

CONSTITUTIONAL BOUNDARIES OF PRESIDENTIAL POWER AND GENERAL LEVEL OF POLITICAL CULTURE. THE CASE OF SERBIA¹

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The general level of democratic, political culture in one country is the important determinant that should be taken into consideration both when analyzing its constitutional order as well as when considering its future shaping and direction. Countries that have had a substantial discontinuity in their historical-democratic development face special challenges when returning to the paths of liberal-democratic constitutionality, perhaps the biggest of which is raising the general level of political culture and (re)building a constitutional, democratic tradition. During this process particular systematic distortions may occur; among others, those regarding the mutual control and influence of the highest state authorities. In the Republic of Serbia, there is a noticeable inconsistency in what is generally perceived by the general public (as well as by the constitutional law scholars) as the level of powers and the authority of the President of the Republic. Constitutional framework is often being interpreted without taking the wider scope of the problem into consideration, which includes the immaturity of the democratic culture. This leads to (apparent) inconsistency between the presidential powers by the Constitution and how they really manifest themselves in reality. In this paper the author analyses Serbian constitutional omissions in this regard and offers possible solutions.

Keywords: democracy, President of the Republic, Serbia, political culture, semi-presidentialism, Constitution, presidential power.

LIMITELE CONSTITUȚIONALE ALE PUTERII PREZIDENȚIALE ȘI NIVELUL GENERAL AL CULTURII POLITICE. CAZUL SERBIEI

Nivelul general al culturii politice și democratice dintr-o anumită țară reprezintă un factor determinant important care trebuie luat în considerare atât la analizarea sistemului constituțional al acesteia, cât și la formarea direcției viitoare de dezvoltare. Țările care au avut un decalaj semnificativ în dezvoltarea lor democratică și istorică se confruntă cu provocări deosebite în revenirea pe calea constituționalității democratice liberale. Cea mai importantă problemă rămâne a fi ridicarea nivelului general al culturii politice și (re)crearea tradiției constituționale, democratice. În cursul acestui proces, pot apărea anumite distorsiuni sistematice, inclusiv în controlul reciproc și influența celor mai înalte organe ale puterii de stat. În Republica Serbia, există o disparitate marcată în ceea ce este perceput în mod obișnuit de publicul larg (precum și de cercetătorii constituționali) ca nivelul de autoritate și putere al Președintelui țării. Cadrul constituțional este adesea interpretat fără a ține cont de sfera mai largă a problemei, inclusiv de imaturitatea culturii democratice. Acest lucru duce la o discrepanță între atribuțiile prezidențiale, conform Constituției, și modul în care acestea se manifestă în realitate. În prezentul articol, autorul analizează lacunele constituționale ale Serbiei în acest sens și sugerează posibile soluții.

Cuvinte-cheie: democrație, Președintele Republicii, Serbia, cultură politică, semiprezidențialism, Constituție, putere prezidențială.

¹ The early version of this paper was presented at the ECPR (European Consortium for Political Research -UK) General Conference in 2021.

LIMITES CONSTITUTIONNELLES DU POUVOIR PRÉSIDENTIEL ET NIVEAU GÉNÉRAL DE CULTURE POLITIQUE. LE CAS DE LA SERBIE

Le niveau général de la culture démocratique et politique dans un pays donné est un déterminant important qui doit être pris en compte à la fois dans l'analyse de son ordre constitutionnel et dans l'examen de sa formation et de sa direction futures. Les pays qui avaient un écart important dans leur développement historique et démocratique se heurtent à des défis particuliers pour retrouver la constitutionnalité démocratique libérale, dont le plus important est peut-être l'amélioration du niveau général de la culture politique et la (ré)création d'une tradition constitutionnelle et démocratique. Au cours de ce processus, il peut y avoir certaines distorsions systématiques, y compris dans le contrôle mutuel et l'influence des plus hautes autorités de l'état. En République de Serbie, il y a une disparité notable dans ce qui est généralement perçu par le grand public (ainsi que par les spécialistes de la Constitution) comme le niveau d'autorité et d'autorité du Président de la République. Le cadre constitutionnel est souvent interprété sans tenir compte de l'ampleur du problème, y compris de l'immaturité de la culture démocratique. Cela conduit à une divergence (apparente) des pouvoirs du président par rapport à la Constitution, telle qu'elle se manifeste réellement dans la réalité. Dans cet article, l'auteur analyse les omissions constitutionnelles de la Serbie à cet égard et propose des solutions possibles.

Mots-clés: démocratie, Président de la République, Serbie, culture politique, semi-présidentialisme, Constitution, pouvoir présidentiel.

КОНСТИТУЦИОННЫЕ ГРАНИЦЫ ПРЕЗИДЕНТСКОЙ ВЛАСТИ И ОБЩИЙ УРОВЕНЬ ПОЛИТИЧЕСКОЙ КУЛЬТУРЫ. ПРИМЕР СЕРБИИ

Общий уровень демократической, политической культуры в той или иной стране является важной детерминантой, которую следует учитывать как при анализе ее конституционного строя, так и при рассмотрении ее будущего формирования и направления развития. Страны, имевшие существенный разрыв в своем историко-демократическом развитии, сталкиваются с особыми проблемами при возвращении на путь либерально-демократической конституционности, возможно, самой большой из которых является повышение общего уровня политической культуры и (вос)создание конституционной, демократической традиции. В ходе этого процесса могут возникать определенные систематические перекосы, в том числе и во взаимном контроле и влиянии высших органов государственной власти. В Республике Сербия наблюдается заметное несоответствие в том, что обычно воспринимается широкой общественностью (а также учеными-конституционалистами) как уровень полномочий и власти Президента Республики. Конституционные рамки часто интерпретируются без учета более широкого масштаба проблемы, в том числе незрелости демократической культуры. Это приводит к (кажущемуся) несоответствию полномочий президента, согласно Конституции, тому как данные полномочия реально проявляются в реальности. В статье автор анализирует конституционные пробелы Сербии в этом отношении и предлагает возможные решения.

Ключевые слова: демократия, Президент Республики, Сербия, политическая культура, полупрезидентство, Конституция, президентская власть.

Introduction

The level of general political and democratic culture plays a major role in the way to approach normative activities in one country, in order to build up the constitutional order and develop democracy. These two terms are among those whose meaning anyone interested “simply knows and feels”, but on whose definitions there is essentially no consensus

on. One of the definitions of political culture (according to the Encyclopedia Britannica) is that: „Political culture, in political science, a set of shared views and normative judgments held by a population regarding its political system (...) the building blocks of political culture are the beliefs, opinions, and emotions of the citizens toward their form of government.”² When it comes to democratic culture, it is of-

² <https://www.britannica.com/topic/political-culture>

ten explained that: “Democratic culture is defined as the desire and ability of individuals in a population to participate actively, individually and together, to the government of public affairs affecting them. The existence of a democratic culture within a population is characterized by the active contribution, effective and in duration, of members of civil society to development of: the common good, the terms of ‘living together’ and the construction of collective decisions.”³ One could say that a high level of political and democratic culture in a modern society implies the perception of the state as a common good (*res publica*), awareness of the existence of a social contract, government as a public service to citizens and finally - awareness of the need to respect human rights and other democratic values.

In countries with the long tradition of democracy, the unwritten rules - constitutional customs (which political factors follow despite the apparent absence of their exact foundation in a written constitution and laws), have been formed over decades and even centuries in some cases. Certain things are not done simply “because the one doesn’t do it”. On the other hand, in countries where democracy is still developing the principle that “everything that is not explicitly forbidden is hence allowed” applies as a rule. This phenomenon is also present when it comes to the role and function of the president of the republic. While the developed countries of Western Europe have long since established the fundamental principles of the presidency, the countries of the former Eastern bloc have had to face many challenges after the establishment of a democratic order (which the former overcame decades ago). The legacy of the authoritarian system, the process of transition and the anachronism of (re)encountering the original accumulation of capital at the very end of the 20th century, have left their consequences when it comes to

forming the physiognomy of the constitutional system, and thus the role of the president.

With the adoption of its Constitution in 1990, the Republic of Serbia re-traced its path in the direction of liberal-democratic constitutionality and the multi-party system was re-introduced. The legacy of the authoritarian communist regime, the civil war in the former Yugoslavia, isolation and the generally unfortunate historical circumstances in Serbia in the 1990s made the political and economic transition very slow, only to gain momentum after the fall of Slobodan Milošević in 2000. The 1990 Constitution, on the other hand, remained in force until Serbia’s independence in 2006 and the adoption of a new Constitution that remains in force up to this day. Both Serbian constitutions contain omissions (following the same constitutional model) that prevent the predictability of political life and create a completely legal possibility for the President of the Republic, if certain political conditions are met, to *de facto* concentrate far more power in his hands, than he or she seems to have at disposal, according to the text of the Constitution. There are clear indications that such omissions in the constitutional framework did not occur by accident in 1990. They seem to be made deliberately in order to create a “flexible” concept, able to adapt to the current political needs by means of interpreting the functions of the president. Especially worrying is the fact that the current Constitution from 2006 contains the same flaws as the previous one in this regard.

Democratic tradition and presidential powers

Building a constitutional tradition and raising the level of political and democratic culture are processes that require time and continuity, regardless of the specific features of the government system in a particular country.

In the presidential system of government, like the one in USA, the president incorporates

³<http://fundfordemocraticculture.org/democratic-culture/>

all the effective executive power in addition to a series of ceremonial functions, in accordance with the strict division of power in this country. He is the head of state, a symbol of the people and at the same time the head of the government. In the literature, this is described by the slogan “*He reigns, but he also rules*” - as a contrast to the maxim of English constitutionalism “*King reigns, but does not rule*”.⁴ Despite the fact that the powers of the American president are extremely numerous and heterogeneous in nature, their stronghold in the US Constitution is vague and shallow, constitutional regulation is mostly of a principled nature. The exact limits of the president’s authority are determined by a series of conventions that came to existence during the centuries of development of this country. The literature hence emphasizes the need to consider the historical development and practice of the president’s authority, in order to easily determine their limits in a particular case.⁵

Regarding the strength of presidential powers, at the very other end of the spectrum is the federal president in Germany (*Bundespräsident*). The constitutional regulation of presidential powers in this country is also vague and somewhat imprecise (the right of presidential veto, i.e. waiving the promulgation of a bill is, for example, derived from the Basic law entirely doctrinally⁶), and the literature points out that many constitutional lawyers have difficulties, even “contempt for this function”, because the powers and duties of the president are “hard to grasp”. “The fact that the consti-

tutional regulation of this function is imprecise, as well as the strong influence of practice, contribute to the difficulties in trying to give answer to the question what is constitutional and what is simply part of the political code”. Additionally, no federal president has ever tried to “test the limits of his powers” against the other constitutional bodies.⁷ There is not even a consensus in the doctrine whether the federal president is a “head of state” or not.⁸

When it comes to the countries of the former Eastern bloc, returning to the ideas of liberal constitutionality meant problems. As a rule, the presidents of these states initially tried to appropriate as much *de facto* power as possible, but over time, sooner or later, depending on the specific state, the physiognomy of the constitutional order would become clearer.

For example, Árpád Göncz, the first president of Hungary after the collapse of socialism, examined the limits of his power in relation to the government with pronounced “presidential

⁷ Martin Nettesheim, „Amt und Stellung des Bundespräsidenten in der grundgesetzlichen Demokratie“, *Handbuch des Staatsrechts der Bundesrepublik Deutschland III*, Heidelberg 2005, 1052.

⁸ According to some authors (von Münch, Kunig, Nettesheim, Badura, etc.), the Federal President is the “head of state” (*Staatsoberhaupt*) of the Federal Republic of Germany and functionally represents part of the executive, although he or she is not a member of the Federal Government. According to others, he or she is not a “weaker part of the double-headed executive”, because by the nature of his/her powers and the character of the Basic Law, it differs significantly from the domain of executive power, and there is no place for this function in the classical scheme of power division into three branches (Schleich). There are also authors who notice the difference between the qualification of the federal president as head of state when it comes to foreign affairs and internal affairs, recognizing the limited powers in the second case, but also noting that the situation is similar in constitutional parliamentary monarchies such as the United Kingdom or some Scandinavian countries, in which no one denies the monarch the epithet of head of state (Mangoldt, Klein, Starck). See: Ingo von Münch, Philip Kunig (Hrsg.), *Grundgesetz Kommentar*, München 2012, 2580-2581. ; Martin Nettesheim, 1040 – 1041. ; Peter Badura, *Staatsrecht – Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland*, München 2015, 617. ; Klaus Schlaich „Die Funktionen des Bundespräsidenten im Verfassungsgefüge“, *Handbuch des Staatsrechts der Bundesrepublik Deutschland II*, Heidelberg 1987, 579 – 580. ; Herman Mangoldt, Fridrich Klein, Christian Starck, *Kommentar zum Grundgesetz*, München 2005, 1408.

⁴ Clinton Rossiter, *The American Presidency*, New York 1956, 6.

⁵ Curtis A. Bradley, Trevor W. Morrison, Presidential Power, Historical Practice and Legal Constraint, *Columbia Law Review*, 4/2011, 1103 – 1105.

⁶ At the same time, there is a full consensus only about the presidential veto due to formal unconstitutionality, while there are doctrinal differences when it comes to material unconstitutionality. It is rightly pointed out that these two aspects are sometimes difficult to separate. See: Martin H. W. Möllers, „Staats- und verfassungsrechtliche Aufgaben und Kompetenzen“, *Der Bundespräsident im politischen System*, Wiesbaden 2012, 85 – 87.

activism” during his first term, but stopped having such aspirations during his second term, thus tracing the practice that will be continued by all future presidents of Hungary.⁹

After the adoption of the transitional, the so-called. “Small Constitution” in Poland, the first president of this country (*Prezydent Rzeczypospolitej Polskiej*) was Lech Wałęsa, former leader of the independent union “Solidarity” (*Solidarność*). At that time, he actually already held this position for two years, before the adoption of the Small Constitution. Though the characteristics of this Constitution were such that they provided for a balanced relationship between the powers, political circumstances (primarily highly fragmented parliament) were such that they favored aspirations to strengthen the function of president. The parliament in which as many as 29 political groups had representatives (out of which the strongest won only 14 percent of the votes), could not be an adequate counterweight to the president, so Lech Wałęsa “constantly sought to have a decisive say in the conduct of state policy.”¹⁰

Tensions between the president and the prime minister were notable especially in the sphere of international relations and defense (Wałęsa kept interfering when it came to the selection of ministers from these two departments).¹¹ The roots of the misunderstanding about the limits of the president’s power date back to before the adoption of the Small Constitution. The literature points out that the origin of the problem lies in the fact that in

1990, when Lech Wałęsa was elected president, the norms governing this function were deliberately left unclear so that they could be interpreted in accordance with political needs. As we will see, a very similar situation happened in Serbia in the same year.¹²

In addition to (mis)using rather vague regulations, the absence of constitutional customs and still undeveloped democratic culture in order to expand the scope of his political power, the Polish president also openly threatened with unconstitutional actions. For example, when he vetoed the proposal to amend the Polish Criminal Code (which provided for the decriminalization of abortion) in 1994, he publicly stated that he would refuse to sign such a law, even if it was re-voted in the parliament (what would be his obligation by the Constitution). However, the constitutionally required high majority of 2/3 of the deputies was not reached in re-vote, and the threat of unconstitutional actions of the president was no longer relevant.¹³ It remains however as a testimony to the perception of the presidency at one point.

The phenomenon that (after the fall of authoritarian regimes) the new rulers examine the limits of their constitutional powers was widespread in the former communist states. The same thing was happening in Russia itself, with the difference that there the president openly insisted on broad and strong powers when writing the Constitution.¹⁴ In other words, it was not necessary to use “back doors” and extensively interpret the reduced constitutional framework, because it was initially built for “superpresidentialism”, as described at the time by some Western authors, such as Steven Holmes. In his paper, he cites

⁹ Philipp Köker, *Veto et peto: Patterns of Presidential Activism in Central and Eastern Europe*, (doctoral dissertation - University College London), London 2015, 227.

¹⁰ Darko Simović, *Polupredsednički sistem*, Beograd 2008, 255.

¹¹ Piotr Sula, Agnieszka Szumigalska, „The Guardian of the Chandelier or a Powerful Statesman? The Historical, Cultural and Legislative Determinants of the Political Role of the President of Poland“, *Presidents above Parties? Presidents in Central and Eastern Europe, Their Formal Competencies and Informal Power*, Brno 2013, 113. and Mirjana Kasapović, *Parliamentarism and Presidentialism in Eastern Europe, Politička misao*, 5/1996, 132.

¹² John Elster, *Bargaining over the Presidency*, *East European Constitutional Review*, 1/1994, 96.

¹³ George Sanford, *Democratic Government in Poland – Constitutional Politics since 1989*, London 2002, 141.

¹⁴ For more on the circumstances of the adoption of this Constitution, see: Lee Kendall Metcalf, *Presidential Power in the Russian Constitution*, *Journal of Transnational Law and Policy*, 1/1996, 126 – 134.

the president of Russian President Boris Yeltsin, who had a comment on this topic shortly before the adoption of the Constitution: „I will not deny that the powers of the president outlined in the draft are considerable. What do you expect? How can we rely on Parliament and Parliament alone in a country that is used to czars or 'leaders', in a country that does not have well defined interest groups, where normal parties are only now being formed, in a country with very low executive discipline and with wide-spread legal nihilism? In half a year, people will demand a dictator“.¹⁵

Very similar views were shared in Serbia as well, even within moderate scholarly circles: „A weak president, subordinate to the Parliament, with radically limited authority, is a concept that seems to be in opposition to our constitutional tradition, to comparative experience of similar countries.“¹⁶

The transition and the “returning” to the paths of liberal-democratic constitutionalism was a challenge for all countries of the former Eastern bloc, but not to the same extent, due to historical circumstances and the immanent characteristics of cultural heritage. The transition to a market economy, the inviolability of private property, political freedom - were only some of the challenges for the countries of the former Eastern bloc. In scholarly circles it is sometimes stated that the countries of Protestant and Catholic spiritual tradition such as the Czech Republic, Slovenia, Croatia or East Germany „have experienced relatively successful transitions from communism to market economies – and they were historically shaped by the Protestant or Roman Catholic religious traditions, rather than by Orthodox tradition“.¹⁷ This only somewhat

correlates to the results of the research about the relation of traditional vs. secular-rational values.¹⁸ Protestants find themselves in the first place, but Orthodox take the third place, right in front of predominantly Catholic cultural regions. Therefore, the wider historical scope is to be taken into consideration in order to determine the obstacles and means for their overcoming. Also, when it comes to the Republic of Serbia (and parts of the region as well), it is important not to ignore the fact that a whole decade after the fall of the Berlin Wall was marked by instability, war and economic crisis. Only after 2000, after the political changes and the onset of relative stability (primarily in the international context), the transition processes in Serbia began somewhat to speed up and gain traction. Because of these reasons as well, Serbia was behind many other countries of the former Eastern bloc. The progress of democratic culture required, above all, stability.

The level of general political and democratic culture significantly affects the scope and quality of the necessary constitutional and normative actions, in order to achieve the highest possible degree of democracy in society. In principle, the higher the level of political culture in one society that strives for democracy, the less the need for detailed normative regulation of political life. The long, unbroken tradition of aiming for democracy will, as a rule, generate constitutional customs and the socio-political climate in which the following of those customs is simply implied. In young democracies, especially those that have historically only recently emerged from some kind of authoritarian regime (and particularly if such a regime has been in force for a long time), it will generally be the opposite – “everything that is not explicitly forbidden” will be considered as allowed. The evolution of democratic culture therefore inevitably requires time, continuity of stability. Serbia still has a long way

¹⁵ Steven Holmes, *Superpresidentialism and its Problems*, *East European Constitutional Review*, 1/1994, 125.

¹⁶ Olivera Vučić, Position and Functions of State Sovereign (Head of State), *Facta Universitatis*, 2/2004, 44.

¹⁷ Ronald Inglehart “East European value systems in global perspective”, *Democracy and Political Culture in Eastern Europe* (ed. Hans-Dieter Klingemann, Dieter Fuchs and Jan Zielonka), New York, 2006, 73.

¹⁸ *Ibid.* 74.

to go in this regard, which can be easily be noticed by observing its political life.

Constitutional and factual position of the President of the Republic of Serbia

When it comes to the position of the president in the Serbian constitutional order, the basic paradox and the key word is - constitutionalized unpredictability. This implies that in a completely identical constitutional and legal framework, depending on the existence of certain political circumstances, the role of the president can manifest itself almost as a mere ceremonial function, or as a central political position that *de facto* represents the center of political power and decision-making. In Serbian literature, within the analysis of the “development of the institution of the President of the Republic of Serbia” from 1990 onwards, Serbian presidents encounter contradictory qualifications where they are characterized as “passive” or “omnipotent” president, “constitutional president” or “very powerful president”.¹⁹ It is interesting that President Boris Tadić was considered “passive” in the first term, and “omnipotent” president of the Republic in the second, in one and the same constitutional framework. Does that mean that the Serbian constitutional framework is actually such that it foresees a weak president, and that all those “omnipotent” presidents actually violate it? The answer to that question is negative - it is not a question of violating the Constitution, but of two essential problems that in combination lead to such phenomena, quite legally. The first is the lack of a constitutional tradition and the immaturity of democratic culture, and the second is inadequate regulations whose creators (un)intentionally did not take into account the first two factors.

The leading relevant literature in Serbia most often points out that in Serbia “constitu-

tional customs do not even exist in traces”, and that “constitutional practice, if it can be talked about, is fragile”.²⁰ It is emphasized that “the only constitutional custom could most likely have been established if the current president, Aleksandar Vučić, had done the same as his predecessor when he took office - Tomislav Nikolić resigned from the position of political party president in 2012, and Aleksandar Vučić did not do the same”.²¹ The current president did not do that because his predecessor paid a high political price for doing so, and he did not want to repeat the same mistake. The doctrine points out: “The political collapse of Tomislav Nikolić was an important message to every subsequent candidate for the presidency, because it became clear that there is no real political power without the support of the ruling political party. Hence, instead of improving the political culture and strengthening the principles of constitutionality, Serbia took a step back in 2017.”²² The attempt to establish the first constitutional custom came too early, when the political climate and the general level of achieved political culture are taken into account.

In the atmosphere of extensive political conflicts, after the adoption of the Constitution in 1990, wide-range criticism of the position of the President of the Republic immediately started within the scholarly and general public. The assessments ranged from the perception of the presidential function as “a weak one”, up to the claims that the president has extremely strong powers established by the Constitution. „This criticism had commenced not only on the day of its coming into force, the day its solutions were brought to life, but rather as

²⁰ Vladan Petrov, „Predgovor – Ustav po meri predsednika i predsednik po meri ustava?“, *Predsednik Republike i Ustav*, Beograd 2018, 8.

²¹ Vladan Petrov, „O nekim opštim mestima i poimanju sistema vlasti uopšte i u Republici Srbiji“, *Parlamentarizam u Srbiji*, Sarajevo 2018, 17.

²² Darko Simović, „Kako do neutralne moderatorne vlasti predsednika Republike Srbije?“, *Predsednik i Ustav*, Beograd 2018, 39.

¹⁹ Đorđe Marković, „Način izbora predsednika Republike Srbije“, *Predsednik Republike i Ustav*, Beograd 2018, 131.

of the day in which its writing started, which means the critique was not so much aimed at the solutions, but at the way in which its adoption was decided, and, foremost, at those adopting it. Therefore, the original criticism was much more political than legal in nature, and the purpose of such endeavors was much more political, than legal.²³ There were few objective assessments of the role of the president in that period. „The impression remains that the question of the President of the Republic has been that principal target of such attacks more for non-constitutional than for constitutional reasons, and more for supposed and possible than for realistic and actually conducted Constitutional actions.“²⁴

The Constitution of Serbia from 1990, as well as the Constitution from 2006 (in force), envisage a kind of semi-presidential system, in which the President of the Republic is elected directly by the people and in which there is no institute of counter signature for his acts. On the other hand, the scope of his constitutionally given powers is not too wide, and for the most part not even executive in nature. There are some differences between these constitutions when it comes to the function of the President of the Republic. In the current Constitution, the presidential powers are somewhat reduced compared to the previous one, but the President also got some powers that he did not have before, since the 1990 Constitution was not written for an independent state but a member of the federation (Serbia was part of Yugoslavia). According to the current constitutional framework, the President of Serbia “expresses the state unity of the Republic of Serbia”²⁵, represents the Republic in the country and abroad, proposes a candidate for Prime Minister, promulgates laws and has other classical powers of the President in the parliamentary system (presidential veto, the right

to appoint and recall ambassadors, etc.).²⁶ The President also commands the Army and appoints, promotes and dismisses Army officers. He is elected directly for a term of 5 years and no one can be elected to this position more than twice.

It is clear, therefore, that this is a function of extremely high legitimacy, but not of particularly high political potency (if only that what the Constitution states as the powers of the president is taken into consideration). The constitutional formulations lead to the conclusion that the weight of political power in the Serbian constitutional order is in the position of prime minister. However, the “problem” arises not due to what is written in the Constitution, but due to the absence of what should be written (and is missing), and that is the issue of incompatibility of the incumbent President and retention of membership and leadership position in the political party from which he or she comes.

The ban on retaining membership and leadership in a political party is not prohibited by the Constitution for the president of the Republic (as is the case, for example, in neighboring Croatia - also a country with a semi-presidential system of government²⁷). Such prohibition does not exist in the relevant laws either. The Constitution of the Republic of Serbia only states that “the President of the Republic may not perform another public function or professional activity.” Is the position of the president of the political party a “public function” or a “professional activity”? Any dilemma on this issue was ceased to exist in 2004 with the adoption of the Law on the Prevention of Conflicts of Interest in the Exercise of Public Functions. This law defines the term “public office”, not including the president of the party or any other function in a political party. Four years later, the term “public office” was redefined with the adoption of the Law on

²³ Olivera Vučić, 42.

²⁴ *Ibid.*

²⁵ Ustav čl. 111.

²⁶ Ustav čl. 112 para. 1.

²⁷ Constitution of the Republic of Croatia, art. 96

the Anti-Corruption Agency²⁸ (came into force in 2010), but positions in a political party did not fall under this term again.²⁹ Therefore, the prevailing view in Serbian literature today is that “when you look at the concepts of public office, professional activity, it is clear that membership or a leading position in a political party is neither a public function nor a professional activity – hence there is no incompatibility with the function of the president of the Republic.”³⁰

After the adoption of the 1990 Constitution, opponents of Slobodan Milošević’s regime (who was the first president of Serbia after the fall / transformation of the communist regime) pointed out that “in essence, constitutional decisions on the President of the Republic (according to the 1990 Constitution – M.Đ.), his powers and relations with the National Assembly, pave the way for the establishment of a personal government shrouded in a veil of a kind of parliamentary-presidential system.”³¹ The key part here is “paving the way”, therefore, creating opportunities that may, but do not necessarily have to (depend on a number of factors) lead to the possibility for the concentration of power. In that sense, the Serbian doctrine points out the importance of “the personal authority of the head of state, the strength of the party apparatus under his control and plebiscite support.”³² In other words, if the President of the Republic is also the leader (president) of a party with broad and strong support in parliament, there is the possibility

of concentration of power by essentially removing the decision-making process out of the institutions (using political party power-leavers). Decisions are reached elsewhere and then merely implemented through the institutions. However, if cohabitation is taking place, or if the President of the Republic is not also the leader of his party, this possibility does not exist. All of the Serbian presidents who had been in a position to legally *de facto* concentrate far more effective power than “constitutionally expected”, seized the opportunity and did so.

A kind of confirmation that this “small door” mechanism for the concentration of power was not a matter of omission, but that it was made on purpose, is primarily a circumstance that it was not removed by the adoption of the current Constitution from 2006, because such potential obviously suited the elites. Also, a kind of recognition comes from the pen of one of the creators of the Constitution from 1990, prof. Dr. Ratko Marković, who wrote that the Serbian Constitution “was not built on the outlines of either the parliamentary or semi-presidential system, but on the unique, and already past historical circumstances in Serbia in the early 1990s. Back then, from self-governing socialism, we formally and institutionally entered the regime of parliamentary democracy with the newly formed economic and political institutes that follow it. After half a century of their non-existence, political parties were re-formed in Serbia. A pure parliamentary government in which the government is on a seesaw - standing up when it has a parliamentary majority, falling down when it is left without it - would mean a great danger to the stability of the newly introduced institutions and the new political system. The consciousness of the citizens, accustomed to the same center of power for almost half a century, also wanted to know where the seat of power is in the new order. That is why they resorted to one constitutional trick. The President of the Repu-

²⁸ Law on the Anti-Corruption Agency, *Official Gazette RS* 97/2008, 53/2010, 66/2011 – decision of the CC, 67/2013 – decision of the CC, 112/2013 – authentic interpretation, 8/2015 – decision of the CC 88/2019.

²⁹ Dejan Milić, „Da li su inkompatibilne funkcije šefa države i predsednika političke stranke? Ustavnopravni položaj predsednika Republike Srbije“, *Parlamentarizam u Srbiji*, Sarajevo 2018, 240 – 243.

³⁰ Miloš Stanić, „Nespojivost funkcije predsednika države sa članstvom i vođstvom u političkoj stranci – primer Srbije“, *Parlamentarizam u Srbiji*, Sarajevo 2018, 200.

³¹ Pavle Nikolić, Institucija predsednika Republike i promašaji i nedorečenosti Ustava Republike Srbije od 1990., *Arhiv za pravne i društvene nauke*, 2-3/1991, 290 – 291.

³² Dragan Stojanović, *Ustavno pravo*, Niš 2006, 323.

blic is foreseen to be almost untouchable (irrevocable) during his constitutional mandate, but with little executive power. The focus was on his direct election, because such a choice of an innocuous organ creates the illusion that he has the greatest power. There is no constitutional institution that cannot be abused in practice and thus betray its purpose, so it was the same with the institution of the President of the Republic.”³³ The motives were therefore somewhat similar to those expressed by Boris Yeltsin in Russia at the time. The mode of realization, as we have seen, was however somewhat different.

The fact that leaving the position of leader of a political party after assuming the office of the President of the Republic is not illegal, but allowed, in combination with the lessons of political life in Serbia as the one that has been served to the former President Tomislav Nikolić mean that nothing will change, unless constitutional-normative intervention that would unequivocally prohibit the retention of party membership by the President of the Republic takes place. An alternative to this is to wait for a longer period of time in which the maturation of political and democratic culture would lead to this circumstance not anymore being decisive.

Finally, in the periods when the concentration of effective power in the hands of the president occurs, it has its consequences in terms of metamorphosis/distortion of particular presidential powers. For example, the classical presidential power of presidential veto (which in Serbia includes both political and constitutional veto) changes primarily in its political part. Since it no longer serves to control the expediency of the legislative activity of the parliament, the presidential veto sometimes becomes a kind of a “public opinion test” for certain policies. A particular solution is placed in the form of a proposal of the government,

and then it is voted upon in the parliament. If there is a severe negative reaction from the general public, the president vetoes the bill and thus retains political points.³⁴

Great expectations and harsh reality

In Serbia, when it comes to interpretation of constitutional regulations (even in scholarly circles), the comprehension of reality (“what is”) and well-intentioned projections of “what we think it should be” are sometimes mixed and twisted. Constitutional interpretations, which often do not have a clear basis in the Constitution itself, are drawn on the basis of the concept of the constitutional identity and the spirit of the Serbian Constitution. In principle, it is true that “constitutional culture implies consistent respect for the constitution, not only its explicit written word, but also its spirit, and even the unwritten rules of modern constitutionalism.”³⁵ However, due to the absence, or perhaps better said, the immaturity of political and constitutional culture, the expectations for the following of the “spirit and unwritten constitution” are unrealistic and in the field of practical application – totally arbitrary. “The spirit of the Constitution”, in the conditions of the present level of democratic culture in Serbia, consists simply and only out of that what was written in the Constitution and (still) nothing more.

In the constitutional judiciary context, this is explained in the literature as follows: “The Constitutional Court finds, and then protects the objective meaning of constitutional norms, regardless of the will of its creator.” Interpretation must be oriented towards determining the objective linguistic meaning of constitutional norms, but also taking into account

³³ Ratko Marković, *Ka budućem Ustavu Srbije, Srpska politička misao*, posebno izdanje (2017), 267.

³⁴ This happened several times, for example, during the term of President Slobodan Milošević, when he vetoed a law that was passed by the parliamentary majority, which was under his control. – Presidential veto on public company „Politika“ from 1992.

³⁵ Darko Simović, „Uzroci prezidencijalizovanja parlamentarizma i dometi ustavnog inženjeringa u Republici Srbiji“, *Parlamentarizam u Srbiji*, Sarajevo 2018, 74.

their goal and place in the entire constitutional system. Subjective interpretive methods have significance only to the extent that they confirm objective linguistic meaning. Attempts to reveal the meaning of the constitution only by establishing its ‘spirit’ (even when it is sought in the history of constitutional norms) are too uncertain, because they are based on subjective interpretation. The ‘exact’ meaning of the notion ‘spirit of the constitution’ cannot be reliably established, in order to achieve immediate constitutional judicial protection. This does not mean, however, that the constitutional court must necessarily recognize constitutional norms only as their narrowest verbal meaning.”³⁶

Unfortunately, Serbia does not have a clearly defined constitutional identity yet. On the contrary - unpredictability and “incompleteness” is an immanent characteristic of the order itself, in the way in which it is organized currently, as well as in the last 30 years. “For none of the previous presidents, the central problem was that he institutionally undertook an action for which he was not authorized. On the contrary, the mechanism is extremely simple - as a person of high legitimacy, who controls the parliamentary majority through a party leadership through a party position, it is enough to “recommend” or “suggest” a certain solution and it will be implemented. There is no constitutional mechanism that can stop him from expressing his opinion (nor should it exist), but that opinion in this case has a special weight due to the party function, which he or she is allowed to retain. This also does not violate the article of the Constitution which stipulates that ‘political parties may not directly exercise power, nor subordinate it to themselves’ (Art. 5 Para. 4), because there is no direct exercise of power - everything still goes through institutions, but the actual cen-

ter of decision making is displaced (which is practically impossible to prove). From 1990 onwards, the constitutional order in Serbia is inconsistent and the function of the president is unpredictable in its real strength. That should definitely change in the future.”³⁷

One could raise the question – why is the accumulation of leadership position and specifically presidential function a decisive factor for the metamorphosis of the system of government in the Republic of Serbia. The reasons are complex, but can be reduced to several basic factors. First of all, Serbia is a country of authoritarian political heritage, and the president is a figure of high legitimacy due to the direct way of election. These two factors, just like in Russia, contribute to the visibility of the president and his strength in the eyes of the general public. Secondly, the electoral system in Serbia is such that elections are largely depersonalized. Important roles in political life, in the eyes of the citizens, are played either by parties as such or more often - their leaders. A depersonalized electoral system implies that when electing deputies, citizens are usually guided by the image and policy of party leaders, which then makes it easier for them to manage the use of party instruments. Finally, it should be pointed out that the global phenomenon of the crisis of parliamentarism as such is also present in Serbia and due to the previously listed factors - it is comparatively taking on greater proportions.

Finally, it must be noted that the expectations of both the general and professional public on all these issues may be too high due to the specifics of the age in which we live. Namely, the world has never been smaller, the simple trip to some far more democratically and constitutionally developed country of the West can be organized and undertaken with unprecedented simplicity when the wider his-

³⁶ Dragan Stojanović, „Premise ustavne kontrole prava i njihovo ostvarivanje u praksi Ustavnog suda Srbije“, *Uloga i značaj Ustavnog suda u očuvanju vladavine prava*, Beograd 2013, 116.

³⁷ Miroslav Đorđević, *Presidential Veto Power*, (doctoral dissertation – Faculty of Law University of Belgrade), Belgrade 2020, 173.

torical scope is taken into consideration. The means of modern communication also allow for much clearer insight into those societies, like never before. An individual in a country like Serbia, which is burdened with historical heritage, may wonder why such a type of constitutional and democratic organization cannot simply be established. The reasons lie in the fact that human consciousness does not develop or change at the speed at which the technological progress does. The development of political and democratic culture requires time. The new generations will eventually perceive some of the acquired freedoms as something that is "normal" and take them for granted. This however does not mean that the passage of time alone is sufficient. Careful measured baby steps in the direction of the desired goal are necessary. In this process, all the factors shaping the political life and culture in the country must play an active role - the voters themselves, as well as all active political and political factors in the broadest sense, which includes public office holders, political parties and their activists, NGOs, various other civil society organizations (which can also be informal politically profiled groups), media, etc.

Conclusions

Today, the Republic of Serbia is facing challenges on its path to developing democracy – the same or similar ones as those that were overcome decades or even centuries ago by the more developed countries of the West. The consequence of the historical legacy and decades of authoritarian constitutionalism is, among other things, that the level of democratic culture and the quality of political culture are still relatively low. Due to these circumstances, as well as inadequate constitutional regulation in Serbia, there is a distortion of constitutional solutions that successfully exist in countries with a longer democratic tradition. In parallel with the strengthening of the processes leading to the maturation of political, democratic and

constitutional culture in the country, we should strive for constitutional and legal solutions that respect the reality of the current situation and pave the way for progress with their provisions. The regulation of the powers of the President of the Republic is one of those areas in which the discrepancy between the proclaimed and the real is highly visible and leads to the deformation of the principle of separation of powers, formally observed – in full accordance with the Constitution and relevant laws. As a temporary solution, which could speed things up in this sense, we should strive to ban the accumulation of membership in a political party and the function of the President of the Republic, as has been done, for example, in Croatia. Such a reform, perhaps paradoxically, can only be carried out by a strong government with a long-term vision, because in addition to changing the Constitution, it also requires a broad social consensus. After successful and *pro futuro* very important recent constitutional revision in domain of judiciary, politically speaking, it seems that the potential for such a key structural reform exists right now, and this opportunity should not be missed.

Bibliography

1. BRADLEY, Curtis A., MORRISON TREVOR, W., Presidential Power, Historical Practice and Legal Constraint, *Columbia Law Review*, 4/2011.
2. ĐORĐEVIĆ, Miroslav, *Presidential Veto Power*, (doctoral dissertation – Faculty of Law University of Belgrade), Belgrade 2020.
3. ELSTER, John, Bargaining over the Presidency, *East European Constitutional Review*, 1/1994.
4. HOLMES, Steven, Superpresidentialism and its Problems, *East European Constitutional Review*, 1/1994.
5. Inglehart Ronald "East European value systems in global perspective", *Democracy and Political Culture in Eastern Europe* (ed. Hans-Dieter Klingemann, Dieter Fuchs and Jan Zielonka), New York, 2006.
6. KASAPOVIĆ, Mirjana, Parliamentarism

and Presidentialism in Eastern Europe, *Politička misao*, 5/1996.

7. KÖKER, Philipp, *Veto et peto: Patterns of Presidential Activism in Central and Eastern Europe*, (doctoral dissertation - University College London), London 2015,

8. MANGOLDT, Herman, KLEIN, Fridrich, Starck Christian, *Kommentar zum Grundgesetz*, München 2005.

9. MARKOVIĆ, Đorđe, „Način izbora predsjednika Republike Srbije“, *Predsednik Republike i Ustav*, Beograd 2018.

10. MARKOVIĆ, Ratko, Ka budućem Ustavu Srbije, *Srpska politička misao*, posebno izdanje (2017).

11. METCALF LEE, Kendall, Presidential Power in the Russian Constitution, *Journal of Transnational Law and Policy*, 1/1996.

12. MILIĆ, Dejan, „Da li su inkompatibilne funkcije šefa države i predsjednika političke stranke? Ustavopravni položaj predsjednika Republike Srbije“, *Parlamentarizam u Srbiji*, Sarajevo 2018.

13. MÖLLERS, Martin H. W., „Staats- und verfassungsrechtliche Aufgaben und Kompetenzen“, *Der Bundespräsident im politischen System*, Wiesbaden 2012.

14. NETTESHEIM, Martin, „Amt und Stellung des Bundespräsidenten in der grundgesetzlichen Demokratie“, *Handbuch des Staatsrechts der Bundesrepublik Deutschland III*, Heidelberg 2005.

15. NIKOLIĆ, Pavle, Institucija predsjednika Republike i promašaji i nedorečenosti Ustava Republike Srbije od 1990., *Arhiv za pravne i društvene nauke*, 2-3/1991.

16. PETER, Badura, *Staatsrecht – Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland*, München 2015.

17. PETROV, Vladan, „O nekim opštim mestima i poimanju sistema vlasti uopšte i u Republici Srbiji“, *Parlamentarizam u Srbiji*, Sarajevo 2018.

18. PETROV, Vladan, „Predgovor – Ustav po

meri predsjednika i predsjednik po meri ustava?“, *Predsednik Republike i Ustav*, Beograd 2018.

1. ROSSITER, Clinton, *The American Presidency*, New York 1956.

19. SANFORD, George, *Democratic Government in Poland – Constitutional Politics since 1989*, London 2002.

20. SCHLAICH, Klaus, „Die Funktionen des Bundespräsidenten im Verfassungsgefüge“, *Handbuch des Staatsrechts der Bundesrepublik Deutschland II*, Heidelberg 1987.

21. SIMOVIĆ, Darko, „Kako do neutralne moderatorne vlasti predsjednika Republike Srbije?“, *Predsednik i Ustav*, Beograd 2018.

22. SIMOVIĆ, Darko, „Uzroci prezidencijalizovanja parlamentarizma i dometi ustavnog inženjeringa u Republici Srbiji“, *Parlamentarizam u Srbiji*, Sarajevo 2018.

23. SIMOVIĆ, Darko, *Polupredsednički sistem*, Beograd 2008.

24. STANIĆ, Miloš, „Nespojivost funkcije predsjednika države sa članstvom i vođstvom u političkoj stranci – primer Srbije“, *Parlamentarizam u Srbiji*, Sarajevo 2018.

25. STOJANOVIĆ, Dragan, „Premise ustavne kontrole prava i njihovo ostvarivanje u praksi Ustavnog suda Srbije“, *Uloga i značaj Ustavnog suda u očuvanju vladavine prava*, Beograd 2013.

26. STOJANOVIĆ, Dragan, *Ustavno pravo*, Niš 2006.

27. SULA, Piotr, Szumigalska Agnieszka, „The Guardian of the Chandelier or a Powerful Statesman? The Historical, Cultural and Legislative Determinants of the Political Role of the President of Poland“, *Presidents above Parties? Presidents in Central and Eastern Europe, Their Formal Competencies and Informal Power*, Brno 2013.

28. von Münch Ingo, Kunig Philip (Hrsg.), *Grundgesetz Kommentar*, München 2012.

29. VUČIĆ, Olivera, Position and Functions of State Sovereign (Head of State), *Facta Universitatis*, 2/2004.