

There is agreement that the Serbian Constitution will have to be amended at least twice within the EU accession process. The complex constitutional amendment procedure will slow down or prolong the period needed for enacting the accession-related amendments, as well as any other constitutional changes deemed necessary. The provisions on the amendment of the Constitution thus need to be changed, either within the recommended total revision of the Constitution, or the very first time its individual provisions are amended.

## Necessity of Amending the Serbian Constitution Provisions on Constitutional Amendment within the EU Accession Process

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EU Member States' experiences indicate the necessity of amending their national constitutions during the EU negotiation and accession process. Moreover, the constitutions of some countries were amended more than once during the process. The amendments involved both the introduction of the so-called integration clause in the national constitutions and the amendment of individual constitutional provisions requisite for the constitutions' alignment with EU membership obligations. Furthermore, countries may need to amend their constitutions after they join the EU as well, due to changes in the functioning of the EU. Serbia is also likely to face the necessity of changing its Constitution.<sup>1</sup>

The Constitution of the Republic of Serbia lays down a complex constitutional amendment procedure, wherefore it falls in the group of so-called rigid constitutions. A two-thirds majority in the National Assembly needs to be secured twice for amending both most of the provisions in its normative part and the Preamble (on the proposal to amend the Constitution and on the amendment(s) themselves), which is followed by the ratification of the amendment(s) by the majority of votes cast at a referendum (Article 203 of the Constitution). Naturally, a referendum would be required in case of adoption of a completely new text of the Constitution. Under the Constitution, proposed constitutional amendments that are not upheld by a two-thirds majority in



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parliament may not be resubmitted for a year.

Given the identified need to amend the Constitution, on the one hand, and the features of the constitutional amendment procedure, on the other, it may be concluded that the difficult amendment procedure will slow down the process of Serbia's accession to the EU and any constitutional changes that may be required once it joins the EU. The duration of the process will undoubtedly be affected by at least two referendums on the constitutional amendments and one referendum on accession to the EU. Furthermore, every unsuccessful attempt to amend the Constitution (under the valid provisions on its revision) would prolong the procedure for another year.

This is why this Policy Brief, based on the analysis of the constitutional provisions and constitutional revision experiences, as well as the analysis of the constitutions of EU Member States, provides suggestions on amending the provisions of the Constitution for its own amendment.

Deliberation of constitutional reform needs to take account of its dynamic. A comprehensive constitutional reform plan, covering all the requisite and/or planned amendments, needs to be drawn up. Its authors need to bear in mind its feasibility and the duration of the reform, especially in light of the complexity of the constitutional amendment procedure.

The issue of the constitutional amendment procedure needs to be reviewed before the procedure for amending specific parts of the Constitution is launched, simultaneously with the discussion on amending the other parts of the Constitution at the latest. More precisely, the constitutional provisions on the revision of the Constitution need to be amended within its first revision – be it total (if the view voiced in expert analyses - that the whole Constitution needs to be changed, regardless of EU accession - is adopted<sup>2</sup>) or partial. This Policy Brief has been prepared with the aim of initiating a timely debate on this subject.

## Constitutional Revision in General

A constitution should not be amended often, given that it comprises the most important and fundamental legal norms underlying a state's legal system. A constitution is expected to be stable and predictable, which contributes to the legitimacy of the constitutional provisions. On the other hand, a constitution sometimes needs to be amended, in order to align it with political, economic or social changes. Therefore, the main challenge is to strike a proper balance between these requirements – overly rigid provisions on constitutional amendment may block necessary change, whereas overly flexible provisions may create instability and political conflict.<sup>3</sup>

The Constitution, as the highest law of the land, is usually adopted and amended in a procedure that differs from the legislative procedure. These differences may be greater or smaller. Notably, constitutional revision requirements can be stricter and (generally) more difficult to fulfil, wherefore constitutions can abstractly be classified as those more difficult to amend (so-called rigid constitutions) and those easier to amend (so-called flexible constitutions).<sup>4</sup> The differences between the constitutional amendment and legislative procedures are most often reflected in the qualified parliamentary majority they require (a two-thirds or three-fifths v. simple majority), the number of (usually two) consecutive votes on the same proposal, the mandatory time lapse between the two votes, as well as ratification at a referendum; federal states usually require the adoption or endorsement of the amendments by the federal units.

This abstract assessment of constitutional amendability need not, and in practice, usually does not mean that a specific flexible constitution will be amended more times than a constitution that is considered rigid.<sup>5</sup>

As opposed to (ordinary) laws, revision rules are always an integral part of written constitutions and their amendments are made outside constitutionally prescribed procedures only in exceptional cases.<sup>6</sup>

## Constitutional Revision in European States

With a view to drawing comparisons with the procedure for amending the Serbian Constitution (set out below), this section will provide an overview of examples regarding the: a) parliamentary majority needed to revise the Constitution or uphold the proposal for its revision, and b) the obligation to have the constitutional amendments ratified at a referendum. These two elements clearly do not reflect the entire constitutional systems but they may be useful in this analysis of the select provisions of the valid Serbian Constitution.

The procedures for partially or totally revising the Constitution differ among European states, both in terms of the requisite majority in their national parliaments and in terms of the referendum requirement. In some states, referendums are mandatory only in case of total constitutional revision, while in others, referendums are optional or mandatory only if a popular initiative or an initiative by a state authority to organise a referendum has been launched.

Constitutional amendments must be adopted by a qualified parliamentary majority in nearly all European states. The purpose of this requirement is to achieve consensus and protect minority interests. The few states in which the amendments are adopted by a simple parliamentary majority (such as Denmark, Iceland, Ireland and Malta) have in place other requirements, such as referendum or that the amendment must be passed again in the next parliament, after elections.<sup>7</sup> In most countries with unicameral parliaments, such as Serbia's, the requisite majority is usually two-thirds, or slightly higher (three-fourths) or lower (three-fifths).<sup>8</sup> The Slovene and Croatian Constitutions, for instance, require two votes in parliament – the first on the proposal to amend, i.e. the need to initiate the amendment procedure (the Croatian Constitution requires an absolute and the Slovene Constitution a two-thirds majority), and the second on the very enactment amending the Constitution (both Constitutions require a two-thirds majority

of all MPs).

Constitutions usually include provisions on the so-called temporal restriction of their amendment, which usually prohibit amendment of the constitution during a state of war or emergency (the Serbian Constitution also includes such a clause, in Article 204). However, a number of constitutions also specifically provide that a rejected proposal for a constitutional amendment may not be resubmitted within a certain time period (e.g. Article 203, paragraph 4 of the Serbian Constitution).<sup>9</sup>

Most European constitutions are amended in a procedure conducted only in parliament, while a fewer states also hold referendums, either mandatory or optional. Some lay down mandatory referendums on any amendments to constitutional provisions, others only on amendments to specific provisions enjoying special protection, and some only in case of the total revision of the constitution. A referendum on amendments to all provisions, which is what the Serbian Constitution essentially prescribes, is required in a fewer European constitutions; among them, only the Constitutions of Andorra and Romania lay down a combination of adoption by a two-thirds parliamentary majority and ratification at a referendum. In addition, the Albanian Constitution, for instance, sets out that a referendum will be called after an amendment is adopted by a two-thirds parliamentary majority if so required by such a parliamentary majority, while the Constitution of the Russian Federation provides alternative options: a two-thirds majority of the constituent assembly or a referendum.

On the other hand, some constitutions lay down that a referendum shall be held at the request of a specific number of MPs (e.g. the Austrian Constitution), a popular initiative (e.g. 10% of the voters in Croatia), the local authorities or the head of state (e.g. the French Constitution).<sup>10</sup>

The majority needed for a referendum to succeed is defined in the constitution or a separate law and may be set as the majority of the electorate or the majority of votes

cast. A requirement on minimum turnout is also in place in some states.

Apart from the fact that it is one of the rare mechanisms by which citizens exercise government, the referendum is also considered a mechanism for involving the public in the important constitutional revision procedure. A referendum, however, should not be considered a substitute for a broad and open public debate on constitutional change. Although the constitutions of most European states analysed here do not mandate public debates, they are regularly conducted in them. In the absence of a broad public debate on all aspects of constitutional change (particularly when the adoption of a totally new Constitution is at issue), a referendum vote for or against the entire package of amendments can also be viewed as merely a formal fulfilment of the requirement on civic engagement, even as its abuse, rather than as a decision-making method.<sup>11</sup>

### Revision of Serbia's Constitution

Experts usually qualify the 2006 Constitution as a rigid constitution.<sup>12</sup> Under Article 203, proposals to amend the Constitution may be submitted by at least a third of all members of parliament (i.e. at least 84 MPs), the President of the Republic, the Government or at least 150,000 voters.<sup>13</sup>

The proposal to amend the Constitution, which does not mean its change, shall be deemed adopted if at least two-thirds (i.e. at least 167) of the Assembly deputies vote for it. In the event the proposal is not endorsed, amendments of the constitutional provisions on issues covered by that proposal may not be initiated over the course of one year. In the event the National Assembly endorses the proposal to amend the Constitution, an enactment amending the Constitution shall be drafted and reviewed. The National Assembly shall adopt the enactment amending the Constitution, again by a vote of two-thirds of all its MPs. Subsequently, depending on the content of the amendment, the enactment amending

the Constitution is to be ratified at a referendum. The National Assembly is under the obligation to call a nationwide referendum on the enactment amending the Constitution (mandatory referendum) in the event the amendments concern the Preamble of the Constitution, constitutional principles, human and minority rights and freedoms, the system of government, declaration of a state of war or emergency, derogations of human and minority rights during a state of war or emergency, or the constitutional amendment procedure – which account for most constitutional provisions. Furthermore, even if the amendments do not concern the listed sections of the Constitution, the National Assembly may decide to call a referendum to ratify the amending enactment (an optional referendum). A referendum ratifying adopted enactments amending the Constitution must be held within sixty days from the day of adoption. Constitutional amendments are adopted by a majority of votes cast at the referendum.

The valid Constitution is the second in Serbia's constitutional history envisaging mandatory referendums on its constitutional amendment provisions.<sup>14</sup> It lays down a milder referendum requirement than the 1990 Constitution: the majority of votes cast, wherefore it considerably diminishes the likelihood of the referendum failing, but also the importance of the referendum vote.

In its 2007 Report, the Venice Commission qualified this procedure as overly complex, questioning the objective need for such complexity and the potential consequences.<sup>15</sup> An overly extensive list of provisions, the change of which requires ratification at a referendum, may practically lead to a situation in which a referendum has to be called for every amendment.

As per the complexity of the procedure, Serbian experts have also alerted to the difficulties in securing a two-thirds majority in the National Assembly, given that such a majority is difficult to drum up without the consensus of most parliamentary parties.<sup>16</sup> However, an analysis of the parliamentary

majority requirement in isolation, without taking into account the mandatory referendum requirement, needs to bear in mind that an absolute or relative majority for the adoption of the constitutional amendments (required for the adoption of nearly all other Assembly decisions<sup>17</sup>) would not result in the desired stability or the legitimacy of the constitutional text. The qualified majority requirement, on the other hand, need not be set also for the adoption of the proposal to amend the Constitution.

Experts are divided on the necessity of the referendum. On the one hand, they are of the view that the key issues must be brought before the citizens due to the numerous shortcomings of the valid Constitution, which go beyond the EU accession requirements. These shortcomings regard the Preamble, system of government, status of autonomous provinces and specific amendments to and improvements of the catalogue of human rights.<sup>18</sup> Under the valid provisions, a referendum will have to be called the first time the Constitution is amended.

It needs to be noted that even if a referendum is not laid down as a mandatory stage of the constitutional amendment procedure, it can always be held pursuant to Article 108 of the Constitution, under which the National Assembly shall call a referendum on any issue within its remit at the request of the majority of MPs or at least 100,000 citizens.<sup>19</sup> Although the Constitution does not mention advisory referendums, they can definitely be organised, given their advisory character.

It would be reasonable and, as the recent past demonstrates, necessary to introduce the obligation of holding a public debate on the very provisions on constitutional revision, although there are not many examples of such an obligation in comparative law. The only point all commentators of the valid Constitution agree on regards the deficiencies of the procedure by which it was adopted, i.e. the total absence of a public debate.<sup>20</sup> These flaws are the reason for the questionable legitimacy of the very text of

the Constitution.

Although constitutional change is at present primarily discussed in the context of EU accession, wherefore at least these amendments are presented as undisputable, under no circumstances should the Constitution be amended in the absence of a public debate or after a simulated or trivialised debate.

It also needs to be noted that Serbian constitutional history shows that total revisions of the Constitution, i.e. adoption of a brand new constitution (often marking a break with the prior system or effecting a kind of constitutional discontinuity, like, e.g. in 1946 or 2006) were more frequent than the adoption of constitutional amendments. However, the published public policy documents review the issue of constitutional change partially, rather than comprehensively. The only changes mentioned for now regard the provisions on the judiciary and realisation of national minority rights,<sup>21</sup> wherefore it remains unknown whether the Constitution will be amended at all or what the extent of the potential amendments will be – from the amendment of the small number of provisions on the two issues to total revision.

In view of the above considerations, the proposal to amend Article 203 of the Constitution could be worded as follows:

*Proposal to Amend the Constitution and  
Adoption of the Amendment  
to the Constitution  
Article 203*

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

*The National Assembly shall decide on amending the Constitution.*

*A proposal to amend the Constitution shall be adopted by the majority of the total number of*

*deputies.*

*A public debate lasting at least 90 days shall be organised on the proposal to amend the Constitution adopted by the National Assembly.*

*Upon the completion of the public debate, the act amending the Constitution shall be drafted.*

*The National Assembly shall adopt an act amending the Constitution by a two-thirds majority of the total number of deputies.*

*The implementation and mandatory course of the public debate on the proposal to amend the Constitution shall be governed by a separate law adopted by a two-thirds majority of the total number of deputies in the National Assembly. Pending the adoption of the separate law, constitutional amendments shall be adopted at a nationwide referendum by a majority of votes cast.*

This proposal looks at the current constitutional provisions on amending the Constitution (primarily Article 203) in isolation, in the context of the current system of government and the current electoral system (which, for the most part, is not regulated by the Constitution). This is why the proposal retains the provisions on who is entitled to submit a proposal to amend the Constitution (paragraph 1) and the provisions on two rounds of voting in the National Assembly – one on the proposal to amend (albeit envisaging a milder Assembly majority requirement) and the other on the amending act. Constitutional amendments pertaining also to the system of government (e.g. composition of the National Assembly and the election of deputies, status and powers of the President of the Republic, as well as territorial organisation issues, i.e. the status of autonomous provinces and local self-government units) would also effect changes of this proposal. These aspects cannot be specified at the moment given the absence of a comprehensive constitutional change plan.

The two rounds of voting in the National Assembly have also been retained because of the introduction of a mandatory public debate in the amending procedure.

Otherwise, each proposal to amend the Constitution would initiate the holding of such a debate, the drafting of the amending enactment and the National Assembly's vote on it.

Therefore, this proposal retains the same list of entities entitled to file the proposal and the requirement regarding the qualified, two-thirds majority in the National Assembly by which a decision to amend the Constitution is adopted. On the other hand, it proposes the following changes of Article 203 of the valid Constitution:

- An absolute instead of a two-thirds parliamentary majority for the adoption of the proposal to amend the Constitution, given that several more steps will follow until the constitutional amendment is adopted;
- Deletion of the temporal restriction on resubmitting a rejected proposal to amend the Constitution, given that the very procedure of filing the proposal and its adoption already lasts a specific period of time (including the time needed to hold the proposed mandatory public debate), wherefore the risk of excessively frequent submissions of proposals to amend the Constitution is not great;
- The obligation to hold a public debate on the proposed amendment in between the adoption of the proposal to amend and the adoption of the amending act, in case of any kind or volume of constitutional revision. A separate law governing in detail the holding and mandatory course of public debates, to be adopted by a qualified parliamentary majority, is proposed to prevent abuse of provisions on public debates, primarily to preclude the stakeholders from going through the motions of conducting a public debate merely to fulfil the formal requirement prescribed by the Constitution. For this reason, and in view of the fact that

some laws explicitly envisaged by the Constitution have not been adopted yet (e.g. a law on the substantial autonomy of the Autonomous Province of Kosovo and Metohija or a law on the funding of autonomous provinces), the proposal also sets out that the valid system, with the mandatory referendum, shall apply until this separate law is enacted;

- Deletion of the requirement on the obligation to hold a referendum on constitutional change - above all, in view of the comparative law examples - once the separate law on public debates is passed.

The issue of mandatory referendums on constitutional amendments, even when viewed within the context of EU accession, is deliberated here independently of the holding of a referendum on accession to the EU.<sup>22</sup>

If, however, the constitutional reform debate shows that most stakeholders are of the view that the amendment of all or most constitutional provisions must be ratified at a referendum, like in Austria, the following paragraph should be added to Article 203:

*The National Assembly shall call a nationwide referendum on the act amending the Constitution in the event a new Constitution is to be adopted or at the request of one-third of the total number of deputies.*

## Conclusion and Recommendations

Serbia's Constitution will be amended at least twice in the next few years. It is quite likely that it will be amended more than twice given the absence of a strategic approach to EU accession-related constitutional change and numerous other initiatives for amending the Constitution that are not directly related to EU accession.

The needs for all the potential amendments

ought to be thoroughly reviewed and a comprehensive constitutional revision plan ought to be drawn up. The revision plan should also answer the following question: Will the amendments to the Constitution be initiated partially, as the needs for them are identified (e.g. with regard to EU accession, like in the case of the provisions on the judiciary or for another reason) or will all the requisite amendments not regarding the integration clause be adopted at the same time? Such a plan should not be defined by a narrow circle of state officials and civil servants; it must be the product of a broad consensus – political and social alike.

The very constitutional amendment procedure must be an important factor in deliberations on the volume and pace of constitutional change. The current amendment procedure needs to be analysed from the perspective of its potential results – which benefits can the current procedure bring, i.e. can it slow down or block the procedure of making the necessary constitutional amendments. This particularly applies to the importance of referendums on constitutional amendments. This proposal envisages the introduction of a mandatory public debate on all constitutional amendments in the Constitution instead of the referendum, as public debates are a more effective way to ensure the involvement of all relevant groups of society.

The proposal to amend the constitutional revision provisions retains the qualified parliamentary majority requirement and introduces a mandatory public debate in the procedure, relieving it of the mandatory referendum requirement, in view of the fact that a mandatory referendum can be called pursuant to other constitutional provisions if necessary, while an advisory referendum can always be called. Alternatively, the Constitution can lay down that referendums shall be held in exceptional cases, in case of the total revision of the Constitution or at the request of a specific share of MPs, rather than stipulating a referendum on every constitutional change.

These changes should be adopted the next time the Constitution is amended, either partially or totally.

## BIBLIOGRAFSKE NAPOMENE

- 1 Vladimir Međak, "Does the Serbian Constitution Need to be Amended in the EU Accession Process?" (Belgrade, European Movement in Serbia Research Forum, 2016).
- 2 An overview of a number of expert analyses is available in Serbian at: Jelena Jerinić and Tijana Kljajević, "Analiza stručnih i političkih predloga za ustavnu reformu – U javnosti predstavljeni predlozi u periodu 2006–2016" (Belgrade: Friedrich Ebert Foundation, 2016).
- 3 European Commission for Democracy through Law (Venice Commission), Report on Constitutional Amendment, CDL-AD(2010)001, 2010, paras. 8, 12.
- 4 See, e.g. Giuseppe de Vergottini, "Uporedno ustavno pravo" (Belgrade: Službeni glasnik, 2015), pp. 291–298 (Serbian translation of "Diritto costituzionale comparato vol. I", 2011)
- 5 More in, e.g. Bogoljub Milosavljević and Dragoljub Popović, "Ustavno pravo, Peto izmenjeno i dopunjeno izdanje" (Belgrade, Union University Law College and Službeni glasnik, 2015), pp. 33–34, 47–52.
- 6 More on the so-called *de facto* and revolutionary constitutional change in, e.g. Milosavljević, Popović, *op. cit.*
- 7 Venice Commission, para. 38.
- 8 *Ibid.* para. 39. A two-thirds parliamentary majority is required by the Constitutions of Albania, Andorra, Austria, Croatia, Finland, Georgia, Hungary, Latvia, Lithuania, Luxembourg, Macedonia, Malta, Moldova, Montenegro, Norway, Portugal, San Marino and Ukraine.
- 9 *Ibid.* paras. 54–55.
- 10 *Ibid.* paras. 46–49. For instance, under the Austrian Constitution, a referendum must always be held in case of total revision, and at the request of a third of MPs in either parliamentary chamber in case of partial revision.
- 11 Analyses show that the number of referendums in Europe, most of which regard the EU and the national constitutions, has increased to eight a year in the past few years (from an average of three per annum in the 1970s) and that most of them can be considered plebiscites on political issues, wherefore the citizens essentially do not decide at them. See: 'The Referendum Craze: Let the People Fail to Decide,' *The Economist*, May 19, 2016, Leaders, Print Edition.
- 12 The current Constitution is nevertheless less rigid than its 1990 predecessor because it sets a milder requirement regarding the referendum majority. On the other hand, it is more rigid in some segments, especially regarding the restriction on reviewing the rejected proposal for a year. To recall, during the discussion on changing the 1990 Constitution, some suggested that the constitutional amendment requirements be softened; this led to the adoption of a law on constitutional change in 2003, which was subsequently repealed by the Constitutional Court.
- 13 When compared with the list of those entitled to submit laws for adoption, this list does not include the provincial assemblies, but it includes the President of the Republic. Furthermore, the list does not include the Ombudsman and the National Bank of Serbia, entitled to submit for adoption laws within their remit. See Article 107 of the Constitution.
- 14 Under the SFRY 1963 Constitution, constitutional referendums were to be called only in case of a disagreement between the two chambers of the Federal Assembly. The referendum majority requirement was the same as in the Serbian 1990 Constitution.
- 15 European Commission for Democracy through Law (Venice Commission), Opinion on the Constitution of Serbia, CDL-AD(2007)004, of 19 March 2007, paras 102 and 104. The Commission, notably, said that "it is particularly surprising that the Constitution is extremely rigid and that large parts are very difficult to amend. If one lesson could have been drawn from the history of constitution-making process in Serbia it would seem to be that amending the Constitution should not be made too difficult."
- 16 "Ustav na prekretnici – izveštaj o ustavnoj praksi, nedostacima ustava i načinima njegovog poboljšanja," (Belgrade, Lawyers' Committee for Human Rights, 2013), p. 29.
- 17 The Constitution does not lay down the two-thirds majority requirement for the adoption of any law, including those on joining international organisations or ratifying international treaties. Its Article 105 governs the majority requisite for the adoption of laws and other National Assembly decisions. The Constitution lays down the two-thirds majority requirement also for the dismissal of the Serbian President (Article 118) and for the adoption of the constitutional law on the implementation of the constitution (Article 205).
- 18 A different opinion was voiced during the expert debate: that constitutional change should not be ratified at a referendum, but delegated to the National Assembly, elected as the constituent

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assembly at separate elections. See Vladimir Pavićević and Vladimir Džamić, "How to make a new Constitution: the merit and the procedure" (Belgrade: European Movement in Serbia Research Forum, 2013), pp. 14-15.

- 19 Under Article 108, the following issues may not be the subject of a referendum: obligations deriving from international treaties, laws on human and minority rights and freedoms, tax and other financial laws, the budget and balance sheet, introduction of a state of emergency and pardons, as well as issues pertaining to the electoral competences of the National Assembly.
- 20 E.g. the Venice Commission, paragraphs 4 and 104. In its Opinion, the Commission said "A small group of party leaders and experts negotiated during a period of about two weeks to achieve a compromise text, acceptable to all political parties including the Serbian Radical Party."
- 21 Chapter 23 Action Plan and Action *Plan* for the Realisation of the *Rights of National Minorities* in the Republic of Serbia.
- 22 More in Međak, *op. cit.*

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