



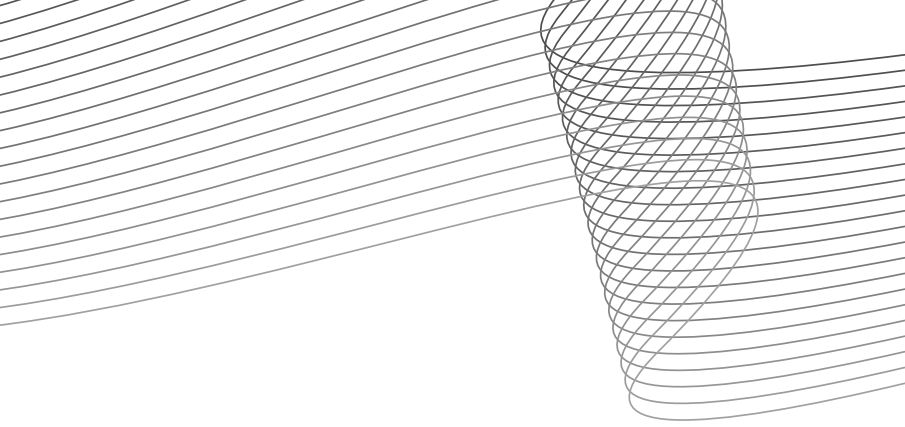
# CHANGING THE CONSTITUTION ON THE WAY TO THE EUROPEAN UNION



European  
Movement  
Serbia



Kingdom of the Netherlands



**CHANGING THE  
CONSTITUTION**  
on the way to the EU

# CHANGING THE CONSTITUTION ON THE WAY TO THE EUROPEAN UNION

September 2017



**European  
Movement**  
Serbia



Kingdom of the Netherlands

*Changing the Constitution on the Way to the European Union*

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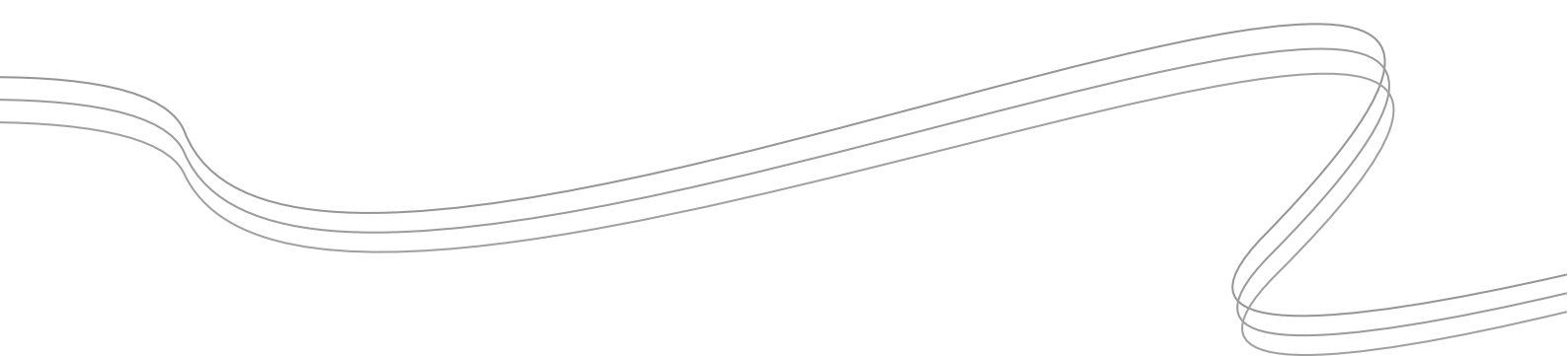
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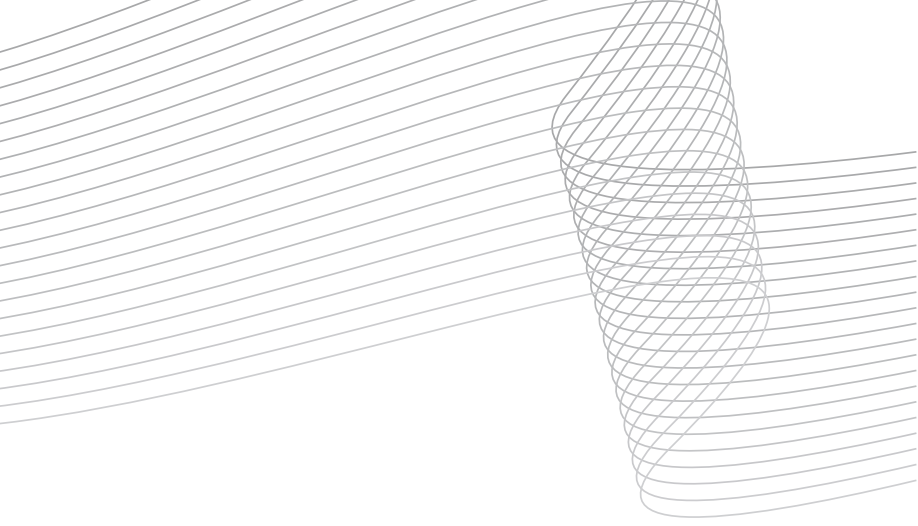


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# **Part 1**

## **Introductory Explanation**



Nearly all EU states had to amend their Constitutions to complete the EU accession process. The Republic of Serbia, which now has the status of a candidate state, is about to reform its Constitution. The far-reaching effects of the process call for the timely preparation of the proposed amendments and an open and informed debate of all the relevant actors in the public sphere. The European Movement in Serbia (hereinafter: *EMinS*) is of the view that the “constitutional moment” has come. This publication lays out *EMinS*’ specific views and suggestions on constitutional reform based on its years-long focus on the issue.

The *EMinS* Research Forum’s analyses, conducted with a view to covering all the obligations facing Serbia until it joins the EU, go beyond the current political circumstances of constitutional change initiated in accordance with the timeframe set in the Action Plan on Chapter 23 – Judiciary and Fundamental Rights (Chapter 23 Action Plan). The reason for the analyses stems from the fact that EU Member States have to ensure the full and proper enforcement of the EU *acquis communautaire* in their territory from the moment of accession. Furthermore, the Treaty of Accession of the Republic of Serbia to the EU must be in compliance with the Serbian Constitution if it is to be ratified by the National Assembly of the Republic of Serbia (hereinafter: *National Assembly*).

Our comparative analysis has led us to conclude that there are two types of amendments candidate states have made in the accession process. The first arises from the very legal order of the European Union as an organisation, and the second from the specific features of the constitutional order of the state at issue. The first type of amendments is universal to all candidate states, while the second varies from one state to another. As far as the second type of amendments is concerned, the Republic of Serbia will not have to change some provisions other states had to, but it will have to address its specific features not in compliance with EU standards; furthermore, it ought to make specific amendments to respond better to the EU accession requirements.

We concluded that several amendments to the Constitution of the Republic of Serbia need to be made and that they do not have to be made at the same time. Notably, the Constitution will have to be amended twice, the first time pursuant to the Chapter 23 Action Plan (these amendments are to be made by end 2017) and the second time before it joins the EU, i.e. after it signs the Treaty of Accession.

The *EMinS* Research Forum drafted amendments addressing:

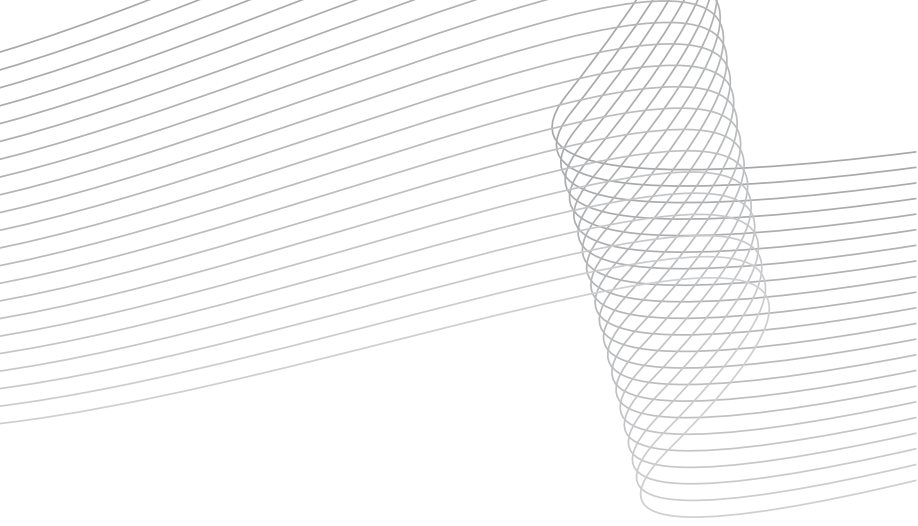
- 1. The need to include a so-called “integration clause” in the Constitution of the Republic of Serbia**, enabling the conferral of some sovereign rights of the Republic of Serbia to EU institutions. Regulations enacted by EU institutions will be directly applied in the Republic of Serbia once it joins the EU; Serbia will also be participating in the work of these institutions (its Government representatives will sit on the Council of the EU and its MEPs, elected by its citizens, in the European Parliament). The Serbian Constitution needs to be amended to



enable this. The amendment arises directly from the EU's character and order and all Member States addressed the issue by amending their Constitutions (this amendment should be made in the last stage of EU accession, after the Treaty of Accession is signed and before it is ratified by the National Assembly).

- 2. The need to provide active and passive voting rights to "EU citizens"** legally residing in Serbia's territory at local and European Parliament elections (Serbian presidential and parliamentary elections will remain reserved for the nationals of the Republic of Serbia). These voting rights will be accorded to Serbian nationals legally residing in EU territory as well. This amendment directly stems from EU regulations and all Member States addressed the issue by amending their Constitutions (this amendment should be made in the last stage of EU accession, after the Treaty of Accession is signed and before it is ratified by the National Assembly).
- 3. The need to strengthen the position of independent bodies in the Republic of Serbia.** Although these amendments do not arise from EU regulations and are not required under the EU legal order, they would considerably strengthen Serbia's rule of law and legal certainty, one of the fundamental principles underlying the European Union. (Although these amendments are not stipulated by other activities or Action Plans, it would be best to enact them the very first time the Constitution is amended, given the above-mentioned benefits they would bring the Republic of Serbia and its citizens.)
- 4. The need to boost constitutional guarantees of judicial independence in Serbia as provided for by the Chapter 23 Action Plan** The publication includes a policy paper outlining our view of the direction of the amendments that need to be made. EMinS has been participating actively in the public debate on this issue organised by the Justice Ministry and the Government Office for Cooperation with Civil Society (the amendments ought to be made within the timeframe set out in the Chapter 23 Action Plan).
- 5. The need to amend the provisions on the constitutional amendment procedure.** In our view, the valid constitutional amendment procedure is overly rigid: it requires that referendums be called on amendments to nearly all sections of the Constitution and renders its alignment with social changes extremely difficult. These provisions also need to be amended in view of the likelihood that Serbia will need to make further amendments to its Constitution once it joins the EU; under the current procedure, Serbia will have to organise a referendum on every amendment caused by a change in the EU. (Although the timeframe for these amendments is not stipulated by or linked to other activities or Action Plans, from the viewpoint of the goals they will achieve, it would be best to enact them the very first time the Constitution is amended, i.e. when the provisions on the judiciary are changed).

The EMinS Research Forum has prepared a number of amendments to the Constitution and policy papers explaining each of them. Several authors were involved in drafting the policy papers. In addition, consultations were held with a large number of public officials and experts. We take this opportunity to thank them for their advice and assistance. The last part of the publication provides information on the project "Changing the Constitution on the Way to the European Union", financially supported by the Embassy of the Kingdom of the Netherlands in Serbia within the Dutch Ministry of Foreign Affairs MATRA Programme, within which the papers and proposals in this publication were prepared. Part 4 also provides an overview of EMinS' engagement in this area to date.



## **Part 2**

# **Constitutional Amendments Proposed by the European Movement in Serbia Research Forum\***

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\* The proposed amendments are listed in the same order as the Articles of the Constitution they concern and are italicised.



- 1. Proposal to include a new Article 16a after Article 16 of the Constitution** (International Relations) governing the Republic of Serbia's accession to the EU and its sovereignty within the EU (this amendment ought to be enacted in the last stage of EU accession, after the Treaty of Accession is signed and before it is ratified by the National Assembly)

**Text of Article 16a of the Constitution:**

**Article 16a**

*Pursuant to the Treaty of Accession ratified by a two-thirds majority vote of National Assembly deputies, the Republic of Serbia may confer the exercise of part of its sovereign rights to international organisations, established by states that freely decided to exercise some of their sovereign rights in common and based on the respect for human rights and fundamental freedoms, democracy and the principle of rule of law (plus, optionally: and may join defence alliances with states founded on those values).*

*The National Assembly shall call a referendum on the Treaty of Accession prior to its ratification. The proposal shall be adopted if it wins the majority of votes cast by the citizens of the Republic of Serbia at the referendum. The result shall be binding on the National Assembly.*

*Legal acts adopted within international organisations, to which the Republic of Serbia has conferred the exercise of part of its sovereign rights, shall apply in the Republic of Serbia in accordance with the legal orders of such organisations.*

*The Government shall without delay notify the National Assembly of the draft legal acts and decisions of international organisations, to which the Republic of Serbia conferred the exercise of part of its sovereign rights, during the process of their adoption, and of its activities.*

*The relationship between the National Assembly and the Government on issues referred to in the previous paragraph shall be governed by a law adopted by a two-thirds majority vote of National Assembly deputies.*

- 2. Proposal to amend Articles 21, 42 and 51 of the Constitution**, to regulate the positions of the Commissioner for the Protection of Equality and the Commissioner for Information of Public Importance and Personal Data Protection

**Text of amended Article 21 of the Constitution:**

**Prohibition of Discrimination**

**Article 21**

All are equal before the Constitution and law.

Everyone shall have the right to equal legal protection, without discrimination.

All direct or indirect discrimination based on any grounds, particularly on race, sex, national origin, social origin, birth, religion, political or other opinion, property status, culture, language, age, mental or physical disability shall be prohibited.

Special measures which the Republic of Serbia may introduce to achieve full equality of individuals or group of individuals in a substantially unequal position compared to other citizens shall not be deemed discrimination.

*Equality protection duties shall be performed by the Commissioner for the Protection of Equality, as an independent and autonomous state body appointed and dismissed by the National Assembly. The Commissioner for the Protection of Equality shall be charged with preventing all types, forms and cases of discrimination and with protecting the equality of natural and legal persons. The Commissioner for the Protection of Equality shall enjoy immunity accorded to people's deputies, which shall be decided on by the National Assembly.*

*The Law on the Commissioner for the Protection of Equality shall be enacted.*

#### **Text of Amended Article 42 of the Constitution:**

##### ***Protection of Personal Data***

##### ***Article 42***

Protection of personal data shall be guaranteed.

Collecting, keeping, processing and using of personal data shall be regulated by the law.

Use of personal data for any the purpose other the one were collected for shall be prohibited and punishable in accordance with the law, unless this is necessary to conduct criminal proceedings or protect safety of the Republic of Serbia, in a manner stipulated by the law.

Everyone shall have the right to be informed about personal data collected about him, in accordance with the law, and the right to court protection in case of their abuse.

*Personal data protection duties shall be performed by the Commissioner for Information of Public Importance and Personal Data Protection, as an independent and autonomous state body appointed and dismissed by the National Assembly. The Commissioner for Information of Public Importance and Personal Data Protection shall enjoy immunity accorded to people's deputies, which shall be decided on by the National Assembly.*

*The Law on the Commissioner for Information of Public Importance and Personal Data Protection shall be enacted.*

#### **Text of Amended Article 51 of the Constitution:**

##### ***Right to Information***

##### ***Article 51***

Everyone shall have the right to be informed accurately, fully and timely about issues of public importance. The media shall have the obligation to respect this right.

Everyone shall have the right to access information kept by state bodies and organisations with delegated public powers, in accordance with the law.

*The Commissioner for Information of Public Importance and Personal Data Protection, as an independent and autonomous state body appointed and dismissed by the National Assembly, shall be charged with the enforcement of and respect for the guaranteed right of access to information of public importance. The Commissioner for Information of Public Importance and Personal Data Pro-*

*tection shall enjoy immunity accorded to people's deputies, which shall be decided on by the National Assembly.*

*The Law on the Commissioner for Information of Public Importance and Personal Data Protection shall be enacted.*

**3. Proposal to amend Article 52 of the Constitution, by including a new paragraph, Paragraph 2,** on the active and passive voting rights of "EU citizens" at local and European Parliament elections in the Republic of Serbia: (this amendment ought to be enacted in the last stage of EU accession, after the Treaty of Accession is signed and before it is ratified by the National Assembly).

**Text of Amended Article 52 of the Constitution:**

**Article 52**

1. Every citizen of age and working ability of the Republic of Serbia shall have the right to vote and be elected.
2. *European Union citizens shall also be entitled to vote and be elected at European Parliament and local elections pursuant to the law and the EU *acquis communautaire*.*
3. Suffrage shall be universal and equal for all, the elections shall be free and direct and voting is carried out by secret ballot in person.
4. Election right shall be protected by the law and in accordance with the law.

**4. Amendment to Article 203 of the Constitution** simplifying the constitutional amendment procedure:

**Text of amended Article 203 of 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 all people's deputies.*

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

*An act amending the Constitution shall be drafted upon the completion of the public debate.*

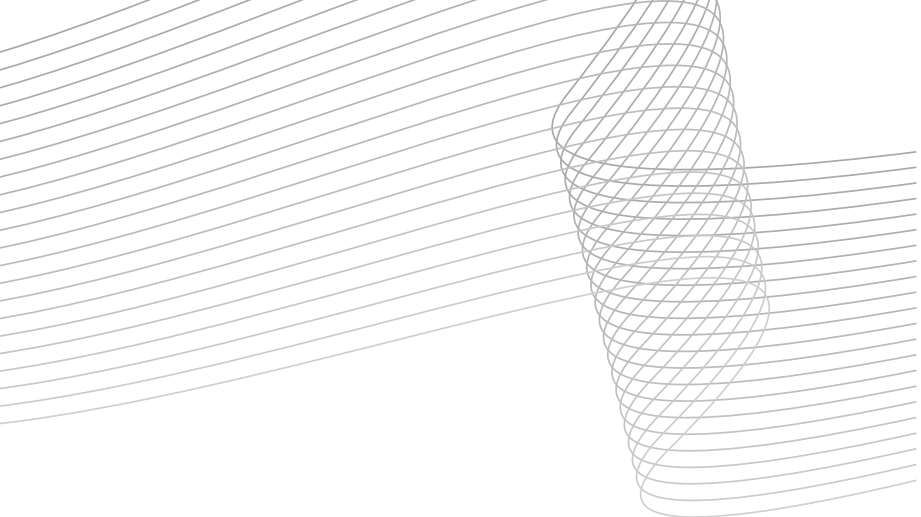
*The National Assembly shall adopt the act amending the Constitution by a two-thirds majority of all people's deputies.*

*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 all people's deputies in the National Assembly. Pending the adoption of the separate law, constitutional amendments shall be adopted at nationwide referendums by a majority of votes cast.*

Alternatively, in the event the constitutional reform debate shows that most stakeholders are of the view that the amendment of all or specific constitutional provisions must be ratified at a referendum, like in other European countries, 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, the provisions of Sections 1, 2 or 9 of the Constitution are to be amended or at the request of one-third of all people's deputies.*



## **Part 3**

# **Four Policy Papers on Proposed Draft Amendments**





**Vladimir Međak\***

## **Does the Serbian Constitution Need to be Amended in the EU Accession Process?**

The Republic of Serbia has embarked on negotiations on accession to the European Union (hereinafter: *EU*). In order to join the EU, Serbia has to fulfil the so-called Copenhagen criteria all Member States have to satisfy. Under the third *Copenhagen criterion*, the member states must have the ability to take on the obligations of membership, i.e. their legislation has to be in conformity with the EU body of law (the *EU acquis*).

Conformity with the EU entails both alignment with the provisions of primary and secondary EU law and adherence to the principles underlying the EU and developed in the case law of the Court of Justice of the European Union (hereinafter: CJEU).

Over the decades, the CJEU has in its case law developed a number of principles, the most important of which, for the purpose of this Policy Paper, is that of the supremacy of EU law over the law of the Member States. The very principle of supremacy of EU law over the law of the Member States is not very disputable from their perspective, because most countries in the world recognise the supremacy of international treaties over national law. The constitutional consequences of this principle arose when, in its judgment in the case of *Internationale Handelsgesellschaft* (in 1970)<sup>1</sup>, the CJEU confirmed that Member States may not derogate from their obligations arising from EU membership by subsequent adoption of legal norms, even those constitutional in character. The CJEU thus established that the provisions of the Member States' Constitutions must be in compliance with their obligations arising from EU membership.

This view of the CJEU, coupled with the Member States' obligation to ensure the full and proper enforcement of the *EU acquis* from the moment of accession, clearly demonstrate that a state joining the EU must make sure that the provisions of its Constitution are not in contravention of the obligations it will assume when it accedes to the EU.

The Republic of Serbia is not an isolated case. Some of the countries that joined the EU in the 2004-2013 period were also under the obligation to amend their Constitutions. An analysis of their experiences indicates that candidate countries had to make two types of amendments to their Constitutions.

The first type of amendments was almost identical in all the acceding states, as they arise from the very order of the EU as an organisation and have to be made in order to enable the state to function within the EU. They include the conferral of specific decision-making powers to the EU and the issues arising from the body of rights of so-called "European citizenship".

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\* Chairman of the European Movement in Serbia Research Forum.

The second type of amendments are specific to each state and stem from the specific features of its constitutional order that are not compatible with the obligations arising from EU membership. In both cases, the candidate state needs to conform its Constitution with its membership obligations before it completes the accession talks.

According to the Serbian Constitution as it stands now, the Treaty of Accession to the EU and the obligations arising from EU membership will have to be in accordance with the Serbian Constitution for the Treaty of Accession to be ratified and enter into force. Namely, under Article 194 of the Serbian Constitution, the Constitution is the highest law of the land; ratified international treaties and generally accepted rules of international law shall be part of Serbia's legal order; and, ratified international treaties may not be in contravention of the Constitution.

However, the Republic of Serbia will be unable to complete the accession talks and sign the Treaty of Accession unless it aligns its Constitution with its EU membership obligations or, - if such alignment is impossible before it signs the Treaty of Accession due to the character of the amendment - unless it binds itself to do so before it becomes a member. These latter amendments are made in the period between the completion of the talks or signing of the Treaty of Accession and the date of accession. This period ordinarily suffices to implement all the final activities agreed on during the negotiations, primarily for the ratification of the Treaty of Accession by Serbia and all EU Member States, and usually lasts around two years, from the day a state closes the last chapter, i.e. completes the negotiations, to the day it accedes to the EU.

Specific obligations arising from EU accession are clearly not in conformity with the Serbian Constitution. Given that the EU membership obligations are well known, the Constitution will have to undergo specific amendments at one point.

The purpose of this Policy Paper is to identify the requisite and potential constitutional amendments to be taken in the EU accession process. It aims to serve as a basis for initiating a debate on this topic and proposes two draft amendments that may serve as a starting point in the expert debate on this topic. Such a debate needs to be launched as soon as possible, with a view to dispelling the dilemmas about whether Serbia will preserve its sovereignty once it joins the EU already in the early stages of the negotiations. Furthermore, the launch of a public debate will provide enough time to achieve consensus on these issues, as well as on the very text of the constitutional amendments, thereby avoiding the negative experiences during the adoption of the 2006 Constitution, namely lack of transparency and public debate.

The Policy Paper focuses on the amendments to the Constitution required in the EU accession process, while the requisite constitutional amendments in general have been elaborated in prior analyses of the European Movement in Serbia.<sup>2</sup> This Policy Paper is based on currently available information but it is possible that other issues requiring constitutional interventions will arise during the accession talks, given that the negotiations are at a relatively early stage.

The constitutional amendments required within the EU accession process can be divided into the following four groups:

Regular, ordinary amendments to the Constitution required within the EU accession process:

- a) Amendments arising from the need to regulate the conferral of the exercise of the part of Serbia's sovereign rights to the EU and the relationship between EU and national law (the so-called integration clause),
- b) Amendments required to ensure the full enforcement of rights arising from "European citizenship" in Serbia,

Amendments arising from Serbia's specificities already mentioned in accession documents:

- a) Amendments required to ensure the full independence of the judiciary, which has been assessed as in need of further strengthening in the accession talks held to date,
- b) Potential amendments to reinforce the realisation of national minority rights in Serbia.

Amendments to the Serbia Constitution, which may be required as a consequence of the top-level dialogue on the normalisation of relations between Belgrade and Priština, are another category of issues to be borne in mind, given that, under the EU Negotiating Framework for Serbia, such a dialogue is to lead to the “*comprehensive normalisation of relations between Kosovo and Serbia, in the form of a legally binding agreement by the end of Serbia’s accession negotiations.*”<sup>3</sup> The necessity of these amendments to the Constitution is uncertain at the moment.

The Policy Paper also reviews the dynamic of amending the Constitution and the issue of a referendum on Serbia’s accession to the EU.

### ***Integration Clause***

By acceding to the EU, the Republic of Serbia will accept the adoption of legally binding acts by the EU authorities that will be directly enforced in its territory. Serbia will participate in the adoption of such acts like all other EU Member States. Furthermore, under the EU legal order, the EU *acquis* has supremacy over national law.

Article 98 of the Constitution clearly lays down that the National Assembly shall be the supreme representative body and holder of constitutional and legislative power in the Republic of Serbia. Article 99(7) of the Constitution on the Assembly’s powers states that the National Assembly shall “*enact laws and other general acts within the competence of the Republic of Serbia*”. These provisions explicitly specify which authority may adopt laws in Serbia, leaving no room for any dilemmas or interpretations – only the National Assembly is entitled to enact them. Therefore, these two articles do not allow any other body to enact laws or other legal acts that will be enforced in the territory of the Republic of Serbia and binding on its citizens.

By acceding to the EU, a Member State agrees that legally binding acts (regulations), which are not adopted or ratified by its parliament or introduced in its national legal system by any other legal act, shall apply and be enforced in its territory.<sup>4</sup> This actually distinguishes the EU from other international organisations, rendering it a supranational entity. By signing and ratifying the Treaty of Accession to the EU, Serbia will agree to the adoption of legally binding acts - that will also be legally binding on Serbia - by EU authorities in accordance with the procedures laid down in the Treaty on European Union (hereinafter: *TEU*) and the Treaty on the Functioning of the European Union (hereinafter: *TFEU*) and within the competences conferred to the EU.<sup>5</sup> The representatives of the Republic of Serbia will, of course, take part in the work of the EU authorities enacting such regulations.

By acceding to the EU, a state accepts the principles of the supremacy of EU law over national law, since this principle was established by the CJEU. In view of the clear hierarchy of norms defined in the Constitution<sup>6</sup> and the principle of supremacy of EU law, the Constitution needs to clearly define the relationship between the two legal orders, which are to function in as a single one in Serbia after it joins the EU. The definition of this relationship in the Constitution would eliminate numerous dilemmas regarding the enforcement of EU law in the Republic of Serbia, especially in the first few post-accession years, until the national system grows accustomed to the new environment.

Therefore, the integration clause governs the exercise of sovereign rights, which includes the adoption of legally binding acts that will apply in Serbia upon its accession and which will be adopted by EU institutions in the work of which Serbia, too, will participate. The common denominator for most constitutional provisions on this issue in the EU Member States is that they mention the transfer/ conferral of the *exercise of part of sovereign rights*.<sup>7</sup> Therefore, not the conferral of sovereign rights as such but of the exercise of *part of the sovereign rights* is at issue.<sup>8</sup> This ensures the state’s sovereignty as it remains the holder of sovereignty, having conferred the exercise of part of it to the EU. For instance, the UK, which voted for leaving the EU at *Brexit*, will reassume all the rights it had conferred

to the EU.<sup>9</sup> In addition, the integration clause needs to specify the supremacy of the EU *acquis* over the national legal order, in order to avoid different interpretations of this relationship in the future.

The integration clause needs to be inserted after Article 16 of the Constitution (International Relations), as a new Article 16a, since it will govern the issue of Serbia's accession to the EU and its sovereignty within the EU.

The integration clause should be worded as follows:

*Pursuant to the Treaty of Accession ratified by a two-thirds majority vote of all National Assembly deputies, the Republic of Serbia may confer (alternative: transfer) the exercise of part of its sovereign rights to international organisations, established by states that freely decided to exercise some of their sovereign rights in common and based on the respect for human rights and fundamental freedoms, democracy and the principle of rule of law (plus, optionally: and may join defence alliances with states founded on those values).*

*The National Assembly shall call a referendum on the Treaty of Accession prior to its ratification. The proposal shall be adopted if it wins the majority of votes of the citizens of the Republic of Serbia who voted. The result shall be binding on the National Assembly.*

*Legal acts adopted within international organisations, to which the Republic of Serbia has conferred (alternative: transferred) the exercise of part of its sovereign rights, shall apply in the Republic of Serbia in accordance with the legal orders of such organisations (alternative: shall have supremacy over national general legal acts).*

*The Government shall without delay notify the National Assembly of the draft legal acts and decisions of international organisations, to which the Republic of Serbia conferred the exercise of part of its sovereign rights, during the process of their adoption, and of its activities.*

*The relationship between the National Assembly and the Government on issues referred to in the previous paragraph shall be governed by a law adopted by a two-thirds majority vote of National Assembly deputies.<sup>10</sup>*

The integration clause can also be used to define additional issues of relevance to accession and/or future membership, such as:

- a) The majority (simple or qualified) in the National Assembly required for the ratification of the Treaty of Accession,<sup>11</sup>
- b) The holding of a referendum on EU accession,
- c) The post-accession relationship between the Government and National Assembly with respect to the administration of EU affairs, et al.

In addition to EU accession requirements, the integration clause in Article 3a of the Slovenian Constitution, for instance, also lays down the criteria for Slovenia's accession to NATO.

All these elements need to be taken into account during the formulation of this clause, which is indispensable if Serbia is to join the EU.

The content of the integration clause is relevant both in terms of regulating Serbia's relations with the EU and in terms of a debate on Serbia's preservation/loss of sovereignty upon its accession to the EU. This debate needs to be launched as soon as possible to provide the relevant experts with the opportunity to discuss the preservation/loss of sovereignty issue. On the other hand, Serbia should also initiate an expert debate on the content and scope of the integration clause as soon as possible, albeit not in a (parliamentary or presidential) election year. In view of the negative experiences with the adoption of the 2006 Constitution, this debate has to be broad and long-lasting and include the representatives of the Government, the academia and civil society, as well as Constitutional Court judges.

## ***Constitutional Amendments Prerequisite for Ensuring the Full Enforcement of “European Citizenship” Rights***

Election rights in Serbia are governed by Article 52 of the Constitution. Under this Article, all nationals of Serbia of age and possessing legal capacity are entitled to vote and be elected. The Constitution thus reserves the active and passive voting rights for Serbia’s nationals, as most constitutions do. This norm is clear and unambiguous, not leaving any room for interpretations on who is entitled to vote at elections in Serbia.

The rights of Serbia’s nationals will, on the one hand, expand on the country’s accession to the EU, since they will be entitled to vote for their representatives in and be elected to the European Parliament. On the other hand, Serbia will assume the obligation to ensure the right the EU, as an organisation, grants its “citizens”. “EU citizens” denote all nationals of all EU member states, whether or not they live in their country of nationality. The rights emanating from “EU citizenship” are enjoyed by all nationals of EU Member States, in addition to the rights they have on the basis of their nationality. These supplementary rights are granted and guaranteed by the EU itself.<sup>12</sup>

The “EU citizenship” body of rights entails, *inter alia*, the right of “EU citizens” to vote and to stand as candidates in elections to the European Parliament and at municipal elections in the Member States they are residing in, pursuant to Article 22 of the TEU. On accession, Serbia will assume the obligation to grant “EU citizens” the same rights enjoyed by its nationals - to vote and stand as candidates in these elections. Of course, it goes without saying that all Serbian nationals lawfully residing in any EU Member State will also be granted these rights once Serbia joins the EU. The large number of Serbian nationals living in EU Member States testifies to the importance of this right for the Republic of Serbia and its nationals.

To sum up, Serbia will have to grant “EU citizens”, who are not nationals of Serbia and are lawfully residing in it, the active and passive voting rights at European Parliament and municipal elections.

It needs to be stressed that the parliamentary and presidential elections will remain reserved for nationals of Serbia.

Serbia will have to align its legislation with the following two EU regulations enacted pursuant to Article 22 of the TEU during the accession negotiations:

- a) Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (with subsequent amendments thereto),
- and
- b) Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (with subsequent amendments thereto).

Serbia will have to adopt a law governing the active and passive rights to vote at European Parliament elections of both Serbian nationals and “EU citizens” since this is a completely new area for Serbia and the matter is not governed by Serbian law. Although Serbian nationals will not be able to take part in European Parliament elections at least not until 2024, this law will have to be adopted earlier, for the accession negotiations to be completed. As far as municipal elections are concerned, amendments will have to be made to the Local Election Law, governing this matter in the Republic of Serbia.

The adoption of this legislation requires the amendment of Article 52 of the Constitution.

Active and passive rights of EU citizens can be introduced in the Constitution by adding the following (italicised) paragraph 2 to Article 52:

- “1. All nationals of Serbia of age and possessing legal capacity are entitled to vote and be elected.
2. *European Union citizens shall also be entitled to vote and stand as candidates in elections to the European Parliament and at municipal elections, pursuant to the law and EU acquis.*
3. Suffrage shall be universal and equal for all, elections shall be free and direct and voting shall be carried out by secret ballot and in person.
4. Suffrage shall be protected by law and in accordance with the law.”

This amendment is indisputable, wherefore it is unnecessary to conduct a separate public debate on it. This issue can be addressed during the general debate on EU accession at the end of the negotiations, with a view to finding the optimal solution.

### ***Constitutional Amendments Prerequisite for Ensuring Full Judicial Independence***

In its 2007 opinion on Serbia’s 2006 Constitution, the CoE Venice Commission voiced a number of criticisms about the organisation of the judicial authorities in the Republic of Serbia, primarily with regard to ensuring the judiciary’s independence from the executive and legislative authorities.

Although voiced by a Council of Europe commission, these assessments were included in the European Commission’s Screening Report on Chapter 23 – Judiciary and Fundamental Rights. The EC said that Serbia should make a thorough analysis of the existing solutions/possible amendments to the Constitution bearing in mind the Venice Commission recommendations and European standards, ensuring independence and accountability of the judiciary. Changes should include, *inter alia*, the following points: The system for the recruitment, selection, appointment, transfer and dismissal of judges, presidents of Courts, and prosecutors should be independent of political influence; the roles and compositions of the High Judicial Council and the State Prosecutorial Council, without involvement of the National Assembly (unless solely declaratory), etc.

In short, these changes aim at eliminating the influence of the executive and legislative authorities on the judiciary and ensuring its full independence. The following provisions of the Constitution met with the greatest criticism: Article 147, under which first-time judges shall be elected by the National Assembly; Article 153, under which the National Assembly shall elect also the members of the High Judicial Council charged with nominating the judges to be elected by the National Assembly; and Article 164, under which the National Assembly shall elect also the members of the State Prosecutorial Council.

The EU conditioned the opening of talks on Chapter 23 by Serbia’s adoption of an Action Plan setting out the activities aimed at eliminating the deficiencies identified during the screening process.

On 23 October 2015, the Serbian Government adopted the Chapter 23 Action Plan, in which it addressed the criticisms in the Screening Report, and forwarded it to the EU.<sup>13</sup>

A number of measures aimed at rectifying the identified shortcomings and requiring the amendment of the Serbian Constitution are set out in Section 1.1.1 on judicial independence of the Action Plan. They involve the drafting of the amendments, a public debate on the draft amendments and their referral to the Venice Commission for comment. All these activities are to be implemented in 2016.

Under the Action Plan, the requisite constitutional amendments are to be adopted by the end of 2017. This will be followed by aligning all the relevant judicial laws with the amended Constitution.

The Action Plan demonstrates the Government's intention to address the issue of judicial independence in accordance with the recommendations of the Venice Commission and Screening Report assessments at the start of the accession negotiations.

Since the Action Plan provides for a public debate on this subject, civil society and the academia, as well as all other stakeholders, need to take an active part in such a debate.

### ***Potential Amendments to Strengthen the Realisation of National Minority Rights in Serbia***

Although the Serbian Constitution guarantees national minority rights in accordance with all valid international and European standards and documents, and even goes beyond the protection of national minorities required by these documents in some areas, the realisation of the enshrined rights calls for specific improvements.

This is why the Serbian Government adopted the Action Plan for the Realisation of National Minority Rights in the Republic of Serbia on 3 March 2016.<sup>14</sup> This document spells out the activities envisaged in the Chapter 23 Action Plan, in the section on fundamental rights and that consideration shall be given to improving the constitutional guarantees related to the realisation of national minority rights. This Action Plan mentions the possibility of amending the Constitution twice.

Firstly, the section of this Action Plan on the realisation of national minority rights on an equal footing, the development of tolerance and prevention of discrimination (Point 2.8) envisages review of the need to amend the relevant provisions of the Constitution with a view to strengthening the enforcement of affirmative measures in order to improve the equality of persons belonging to national minorities and eliminate any ambiguities on the issue in the Constitution. In its Opinion on Serbia's Constitution, the Venice Commission also questioned the clarity and precision of these provisions (Article 76 of the Constitution). If it is concluded that the provisions in this part of the Constitution need to be amended, these amendments, under this Action Plan, will be adopted together with the other amendments planned within the judicial reform, at the end of 2017.

Secondly, the section of this Action Plan on the development of efficient mechanisms for the democratic participation of national minorities in political processes (Point 7.1) envisages a legal analysis of the practices of the EU Member States in the region with a view to identifying best practices and an adequate model of minority participation in the election process and the adequate representation of national minorities in representative bodies at the national, provincial and local levels. Point 7.2. sets out that the potential models of democratic participation of national minorities, including smaller ones, in election processes guaranteeing the adequate representation of national minorities in representative bodies at the national, provincial and local levels, whilst ensuring that no room is left for any abuse of the more flexible provisions on national minority parties, will be identified on the basis of the analysis and comparative law practices. This work is to be completed in 2016. If the analyses demonstrate the need to amend the Constitution to achieve the defined goal, they can serve as the basis for amending the Constitution, as they will be forwarded to the National Assembly's Action Group for the Political System.

In the event the analyses demonstrate the need to amend the Constitution in this area, the Government should organise a comprehensive public debate in which all stakeholders should take an active part.



## Constitutional Amendments Arising as a Consequence of the Top-Level Belgrade-Priština Dialogue on the Normalisation of Relations

A top-level dialogue on the normalisation of relations between Belgrade and Priština opened in 2012. This dialogue, facilitated by the EU High Representative for Foreign Affairs and Security Policy, has been ongoing for four years now and resulted in the adoption of the First Agreement on Principles Governing the Normalisation of Relations in April 2013.

The dialogue continued after this Agreement was reached and its participants are discussing including new topics in the agenda. The dynamics of the dialogue, the issues that will be raised and how they will be regulated cannot be assessed, as they depend on numerous factors, impossible to predict at the moment.

The link between the dialogue with Priština and the EU accession talks was established in Chapter 35 – Other issues, within which the dialogue with Priština is monitored. This approach is a novel one in accession talks with the EU. The Republic of Serbia cannot make any alignment plans regarding Chapter 35 because this Chapter does not deal with the EU acquis. This is why talks on Chapter 35 opened on 14 December 2015, without Serbia submitting its negotiating position. It needs to be underlined that the talks within Chapter 35 represent exclusively a mechanism for monitoring and evaluating agreements reached in the dialogue on normalisation and that talks with the EU on Kosovo are not held within this Chapter.

The EU stated the following in paragraph 23 of its EU Negotiating Framework, presented at the first Intergovernmental Conference on the Accession of Serbia to the European Union on 21 January 2014:

*"23. The advancement of the negotiations will be guided by Serbia's progress in preparing for accession, within a framework of economic and social convergence. This progress will be measured in particular against the following requirements:*

...

- *Serbia's continued engagement, in line with the Stabilisation and Association process conditionality, towards a visible and sustainable improvement in relations with Kosovo\*\*.* This process shall ensure that both can continue on their respective European paths, while avoiding that either can block the other in these efforts and should gradually lead to the comprehensive normalisation of relations between Serbia and Kosovo, in the form of a legally binding agreement by the end of Serbia's accession negotiations, with the prospect of both being able to fully exercise their rights and fulfil their responsibilities."

It needs to be noted that it is unclear at the moment what all the parties involved in the dialogue consider under "comprehensive normalisation of relations between Serbia and Kosovo," and that this will be one of the key points in the negotiations, which cannot be elucidated at the moment. The Negotiating Framework envisages the conclusion of a "legally binding agreement" as a result of the dialogue. The question whether the Constitution will have to be amended to ensure that the results of the dialogue find their place in Serbia's constitutional order will be clearly answered only once the outcome of the dialogue, as well as the form and content of that "legally binding agreement", are known.

### ***Dynamic of Amending the Constitution***

The above text clearly indicates that the Republic of Serbia will amend its Constitution at least twice during the accession talks.

\*\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and ICJ Opinion on the Kosovo declaration of independence.

Under the Chapter 23 Action Plan, the first amendments are planned for 2017, with a view to putting in place constitutional prerequisites for ensuring judicial independence in line with the Venice Commission's recommendations and accepted European standards. Without them, further headway in talks on Chapter 23 would be brought into question, and, thus, the pace of the accession negotiations on the whole would be slowed down. As noted, consideration is also to be given to amending the Constitution under the Action Plan for the Realisation of National Minority Rights in the Republic of Serbia, and these potential amendments might be adopted at the same time as those aiming to ensure judicial independence.

The next enactment of constitutional amendments will ensue at the end of the talks, i.e. after Serbia signs the Treaty of Accession, when all the parameters according to which Serbia will be joining the EU will be known. The Constitution should then be amended by a new integration clause and provisions enabling the exercise of the rights related to "EU citizenship". These amendments are inevitable and are ordinarily adopted at the very end of the negotiating process, i.e. after the Treaty of Accession is signed and before it is ratified by the National Assembly.

Furthermore, it will be known by then what the "*comprehensive normalisation of relations between Serbia and Kosovo\*\*\* in the form of a legally binding agreement*" mentioned in the EU Negotiating Framework entails and whether that agreement will have any implications with respect to the Constitution, and which. The timing of the potential constitutional amendments arising as a consequence of the dialogue remains unknown, for now.

### ***Referendum on Serbia's Accession to the EU***

The analysis of the valid Constitution clearly shows that Serbian nationals will have to decide at a referendum whether or not Serbia will join the EU.

This view arises from Article 203 (6), of the Constitution, under which:

*"The National Assembly shall be obliged to call a national referendum on the act amending the Constitution when the amendment pertains to the Preamble of the Constitution, constitutional principles, human and minority rights and freedoms, **system of government**, proclamation of a state of war and emergency, derogation from human and minority rights in a state of emergency or war or the constitutional amendment procedure."*

Since the provisions providing for the enforcement of the EU *acquis* in Serbia will require amendments to those on the system of government in the Republic of Serbia, i.e. will derogate from the scope of Article 98, which confers legislative powers exclusively to the National Assembly, we are of the view that the constitutional amendment introducing the integration clause will require a referendum.

The Serbian Government stated the following in paragraph 35 of the Opening Statement of the Republic of Serbia<sup>15</sup> presented at the first Accession Conference on 21 January 2014: "[U]pon the signing of the Accession Treaty between the Republic of Serbia and the European Union, the final decision on the accession of the Republic of Serbia to the European Union will be made by the citizens of the Republic of Serbia at the referendum".

This Government view not only clearly indicates that a referendum will be held at the end of the talks, but its timeframe as well – after the Treaty of Accession is signed and before its ratification by the National Assembly.

Optimally, Serbia's nationals would vote both on the text of the constitutional amendments that have to be adopted to allow Serbia to join the EU and on the Treaty of Accession at the

\*\*\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and ICJ Opinion on the Kosovo declaration of independence.

referendum. In that case, provided that they uphold both the constitutional amendments and the Treaty of Accession, the former would come into force first, enabling the National Assembly to ratify the Treaty of Accession in accordance with the procedure defined in the constitutional amendments. Serbia's citizens will, in any case, clearly have the opportunity to vote "for" or "against" Serbia's accession to the EU at a referendum. To ensure they are informed of the issue(s) they will be voting on at the referendum, the Government has to continue consistently communicating the issues discussed in the negotiations to the public, thus ensuring that the citizens are adequately informed of them and with a view to mustering a high turnout at the referendum and avoiding the repetition of the Croatian scenario (where most of the citizens boycotted the referendum on accession to the EU; the turnout stood at 43.51%).<sup>16</sup> Civil society organisations involved in monitoring the accession negotiations play an important role in informing the public and in public debates on Serbia's accession to the EU.

### ***Conclusions and Recommendations***

Our analysis shows that the Republic of Serbia will have to amend its Constitution at least twice during the accession process in order to join the EU. All constitutional amendments need to undergo broadest possible public debates, officially launched by the Government, to ensure the legitimacy of those amendments and the entire accession process and thus avoid the negative experiences surrounding the adoption of the 2006 Constitution. On the other hand, stakeholders need to participate intensively in the debates once the Government launches them.

An integration clause governing the following issues of relevance to Serbia's accession to the EU needs to be inserted in the Constitution: conferral of specific powers to the EU; relationship between the national and European legal systems; the kind of majority needed in the National Assembly for the ratification of the Treaty of Accession; the relationship between the Government and National Assembly once Serbia joins the EU. This clause can be introduced by the adoption of a new Article, Article 16a of the Constitution. A public debate on this topic is indispensable, in order to dispel any dilemmas about whether Serbia will preserve its sovereignty if it joins the EU and find the optimal wordings of the constitutional amendments. Furthermore, the debate would provide the experts and other stakeholders with the opportunity to discuss whether this clause can also be used to regulate the issue of Serbia's accession to defence alliances. This debate needs to be launched as soon as possible, ideally not in election year.

The Constitution needs to provide for active and passive voting rights of "EU citizens" at European Parliament and local elections in Serbia i.e. a constitutional basis for the adoption of the relevant laws. This can be achieved by adopting the proposed amendment to Article 52 of the Constitution.

The Chapter 23 Action Plan envisages the amendment of the Constitution by end 2017, with a view to ensuring judicial independence. Civil society needs to monitor the Government's activities in this field and actively involve itself in the debate on this topic, once the Government launches it.

On the other hand, the Constitution will possibly have to be amended to strengthen the realisation of the rights of national minorities in Serbia. At present, it is impossible provide a definitive answer to the question whether the Constitution will also have to be amended to reflect the results of the top-level dialogue on the normalisation of relations between Belgrade and Priština. As potential amendments to the Constitution are at issue, civil society needs to monitor the activities in this field and actively involve itself in a public debate in case the need for adopting such amendments is identified.

Our analysis also shows that the Constitution lays down that a referendum has to be called on constitutional amendments prerequisite for Serbia's accession to the EU. The Government

has already stated its view on the need to hold a referendum in its Opening Statement at the first Intergovernmental accession conference on 21 January 2014, in which it reaffirmed that the citizens of the Republic of Serbia will have a final say on Serbia's accession to the EU at a referendum to be held after the Treaty of Accession is signed. Once the referendum on Serbia's EU membership is called, civil society organisations need to involve themselves actively in supporting the referendum and promoting Serbia's EU membership, to encourage as many citizens as possible to vote at the referendum (and avoid the low turnout, like in Croatia) and vote for Serbia's accession to the EU. Concerted civil society support will be of major relevance to mobilising the public to vote at the referendum on such an important and far-reaching decision, such as Serbia's accession to the EU.

## ENDNOTES

1. Case C-11/70 *Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, (1970), ECR 1125.
2. Generalno pitanje potrebnih izmena Ustava obrađeno je u ranijim analizama Evropskog pokreta u Srbiji, available at [www.emins.org](http://www.emins.org)
3. EU Negotiating Framework, Paragraph 23, available at <http://register.consilium.europa.eu/doc/srv?l=EN&t=PDF&gc=true&sc=false&f=AD%201%202014%20INIT>.
4. In terms of Article 99(4) of the Serbian Constitution: "The National Assembly shall... 4. Ratify international treaties when the obligation to ratify them is provided for by the law".
5. Article 2(2) of the Treaty on the Functioning of the European Union.
6. Article 194 of the Serbian Constitution.
7. Annex I lists constitutional provisions of eight states that joined the EU in the 2004-2013 period.
8. Article 3a of the Slovene Constitution refers to the **transfer** while Article 143(2) of the Croatian Constitution refers to the **conferral** of the exercise of part of their sovereign rights. Article 2 of the TFEU mentions **conferral** of competences by the Treaty on European Union.
9. The mechanism for leaving the EU is laid down in Article 50 of the Treaty on European Union.
10. The draft is modelled after the integration clause in the Slovene Constitution.
11. Under Article 105 of the Serbian Constitution, the National Assembly shall ratify international treaties by a majority vote of all deputies.
12. Apart from the voting rights, the body of "EU citizenship" rights includes prohibition of discrimination on grounds of nationality in EU territory, freedom of movement and residence, right to diplomatic or consular protection of any EU Member State in a third country, right of petition to the European Parliament and right of complaint to the European Ombudsman, communication with EU institutions in one of the official EU languages, right of access to European Parliament, Commission and Council documents under specific conditions, and right to employment in EU services.
13. Chapter 23 Action Plan, available at the Serbian Ministry of Justice website: [www.mpravde.gov.rs](http://www.mpravde.gov.rs)
14. Available at the Serbian Ministry of State Administration and Local Self-Government website: [www.mduls.gov.rs](http://www.mduls.gov.rs)
15. Available at the Serbian European Integration Office website: [http://www.seio.gov.rs/upload/documents/pristupni\\_pregovori/the\\_opening\\_statement\\_of\\_the\\_republic\\_of\\_serbia.pdf](http://www.seio.gov.rs/upload/documents/pristupni_pregovori/the_opening_statement_of_the_republic_of_serbia.pdf).
16. Data available at the website of the Croatian Ministry of Foreign Affairs and European Integration: <http://www.mvep.hr>

**Tara Tepavac\***

## **More than Hollow Words: Independent Bodies in Constitutional Revision**

Despite its potential to mark the ultimate break with the tradition of adopting constitutions in the absence of public consultations and broader social consensus, the 2006 Constitution of the Republic of Serbia was adopted in a rush that irreparably undermined its legitimacy. After a hasty drafting process, brief negotiations among the party structures and in the total absence of public and parliamentary debate, the deputies (MPs) of the National Assembly of the Republic of Serbia (hereinafter: *National assembly*) adopted the text of the new Constitution, drawn up by the representatives of a narrow circle of the leading parties, rather than the competent parliamentary Committee for Constitutional Issues and Legislation.<sup>1</sup> Apart from the problem of its legitimacy, the experts and the public were soon prompted to raise the issue of amending the Constitution for a number of reasons, from the deficiencies of its content and dissatisfaction with its inconsistent provisions, to the amendments that must be made within Serbia's process of accession to the European Union (hereinafter: *EU*). In the EU accession process, constitutional revision is one of the prerequisites for the ratification and entry into force of the Treaty of Accession to the EU and the obligations arising from EU membership. Consequently, it is a step that must be made for Serbia's progress towards EU membership.<sup>2</sup> Given that the revision of the Constitution is now a certainty, the forthcoming constitutional revision process ought to be used to make the requisite amendments to the constitutional provisions in order to considerably improve the state's legal and political system. These amendments should definitely include an emphasis defining the position and influence of independent bodies, as one of the key components of a stable and efficient democratic system developed on the principles of rule of law and good governance.

Independent bodies, which are often also referred to as the *fourth branch of power*, not only protect the citizens and their rights, but provide a strong mechanism for the effective oversight of the executive as well. They are the National Assembly's key partners in exercising oversight of the executive and controlling the work of institutions, bodies and organisations exercising public authority. Efficient and effective work of independent bodies is prerequisite for ensuring balance among the holders of state power. However, previous research conducted by the European Movement in Serbia indicates that independent bodies still face obstacles and problems directly degrading their status and influence.<sup>3</sup> Hampering the effective work of independent bodies affects the overall work of democratic institutions in Serbia, starting, for instance, with the National Assembly. The activities of the National Assembly have been reduced to the sheer formal role of "voting machine", due to the concentration of power in the hands of the executive and the party structures' excessive influence on the MPs. Functional oversight of the work of the executive is prerequisite for the separation and balance of power and, ensuring the rule of law as one of the key conditions for Serbia's progress in the EU integration process.

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Defining the position and remit of independent bodies guaranteeing the respect for fundamental rights in the Constitution itself will create the prerequisite necessary for strengthening their position, authority and influence. Strong, stable and effective independent bodies, the opinions and recommendations of which are respected and effectively implemented, are key guarantors of the protection of human and minority rights proclaimed in the Constitution. At the same time, they are indispensable for the establishment of stable and functional democratic institutions, which guarantee and respect the separation and balance of power. Precisely these prerequisites form the pillars of the rule of law and their fulfilment is the key step for Serbia's progress in the EU integration process. In this regard, the European Commission's Serbia 2016 Report reiterates the need to further enhance the "effective oversight of the executive", as well improve the "understanding and acknowledgement of the remit of independent bodies".<sup>4</sup>

It should be noted that the major differences in the scopes and remits of the independent bodies impede us from defining them as a group in the Constitution, as for instance, formally defining them as the *fourth branch of power*. Yet, constitutional regulation of their stable position and roles would put in place the prerequisites they need for their proper functioning. On the other hand, the group of independent bodies in charge of the protection of human rights and fight against discrimination definitely warrants a place of its own in the Constitution, given their indispensable importance for protecting the guaranteed rights of the citizens, as well as the principles of the rule of law as the fundamental prerequisite of the Constitution. This Policy Brief thus focuses precisely on this group of independent bodies: the *Protector of Citizens* (hereinafter: *Ombudsman*), the *Commissioner for Information of Public Importance and Personal Data Protection* (hereinafter: *Commissioner for Information and Data Protection* and the *Commissioner for the Protection of Equality* (hereinafter: *Commissioner for Equality*).

This Policy Brief aims to identify the reasons for the constitutional regulation of the position and functions of these independent bodies, the potential advantages and any disadvantages of constitutionally defining them in the context of Serbia's legal and political system, and to offer recommendations for regulating the position and functions of these independent authorities within the forthcoming revision of the Constitution. Drawing on its findings, the Policy Brief also aims to open a debate on the constitutional regulation of the principles underlying the establishment and work of other independent bodies.

### ***Position of Independent Bodies in Serbia: Their Stability and Effectiveness in Practice***

There are three independent bodies in Serbia's legal and political system active in the field of protecting human and minority rights and the prohibition of discrimination: the *Ombudsman*, the *Commissioner for Information and Data Protection* and the *Commissioner for Equality*. Apart from their role of guarantor of fundamental rights and freedoms, these institutions are also an instrument for overseeing the work of the executive. Serbia, as a representative democracy, is based on the principles of the rule of law and separation of powers, in which the people have their representatives in the National Assembly to which the Government is to be accountable. The Constitution defines the rule of law as one of its basic principles and as "a fundamental prerequisite for the Constitution which is based on inalienable human rights" (Article 3) and states that the "relation between three branches of power shall be based on balance and mutual control" (Article 4).<sup>5</sup> In such a system, a functional National Assembly and its efficient and effective cooperation with the independent bodies is the main prerequisite for political and legal accountability.

The independent bodies are, therefore, the National Assembly's partner and complement its oversight role, regularly alerting to the deficiencies in the work of the state institutions, bodies

and organisations exercising public authority and issuing recommendations on how they can improve their work, as well as the quality of regulations. Although the institutions of the *Ombudsman*, *Commissioner for Information and Data Protection* and *Commissioner for Equality* have over the past few years made significant achievements and progress in ensuring the protection of human rights and prohibition of discrimination, practice has shown that there are still systemic problems and obstacles impeding their work.<sup>6</sup> Even the National Assembly's cooperation with independent bodies is characterised by numerous shortcomings, from procedural non-compliance and delays to the lack of respect for and inappropriate attitude towards their representatives, directly undermining both their personal integrity, legitimacy and authority and those of the institutions they represent. The National Assembly often does not review or discuss the independent bodies' reports or adopt conclusions based on their reports after they are debated in the competent committees of the National Assembly.<sup>7</sup>

The purpose of the independent bodies' oversight has been rendered senseless by these routine delays, which recurred in 2016, when the National Assembly failed to review the 2015 annual reports of the *Ombudsman*, *Commissioner for Information and Personal Data Protection* and *Commissioner for Equality*, which they submitted back in March 2016.<sup>8</sup> The independent bodies' reports are their key instrument given that, in the context of their limited powers, their effectiveness greatly depends on their opportunity to alert the public and the parliament to the citizens' complaints precisely through them.<sup>9</sup> This is why the National Assembly's conclusions on the reports are necessary for the enforcement of their recommendations, specifically, for eliminating the shortcomings and improving the work of state authorities monitored and overseen by the parliament. Therefore, the National Assembly's habitual delays in adopting these reports gravely degrade the position and influence of the independent bodies as well as of the National Assembly itself, undermining effective oversight and thus, the balance of power.

The independent bodies' recommendations and opinions on draft regulations have often been ignored. The executive has also gotten into the habit of greatly delaying its adoption of the independent bodies' recommendations and its implementation of the conclusions adopted by the National Assembly based on their reports. For instance, the Government still has not adopted the *Action Plan for the Implementation of the Personal Data Protection Strategy*, pending since 2010, or formed a "special working body" envisaged in the *Personal Data Protection Strategy* it had adopted that summer.<sup>10</sup> The Strategy has in the meantime become outdated, especially with respect to the international standards set within the Serbia-EU accession negotiations. The need to enact a new *Personal Data Protection Law* was recognised back in 2014, given that the valid Law is not in line with the current standards enshrined in European documents and does not provide for the unimpeded enjoyment of this right. The Government failed to meet the deadline for the adoption of the new law, by the end of 2015, or take into consideration the Model drafted by the Commissioner, although it had itself set this goal in its Chapter 23 Action Plan.<sup>11</sup>

The Government's attitude towards the independent bodies' recommendations and National Assembly's binding conclusions is unimaginable in functional democracies. Moreover, the practice of non-accountability for violations of the *Free Access to Information Law* has entrenched itself. The problems arising from the Government's failure to take coercive measures to ensure the enforcement of the rulings of the *Commissioner for Information and Data Protection* culminated in 2016, when the Commissioner was forced to seek the Government's assistance as many as 61 times. The Government, however, failed to fulfil its obligation even once.<sup>12</sup> Moreover, the state's activities in the area of personal data protection "mostly come down to those undertaken by the Commissioner" which "cannot compensate for what the line Ministries, the Government and the National Assembly are supposed to do".<sup>13</sup> What is particularly concerning is that, rather than acting on the criminal reports filed by the Commissioner, the Public Prosecutor's Office, which ought to be impartial and autonomous from the executive, filed "more lawsuits seeking the annulment of the Commissioner's rulings last year than in the previous 11 years altogether".<sup>14</sup> In March 2017, the Higher Public Prosecutor in Belgrade sent the Commissioner

a letter that “contains insinuations without any factual or legal grounds that the Commissioner has allegedly committed a criminal offense of some sort, it is not clear which particular one”, that objectively “cannot be understood otherwise than as a threat”.<sup>15</sup>

Not only does such an attitude towards independent bodies practically “call for” violations of the law; it directly undermines the capacity of their sanctions and degrades their effectiveness in protecting human and minority rights. The position and influence of the independent bodies need to be systematically strengthened in order to overcome the obstacles and limitations standing in their way and enable them to effectively perform their functions. Furthermore, the authority and influence of these bodies cannot be strengthened unless the position and authority of the National Assembly itself is consolidated and their mutual cooperation is improved. Defining the position and remits of the *Commissioner for Information and Data Protection* and the *Commissioner for Equality* in the Constitution in the framework of the upcoming revision process, accompanied by an open public debate and broad public consensus, is a crucial step towards strengthening the legitimacy, authority and influence of these bodies.

### ***Why do the independent bodies need to be defined in the Constitution?***

The *Ombudsman* is the only independent body in charge of human rights protection that is defined and regulated by the Constitution. Article 137 of the Constitution, however, lays down that particular public powers may be delegated by law also to “specific bodies through which they perform regulatory function in particular fields or affairs”.<sup>16</sup> Given that European states have traditionally established and regulated the work of independent authorities by law, the question arises why Serbia needs to establish them in its Constitution.

The reason for defining the independent bodies in the Constitution arises from the need to put in place the main prerequisites for their effective work and influence, which are long established in the functional democratic orders of Western European states. The extent to which independent bodies can actually effectively contribute to guaranteeing the protection of human rights and overseeing the executive depends on their independence, powers and influence. In view of the shortcomings and obstacles all three independent bodies have been facing in practice, their establishment by the Constitution is one of the key steps towards improving their position, authority and effectiveness. This will also strengthen the guarantees of constitutionally proclaimed values, as an important step in resolving the problem arising from the declarative character of the Constitution, and ensuring its enforcement as the highest law of the land setting out the norms of the state’s legal and political order and guaranteeing its citizens the respect for the rule of law and common values.

Although the Western European states differently regulate the legal and political framework in which independent bodies operate, these states function in quite a different context, involving stable and functional institutions, as well as the existence of a democratic tradition and political culture. In such systems, the independence, stability and authority of the independent bodies is respected and their opinions and recommendations are heeded and effectively enforced in practice. Therefore, the guarantees for the protection of citizens’ rights are secured in practice, as is the functional separation and balance of power, the pillars of the rule of law. On the other hand, the negative trend of declining democracy has continued in Serbia. In its Nations in Transit report, Freedom House qualified Serbia as a “semi-consolidated democracy” with an average rating of 3.75 out of 7 in 2016, the lowest since 2005.<sup>17</sup> Serbia was qualified as a “flawed” democracy with an average rating of 6.51 on the 2016 Democracy Index, whereas Western European democracies averaged between 8 and 10.<sup>18</sup> In view of the absence of a universal “one size fits all” solution guaranteeing prerequisites for the efficient and effective work of independent bodies due to the specific features of each state, a legal and political framework suiting Serbia’s context needs to be designed.



At first glance, the protection of human and minority rights and freedoms is guaranteed by a considerable number of Articles of the Constitution (as many as 70 out of 206) and “[T]heir content is at least in line with European standards and goes in some respect even beyond them”.<sup>19</sup> However, the improvement in human rights protection is undermined by the vague wording of individual provisions not satisfying European standards and the selective enforcement of the law in practice, coupled with the lack of reliable, clear and effective guarantees that would additionally strengthen the constitutional values. A survey entitled *Why the Constitution Has to Be Changed* showed that the citizens and the elites largely agreed in their assessments of the constitutional provisions that needed to be amended. Indeed, the respondents singled out as the chief problems the declarative character of the Constitution and lack of guarantees for the values it enshrines, notably human rights, including the right to privacy, equality of religious communities and minorities and gender equality.<sup>20</sup> The institutions of the *Commissioner for Information and Data Protection* and the *Commissioner for Equality* are guarantees for the protection of these rights.

Such guarantees are particularly important in the context of the disturbing non-functionality of the National Assembly, whose role has degraded to that of a sheer “voting machine” acting on the will of the party leadership and dominated by the Government. The manner in which the latest in the series of Serbia’s Constitutions was adopted in 2006 confirmed that such practices have entrenched themselves in Serbia, building a façade of declarative rule of law and simulation of *checks and balances*. Even the MPs themselves do not consider the existing parliamentary oversight mechanisms strong or efficient, and perceive the National Assembly’s role predominantly through the prism of their party affiliation.<sup>21</sup> According to a recent survey, the MPs believe that they have much less political influence than the other state actors, including independent bodies. Only 22% of the MPs singled the latter out as the most relevant partners that could contribute to the improvement of parliamentary oversight. In such a context, in which power is concentrated in the hands of the executive and there is a risk of an excessive influence of political parties since the mandate of MPs is made dependent on the “will and whim” of the political parties<sup>22</sup> the existence and regulation of independent bodies protecting citizens’ rights is in practice left to the political will of the ruling parties and thus brought into question.

The experiences of European countries show that independence, continuity and stability of the independent bodies must be secured in order to build their authority, as well as the political culture in which their opinions and recommendations will be respected, and that, along with their efficient cooperation with the National Assembly, such authority is one of the key prerequisites for their effectiveness. Defining the institutions of the *Commissioner for Information and Data Protection* and *Commissioner for Equality* in the Constitution is the first step towards putting such prerequisites in place. This necessary, although insufficient, step will facilitate the upcoming long-lasting process of changing the mind-set and approach to compliance with the Constitution and the set legal and political framework, particularly among the executive.

### ***Defining Independent Bodies in the Constitution: Limitations and Advantages***

The resistance to defining independent bodies in the Constitution stems from several fears and reservations. The first is based on the presumption that independent oversight institutions “tend to develop an existence of their own” and that, where there is an excessive number of them, they “can ultimately lead to the blurring of the actual accountability”<sup>23</sup> primarily of the government to the parliament and then the very parliament, which should be performing its oversight function effectively. Namely, if the accountability for oversight is delegated to the independent bodies, “the parliament may feel relieved of accountability”,<sup>24</sup> wherefore the main part of the oversight duties should remain in the hands of the National Assembly. There is also

hesitation about the potential overlap of oversight functions that may “ultimately result in a major lack of accountability for performing or not performing oversight, and even in manipulating decisions.”<sup>25</sup> Yet another fear is based on the presumption that the establishment of independent oversight institutions would demonstrate distrust towards the National Assembly itself. Finally, some critics claim that the Ombudsman and State Audit Institution are the only independent bodies that should be defined in the Constitution, because regulations on the other independent bodies are not constitutional issues.

Although such hesitations are understandable in the context of functional representative democracies, there are no grounds for them in Serbia’s legal and political context. The presumption that the definition of independent bodies in the Constitution would lead the National Assembly to exercise its oversight role less and thus perceive it as “redundant” or result in the loss of trust in the National Assembly, is paradoxical in the case of the institutions of the *Ombudsman*, *Commissioner for Information and Data Protection* and the *Commissioner for Equality*. Numerous examples illustrate that the National Assembly’s degree of accountability for the effective implementation of its oversight role over the executive is already alarmingly low. Moreover, “the parliament is obviously no longer the home of power”<sup>26</sup> and any power it still may have boils down to the parties’ power directed at fulfilling their selfish goals of daily politics.

The National Assembly’s elementary legitimacy and functionality definitely has to be restored in order to restrain and control the executive, an endeavour efficient and effective independent bodies can only facilitate. These independent bodies play their compatible, authentic roles also in the systems in which the parliaments have been successfully monitoring and overseeing the executive, complementing the parliaments “with the principles, their own specific features not inherent to the parliament”,<sup>27</sup> thus constituting a comprehensive and effective oversight mechanism as the precondition for the balance of power. It also needs to be noted that the National Assembly neither has nor should have the capacity needed to perform the duties of these bodies; rather, it should be performing its oversight function efficiently and effectively.

On the other hand, trust in the National Assembly is already so low that it cannot be considerably jeopardised by defining the independent bodies in the Constitution. Numerous surveys have for years now been alerting to the high degree of citizens’ mistrust towards state institutions in Serbia. To illustrate, a 2016 survey assessing the public’s opinions of the police showed that as many as 56% of the citizens did not trust the National Assembly and that only 7% of them fully trusted this institution.<sup>28</sup> Conversely, the citizens’ trust in independent bodies has been growing, as corroborated not only by the increasingly frequent complaints natural and legal persons have been filing with the *Ombudsman*, the *Commissioner for Information and Data Protection* and the *Commissioner for Equality*, but by public opinion polls as well. For instance, a survey conducted in June 2016 showed that 18% of the citizens would report discrimination cases to the *Commissioner for Equality*, as opposed to only 2% in 2013.<sup>29</sup>

Finally, the institutions of the *Commissioner for Information and Data Protection* and *Commissioner for Equality* do constitute constitutional issues given that they protect constitutionally guaranteed rights and freedoms. Free access to information of public importance, as a prerequisite of quality and effective enjoyment of other human rights and freedoms and an instrument for overseeing the work of public institutions, is laid down in Article 51 of the Constitution, while the prohibition of any form of discrimination, both direct and indirect, on any grounds, is enshrined in Article 21 of the Constitution. It also needs to be recalled that the need to regulate personal data protection is gaining in relevance in the digital era given that technological developments increase opportunities for abuse of such data.

Defining the institutions of *Commissioner for Information and Data Protection* and *Commissioner for Equality* in the Constitution, in addition to the existing determination of the *Ombudsman*, can only benefit Serbia’s legal and political system, by strengthening guarantees in the fields of human rights protection and the fight against discrimination, on the one hand, and oversight over the executive, on the other. The prerequisites for the enforcement of the principles of rule

of law and *checks and balances* will thus be ensured in practice. Therefore, it may be concluded that the introduction of these independent bodies in the Constitution will contribute to:

- Strengthening the guarantees of independence of these independent bodies from other state institutions, bodies and organisations exercising public authority, the work of which they are monitoring and overseeing;
- The continuity and stability of the independent bodies, by protecting them from the arbitrariness of the elected government officials, ruling parties and constellation of relations in the National Assembly, which may result in the abrogation or modification of the laws by which they have been established;
- The acknowledgement of and compliance with their opinions and recommendations by the representatives of the state institutions and administration, thus strengthening their preventive role and contribution to the building of the political culture of Serbia's citizens and public;
- The development and strengthening of the culture of human rights and rule of law, their respect and the political accountability of both the representatives of the institutions, as well as the MPs, ministers, etc.

### ***Conclusion and Recommendations***

Guided by its determination to fulfil its strategic goal of joining the EU, Serbia has again found itself in the so-called constitutional moment "when the valid constitution is an obstacle to the opening of new prospects," and "in which the strength of the need for change is the greatest and the importance of daily political calculations minimal and in which it is likely that the new norm will respond to society's needs in a most authentic and far-reaching manner"<sup>30</sup>. Having learned the lesson from the opportunities missed since the beginning of the 21<sup>st</sup> century, we can use this moment and finally put an end to the tradition of adopting constitutions deprived of broad public debates and societal consensus, improve the legal and political order of the state and establish qualitatively new state and societal foundations based on democratic values through comprehensive dialogue.

Defining the independent bodies that safeguard human rights and fight against discrimination in the Constitution is indisputably important for the improvement of Serbia's legal and political system, as well as its progress in EU accession negotiations. The consolidation of their preventive and oversight functions will secure guarantees of human rights and freedoms enshrined in the Constitution, one of the key criteria for a state governed by rule of law. Stable, efficient and effective independent bodies are an indispensable segment of a strong and effective National Assembly overseeing the executive and thus ensuring a functional and not merely a symbolic balance of power. The relevance of this issue has also been recognised by the citizens themselves, whose lists of reasons for changing the Constitution include the belief that oversight of the public authorities is hardly conceivable without stronger guarantees of the institutional independence of the independent bodies.

Therefore, the forthcoming constitutional revision process should include making the following amendments:

- In addition to the *Ombudsman* and the *State Audit Institution*, the Constitution must define the other independent bodies contributing to the protection of human rights in Serbia: 1) the *Commissioner for Information and Data Protection* and 2) the *Commissioner for Equality*;
- The broad and inclusive public debate on constitutional amendments must include the review of the possibility and adequate manner of regulating the principles underlying the establishment of other independent and regulatory bodies by the Constitution;

Apart from the specified amendments to the Constitution and with a view to ensuring the actual strengthening of the position and influence of independent bodies, prerequisites need to be put in place to ensure the practical enforcement of the constitutional norms. In that regard, a public debate needs to be launched, inter alia, on the possibility of and need for revising and improving the Law on the National Assembly and its Rules of Procedure, in order to define more precisely the procedures and obligations of the National Assembly and its Committees regarding their cooperation with independent bodies, especially with respect to the review and adoption of their reports and monitoring of the executive's implementation of the National Assembly's conclusions based on the independent bodies' reports. In the longer term, the development of political culture in the state and society needs to be continuously encouraged and fostered.

## ENDNOTES

1. See "Ustav na prekretnici – izveštaj o ustavnoj praksi, nedostacima ustava i načinima njegovog poboljšanja," (Belgrade, Lawyers' Committee for Human Rights, 2013), pp. 8–10; and Vladimir Džamić, "Necessity to amend the Constitution of the Republic of Serbia: position and importance of the National Assembly" (Belgrade, European Movement in Serbia, 2014), p. 2.
2. Vladimir Međak, "Does the Serbian Constitution Need to be Amended in the EU Accession Process?" (Belgrade, European Movement in Serbia, 2016).
3. Tara Tepavac, "The Independent Bodies and the National Assembly of the Republic of Serbia: Collaboration or Ignorance?" (Belgrade, European Movement in Serbia, 2015).
4. European Commission's *Serbia 2016 Report*, pp. 4, 7.
5. The wording of this Article of the Constitution is problematic because the term "mutual control" can be understood as providing the legislative and executive authorities with the power to control the judiciary, which is impermissible in democratic states. Therefore, the wording of this provision should be amended within the forthcoming revision of the Constitution.
6. Tara Tepavac, "The Independent Bodies and National Assembly of the Republic of Serbia: Collaboration or Ignorance?" (Belgrade, European Movement in Serbia, 2015).
7. Under Articles 237-241 of the Rules of Procedure of the National Assembly, the relevant National Assembly Committees shall review the independent bodies' reports within 30 days from the day of their submission, adopt conclusions on the basis of the reports and submit them to the National Assembly to debate and adopt at the very next plenary sessions.
8. Vladan Petrov, "The Constitution and Regulatory (Independent) Bodies – An Attempt at Defining the Place and the Role of Regulatory Bodies in the Constitutional System", in: *National Assembly of the Republic of Serbia and Independent Bodies : Materials from the Conference "National Assembly of the Republic of Serbia and Independent Bodies", Belgrade, 26-27 November 2009 and an Overview of the Examples of International Practice*, eds. Boris Čamernik, Jelena Manić and Biljana Ledeničan, (Beograd: UNDP Country Office Serbia, 2010), p. 49.
9. Dejan Milenković, "Javna uprava: odabrane teme" (Belgrade, Faculty of Political Sciences: Čigoja štampa, 2013), p. 200.
10. Summary of the 2014 Report on the Implementation of the Law on Free Access to Information of Public Importance and the Personal Data Protection Law, p. 6. See <http://www.poverenik.rs/en/commissioners-report/2048-izvestaj-poverenika-za-2014-godinu.html> (accessed on 21 March 2017).
11. *New Model Law on Personal Data Protection*, Information and Data Protection Commissioner's press release of 6 March 2017, available at <http://www.poverenik.org.rs/en/press-releases-and-publications/2554-nov-model-zakona-o-zastiti-podataka-o-licnosti.html> (accessed on 21 March 2017).
12. 2016 Report on the Implementation of the Law on Free Access to Information of Public Importance and the Personal Data Protection Law, Belgrade, March 2017, p. 4, available at <http://www.poverenik.rs/en/commissioners-report/2568-izvestaj-poverenika-za-2016-godinu.html> (accessed on 21 March 2017)
13. Rodoljub Šabić, „Jedna sumorna godina”, *Danas*, 10 December 2016, available in Serbian at: [http://www.danas.rs/licni\\_stavovi/licni\\_stavovi.1148.html?news\\_id=334212&title=Jedna+sumorna+godina](http://www.danas.rs/licni_stavovi/licni_stavovi.1148.html?news_id=334212&title=Jedna+sumorna+godina) (accessed on 28 March 2017).
14. Rodoljub Šabić, „Jedna sumorna godina”, *Danas*, 10 December 2016, available in Serbian at: [http://www.danas.rs/licni\\_stavovi/licni\\_stavovi.1148.html?news\\_id=334212&title=Jedna+sumorna+godina](http://www.danas.rs/licni_stavovi/licni_stavovi.1148.html?news_id=334212&title=Jedna+sumorna+godina) (accessed on 21 March 2017).
15. Press release of the Commissioner for Information and Data Protection of 17 March 2017, available at <http://www.poverenik.rs/en/press-releases-and-publications/2563-pismo-poverenika-republickom-javnom-tuzilastvu.html> (accessed on 30 March 2017)

16. Constitution of the Republic of Serbia, (Belgrade: JP Službeni glasnik, 2006), p. 68.
17. Nations in Transit, Freedom House, available at: <https://freedomhouse.org/report/nations-transit/2017/serbia>
18. The Economist Intelligence Unit's Democracy Index, available at: <https://infographics.economist.com/2017/DemocracyIndex/>. The Index of Public Integrity (available at <http://integrity-index.org/> and accessed on 4 April 2017), also testifies to the degree of (in)dependence of the judiciary.
19. European Commission for Democracy through Law (Venice Commission), Opinion on the Constitution of Serbia, CDL-AD(2007)004, paragraph 32, p. 9.
20. Jadranka Jelinčić, „Konstituisanje Srbije“, in *Zašto je Srbiji potreban novi Ustav?*, eds. Jadranka Jelinčić and Dejan Ilić (Belgrade: Open Society Foundation Serbia: Fabrika knjiga, 2013), p. 61. The survey entitled “Why Does Serbia Need a New Constitution” showed that “only 17% of the citizens and 21% of the politicians think that the powers have been adequately separated between the legislative, executive and judiciary but that even they think that the guarantees of independence of independent bodies are insufficient”. The citizens also recognise the obstacles and limitations independent bodies have been facing in their work – “only two percent of the citizens and four percent of the representatives of the elite think that the autonomous state authorities are fully allowed to do their job (control the government and state administration)” i.e. that “72% of the representatives of the elite think that the Constitution should provide stronger guarantees of the status of autonomous state authorities,” while most representatives of the elite think that “this area should be systemically regulated and that other authorities performing similar duties as autonomous and independent bodies should also be covered by the Constitution”.
21. “How Does Parliament Control Executive Power? Open Parliament’s Report on the Oversight Role of the National Assembly of the Republic of Serbia,” Open Parliament, 2014, pp. 7, 12, 13.
22. European Commission for Democracy through Law (Venice Commission), Opinion on the Constitution of Serbia, CDL-AD(2007)004, paragraph 48, p. 11.
23. Dr iur. Matthias Hartwig, “Ustavne pretpostavke odgovorne vlade - Nemačko iskustvo: kontrola vlasti u nemačkom ustavu”, discussion at Rule of Law – the Accountability of Government and State Power Control, Collection of Seminar Papers and Speeches, eds. Associate Professor Dr Ljubica Đorđević, Aleksandra Popović, (Belgrade: Konrad Adenauer Stiftung, 2009), p. 22.
24. *Ibid.*, p. 33.
25. *Ibid.*, p. 33.
26. Prof. Dr. Marijana Pajvančić, “Ustavne pretpostavke odgovorne vlade -Nemačko iskustvo: kontrola vlasti u nemačkom ustavu”, discussion at Rule of Law – the Accountability of Government and State Power Control, Collection of Seminar Papers and Speeches, eds. Associate Professor Dr Ljubica Đorđević, Aleksandra Popović, (Belgrade: Konrad Adenauer Stiftung, 2009), p. 38
27. Saša Janković, “Ustavne pretpostavke odgovorne vlade -Nemačko iskustvo: kontrola vlasti u nemačkom ustavu”, discussion at Rule of Law – the Accountability of Government and State Power Control, Collection of Seminar Papers and Speeches, eds. Associate Professor Dr Ljubica Đorđević, Aleksandra Popović, (Belgrade: Konrad Adenauer Stiftung, 2009), p. 34.
28. Aurelija Đan, The Citizens’ Opinion of the Police Force, The Results of a Public Opinion Survey Conducted in Serbia (Belgrade Centre for Security Studies, Belgrade, September 2016), p. 8, available at [http://www.bezbednost.org/upload/document/the\\_citizens\\_opinion\\_of\\_the\\_police\\_force.pdf](http://www.bezbednost.org/upload/document/the_citizens_opinion_of_the_police_force.pdf) (accessed on 6 April 2017).
29. Survey Citizens and Their Views on Discrimination in Serbia, conducted by the Faktor plus agency in June 2016, commissioned by the Commissioner for the Protection of Equality, available at <http://ravnopravnost.gov.rs/en/citizens-trust-the-institution-of-the-commissioner-for-the-protection-of-equality-and-the-police-in-their-efforts-in-fighting-discrimination/> (accessed on 6 April 2017).
30. Jadranka Jelinčić, „Konstituisanje Srbije“, in *Zašto je Srbiji potreban novi Ustav?*, eds. Jadranka Jelinčić and Dejan Ilić (Belgrade: Open Society Foundation Serbia: Fabrika knjiga, 2013), p. 12.

**Milan Antonijević\***

## **Struggle for Separation of Powers and Rule of Law**

Strengthening of the rule of law in the process of accession to the European Union (hereinafter: *EU*) has for decades been a priority set by the countries in the Western Balkan region. Due to the dynamic of the negotiations with the European Union, the issue of the rule of law has reclaimed the position and attention it deserves in Serbia over the past few years, especially since talks on Chapter 23 were launched in mid-2016. Insistence on the implementation of the law, as well as on other elements of the rule of law, has increasingly been mentioned as a priority by Serbian politicians and, in particular, has been highlighted by all visiting EU officials.

The decision to attach major attention to the rule of law in the Chapter 23 Action Plan (hereinafter: *AP*) was a logical consequence of analyses of the situation in the judiciary<sup>1</sup>; the AP puts special emphasis on amending the Constitution, as one of the obstacles to the full realisation of judicial independence.

Namely, the system established under the 2006 Constitution of the Republic of Serbia does not provide sufficient guarantees for the independent work of the judicial and legislative authorities and insufficiently supports the work of independent institutions.

The shortcomings are primarily visible in the institutions established to guarantee judicial independence, as well as the judiciary's inequality vis-à-vis the other branches of government, and, finally, in the imprecision and illogicality of the provisions on the appointment of judges and prosecutors, court presidents and other judicial officers.

The fact that not all the constitutional rights and guarantees of separation of powers, especially the provisions guaranteeing conditions for the creation of an independent judiciary and autonomous prosecution service, have been consumed sufficiently has further motivated us to investigate the causes of the situation. This would pre-empt the risk of constitutional amendments, including the ones proposed in this Paper, bypassing the independent judiciary, i.e. not contributing to the establishment of an independent judiciary at long last.

The timeliness of opening a public debate on the Constitution stems from the Chapter 23 Action Plan, which sets the deadlines for the debate and adoption of the Constitution in 2017. The urgency of constitutional change is also corroborated by the fact that the European Commission will re-examine and critique the efficiency of the realisation of the rule of law during the process of reviewing Serbia's compliance with the Copenhagen criteria.

The two above-mentioned reasons for the urgency of opening a public debate on constitutional amendments must immediately be supplemented by the third reason: the citizens' demands that rule of law be established and that the independence of the judiciary be simultaneously ensured.

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## ***Inception of the Debate on Constitutional Change***

The need to amend the Constitution has been discussed since the day it was adopted, when the legitimacy of the constitutional text was disputed because of the manner in which it was adopted, primarily due to the absence of a public debate, the two-day referendum at which the citizens voted on it, and the fact that the MPs, let alone the citizens, did not have the text in their hands they could peruse before voting on it<sup>2</sup>.

To recall, all the present MPs voted for the constitutional text in 2006 and the Constitution was adopted almost by consensus; the text itself puts in place broad human rights guarantees, as well as the basis for judicial independence and prosecutorial autonomy. We therefore strongly urge the parties - which later opposed human rights guarantees, when they were to be enforced in practice, especially the proper implementation of the provisions on the judiciary creating the framework for its full independence - to conform their activities to the constitutional framework.

Now, when a session of the National Assembly of the Republic of Serbia (hereinafter: *NARS*) and the forming of the political will to adopt the constitutional amendments by a two-thirds majority are clearly in the offing, we urge the MPs to clearly advocate the enforcement of the constitutional provisions they will adopt, particularly the ones on the separation of powers and the strengthening of the roles of independent institutions and the legislative and judicial branches of government vis-à-vis that of the strong executive.

We also wish to highlight the importance of the citizens' attitude towards constitutional change and the necessity of perceiving the forthcoming amendments as endowing the constitutional text with legitimacy, primarily through a long, thorough and meaningful debate on all issues, above all the judiciary.

The difficulty of writing a paper on the Constitution is compounded by the fact that a number of publications, academic and expert papers, as well as the Venice Commission's opinion on the directions of constitutional amendments, including the section on the judiciary, have already been published. This called for the perusal of all these papers and interviews with judicial officers, stakeholders holding legislative and executive offices, and those in independent institutions, who have been following the launched constitutional amendment process. The courage to offer specific solutions and suggest the deletion, amendment or abandonment of specific proposals made by experts stems from the wish to open a meaningful debate on the Constitution on time, before all the amendments are definitely submitted to the MPs for adoption.

Some of the issues we believe warrant greater attention are clearly reviewed in this Paper, which describes the current state of play, the proposed solutions and the expected effects of changing the provisions of the Constitution. It outlines the problems regarding the fewer issues that remain open, but leaves it to a meaningful public debate to have the final say.

## ***Integrity – the Prerequisite for Judicial Reform***

Integrity of judicial officers is the first issue to be reviewed before moving on to headway in the separation of powers and judicial independence. Integrity is, indeed, prerequisite for the success of any reform, be it imposed by constitutional amendments, a strategy<sup>3</sup> or by going back to the implementation of the adopted laws. Integrity cannot be sufficiently defined in the text of the Constitution, but it must feature as the central point in assessments of the ability to conduct thorough judicial reforms during the public debate on the constitutional amendments.

Judges and prosecutors are best placed to assess whether their peers and superiors possess the required integrity and ability to fully assume their share of responsibility for the situation

in the judiciary. In addition to disciplinary accountability proceedings, which can be initiated by the High Judicial Council (hereinafter: *HJC*) and the State Prosecutorial Council (hereinafter: *SPC*)<sup>4</sup>, judicial integrity can also be controlled by other mechanisms, already included in the Constitution. Other proposed solutions in this text additionally guarantee the establishment and positioning of integrity as the backbone of judicial independence

### ***About the Judiciary – Background***

The constitutional provisions on the judiciary govern the appointment of judges, incompatibility of office, duration and termination of office, grounds for and decisions on their dismissal, their immunity rights and financial security. The list of issues regulated by the Constitution, which directly or indirectly regard judicial independence and impartiality, does not end here. One must thoroughly understand these issues before one begins to suggest ways to improve the status of the judiciary in the text of the Constitution. The existing overviews of the relationship between the Constitution and the judiciary serve that purpose<sup>5</sup>. The separation of powers, as a clear principle and backbone of the Constitution, completes the set of provisions defining the judiciary, distinguishes the judiciary from other branches of government and creates mechanisms of mutual checks and balances between the branches of government. As far as the separation of powers is concerned, the Constitution comprises sufficient guarantees for their full separation. The details proposed in this text, the specific articles of the Constitution that must be amended, will further strengthen such a separation and the full enforcement of all the guarantees of this democratic legacy is expected to result in an entirely different perception of the government, through a well-ordered system, based on mutual checks and balances.

The chapter on the organization of state government regulates the status, organisation and jurisdiction of courts, their relationship vis-à-vis other branches of government and the status of judges. The fundamental constitutional provisions govern the principles of the constitutional state; such are the provisions on the judiciary, rule of law, restriction of state power, obligation to respect the Constitution and the law, equality before the law, et al.

The section on human rights lays down the judicial procedure principles and the presumptions of legal certainty (right to a fair trial and presumption of innocence; legality of acts and penalties; right to defence; right of appeal; public character of trials and delivery of judgments, et al).<sup>6</sup>

Under the Constitution<sup>7</sup>, the rule of law shall be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of powers, independent judiciary and the authorities' observance of the Constitution and the law. The latter three items listed in the Constitution are clearly based on and define the framework conducive to the creation of an independent judiciary. Judicial independence has also become a universal generally-accepted value guaranteed by international regulations, wherefore the authors of the constitutional amendments also have to consult these high standards, especially those defined after the 2006 Constitution was adopted<sup>8</sup>.

The first general criticism of the Constitution regards the consistency of the provisions defining and governing the judiciary. The principles guaranteeing judicial independence can be found in various sections of the Constitution. This issue should thus be regulated better nomothetically, with a view to systematising the constitutional principles and presenting them more clearly.

Provisions on the judiciary can be found in Section One entitled "Constitution Principles", notably in Articles 3 and 4 on the separation of powers, the checks and balances between the three branches of government and the independence of the judiciary<sup>9</sup>, as well as in Part Five, which regulates the judiciary in greater detail; such provisions cannot, however, be found in



the part governing the bounds of the executive and legislative branches. The provision on the independence of the judiciary in Article 4 of the Constitution is thus not clearly reflected in the principles binding on the judicial, legislative and executive branches.

It is imperative to group the Articles of the Constitution, specifically in Section One, Principles, whilst avoiding the contradictoriness of the checks and balances between the three branches of government and judicial independence. The principles regarding the executive and legislative branches ought to be singled out, like the judiciary principles have been in the part on the courts<sup>10</sup>. This would facilitate perusal of and familiarisation with the parts of the Constitution guaranteeing judicial independence and reflect the authors' clear view that the types of checks and balances between the three branches of government cannot be equated, and would, thus, guarantee the independence of the judiciary.

### ***Protection and Improvement of Judicial Independence vis-à-vis the Executive and Legislative Branches of Government***

The next issue to be addressed after the principles of the Constitution, as well as the principles governing the three branches of government, is the influence of NARS on the judiciary, accompanied by justified concerns that the judicial offices are and will be divided among the political parties, with no account being taken of objective judicial appointment criteria.

The question of NARS' role in the appointment of judges, especially of lower courts, duly arises, because it is inevitably linked to politicization. There have been instances of NARS refusing to appoint the judges nominated by the HJC, thus both delaying or precluding the filling of prosecutorial and judicial vacancies and amounting to disrespect of the HJC and SPC, which have to be the bulwarks and guarantors of judicial independence and prosecutorial autonomy. It may be concluded that the MPs have been provided with excessive discretionary powers and, given the absence of a meaningful debate on the specific candidates<sup>11</sup>, either in the relevant parliamentary committee or at the plenary session, the impression is that the NARS has rendered its (non-)appointment decisions largely on the basis of political criteria, i.e. that these decisions were taken outside the NARS. Experts have also been mentioning the quotas individual political parties were given during the judicial appointment process, which further fogs the picture and corroborates the necessity of reviewing the NARS' role in the appointment of judges.

The articles on the jurisdiction of the High Judicial Council<sup>12</sup> and the State Prosecutorial Council<sup>13</sup> must be amended to ensure the clear regulation of the system of nominating candidates and to impose upon the NARS the obligation to appoint the judges on the list of nominees and to strengthen i.e. introduce the SPC's role in the appointment of the Republican Public Prosecutor<sup>14</sup>. Limiting the number of candidates running for one judicial or prosecutorial office to two, from among whom the NARS is to appoint one, will facilitate the depoliticization of the judicial appointment process; this is a matter that can be clearly prescribed by the Constitution.

The same applies to appointment to other judicial offices, including, notably, to the appointment of the court presidents, and, in particular, the President of the Supreme Court of Cassation (hereinafter: SCC).

Amendments have to be made to Article 144, authorising the NARS to appoint the SCC President, especially the provisions on the termination of his/her office. The term in office of the SCC President must be extended from five to at least seven years, to ensure s/he holds the office over a period spanning a number of parliamentary elections, while the provision prohibiting the reappointment of the SCC President needs to be preserved. These observations are all the more topical given that the NARS amended the Law on Judges at the time this Paper was written, shortening the SCC President's term in office from five to four years, but allowing for his/her reappointment.

### ***Protection of the Judges' Independence and Securing Their Impartiality***

The permanence of judicial tenure, coupled with the rule on the three-year term in office of first-time judges under Article 147 of the Constitution, provide sufficient guarantees of independence. Judges have frequently called for the abolition of the three-year probation period, which is followed by reappointment, i.e. confirmation of judicial tenure and appointment to permanent judicial tenure. Amendment of Article 147, which would involve the abolition of appointment to probation judicial tenure, would result in the abolition of the mechanism for appraising judicial performance in light of the guaranteed permanence of judicial tenure. In a system in which rigorous disciplinary and other measures are rarely resorted to in cases of judges whose performance is appraised as unsatisfactory, the mechanism of confirmation, i.e. appointment three years after the first appointment to a judicial office, along with a probation period that is not excessively long<sup>15</sup>, is an adequate solution. Given that the HJC, rather than the NARS, is charged with appointing first-time judges to permanent tenure, the judges, HJC members, themselves have the possibility of exerting greater influence on the appointment of judges, awarded permanent tenure and all the guarantees of independence accompanying it.

The concept of appointing first-time judges to a “probation period” should not be abolished, but it must be limited in individual cases, i.e. abolished with regard to appointments of judges to the SCC for the first time.

Furthermore, with a view to emphasising the importance and delicacy of the judicial dismissal issue, the grounds for dismissing judges must be clearly specified in the Constitution, rather than leaving the enumeration of the grounds for dismissal to the law.

In addition, the judicial appointment and dismissal procedures are closely linked to judicial independence, and, given that the Constitution allows dismissed judges to complain to the Constitutional Court, there is no reason to preclude the Constitutional Court from reviewing appointment issues, i.e. not to expand this constitutional framework. This is why the provision on the protection accorded judges during the appointment process must be expanded to cover dismissals as well.

The same arguments apply with respect to introducing in the Constitution the provisions on judicial disciplinary accountability, which would comprise elements now elaborated by laws on the judiciary, again with a view to emphasising their importance. Enough room needs to be left to subsume the reality in the courts under the above-mentioned constitutional norm, as well as under the adopted laws.

In addition, the public character of trials, although guaranteed by the Constitution, has to be expressly formulated to cover delivery of judgments as well.

### ***Composition of the High Judicial Council and the State Prosecutorial Council***

The fewest disagreements have arisen with respect to the composition of the High Judicial Council. Namely, most of the existing documents, from the Venice Commission's report to the analysis conducted by the Center for Judicial Research, which was commissioned by the Organization for Security and Co-operation in Europe (OSCE), the composition of the HJC, more specifically, the member coming from the ranks of the executive, is considered an indicator of the executive government's influence on the judiciary. The Justice Minister's participation in HJC sessions, especially his/her right to vote on HJC motions during disciplinary proceedings, has been qualified as an indicator of such influence<sup>16</sup>. The same applies to the State Prosecutorial Council and its composition, as the Minister also sits on the SPC.

The mechanisms the executive has been applying to influence these two bodies defining the judiciary are numerous, i.e. the possibility of the executive fully affecting their work thanks to the presence of merely one of its members is indisputable.

Another issue that must be raised regards the way in which decisions on the appointment and “termination of office” of a large number of HJC members are taken<sup>17</sup>. The NARS’ influence has to be reduced, i.e. the HJC members should be elected in direct elections organised by the HJC and providing judicial officers with a broad right to vote; their election can subsequently merely be upheld by the NARS.

The theses in this Paper on the Constitution were anticipated in one of the last sentences of the Venice Commission’s Opinion, that “[W]ith respect to other parts of the Constitution, a lot will depend on implementation.” Now, more than a decade since the Constitution was adopted, we can clearly say that the Constitution did not yield the desired results later in practice, especially with respect to the part governing the judiciary.

### ***Chapter 23 Action Plan***

Before concluding the review of the directions which the amendments of the Constitution in the field of judicial independence need to take, we must outline the priorities set in the Chapter 23 Action Plan. The Chapter 23 AP sections on constitutional amendments in light of putting in place stronger guarantees for protecting the judiciary from the excessive influence of other branches of government, especially the executive, as well as the legislative authorities, largely coincide with the proposals set out in this Paper.

The Chapter 23 AP, for instance, sets out that “[T]he system for the recruitment, selection, appointment, transfer and termination of judge’s office, presidents of courts, and prosecutors should be independent of political influence”. It further states that “[E]ntry in the judiciary shall be based on merit-based objective criteria, fair in selection procedures, open to all suitably qualified candidates and transparent in terms of public scrutiny.”

The Chapter 23 AP then goes on to say that the “[T]he High Judicial Council and the State Prosecutorial Council should be empowered with leadership and the power to manage the judicial system, including when it comes to immunities. They should have a pluralistic composition, without involvement of the National Assembly (unless solely declaratory), with at least 50% of members stemming from the judiciary, representing different levels of jurisdiction. Their elected members should be selected by their peers.”

The AP also raises the following three issues:

- Legal or executive authorities should not have the power to supervise or monitor operations of the judiciary;
- Reconsider the probation period of three years for candidate judges and deputy prosecutor;
- Clarify the grounds for the dismissal of judges.

Although this Paper does not deal with the Constitutional Court, its status, powers and relationship with courts in greater detail, apart from the possibility of it reviewing judicial appointment and dismissal complaints, it needs to be specified that the Chapter 23 AP also calls for clarifying “[...] the rules for terminating the mandate of judges of the Constitutional Court.”

Furthermore, once the Constitution is amended, the AP sets end 2018 as the deadline for “[A]lignment of judicial laws with new constitutional provisions (Law on Organization of Courts, Law on Seats and Territorial Jurisdiction of Courts and Public Prosecutors’ Offices, Law on Judges, Law on Public Prosecutor’s Office, Law on High Judicial Council, Law on State Prosecutorial Council, Law on Judicial Academy)”.

The implementation of this part of the AP is particularly surprising. Namely, in May 2017, the NARS adopted amendments to the provisions of the Law on Judges on the appointment of court presidents, cutting their terms in office from five to four years and allowing them one re-appointment, which this Law had not originally permitted. This move is not in compliance with the Chapter 23 AP. It has greatly extended room for politicization of this judicial office as well. Furthermore, the practice of amending a systemic law defining the judiciary's bloodstream in mid-2017, under an emergency procedure and in the absence of a meaningful debate, although its amendment envisaged by the AP is to take place very soon, gives rise to doubts about the legislator's intention of adopting such amendments at this very time.

The AP envisages the "[A]lignment of by-laws with amended judicial laws" in 2019 and this is where the text of this document referring to the Constitution and judiciary in light of EU integration ends. There remains the part of the AP prescribing the alignment of the valid Constitution with the observations of the Venice Commission, wherefore the constitutional reform must be viewed much more broadly than as merely the amendment of several articles on the judiciary and it must also cover other constitutional provisions, both those in the field of human rights protection and others.

### ***Conclusion and Recommendations***

This Paper suggests the directions in which the Constitution is to be amended, the specific Articles that have to be re-examined and changed, at the moment when the public debate on constitutional change is opening.

We started out by proposing nomothetical amendments, suggesting the grouping of norms and principles on the judiciary. We then clearly called for the protection and improvement of judicial independence from the executive and legislative authorities, through the redefinition of the Government's and NARS' roles in the appointment of judges and prosecutors. The provisions on the protection of independence and ensuring the impartiality of the judges, primarily via amending the probation period and its limitation, will further contribute to judicial independence. So will a change in the HJC's and SPC's composition and elimination of the executive government's influence on these two bodies.

The fact that a number of articles on the judiciary need to be amended clearly testifies to the necessity of changing the current practice, which is the main thesis advocated in this Paper. We perceive constitutional amendments as a new chance to build guarantees of judicial independence, as well as to implement the existing standards.

This is why the constitutional amendments must also be perceived as a new opportunity to review the issues of the success of the judicial reform, as well as the adopted documents, which still can change the image of the courts and prosecutorial services.

Time needed to properly conduct the constitutional amendment process is another factor that must be added to the recommendations in this Paper to ensure enough room and elements for debate. The Chapter 23 AP deadlines, which have been set ambitiously<sup>18</sup>, cannot be interpreted as denying, limiting or undermining a meaningful public debate and presentation of its results to the public.

The EU integration process, from which the political will to amend the Constitution stems as well, must be presented also as a social process, acquiring the elements of a social contract; it was mislaid in 2006 and is now being rediscovered and extended to the citizens. Public debate is the basis of such a process wherefore, to reiterate, the involvement of all the relevant institutions, organizations and experts is prerequisite for presenting the full breadth and diversity of views on constitutional amendments. That is the only way to ensure that the citizens will really understand the question they will be asked at the referendum: Do you endorse the proposed amendments to the Constitution?

## ENDNOTES

1. "Serbia Judicial Functional Review" (Belgrade, World Bank. 2015) et al.
2. The National Assembly session at which the Constitution was adopted lasted slightly over an hour: fifteen MPs discussed the text and all 242 MPs present at the session voted for the Constitution, which was approved at a referendum.
3. Strategy for Judiciary Reform.
4. The SPC reviews the complaints about the work of the prosecutors in the second instance.
5. See: 'Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality' (Strasbourg: Council of Europe, 2017), available at: <https://rm.coe.int/1680700125>
6. See the paper and detailed overview of the constitutional provisions on judicial independence in "The Constitutional Position of the Judiciary – Analysis and Recommendations for Modification" (Belgrade, Center for Judicial Research, 2016), available in Serbian at: [http://mojustav.rs/wp-content/uploads/2013/03/CEPRIS.Ustavni-poloz%CC%8Caj-sudske-vlasti.PROJEKAT.OEBS\\_.decembar-2016.pdf](http://mojustav.rs/wp-content/uploads/2013/03/CEPRIS.Ustavni-poloz%CC%8Caj-sudske-vlasti.PROJEKAT.OEBS_.decembar-2016.pdf)
7. Article 3, "Constitution of the Republic of Serbia," *Službeni glasnik Republike Srbije* No. 98/2006.
8. See: 'Council of Europe Plan of Action on Strengthening Judicial Independence and Impartiality', (Strasbourg: Council of Europe, 2017), available at: <https://rm.coe.int/1680700125>
9. The expression "judiciary power" prevails in the Constitution, while the term "judiciary" appears later in the text.
10. Article 142, Constitution of the Republic of Serbia.
11. See the transcripts of the NARS sessions on judicial candidates, available in Serbian at: [www.otvoreniparlament.rs](http://www.otvoreniparlament.rs)
12. Article 154, Constitution of the Republic of Serbia.
13. Article 165, Constitution of the Republic of Serbia.
14. In the event the public debate results in the necessity of introducing the role of the State Prosecutorial Council in the appointment of the Republican Public Prosecutor, the autonomy of the prosecution services needs to be redefined and approximated to independence.
15. To recall, under the preliminary drafts of the Constitution preceding the text adopted in 2006, the first-time judges' probation period initially lasted five years, and was subsequently shortened to three years. novi ugovor sa a da to je važnosvoju punu nezavisnost.ndumusvihiji pratio izbore za članove VSS i DVT koji su se odvijali širo
16. Out of 11 members: the President of the Supreme Court of Cassation, the Justice Minister and the Chairperson of the relevant NARS Committee are *ex officio* members, while the rest - six judges (one of whom from the autonomous province), one lawyer and one law school professor - are elected members.
17. With the support of the OSCE Mission to Serbia, the Lawyers' Committee for Human Rights monitored the elections of HJC and SPC members in the prosecution services and courts across Serbia in December 2015.
18. Under the Chapter 23 AP, the constitutional amendments are to be adopted by the fourth quarter of 2017.

*Jelena Jerinić\**

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

The experiences of European Union (hereinafter: *EU*) Member States 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 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 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 Paper, 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.

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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 Paper 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.

Constitutional provisions enjoying special protection mostly include those defining the main principles or the state, human rights and constitutional amendment provisions. Such examples can, for instance, be found in the Constitutions of Estonia, Montenegro, Poland and Spain. The Constitutions of the first three countries require endorsement of the amendments to these provisions at a referendum; the Spanish Constitution lays down that the amendments must be upheld by two consecutive convocations of the parliament.<sup>10</sup>

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>11</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>12</sup>



## ***Revision of Serbia's Constitution***

Experts usually qualify the 2006 Constitution as a rigid constitution.<sup>13</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>14</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>15</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>16</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>17</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>18</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>19</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 Con-

stitution, 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>20</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>21</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>22</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 an act amending the Constitution is adopted. On the other hand, it proposes the following changes of Article 203 of the 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>23</sup>

If, however, the constitutional reform debate shows that most stakeholders are of the view that the amendment of all or specific constitutional provisions must be ratified at a referendum, like in the above-mentioned European countries, 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, the provisions of Sections 1, 2 or 9 of the Constitution are to be amended 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.

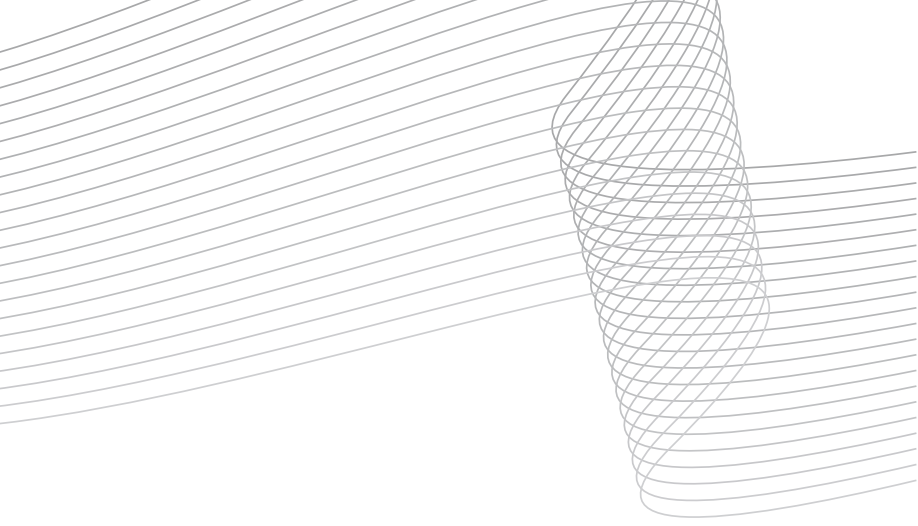
The proposal to amend the constitutional revision provisions retains the qualified parliamentary majority requirement and introduces a mandatory public debate in the procedure, relieving it of the mandatory referendum requirement, in view of the fact that a mandatory referendum can be called pursuant 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.

## ENDNOTES

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. The Spanish Constitution, however, affords special protection to its parts on basic constitutional principles, fundamental rights and freedoms and the Crown, but not to the part on constitutional amendment.
11. *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.
12. 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.
13. 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.
14. 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.
15. 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.
16. 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."
17. "Ustav na prekretnici – izveštaj o ustavnoj praksi, nedostacima ustava i načinima njegovog poboljšanja," (Belgrade, Lawyers' Committee for Human Rights, 2013), p. 29.
18. 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).
19. 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 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.
20. 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.
21. 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."
22. Chapter 23 Action Plan (<https://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf>) and Action Plan for the Realisation of the Rights of National Minorities in the Republic of Serbia (Available in Serbian at: <http://www.ljudskaprava.gov.rs/sh/node/21793-Jelena>). Although the Chapter 23 Action Plan makes general mention of the Venice Commission's recommendations on the entire text of the Constitution, the Action Plan envisages that only constitutional provisions on the judiciary are to be amended by the end of 2017. The Ministry of Justice and Office for Cooperation with Civil Society's public invitation to consultations on constitutional amendments was couched in the same terms (Available in Serbian at: <http://civilnodrustvo.gov.rs/poziv/konsultacije-o-izmenama-ustava.39.html?invitationId=406> ).
23. More in Međak, *op. cit.*



## **Part 4**

# **European Movement in Serbia Research Forum and Constitutional Reform**





The European Movement in Serbia's Research Forum has been dealing with the reform of the Constitution of the Republic of Serbia for a number of years and for a variety of reasons. The 2006 Constitution of the Republic of Serbia was adopted in a specific atmosphere and in violation of all the rules of a proper democratic procedure. It needs to be amended not only because of its disputed legitimacy, but to eliminate its technical, linguistic, and, above all, legal deficiencies as well. The revision of the Constitution and creation of a new constitutional moment are today predominantly affected by two other important circumstances: the Brussels agreement between Belgrade and Priština and Serbia's talks on accession to the European Union.

EMINS' activities to date have involved a combination of research, consultations with experts and interviews with policy makers and citizens. We have performed analyses explaining the deficiencies of the valid Constitution in greater detail, proposing procedures for amending it, reviewing the position of the National Assembly, offering recommendations on how to improve constitutional human rights guarantees and, finally, reviewing the position and role of the independent bodies.

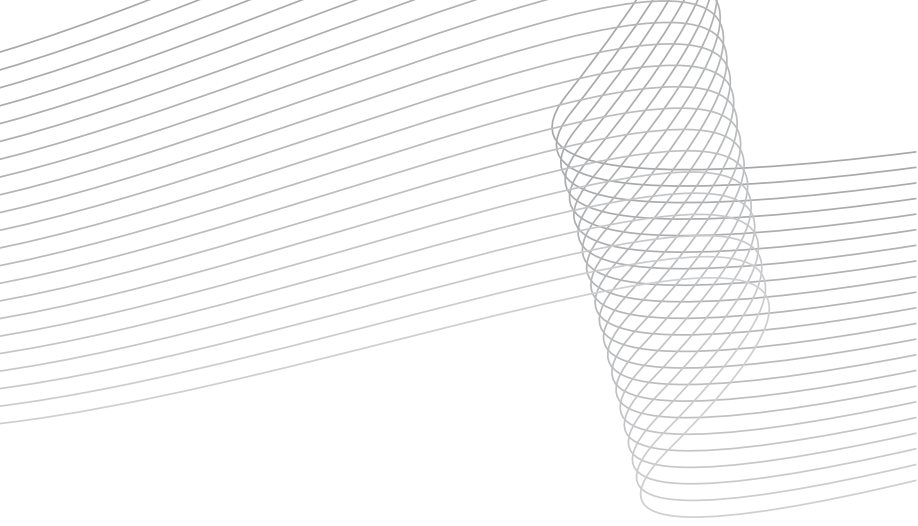
The project entitled "Changing the Constitution on the Way to the European Union", within which this publication was prepared, is a continuation of the EMinS Research Forum's endeavours in this area. Its purpose is to help build consensus and increase the transparency and legitimacy of the pending revision of the Constitution of the Republic of Serbia in the context of Serbia's accession talks with the EU in a comprehensive and open public debate, based on specific suggestions and recommendations.

The project activities also included consultations with experts in Serbia's university centres and the organisation of an international conference. The activities began with the preparation of three policy papers by the Research Forum's experts and network of associates. The quality of the papers was tested during public debates in Belgrade, Niš, Kragujevac and Novi Sad, attended by over 200 relevant experts. The debates resulted in the drafting of concrete amendments to the valid Constitution and improvement of the policy papers explaining these amendments in greater detail. The upcoming international conference will provide us with the opportunity to hear about the experiences of our foreign counterparts and exchange views about the EMinS' proposals with them.

The project is financially supported by the Embassy of the Kingdom of the Netherlands in Serbia within the Dutch Ministry of Foreign Affairs MATRA Programme. We take this opportunity to express our appreciation to our many friends, opponents, experts, public office holders, representatives of political parties and civil society organisations, and ordinary citizens for their contribution to the years-long activities of the EMinS Research Forum.







# Appendices



## Appendix 1.

Examples of Integration Clauses of Some States That Acceded to the EU in the 2004-2013 Period

### 1. Slovene Constitution

#### *Article 3a*

Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

Before ratifying a treaty referred to in the preceding paragraph, the National Assembly may call a referendum. A proposal shall pass at the referendum if a majority of voters who have cast valid votes vote in favour of such. The National Assembly is bound by the result of such referendum. If such referendum has been held, a referendum regarding the law on the ratification of the treaty concerned may not be called.

Legal acts and decisions adopted within international organisations to which Slovenia has transferred the exercise of part of its sovereign rights shall be applied in Slovenia in accordance with the legal regulation of these organisations.

In procedures for the adoption of legal acts and decisions in international organisations to which Slovenia has transferred the exercise of part of its sovereign rights, the Government shall promptly inform the National Assembly of proposals for such acts and decisions as well as of its own activities.

The National Assembly may adopt positions thereon, which the Government shall take into consideration in its activities. The relationship between the National Assembly and the Government arising from this paragraph shall be regulated in detail by a law adopted by a two-thirds majority vote of deputies present.

### 2. Bulgarian Constitution

#### *Article 4*

(1) The Republic of Bulgaria shall be a State governed by the rule of law. It shall be governed by the Constitution and the laws of the country.

(2) The Republic of Bulgaria shall guarantee the life, dignity and rights of the individual and shall create conditions conducive to the free development of the individual and of civil society.

(3) (new, SG 18/05) Republic of Bulgaria shall participate in the building and development of the European Union.

#### *Article 42*

(1) Every citizen above the age of 18, with the exception of those placed under judicial interdiction or serving a prison sentence, shall be free to elect state and local authorities and vote in referendums.

(2) The organization and procedure for the holding of elections and referendums shall be established by law.

(3) (new, SG 18/05) The elections for Members of the European Parliament and the participation of European Union citizens in the elections for local authorities shall be regulated by law.

### **Article 85**

(1) The National Assembly shall ratify or denounce by law all international treaties which:

1. are of a political or military nature;
2. concern the Republic of Bulgaria's participation in international organizations;
3. envisage corrections to the borders of the Republic of Bulgaria;
4. contain obligations for the treasury;
5. envisage the State's participation in international arbitration or legal proceedings;
6. concern fundamental human rights;
7. affect the action of the law or require new legislation in order to be enforced;
8. expressly require ratification;
9. (new, SG 18/05) confer to the European Union powers ensuing from this Constitution.

(2) (new, SG 18/05) The law ratifying the international treaty referred to in para 1, item 9 shall be adopted by a majority of two-thirds of all members of the Parliament.

(3) (former para 2, SG 18/05) Treaties ratified by the National Assembly may be amended or denounced only by their built-in procedure or in accordance with the universally acknowledged norms of international law.

(4) (former para 3, SG 18/05) The conclusion of an international treaty requiring an amendment to the Constitution shall be preceded by the passage of such an amendment.

### **Article 105**

(1) The Council of Ministers shall direct and conduct State's domestic and foreign policy in accordance with the Constitution and the laws.

(2) The Council of Ministers shall ensure the public order and national security and shall exercise overall guidance over the state administration and the Armed Forces.

(3) (new, SG 18/05) The Council of Ministers shall inform the National Assembly on issues concerning the obligations of the Republic of Bulgaria resulting from its membership in the European Union.

(4) (new, SG 18/05) When participating in the drafting and adoption of European Union instruments, the Council of Ministers shall inform the National Assembly in advance, and shall give detailed account for its actions.

## **FINAL PROVISION (SG 18/05)**

### **§ 7.**

§ 2 shall enter into force as of the date of entry into force of the Treaty concerning the Accession of the Republic of Bulgaria to the European Union and shall not apply to international treaties found.

### 3. 1949 Hungarian Constitution as amended until 2007\*\*

#### **Article 2**

- (1) The Republic of Hungary is an independent, democratic state governed by the rule of law.
- (2) In the Republic of Hungary supreme power is vested in the people, who exercise their sovereign rights directly and through elected representatives.
- (3) No activity of any person may be directed at the violent acquisition or exercise of public power, nor at the exclusive possession of such power. Everyone has the right and obligation to resist such activities in such ways as permitted by law.

#### **Article 2/A**

- (1) By virtue of treaty, the Republic of Hungary, in its capacity as a Member State of the European Union, may exercise certain constitutional powers jointly with other Member States to the extent necessary to exercise the rights and fulfill the obligations conferred by the founding treaties of the European Union and the European Communities (hereinafter referred to as "European Union"); these powers may also be exercised autonomously by the institutions of the European Union.
- (2) The ratification and promulgation of the treaty referred to in paragraph (1) shall be subject to a two-thirds majority vote of the Parliament.

## 4. Croatian Constitution

### **VIII. EUROPEAN UNION**

#### **1. LEGAL GROUNDS FOR MEMBERSHIP AND TRANSFER OF CONSTITUTIONAL POWERS**

##### **Article 143**

Pursuant to Article 142 of the Constitution, the Republic of Croatia shall, as a Member State of the European Union, participate in the creation of European unity in order to ensure, together with other European states, lasting peace, liberty, security and prosperity, and to attain other common objectives in keeping with the founding principles and values of the European Union.

Pursuant to Articles 140 and 141 of the Constitution, the Republic of Croatia shall confer upon the institutions of the European Union the powers necessary for the enjoyment of rights and fulfilment of obligations ensuing from membership.

#### **2. PARTICIPATION IN EUROPEAN UNION INSTITUTIONS**

##### **Article 144**

The citizens of the Republic of Croatia shall be directly represented in the European Parliament where they shall, through their elected representatives, decide upon matters falling within their purview. The Croatian Parliament shall participate in the European legislative process as regulated in the founding treaties of the European Union.

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\*\* The new Hungarian Constitution, adopted in 2010, was not analysed.

The Government of the Republic of Croatia shall report to the Croatian Parliament on the draft regulations and decisions in the adoption of which it participates in the institutions of the European Union. In respect of such draft regulations and decisions, the Croatian Parliament may adopt conclusions which shall provide the basis on for the Government's actions in European Union institutions. Parliamentary oversight by the Croatian Parliament of the actions of the Government of the Republic of Croatia in European Union institutions shall be regulated by law.

The Republic of Croatia shall be represented in the Council and the European Council by the Government and the President of the Republic of Croatia in accordance with their respective constitutional powers.

### **3. EUROPEAN UNION LAW**

#### **Article 145**

The exercise of the rights ensuing from the European Union *acquis communautaire* shall be made equal to the exercise of rights under Croatian law.

All the legal acts and decisions accepted by the Republic of Croatia in European Union institutions shall be applied in the Republic of Croatia in accordance with the European Union *acquis communautaire*. Croatian courts shall protect subjective rights based on the European Union *acquis communautaire*.

Governmental agencies, bodies of local and regional self-government and legal persons vested with public authority shall apply European Union law directly.

### **4. RIGHTS OF EUROPEAN UNION CITIZENS**

#### **Article 146**

Citizens of the Republic of Croatia shall be European Union citizens and shall enjoy the rights guaranteed by the European Union *acquis communautaire*, and in particular: – freedom of movement and residence in the territory of all Member States,

- active and passive voting rights in European parliamentary elections and in local elections in another Member State, in accordance with that Member State's law,
- the right to the diplomatic and consular protection of any Member State which is equal to the protection provided to own citizens when present in a third country where the Republic of Croatia has no diplomatic-consular representation,
- the right to submit petitions to the European Parliament, complaints to the European Ombudsman and the right to apply to European Union institutions and advisory bodies in the Croatian language, as well as in all the other official languages of the European Union, and to receive a reply in the same language.

All rights shall be exercised in compliance with the conditions and limitations laid down in the founding treaties of the European Union and the measures undertaken pursuant to such treaties.

In the Republic of Croatia, all rights guaranteed by the European Union *acquis communautaire* shall be enjoyed by all citizens of the European Union.

## 5. Polish Constitution

### *Chapter III* **SOURCES OF LAW**

#### **Article 87**

1. The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.
2. Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments.

#### **Article 88**

1. The condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof.
2. The principles of and procedures for promulgation of normative acts shall be specified by statute.
3. International agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute.

#### **Article 89**

1. Ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute - if such agreement concerns:
  - 1) peace, alliances, political or military treaties;
  - 2) freedoms, rights or obligations of citizens, as specified in the Constitution;
  - 3) the Republic of Poland's membership in an international organization;
  - 4) considerable financial responsibilities imposed on the State;
  - 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute.
2. The President of the Council of Ministers (the Prime Minister) shall inform the Sejm of any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute.
3. The principles of and procedures for the conclusion and renunciation of international agreements shall be specified by statute.

#### **Article 90**

1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.
2. A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.
3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.



4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

#### ***Article 91***

1. After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.
2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.
3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

#### ***Article 92***

1. Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.
2. An organ authorized to issue a regulation shall not delegate its competence, referred to in para. 1 above, to another organ.

#### ***Article 93***

1. Resolutions of the Council of Ministers and orders of the Prime Minister and ministers shall be of an internal character and shall bind only those organizational units subordinate to the organ which issues such act.
2. Orders shall only be issued on the basis of statute. They shall not serve as the basis for decisions taken in respect of citizens, legal persons and other subjects.
3. Resolutions and orders shall be subject to scrutiny regarding their compliance with universally binding law.

#### ***Article 94***

On the basis of and within limits specified by statute, organs of local government and territorial organs of government administration shall enact local legal enactments applicable to their territorially defined areas of operation. The principles of and procedures for enacting local legal enactments shall be specified by statute.

## 6. Czech Constitution

### **Article 10**

Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form part of the legal order; if treaty provides something other than that which statute provides, the treaty shall apply.

### **Article 10a (rev. 2002)**

1. Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.
2. The ratification of treaty under paragraph requires the consent of Parliament, unless constitutional act provides that such ratification requires the approval obtained in referendum.

### **Article 10b (rev. 2002)**

1. The government shall inform the Parliament, regularly and in advance, on issues connected to obligations resulting from the Czech Republic's membership in an international organization or institution.
2. The chambers of Parliament shall give their views on prepared decisions of such international organization or institution in the manner laid down in their standing orders.
3. A statute governing the principles of dealings and relations between both chambers, as well as externally, may entrust the exercise of the chambers' competence pursuant to paragraph to body common to both chambers.

## 7. Romanian Constitution

### **TITLE VI**

### **Euro-Atlantic integration**

### **Integration into the European Union**

### **ARTICLE 148**

- (1) Romania's accession to the constituent treaties of the European Union, with a view to transferring certain powers to community institutions, as well as to exercising in common with the other member states the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.
- (2) As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act.
- (3) The provisions of paragraphs (1) and (2) shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.

- (4) The Parliament, the President of Romania, the Government, and the judicial authority shall guarantee that the obligations resulting from the accession act and the provisions of paragraph (2) are implemented.
- (5) The Government shall send to the two Chambers of the Parliament the draft mandatory acts before they are submitted to the European Union institutions for approval.

### ***Accession to the North-Atlantic Treaty***

#### **ARTICLE 149**

Romania's accession to the North-Atlantic Treaty shall take place by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators.

## **8. Lithuanian Constitution**

### ***THE CONSTITUTIONAL ACT OF THE REPUBLIC OF LITHUANIA ON MEMBERSHIP OF THE REPUBLIC OF LITHUANIA IN THE EUROPEAN UNION***

The Seimas of the Republic of Lithuania,

executing the will of the citizens of the Republic of Lithuania, as expressed in the referendum on membership of the Republic of Lithuania in the European Union, held on 10-11 May 2003,

expressing its conviction that the European Union respects human rights and fundamental freedoms and that Lithuanian membership in the European Union will contribute to the more efficient securing of human rights and freedoms,

noting that the European Union respects the national identity and constitutional traditions of its Member States,

seeking to ensure the fully fledged participation of the Republic of Lithuania in the European integration, as well as the security of the Republic of Lithuania and welfare of its citizens,

having ratified, on 16 September 2003, the Treaty Between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic Concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic to the European Union, signed on 16 April 2003 in Athens,

adopts and proclaims this Constitutional Act:

1. The Republic of Lithuania as a Member State of the European Union shall share with or confer on the European Union the competences of its state institutions in the areas provided for in the founding Treaties of the European Union and to the extent it would, together

with the other Member States of the European Union, jointly meet its membership commitments in those areas, as well as enjoy membership rights.

2. The norms of European Union law shall be a constituent part of the legal system of the Republic of Lithuania. Where it concerns the founding Treaties of the European Union, the norms of European Union law shall be applied directly, while in the event of the collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.
3. The Government shall inform the Seimas about the proposals to adopt the acts of European Union law. As regards the proposals to adopt the acts of European Union law regulating the areas that, under the Constitution of the Republic of Lithuania, are related to the competences of the Seimas, the Government shall consult the Seimas. The Seimas may recommend to the Government a position of the Republic of Lithuania in respect of these proposals. The Seimas Committee on European Affairs and the Seimas Committee on Foreign Affairs may, according to the procedure established by the Statute of the Seimas, submit to the Government the opinion of the Seimas concerning the proposals to adopt the acts of European Union law. The Government shall assess the recommendations or opinions submitted by the Seimas or its Committees and shall inform the Seimas about their execution following the procedure established by legal acts.
4. The Government shall consider the proposals to adopt the acts of European Union law following the procedure established by legal acts. As regards these proposals, the Government may adopt decisions or resolutions for the adoption of which the provisions of Article 95 of the Constitution are not applicable.



## Appendix 2

### Evaluation Questionnaire

The Questionnaire aims to evaluate the results of EMinS' work. It will take you around 10 minutes to fill it and thus help us collect information facilitating the evaluation process. We would be grateful if you would fill the Questionnaire and send it to the following address: European Movement in Serbia, Kralja Milana Street 31/II, 11000 Belgrade. You can also download the Questionnaire as a word document on the *Changing the Constitution on the Way to the European Union* page on the EMinS website [www.emins.org](http://www.emins.org) and e-mail it to [if@emins.org](mailto:if@emins.org) or fill it online by using the link on the above-mentioned project webpage.

EMinS would highly appreciate receiving your filled Questionnaires in any of these formats by end November 2017.

Please feel free to contact EMinS should you need any further information or clarification about the Questionnaire either by e-mail [if@emins.org](mailto:if@emins.org) or by telephone +381 11 3640 174.

1. I have read the policy document provided by EMinS.

This statement is:

- 1 - True  
 2 - False

Please provide any additional comments that you think might be of use to EMinS.

2. The document has been used by my organisation/ agency in our discussions/ deliberations about the area of research.

This statement is:

- 1 - True  
 2 - False

Please provide any additional comments that you think might be of use to EMinS.

3. The document was useful to my organisation/ agency in formulating policy or in thinking about legislation.

- 1 - Very useful  
 2 - Somewhat useful  
 3 - Neither useful nor unuseful  
 4 - Not very useful  
 5 - Not at all useful

Please provide any additional comments that you think might be of use to EMinS.

4. Some specific parts of the EMinS document have been included in Government policy/ legislation. This statement is:

- 1 - True  
 2 - False



5. If true, which specific parts of the EMinS document did you use in policy/ legislation.

**If the document *was used* by your organisation, please provide feedback in the areas defined below.**

6. What feedback do you have for us on quality of content?

7. What feedback do you have for us on the structure of the research and the arguments put forward in the paper?

8. What feedback do you have for us on the readability of the document?

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