

# **CONSTITUTION-MAKING PROCESS IN SERBIA, 2000-2006**

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## ABSTRACT

This thesis is situated in the constitution-making theory. The purpose of this thesis is to examine the constitution-making process in Serbia. Firstly, I analyze the possible reasons of the lack of the constitution-making process in Serbia, after the fall of Milosevic regime in 2000. Secondly, I research the hasty constitution making of the belated constitution in the fall of 2006. More precisely, I explore the possible reasons that could have precluded the evolvement of the constitution-making process in the first few years of democratic transition in Serbia after the fall of the previous regime. I applied the process-tracing and used contextual knowledge for the analysis of political institutions, political actors and actors' incentives. I found that, the institutional relations between Serbia and Montenegro cannot explain the initial lack of constitutional changes in Serbia. Moreover, the re-arrangement of the federative state should have created an impetus for constitutional changes in Serbia. The reasons of the lack of constitutional changes in Serbia, in the period between 2000 and 2006, are in the divisions of political actors over the issues that are the manifestation of the categorical conflicts. Finally, in the fall of 2006, the political elite resorted to the constitution-making process. However, they did not engage themselves in the constitution making because of the reasons that are related to the constitutional democracy. On the contrary, the political elite instrumentalized one national issue in order to obtain the constitutive power and to design the new constitution.

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## INTRODUCTION

After regime change, the political elite that was leading the movement for change, and eventually succeeded, finds itself in a new position. Now, it can no longer only emphasize “what they are against”, they have to show “what they are for” (Ackerman, 1992, p49). In this moment, designing a new polity is one of the main problems that they need to solve. Thus, drafting and enacting a new constitution is one of the primary tasks for the political elite and they have to decide how the constitution-making process will evolve.

In my thesis, I will engage myself in constitutional theory and I will address questions regarding the conditions, timing, and proper design of the constitution making process. I will address them through researching the constitution-making process in Serbia 2000-2006. After the change of the regime in 2000, the ruling political elite in Serbia did not seize “the window of opportunity for constitutionalizing liberal revolution” (Ackerman, 1992, p46). They failed to engage in changing the existing constitution of the old regime. Thus, Serbia represents a unique case in Central and Eastern Europe (CEE). In other CEE countries, the change of the regime led to the enactment of a new constitution or the substantial revision of the old one. In contrast to this, in Serbia the new Constitution was enacted only six years after the change of the regime in 2000, but in years prior to that there was no constitution-making attempt. In this thesis, my aim is to explore the reasons of such a peculiar constitutional choice. Specifically, I will focus on two areas. The first is related to the lack of proper constitution-making process after the change of the regime. Second, I will examine the belated constitution design of 2006.

I will analyze the question of the lack of the constitution-making process after the regime change in 2000 in two ways. First, I intend to analyze whether the constitution-making impasse

was produced by the inherited institutional structure ambiguity. Specifically, I will examine whether there was confusion among the political actors over the issue of which institutional level should be used as a starting point for constitutional changes. Namely, I will examine whether the confusion was to start constitutional changes from the federal level and then to adjust Serbian constitution to the federal constitution, or to enact a new one Constitution of Serbia separately from the issue of the possible change of the federal institutional structure. Secondly, I will examine social and political conditions, to see if they acted as constraints preventing the ruling political elite to come to a consensus and enact a new constitution either through a radical break or through the strategy of legal continuity. It can be argued that, the only thing that was keeping together the opposition party coalition was the shared aim to overthrow the old regime. Therefore, after the regime change, they could not agree on principles that new community should embrace. I will examine the intricate relation between the constellations of relevant political actors, their preferences, and try to observe whether, after the initial non-successful constitution making, these reasons could explain the absence of constitution making. Turning to the constitution design in 2006, that was enacted through fulfilling necessary procedural requirements for the change of the old constitution, I will examine what was so different that this time, a new constitution could be enacted. Was it context change, the perception of the new crisis or did political actors come to consensus on the previous constraining issues, or did they just agree to put them aside?

In order to achieve the goals of my thesis, I will examine the political context of Serbia after the regime change in 2000, and focus my research on constraints, institutions and political actors. Before I do that, I will first elaborate on the main issues in the constitution-making process, the issues such as: why, when and how political elite should enact the new constitution.

Especially, I will explore the scholarly debate on what is a right procedure for the constitutional change, namely the procedure of enacting a new constitution by constitutional assembly or parliament, or enacting a new constitution by applying the principle of constitutional legality. Then, I will examine the constitutional change in Central and Eastern European countries, and show how was the principle of legal continuity applied in some of those countries. I will use those countries as reference cases for the constitutional change in Serbia.

## CHAPTER 1: THEORETICAL FRAMEWORK

### 1.1. Constitution making

In the literature, several questions are raised concerning the constitution-making process. Among them, the two main questions are, why and when are constitutions made? An additional question is how a constitution should be made, and which body should act as a constitutive force? Elster reminds us that constitutions are mostly made in specific circumstances, such as the situations of social and economic crises, after a war, the creation of a new state, or the fall of a regime (1995, p370, 371). Making of a new constitution becomes an important issue in situations that are not favorable for the creation of a constitution. In times of crisis, the need and pressure for re-constitution of society becomes obvious but also such circumstances are in contradiction with the aim of the constitution-making process. In contrast to Elster's view are the positions of Ackerman and Arato, who argue that the above-mentioned situations are a suitable environment for making a new constitution (Ackerman, 1992, p26-27; Arato, 1993). For instance, Ackerman argues that in revolutionary moments, liberals have chance to reconstruct and institutionalize the common political ideals. However, he does not neglect that throughout history, there were so many examples of unsuccessful revolutions. In those cases, the revolutionaries did not succeed to institutionalize guiding revolutionary principles, i.e. French revolutionaries in 1830 (Ackerman, 1992, p26-31). Nonetheless, they all agree that the aim of the process is to draft and enact a legal act that will constitute a new polity. Because of the circumstances in which constitutions are mostly made, the proper timing and procedure of the constitution-making process is very important.



Therefore, the answer to the first question, namely why we need constitutional change after the fall of a previous regime, can be obtained by analyzing the reasons why there was a movement to change the regime, in the first place. We can have part of the answer to this, by examining the functions of the constitution. According to Preuss there are several main functions of a constitution, such as to introduce “the limitation of power”, to “constitute and to legitimize political authority”, and related to the previous two is the “integrative function” of the constitution (Preuss, 1993, p77, 78). This last function can show us what the binding principles, values and beliefs of the community are. Constitution making presents an opportunity to institutionalize the guiding principles of the revolutionary movement and to translate them into a constitution that will create a new polity and political order. Every revolution is a political reconstruction of the polity and a response to the current context. By looking into guiding principles, we can determine whether the revolution was a liberal one, or it was of another type.

The “liberal revolution” aims to re-evaluate the principle of justice and to introduce it, through the constitution, into a new political order, with the aim to allow everybody an equal chance to make sense of their life. In addition, the “liberal revolutions are passing events” (Ackerman, 1992, p26, 27). Thus, liberals seek to seize, as quickly as possible, a revolutionary moment and to introduce through the constitution the principles of democracy and to establish human rights. The revolution cannot go on indefinitely. It needs to be constitutionalized. Thus, the new elite needs to enact a constitution, and their “revolutionary product” should be the establishment of democratic institutions. After that, it is assumed that “normal politics” will proceed. In addition, if we apply this concept on countries that undergo the process of democratization, then by enacting a constitution and introducing and legitimizing new democratic institutions, the political elites would create space for “normal politics” to proceed. In

the context of democratic transition, the “normal politics” would mean that for the first time political actors are solving political issues by respecting democratic practices. If new issues are solved in such a manner, then the true social learning should contribute to the consolidation of democracy among political actors.

When do we need to construct a new constitution? According to Ackerman (1992, p46, 47), it is immediately after an old regime is overthrown. When he was arguing that constitution-making process should be the main task, he was bearing in mind the political change that occurred in Central and Eastern Europe at the end of the eighties and in the early nineties. He was trying to persuade the political elite of that time to put as the top priority, in their political agenda, the creation of a constitution rather than economic reform, although he did not dispute the importance of that task either. While Ackerman and Arato, have contrasting views on the procedure of the constitutional change, they have converging opinions that the regime change should not be perceived as a crisis, but as the right moment for solving issues and reconstituting polity. On the other side, Elster argues that in times of crisis, rationality of actors is narrowed, and the whole process is more determined by passions. Briefly presented, according to Elster on the individual level passions are based on emotions and intuition, and not on the reasoning. As Elster notes “passion is blind”, thus a person whose action is based on the passion acts like a “blind” person. Acting on this basis can interfere with a person’s reasoning, and he could either miscalculate “the consequences of his behavior” or not consider them seriously even though he can see that it can be harmful for him (Elster 2000, p7-9). If we apply Elster’s view on the case of Serbia, we can see that it is very relevant. This does not apply to the lack of the constitution-making process in Serbia in period after the regime change in 2000, but more on the “belated” constitution making in 2006. As I will later explain, the belated constitution making was driven

by the passions of political actors. Their motivation for constitutional change was to respond to the perceived crisis over the “stateness” issue, namely the issue of Kosovo. They instrumentalized the issue of Kosovo for making constitutional change. The “stateness” problem represents the case when one group that lives in a political community disputes their belonging to that state, or there are problem to determine who are the citizens of one country. In addition, the stateness problem also exists when the political community’s territory is under dispute and the question of who is the member of that community is present in the public realm (Linz and Stepan, 1996, p16). Kosovo being under the rule of the international community after 1999 and with a population of ethnic Albanians that sought secession from Serbia clearly represented such case. It still represents such a case for the majority of Serbian citizens and political elite.

If we accept that enactment of a new constitution means the introduction of the new principles into society and re-constitution of the political community, then the next question is which procedures should we use? In order to answer that question, political actors need to agree on a few issues. First, they have to agree on who is going to be the new constitution maker, which political body will perform this role, and who is going to be the representatives in that political body (Dimitrijevic, 2003, p42). Second, they have to come to an agreement on procedures according to which new constitution will be enacted (Dimitrijevic, 2003, p42). The fall of communism in countries in Central and Eastern Europe brought once again these questions to scholarly debate. In the literature, two main viewpoints evolved on the issue of the constitution-making process. The first viewpoint, strongly proposed by Ackerman (1992), was to organize a constitutional convention that will have only one task, and that is to draft and enact a new constitution. The second viewpoint, argued by Arato (1993), was to recognize change in society by using the concept of “constitutional continuity”.

The first viewpoint is much easier to grasp. Revolution and regime change was the first phase of democratization. The second phase is constitutionalization of (liberal) principles of revolution and thus creation of a new “political identity” (B. Ackerman, 1992, p61, 62). According to Ackerman, the best way to do that is to organize a constitutional convention, with a limited time frame and with only one task, namely to design a new constitution that will symbolize the break with the old regime, and its principles. In addition, Ackerman (1992, p62) argues that a constitution constructed in such a manner will produce positive incentives for the political elite that participated in the process of bargaining and the creation of the constitution. Because political actors participated in the constitution making process, they will respect the constitution much more and it will not be easy for them to depart from constitutional norms. Addressing the alternative of piecemeal constitution making, he argues that changing the constitution of the previous regime by constantly amending it can still allow for some articles, which essentially represent authoritarian practices, to survive (Ackerman, 1992, p61, 62).

The second stream regarding constitutional change derived from the analysis of transition from authoritarian rule to democracy in Spain, as well as, in some post-communist countries. The analysis introduced the concept and practice of “constitutional continuity” (Arato, 1993). Arato argues that although communist regimes were not constitutional governments, the new constitution-makers should act as if they were, and in accordance with the legal requirements of the existing constitution (Arato, 1993, p271-272). Thus, the idea of continuity is based on the assumption that acting in a revolutionary manner, and drafting, and enacting a new constitution without paying attention to the procedures of the existing constitution would represent continuity with the legal violations that were characteristics of the old regime. An alternative path of change would be to act in contrast to previous practice, and to change the constitution in accordance

with its revision procedures. The aim is to change the existing institutional framework and to recognize regime change. In this process, the existing legislative body is involved as an actor, but only to adopt proposals that were agreed by the “bodies without any legal status” (Arato, 1993, p159). Those bodies in cases of the Central and Eastern Europe were roundtables. Constitutional changes in Poland and Hungary that occurred after the fall of communism represents a good example of the constitution-making process based on the idea of legal continuity (Arato, 1993, p271).

Before I proceed to the case of Serbia, I will elaborate on the regime change and strategy of constitutional change in the Central and Eastern Europe. We need to examine in depth the concept of constitutional change based on the principle of legal continuity that was applied in Poland and Hungary, so we could compare the case of constitutional change in Serbia with these reference cases.

## **CHAPTER 2: THE CONSTITUTIONAL CHANGES OF THE POST-COMMUNIST REGIMES IN CENTRAL AND EASTERN EUROPE (CEE)**

How did constitutional change, as part of a broader process of democratic consolidation, actually occur in the CEE region? Here we first need to reflect on how the change of the communist regime happened in the first place, and what the institutional outcome was. In the literature that deals with transitional changes, several issues are examined. One of the issues is the mode of extrication and its influence on institutional outcomes. Furthermore, the mode of extrication has influence on the exclusion or inclusion of the old elites. In addition, after the fall of previous regime, the primary focus of new political actors can be several things. Among all, it could be the creation of new institutions or the struggle for power between political actors. The creation of new institutions represents an “investive” use of the new political space, while focus on struggle for more power of emerging actors represents the “consumptive” use of the new political space. Enacting of constitution after the fall of the previous regime represents the “investive” use of power (J.Elster, C.Offe, U.K.Preuss, 1998, p59-63).

### **2.1. The type of previous regime and the mode of extrication**

Before I proceed in explaining the constitutional changes that happened in the CEE region, I will first dwell on a variable that influences the actual extrication and by that effects a consolidation of democracy and constitutional change. That variable is the type of the previous regime, which can affect the mode of extrication and by that, the context in which the new constitution will be enacted. The context for making a new constitution is also considered crucial for democratization, because some contexts can have a restraining effect on the consolidation of democracy. For instance, the preservation of the constitution of previous regime that has difficult

amending procedures and stipulates “reserve domains” for previous elite can have negative effect on the consolidation of democracy. Furthermore, in some federal states constitutional norms stipulated complex decision-making procedures. That was not a problem in previous nondemocratic regime when one party was controlling all institutions. However, in changed circumstances, difficult decision-procedures can contribute to institutional deadlock and in some cases to the dissolution of state, i.e. Czechoslovakia (Linz and Stepan, 1996, p81, 82). In the literature on transition, it is argued that the type of previous regime has implications for tasks that need to be done in order for democracy to be achieved. For instance, for Spain the transition from an authoritarian regime entailed constructing a political society, because a market economy, state bureaucracy were more or less in the place and suitable for democracy. In addition, it is expected that transition from a totalitarian regime should be harder to achieve successfully, than from a post-totalitarian regime (Linz and Stepan, 1996, p55). It is because the former regime is more distinct and further from the goal of crafting a democratic regime. Thus, a political elite, operating in such circumstances, have more tasks that simultaneously should be dealt with.

Linz and Stepan make a distinction between post-totalitarian, totalitarian and authoritarian regimes. One of the defining features concerns the existence of “political, economic and social pluralism”. No one type of pluralism exists in true totalitarian regimes, while economic and social pluralism can exist in an authoritarian regime, and to some extent even political pluralism is present. In post-totalitarian regimes, they recognize three subtypes, namely “early”, “frozen” and “mature” post-totalitarianism (Linz and Stepan, 1996, p42, 43). In the post-totalitarian regime, there is no political pluralism. There could be “institutional pluralism” in the ruling party that could have the consequence of imposing and tolerating some economic reforms, even the emerging of a “parallel culture”. In addition, there is social pluralism that could

pressure changes in the political realm. Ideology in a post-totalitarian regime still exists and is present, it represents the official truth of the regime. However, even members of the ruling elite lost in some degree their faith in the ideological goals. Nevertheless, that does not mean, that ideology can be “questioned officially”. In addition, this situation reflects on the mobilization of society. In the post-totalitarian regime official associations, created with the purpose of mobilizing enthusiasm among society for ideological aims of the regime, still exist, but do not anymore produce the envisaged goals (Linz and Stepan, 1996, p46-50).

Hence, according to Linz and Stepan, countries in CEE region represented different types of regimes. Poland was an example of authoritarian communism, and the mode of extrication was a “pacted transition”. Hungary represented at that time when extrication started the case of “mature post-totalitarianism” and extrication was the “negotiated transition”. Czechoslovakia was a “frozen post-totalitarianism” and transition was initiated by the collapse of regime, after only ten days of demonstration. After that, before the first elections a provisional government was in power. Difference between “pacted transition” and “negotiated transition” is in the starting position of the old elites in the emerging new regimes. In the case of Poland, the old elite secured for itself uncontested seats in a new legislative body. While in the case of Hungary, the regime officials and opposition agreed that the free elections would fully determine future outcome (Linz and Stepan, 1996, p255, 265, 296, 316). Although, according to this typology Poland represented the case of authoritarian regime, still it should not be considered similar to Spain during the authoritarian regime, which would imply that economic changes were not required once communism collapsed. In this case, it only meant that there was more social pluralism because only in Poland was there a strong massively manifested oppositional movement. In addition, the Catholic Church remained a strong actor even during communism.



However, as I will present later in this work, Poland was the first transitional case and that situation contributed to a less favorable Roundtable Agreement.

Let us now proceed to an explanation of the extrication from a previous regime and “negotiated transition” and principle of the legal continuity as the type of constitutional change that evolved from these negotiations. Chronologically the extrication of the old regime and Round Table Talks happened in Poland, Hungary, East Germany, Czechoslovakia, and Bulgaria (J.Elster, C.Offe, U.K.Preuss, 1998, p65). In Poland, the opposition movement was the strongest. Opposition was formally recognized during the Round Table Talks and the opposition accepted to run in a semi-free election. As it turned out, the regime was defeated in that election, which was held in June 1989. In comparison to Poland, in all other CEE countries the opposition movement was fragmented, and not even close to being as strong as Solidarity. However, in those countries the opposition elite succeeded in influencing the course of extrication from the communist regime. Partially it was because of the influence of the reformist wing in the communist party that recognized the need for change. However, the reform wing of the communist party and the opposition elite needed each other for success of the extrication (J.Elster, C.Offe, U.K.Preuss, 1998, p53, 54.)

In East Germany and Czechoslovakia, although round tables had the form of negotiations, they were substantively only formed in order to recognize decisions of the opposition elite. Nevertheless, the opposition did not change the institutional structure of Czechoslovakia, but only struggled and succeeded in making Vaclav Havel president, enacted by the old Federal Assembly, in forming a government coalition consisted from the representatives of opposition and the regime officials. Furthermore, the opposition representatives replaced nearly half of the MPs of communist party. In addition, an election was called for June 1990

(J.Elster, C.Offe, U.K.Preuss, 1998, p68). In Hungary, in the fall of 1989, the oppositional political parties successfully pressured the regime officials to extensively amend the constitution in still nondemocratic parliament. In Bulgaria after the election the ordinary legislative body that was dominated by the Bulgarian Socialist Party, successor of Communist party, drafted and enacted a new constitution. In the Czechoslovakian case, although there was the same idea that the ordinary legislative body after the first free elections should enact the new constitution, the process came to a deadlock, and the country later ceased to exist. Partially, it was due to the strong veto power that the Slovakian constituency had by the Constitution of 1968. However, the first Czechoslovakian parliament also as in the case of Hungary amended the old constitution (J.Elster, C.Offe, U.K.Preuss, 1998, p70). The exceptions were Bulgaria and Romania. In the former, the ruling elite dictated change of the regime and it had characteristics of “a reform of the regime from above”. In Romania, the extrication of the regime had features of violent change (J.Elster, C.Offe, U.K.Preuss, 1998, p54, 55).

## **2.2. The Round Table Talks in Poland and Hungary**

Let us now examine more in depth the cases of Poland and Hungary in order to understand the procedure of constitutional change and the basic principles behind those constitutional changes. We have to examine the rules of negotiated transition and the principle of legal continuity, before we proceed to the case of Serbia.

As Elster (1996) notes, by accepting negotiations, communist governments in CEE recognized that, they have legitimacy problems and that they do not represent society. Roundtable talks (RT) had “a preconstitutional or quasi-constitutional nature”. Although, RTs can be considered as the beginning of democratic changes and of a constitution-making process,

the initial perception of elite were not about the content of future constitution but about defining future conditions in which constitution making should evolve. However, the initial preferences changed. Primarily, it was because, the process of making conditions for future constitution making entails partial changes in the existing constitution, i.e. changing article that stipulates the leading role of the communist party. Of course, it was also about defining circumstances for the first election and recognizing change in the relationship between society and government, i.e. the making of interim government, defining electoral system or amending the clause of the leading role of the communist party, etc (Elster, 1996, p3, 4). In Poland as in Hungary, the initial idea of opposition for roundtable talks was to reach agreement on a path for democratization. They wanted to leave future constitutional issues to be settled by a freely elected parliament. Only during the talks, opposition changed their initial idea (Kis, 1998, p308). Especially, raising the stakes in negotiations was the case for Hungary, because the second part of the roundtable negotiations was after the first semi-free elections in Poland in which opposition candidate won in every contested seat.

In the case of Poland and Hungary, the roundtable negotiations represented a clear examples of the bargaining procedures that eventually led to the agreement being a compromise. A typical example of “a bargaining over” institution was the creation of the post of president in these countries (Elster, 1996, p11-14). The dynamics of roundtable in Poland influenced the negotiations in Hungary. It was because RT in Poland was from February to April 1989, and the first election in June 1989. In Hungary, RT was from March to September 1989, and the first election in November 1989. Thus, the second half of Hungarian negotiations were after the first election in Poland, so the new impetus for opposition was the electoral success of the Solidarity in Poland (Elster, 1996, p5). However, also in Poland, the dynamics of negotiations was such

that it led to the strong gains for the opposition. The proposed agenda of RT was initially only based on the idea of recognizing Solidarity as a representative of society, and as an exchange for that, the government hoped to share the burden of necessary economic changes with Solidarity and to get economic support from the West. Only after the negotiations started, the idea of changing the constitution, and imposing the change toward political democracy emerged. From Hungary onwards, all RTs were about the political change from the beginning (Elster, 1996, p5).

The main outcome of the RT in Poland was agreement on parliamentary elections that were held in June 1989, with sixty-five percent of seats uncontested and shared between the Communist party of Poland and their allies. In addition, fully free elections for the Senate were held. The Senate had one hundred representatives elected by majority voting, and power of legislative initiative and veto power over the Sejm, however the Sejm needed a two-third majority to override the veto. The strong executive powers were invested in the presidency (Osiatynski, 1996, p56, 57). The strong presidency and the upper chamber of parliament that was established by the agreement remained even after the democratic change. Thus, it set Poland to a semi-presidential system.

In Hungary, the similar issue of the presidency was on the agenda, namely when and how the president should be elected and what powers should be invested in the future post of president. The reform wing of the Communist party opted for a presidency with essential, and not only representative powers, and for the election of the president before parliamentary elections. They thought that they would secure this position for Poszgay, who was then leader of the reformist wing. In addition, instead of electing a president by the parliament in which they still had absolute control, they suggested, as a bargaining offer, to elect the president by the electorate. The opposition was divided on this issue. At one end of the Roundtable, the MDF and

other smaller parties accepted the proposition of the Communist party, while others, namely SZDSZ and FIDESZ were against it (Sajo, 1996, p 81, 82, 86). The crucial critical juncture happened after the change of the name of the Communist party into the Socialist Party. After this event, they did not succeed in maintaining their previous membership. Thus, a power vacuum evolved. This gave new impetus and more legitimacy to the opposition. During this period, the old government enacted constitutional amendments, which were agreed in collaboration with the opposition. In addition, the SZDSZ and FIDESZ seized the moment and called for a popular referendum on the previously suggested procedure for electing president, in which they succeeded. Thus, the president was elected by the parliament after the first parliamentary election (Sajo, 1996, p88, 89).

When RTs in these two countries are compared, it can be seen that, the overall agreement was more favorable for the opposition in Hungary than it was in the case of Poland. Although, the Polish opposition was a much stronger political actor, they were coerced to accept the agreement that stipulated uncontested seats in the parliament for the successor of the Communist Party. It was, as already mentioned, because the Polish RT was the first in CEE region and opposition elite did not know how the Soviets would react. In addition, in Hungary the opposition consisted of several small political parties, and their representativeness was questionable, but they succeeded in enforcing favorable political changes for them. Of course, the time argument contributes to an explanation of this. In addition, Kis argues that an additional explanation is paradoxically in the position of the Hungarian oppositional elite. They were not so strong as in Poland and they could not persuade the mass public, so they needed to raise the stakes, and that meant that there should be more change of constitutional order in the first phase of transition (Kis, 2011). However, the institutional outlook that was laid down in the RT

agreements, and in the case of Hungary, that was partially the product of ensued political dynamics, remained even after the democratic transition was achieved.

### **2.3. The constitutional changes in Poland and Hungary**

In the literature, scholars have tried to explain and label the constitutional change that unintentionally started during the round tables. Kis argues that it was the constitution-making process in a specific context of negotiated transition, and that negotiated transitions are the natural home for “a two-stage constitution making process”. Stage one was the making of interim constitutional arrangements for the transition period and the final constitution was planned to be adopted some time after the first free elections when the transition was over (Kis, 2011). In the case of Hungary, there was a successful initial phase and then failed attempts to accomplish the second phase during 1995 and 1998, when political actors did not succeed in adopting a new constitution. According to Kis, the Constitutional Court in Hungary from the beginning acted like there was already an established final stage, and that there was a final constitution. It was based on the idea that a constitution without the second phase of constitution making will obtain the status of the final constitution through practice. All parties later recognized this idea of the Constitutional Court, and thus established “quasi-consensus” on the existing constitution (Kis, 2011).

In contrast to this situation, in Poland the “two-staged” constitution-making process properly succeeded, although it lasted more than it was initially expected. Partially, it was due to agreement that sixty-five of the seats in the first election would be uncontested and obtained by the successor of Communist Party. This situation later led to the disputed legitimacy of those representatives, as it was questionable whether they should influence drafting of a final

constitution. Additionally, it was a problematic because the lower chamber of parliament by parliamentary tradition had greater power than upper chamber. Thus, when Sejm created a Constitutional Committee with the aim of drafting a new constitution, the upper chamber did the same, so there were two competing Committees. This situation, as well as, a lack of political will led to the failure of this first attempt to make a new constitution by the end of envisaged date, which was until May 1991 (Wyrzykowski, 1999, p10). Thus, a new constitution-making process started after the second election in the fall of 1991, by creating a new Constitutional Committee, comprised of the representatives of both chambers, and parliament enacted “the Constitutional Law on the Procedure of Preparing and Enacting a Constitution for the Republic of Poland”. In addition, parliament enacted the Constitutional Law that regulated relation between executive and legislative bodies, and self-government. It was the so called “small constitution”. While this process came to a halt because the government lost its ruling majority in the parliament, they succeeded in producing a “small constitution” (Wyrzykowski, 1999, p10). In the autumn of 1993, there was a third parliamentary election and the most successful was the left coalition, which succeeded in creating a government. However, the ruling coalition needed to collaborate with oppositional parliamentary parties in order to have a two-third majority, which was the requirement for the enactment of a new constitution. Thus, compromises were made by the ruling parties, namely the Democratic Left Alliance and the Polish Peasants’ Party, with oppositional parties, namely the Union of Freedom and Union of Labor. In addition, because approval by popular referendum was a requirement for the enactment of a new constitution, and because right-wing parties had criticized the first drafts, the parties that were crafting the proposal of constitution reacted to some criticism. The governmental coalition slightly changed

the draft of constitution out of fear that referendum could be unsuccessful. In May 1997, the proposed draft of constitution was approved by referendum (Wyrzykowski, 1999, p11, 12).

Hungary represents one of the clearest examples of changes in the context of constitutional, and legal continuity. Although in Hungary there was revolutionary achievement, there was no revolution, because the mode of the change was not revolutionary (Kis, 2011). In order to understand why, according to Kis, it is possible to have a revolutionary outcome without a revolution, we have to examine two variables of the political system: the principles of legality and legitimacy. In addition, in every process, there is a modality and outcome. The revolution would have the abrupt mode of change and would have far-reaching consequences. In contrast to this, the reform is imposed by above and by respecting the legal order of the country. In a revolution, people do not obey the rules of the system because they perceive them as illegitimate. Thus, revolution represents a “situation of legitimization crises” (Kis, 1998, p313). In a revolution, the legal system ceases to exist because the people of one country have strong doubts about the legitimacy of the system. In contrast to this, in a reform legal system continues to exist, and changes are implemented in accordance with legal requirements. Prelude to change can be a “legitimization crisis”, but it is not necessary condition. Furthermore, dominant agency that seeks for changes differ. In a revolutionary process, it is a group that questions legitimacy of the system, while it is ruling elite in a reform process (Kis, 1998, p316, 317).

The mode of political process that happened during 1989/90 in CEE, except in Romania, had features of reform. However, the scope of the change was colossal. Thus, a third concept is needed and Kis calls it a “coordinated transition” or “negotiated transition” (Kis, 1998, p300, 301, 304, and Kis, 2011). Features of the changes in CEE are the following, the ruling elite lost their authority and there is a “legitimization crisis” but it does not lead to the collapse of the



system. Thus, it is not a revolution. In addition, there are attempts to preserve legal system, but only through the coordination of opposition that are out of power but possess authority and the ruling elite that have official authority but only as a formality. In exchange for authority in order to secure order, the regime officials agree to implement large-scale change. Kis names this situation “coordinated transitions” that have several features or steps. The legitimacy of system is questioned on a large-scale in a society, however in order to prevent the collapse of whole system, which could lead to unknown outcome, opposition groups and the ruling elite starts negotiations and reach an agreement on the national roundtable. Agreement entails transitional rules for the creation of a new regime, which is based on the ideas incompatible with the current one, and agreement is enacted in a parliament by respecting the legal procedural norms (Kis, 1998, p318, 320).

It is argued that opposition groups had authority, however constantly it was questioned whom they represented. Then, maybe it is better to state that neither one political actor, namely opposition nor the ruling elite had true authority. It was obvious that the ruling elite did not have authority due to “legitimization crises” that was unfolding during 1989, while the opposition only were assumed to represent society, or part of society, at the roundtable talks and it was assumed that it had authority. Of course, only in the case of Poland was it clear that the opposition had authority. Nevertheless, the social protests that were happening on a few occasions at the same time when were roundtables, showed that parties can claim representativeness. Nevertheless, the general rule for negotiated transition is that all political actors have to agree on two things: where transitional process should lead and what the rules of transition are. The latter issue means that all parties should agree on the constitution. In addition, they should recognize themselves as “constitutional partners”. Because all relevant parties

participated in the first phase of the constitution-making process, nobody could accuse the other side that the existing constitution is more inclined towards the interests of one side (Kis, 2011).

## CHAPTER 3: THE CONSTITUTION-MAKING PROCESS IN SERBIA

### 3.1. Introduction

Compared with other countries in Central and Eastern Europe, Serbia represents a “deviant case” when the process of making a new constitution is analyzed. In CEE countries, either the first parliament acted as the constitutional assembly or constitutional changes are established through a “two-stage” process based on the principle of legality. Although, after the fall of Milosevic’s regime in October 2000, the principle of legal continuity became the proposed strategy of the ruling elite for changing the constitution, however in this case there were no constitutional changes at all. The old constitution was preserved without any changes. When the power relations after the 2000 elections for the Serbian parliament are analyzed, it can be seen that the ruling parties initially had a two-third majority of seats in the parliament. It was expected that, they would draft and enact a new constitution, as in every other post-regime change process, but they did not. Contrary to expectations, the ruling elite disintegrated itself in less than a year. The new constitution was enacted six years later, and at that point, the third government was in power since the fall of the Milosevic regime. It was enacted and promulgated in November 2006. Prior to that, people confirmed the proposed draft of the constitution in a referendum. The referendum lasted two days and that was contrary to the Law on referendum, which stipulates that referendum can last only one day (Petrov, 2010, p1). All relevant parties in parliament agreed on the draft of the Constitution. However, one party that was then a new one but later emerged as a relevant parliamentary party opposed it.

One could argue that this situation was nothing more special than the Polish case, because also in Poland, politicians needed seven years to enact a new constitution. Thus, when

years that were spent on the constitutional issue are compared both cases seem very similar. However, when the Polish constitution-making process is compared with the Serbian, several distinctions are obvious. Namely, although overall process in the Polish case lasted for seven years, however the continuous efforts of the constitution making can be traced. The first non-communist parliament in Poland that had proper legitimacy was the second convocation of parliament. During the tenure of this convocation of parliament, two constitutional laws were enacted in 1992. One constitutional law regulated procedures for the adoption of a new constitution, and other constitutional law was actually a “small constitution”. It regulated relations between governmental branches. It could be argued that, their initial failure to draft a constitution was partially because of Poland’s special situation of being the first transitional country in CEE. Thus, the mode of extrication led to semi-free elections, which resulted in the semi-legitimate parliament. Because of these circumstances, there was a competition between two political actors in parliament, namely the Sejm and the upper chamber: Senate. The competition was on the issue of who would be the representative body for drafting a new constitution. Then, as time passed, it was harder to regain such “constitutional momentum” because normal political dynamics were happening. In contrast to this, in Serbia, although the officially proposed strategy for change was the concept of legal continuity, however there was the lack of constitution making.

In order to see why there was such an outcome, I will apply process-tracing, a sub-type of case study, in which the researcher examines one case by relying on assumptions on “how the world works”. Moreover, most importantly, in order to make this kind of research succeed, one must have “contextual knowledge” and must also detect all other possible “alternatives and scenarios” that could have taken place (Gerring, 2007, 178-181). In order to do this, I will focus

on the examination of the political context in which the political elite in Serbia operated, thus the focus of analysis will be on incentives, institutions and actors. These three units of observation, while analytically distinguishable, heavily overlap in the case of post 2000 Serbia.

### **3.2. (The absence of) constitution-making in Serbia 2000-2006**

In Serbia, the initial preemptive transition from a communist regime ended with the new kind of hybrid, nationalistic regime that existed throughout the nineties. Consequently, only with the fall of the Milosevic's regime in 2000, did the proper condition for democratic transition become established. The regime change occurred as a consequence of a massive, public uprising against the ruling political elite, because the regime officials did not recognize the electoral win of the opposition coalition. In that time, Serbia was a federal unit of Yugoslavia.<sup>1</sup> It was expected that one of the main priorities of the newly established political regime would be drafting a new constitution and crafting a new political community. It was assumed that the new regime officials would re-organize relations with the Republic of Montenegro, which was the second constitutive unit of FR Yugoslavia, and engage themselves in drafting the new constitution for Serbia. It was also in a legal sense a mandatory process because at that time the Constitution of Serbia was in collision with the Constitution of FR Yugoslavia, which acted as a higher legal act. The anticipated processes did not happen. Rather a very peculiar attitude to the constitution-making process was adopted. I believe that part of the answer why it was so, is to understand the type of regime that existed in Serbia during the nineties, and how transitional change started.

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<sup>1</sup> Federal Republic of Yugoslavia was established in April 1992. Two constitutive units were Republic of Serbia and Republic of Montenegro. FR of Yugoslavia ceased to exist in February 2003, after the re-arrangement of the relations between two constitutive units. They created "loose" confederation as a successor state, called Serbia and Montenegro. In May 2006, after the popular referendum in the Republic of Montenegro, Montenegro representatives declared independence. Serbia was declared as the successor state of the confederation of Serbia and Montenegro.

Thus, I depart from an analysis of the nature of the old regime and “the mode of extrication” that took place in the transitional period.

In September 1990, a new Serbian constitution was enacted, while Serbia was still – constitutionally speaking – a part of the Yugoslav socialist federation. This constitution introduced democratic institutions, such as elections and party pluralism. The still ruling communist party that before the first elections changed its name into the Socialist Party of Serbia enacted a new constitution without negotiations with the emerging opposition. Thus, constitutional change occurred before the first free elections, and was not the product of agreement between regime and emerging oppositional parties. Hence, Milosevic who was already in power endorsed preemptive changes. Prior to that, he started with nationalistic mobilization and used nationalistic ideology as a way to slow down the possible democratic transition (Pavlovic and Antonic, 2007, p254). Those preemptive changes created the new political system.

Milosevic maintained power during the nineties. The prelude for the regime change was the elections for the post of president of Federal Republic (FR) of Yugoslavia and for bicameral Federal Assembly in September 2000. Before that, Milosevic decided to induce change in the federal constitution, and to introduce new popular elections for the post of president of FR of Yugoslavia. Prior to this change, the Federal Assembly had the function of electing the president. The ruling elite in Montenegro boycotted the elections. On the other hand, political opposition in Montenegro was participating in the elections. Prior to that, they were part of the ruling governmental coalition on the federal level. After losing elections for the post of president, the Milosevic regime did not recognize elections. That led to the massive uprising of people in Serbia. Demonstrations ended after Milosevic recognized the election results and stood down

from power. As the result of negotiations between the opposition, embodied in the coalition of parties called Democratic Opposition of Serbia (DOS), and the ruling elite, a new election for the Serbian parliament was scheduled for December 2000. In the mean time, a transitional government was formed in Serbia which consisted of the previously main ruling party, namely Socialist Party of Serbia and DOS, and another one at that time oppositional party: Serbian Renewal Movement. In the parliamentary elections in December 2000, DOS won a two third majority of seats and formed a government. On the federal level, DOS formed a government with parties from Montenegro that previously supported the Milosevic regime and were for the maintaining of the federation. Although, the opposition won the election on federal level, “the mode of extrication” from the hybrid regime was eventually through negotiations and was applied also on the regime in the Republic of Serbia.

Levitsky and Way argue that Serbia during the nineties falls into the category of “competitive authoritarianism”, as a type of hybrid regime. In their article from 2002, the authors developed the concept of competitive authoritarianism, the form of regime that is neither authoritarian regime, nor democratic regime (Levitsky and Way, 2002, p 52). In addition, Pavlovic and Antonic using the concept of these two scholars, argue that in Serbia during the Milosevic rule in the nineties political regime was hybrid regime. In addition, they argue that even three years after the fall of Milosevic from power in 2000, it continued to be such.<sup>2</sup> They call it “electoral authoritarianism”, but it is a different term for the same type of hybrid regime

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<sup>2</sup> However, later they slightly changed their opinion. “Hybrid regime” remained as a typology of the Milosevic regime in the nineties, but they to some extent altered their opinion on the period between 2000 and 2003. They used successful and free elections as one of the main indicators for change from “electoral authoritarianism” into “electoral democracy”. The first such elections were the parliamentary elections in December 2003. However, authors partially changed opinion on the type of regime after 2000 due to criticism of other scholars. Namely, if one government organized free and successful elections, then it could be doubt, whether that government falls into the category of “electoral authoritarianism”. Thus, they accepted opinion that the change into “electoral democracy” was during the period between 2000 and 2003, but there is the lack of clear indicator when actually change occurred (Pavlovic and Antonic, 2008, p169).

(D.Pavlovic, S.Antonic, 2007, p83, 85). What does this type of hybrid regime mean? In “competitive authoritarianism”, formal democratic institutions exist, i.e. elections, parliament, and political parties, some independent media. However, minimum democratic criteria, such as that, representatives are elected through “open, free and fair” elections, existence of universal suffrage, civil liberties and political freedoms, and that elected representative is in position to exercise his authority without “the tutelary control of military or clerical leaders” are not met. In addition, violation of these criteria by regime is systemic and on a large scale, and that situation contributes to “an uneven playing field between government and opposition” (Levitsky and Way, 2002, p53).

As was stated in the previous chapter, according to the literature on transition, the type of previous regime determines what needs to be reformed in order for democratization to proceed. Linz and Stepan argue that transition from totalitarianism to democracy is more difficult to achieve, then from “mature post-totalitarianism” or authoritarian regime to democracy (Linz and Stepan, 1996, p55). According to this notion, hybrid regime would be better starting point for democratization, due to hybrid institutional structure being closer to desired democratic regime. It is because formally some institutions that correspond to democracy already are in place, i.e. party system, electoral institutions. Thus, in order for democracy to be achieved, it is required to alter institutional structure in such way that institutions would influence political actors to respect democratic procedures and thus to produce democratic outcome. However, the regime is not only its institutional structure, but also it is dominant political cleavages and the legacy of political practice that was propagated during the period of that regime. In the political sphere are mostly present dominant political divisions, which are structured on the dispute over dominant political issues. Parties represent their stances on those political issues. In addition, the same



political actors exist after the fall of regime. Thus, divisions could be maintained if dominant issues are unresolved. In the Serbian case, the regime during the nineties represented nationalistic politics and was involved in wars during the armed dissolution of former Yugoslavia. After its fall, issues related to stateness, i.e. Kosovo, relations with Montenegro remained unresolved. In addition, the legacy of war crimes and nationalism as legitimization for wars and committed crimes was present. As it is going to be showed later in this thesis, this situation can contribute to the stalemate of enacting a constitution and to slow pace of democratic changes, because those issues are part of the dominant divisions among parties. However, the case of Kosovo can act as an incentive for constitution making.

In Serbia, the mode of extrication was complicated because of two institutional levels: federal level and republic level. The extrication was through federal elections that were not recognized and caused a massive uprising on the streets. The uprising ended after the transitional government on the level of Serbian Republic was agreed and elections for Serbian parliament were scheduled for December 2000. However, Pavlovic and Antonic argue that in Serbia, due to the nature of the regime that existed in the nineties, there was a specific type of pact as a way of extrication from previous regime. According to them among the representatives of regime existed also division on hardliners and reformers, and in the opposition division was on the moderates and radicals. Hardliners in the regime were the representatives of the ruling Socialistic party of Serbia, while reformers were representatives of “national security, military and mafia” that were also a defining part of old regime (Pavlovic, Antonic, 2007, p227, 228). Thus, in Serbia there were two pacts, between ruling and opposition political elites, and between the oppositional political elite that won elections and “reformist” of regime (Pavlovic, Antonic, 2007, p228). However, this pact is only implicit interpretation of the power vacuum that was created after the

federal elections in September 2000. There is no strong evidence for the second type of pact. This power vacuum lasted until the early elections for the Serbian parliament, which were in December 2000. It could be argued that, during this “legitimacy crisis” neither the regime officials, nor the opposition representatives knew how strong was the other side and how would the other side react in circumstances when everybody lacks the information about the willingness of other side to proceed. This situation probably led to the self-constraining actions of actors. In addition, the opposition ability to mobilize massive support on the streets probably influenced the regime structure not to act violently and eventually to recognize defeat.

Pavlovic and Antonic argue that this kind of “implicit agreement” as a mode of extraction is suitable only for transition from authoritarian or post-totalitarian regimes and it have opposite effect if it is used as mode of extrication from hybrid regime. In hybrid regimes, in contrast to former types of regime, this kind of extrication produces negative consequences for consolidation of democracy. It is because “negotiated transition” in post-totalitarian or authoritarian regimes is focused on defining character of future institutions. In contrast to this, in hybrid regimes, those institutions already exist in some way and the focus of pact is on the future position of old regime elite. This situation can lead to the creation of reserved domains that in this kind of environment will have more negative influence on consolidation of democracy, than it can in “negotiated transition” of authoritarian regime (Pavlovic, Antonic, 2007, p224, 225).

After the change of the regime, dominant strategy for reforming was the concept of legal continuity, but qualitatively different from previously experienced in Central and Eastern Europe. In Serbia, legal continuity was agreed without negotiations with representatives of the previous regime and, crucially, it meant non-action (Dimitrijevic, 2003, p38). In addition, the Democratic Party of Serbia, which was at the beginning of the democratic transition part of

ruling coalition, and its leader Vojislav Kostunica, who was then the President of FR of Yugoslavia acknowledged the importance of legal continuity as the way of change. The consequence of this kind of “constitution-making” was no change at all, and the process was basically dissolved. After the fall of Milosevic regime and until November 2006, when the new constitution was enacted, there were three consecutive governments. All three governments, as part of their agenda, declared that one of their aims was to draft a proposal of new constitution. Even the government during whose tenure constitution-making process happened stated that, it would draft constitution in the first three months of their tenure (Molnar, 2010, p13). However, they only endeavored to make a constitution more than two years after they were formed. Thus, the Constitution was drafted in September 2006.

### **3.3. The possible reasons for the lack of constitution-making in Serbia 2000-2006**

Possible causes or constraints for the lack of constitution-making process after the initial change of the regime are already offered in scholarly literature. However, before I proceed to presentation of them, I will first dwell on the term “constraint” in constitution-making literature in order to present the manner in which this term will be later used in work. In his presentation of the constitution-making in constituent assembly, Elster notes two types of constraints: “upstream” and “downstream” constraints (Elster, 1995, p373). “Upstream” constraints are laid down by the actor that created or called for constituent assembly and who determine mechanism for the selection of delegates. “Downstream” constraints are produced by the fact that constitution needs to be ratified. Upstream constraints produced by actors that convene constituent assembly are related either to assembly’s procedures or to “the substance of the constitution”, making by that clear guidance or framework for delegates. If the enactment of the

draft of constitution implies ratification, then preferences of the political body that is going to decide on ratification represent downstream constraint. However, Elster also notes that historical evidence shows that constituent assembly often decide to act against both constraints, which often are laid down by the same body (Elster, 1995, p373-p375).

How can the concept of constraints be applied on a constitution-making process in general. First, if “downstream constraint” could be electorate that needs to ratify the proposed draft of constitution, then maybe we should go further in delineating constraints. If main political actors make a decision that, there will be no constituent assembly and the new constitution would be enacted according to the principle of legal continuity. In addition, in the case of Serbia, the procedure for constitutional change entails that the draft of constitution needs to be confirmed on referendum. However, the constitution-making process does not evolve, then explanation for this situation could be found in a political context in which parties operate. This political context can have constraining effect on the evolvement of constitution making. Thus, we do not have manifestation of constitutional bargaining in which opposite group interests of the political parties led to a stalemate of the process, but constraints could be in the political context that divides parties, as well as, electorate.

In the case of Serbia, the political context should be perceived as consistent of two arenas, namely institutional arena and political context, in narrower sense, in which parties operate. Thus, the first possible constraint can be inherited institutional structure ambiguity that led to “confusion” on which governmental level would be used for constitutional change, namely federal or republic institutions. The second category of constraints is divisions among relevant political actors, based on their different preferences. It includes division among parties over the main issues that dominate in the political sphere and shape the dominant axis of political

division, i.e. stateness issue such as Kosovo, the issue of possible separation of the Montenegro, the relation towards the old regime and the legacy produced by that regime. It is not only divisions among parties on these issues but also on perceiving whether they are objective reasons for making a new constitution, whether there could be a consensus on those issues or even whether it is a right time for solving those issues. These two defined arenas necessarily overlap.

### ***3.3.1. The ambiguity of institutional structure***

I will first start with the analysis of inherited institutional ambiguity that could have acted as a constraint for development of the constitution making. These inherited issues are already mentioned in scholarly literature. Mostly as constraints are categorized problems such as: impossibility to recognize who the citizens of Serbia are, due to Kosovo being under the rule of international community. Thus, there was a problem to identify to whom future constitutional norms will apply, because there was a problem to define borders and citizens of Serbia. In addition to this, legal discrepancy between federal constitution and constitution of Serbia existed. Thus, additional question was which constitution will be used as legal framework for change. Furthermore, political representatives of federal unit of Montenegro did not anymore recognize Yugoslavia as their state (Dimitrijevic, 2003, p39 - 41). However, in constitutional theory, this kind of situation can be also perceived as an incentive to enact a new constitution, and not as a constraint for such an act. Similarly, Molnar considers that one of two explanations for the lack of constitution-making process in Serbia after the 2000 is related to declared aim of the ruling elite in Serbia to restructure existing federation with Montenegro. The ruling elite and the one portion of electorate in Montenegro had preferences for independence. Thus, constitutional change would start from the federal level of government (Molnar, 2010, p 23, 24).

I will now dwell more on the inherited relations between Serbia and Montenegro, in order to present my opinion that this possible constraint should have acted as an impetus for constitutional change and not as a limitation on the development of constitution-making process. Before I proceed to the explanation of inherited institutional arrangements between Serbia and Montenegro, I will first present the institutional development of Federal Republic of Yugoslavia and relation between the Federal Constitution and the Constitution of Serbia from 1990.

The Federal Republic of Yugoslavia came into existence after the adoption of the Federal Constitution in April 1992. The FR Yugoslavia was consisted from two federal units: Serbia and Montenegro. The ruling representatives claimed that the new federation was the successor state of the previous Socialist Federative Republic of Yugoslavia. However, from the legal point of view it was false, because the constitution-making process in a legal sense violated stipulated procedure for the constitutional review of the Constitution of 1974 of former socialist Yugoslavia. There were several violations. Firstly, only the representatives of Serbia, Montenegro and the representatives of the two autonomous provinces of Serbia were involved in the process and gave their consent (Vucetic, 2003, 73, 74). Thus, other four constitutive federal units of former Yugoslavia did not participate, nor they had willingness to participate in constitutional revision. According to the rules of constitutional revision, their legislative bodies needed to give consent on constitutional change. Thus, the Federal Chamber of SFR Yugoslavia did not envisage the quorum for work. Secondly, the tenure of the representatives in the Federal Chamber that were involved in the revision process was expired. In addition, in Serbia new Constitution was enacted in 1990, and only recognized Serbia as the bearer of sovereignty (Pajvancic, 2000, p256, 257). In addition, SFR Yugoslavia was already a non-existing country that dissolved itself in armed conflict. Thus, legitimacy to claim that one newly created

federation is a successor state was very shaky. The Constitution of Serbia from 1990 was in collision with the articles of the Constitution of FR Yugoslavia from 1992. Especially, articles on the basic freedoms and rights of citizens in the Constitution of Serbia were much more restrictively determined than in the Federal Constitution (Pajvancic, 2000, p261, 262). This situation existed throughout the nineties.

FR Yugoslavia was not a constitutional democracy, and the existence of three conflicting legal regimes caused little or no problem for the ruling elite, at least as long as Slobodan Milosevic was able to act as an undisputed leader. In practice, the inconsistency of constitutions and legal systems of Serbia and FR Yugoslavia allowed and contributed to the practice of Slobodan Milosevic emphasizing the powers of those institutions that he held during his rule, namely the institution of the president of Serbia and later the institution of the president of Yugoslavia (Vucetic, 2003, p77). The functioning of the Federation was based on the agreement of the ruling elite, which separately were in power in their constitutive units. Only when the ruling elites of Serbia and Montenegro came into collision, the functioning of federal state was questioned.

Therefore, after the split in the Democratic Party of Socialists, which was and still is the ruling party of Montenegro, functioning of federation was for the first time questioned and institutional crisis came to the fore of political problems (Vucetic, 2003, p77, 78). The split of the ruling party in Montenegro on two parties led to institutional crisis. In 1997, the party split into two factions and one faction later found a new party: the Socialist People Party. The Democratic Party of Socialist remained in power in Montenegro, but imposed new politics of opposing to Milosevic's regime and to existence of Yugoslavia. They started to opt for the independent state of Montenegro. The splinter party, the Socialist People's Party continued to

support Milosevic's regime and the existence of Yugoslavia. Milosevic supported them and they participated in the federal government. This was only the beginning of institutional stalemate. In 1998, after the refusal of the Chamber of Republics of the Federal Assembly, in which were represented Montenegrin delegates that were loyal to Socialist people's Party, to recognize the new mandates of representatives from Montenegro who should have succeeded them and who were from the Democratic Party of Socialist, the institutional crisis deepened. The ruling party in Montenegro decided not to recognize any decision of the federal institutions until this unconstitutional situation was resolved. As time passed, the ruling Montenegrin regime inclined towards independence even more (Vucetic, 2003, p78, 79).

After the regime change in Serbia and Yugoslavia, the inherited constitutional discrepancy between Serbian and Yugoslavian level of government continued. In addition, there was the problem of how to solve relations with the regime in Montenegro. Thus, because it is legally proper in federative countries to resolve all constitutional problems starting from the highest legal act, it could be argued that it was nothing special in the case of Serbia, because there was need to first solve relations with other federal unit. The appropriate way to solve the institutional crisis could be by enacting a new constitution, which would be also opportunity to re-arrange mutual institutional relations. Likewise, after that to enact a new constitution for Serbia, so it would be in accordance with the legal norms of the higher act. Thus, the situation should start from the highest level of government. In addition, it would allow Montenegro to solve their internal dispute, namely whether to maintain in common state or to declare independence. However, technically it was also possible to start constitutional change by adjusting the existing Serbian constitution to the Federal Constitution. In addition, that would show the strong belief of Serbian elite in common state with Montenegro.



The constitutional change started as a way of re-arranging institutional relations between two constitutive units. According to the agreement signed in March 2002, both federal units agreed to rearrange and to maintain a common state.<sup>3</sup> Thus, in February 2003, the new Constitutional Charter of the State Union of Serbia and Montenegro was enacted, and by that, Federal Republic of Yugoslavia ceased to exist.<sup>4</sup> The State Union of Serbia and Montenegro was confederation, but also it was argued that it had features of real union (Vucetic, 2003, 82, 83). However, the State Union of Serbia and Montenegro ended after Montenegro declared independence in May 2006. Prior to declaration, there was a popular referendum in that country.

The process of institutional restructuring, all together, lasted for six years, until Montenegro declared independence. This process of “constant” restructuring cannot explain the lack of constitution-making process in Serbia. During the three years of the existence of the State Union, there was no process aimed to enact the new constitution of Serbia. Thus, doubts can be raised whether the federal structure was an objective constraint for constitution making. On the contrary, the constitutional changes and the creation of the new federal level of government should have been impetus for Serbian political elite to enact a new constitution. In addition, the constitutive states of the State Union were obliged by the article 20<sup>th</sup> of the Law for implementation of Constitutional Charter of the State Union to harmonize their constitutions with the Constitutional Charter of the State Union in six months since the Charter was promulgated. The Serbian elite, especially those that were in power in Serbia during the period

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<sup>3</sup> “The Agreement on the Principles of Relations between Serbia and Montenegro within the State Union” was signed in Belgrade in March 2002. The parties in agreement were the representatives of Serbia, Montenegro, the FR of Yugoslavia, and Javier Solana, who acted as representative of the EU that had a role of a mediator in this process. Principles stipulated that the new “state community will be confederation with elements of federalism” and would have the features of real union (Vucetic, 2003, p82, 83).

<sup>4</sup> The highest legal act had the name of Constitutional Charter, and not of Constitution. It was stipulated that firstly would be enacted in the parliaments of both Republics, and then by the Federal Parliament. However, this procedure was contrary to the stipulated procedures for changing the Constitution of FR Yugoslavia and political structure of federal state (Vucetic, 2003, p83, 87).

of existence of the State Union, was strongly for sustaining the common state. Thus, they should have strived to achieve consensus in Serbian parliament in order to adopt a new constitution according to stipulated rules for constitutional change. However, there was no such strive. Thus, by my opinion the reason for the lack of constitution-making process in Serbia is not inherited institutional ambiguity after the fall of the Milosevic regime, but should be found only in relation of the Serbian elite towards the inherited political issues that are related only to the Serbian's political sphere.

### ***3.3.2. Divisions of political actors over dominant political issues***

Constraints that contributed to the prevention of constitution making to evolve came from division among the post-2000 ruling elite. Those divisions are related to dominant issues that structured party sphere and are associated with the previous regime. There are two types of “the legacy of previous regime”. The first is the legacy of institutional structure, namely the political, economical and legal institutions of the previous regime (Dimitrijevic, 2007, p232). The second one is the legacy of practices that were committed by the regime. In addition, the political sphere, as the constitutive part of every regime that entails party system, partially was structured in relation to those legacies. In the case of Serbia, in this second type of legacy belongs also “the criminal legacy”, because of the crimes committed by the regime during the wars on the territory of former Yugoslavia, (Dimitrijevic, 2007, p233).

If we try to determine what was after the change of regime in Serbia the biggest problem for transition then we would need once again to recall the previous type of regime. During the nineties, Serbia was a hybrid regime. In such a regime democratic institutions formally exist, however essentially they do not produce democratic practices, not so because of their wrong

institutional design, i.e. wrongly designed relations between governmental branches, but more importantly because of the behavior of political actors. Therefore, institutionally the type of regime is closer to the aim of transition, namely the establishment of democracy. Thus, it should be easier to produce such outcome once the real transition to democracy starts. Nonetheless, the case of Serbia would represent a counter argument. If the focus of analysis would be only on the institutional legacy of regime, then conclusion would be misleading. However, there is more than political and legal legacy of regime. The constitutive parts of the previous regime were legacies of its crimes committed during the wars in former Yugoslavia in the 90s. Those inherited past and remaining unsolved stateness issue, i.e. Kosovo being under the rule of international community represent the second type of legacy. Those issues shaped the political cleavages and divisions among parties and electorate after the fall of regime in 2000. However, those issues were consequence of nationalism in the 90s that was driving force behind the wars.

Before I proceed to an explanation of political divisions in Serbia, I will briefly show how they were structured in the CEE region in the first years of democratic transition. That will allow us, to compare the type of divisions in CEE with the type of divisions in Serbia. The comparison will help us to see how the type of conflict has influence on the possibility for achieving consensus among parties.

Political scientists strived to comprehend whether the main political divisions in CEE, after the fall of communism, are going to resemble those in well-established Western democracies. According to Nagle and Mahr, the post-communist party systems could not resemble the western pattern of party system. The latter system was shaped mostly by the influence of socio-economic cleavage. This cleavage was the consequence of industrialization and was manifested as social conflict between capitalist class and working class. At the

beginning of transition, post-communist countries lacked the established capitalist class and the imposition of liberalization and market reforms was by the regime officials (Nagle and Mahr, 1999, p171).

Kitschelt argued that, in the most abstract sense, in every post-communist country at the beginning of transition, the ruling elite had to make choices regarding three fundamental issues. Those issues would then shape political cleavages. The ruling elite had to determine who can play the new game, what would be the procedures of the game and with what resources citizens can participate. The decision on the first issue will influence all other decisions (Kitschelt, 1992, p11). In a sovereign state, to determine who can participate in political system means to define concept of citizenship. It is to decide whether the whole population on the territory of state would have the rights of participation, or to restrain citizenship to those with preferred racial, ethnical, religious or cultural characteristics (Kitschelt, 1992, p12). The second issue meant to determine what can be matter of political decision and the way political issues would be decided. The dimension of this political cleavage would have range from “authoritarian” to “libertarian” position. The first one will be in favor of fewer issues that can be the matter of political decision and for centralized way of making decision that affect the political community. In contrast to this, the opposite position would incline towards more participation in the collective decision-making process and the broad range of political issues (Kitschelt, 1992, p12, 13). The third cleavage would create division between those in favor of market economy and those who are in favor of the active engagement of state in the political redistribution of wealth. Kitschelt argued that more likely outcome would be one-dimensional division between parties, meaning that cleavages, and position of parties along them, will be over-lapped (Kitschelt, 1992, p13, 14).

In addition, Elster, Offe and Preuss stated that in the post-communist societies, social cleavages that shaped party sphere were different in the nature, in comparison to dominant cleavages in the Western democracies (Elster, Offe, Preuss, 1998, p247). In the latter countries, the socio-economic cleavage is dominant and it is based on “distributional conflicts” that enables parties to engage in the “bargaining procedures” and to arrive to the compromising solutions among parties (Elster, Offe, Preuss, 1998, p 147, 148). Contrary to Western democracies, post-communist party systems largely were shaped by “categorical conflicts” and “constitutional conflicts” (Elster, Offe, Preuss, 1998, p147). The latter ones are “political-ideological” conflicts that are mostly about the issue of “constitution-making”, and by that, on defining the rules of political game and competition. When it comes to the “constitutional conflicts”, it is not so easy to establish consensus because they have the features of “bargaining and impartial arguing”. Nonetheless, it is possible to achieve consensus on this issue. In addition, these conflicts were about how the old regime was perceived (Elster, Offe, Preuss, 1998, p147, p249). The “categorical conflicts” are about “social belonging and identity”. Because “categorical conflicts” structures around identity, it is very difficult for parties that represents different identities in society to reach compromise once they contest each other. These conflicts can have features of ethnical, religious, cultural divisions (Elster, Offe, Preuss, 1998, p147, 249).

It is questionable whether the above-mentioned political cleavage structure still bears enough explanatory power for comprehending relations between voters and parties in CEE region. However, it could be argued that it was applicable for Serbia after the fall of regime in 2000. It was due to the existence and influence of the same political issues from the nineties, which were unresolved. In Serbia, the political regime existed on the issues that structured main political divisions among parties on “categorical” and “constitutional” conflicts. The

constitutional conflict was structured on division between supporters of authoritarian regime and democratic opposition. It was manifested as a relation towards the existing regime. After the fall of the regime, all conflicts remained and continued to influence the party scene in a slightly different manner. In order to understand why there was no constitution making after the regime was overthrown we need to briefly examine the main political divisions. However, I will only show division on the issues that are related to constitutional matters, namely the type of regime and relation towards the legacy of the nineties, because the latter issue is interconnected with the former.

In Serbia, the party system during the nineties was structured on the two main axes of political divisions. The first one was the product of national mobilization produced by the regime leaders already in the late eighties. It was manifested as a division among voters and parties between those who were more pro “nationalistic” orientation and those who were pro “civic” orientation. This kind of conflict falls in categorical conflicts. The second division was on those who supported the authoritarian regime and on the supporters of opposition that was for the establishment of democratic regime (Goati 2004, p168-170 in Pavlovic and Antonic, 2007, p254). Serbia, in the fall of 2000, once again seemed to be on the beginning of the “triple transformation”, and simultaneously had to establish market economy, democracy and to determine issues related to national identity (C.Offe, 1997, p34). However, it is impossible to start from the zero point. Thus, past divisions continued to influence.

During the period from 2000 to 2006, two main divisions were still relatively the same as in the nineties because the issues on which they existed were still unresolved. However, as Pavlovic and Antonic argue, those two political divisions had slightly changed constellation and manifested issues of division. In this period, the issue of democratization manifested as different

perceptions of the previous regime. It was a division on whether to dismantle the previous regime. If yes, then who would be the main political actor of the change, and how deep and quick would be the previous regime reformed in order to achieve a democratic state (Pavlovic and Antonic, 2007, p255). The second division among the electorate and political actors was to do with the perception of what should be the “state and national identity”. The manifestations of this division were different perceptions on several issues, such as: whether Serbia should be defined on civic or ethnic basis, how to solve relation with Montenegro, the status of Kosovo, EU integration, should Serbia cooperate with International Crime Tribunal for Former Yugoslavia etc. As Pavlovic and Antonic notes these two divisions after the 2000 relatively overlapped (Pavlovic and Antonic, 2007, p255, 256). Thus, parties had relatively coherent standings on relations towards the previous regime and on the stateness and national issues. After the fall of the previous regime in the end of 2000, parties that composed the Democratic Opposition of Serbia did not have the unique standings on dominant issues, especially those related to the stateness and national matters.

If we compare CEE countries, namely Poland and Hungary, we can see that constitutional change happened in order to recognize and allow transformation from authoritarian into democratic regime. In Serbia, as stated above, in the previous regime existed two main political divisions: authoritarian regime vs. democratic regime and pro-nationalistic vs. pro-“civic” option. After the fall of regime in 2000, the Democratic Opposition of Serbia came into power, which consisted of parties that were supporting the establishment of the democratic regime. However, there are indicators that the second division that divided even the ruling parties acted as a constraint, i.e. different viewing on the cooperation with International Crime Tribunal for Former Yugoslavia.

As I stated above, that second division was consisted from issues that had features of stateness problem and defining national identity. Briefly, to recall one political community faces stateness problem when there is a group that recognize itself as being distinct from other citizens of that community, and disputes loyalty to established state authority (Linz and Stepan, 1996, p16). Thus, the Kosovo issue clearly represents such a case because Albanians, which are the majority of the Kosovo population, wanted to establish a separate state. In addition, the relation towards the wars in former Yugoslavia, the involvement of regime in those wars and crimes that regime committed during those wars are the integral part of this division. The enactment of constitution on the beginning of transition means to recognize democratic change and by that necessarily to reflect on the past regime. However, in the case of Serbia reflection on the past regime entails to reflect how we got to situation that Kosovo is under the rule of international community and out of the legal system of Serbia. In addition, then it would be also unavoidable to reflect on the involvement of the previous regime in wars in former Yugoslavia. Thus, it means that political elite needs to debate on those issues.

In the literature, it is already argued that one of the main constraints for the ruling elite to draft and enact the new constitution was the lack of consensus among political elite on the issues of nationalistic and criminal legacy of the past regime (Dimitrijevic, 2007, p373). According to Molnar, Djindjic's government, which lasted from January 2001 until his assassination in March 2003, represented an attempt to mostly end with nationalistic projects. However, the same government continued with the practice of not complying with the norms of "constitutionalism and democracy" and thus did not allow true parliamentarism to develop in Serbia (Molnar, 2010, p25). Nonetheless, argument that the ruling elite was divided on these issues remains.



The relation towards the legacy means how the past is perceived, or what is dominant interpretation of the past social experience that is presented in the public sphere. There is the competition of different interpretations, which are presented by their official political actors, for dominant interpretation of past, which would be “socially relevant” (Dimitrijevic, 2007, p375). “The attitude to the past” was one of the main divisions among the ruling elite of Democratic Opposition of Serbia. It is argued that there were three groups of actors in Serbia according to this division. The first one would be the political operationalization of the negation of the war crimes or refusal to critically assess the past war crimes committed by the regime, as well as, continuous adherence to nationalistic politics. They apply legality principle for defense of their political practice (Dimitrijevic, 2007, p380). The second one would represent “politics of forgetting”. It claims that opening the question of moral responsibility for crimes would be harmful for democratic transition. It is enough to dismantle the institutional structure of the previous regime. The third are the representatives of the politics of critical reflection on the past events. According to that viewpoint, in the Serbian circumstances it is impossible to implement democracy without the change of the value system that was basis of the previous regime (Dimitrijevic, 2007, p380, 381).

During the six-year period from 2000 to 2006, in the political sphere divisions that were relatively the same as in the nineties existed. The first one was a division between the supporters of the democratic regime and the previous regime. The second division was structured around the perception of previous nationalistic politics. In this second division, we can add relations towards the regime involvement in wars in former Yugoslavia, namely who is to be blamed for wars and crimes committed. In addition, the unresolved issue of Kosovo, which was already out of the legal system of Serbia, also belongs here. All these issues belong to categorical conflicts,

because they are perceived as related to “identity and social belonging”. These issues were interconnected with the relation to previous regime. It could be argued that these issues contributed to the situation that after the fall of the Milosevic regime, the impetus to constitutionally recognize the change of regime and to pave the way for democratic transition was not strong enough to create consensus among “democratic” political actors. For instance, one of the reasons that influenced the ruling elite to split in 2001 was the issue of cooperation with the ICTY (Goati, 2006, p30).

### **3.4. The belated Constitution of 2006**

How was consensus among parliamentary parties in September 2006 achieved? It was due to different type of crisis that entailed the different type of motivation as a driving force for the constitutional changes. Before I proceed to an explanation of the second type of crisis, I will briefly summarize the main features of the first crisis.

The first crisis happened in 2000, and it was the fall of Milosevic non-democratic hybrid regime. In this case, motivation for the constitutional change would be to re-constitute political community on the principles of constitutional democracy. It did not happen, not because of the institutional structure ambiguity, but because “democratic” parties did not achieve necessary consensus for constitutional changes. It can be argued, that parties did not achieve consensus because they were divided over the issues that belong to other main political division, such as how to deal with the nationalistic politics of previous regime, the legacy of war crimes and on what basis to structure a new national and state identity, i.e. civic or ethnic. For instance, divisions over the relation towards the past, armed dissolution of Yugoslavia, war crimes

committed by the regime and the issue of Kosovo were manifested in the different stances of parties on the cooperation with ICTY.

However, the issue of Kosovo's status separately created the second crisis in September 2006. The character of crisis was based on the stateness problem and on the perceived crisis of national identity. I share the opinion that the driving force was a perception that the incoming decision on the final status of Kosovo, probably declaration of its independence, was going to happen<sup>5</sup>. It was the impetus for the constitutional change, and because impetus came from the need to react in relation to the issue that is perceived as the basis of national identity, it could be argued that constitutional crafters necessarily was motivated by the passions.<sup>6</sup>

In the following subsection of this chapter, I will explain how it was possible to overcome other divisions among parties and to almost on consensual bases enact the draft of the constitution.<sup>7</sup> Before that, I will first delineate the context of crisis and present its influence on the quick emergence of the constitution making. In order to present that, I will use speeches of main political actors at that time and legal documents enacted by the legislative body.

In 2006, the negotiations over the future status of Kosovo<sup>8</sup> were coming to an end. It was perceived that soon after that, the International community would recognize Kosovo as an independent state. For example, the chief of UNMIK administration, Joachim Ricker in August

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<sup>5</sup> The impetus for government and other parties that participated in drafting a constitution in September 2006 was perception that "final talks" about the future status of Kosovo are near, and that decision would not be in accordance with the preferences of the majority of citizens and political parties (Molnar, 2008, p190).

<sup>6</sup> According to Elster, action can be based on reason, meaning that one person aims to do the just to everybody without any self-interest calculation, or on "rational self-interest" calculation. However, people are also influenced by passions. The behavior of person influenced by passion can be harmful for the achievement of planned aim. Passions could lead people to misjudge or miscalculate "the consequences of the behavior", or not even to take into consideration what can be the consequence of the behavior. In addition, passions could create "the weakness of will", meaning that person still resorts to actions, although they are aware about possible negative consequences for them (Elster, 2000, p7 - 9).

<sup>7</sup> When the draft of new constitution was enacted in the parliament, it was supported by the majority consisted from 242 MPs of altogether 250 MPs that composed Serbian parliament (Molnar, 2008, p67).

<sup>8</sup> Since the 10<sup>th</sup> June 1999, according to UN Resolution 1244 (1999), Kosovo is out of the legal system of Serbia and under the rule of United Nation Interim Mission in Kosovo (UNMIK)

stated that out of the options for the final status of Kosovo are three solutions: to have again the same status as before 1999, the option of territorial separation of Kosovo and to be joined to another neighboring state. In addition, he noted that if these solutions cannot be a final decision, then it could be concluded what is probably to be final decision<sup>9</sup>. In the beginning of September, the chief of parliamentary group of the main governmental party, Democratic Party of Serbia, said that constitution drafting was underway, and that a new Constitution was going to be drafted until the end of autumn<sup>10</sup>. Two days later, the Chairman of the parliament stated that in a few days, the draft of constitution was going to be completed, after the negotiations between main parties were finished.<sup>11</sup>

These statements were a prelude for the extraordinary session of parliament over the issue of the previous work of state's negotiating team in the talks over the final status of Kosovo that was held on September 12<sup>th</sup> 2006. In addition, the part of agenda of that session was to determine strategy for the incoming negotiation rounds over the future Kosovo status. In the adopted decision, the Serbian parliament called for bringing to the end work on the draft of the new constitution. In addition, it was stated that in the constitution it had to be noted that "Kosovo and Metohija as the integral part of Serbia has to have the *substantial* autonomous status in within the sovereign and democratic Republic of Serbia".<sup>12</sup> Although, it is disputable what in a legal sense means the term "substantial", nonetheless we can see that impetus for constitutional

<sup>9</sup>Source:[http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=08&dd=25&nav\\_category=11&nav\\_id=209407](http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=08&dd=25&nav_category=11&nav_id=209407), last time accessed 21st May 2011.

<sup>10</sup>[http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=02&nav\\_category=11&nav\\_id=210373](http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=02&nav_category=11&nav_id=210373), last time accessed 21.05.2011.

<sup>11</sup> [http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=04&nav\\_category=11&nav\\_id=210572](http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=04&nav_category=11&nav_id=210572), last time accessed 21.05.2011.

<sup>12</sup> The Decision of the Serbian parliament regarding the report on the work of the Serbian negotiating team for political talks on the future status of Kosovo and Metohija, (translation mine), source:[http://www.parlament.gov.rs/content/lat/akta/akta\\_detalji.asp?Id=275&t=O#](http://www.parlament.gov.rs/content/lat/akta/akta_detalji.asp?Id=275&t=O#), last time accessed May 21<sup>st</sup> 2011

change did not come from the idea to recognize the regime change. The parties' rhetoric for explanation of why there is a need to enact a new Constitution in a speedy process was to react in defense to perceived incoming decision on the future status of Kosovo. Even more explicitly, this perception and motivation for the constitutional change can be traced in the speech of the Prime Minister, Vojislav Kostunica during that session of parliament. In his speech, the Prime Minister acknowledged, "for Serbia, Kosovo can never be independent, and that stance has to be present in the new constitution of Serbia".<sup>13</sup> Two days later, the government decided to implement into the draft of Constitution the previously stipulated stance on the Kosovo. The stance became the part of preamble of Constitution. In just a few days, government succeeded to come to consensus over the need for drafting a new constitution. Terminology used for achieving consensus again was based on the need to react due to the new circumstances. For instance, the Prime Minister had a meeting with the leader of the Serbian Radical Party, which is a party of the "previous regime" that then had the biggest electoral support. The joint conclusion of the meeting was that "all parliamentary parties should fully contribute to the completion of constitutional draft... in order to make the promptly respond of the state to the possible attempt for the imposition of solution for the status of Kosovo".<sup>14</sup>

On September 30<sup>th</sup> 2006, the Draft of Constitution was adopted in the Parliament, and once again the speech of the Prime Minister demonstrates that motivation for drafting constitution was perception that constitutional change was going to contribute to the solution of stateness problem. For instances, it was stated that "two most important things merged:

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<sup>13</sup> [http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=12&nav\\_category=11&nav\\_id=211441](http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=12&nav_category=11&nav_id=211441), (translation mine), last time accessed May 21<sup>st</sup> 2011

<sup>14</sup> Source: [http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=19&nav\\_category=11&nav\\_id=212368](http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=19&nav_category=11&nav_id=212368), (translation mine), last time accessed May 21<sup>st</sup> 2011

Constitution and Kosovo, and with that, Kosovo will always be the part of Serbia”.<sup>15</sup> In addition, all main parties that were then in parliament adhered to the notion that Kosovo is separated matter from other issues, such as: the relation towards the involvement of the previous regime in the armed dissolution of Yugoslavia, thus from the perception on war crimes that were committed in those wars, and cooperation with ICTY. Although, there is a lack of empirical data that would show that the majority of electorate also shared the perception that Serbian national identity is intrinsically connected with Kosovo. However, there are some data on their desires over the status of Kosovo. In September 2006, 58 percent of the respondents in one research stated that, for them, preferred solution for Kosovo would be to Kosovo remain the part of Serbia<sup>16</sup>. Thus, it can be assumed that certainly parties were motivated to act or perceived that they had to act.

Let us now examine reasons that contributed to the achievement of consensus among parties for drafting a constitution in such short notice. In order to do that, I will apply as an explanatory tool, party positions on previously explained divisions among parties.

The parties acknowledged that crisis is impetus for constitutional change. Governmental coalition was relying for achievement of the parliamentary majority on the support from the one party of previous regime, namely Socialist Party of Serbia. The “perception of the past” of the main parties of governmental coalition was very similar to the oppositional parties that belonged to the camp of parties from “previous regime”. The parties of previous regime were Socialist

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<sup>15</sup> Source:  
[http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=30&nav\\_category=11&nav\\_id=213654](http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=30&nav_category=11&nav_id=213654),  
 (translation mine), last time accessed May 21<sup>st</sup> 2011

<sup>16</sup> Cesid, Source:  
[http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=29&nav\\_category=11&nav\\_id=213607](http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=29&nav_category=11&nav_id=213607), last  
 time accessed 21.05.2011.

Party of Serbia and Serbian Radical Party. For instance, in the political program of Democratic Party of Serbia is stated that cooperation with ICTY<sup>17</sup> is “our international obligation that cannot be avoided”<sup>18</sup>. Nevertheless, one of the reasons why Democratic Party of Serbia left the governmental coalition in August 2001 was because of extradition of Milosevic to the ICTY (Goati, 2006, p30). In the perception of Democratic Party of Serbia, the Kosovo is not only matter of state interest but also the most important national interest. For instance, during the session of parliament when Constitution is enacted, the Prime Minister acknowledged in his speech that “essential national interest is the defense of Kosovo”.<sup>19</sup>

It could be argued that there were two types of incentives for oppositional parties that in the past composed the Milosevic regime to participate in the constitution making. The parties of previous regime achieved to be legitimized as acceptable parties of the new regime by accepting engagement in the quick drafting of constitution. This is because, if some party can be a legitimate partner in a constitution making, than it also means recognition of that party as a legitimate political actor in a newly created polity. Furthermore, by engaging in the constitution making, they legitimized their perception of the past as also socially relevant, because the enactment of new constitution was in the context of perceived crisis over Kosovo. In addition, the constitutional process because of the type of crisis and behavior of political actors did not entail the reflection on the previous regime, and on the all inherited unresolved issues of that regime. In addition, the constitutional process did not entail discussion on the question “whether

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<sup>17</sup> The issue of cooperation with ICTY was during the first years after the 2000 one of the main dividing issue. However, later it became “unwilling procedure” that needs to be fulfilled. The cooperation did not produce the dominant social debate why there is obligation for cooperation. Especially, it became unwilling duty during the tenure of government that was in power when constitution was enacted.

<sup>18</sup> Source: The political program of Democratic Party of Serbia from 2001

<sup>19</sup> [http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=30&nav\\_category=11&nav\\_id=213654](http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=09&dd=30&nav_category=11&nav_id=213654), (translation mine), last time accessed 21.05.2011.

the previous regime was good or bad, and if bad, then why?" Thus, every political actor could continue to adhere to his perception of the previous regime.

The main oppositional party from the "democratic" camp in the fall of 2006 was Democratic Party. Their "perception of the past" was never clearly stated. They were the main ruling party of the first, "broad" governmental coalition after the fall of Milosevic regime. It was the first government that started to cooperate with ICTY. It was argued that stance on the "perception of past" of that government was in between "politics of forgetting" and "reflecting on the past" (Dimitrijevic, 2007, p380, 381). After the parliamentary elections in 2003, they lost power and became the part of opposition. In the subsequent years, they steadily improved their electoral support. For instance, in 2004, the leader of party won in direct election for the post of president. In addition, they capitalized the increase of electoral support in the elections that ensued after the Constitution was enacted. However, their increase of electoral support also meant gradually changing political agenda and addressing more to the "political center"<sup>20</sup> of electorate. It could be argued that their perception of the past became much more congruent with the stances of "politics of forgetting". Nevertheless, they maintained cooperation with the ICTY as part of their political program. In addition, in their program from 2007, they stated, "dealing with the past is important during the process of modernization of society and European integration".<sup>21</sup>

In the literature, it is argued that their stances on the issue of lustration crystallized in such manner that the right moment for lustration was immediately after the fall of previous regime. Thus, as that opportunity was missed, then lustration should not be raised as a question.

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<sup>20</sup> Addressing more to the center of the electorate is successful for Serbian party sphere (Pavlovic and Antonic, 2007, p264).

<sup>21</sup> Electoral program of Democratic Party from 2007



For instance, Boris Tadic, the leader of party and the president of Serbia stated, “lustration after so many years is impossible. It was possible 5<sup>th</sup> or 6<sup>th</sup> October. After so many years lustration is impossible”<sup>22</sup> (Interview given to the B92 television in January 2007, in Pavlovic and Antonic, 2007, p266). Although the leader of party stated that he regrets that there was no public debate as a part of constitution making, however he also stated that hasty constitution-making process had its “internal and external reasons” (Cesid, 2006, p85). It could be argued that if one party pretends to have strong electoral support then would necessarily need to participate in constitution making process that is justified as a way of response to incoming decision over Kosovo. It is because the majority of citizens has a desire that Kosovo remains a part of Serbia.

Let us now reflect on the character of crisis and dynamic of the constitution making in order to explain motivation and incentives for constitutional changes. The constitution making was very quick process. For instance, The Venice Commission acknowledged that constitution was drafted in a hasty manner that precluded public debate. In addition, it is noted that such procedure “raises questions of the legitimacy of the text with respect to the general public” (Venice Commission, Opinion No. 405/2006). In addition, Stojiljkovic argues that voting for the proposed draft of constitution had the features of conducting patriotic duty due to created atmosphere prior to referendum (Stojiljkovic, 2006, p14). For instance, in the research prior to the referendum, the fifty-four percent of the respondents, which avowed that certainly would participate in the referendum and vote for the proposed draft of constitution, stated that they consider such act as their duty (Mojsilovic, 2006, p56). Thus, we can see that parties created the atmosphere of patriotic duty to vote for the proposed draft of constitution. In these circumstances constitutional changes happened and they were legitimized as a reassertion of a national identity.

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<sup>22</sup> (translation mine)

In addition, the ruling elite argued that there is a need to react and that later it is going to be easier to change the possible drawbacks of constitution because procedure for change would not be rigid as it was the case with the previous constitution (Molnar, 2010, p13). However, the Venice Commission in their Opinion on the Constitution stated that procedure for amending Constitution is very rigid (Venice Commission, Opinion No. 405/2006).

What does it mean to enact a constitution based on the argumentation of protecting national identity and territorial integrity of Serbia? We cannot know whether political elite, especially the ruling coalition, really believed that enacting a constitution would contribute to the better position of Serbia in the negotiation and protection of territorial integrity. We can see that argumentation was such, although the previous constitution was fulfilling the same function of protecting territorial integrity of Serbia (Petrov, 2010, p1). In addition, the Venice Commission in their opinion on the Constitution of Serbia, stated that although in the enacted text of preamble is stated that Kosovo is integral part of Serbia and it has *substantial* autonomy, the envisaged articles in Constitution do not protect such status on the constitutional level (Venice Commission, Opinion No. 405/2006, p3). Thus, it seems that Constitution did not contribute to the impression of the cooperation of Serbian negotiation team.

Therefore, what would be motivation and consequences to enact Constitution during the perceived crisis over the incoming final decision on Kosovo? In the preamble of constitution is stated that, according to the position of Kosovo as being integral part of Serbia “ensues constitutional duties of all state organs to represent and protect the state interests of Serbia” relating to Kosovo in “all internal and external political relations”. The consequence of such statement would mean to make stipulated policies as a “state goal” that would represent an

“integrative function” of Constitution.<sup>23</sup> In addition, it is argued that constitution, especially preamble, is suitable for shaping collective identities (Bogdandy et al, 2005, p600, 601). Thus, preamble implies that Kosovo is the part of national identity. In addition, the stipulated “state goal” would be present in the political discourse, so it will be present as a political issue. That would present clear incentive for parties that prior to constitutional changes were putting more emphasis on the national issues in their political programs to react in the first place. In addition, they could instrumentalize crisis over Kosovo to achieve better positioning in further “party struggles” and to increase their electoral chances.

In the literature, it is argued that parties’ interest was to politically survive after the possible declaration of independence of Kosovo and they needed to show they could maintain the “paper sovereignty” of Serbia on Kosovo. Thus, they instrumentalized Kosovo issue as a way of obtaining the constitutive power in order to enact a new constitution and create a new regime (Molnar, 2008, p207, 208). In addition, Molnar argues that Constitution, as it is framed, mostly represents political stances of the than main governmental party, Democratic Party of Serbia.<sup>24</sup> It is stance on Serbia as a national state and Kosovo as its integral part. In addition, he argues that because of that constitution strengthened the coalition potential and the blackmailing potential of Democratic Party of Serbia. It strengthened their coalition potential because they could, from

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<sup>23</sup> In constitutional theory, the “policy oriented components” of the constitution are considered to represent the “teleological character of a constitution” (Preuss, 1993, p77-78). Those orientation represent “the integrative function” of constitution. Preuss argues that constitution can foster integration of society by enumerating “the goals, aspirations, values and basic beliefs” that are considered to be upheld by the all members of society, i.e. social rights and services. However, he also claims that policy orientation that represents the teleological claims does not have to be only envisaged social rights (Preuss, 1993, p77-78). If the “state goals” are not only defined as a social rights, but also can be other policy orientations that stem out from envisaged common values and beliefs stipulated in the constitution, then the “teleological” component of constitution can be state goal that are based on the belief about common national identity.

<sup>24</sup> It represents politics consisted of the idea of mythology-based nationalistic politics, i.e. myth used for creating “friend vs. foe” distinction. The line of division between friend and foe is in acceptance of the same stance on the Kosovo issue (Molnar, 2010, p 29-32, 298).

then on, craft a coalition with the parties of “previous” regime. Consequently, they increased their blackmailing potential toward the parties from “democratic camp”, namely Democratic Party and G17 (Molnar, 2010, p14, 46, 47). It strengthened their coalition potential because they can make coalition with parties of previous regime, because they also participated in constitution making and they support politics that are more nationalistic. The blackmailing potential towards “democratic” camp increased because parties from this camp would have to accept stances of Democratic Party of Serbia if they want to make a governing coalition with Democratic Party of Serbia.

Although, it is questionable whether the explained party positioning can be used for the explanation of party positioning for today’s party scene, nonetheless I will try to show why it is plausible that achieving better political positioning was the initial motivation of the main governing party in crafting a constitution. After the enactment of a new constitution, new parliamentary elections ensued. In those elections, all parties that participated in the constitution making were agreeing in stance that Kosovo is part of Serbia and that possible independence would never be recognized (Nauparac, 2007, p58). In addition, electoral campaigns of Serbian Radical Party and Democratic Party of Serbia represented a continuation of the previous campaign for referendum. In the campaign for referendum, Serbian Radical Party was emphasizing the constitutionally stipulated duty of the president to defend the territorial integrity of Serbia (Slavujevic, 2007, p149). Furthermore, the campaign for parliamentary elections of Democratic Party of Serbia was mostly based on patriotic rhetoric. For instance, their electoral slogan was “Long live Serbia” (Mihajlovic, 2007, p13, 14). After the elections, the Democratic Party of Serbia succeeded in obtaining the position of the Prime Minister in the government consisted from the parties of “democratic” camp, although they had fewer seats in the parliament

compared with Democratic Party. They succeeded in that, because they had additional “bargaining chip”, namely possibility to craft a government with Serbian Radical Party.

If we recall Elster’s note that constitutions are mostly made in crisis circumstances, which are not favorable environment for a constitution making because actors could easily resort to passions, we could see that it has applicability on the case of Serbia. Political actors in Serbia resorted to constitution making not because of the reasons that are related to constitutional democracy. In addition, the hasty manner of drafting influenced the creation of drawbacks in the content of Constitution.<sup>25</sup> Furthermore, the constitution making was not process in which actors reflected on the issue of desired political system and then through bargaining reached a consensus on political framework which would be suitable for the future political competition in times of “normal politics”. In contrast to this, in the case of Serbia, one national issue was instrumentalized for the constitution making and precluded any debate. In addition, it was used for imposing the political stances of the one part of political spectrum as a constitutional obligation.

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<sup>25</sup> In the “Opinion on the Constitution of Serbia”, it is stated that the Constitution have the worse quality of legal norms compared with the previous proposals of constitutions that were written by various organizations. (Venice Commission, Opinion No. 405/2006)

## CONCLUSION

In this thesis, I engage myself in the field of constitutional theory. I have entered into analysis of the constitution-making process by exploring the reasons for a constitutional change and the proper timing of the constitution making. Especially, I wanted to find out when, why and by whom new constitutions are drafted and enacted.

The main motivation for my thesis was to find out the reasons why the proper constitution making process did not evolve in Serbia after the fall of Milosevic regime. In order to do that, I have focused my research on two problems. The first one was to find the answer why there was the lack of constitutional change after the old regime was overthrown. Secondly, I turned to analysis of the hasty constitution making in September 2006. Compared with the constitutional changes in the countries from the Central and Eastern Europe, the constitution making process in Serbia had several distinctions that makes it interesting field for research. The main distinction is the absence of the constitutional changes after the fall of previous regime. In all post-communist states in Central and Eastern Europe, the constitutional changes ensued after the change of regime. Furthermore, constitutional changes in those countries had two aims. They

were necessary condition for the change of regime, but also the new constitution was the recognition of the fall of previous regime. More importantly, the constitutional changes laid down the foundation for democratic transition and consolidation.

In order to research the stipulated aims, I engage myself in scholarly debate over the proper timing of constitutional changes. I have searched for answers when constitutions are made and what can be the driving force of the crafters of constitution. In addition, I examined why we need to recognize the change of a regime and design a new polity. All of these principles but mostly the mechanism of constitution-making process, I have thoroughly examined in the cases of the regime change in Central and Eastern Europe. Especially, as two reference cases I used the constitutional change in Poland and Hungary. After this, equipped with knowledge about the constitutional changes in these countries, I have proceeded to the case of Serbia trying to grasp what acted as possible constraint for constitution making process.

After the initial analysis of the type of regime in the nineties and the mode of extrication from that regime, I turned to investigation of two main areas. My analysis of possible reasons for the lack of constitution-making process since the fall of regime had two steps. First, I have investigated whether the inherited institutional ambiguity and confusion over the possibility to maintain federation with Montenegro had influenced the lack of constitution making. As I have showed in the work, the inherited relation between two constitutive units and Federal institutions does not bear any explanation. On the contrary, it should have acted as an impetus for constitutional change in Serbia, because the creation of the State Union also should have influenced the adaptation of the constitutions of the constitutive units. Especially, this relates to Serbia, due to declared willingness of the Serbian political elite to maintain common state with Montenegro. Secondly, I have investigated whether the axis of political division can be

explanation for the absence of the constitution making. I have accepted opinion that after the fall of the regime in Serbia, the same political issues that divided parties and electorate in the nineties maintained their influence on divisions among parties and electorate. In the nineties there were two main divisions, namely division on pro-”national” vs. pro-”civic” options and authoritarian regime vs. democratic opposition (Goati 2004, p168-170 in Pavlovic and Antonic, 2007, p254). However, these political divisions continued to influence in slightly different manner.

If we would use the concept of political conflicts delineated by Elster, Offe and Preuss (1998), then in the Serbian case, the first one would represent the categorical conflict and the second one would represent constitutional conflict. The latter one, after the fall of Milosevic regime changed and reshaped into division: democratic regime vs. the previous regime. The first conflict manifested as division on the issues such as how to deal with the past of war crimes committed by the regime in the armed dissolution of Yugoslavia. One of the main indicators of party positions on this conflict was their stances towards the cooperation with ICTY. In addition, the manifestation of this conflict was the relation towards the issue of Kosovo, the perception of nation, i.e. civic or ethnic. The division among parties on the issues that relates to this categorical type of conflict divided parties that previously belonged to the common “democratic camp”. In addition, these issues were strongly manifested in the political realm in the years after the fall of Milosevic regime. Thus, it can be argued that those issues explain why there was no endeavors to reach the consensus for constitutional changes. To establish consensus on these issues would entail to debate and come to agreement. However, even parties that belonged to “democratic” camp had diverging opinions on the issues that display categorical conflict.

Furthermore, I share opinion that impetus for the belated constitution drafting and enacting was the perception of the incoming decision of the international community over the



final status of Kosovo. The political elite instrumentalized this “crisis” in order to enact the new constitution. The rhetoric and explanation offered by the political elite to the question “why we need constitution” was to reassert the national identity and territorial integrity. Consequently, Serbia belongs to the group of countries that did not enact constitution in order to craft a new polity on the principles of constitutional democracy. In Serbia, constitution was enacted and legitimized on the idea of restating social belonging and also was used to legitimize the one view on the issue of Kosovo.

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