CONSTITUTION OF THE REPUBLIC OF SERBIA – SHORTER COMMENTARY ON ARTICLES (WHY IT MUST BE AMENDED?)[1]

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Abstract

After the referendum, on the 8th of November, 2006, the Assembly of the Republic of Serbia promulgated the currently valid Constitution of the Republic of Serbia. However, from the moment of its adoption, this Constitution was subjected to a great deal of criticism. Even the manner of its adoption was disputed. Currently, there are numerous demands for its amendment. Political parties in Serbia also more or less agree that the current Constitution should be amended, especially in the light of European integrations. Most frequently heard objections are to the provisions regarding the too high number of deputies in the Parliament, the content of the preamble, provisions regarding judiciary, the matter of regionalization etc.

This paper reviews and provides a short commentary on certain provisions of the Constitution of the Republic of Serbia, which we deem necessary to be pointed out when debating this matter. Particular focus is placed on certain normative solutions which we believe are not adequately regulated, i.e. those provisions we believe should be altered in order to adapt this supreme legal act to the intentions of Serbia to become a full member of the European Union, and which are at the same time in the interest of the citizens of Serbia.

Keywords: *the Constitution of the Republic of Serbia; commentary on articles; shortcomings; reasons to amend the Constitution; opinion of the Venice Commission*

1. Part six – Constitutional Court

The Constitutional court is a special body in the system of state power bodies, to which the role of "guardians of the constitution" was attributed, referring to the control

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of constitutionality and legality. Even though from its title it can be (wrongly) concluded that it is a body of the judicial type, according to its authority and numerous other elements, the Constitutional Court is significantly different from the courts as carriers of judicial authority.

The position of the Constitutional Court is defined in Article 166 of the Constitution by being defined as an autonomous and independent state body, the basic role of which is to protect constitutionality and legality, as well as human and minority rights and liberties. Its autonomy and independence are reflected in the fact that it is the only body of this kind, that it is not subservient to any other government authority, and finally, that it has the power of making decisions that are final, enforceable and generally binding.

The organization of the Constitutional Court is contained in a special part of the Constitution, the part that includes Articles from 166 to 175. Apart from these constitutional provisions, the procedure itself led before the Constitutional Court, its organization and legal effect of its decisions are more regulated in more detail in the Law on Constitutional Court[3].

Taking into consideration that giving a more detailed commentary on the organization and the proceedings before the Constitutional Court is not possible without an encompassing analysis of the corresponding proceedings of the Law on Constitutional Court (which would inevitably take up much more space and should be the subject of a separate paper), only the provisions that make up this part of the Constitution will be presented at first, and then, a shorter general commentary will be provided at the end of the chapter, by referencing the Law on Constitutional court in the measure necessary for a more precise explanation of these constitutional norms.

Article 166. Status

The Constitutional Court shall be an autonomous and independent state body which shall protect constitutionality and legality, as well as human and minority rights and freedoms.

The Constitutional Court decisions are final, enforceable and generally binding.

Article 167. Jurisdiction

The Constitutional Court shall decide on:

1. compliance of laws and other general acts with the Constitution, generally accepted rules of the international law and ratified international treaties;

2. compliance of ratified international treaties with the Constitution;

3. compliance of other general acts with the Law;

4. compliance of the Statute and general acts of autonomous provinces and local self-government units with the Constitution and the Law;

[3] "Official Gazette of RS" no. 109/2007, no. 99/2011, no. 18/2013, Decision of the Constitutional Court no. 103/2015 and no. 40/2015 – st. law.

5. compliance of general acts of organisations with delegated public powers, political parties, trade unions, civic associations and collective agreements with the Constitution and the Law.

The Constitutional Court shall:

1. decide on the conflict of jurisdictions between courts and state bodies;

2. decide on the conflict of jurisdictions between republic and provincial bodies or bodies of local self-government units;

3. decide on the conflict of jurisdictions between provincial bodies and bodies of local self-government units;

4. decide on electoral disputes for which the court jurisdiction has not been specified by the Law;

5. perform other duties stipulated by the Constitution and the Law.

The Constitutional Court shall decide on the banning of a political party, trade union organisation or civic association.

The Constitutional Court shall perform other duties stipulated by the Constitution.

Article 168. Assessment of constitutionality and legality

A proceedings of assessing the constitutionality may be instituted by state bodies, bodies of territorial autonomy or local self-government, as well as at least 25 deputies. The procedure may also be instituted by the Constitutional Court.

Any legal or natural person shall have the right to an initiative to institute a proceedings of assessing the constitutionality and legality.

The Law or other general acts which is not in compliance with the Constitution or the Law shall cease to be effective on the day of publication of the Constitutional Court decision in the official journal.

Before passing the final decision and under the terms specified by the Law, the Constitutional Court may suspend the enforcement of an individual general act or action undertaken on the grounds of the Law or other general act whose constitutionality or legality it assesses.

The Constitutional Court may assess the compliance of the Law and other general acts with the Constitution, compliance of general acts with the Law, even when they ceased to be effective, if the proceedings of assessing the constitutionality has been instituted within no more than six months since they ceased to be effective.

Article 169. Assessment of constitutionality of the law prior to its coming into force

At the request of at least one third of deputies, the Constitutional Court shall be obliged within seven days to assess constitutionality of the law which has been passed, but has still not been promulgated by a decree.

If a law is promulgated prior to adopting the decision on constitutionality, the Constitutional Court shall proceed with the proceedings as requested, according to the regular proceedings of assessing the constitutionality of a law.

If the Constitutional Court passes a decision on non-constitutionality of a law prior to its promulgation, that decision shall come into force on the day of promulgation of the law.

The proceedings of assessing constitutionality may not be instituted against the law whose compliance with the Constitution was established prior to its coming into force.

Article 170. Constitutional appeal

A constitutional appeal may be lodged against individual general acts or actions performed by state bodies or organisations exercising delegated public powers which violate or deny human or minority rights and freedoms guaranteed by the Constitution, if other legal remedies for their protection have already been applied or not specified.

Article 171. Ensuring the enforcement of decisions

Everyone shall be obliged to observe and enforce the Constitutional Court's decision.

The Constitutional Court shall regulate in its decision the manner of its enforcement, whenever deemed necessary.

Enforcement of the Constitutional Court's decisions shall be regulated by the Law.

Article 172. Organisation of the Constitutional Court. Election and appointment of the Constitutional Court justices

The Constitutional Court shall have 15 justices who shall be elected and appointed for the period of nine years.

Five justices of the Constitutional Court shall be appointed by the National Assembly, another five by the President of the Republic, and another five at the general session of the Supreme Court of Cassation.

The National Assembly shall appoint five justices of the Constitutional Court form among ten candidates proposed by the President of the Republic, the President of the Republic shall appoint five justices of the Constitutional Court from among ten candidates proposed by the National Assembly, and the general session of the Supreme Court of Cassation shall appoint five justices from among ten candidates proposed at a general session by the High Judicial Court and the State Prosecutor Council.

On each of the proposed lists of candidates, one of the appointed candidates must come from the territory of autonomous provinces.

A justice of the Constitutional Court shall be elected and appointed from among the prominent lawyers who have at least 40 years of experience in practicing the law.

One person may be elected or appointed a justice of the Constitutional Court on two occasions at the most.

Justices of the Constitutional Court shall elect the president from among their representatives for the period of three years, in a secret ballot.

Article 173. Conflict of interest. Immunity

A justice of the Constitutional Court may not engage in another public or professional function or action, except for the professorship a law faculty in the Republic of Serbia, in accordance with the Law.

A justice of the Constitutional Court shall enjoy immunity as a deputy. The Constitutional Court shall decide on its immunity.

Article 174. Termination of the tenure of office of the Constitutional Court justice

Tenure of office of the Constitutional Court justice shall terminate upon expiry of the period for which he/she had been elected or appointed, at his/her own request, after meeting the requirements regulated by the Law for obtaining the old age pension or by relief of duty.

A justice of the Constitutional Court shall be relieved of duty if he/she violates the prohibition of the conflict of interest, permanently loses the ability to discharge the function of a justice of the Constitutional Court, or is convicted of a penalty of imprisonment or criminal offence which makes him/her ineligible for the post of the Constitutional Court justice.

The National Assembly shall decide on the termination of a justice's tenure of office, on request of movers authorised for election, as well as on appointment for election of a justice of the Constitutional Court. An initiative to institute the proceedings of relieving of duty may be submitted by the Constitutional Court.

Article 175. The manner of deciding in the Constitutional Court. The Law on the Constitutional Court

The Constitutional Court shall adjudicate by the majority of votes cast by all justices of the Constitutional Court.

A decision to autonomously institute the proceedings of assessing the constitutionality or legality shall be passes by the Constitutional Court by two thirds of the majority votes cast by all justices.

Organisation of the Constitutional Court and the proceedings before the Constitutional Court, as well as the legal effect of its decisions shall be regulated by the Law.

As previously stated, the Constitutional Court is a state body entrusted by the constitutional system of the Republic of Serbia to decide upon the protection of constitutionality and legality. Apart from that, the Constitutional Court performs other affairs delegated by the Constitution.

Most of the competencies are provided by Article 167 of the Constitution, with a smaller part of the competencies provided in other parts of the Constitution, as is the jurisdiction of the Constitutional Court to decide upon the ban of a religious community in the case that its activities infringe those values explicitly listed in the Constitution, or

if it incites religious, national or racial intolerance (Article 44 para. 3) is proscribed in the part related to human and minority rights. Furthermore, according to the provisions of Article 187 and Article 193 para. 2, the Constitutional Court protects the right of the citizens to provincial or local self-government.

However, the most important jurisdictions of the Constitutional Court are definitely those in the domain of decisions regarding constitutionality and legality of laws and other general acts, or, regarding the compliance of these normative acts with the Constitution and the Law (Article 167 para. 1).

According to the forms of control, the Constitution differentiates between:

1. proceedings for assessment of constitutionality and legality according to the system of subsequent control (Article 168);

2. proceedings for assessment of constitutionality of the laws according to the system of preliminary control (Article 169).

Subsequent control of constitutionality is the prevailing, *i.e.* regular model of control. It is executed after a law comes into force, and according to the RS Constitution, it can be conducted in two sub-forms:

a) as an *abstract dispute on the constitutionality*, which is litigated regardless whether the law in question was applied and whether, as a result, the issue of constitutionality of the law was mentioned in a specific case. In such case, it is sufficient that authorized subjects, by listing the reasons for their suspicion regarding the constitutionality of the law, demand the Constitutional Court to provide an assessment of the constitutionality of such a law;

b) as *a specific dispute on the constitutionality*, which can be litigated only after the law is applied to a specific case. The procedure of solving the case is then stopped in order to first solve the issue of constitutionality of the corresponding regulation.

According to the provisions of Article 168 of the Constitution, the authorized institutors for initiating the proceedings of assessing the constitutionality and legality are the state bodies, bodies of territorial autonomy or local self-government, as well as at least 25 deputies. Apart from this, such proceedings can be initiated by the Constitutional Court itself, with a decision passed by a two third majority vote of all justices.

On the other hand, any legal or natural person has as a right to *initiate* the proceedings to assess constitutionality and legality. In such cases, the Constitutional court determines if there is basis to initiate the proceedings, and if it finds that there are grounds for the case, it will accept the initiative and pass a court decision on initiating the procedure of constitutionality assessment. In assessing constitutionality and legality, the Constitutional Court is not limited by the claim of the proponent, *i.e.* initiator.

The Constitutional Court has the right to, under the conditions determined by the law until making the final decision, suspend the execution of any individual act or actions taken based on the law or other general act, the constitutionality and legality of which is being assessed, thus preventing further consequences from the disputed law. On the other hand, the Constitutional Court has the option to stop the procedure of

assessing constitutionality and legality, in order to provide the enactor of the act the possibility to modify the said act. The rule is that the Constitutional Court assesses constitutionality and legality of the acts in power, but it can also do so upon their termination, but only if the proceedings of their assessment was initiated six months starting from the date of their termination, at the latest. The Law and other general acts that are not in accordance with the Constitution or the Law cease to be valid on the day the decision of the Constitutional Court is published in the official gazette of the Republic of Serbia.

Preliminary control is of preventive character and its purpose is to coordinate the law with the Constitution before it comes into force, and thus to prevent the application of an unconstitutional law. Such control is conducted after a law is passed, and before it comes into force, *i.e.* in the time interval between passing and promulgation of the law. It is necessary to emphasize that the proceedings for preliminary assessment of constitutionality can be initiated only for assessing the constitutionality of the Law. According to the provisions of Article 169 of the Constitution, these proceedings can be initiated at the request of at least one third of deputies, and the Constitutional Court is obliged within seven days to assess the constitutionality of the law which has been passed, but has still not been promulgated by a decree. In the case that the law is promulgated before a decision is reached regarding its constitutionality, the Constitutional Court will proceed with the proceedings as requested, but the proceedings will be continued in the form of proceedings for subsequent assessment of constitutionality of a law (the Constitution uses a slightly inadequate and confusing term "regular proceedings"). In the case that the Constitutional Court passes a decision on non-constitutionality of a law prior to its promulgation, this decision will come into force on the day of promulgation of the law. However, when in these proceedings, the Constitutional Court determines that the law is in accordance with the Constitution, the proceedings for assessing the constitutionality of such a law cannot be initiated later based on the system of subsequent assessment. We deem such solution, according to which the proceedings of subsequent assessment of constitutionality of a law that has been assessed as in accordance with the Constitution in previous proceedings, to be inadequate. This is due to the reason that true defects of a law, even its deviation from constitutional rights, can be, as a rule, discovered only after its application in practice on specific cases.

Apart from the proceedings of assessing the coordination of the laws and other general acts with the Constitution, and accordance of other general acts with the Law, proceedings based on constitutional appeal are particularly important, and they represent a *novum* in the constitutional system of Serbia. The bases for this legal institute are regulated in Article 170 of the Constitution, while the complete proceedings are regulated in more detail in the Law on the Constitutional Court[4]. So, in

[4] "Official Gazette of RS" no. 109/2007, no. 99/2011, no. 18/2013, Decision of the Constitutional Court no. 103/2015 and no. 40/2015 – st. law.

Article 82, the Law repeats the Constitutional provision according to which it is proscribed that a constitutional appeal can be lodged against an individual act or an action of the state body or an organization vested with public authority, and which violates or denies human or minority rights or freedoms guaranteed by the Constitution, if other legal remedies have already been applied or have not been specified, or the right for their judicial protection is excluded by the Law.

According to the provisions of Article 83 of the Law, a constitutional appeal can be declared by any person who believes his/her human or minority right and freedoms guaranteed by the Constitution have been violated or denied by an individual act or action of a state body or an organization vested with public authority. A constitutional appeal can be lodged by another natural person, or a state or other body in charge of monitoring and exercise of human and minority rights and liberties, on the behalf of that person, based on their written authorization. The appeal can be lodged within 30 days of being served an individual act, or from the date of the action that violated or denied human or minority rights and the freedoms guaranteed by the Constitution (Article 84 of the Law on Constitutional Court). The law proscribes that, as a rule, the constitutional appeal does not prevent the application of an individual act or action that it was lodged against, and that on the proposal of applicant, the Constitutional Court can postpone the execution of an individual act or action that it was lodged against if such execution would cause irreparable damage to the applicant, and the postponement is not contrary to public interest, nor would it cause significant damage to a third person. If an individual act or activity violates or denies constitutionally guaranteed human or minority rights and freedoms of more persons, and only some of them have lodged a constitutional appeal, the decision of the Constitutional Court refers also to the persons that did not file the constitutional appeal, conditioned that they are in the same legal situation.

We cannot help but point out a certain dose of reserve to the possibility of lodging a constitutional appeal. Namely, by introducing this institute, the Constitutional Court, which is not a part of judicial authority and the members of which do not have all judicial prerogatives (and who are not elected based on the criteria for electing judges), is given the option to expand its original competency of controlling constitutionality and legality to assessing the decisions of regular courts, even the decisions of the Supreme Court of Cassation, which we believe to be a debatable solution.

Finally, it is necessary to look back on the legal nature of Constitutional Court decisions.

According to the provisions of Article 166 para. 2 of the Constitution, the decisions of the Constitutional Court are final, enforceable and generally binding, which in fact means that there is no legal remedy against them, they have the property of enforceability, and that they act *erga omnes*. Article 171 of the Constitution proscribes that everyone is obliged to observe and enforce the decisions of the Constitutional Court, and their execution is regulated by law, and that when necessary, the

Constitutional Court itself regulates the manner of its enforcement in its own decision. The beginning of the legal effect of Constitutional Court decisions differs based on whether they concern individual items, in which case the decisions produce legal effect from the day of submission to the participants of the proceedings or authorized body, or if they concern general acts, when the decisions produce legal effect from the day of being published in the official gazette. We wish to remind that there is an exemption from this rule concerning the decision on preliminary assessment of constitutionality of a law, that produces the legal effect from the day of promulgation of the law (Article 169 para. 3).

In the amendments of the Law on the Constitutional Court in the year 2011, the Constitutional Court has been given a discretional right to be able to postpone the publishing of its decision in the official gazette for six months at the longest, which also postpones the moment of termination of an unconstitutional or unlawful general act. In this manner, the enactor of the disputed general act is given the possibility of passing a new general act, and thus avoid legal vacuum (Article 58 para. 4 of the Law on the Constitutional Court).

2. Part seven – Territorial organization

The constitutional mater regarding the territorial organization of the Republic of Serbia is systematized in three special items. The first item contains general provisions regarding the matters equally referring to the constitutional status of autonomous province and the constitutional status of local self-government units. The second item consist on the status of the autonomous province, and the third – on the status of local self-government units (municipality, city, City of Belgrade).

Apart from defining the terms of provincial autonomy and local self-government, in this part, the Constitution also regulates distribution of authority, delegating authority, the right to autonomous regulation of bodies in autonomous province and local self-government units, assembly of autonomous province and local self-government units, as well as the issues of cooperation between autonomous provinces and local self-government units.

In the beginning, we will point out the the opinion of the Venice Commission regarding this part of the Constitution, which we agree with completely: "This Part of the Constitution seems not very coherent. On the one hand, there are generous provisions of principle, including the right to provincial autonomy and local selfgovernment and on substantial autonomy of Autonomous Provinces. On the other hand, these concepts are not really filled with substance. The constitutional regulation of the division of competences between the State, autonomous provinces and units of local self-governance is quite complicated and leaves quite a wide scope for interpretation and specification through legal acts of lower rank"[5].

[5] Venice Commission, *Opinion on the Constitution of Serbia*, no. 405/2006, para. 85.

2.1. Provincial autonomy and local self-government – Articles 176-181

Within the framework of the territorial organization of the Republic of Serbia, the Constitution recognizes autonomous provinces and local self-government units. The autonomous provinces are units of territorial autonomy where the citizens exercise their constitutionally given right to territorial autonomy. Units of local self-government are municipalities, cities and the City of Belgrade, where the citizens also exercise their constitutionally given right to local self-government. Provinces and local self-government units have the status of legal entities (Article 176).

The Constitution regulated the position and exercising the right to territorial autonomy and local self-government on the following principles:

- on the principle of subsidiary, which states that the local self-government and provincial units are competent in the matters that are not a competency of the Republic. This refers to those matters, which, in an effective manner, can be realized within a local self-government unit, or within an autonomous province, while legally regulating what matters are of the republic, provincial or local interested (Article 177);

- on the principle of delegating competencies, according to which the Republic can, in accordance with the law, delegate particular matters within its competence to autonomous provinces and local self-government units. Furthermore, according to the same principle, an autonomous province can make a decision to delegate particular matters within its competence to local self-government units. Competency of the Republic of Serbia and the provinces to monitor and execute the entrusted matters is regulated by Law, which includes the right to withdraw the entrusted competency if the delegated matters are not executed efficiently, legally, and in a timely manner. The funds for executing the delegated competencies are supplied from the budget of whomever delegates the matters (Article 178);

- on the principle of independence, according to which, the provinces, in accordance with the Constitution and the Statute, and local self-government units, in accordance with the Constitution and the Law, autonomously regulate the organization and competencies of its bodies and public services (Article 179);

- on the principle of assembly system of power, according to which, the Assembly of an autonomous province and the assembly of the local self-government unit is the supreme body of these territorial units. The provincial Assembly consists of deputies, and the assembly of local self-government units of councilors, elected to the period of four years, in direct elections, by secret ballot (Article 180);

- on the principle of cooperation, according to which the provinces and local self-government units have the right to cooperate with corresponding territorial communities and local self-government units from other countries, within the foreign policy of the Republic of Serbia, observing the territorial integrity and legal system of the Republic of Serbia (Article 181).

2.2. Autonomous provinces – Articles 182-187

Provinces are autonomous territorial units established by the Constitution, in which citizens exercise the right to provincial autonomy. In theory, existence of a territorial autonomy means that there is a certain degree of independence in conducting certain matters in a certain part of the territory, guaranteed by the state by the Constitution to the citizens who live and work on that part of its territory, primarily due to the existence of certain national, cultural, historical and other specificities, or properties existing in that part of the country's territory. The difference between a local self-government unit in a unitary state and federal units in a composite state is that units of territorial autonomy do not have sovereign power.

The Republic of Serbia has the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija. According to the provisions of Article 182 para. 2 of the Constitution, the substantial autonomy of the Autonomous province of Kosovo and Metonija will be regulated by a special law adopted after the proceedings determined for amending the Constitution.

New provinces can be established, and already established ones can be revoked or merged, following the proceedings determined for amending the Constitution. The proposal to establish new, or revoke or merge the existing autonomous provinces is established by citizens in a referendum. The territory of provinces and the terms under which borders between provinces may be altered is regulated by the Law. Moreover, the Constitution also proscribes protection of borders of autonomous provinces and proscribes that the territory of autonomous provinces cannot be altered without the consent of its citizens given in a referendum (Article 182 para. 2-3).

In the scope of the rights and obligations of autonomous provinces, their direct and entrusted competencies differ.

Direct competencies of autonomous provinces are given in Article 183 of the Constitution:

Autonomous provinces shall, in accordance with the Constitution and their Statutes, regulate the competences, election, organisation and work of bodies and services they establish.

Autonomous provinces shall, in accordance with the Law, regulate the matters of provincial interest in the following fields:

1. urban planning and development;

2. agriculture, water economy, forestry, hunting, fishery, tourism, catering, spas and health resorts, environmental protection, industry and craftsmanship, road, river and railway transport and road repairs, organising fairs and other economic events;

3. education, sport, culture, health care and social welfare and public informing at the provincial level.

Autonomous provinces shall see to exercising human and minority rights, in accordance with the Law.

Autonomous provinces shall establish their symbols, as well as the manner in which they shall be put to use.

Autonomous provinces shall manage the provincial assets in the manner stipulated by the Law.

Autonomous provinces shall, in accordance with the Constitution and the Law, have direct revenues, provide the resources for local self-government units for performing the delegated affairs and adopt their budget and annual balance sheet.

To finance performing these tasks, the Autonomous province has direct income. According to the provisions of Article 184 of the Constitution, the kind and amount of direct revenues are stipulated by the Law. The Law also specifies the share of autonomous provinces in the part of revenue of the Republic of Serbia. The Constitution also proscribes that the budget of the Autonomous Province of Vojvodina amounts to be at least 7% in relation to the budget of the Republic of Serbia, bearing in mind that three-sevenths of the budget of the Autonomous Province of Vojvodina are to be used to finance capital expenditures.

As previously stated, apart from direct competencies, autonomous provinces can perform certain tasks entrusted by the Republic. In conducting these affairs, the provinces have a different position, considering that they remain state affairs, while the provincial bodies are only "intermediaries" that conduct them under the supervision of the state, in its name and in its expense.

Within the right to monitor the work of bodies of autonomous provinces in performing direct tasks, the Government can institute the proceedings of assessing the constitutionality and legality of decisions of autonomous province before the Constitutional Court, prior to their coming into force. In these cases, the Constitutional Court can, prior to passing its decision, defer coming into force of the challenged decision of the autonomous province (Article 186). On the other hand, in Article 187, the Constitution proscribes two specific legal remedies for protecting provincial autonomy. The first consists of the right of the bodies designated by the Statute of the autonomous province to lodge an appeal with the Constitutional Court, if an individual act or action of a state body or local self-government unit obstructs performing of competencies of autonomous province. The second legal remedy consists of the possibility of the body designated by the Statue of the autonomous province to institute the proceedings for assessing the constitutionality or legality of a law or other legal act of the Republic of Serbia, or general legal act of local self-government unit which violates the right to the provincial autonomy.

The supreme legal act of an autonomous province is the Statute, adopted by its Assembly, with prior approval of the National Assembly of the Republic of Serbia. The autonomous province enacts other decisions and general acts pertaining to matters within its competencies (Article 185).

Apart from the most basic organization of the provincial assembly, the Constitution did not delve into further ordination of provincial bodies.

According to the current organization, AP Vojvodina has the Assembly, which consists of 120 deputies elected in direct elections by secret ballot, according to mixed electoral system (half is elected according to proportionate system, and other hand according to majority vote), to the period of 4 years, then the Provincial Government, provincial administrative bodies, Provincial ombudsman and provincial public and expert services. The administrative center or AP Vojvodina is Novi Sad. The provinces cannot establish courts, considering they are established exclusively as bodies of state power.

As far as AP Kosovo and Metohija is concerned, its status is in the phase of international addressing since the year 1999.

2.3. Local self-government – Articles 188-193

Local self-government is an expression of the right of the citizens to, within the limits of constitutionally guaranteed rights, participate in decision making regarding local affairs, which are in the interest of the local population. Therefore, it represents an authority in the local communities that is organized and executed by the members of these communities. In the area of Europe, the basic principles of local self-government are determined by the European Charter on Local Self-Government from the year 1985[6].

Unlike the territorial autonomy that can exist only in a part of the state territory, the rule with local self-government is that it is organized in the entire territory.

In order to discuss local self-government, it is necessary for it to complete four conditions:

1. that there is an established range of public affairs of local character conducted autonomously by the local self-government units, with supervision of constitutionality and legality by the state bodies;

2. free election of local bodies and officials, and their responsibility towards the voters in the local community;

3. the existence of legal independence of local self-government units, guaranteed by the Law and the Constitution, with recognizing the properties of legal entity and providing the means for legal protection from the reach of state bodies; and

4. the existence of financial autonomy and local property.

The Constitution of the Republic of Serbia proscribes the basis of the content and the forms of exercising the rights of the citizens to local self-government, and a more detailed regulation is entrusted to the Law on Local Self-Government[7] and a special Law on the Capital City[8].

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[6] European Charter of Local Self-Government, ETS, no. 122, Strasbourg, 15 October 1985 – Treaty open for signature by the member States of the Council of Europe.
[7] "Official Gazette of RS" no. 129/2007, no. 83/2014 and no. 101/2016 – st. law.
[8] *Ibidem*.

Units of local self-government are municipalities, towns and the City of Belgrade (Article 188 para. 1 of the Constitution).

According to the Law on Local Self-government, a municipality is a basic territorial unit where local self-government takes place, which is capable of exercising its right and delegated competencies through its bodies, and which has at least 10.000 inhabitants (Article 18 para. 1 of the Law on Local Self-Government).

In Article 23 of that law, a town is defined as a local self-government unit stipulated by law, which is an economical, administrative, geographical and cultural center of a wider are and which has over 100.000 inhabitants, or exceptionally, if there are special economical, geographical and historical reasons a territorial unit with less than 100.000 inhabitants can be stipulated as a town. A town has the same competencies as a municipality, but it can be delegated with other competencies by law, and municipalities can be established on the territory of a town by the town Statute.

The position of the City of Belgrade, as the capital of the Republic of Serbia, is regulated in more detail by a special law. Apart from the competencies delegated to other municipalities and towns by the Constitution and the Law on Local Self-Government, the City of Belgrade has additional competencies delegated by the aforementioned Law on Capital City.

According to the Constitution, the territory and the seat of local self-government unit is specified by law, and passing a law regarding the establishment, revocation or alteration of the territory of local self-government unit must be preceded by a referendum on the territory of that local self-government unit (Article 188 para. 2-3).

According to Article 190 of the Constitution, the municipality, through its bodies, and in accordance with the law conducts the following direct tasks:

1. regulate and provide for the performing and development of municipal activities;

2. regulate and provide for the use of urban construction sites and business premises;

3. be responsible for construction, reconstruction, maintenance and use of local network of roads and streets and other public facilities of municipal interest; regulate and provide for the local transport;

4. be responsible for meeting the needs of citizens in the field of education, culture, health care and social welfare, child welfare, sport and physical culture;

5. be responsible for development and improvement of tourism, craftsmanship, catering and commerce;

6. be responsible for environmental protection, protection against natural and other disasters; protection of cultural heritage of the municipal interest;

7. protection, improvement and use of agricultural land;

8. perform other duties specified by the Law.

The municipality shall autonomously, in accordance with the Law, adopt its budget and annual balance sheet, the urban development plan and municipal development programme, establish the symbols of the municipality, as well as their use.

The municipality shall see to exercising, protection and improvement of human and minority rights, as well as to public informing in the municipality.

The municipality shall autonomously manage the municipal assets, in accordance with the Law.

The municipality shall, in accordance with the Law, prescribe offences related to violation of municipal regulations.

Affairs of local self-government units are financed from direct revenues of local self-government unit, the budget of the Republic of Serbia, in accordance with the Law, and the budget of the autonomous province, in the case when the autonomous province delegated the performing of the affairs within its competences to the local self-government units, in accordance with the decision of the Assembly of the Autonomous Province (Article 188 para. 3 of the Constitution).

The supreme legal act of the municipality is the Statute, adopted by the Municipal Assembly (Article 191 of the Constitution).

Within the monitoring the work of the municipality, and in accordance with Article 192 of the Constitution, the Government is obliged to cancel the enforcement of the municipal general act which it considers to be in noncompliance with the Constitution or the Law, and institute the proceedings of assessing its constitutionality or legality within five days. The Government, under the conditions specified by the Law, may dismiss the Municipal Assembly, and simultaneously appoint a temporary body which performs duties within the competencies of the Assembly, taking into consideration the political and national composition of the dismissed Municipal Assembly.

Similarly as the provinces, local self-governments also have the right to lodge an appeal to the Constitutional Court if an individual act or action by a state body or a body of local self-government unit obstructs performing the competencies of the municipality. Furthermore, the body designated by the Statue of the municipality can institute the proceedings of assessing the constitutionality or legality of the Law or other legal act of the Republic of Serbia or autonomous province which violates the right to local self-government (Article 193 of the Constitution).

3. Part eight – Constitutionality and legality

In the part dealing with constitutionality and legality, the Constitution takes as its basic principle that the legal order of the Republic of Serbia is unique and regulates the hierarchy of international regulations and general regulations of internal law, proscribes the way laws and other general acts are publicized when coming into force, legality of administration, as well as the language of proceedings. In this part of the Constitution, provisions related to state of war, state of emergency are systematized, as well as the provisions regarding derogation from human and minority rights in the state of emergency or war.

In continuation, we will focus on provisions of Articles 194-202 that make up the Eighth part of the Constitution, with a shorter, but in our opinion very significant, commentary provided only regarding the Article 202 of the Constitution.

Article 194. Hierarchy of domestic and international legal acts

The legal system of the Republic of Serbia shall be unique.

The Constitution shall be the supreme legal act of the Republic of Serbia.

All laws and other general acts enacted in the Republic of Serbia must be in compliance with the Constitution.

Ratified international treaties and generally accepted rules of ithe international law shall be part of the legal system of the Republic of Serbia. Ratified international treaties may not be in noncompliance with the Constitution.

Laws and other general acts enacted in the Republic of Serbia may not be in noncompliance with the ratified international treaties and generally accepted rules of the International Law.

Article 195. Hierarchy of domestic general legal acts

All by-laws of the Republic of Serbia, general acts of organisations with delegated public powers, political parties, trade unions and civic associations and collective agreements must be in compliance with the Law.

Statutes, decisions and other general acts of autonomous provinces and local self-government units must be in compliance with the Law.

All general acts of autonomous provinces and local self-government units must be in compliance with their statutes.

Article 196. Publication of laws and other general acts

Laws and all other general acts shall be published prior to coming into force.

The Constitution, laws and by-laws of the Republic of Serbia shall be published in the republic official journal, and statutes, decisions and other general acts of autonomous provinces shall be published in provincial official journals.

Statutes and general acts of local self-government units shall be published in local official journals.

Laws and other general acts shall come into force no earlier than on the eighth day from the day of publication and may come into force earlier only if there are particularly justified grounds for that, specified at the time of their adoption.

Article 197. Prohibition of retroactive effect of laws and other general acts

Laws and other general acts may not have a retroactive effect.

Exceptionally, only some of the law provisions may have a retroactive effect, if so required by general public interest as established in the procedure of adopting the Law.

A provision of the Penal Code may have a retroactive effect only if it shall be more favourable for the perpetrator.

Article 198. Legality of administration

Individual acts and actions of state bodies, organisations with delegated public powers, bodies of autonomous provinces and local self-government units must be based on the Law.

Legality of final individual acts deciding on a right, duty or legally grounded interest shall be subject to reassessing before the court in an administrative proceedings, if other form of court protection has not been stipulated by the Law.

Article 199. Language of proceedings

Everyone shall have the right to use his/her language in the proceedings before the court, other state body or organisation performing public powers, when his/her right or duty is decided on.

Unfamiliarity with the language of the proceedings may not be an impediment for the exercise and protection of human and minority rights.

Article 200. State of emergency

When the survival of the state or its citizens is threatened by a public danger, the National Assembly shall proclaim the state of emergency.

The decision on the state of emergency shall be effective 90 days at the most. Upon expiry of this period, the National Assembly may extend the decision on the state of emergency for another 90 days, by the majority votes of the total number of deputies.

During the state of emergency, the National Assembly shall convene without any special call for assembly and it may not be dismissed.

When proclaiming the state of emergency, the National Assembly may prescribe the measures which shall provide for derogation from human and minority rights guaranteed by the Constitution.

When the National Assembly is not in a position to convene, the decision proclaiming the state of emergency shall be adopted by the President of the Republic together with the President of the National Assembly and the Prime Minister, under the same terms as by the National Assembly.

When the National Assembly is not in a position to convene, the measures which provide for derogation from human and minority rights may be prescribed by the Government, in a decree, with the President of the Republic as a co-signatory.

Measures providing for derogation from human and minority rights prescribed by the National Assembly or Government shall be effective 90 days at the most, and upon expiry of that period may be extended under the same terms.

When the decision on the state of emergency has not been passed by the National Assembly, the National Assembly shall verify it within 48 hours from its passing, that is, as soon as it is in a position to convene. If the National Assembly does not verify this

decision, it shall cease to be effective upon the end of the first session of the National Assembly held after the proclamation of the state of emergency.

In cases when the measures providing for derogation from human and minority rights have not been prescribed by the National Assembly, the Government shall be obliged to submit the decree on measures providing for derogation from human and minority rights to be verified by the National Assembly within 48 hours from its passing, that is, as soon as the National Assembly is in a position to convene. In other respects, the measures providing for derogation shall cease to be effective 24 hours prior to the beginning of the first session of the National Assembly held after the proclamation of the state of emergency.

Article 201. The State of war

The National Assembly shall proclaim the state of war.

When the National Assembly is not in a position to convene, the decision on proclamation of the state of war shall be passed by the President of the Republic together with the President of the National Assembly and the Prime Minister.

When proclaiming the state of war, the National Assembly may prescribe the measures which shall provide for derogation from human and minority rights guaranteed by the Constitution.

When the National Assembly is not in a position to convene, the measures which provide for derogation from human and minority rights guaranteed by the Constitution shall be decided on by the President of the Republic together with the President of the National Assembly and the Prime Minister.

All measures prescribed in the period of the state of war shall be verified by the National Assembly when in a position to convene.

Article 202. Derogation from human and minority rights in the state of emergency and war

Upon proclamation of the state of emergency or war, derogations from human and minority rights guaranteed by the Constitution shall be permitted only to the extent deemed necessary.

Measures providing for derogation shall not bring about differences based on race, sex, language, religion, national affiliation or social origin.

Measures providing for derogation from human and minority rights shall cease to be effective upon ending of the state of emergency or war.

Measures providing for derogation shall by no means be permitted in terms of the rights guaranteed pursuant to Articles 23, 24, 25, 26, 28, 32, 34, 37, 38, 43, 45, 47, 49, 62, 63, 64 and 78 of the Constitution.

Due to the diversity of the situations that occur and exist during the state of war compared to the state of emergency, we are of the opinion that, within this article, it is

necessary to clearly distinguish between the extent of derogating basic rights in these diverse circumstances. Furthermore, we believe that the expression "only to the extent deemed necessary" used in the first paragraph of this article is too unspecific. The solution we deem to be much better, and which could be used is the phrasing from Article 15 of the European Convention on human rights – "to the extent strictly required by the exigencies of the situation".

4. Part nine – Amending the Constitution

The Constitution, as a supreme political and legal act of a country, differs from other laws by the fact that it regulates the proceedings for its own amending, which is as a rule far more complex than the proceeding for amending a law.

Precisely these proceedings, which are more than complex as far as the Constitution of the Republic of Serbia is concerned, regulates Part Nine of the Constitution.

Article 203. Proposal to amend the Constitution and adoption of the amendment of the Constitution

A proposal to amend the Constitution may be submitted by at least one third of the total number of deputies, the President of the Republic, the Government and at least 150,000 voters.

The National Assembly shall decide on amending the Constitution.

A proposal to amend the Constitution shall be adopted by a two-third majority of the total number of deputies.

If the required majority of votes has not been achieved, the amending of the Constitution according to the issues contained in the submitted proposal which has not been adopted shall not be considered in the following twelve months.

In case the National Assembly adopts the proposal for amending the Constitution, an act on amending the Constitution shall be drafted, that is, considered.

The National Assembly shall adopt an act on amending the Constitution by a two-third majority of the total number of deputies and may decide to have it endorsed in the republic referendum by the citizens.

The National Assembly shall be obliged to put forward the act on amending the Constitution in the republic referendum to have it endorsed, in cases when the amendment of the Constitution pertains to the preamble of the Constitution, principles of the Constitution, human and minority rights and freedoms, the system of authority, proclamation the state of war and emergency, derogation from human and minority rights in the state of emergency or war or the proceedings of amending the Constitution.

When the act on amending the Constitution is put forward for endorsement, the citizens shall vote in the referendum within no later than 60 days from the day of

adopting the act on amending the Constitution. The amendment to the Constitution shall be adopted if the majority of voters who participated in the referendum voted in favour of the amendment.

The act on amending the Constitution endorsed in the republic referendum shall come into force once promulgated by the National Assembly.

If the National Assembly does not decide to put forward the act on amending the Constitution for endorsement, the amendment of the Constitution shall be adopted by voting in the National Assembly, and the act on amending the Constitution shall come into force once promulgated by the National Assembly.

"It strikes the Venice Commission, first of all, that the procedure drafted is very complex, as it involves two or even three steps: first, the National Assembly has to adopt, by a two-thirds majority of all deputies, a proposal to amend the Constitution (Article 203.3), and then the same National Assembly has to adopt an act amending the Constitution by a two-thirds majority of all deputies (Article 203.6). Finally, Article 205 seems to require the adoption, again by a two thirds majority, of a further constitutional law for the enforcement of the amendments to the Constitution"[9].

"A number of questions arise as to the significance and use of this procedure. What is the legal effect of the adoption of the proposal to amend the Constitution? What is the relationship between the votes held by the National Assembly? What is the use of the complexity that results from this procedure? The Venice Commission draws attention to the drawbacks of an excessively rigid procedure for amending the Constitution, as was experienced in Armenia and in Serbia itself under the Constitution of 28 September 1990"[10].

Article 204. Prohibition to amend the Constitution

The Constitution shall not be amended in the time of the state of war or emergency.

Apart from the temporary prohibition on amending the Constitution, the effect of which extends only to the matters contained in the proposal for amending the Constitution which has not been supported by the National Assembly (Article 203 para. 4), the Constitution proscribes another temporary prohibition on amending the Constitution. Namely, amending the Constitution during the time of war or emergency is explicitly prohibited (Article 204).

Article 205. Constitutional Law

A constitutional law shall be enacted for the enforcement of the amendments to the Constitution.

A constitutional law shall be adopted by a two-third majority of the total number of deputies.

[9] Venice Commission, *Opinion on the Constitution of Serbia*, no. 405/2006, para. 99.
[10] Venice Commission, *Opinion on the Constitution of Serbia*, no. 405/2006, para. 100.

The Constitution differs from the Law also by the act regulating its application and enforcement. A special Law is passed to enforce the Constitution, which has the form of a constitutional law (Article 205 para. 1). Special proceedings are proscribed to adopt this law, which differs from the adoption of other "regular" laws, amongst other things, by the majority required for its adoption in the National Assembly. In order to adopt a constitutional law to enforce the Constitution, a qualified two-third majority of the total number of deputies is necessary.

Furthermore, the act regulating the enforcement of the Constitution is adopted by the National Assembly, unlike the provision for enforcing the laws, which as a subordinate legal act, is enacted by the Government.

And finally, the constitutional law for enforcing the Constitution is adopted at the same time as the Constitution, and it comes into force on the same day as the Constitution, while the provision for enforcing a law is adopted after a law is enacted, and it comes into power after the law the enforcement of which it regulates.

5. Part ten – Final provision

Article 206

This Constitution shall come into force on the day of its promulgation in the National Assembly.

Another difference between the Constitution and the Law is also that, unlike the laws which come into force no earlier than on the eighth day after of publication in the Official Gazette, and can only exceptionally come into force before the period of 8 days if there are particularly justified grounds for that, specified at the time of their adoption (Article 196 para. 4 of the Constitution), the Constitution, in accordance with the explicit provision of its final article, comes into force on the day of its promulgation in the National Assembly.

Conclusion

Following the analysis of the content of the current Constitution of the Republic of Serbia, from the preamble to the provisions regarding the process of constitution-making, it can be concluded that this Constitution contains a certain number of positive and good solutions, however it also contains not a small number of shortcomings, oversights, inadequate wording and ambiguities that impact the general quality of the constitutional text and make it far below the level expected from the supreme legal and political act of a modern European country.

However, apart from the shortcomings of legal and political nature, the largest obstacles are those provisions that do not provide a good foundation and that are contrary to the ambitions of Serbia to become a member state of the European Union, which is why it is perfectly clear the process of European integrations will force the hand of the legislators to amend certain parts of the Constitution or make a new one.

We will briefly point out some of the most important issues that, according to our opinion, would have to be reexamined and redefined while amending the Constitution:

- reexamining the definition of the relationship of international and internal law;
- establishing the primacy of EU law after joining the European Union;
- reexamining the content and the function of current preamble of the Constitution in the context of political changes from its adoption and solving the issue of Kosovo;
- defining the country as a "Republic of all those who live in it";
- raising the level of constitutionally guaranteed human rights by returning to the previous level of rights guaranteed by the Charter on human and minority rights of the State Union of Serbia and Montenegro, as well as coordinating with modern trends of human rights development and the standpoints of the European Court for Human Rights;
- making the court and other forms of legal protection more precise;
- redefining an entire system of constitutional provisions regarding judiciary;
- excluding the National Assembly from the process of electing the heads of courts, judges, public prosecutors/deputies of public prosecutors, as well as members of the High Judicial Council and the State Prosecutor's Council;
- changing the composition of the High Judicial Council and State Prosecutor's Council for the purpose of excluding the representatives of judicial and executive power from the membership in these bodies;
- introducing the right free legal assistance (defining the circle of providers and beneficiaries);
- reexamining the means for protecting the rights and the proceedings related to human rights before the Constitutional Court;
- providing a more precise definition of limiting the rights in war and state of emergency;
- constitutionally defining the Commissioner for Information of Public Importance and Personal Data Protection, and the Commissioner for Protection of Equality;
- a constitutional definition of Public Notaries;
- decreasing the number of deputies;
- reexamining the constitutional guarantees related to social and economic rights, primarily to the right to adequate housing and the right to social protection;
- providing a constitutional definition of alphabetical writing (along with Cyrillic) as the official letter in the Republic;

- ensuring and strengthening the position of the Autonomous province of Vojvodina;

- decentralization and a wider spectrum of local self-government competencies.

At the moment, the initiatives for amending the Constitutions are numerous and are connected with European integrations and the dialogue with Priština, as well as with numerous other issues such as the number of deputies in the Assembly, the matter of the preamble, judiciary, regionalization, etc.

On the Seventh extraordinary sitting of the National Assembly of the Republic of Serbia in the year 2013, held on July 1st of 2013, the National Judicial Reform Strategy for the period of 2013-2018[11] was passed. The strategy is a five-year strategic framework dealing with key principles of the reform, its strategic goals and long-term strategic guidelines for completing certain strategic goals, and its bearer is the Ministry of Justice. The strategy should ensure the continuity of justice reform and expand the scope of reformative activities to the entire justice system in the Republic of Serbia, and its goals are: improving the quality and the efficiency of justice, strengthening independence and responsibility of judiciary for the purpose of the rule of law, democracy, legal security, brining justice closer to the citizens, and reestablishing trust in the judicial system.

Certain commitments from this Strategy require the Constitution to be amended. This refers to the solutions such as: excluding the National Assembly from the process of electing the heads of courts, judges, public prosecutors/deputies of public prosecutors, as well as members of the High Judicial Council and the State Prosecutor's Council; changing the composition of the High Judicial Council and State Prosecutor's Council for the purpose of excluding the representatives of judicial and executive power from being members in these bodies; making the judicial academy a mandatory condition required for being elected to the position of a judge or a prosecutor. Considering that amending the Constitution is a lengthy and complicated process over which the authority holders in the process of creating and conducting the Judicial Reform Strategy have limited influence, a strong and decisive dedication to the aforementioned goals are expressed through this Strategy. The implementation of these goals will require a process of preparation necessary to amend the Constitution. In relation to this, the Commission for the implementation of the Strategy has formed a special sub-group in order to draft a proposal related to the amendments of the provisions of the Constitution that regulate the aforementioned areas. For the period preceding the constitutional changes, the Strategy includes a series of alterations to the normative framework that would serve as a transitionary solution, which would, in accordance with the existing constitutional framework, provide adequate support to a more efficient functioning of the judiciary[12].

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[11] Available at *http://www.mpravde.gov.rs/files/Nacionalna-Strategija-reforme-pravosudja-za-period-2013.-2018.-godine.pdf.*

[12] *National Judicial Reform Strategy for the period of 2013-2018*, V part, point 2.

After a consultative process with the European Commission, in September of 2015, the negotiating group for Chapter 23 (Judiciary and fundamental rights) for joining of Serbia to the EU, made the Action Plan for Chapter 23[13], ratified by the European Commission, and adopted seven months later by the Government of the Republic of Serbia (in its momentary mandate) in a Sitting held on April 27th of 2016. This Action Plan contained all the necessary steps Serbia must take in promulgating a new Constitution. Here, it was confirmed that in the fourth quarter of 2017, after a referendum, the National Assembly will adopt a new Constitution.

Whether this optimistically set deadline will be respected, or if there even will be an amendment to the Constitution of the Republic of Serbia in the near future, remains to be seen. The fact that the current Constitution is extremely rigid in terms of its amendment should be taken into consideration. Apart from that, the issue remains whether the majority of our society is ready to accept all European values and whether the government is willing to adapt and fulfill all the requirements stemming from it.

We sincerely hope that this will transgress as soon as possible, but with an obligatory constructive and wide public debate regarding the new Constitution, based on which a good and well thought through text of the act defining the basic values of our community will be created, in order to enable the fulfillment of its interests and needs in the greatest measure possible, to set good foundations of the entire development of the country, to stabilize and strengthen its institutions, ensure exercising of rights and freedoms of all its citizens, and to limit power in an adequate and precise manner in the name of those rights and freedoms. Such Constitution can and should be adopted by a general national consensus, and should be, in its duration and application, respected by all the citizens of Serbia.

[13] Available at *http://www.mpravde.gov.rs/files/Akcioni%20plan%20PG%2023%20Treci%20nacrt-%20Konacna%20verzija1 .pdf.*