutual control*⁹⁵ which is accompanied by *the independence of judiciary*⁹⁶ in accordance with *the Constitution, the law, and other general acts when it is prescribed by law, generally adopted rules of the international law and ratified international contracts*.⁹⁷ The section on the organization of governing powers also prescribes the instruments (*interpellation*⁹⁸, *a vote of (no)confidence in the Government*,⁹⁹ *dissolution of the National Assembly*¹⁰⁰), as well as the procedures (*on the election of judges, presidents of the Courts*¹⁰¹ and *judges of the Constitutional Court*¹⁰²) which provide for the horizontal separation of powers.

The basic provisions of the Constitution include general provisions on the vertical separation of powers. The Constitution guarantees *the right of the citizens to province autonomy and local self-government*,¹⁰³ which is *a form of limitation of state power*.¹⁰⁴ These constitutional provisions are specified in the section on the territorial organization.¹⁰⁵ The analysis of the provisions on the territorial organization confirms that there is no substantial vertical separation of powers. Territorial units do not have at their disposal constitutionally guaranteed original authorities or financial resources, and all their acts and activities are subject to the control of constitutionality and legality. The major critical remarks on the constitutional solutions, which were contained in the Opinion submitted by the Venice Commission¹⁰⁶ after the adoption of the Constitution, have been that the Constitution does not guarantee substantial contents of the right to the province autonomy and local self-government; instead, this issue is to be regulated by the law.

The Constitution sets out the principle of personal separation of powers in the basic provision explicitly *prohibiting the conflict of interest*.¹⁰⁷

⁹⁴ Art. 4, para. 2 of the Constitution

⁹⁵ Art. 4, para. 3 of the Constitution

⁹⁶ Art. 4, para 4, and art. 142, para. 2 of the Constitution

⁹⁷ Art. 142, para. 2 of the Constitution.

⁹⁸ Art. 129 of the Constitution

⁹⁹ Arts. 130 and 131 of the Constitution

¹⁰⁰ Art. 109 of the Constitution

¹⁰¹ Arts. 144 and 147 of the Constitution

¹⁰² Art. 172 of the Constitution

¹⁰³ Art. 12, para. 1 of the Constitution

¹⁰⁴ Art. 12, para. 2 of the Constitution

¹⁰⁵ Part Seven, Arts. 176-194 of the Constitution

¹⁰⁶ Opinion No. 405/2006 adopted by the Commission in the 70th plenary session, Venice, 17-18 March 2007.

¹⁰⁷ Art. 6, para. 1 of the Constitution

3. The Principle of Democracy

The Constitution does not explicitly define the concept of democracy but it includes provisions which either directly or indirectly indicate how the Constitution regulates issues related to the concept of democracy.

*The principle of civil democracy*¹⁰⁸ is one of the basic principles of the Republic of Serbia. The constitutional provisions on *the separation of powers*¹⁰⁹ and *the observance of the Constitution and the law by the authorities*¹¹⁰ speak in favor of the concept of constitutional democracy. The provision *prohibiting the direct exercise of the governing power by political parties and submission of that power to political parties*¹¹¹ envisages the dissolution of the party state and re-affirms the concept of constitutional democracy. The concept of a plural multi-party democracy is recognized in the guarantee providing for *free establishment of political parties*;¹¹² the Constitution acknowledges the role of political parties in *democratic shaping of the political will of the citizens*.¹¹³ The concept of democracy as a system of values which necessarily includes and presumes human rights guarantees is articulated in the constitutional rule stating that *provisions on human and minority rights shall be interpreted to the benefit of promoting values of a democratic society*,¹¹⁴ pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.

4. Form of State, State Structure, Form of Government

4.1 Meaning of the concept of the republic

In the Constitution of Serbia, the concept of republic has three different meanings. The Republic of Serbia is the name of the state¹¹⁵ but it is also a form of government as well as the right to manage the public affairs (*res publica*). *The Republic of Serbia* is the official name of the state as stipulated in the first article of the Constitution. Serbia is a state of the *republican form of government*, which is stipulated in the provisions on the status of the President of the Republic¹¹⁶ as well as in the explicit constitutional provision that the President of the Republic shall express the unity of the Republic of Serbia¹¹⁷. The Constitutional meaning of the concept of republic also includes the right of the citizens to participate *in the management of public affairs* and their right to *assume public service and functions under equal conditions*.¹¹⁸

¹⁰⁸ Art. 1 of the Constitution

¹⁰⁹ Arts. 3 and 4 of the Constitution, and a specification of those principles in the section on the organisation of the governing powers.

¹¹⁰ Art. 3 of the Constitution

¹¹¹ Art. 5, para. 4 of the Constitution

¹¹² Art. 5, para. 2 of the Constitution

¹¹³ Art. 5, para. 1 of the Constitution

¹¹⁴ Art. 18, para. 3 of the Constitution

¹¹⁵ Heading of Art. 1 of the Constitution

¹¹⁶ Arts. 111 to 122 of the Constitution

¹¹⁷ Art. 111 of the Constitution

¹¹⁸ Art. 53 of the Constitution

4.2 State Structure

The Republic of Serbia is a unitary state. Its territorial organization includes two autonomous provinces (the Province of Vojvodina and the Province of Kosovo and Metohija which has a special status in the constitutional system), municipalities, cities and the City of Belgrade which has a special status as the capital city.

The right to the province autonomy and the right to local self-government are guaranteed in the basic provisions of the Constitution as the right of the citizens¹¹⁹ and the factor restricting the state power.¹²⁰ The contents of this right, the manner and the form of its exercise are comprehensively prescribed in the part on the territorial organization.¹²¹ The citizens are entitled to exercise this right either directly or through their freely elected representatives.¹²² The units which may exercise this right are the autonomous province, municipalities, towns and the city of Belgrade. Autonomous provinces are *autonomous territorial communities established by the Constitution, in which citizens exercise the right to the province autonomy*.¹²³ The Constitution stipulates that there are two autonomous provinces: the Province of Vojvodina and the Province of Kosovo and Metohija. *The substantial autonomy is guaranteed to the Province of Kosovo and Metohija only, which shall be regulated by the special law adopted in accordance with the proceedings envisaged for amending the Constitution*.¹²⁴ The Constitution makes allowances for the establishment of new autonomous provinces as well as revoking or merging the existing ones, provided that such *proposal is established by the citizens in a referendum*.¹²⁵ The Constitution indicates that the units of the local self-government are municipalities, towns and the city of Belgrade. *Municipalities shall be established and revoked by the law provided that establishment, revocation or alteration of the territory of a local self-government unit shall be preceded by a referendum of the citizens*.¹²⁶ The territory and the seat of a municipality is specified by the law.¹²⁷ *A town shall be established by the law*,¹²⁸ and the status of the *City of Belgrade*, as the capital of the Republic, *shall be determined by a special act* regulating this matter.¹²⁹

Each territorial community (a province or a local self-government unit) has *the status of a legal entity*,¹³⁰ *the right to autonomously regulate the organization of its bodies pursuant to the Constitution*,¹³¹ and the right to *protect its status before the Constitutional Court*.¹³² The distribution of competences between the central government, territorial autonomies and local self-governments rests on the *principle of subsidiarity* which is de-

¹¹⁹ Art. 12, para. 2 of the Constitution

¹²⁰ Art. 12, para. 1 of the Constitution

¹²¹ Part seven, arts. 176 to 194 of the Constitution

¹²² Art. 176, para. 1 of the Constitution

¹²³ Art. 182, para. 1 of the Constitution

¹²⁴ Art. 182, para. 2 of the Constitution

¹²⁵ Art. 182, para. 3 of the Constitution.

¹²⁶ Art. 188, para. 2 and art. 189, para. 1 of the Constitution.

¹²⁷ Art. 188, para. 2 of the Constitution

¹²⁸ Art. 189, para. 2 of the Constitution

¹²⁹ Art. 189, para. 5 of the Constitution

¹³⁰ Art. 176, para. 2 of the Constitution

¹³¹ Art. 179 of the Constitution

¹³² Arts. 187 and 193 of the Constitution

fined in the Constitution in general terms;¹³³ however, its content is empowered in the constitutional solutions which provide that *the general presumption of competency is established in favor of the central power*, whereas the competences of autonomous provinces and local units are prescribed by the law.¹³⁴

4.3 *The Quadrangle of Power – Form of Government*

The Serbian constitutional system is established on the separation of powers in the form of a parliamentary system. However, a divergence from the parliamentary system of government may be observed in the direct popular election of the President of the Republic. The principle of the separation of powers is included in the basic principles of the Constitution. The system of government rests on *the separation of powers into the legislative, the executive and the judicial power*. The mutual relationship of *the three branches of governmental power* rests on *the balance and mutual control, as well as on the independence of the judiciary*.¹³⁵ It is easy to observe the contradiction of these constitutional provisions. The principle of *checks and balances*, which in the parliamentary systems of government characterizes the mutual relationship of the legislative and the executive power, has been explicitly associated with *all three branches of power*;¹³⁶ yet, the Constitution concurrently defines the *principle of independence* as an essential characteristic of the constitutional position of the judiciary.¹³⁷ The question that might be posed to the framers of the Constitution by an observant reader is whether the position of the judiciary in the constitutional system (and its relation with other branches of power) rests on the principle of checks and balances, or whether the constitutional position of the judiciary determines the principle of independence.

Under the Constitution, the exercise of the governing powers is vested in the state bodies of authority. The National Assembly, the Government and the President of the Republic are the bodies which have the governing power; they have different competences at their disposal related to policy-making, preparation, adoption and enforcement of decisions. The Constitutional Court is an indirect participant in the decision-making process by the authority to review the constitutionality and legality of the legislation and other rules as instruments for the implementation of state policy.

Under the Constitution, the Government has the most important role in the decision-making processes, policy-making processes and proposing measures as instruments for implementing that policy. *The Government shall establish and pursue policy*.¹³⁸ As a creator of policy, the Government has an exclusive position in the decision-making process. The mode of its participation in the decision-making process, the establishment and formulation of policies, as well as the instruments which the Government has at its dis-

¹³³ Local self-government units shall be competent in those matters which may be realised, in an effective way, within a local self-government unit, and autonomous provinces shall be competent in those matters which may be realised, in an effective way, within an autonomous province, which shall not be the competence of the Republic of Serbia. (Art. 177, para. 1 of the Constitution)

¹³⁴ Art. 177, para. 2 of the Constitution.

¹³⁵ Art. 4, paras. 2, 3 and 4 of the Constitution.

¹³⁶ Art. 4, para. 3 of the Constitution.

¹³⁷ Art. 4, para. 4 of the Constitution.

¹³⁸ Art. 123, para. 1, item 1. of the Constitution.

posals in that process are different in their contents, quality and effects. The Government is entitled to propose legislation and other rules and measures, to issue opinions on proposals emerging from other proposal makers, to adopt law-enforcement regulations and to control their implementation. The Government has the state administration at its disposal, relying on its expert and professional assistance in the course of exercising these activities. The Government has an insight into the data relevant in decision-making processes; it is entitled to *directs and adjusts the work of public administration bodies and perform supervision of their work*.¹³⁹ Moreover, it is the Government that administers the state budget and material funds for the implementation of state policy. In spite of the supervision and limitations which the Government is subject to under the system of parliamentary control, the factual as well as the formal status of the Government as the policy-making body proves that the Government has the decisive role in the decision-making processes.

The National Assembly is *the supreme representative body and the holder of the constitutional and legislative power in the Republic of Serbia*.¹⁴⁰ Its basic competence is to decide on the most important issues pertaining to the society and the political community. The participation of the National Assembly in the decision-making process includes the following activities: the promulgation of the Constitution and legislation (normative activity); the adoption of the Government Program of activities; the election and supervision of the Government (political supervision of the executive power); the proclamation of war and the state of war.¹⁴¹ Although the Constitution generally prescribes that the National Assembly is the holder of *the constitutional power*, the provisions on amending the Constitution¹⁴² reveal that the constitutional power is divided between the National Assembly and the citizens.¹⁴³ The right of the National Assembly to enact legislation is explicitly set out in the Constitution, including the method of decision making.¹⁴⁴ In spite of the deputies' right to propose legislation, the activity of the National Assembly to prepare and elaborate the legislative solutions is only symbolic. The participation of the National Assembly in deciding on the most important issues related to the supervision of the executive power includes decisions on the Government Program and election of its members,¹⁴⁵ decisions on instituting the vote of no confidence to the Government or a particular Minister¹⁴⁶ as well as the adoption of the budget.¹⁴⁷

The participation of *the President of the Republic* in deciding on the most important issues in the constitutional system of Serbia is limited by its contents, quality and scope of competence. The limitation is demonstrated in the quality of rights (the right to propose legal rules,¹⁴⁸ to propose candidates to state offices,¹⁴⁹ to initiate proceedings,¹⁵⁰ to pro-

¹³⁹ Art. 123, para. 1, item 5 of the Constitution

¹⁴⁰ Art. 98 of the Constitution.

¹⁴¹ Arts. 200 and 201 of the Constitution..

¹⁴² Art. 203 of the Constitution.

¹⁴³ Citizens are entitled to decide on amending the Constitution either in a mandatory (Art. 203, para. 7 of the Constitution) or in an optional (Art. 203, para. 6 of the Constitution) constitutional referendum.

¹⁴⁴ Arts. 99 and 105, para. 2 of the Constitution.

¹⁴⁵ Art. 127, para. 3 of the Constitution.

¹⁴⁶ Arts. 129, 130, and 131 of the Constitution

¹⁴⁷ Art. 99, para. 1, item 11 of the Constitution.

¹⁴⁸ The President of the Republic is entitled to propose amendment to the Constitution (Art. 203, para. 1 of the Constitution).

claim legislation¹⁵¹), or in the contents and the scope of competences (the right to appoint one third of the Constitutional Court justices,¹⁵² competences to declare war and a state of war, and to prescribe measures in such circumstances,¹⁵³ the right to dissolve the National Assembly¹⁵⁴). In spite of the fact that President's role in deciding on the most important constitutional issues is limited, it does not necessarily mean that his role is only symbolic and official. For example, he has the right to issue a suspensive legislative veto¹⁵⁵ and the right to act as a Commander-in-Chief of the Army.¹⁵⁶

The position of the *Constitutional Court as a "guardian of the Constitution"* defines the nature and the quality of the participation of the Constitutional Court in the decision-making process. The Constitutional Court is responsible for the normative control of the legislation and the protection of human rights.¹⁵⁷ Accordingly, its participation in the decision-making processes is indirect. It is demonstrated in the removal of unconstitutional and unlawful provisions contained in the legal rules stemming from the decision-making processes in other state authorities.

4.4 The Constitutional Status of the Participants in the Quadrangle of Power

The Government is a *constitutional body of state power*, which means that its position in the constitutional system and its main competences are prescribed by the Constitution. In the Constitution, the Government is defined as *a holder of the executive power in the Republic of Serbia*¹⁵⁸ and a governing body responsible to the National Assembly for the policy of the Republic of Serbia, for enforcement of laws and other general acts of the National Assembly, as well as for the work of the bodies of public administration.¹⁵⁹ Within the system of the separation of powers and the model of government based on the separation of powers in the form of the parliamentary system, the Government is an exclusive and operative holder of most of the state power which belongs to the executive branch.

The statutory issues, the internal organization of the Government and its bodies, the method of its operation and the decision-making procedures are prescribed by the Act on Government.¹⁶⁰ The Constitution of Serbia does not include an explicit rule that the Government independently regulates its internal organization and mode of operation; the fact that these issues are regulated by the Act adopted by the National Assembly does not essentially encroach the independence of the Government in the process of regulating the above-mentioned issues. The right of the Government to propose legislation and its exclu-

¹⁴⁹ The President proposes a candidate for the Prime Minister (Art. 127, para. 1 of the Constitution).

¹⁵⁰ The President is entitled to initiate the proceedings for the review of constitutionality and legality before the Constitutional Court. Art. 168, para. 1 of the Constitution).

¹⁵¹ Art. 112, para. 1, item 2 of the Constitution.

¹⁵² Out of list of 10 candidates proposed by the National Assembly, the President of the Republic appoints 5 justices of the Constitutional Court (Art. 172, paras. 2 and 3 of the Constitution).

¹⁵³ Art. 200, paras. 5 and 6, Art. 201, paras. 2 and 4 of the Constitution.

¹⁵⁴ Arts. 109, paras. 1 and 3, 131, para. 4 of the Constitution.

¹⁵⁵ Art. 113 of the Constitution.

¹⁵⁶ Art. 112, para. 2 of the Constitution.

¹⁵⁷ Art. 166, para. 1 of the Constitution

¹⁵⁸ Art. 122 of the Constitution.

¹⁵⁹ Art. 124 of the Constitution.

¹⁶⁰ Art. 135 of the Constitution.

sive position among the bodies which are entitled to propose legislation speaks in favor of the conclusion that the Government is free to regulate its own organization; it is entitled to propose laws and every single amendment can be adopted only if it is corroborated by the Government. Bound by the Constitution, the Government independently prescribes regulations on the internal organization of its ministries and other bodies of state administration,¹⁶¹ while the specific duties of the state administration and the ministries are defined by the law.

The Government is *a collegiate body of state governance*. It consists of the Prime Minister, one or more Vice-Presidents and ministers¹⁶² who are elected by the National Assembly. Under the Constitution, the status of the Government members (ministers) depends on their constitutional position. The Vice-Presidents and the Ministers who are the heads of certain administrative departments are given different status. The status of Vice-Presidents may differ depending on the criteria which have been decisive in defining their position. The Vice-President's office may point to the fact that the Government is a coalition; in that case, in order to provide the balance of political parties constituting the parliamentary majority, coalition partners (only the strongest among them or all of them) have one Vice President each.¹⁶³ The Vice Presidents may also have a role of inter-departmental coordinators¹⁶⁴ covering similar and mutually connected areas. They may be in charge of certain programs or Government priorities on the basis of which they coordinate the operations of different ministries.¹⁶⁵ The number of ministers is defined by three parameters: the number of ministries as defined by the law,¹⁶⁶ the number of Vice Presidents,¹⁶⁷ and the number of ministers without portfolio. The number of Vice Presidents, their position in the Government and the activities they perform are prescribed by the law. The Government of Serbia is the parliamentary, non-deputy type of Government.¹⁶⁸ Given the fact that the electoral system is proportional, the Government is a coalition.

The constitutional status of the Government largely depends on the characteristics of this body of state power; these characteristics demonstrate that the Government encompasses two most important levers of power and holds two most important instruments by which it exercises its role in the administration of public affairs. Pursuant to the Constitution, the Government has a general authority to *establish and pursue policy*¹⁶⁹ which provides the Government with ample space and a wide range of possibilities to act in the process of establishing, formulating and adopting policy. Besides, the Government is the head of the state administration whose task is to prepare decisions (laws and other rules)

¹⁶¹ Art. 136, paras. 4 and 3 of the Constitution.

¹⁶² Art. 125, para. 1 of the Constitution

¹⁶³ For example the Government from 2001/2003.

¹⁶⁴ For example the Government from 2001/2003

¹⁶⁵ For example: coordination of activities connected to European Integration process during the term of office of the Government 2003/2006, and the current Government.

¹⁶⁶ Art. 136, para. 3 of the Constitution. The number of ministers was increased from 19 (in the previous Government) to 22 in the current Government.

¹⁶⁷ The Constitution establishes that the Government may have one or more Vice Presidents (Art. 125, para. 1 of the Constitution)

¹⁶⁸ The Constitution stipulates incompatibility of the functions of the member of the government and the deputy in Parliament (Art. 126, para. 1 of the Constitution).

¹⁶⁹ Art. 123, para. 1, item 1 of the Constitution

and measures as instruments for policy implementation. The second important characteristic of the constitutional position of the Government is reflected in the fact that the Government is, under the Constitution, generally authorized to *adopt regulations and other general acts for the purpose of law enforcement*.¹⁷⁰ This speaks in favour of the key position that the Government takes not only in the policy-making process and proposing legislation but also in the process of implementing the laws and pursuing state policy. In this context, it is worth noting that the constitutional system of Serbia does not recognize delegated legislation, meaning that the Government is unable to regulate legislative matters by its own statutory acts.

The work of the Government is influenced by the Prime Minister whose functions and authorities are prescribed by the Constitution. *The Prime Minister shall manage and direct the work of the Government*, manage the coordinated political activities of the Government, coordinate the work of the members of the Government.¹⁷¹ He *represent the Government*.¹⁷² *Ministers are accountable* for their work as well as for the activities within the competence of their ministries to the Prime Minister.¹⁷³ He is entitled to *propose a dismissal of a particular minister*¹⁷⁴ and, if the National Assembly passes a vote of no confidence to a minister, the Prime Minister *initiates the procedure for the election of the new member of the Government*.¹⁷⁵ Normatively, the Prime Minister has the decisive role in *creating the Government's program and proposing the composition of the Government*.¹⁷⁶ His resignation results in the termination of the Government's term of office.¹⁷⁷ The Constitution prescribes in detail the responsibilities of the ministers;¹⁷⁸ however, apart from the provisions on the parliamentary supervision of the Government,¹⁷⁹ it does not contain an explicit provision on the Prime Minister's responsibilities.

The National Assembly is *a supreme representative body* and the holder of the *constitutional and legislative power* in the Republic of Serbia.¹⁸⁰ The legitimacy and the position of this supreme citizens' representative body rests on the citizens' sovereignty and is provided for by the direct election of the National Assembly. *Inter alia*, the citizens exercise their sovereign rights through *their freely elected representatives*.¹⁸¹ The competences of the National Assembly, its internal organization, the method of operation and procedures for the exercise of its competences (for example, the constitutional and legislative procedure) follow from such constitutionally defined position, as well as from the relationships with other government authorities (for instance, the procedure of Government election, the procedure on the confidence vote to the Government). As a supreme

¹⁷⁰ Art. 123, para. 1, item 3 of the Constitution.

¹⁷¹ Art. 125, para. 2 of the Constitution

¹⁷² Art. 125, para. 2 of the Constitution.

¹⁷³ Art. 125, para. 3 of the Constitution

¹⁷⁴ Art. 133, para. 3 of the Constitution

¹⁷⁵ Art. 130, para. 5 of the Constitution.

¹⁷⁶ Art. 127, para. 2 of the Constitution

¹⁷⁷ Art. 132, para. 4 of the Constitution stipulates that the office of Government is terminated on the date when the Prime Minister's resignation is established.

¹⁷⁸ Art. 125, para. 3 of the Constitution

¹⁷⁹ Arts. 129, 130, and 131 of the Constitution

¹⁸⁰ Art. 98 of the Constitution

¹⁸¹ Art. 2, para. 1 of the Constitution

representative body which holds constitutional and legislative power, the National Assembly prescribes the organization of the state (the Constitution) and the status of the government authorities (for instance, the National Parliament Act¹⁸², the Government Act¹⁸³, the Act on the President of the Republic,¹⁸⁴ the Courts Act¹⁸⁵). Although the National Assembly is the supreme representative body, its competences are subject to constitutional limitations. In the course of the decisions-making process, the National Assembly acts within the framework and pursuant to the Constitution which prescribes limitations to the activity of each constitutional body, even the National Assembly (for instance, distribution of power, balance and mutual control of the branches of government,¹⁸⁶ prohibition of the concentration of power in the hands of any particular branch of government¹⁸⁷). The competences of the National Assembly are prescribed by the Constitution. During the decision-making process, the National Assembly may act only within the scope of its competences. Finally, if the National Assembly fails to elect the Government within the period prescribed by the Constitution or obstructs the operation of the constitutional system in any other way, it will be sanctioned by being dissolved.¹⁸⁸

The President of the Republic is an individual executive body of state authority. His position in the structure of the central government and in the decision-making processes are determined by two basic constitutional rules. He *shall express the state unity* of the Republic of Serbia¹⁸⁹, and act as a Commander-in-Chief of the Army.¹⁹⁰ The status of the President of the Republic in the constitutional system based on the separation of powers is characterized by the separation of the presidential power from any other form of power; it is confirmed, on the one hand, by the procedure for his election and the incompatibility of the presidential function with any other public function and professional activity¹⁹¹ and, on the other hand, by the coordinating role based on the constitutional rule that the President of the Republic personifies the national unity.

During the decision-making process, the power of the President of the Republic is limited. It is reflected in the contents, the quality and the scope of his competences in the decision-making process. This is confirmed by several constitutional rules.

The first group of rules refers to the decisions which are not made by the President of the Republic independently but where he is one of the participants in the decision-making process. When the National Assembly is not in a position to convene, the President of the Republic, in coordination with the Prime Minister and the President of the National Assembly, decides on *proclaiming the state of emergency and prescribing measures which shall provide for the derogation from human and minority rights guaranteed under the Constitu-*

¹⁸² Art. 110 of the Constitution

¹⁸³ Art. 135 of the Constitution

¹⁸⁴ Art. 121 of the Constitution

¹⁸⁵ Art. 143, paras. 2 and 4 of the Constitution

¹⁸⁶ Art. 4, paras. 2 and 3 of the Constitution.

¹⁸⁷ Art. 2, para. 2 of the Constitution

¹⁸⁸ Art. 109, paras. 1, 3 and 5 of the Constitution

¹⁸⁹ Art. 111 of the Constitution

¹⁹⁰ Art. 112, para. 2 of the Constitution

¹⁹¹ Art. 115 of the Constitution. In spite of this constitutional rule, in the constitutional practice, the President of the Republic retained the position of the political party leader even though this position is undoubtedly a public function.

tion; these measures may be prescribed by the Government and co-signed by the President of the Republic.¹⁹² If the National Assembly is not in the position to convene, the President of the Republic, together with the Prime Minister and the President of the National Assembly proclaim the state of war and determines *measures which provide for the derogation from human and minority rights*.¹⁹³

The second group consists of competences of the President of the Republic to initiate and submit proposals and in that manner stimulate the decision-making process. The President of the Republic is not entitled to a legislative initiative; however, he is entitled to *initiate the procedure to amend the Constitution*.¹⁹⁴ He is entitled to institute *the proceedings for the review of constitutionality* before the Constitutional Court¹⁹⁵ but he is not entitled to institute the proceedings for previous assessment of constitutionality.¹⁹⁶ The President *proposes 1/3 of the Constitutional Court justices* and the National Assembly decides on their appointment.¹⁹⁷

The third group consists of competences the President of the Republic exercises in terms of other bodies of authority, such as the right to *appoint 1/3 of the Constitutional Court justices* from the list proposed by the National Assembly,¹⁹⁸ and the right to *dissolve the National Assembly* upon the Government's proposal.¹⁹⁹

The fourth group includes the decisions that the President of the Republic makes independently, for example to *schedule the elections*,²⁰⁰ to *dissolve the National Assembly* in cases stipulated by the Constitution²⁰¹, and so on.

The fifth group includes the rights of the President of the Republic in the course of the legislative process, such as the right to *promulgate laws* by decree and the right to *return the law for reconsideration* with a written explanation to the National Assembly (*the suspensive legislative veto*).²⁰² The President of the Republic exercises these rights only within the framework determined by the Constitution. He is obliged to promulgate the law within 15 days from the adoption date, i.e. no later than 7 days if the law has been brought in emergency procedure, or to return the law for reconsideration to the National Assembly. If the National Assembly decides by the majority vote of the total number of deputies to adopt the law returned for reconsideration by the President of the Republic, he *is obliged to promulgate the law*.²⁰³ If he fails to do so, he *may be responsible for the violation of the Constitution*,²⁰⁴ in that case, *the Chairman of the National Assembly shall issue a decree on the promulgation of the law*.²⁰⁵

¹⁹² Art. 200, pars. 2 and 4 of the Constitution

¹⁹³ Art. 201, paras. 2 and 4 of the Constitution

¹⁹⁴ Art. 203, para. 1 of the Constitution

¹⁹⁵ Art. 168, para. 1 of the Constitution

¹⁹⁶ This right is given only to the deputies, Art. 169, para. 1 of the Constitution

¹⁹⁷ Art. 172, para. 3 of the Constitution

¹⁹⁸ Art. 172, para. 2 of the Constitution

¹⁹⁹ Art. 109, para. 2 of the Constitution

²⁰⁰ Art. 109, para. 1 of the Constitution

²⁰¹ Art. 109, para. 5 of the Constitution

²⁰² Art. 113, para. 1 of the Constitution

²⁰³ Art. 113, paras. 2 and 3 of the Constitution

²⁰⁴ Art. 118, para. 1 of the Constitution

²⁰⁵ Art. 113, para. 4 of the Constitution

The constitutional system of Serbia *does not recognize the instrument of countersigning* the acts of the head of state. As there is no countersignature, which is a characteristic of the parliamentary system and the bicephalous executive branch where the Government prevails, the issue of a clear distribution of the executive branch competences between the Government and President of the Republic is highly important because of the fact that the executive power is not only by its formulation but also normatively and factually bicephalous.

The Constitutional Court is *an autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms*.²⁰⁶ As the guardian of the Constitution (in charge of protecting the constitutional provisions, protecting human and minority rights guaranteed by the Constitution, resolving competence disputes within the principle of the separation of powers, and so on), in the system of government the Constitutional Court acts as one of the most important factors for reinforcing the principle of the rule of law. The Constitutional Court is a collegiate body consisting of 15 justices who elect their President (Chief Justice) among themselves by secret ballot for a three-year term of office.²⁰⁷ In deciding on the issues from its jurisdiction, the Constitutional Court acts as *an autonomous and independent*²⁰⁸ body. This fact is confirmed by the process of electing the Constitutional Court justices,²⁰⁹ their immunity,²¹⁰ incompatibility of the judicial function with other functions,²¹¹ as well as the reasons for the termination of the tenure of office as prescribed in the Constitution.²¹² The Constitution of Serbia does not contain the provision on the financial independence of the Constitutional Court (the Court budget). The Constitutional Court decisions are based only on the Constitution and the statutory law. They are *final, enforceable and generally binding*,²¹³ (they act *erga omnes*). The Constitutional Court ruling have a direct effect upon the legal system because these decisions actually modify the legislation and create new legal rules within the constitutional system which are legally binding for the state authorities and individuals alike.

²⁰⁶ Art. 166, para. 1 of the Constitution

²⁰⁷ Art. 172, paras. 1 and 7 of the Constitution

²⁰⁸ Art. 166, para. 1 of the Constitution

²⁰⁹ Art. 172 of the Constitution

²¹⁰ Art. 173 para. 2 of the Constitution

²¹¹ Art. 173, para. 1 of the Constitution

²¹² Art. 174 of the Constitution stipulates the reasons for the termination of a judicial function and the decision-making procedure on the tenure of judicial office.

²¹³ Art. 166, para. 2 of the Constitution

BAZIČNI PRINCIPI USTAVNE DRŽAVE

– primer Ustava Srbije –

Marijana Pajvančić

Ustav definiše princip narodnog suvereniteta u Osnovnim načelima. Dva su osnovna vida ispoljavanja suverenosti građana. Prvi je neposredno vršenje vlasti (referendum, narodna inicijativa), drugi je slobodni izbor predstavničkih tela. Ustav zabranjuje državnim organima, političkim partijama i pojedincima da prisvoje suverenost građana ili da uspostave vlast mimo slobodno izražene volje građana. Suverenost građana i njihova slobodna volja kojom iskazuju svoju suverenost štiti kao jedna od temeljnih vrednosti ustavnog poretka.

Suverenitet države Ustav definiše u preambuli u vezi sa statusom Pokrajine Kosovo i Metohija. Ustav definiše Republiku Srbiju kao nacionalnu državu. Država se različito definiše u preambuli odnosno u normativnom delu. Deo osnovnih načela Ustava su i odredbe koje se vezuju za državni suverenitet (teritorija, državni simboli, zaštita državljana, prava i status stranaca i dr.). Formalna obeležja državnog suvereniteta – državni simboli su propisana u osnovnim načelima.

Princip pravnog suvereniteta i vladavine prava Ustav izričito navodi u kontekstu jedinstva pravnog poretka. Ustav najviši pravni akt sa kojim moraju biti u skladu svi zakoni i drugi opšti akti. Nema izričite odredbe da Ustav i zakon obavezuju sve, već samo pojedinačne odredbe o obavezima državne uprave, suda, sudija i javnih tužilaca da poštuju Ustav i zakone. Zapažaju se i razlike u pogledu propisa koje Ustav navodi kada definiše okvir i granice delovanja pojedinih organa vlasti.

Princip vladavine prava Ustav definiše kao jedno od bitnih svojstava države i utemeljujućih principa na kojima ona počiva. Republika Srbija počiva na vladavini prava i socijalnoj pravdi, na načelima građanske demokratije, ljudskim pravima i slobodama i prihvatanju evropskih vrednosti. Pravni sadržaj principa vladavine prava uključuje: hijerarhiju pravnih propisa, jedinstvo pravnog poretka, obavezu objavljivanja pravnih propisa, zabranu povratnog dejstva zakona i drugih propisa uz izuzetke koje Ustav dopušta, sudsku kontrolu zakonitosti rada uprave. Ustavne odredbe o Ustavu kao najvišem pravnom aktu sa kojim moraju biti u skladu zakoni, drugi opšti akti kao i potvrđeni međunarodni ugovori su pravni instrumenti za realizaciju principa vladavine prava. Šire shvaćen princip vladavine prava uključuje funkcionalnu, organizacionu i personalnu podelu vlasti (horizontalnu i vertikalnu).

Ustav ne definiše koncept demokratije, ali sadrži više odredbi koje direktno ili indirektno govore o konceptu demokratije. U prilog konceptu ustavne demokratije govore ustavne odredbe o podeli vlasti, i poverovanju vlasti Ustavu i zakonu. Zabrana neposrednog vršenja vlasti od strane političkih stranaka i zabrana potčinjavanja vlasti od strane političkih stranaka govori o otklonu od partijske države i reafirmiše ustavnu demokratiju. Pluralistička demokratija prepoznaje se u slobodi osnivanja političkih stranaka i priznavanju njihove uloge u oblikovanju političke volje.

Ključne reči: *princip narodnog suvereniteta, suverenitet države, suverenitet prava (vladavina prava), demokratija.*