

THE POSITION OF THE ARMED FORCES IN THE CURRENT LEGAL ORDER OF THE REPUBLIC OF SERBIA

Marko K. Andrun¹

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Abstract: This article consists of two parts. The first part of the paper analyses the concept, significance and functions of the Constitution, which are necessary for further understanding of the position of the armed forces in the Constitution of the Republic of Serbia of 2006, as the highest general legal act of our state, which regulates the foundations of its state and social order, and consequently the armed forces as a key constitutional institution for the defence of the state and the protection of its sovereignty, territorial integrity and legal order. Our proposals for constitutional amendments in the part concerning the armed forces are also defined. In the second part of the paper, based on the previously established constitutional and legal framework of the armed forces and their position, the relevant legal framework is presented, specifying the precise position of the armed forces in the system of the rule of law in the Republic of Serbia, followed by some proposals for improving the existing legal norms concerning the subject matter in question. The aim of this paper is, on the basis of the existing legal framework, namely constitutional and legislative solutions, to provide our opinion as to whether the subject matter has been adequately and sufficiently defined, and to propose concrete solutions and the direction of future changes if we consider it necessary to amend or supplement the constitutional and legal framework governing the armed forces and their position in our state.

Keywords: *armed forces, law, constitutional position of the armed forces, legal position of the armed forces, significance of the armed forces in the system of the rule of law, position of the armed forces in the legal order of the Republic of Serbia*

¹ University of Defence in Belgrade, Military Academy, Belgrade, Republic of Serbia, e-mail: markoandrun@yahoo.com, <https://orcid.org/0009-0007-6919-8309>

Introduction

The fundamental postulate of every modern democratic state is the principle of the rule of law, which is based on the principles of constitutionality and legality, as well as the separation of powers. The separation of powers is an organisational principle on which modern legal and political systems of government rest. In this sense, the separation of powers is the principle that has had the greatest and most far-reaching influence on the organisation of the modern state (Lilić, 2002: 13). In practice, one branch of government is always more dominant in relation to the other branches of government, but the essence is that each possesses a certain quantum of power and influence within the sphere of its activity, as well as certain mechanisms that can ensure not only their equal position, but also the control and, at the same time, direction of another branch of government in its activity, for example, the right of the Government to participate in the dissolution of parliament, the right of parliament to vote no confidence in the Government, etc. In this sense, it is a fact that the armed forces have an exceptionally stable constitutional position in the system of separation of powers within the legal order of the Republic of Serbia. By ensuring peace, the armed forces protect the state from external armed attacks on its sovereignty. Therefore, the armed forces have always represented a *condicio sine qua non* for the existence of the state in the international community. The armed forces are the pillar of the defence of the state and of its existence as a sovereign entity. For this reason, it is indisputable that the armed forces have a place in the constitution as the most important legal act of a state. This regulation should not be scarce, because that would mean that insufficient attention is devoted to the armed forces in the constitution.

On the other hand, it is impossible to place everything concerning the armed forces under the constitutional umbrella. Constitutional regulation concerning the armed forces should not be too extensive either, so that the constitutional text would not be burdened with norms that would be more appropriately placed in laws. Therefore, every constitution devotes a certain part of its text to the armed forces due to their exceptional importance in the legal order, while laws elaborate this constitutional matter in detail. For this reason, it may be said that the armed forces are not only constitutional but also legislative in character. In this paper, we shall not deal with the legal regulation of the armed forces at the level of subordinate legislation in our state, because this would make the paper much more extensive.

CONSTITUTIONAL POSITION OF THE ARMED FORCES

On the Constitution and Its Functions in General

Giuseppe de Vergottini points out that, in the narrower sense, the constitution consists of those regulations that govern the creation of general legal norms and, in particular, the creation of formal laws or, even more precisely, the 'fundamental' regulation which is established as the principle of the order, since it conditions the

regulations concerning the creation of other regulations. According to a broader definition, the constitution coincides with the organisational structure of a social group and, therefore, in the case of the state, with the organisation of its community. Such organisation should acquire a legal character, and not merely a factual one, since it is the product of social self-regulation that transforms 'force' into 'authority', an authority that may be described as supreme legal authority (De Vergotini, 2015: 236). In the theory of constitutional law, there is an unlimited number of definitions of the constitution, in which each author places emphasis on certain parts of constitutional matter that are, for that author as the creator of the definition, the most significant. Thus, Radomir Lukić claimed that the constitution in the formal sense is a legal instrument for achieving certain political goals – the durability of certain legal norms, which in fact means the durability of certain political relations, that is, the durability of the predominance of certain political forces (Lukić, 1966: 22). A much more modern and synthetic definition was provided by Miodrag Jovičić some forty years later, pointing out that the constitution is a written act of the highest legal force which primarily regulates the foundations of the state and social order of a given country... This 'primarily' means: not all foundations and not only foundations (Jovičić, 2006: 29).

It may be said that the constitution is the foundation of the legal order of every state, constituting its main organs of political authority and regulating their functioning in such a way that the human rights and freedoms of each individual are protected from the intrusion of state authority into the private sphere of the individuals who make up society. Therefore, the constitution protects not only the state, but also its society. The level of social development – economic, political, legal, moral, cultural, class, national, scientific, etc., in their interconnectedness – is given in the constitution in force ... The image and likeness – these are the constitution and society – always with historically given character roles (Stanimirović, 1989: 121), which is why it is said that in every society national constitutional identity consists of constitutional principles and values that form the foundation and essence of the constitution (Petrov, 2018: 185). However, the constitution is never perfect. The difficulty lies in the fact that everything human is transient and susceptible to deterioration, so even the best-organised state becomes worn out and corrupted over time. One of the remedies by which this internal ailment may at least be slowed down, if it cannot be completely overcome, consists of appropriate laws (Čavoški, 2000: 65) and constitutions, which should at least strive for perfection because of the crucial significance they have in the legal order of the state.

As regards the functions possessed by the constitution, they may be legal and political. In the first case, the constitution is the result of sovereign authority and, as such, represents the foundation of the validity of the entire legal system. In addition, the constitution precisely defines the competences of the political organs that govern the state, while at the same time it is also the act by which the state comes into being and by which its sovereignty is confirmed. Through the function of stabilisation, the constitution enables the suprapersonal continuity of authority and requires it to confirm itself as rational, which means that it is exercised in a predictable, understandable and prudent manner. If state authority is exercised according to rules prescribed in

advance by the constitution, and not according to the discretion of those who govern, then it proves to be not only rational, but also stable (Stojanović, 2013: 42). As regards the political functions of the constitution, it is more than clear that, by its existence, it limits the conduct of state organs and politicians in power. Benjamin Akzin vividly compared the written constitution to a lock on a door. According to him, a lock is not necessary if perfectly honest citizens are concerned, who would under no circumstances enter someone else's apartment, even when it is not locked. In such a case, the lock is of no use, just as it is of no use when thieves and brazen passers-by are concerned, who have decided to break into someone else's apartment at any cost and enter it in that way. Therefore, the purpose of the lock is to deter ordinary people, who are mostly honest, but who might be tempted to enter someone else's apartment if they see an unlocked and open door. The constitution has the same function in the state (Bataveljić et al., 2019: 12).

All the above undoubtedly indicates that, by the force of its functions, the constitution "sovereignly governs" the legal system of every modern democratic state, regulating, among other things, its main state organs and their competences. One of these organs is the armed forces, which are the most important institution in the country for the survival of the state (Abdulnasir Bereket, 2015: 1). Without them, there is neither the creation nor subsequently the survival of the state in the international community, in which states with powerful armed forces and defence systems today increasingly function according to the principle of "brute force", brutally violating the principle of state sovereignty and all other principles of public international law.

The Position of the Armed Forces in the Constitution of the Republic of Serbia of 2006, with Proposals for Amendments and Supplements to the Constitution

Like any other branch of the executive power, military and police institutions are subject to constitutional and legal limitations on their powers (Krishnaswamy & Khosla, 2010: 63). Despite the fundamental importance that the armed forces have in the defence of the state and the protection of its territorial integrity and sovereignty, the Constitution of the Republic of Serbia of 2006 does not define the concept of the armed forces, although it attempts to do so through the definition of their basic activity. In addition, the Constitution speaks very little about the armed forces within Part Five, entitled "Organisation of Government", and only in three articles, Articles 139–141, which read as follows:

"The Serbian Armed Forces shall defend the country from external armed threats and shall perform other missions and tasks, in accordance with the Constitution, law and the principles of international law regulating the use of force.

The Serbian Armed Forces may be used outside the borders of the Republic of Serbia only by decision of the National Assembly of the Republic of Serbia.

The Serbian Armed Forces shall be subject to democratic and civilian control.

A law shall be adopted on the Serbian Armed Forces” (Constitution of the Republic of Serbia, Articles 139–141).

At first glance, it seems that the constitutional drafter did not intend to deal with the armed forces in greater detail, just as in studies of comparative constitutional law of the twentieth century, the role of the military was often either ignored or implicit, rather than explicit, in research on constitutions outside liberal democracies (Crouch, 2024: 57). However, it is difficult to imagine that, at the time of drafting the Constitution, the constitutional drafter was not sufficiently aware of the importance of the armed forces in the state. It is far more likely that he did not wish to engage in their more detailed regulation because this is, after all, a specific matter that implies a high level of knowledge about the armed forces, education in military sciences and familiarity with the manner of their functioning in practice, while taking into account the needs of the defence system. Therefore, by the norm stating that “a law shall be adopted on the Serbian Armed Forces”, the constitutional drafter very thoughtfully created a legal basis for the Ministry of Defence, as the expert authority, to draft the Law on the Serbian Armed Forces and then submit it, through the Government, to the National Assembly for adoption. We consider that this referring constitutional norm makes sense and that it should not be changed in the future. Members of the armed forces know the needs of the defence system, which guide them in formulating legislative and subordinate legislative solutions in an appropriate manner. Nevertheless, this does not mean that the remaining part of the sparse constitutional matter of our Constitution concerning the armed forces should not be changed. On the contrary. For example, nowhere in the Constitution is the concept of the armed forces defined, namely that they represent “a hierarchically organised armed force”. Some might say that this is implied, but we consider it very important for this to be written as well, so that the Constitution would clearly define the concept of the armed forces, which is a prerequisite for further quality normative regulation and understanding of military matters. At the same time, this would clearly indicate that the armed forces, as a constitutional institution, represent an organisation based on the principle of hierarchy. In this regard, we consider that Article 139 of the Constitution should be supplemented so as to read: “The Serbian Armed Forces are a hierarchically organised armed force that defends the country from external armed threats and performs other missions and tasks, in accordance with the Constitution, law and the principles of international law regulating the use of force.”

Furthermore, our position is that the provision of Article 140 of the Constitution should be reconsidered, as it prescribes that the Serbian Armed Forces may be used outside the borders of the Republic of Serbia only by decision of the National Assembly of the Republic of Serbia. It is a fact that the National Assembly, as the supreme civilian constitutional and legislative body of a political nature, is exceptionally important in the process of exercising democratic and civilian control over the armed forces in our state through the numerous competences it has in relation to the armed forces, such as adopting the military budget, adopting laws concerning the armed forces, etc. However, if one takes into account that the National Assembly consists of members

of parliament as representatives of the people, it is more than clear that these representatives of the people, some of whom do not have higher education or adequate professional experience, are often not the most competent to assess whether a decision should be made on the use of the Serbian Armed Forces abroad. It would be more meaningful for the Constitution to entrust the making of such an important and complex decision, nevertheless based on an expert assessment of the entire security environment and the numerous factors and circumstances affecting it, to the President of the Republic as the Supreme Commander of the Serbian Armed Forces, and also to prescribe that he does so upon the proposal of the Ministry of Defence. The General Staff of the Serbian Armed Forces, as the supreme expert military command within the Ministry of Defence, would have to provide at least an opinion on this matter. Therefore, precisely when our armed forces are used abroad, it is very important to act in the spirit of the unity of our sovereign state, and in this respect it is also logical that the President of the Republic, who expresses that unity and represents the state abroad, should decide on this matter. In this regard, we consider that Article 140 of the Constitution should be amended so as to read: "The decision on the use of the Serbian Armed Forces outside the borders of the Republic of Serbia shall be made by the President of the Republic, upon the proposal of the Ministry of Defence and after obtaining the opinion of the General Staff of the Serbian Armed Forces." In this way, when deciding on the use of the Serbian Armed Forces abroad, the expert view on the matter in question would be taken into account, as would the fact that at the top of the military hierarchy there is nevertheless the President of the Republic, who is part of the executive power, as is the Government, within which the Ministry of Defence is situated, and not the National Assembly. On the other hand, through such a substantive solution, the General Staff of the Serbian Armed Forces would become a constitutional category, which it certainly deserves due to the enormous importance it has in the functioning of the defence system of our state as a whole.

In addition, Article 141, paragraph 1 of the Constitution does not specify who exercises democratic and civilian control over the armed forces. We are of the opinion that this should be defined in the Constitution, because democratic and civilian control of the armed forces is exceptionally important in all modern democracies, given that it ensures that the armed forces, in performing their activities, respect the principles of the rule of law, democratic values and the achieved level of protection of human rights. This ensures that the armed forces will not threaten the basic freedoms, including popular sovereignty, which they are supposed to protect (Joó, 1996: 8). There is no doubt that civil-military relations in democracies are delicate, because they need to maintain the right balance between the effectiveness of the armed forces and their conformity with the character of society and democratic values (Starčević & Ružičić, 2025: 312). Despite this, strong disagreements between civilian and military leaders are fully compatible with the functioning of democratic political control, even in wartime (Morgan-Owen & Gould, 2022: 553–554). In this regard, we propose that Article 141, paragraph 1 of the Constitution be supplemented so as to read: "The Serbian Armed Forces shall be subject to democratic and civilian control, exercised by the President

of the Republic, the Government, the Minister of Defence, the National Assembly, the Protector of Citizens, the courts, the people, the public and other state authorities, in accordance with their competences.”

Such a norm gives the legislator room to prescribe the competences of all other authorities in the field of democratic and civilian control of the armed forces, if it establishes that such authorities exist. In our state, these are, for example, the Commissioner for the Protection of Equality, the Commissioner for Information of Public Importance and Personal Data Protection, and the Agency for the Prevention of Corruption. We clarify that our position is that, in the proposed supplement to the constitutional norm in question, the Government and the Minister of Defence should be listed separately, although the Minister of Defence is also a member of the Government, for the reason that the Minister of Defence is subordinated in the military hierarchy to the President of the Republic, and not to the Prime Minister. This makes his function of establishing a balance between politics, the armed forces and civil society very complex and important, especially if we take into account that throughout history, one of the central issues of political life has been the role of the military (Fissell, 2025: 333). After all, Huntington had already established the complexity of these relations by pointing out that “the social and economic relations between the military and the rest of society are an expression of the political relations between the officer corps and the state” (Huntington, 2004: 5).

Our Constitution explicitly refers to the armed forces in two other places as well, namely in Article 55, paragraph 5, within Part Two, “Human and Minority Rights and Freedoms”, and in Article 112, paragraph 2, within Part Five, “Organisation of Government”. The provision of Article 55, paragraph 5 of the Constitution prescribes that “judges of the Constitutional Court, judges, public prosecutors, the Protector of Citizens, members of the armed forces and the police may not be members of political parties”, while the provision of Article 112, paragraph 2 of the Constitution prescribes that “the President of the Republic, in accordance with the law, commands the armed forces and appoints, promotes and dismisses officers of the Serbian Armed Forces” (Ustav Republike Srbije, Article 55, paragraph 5 and Article 112, paragraph 2). The prohibition of membership of members of the armed forces in political parties prescribed in this manner is of limited scope, because it refers exclusively to membership in political parties in the formal legal sense. Therefore, this constitutional prohibition needs to be expanded so that the aforementioned persons would not perform any other political activity either. In this way, the distinction between the armed forces and politics would acquire its full meaning, because the interference of the military in politics in a state is undoubtedly detrimental to its democracy (Starčević & Blagojević, 2021: 121). A linguistic interpretation of the existing constitutional norm leads to the conclusion that members of the armed forces who are not members of political parties are allowed to attend political gatherings or rallies while carrying banners with political messages, or to make public appearances in any manner with political views. On the other hand, a systematic interpretation of the existing constitutional norm, the Law on the Serbian Armed Forces, the Rules of Service of the Serbian Armed Forces and oth-

er relevant regulations would lead to the conclusion that this is not permitted, but this already requires a higher level of legal reasoning and inference. Since not everyone in the state is a lawyer by education, nor should they be, it is necessary that the constitutional norm in question be understood by absolutely every member of the armed forces in such a way that participation in any political activity is incompatible with him as a military person. Such a prohibition should be prescribed by the Constitution, because it is most likely that, due to the significance of the Constitution, this norm would not go unnoticed by the greatest number of people. In this sense, our proposal is that Article 55, paragraph 5 of the Constitution be amended and supplemented so as to read: "Judges of the Constitutional Court, judges, public prosecutors, the Protector of Citizens, members of the police and members of the armed forces shall be prohibited from engaging in any political activity, except for the exercise of active suffrage." In this way, it would be far clearer that members of the armed forces must not be connected in any way with political parties and their activities, but that they may certainly exercise their active right to vote by voting in elections for the political option of their choice. This is their political right which, as citizens of their state, must in no way be restricted or denied to them. By way of comparison, after the formation of its own state, the Republic of Slovenia undertook the reform of its armed forces by placing emphasis precisely on the loyalty of the armed forces to the Constitution, and thereby to the state, especially to parliament, the President of the Republic and the government, and not to a political party, which marked the end of party control over the armed forces (Malešič, 2001: 236), which thereby became politically neutral.

That the armed forces are a constitutional category is undoubtedly confirmed by the fact that Article 112, paragraph 2 of the Constitution implies that the person performing the function of the President of the Republic is always at the same time the supreme military commander. This is a contemporary standard which, in modern democratic states, enables democratic and civilian control of the armed forces with the aim of preventing the armed forces from acting outside the interests of their state, the existing social environment and the political context. Therefore, we consider that this constitutional norm should not be changed, because it is more than clear and precise, especially since the Constitution does not grant any other state authority the right to command the armed forces. The President of the Republic deserves to be at the head of the armed forces more than any other state authority, especially due to the fact that he has the highest degree of democratic legitimacy among the people. This cannot be said of any other authority in our state, since in all other elections, from local to parliamentary, the rule is that votes are cast for political parties, and not individually for specific persons. Our Constitution latently refers to the armed forces in the provisions concerning the proclamation of a state of war in the state (Articles 201–202) and in the provisions prescribing that the National Assembly "decides on war and peace and proclaims and terminates a state of war, supervises the work of the security services and adopts the defence strategy" (Article 99, paragraph 1, items 5), 6) and 9) of the Constitution). It seems that the provisions on the armed forces "scattered" throughout all parts of the Constitution indicate that the constitutional drafter nevertheless de-

voted more attention to some other institutions and, within them, included the matter concerning the armed forces as well. Our position is that it would be much more appropriate to concentrate the entire matter concerning the armed forces in one place in the Constitution. The armed forces deserve this because of the importance they have in the functioning of the state apparatus and the indisputable exclusivity they possess in the protection and defence of the state.

The proposed amendment to Article 140 of the Constitution, which would enable the General Staff of the Serbian Armed Forces to become a constitutional category, also entails the need for it even to be defined in the Constitution. In this regard, our proposal is that, after Article 140 of the Constitution, Article 140a be added, which would read: "The General Staff of the Serbian Armed Forces is the supreme expert military command situated within the Ministry of Defence and performs the tasks for which it is competent, in accordance with the law and the authorisations received from superior authorities." In this way, it would be defined that the supreme part of the armed forces is precisely the General Staff of the Serbian Armed Forces, which is composed of officers professionally competent to perform all tasks falling within the competence of the General Staff. These tasks arise both from the relevant regulations of the Republic of Serbia and from the authorisations received from civilian authorities that make decisions at the strategic level and are superior to the Chief of the General Staff, namely the Minister of Defence and the President of the Republic. By using the general formulation "from superior authorities", a change to the Constitution would be avoided in the event that hierarchical and organisational changes occur in the future in the functioning of the Ministry of Defence. In any case, from the proposed amendments and supplements to the constitutional matter, it may be concluded that there is room for significant improvement of the position of the armed forces in the Constitution. Nevertheless, we must point out that the existing constitutional solutions are not unclear and do not produce negative consequences, especially since the laws currently in force substantially elaborate the existing sparse constitutional framework of the armed forces as an institution.

LEGAL POSITION OF THE ARMED FORCES

On Law in General

Although Plato clearly wrote that laws in the state are the work of people themselves and that they were created for the sake of people, in *The Laws* he also mentions the belief in their divine origin (Platon, 1971: 9), which would mean that the armed forces, as part of legal matter, also originate from God and that He created them with the emergence of the first states. The aim was precisely to enable those first states to survive in the face of invasions by other states, that is, tribal communities that existed at that time. There is no concrete evidence for such a claim, and therefore we consider that this is, nevertheless, only a matter of "meta-law", that is, a religious myth that the state and the armed forces are of divine origin. Still, it is true that, from its very

emergence, the state was organised as a military organisation. Laws regulate and concretise constitutional matter because constitutional norms often prescribe only the basic principles concerning the regulation of certain areas on which a particular social community organised as a state is based, while laws regulate these areas specifically and in their entirety (Pajvančić, 2001: 18). This is precisely how the constitutional matter concerning the armed forces has been elaborated by laws in our state.

Every law, as well as its amendments and supplements, is adopted in our state by the National Assembly, which is also the case with the Constitution and its amendments and supplements. By force of the Constitution, the National Assembly has exclusive competence in this regard. This also applies to the adoption of all laws concerning the armed forces and determining their position in the constitutional order and political system of the Republic of Serbia. Their aim is to regulate in detail the functioning of the armed forces in practice in every situation. The most important laws in our state in this field are: the Law on the National Assembly, the Law on the President of the Republic, the Law on the Government, the Law on Ministries, the Law on the Serbian Armed Forces, the Law on Defence, the Law on the Military Security Agency and the Military Intelligence Agency, the Law on Civilian Service, the Law on Military, Labour and Material Obligation, and the Law on the Use of the Serbian Armed Forces and Other Defence Forces in Multinational Operations Outside the Borders of the Republic of Serbia. The National Security Strategy of the Republic of Serbia, the Defence Strategy of the Republic of Serbia and the Long-Term Defence System Development Plan of the Republic of Serbia also have the force of law. However, at this point we shall provide a commentary on the normative solutions contained in the Law on the National Assembly, the Law on the President of the Republic, the Law on the Government, the Law on Ministries, the Law on the Serbian Armed Forces and the Law on Defence, which precisely determine the legal position of the armed forces in the system of the rule of law in the Republic of Serbia. The remaining regulations that we have mentioned have narrower subject matters of regulation, and we shall not deal with their analysis at this point.

The Position of the Armed Forces According to the Laws in Force of the Republic of Serbia, with Certain Proposals for Their Amendments and Supplements

The Law on the Serbian Armed Forces and the Law on Defence are not synonyms for the same regulation, as may appear at first glance to laypersons, simply because the armed forces participate in the defence of the state. These are two different laws that have different subject matters of regulation. In this regard, Article 1 of the Law on the Serbian Armed Forces prescribes that this Law regulates "the position and competence of the Serbian Armed Forces, the organisation, composition and principles of service in the Serbian Armed Forces, specific military service and service under difficult conditions, command and management of the Serbian Armed Forces, ranks in the Serbian Armed Forces, symbols and insignia of the Serbian Armed Forces, military holidays, names of units and institutions, religious service, liability for damage

caused by the Serbian Armed Forces, democratic and civilian control, transparency of work, office management and records in the Serbian Armed Forces, service in the Serbian Armed Forces and other issues of importance for the Serbian Armed Forces" (Zakon o Vojsci Srbije, Article 1). Article 1 of the Law on Defence prescribes that this Law regulates "the defence system of the Republic of Serbia, the competences of state authorities and the Serbian Armed Forces in defence, the rights and duties of state authorities, autonomous provinces, local self-government units, citizens, companies, other legal entities and entrepreneurs in defence, as well as other issues of importance for defence" (Zakon o odbrani, Article 1). Already from these legal norms, we may conclude that the position of the armed forces is regulated by the Law on the Serbian Armed Forces, but that certain norms of the Law on Defence also concern our topic in the part relating to the competences of state authorities and the Serbian Armed Forces in defence, which greatly affects the precise positioning of the armed forces in the legal order of our state.

Let us begin with an analysis of the relevant provisions of the Law on the Serbian Armed Forces and proposals for their amendments and supplements. The position and competence of the Serbian Armed Forces are determined by Article 2 in the following manner:

"The Serbian Armed Forces are an organised armed force that defends the country from external armed threats and performs other missions and tasks, in accordance with the Constitution, law and the principles of international law regulating the use of force.

The President of the Republic, or the Minister of Defence upon authorisation of the President of the Republic, may decide that the Serbian Armed Forces shall, at the request of the competent state authority or organisation, the authority of autonomous provinces and the authority of local self-government units, provide assistance for the purpose of protecting the lives and safety of people and property, protecting the environment, or for other reasons established by law.

The use of the Serbian Armed Forces outside the borders of the Republic of Serbia shall be regulated by law."

Bearing in mind that, in the previous part, we explained the reasons why we consider that Article 139 of the Constitution should be supplemented by a definition of the armed forces, we are of the view that this Law should repeat the definition of the armed forces in the same way, that is, by placing emphasis on the facts that they are an organised armed force, which is envisaged by the existing legal solution, as well as on their hierarchical organisation, which is not expressly envisaged by the existing legal solution. We are of the opinion that the legal solution contained in Article 2, paragraph 2 is a good one, namely that the President of the Republic is the authorised person to act on the matter in question, that is, to make the decision, and that the Minister of Defence is the person who may do so upon his authorisation. Nevertheless, it should be supplemented by the obligation to obtain the expert opinion of the General Staff of the Serbian Armed Forces regarding the determination of the possible forms of assistance that the armed forces may provide, as well as their actual capacities to

provide such assistance in a specific situation, so that it would read: "The President of the Republic, or the Minister of Defence upon authorisation of the President of the Republic and after obtaining the expert opinion of the General Staff of the Serbian Armed Forces, may decide that the Serbian Armed Forces shall, at the request of the competent state authority or organisation, the authority of autonomous provinces and the authority of local self-government units, provide assistance for the purpose of protecting the lives and safety of people and property, protecting the environment, or for other reasons established by law."

The Law on Defence, in Article 4, item 5), defines the Serbian Armed Forces in the same way as the Law on the Serbian Armed Forces. Articles 9–15 of the Law on Defence clearly define the competences of the National Assembly, the President of the Republic, the Government, the Ministry of Defence and the General Staff of the Serbian Armed Forces within the defence system. These articles clearly indicate that the Government determines and conducts defence policy and implements laws relating to the armed forces, that the President of the Republic is the Supreme Commander of the armed forces and has a military cabinet that assists him in performing tasks in the field of defence, and that the National Assembly adopts laws and the military budget and adopts key strategic documents in the field of defence, etc. It is more than clear that the aforementioned state authorities greatly influence the position of the armed forces, making them dependent on them with regard to the most important issues that determine the manner of their activity. The armed forces can never act independently of the budget established for military needs, the regulations adopted in the state and the established guidelines for the development of defence policy. All this considerably narrows the room for manoeuvre available to the armed forces in their actions, and therefore we may say that this room is limited to a significant extent. We consider it necessary for this to remain so, because the armed forces represent part of the state apparatus and of the broader social context in general, that is, they are not a private enterprise. Therefore, they also have the task of professionally implementing the established directions of development of state policy for the purpose of defending the state, while taking into account the interests of their people. The armed forces must under no circumstances be viewed in isolation from other relevant political and social factors in the state. In this sense, we would not change the existing solutions contained in the Law on Defence, except in the part concerning their harmonisation with the amendments and supplements to the Constitution that we proposed in the first part of this paper.

As regards the Law on the National Assembly, Article 14 clearly shows the close connection between the armed forces and the National Assembly as an exceptionally important political factor in the state. It prescribes that "the honour guard unit of the Serbian Armed Forces shall be deployed in front of the main entrance to the House of the National Assembly at the beginning of the first session of the National Assembly, at the beginning and end of the regular session of the National Assembly, on the occasion of the taking of the oath by the President of the Republic and on the occasion of the taking of the oath by the Government", and that "the honour guard unit of the Ser-

bian Armed Forces and the military orchestra may also participate in other activities of the National Assembly upon the proposal of the President of the National Assembly” (Zakon o Narodnoj skupštini, Article 14). Therefore, the armed forces are always present during the implementation of the most significant events in the House of the National Assembly, which are expressly listed in the law *exempli causae*, and may also participate in any other activities of the National Assembly if this is proposed by the President of the National Assembly. This, among other things, represents a clear indicator of practical cooperation between the armed forces and the most important political institutions, which ensures the stable and coherent functioning of the entire state apparatus in our state.

In addition to elaborating the constitutional norm that the President of the Republic commands the armed forces and appoints, promotes and dismisses officers of the Serbian Armed Forces, the Law on the President of the Republic determines that “the President of the Republic and members of his household shall be protected by the police, the Serbian Armed Forces and other authorities in accordance with the needs of the President of the Republic and the regulation adopted by the Government”, that “the President of the National Assembly commands the Serbian Armed Forces while substituting for the President of the Republic”, and that even “a former President of the Republic has the right to be protected by the police and the Serbian Armed Forces for one year after the termination of his mandate, in accordance with the regulation of the Government” (Zakon o predsedniku Republike, Articles 8, 17 and 42). These legal norms indicate that certain members of the armed forces may be not only in a professional, but also in an exceptionally close personal relationship with the President of the Republic and members of his family, and even with a former President of the Republic and the President of the National Assembly when he substitutes for the President of the Republic. There is no doubt that members of the armed forces should protect the President of the Republic not only because he is the Supreme Commander of the armed forces, but also because “in a democracy, political leaders have democratic legitimacy because they are elected, directly or indirectly, by the people, who thereby express the will of the people” (Flückiger, 2008: 5). All this confirms our assertion that the armed forces must not in any way be viewed separately from the political authorities with which they cooperate on a daily basis in various ways. There is an inseparable connection between them that helps to determine more precisely the position and significance of the armed forces in the legal order and political system of the Republic of Serbia.

The Law on the Government does not contain norms that directly refer to the armed forces, but it does contain general norms relating to the powers and duties of ministers (Article 14), termination of a minister’s mandate (Article 21), vote of no confidence in a minister and dismissal of a minister (Article 22), resignation of a minister (Article 23), powers of a minister who has submitted his resignation (Article 24), assumption of the powers of a minister whose mandate has terminated and election of a new minister (Article 25). These general provisions also apply to the Minister of Defence and determine not only his position in our legal order, but also what happens

with the armed forces in specific situations, for example, when the Minister of Defence submits his resignation or is dismissed. In this regard, Article 24 of this Law prescribes that “a minister who has submitted his resignation shall be obliged to perform ongoing duties until his mandate terminates. In doing so, he may not adopt regulations, except if their adoption is linked to a statutory deadline or required by the needs of the state, the interests of defence or a natural, economic or technical disaster, and in exercising the founding rights of the Republic of Serbia he may only appoint, or give consent to the appointment of, an acting director and members of the management and supervisory boards” (Zakon o Vladi, Article 24).

We consider that the Minister of Defence must continue to perform ongoing duties after submitting his resignation until a new minister is elected. This represents the only way to ensure the continuity of management of the armed forces as an institution, which is of immeasurable importance for the survival of the state. However, such a legal solution does not determine which current affairs may be performed by the Minister of Defence who has submitted his resignation until his mandate terminates. We are of the view that, in some future amendments and supplements to the Law on the Government, it would be desirable to specify which tasks are considered current affairs. The most appropriate approach would be to do this by enumerating certain current affairs *exempli causae*, followed by the statement that the minister also performs “all other current affairs for which he is competent and authorised”, because it is impossible to enumerate absolutely all current affairs that he performs on a daily basis. The general legal formulation, such as “except if their adoption is linked to a statutory deadline or required by the needs of the state, the interests of defence or a natural, economic or technical disaster”, should be retained in the Law on the Government, because it enables the Minister of Defence in a technical mandate to adopt any regulation whose adoption is justified by statutory deadlines, defence interests and the needs of the state. This contributes to ensuring the continuity of normative and legal activity in the armed forces and to establishing legality for their uninterrupted functioning in every situation. It would be incomplete to analyse the legal position of the armed forces of our state without referring to the Law on Ministries, which, in Article 14, explicitly lists the state administration tasks performed by the Ministry of Defence. We are of the view that this legal norm is of high quality because, on the one hand, it fully encompasses all tasks arising from the competences of the Ministry of Defence in our state, while, on the other hand, it precisely positions the coordinates of the armed forces and their competences within the legal framework of the Republic of Serbia.

Conclusion

The foundations of the position of the armed forces in the legal order of the Republic of Serbia are based on the Constitution and the laws that we have examined. Through the analysis of the relevant provisions and the proposals given for their changes, we have established that it is necessary to define the concept of the armed

forces in the Constitution of the Republic of Serbia, that the General Staff of the Serbian Armed Forces should be raised to the level of a constitutional category, and that it would be more appropriate for the decision on the use of our armed forces abroad to be made by the supreme military commander, as the person who, in the capacity of the President of the Republic, represents the state precisely abroad, due to the high degree of democratic legitimacy acquired by winning the election. We have established that it is necessary to determine in the Constitution the holders of democratic and civilian control of the armed forces, because of the importance that this control has in the process of synchronising the activities of the armed forces and the relevant political factors in the state. We have also established that it is necessary for the constitutional prohibition of membership of members of the armed forces in political parties to be expanded in such a way that the Constitution also prohibits them from engaging in any other political activity. In addition, it would be more appropriate to concentrate constitutional norms concerning the armed forces in one place in the Constitution, due to the exceptional importance that the armed forces have in the state. The impression is gained that the constitutional drafter either did not wish or did not know how to regulate in greater detail the issues concerning the armed forces that deserve to be included in the Constitution because of their significance. In any case, without strong armed forces there is no strong state, nor is there the survival of its sovereignty and legal order. In this sense, more attention should be devoted to the armed forces in the Constitution, but in such a way that the constitutional text is not unnecessarily overburdened.

The legal position of the armed forces is regulated in detail in our state through numerous laws. We consider the existing solutions contained in the Law on Defence to be of high quality, because the armed forces must be viewed in the context of the political system and legal order in which they operate. In the Law on the Serbian Armed Forces, we would introduce the obligation to obtain the expert opinion of the General Staff of the Serbian Armed Forces when deciding on the manner in which the armed forces may assist a state authority or organisation, an authority of autonomous provinces and an authority of local self-government units for the purpose of protecting the lives and safety of people and property, protecting the environment, or for other reasons. It follows from the Law on the National Assembly and the Law on the President of the Republic that only practical cooperation between the armed forces and political authorities ensures the stable functioning of the state, and we have also established that the Law on the Government needs to be changed with regard to specifying the current affairs that each minister may perform after submitting his resignation. Nevertheless, we must not neglect the fact that the armed forces, even within the limits of the existing regulations, are always ready to function without obstruction in every situation. In any case, the decision as to whether our proposals for changes to the Constitution and laws will remain a “dead letter” on paper or will one day “come to life” in practice depends exclusively on the formal participants in the procedure for adopting regulations. Through their practice in the future, they will undoubtedly provide the most adequate assessment of the quality and expediency of our proposals.

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Summary

The structure of this paper, whose subject of research is spatially limited to the Republic of Serbia and temporally limited to the regulations currently in force, is divided into two main parts: the constitutional position of the armed forces and the legal position of the armed forces. The first part of the paper is divided into two smaller chapters. The first chapter concerns the concept, significance and functions of the constitution in general, which first had to be analysed so that, in the second chapter, we could adequately explain the position of the armed forces in the Constitution of the Republic of Serbia of 2006 and provide proposals for changing the constitutional text where we assessed that this would be desirable. The second part of the paper is also divided into two smaller chapters. Inspired by Plato's opinion that laws are of divine origin, in the first chapter we briefly explained what is generally understood by law, who adopts it, what its significance is and which laws relate to the armed forces, determining their exact position in the legal order of our state. In the second chapter, we analysed the provisions of all laws relevant in the context of our topic, while also providing proposals for some of them as to how they should be changed in the future with the aim of achieving more adequate legal regulation. We concluded that there is undoubtedly always room for improvement of the legal regulation of the armed forces, but that the existing substantive legal solutions in the Constitution and laws do not lead to any significant problems in practice, since the armed forces, even on the basis of the existing legal framework, are always ready to function without obstruction in every situation.

Keywords: *armed forces, law, constitutional position of the armed forces, legal position of the armed forces, significance of the armed forces in the system of the rule of law, position of the armed forces in the legal order of the Republic of Serbia*

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