

MAIN CONSTITUTIONAL OBSTACLES TO THE MEMBERSHIP OF SERBIA IN THE EUROPEAN UNION

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Abstract

In this paper, the authors deal with the analysis of the essential obstacles to the accession of Serbia to the European Union and to the successful finalization of the accession negotiations, in terms of the existing constitutional and legal framework. Unlike other studies in this field, the authors analyse the formal and material obstacles that relate not solely to the technical amendments to the Constitution, such as inserting the integrative clause or adopting the European Union Law, but to the changes that they consider essential, such as the redefining of the political system and, consequently, the successful finalization of the democratic consolidation process in Serbia. The authors analyse the relation between the constitutional revision and the negotiation Chapter 35, which deals with the negotiations between Belgrade and Priština within the Brussels Agreement. In a separate chapter, the authors analyse the specific possibilities for the improvement of the political system in Serbia, through the strengthening of the free parliamentary mandate and the strengthening of the parliamentary system, but also through the change in the manner of electing judges and prosecutors, as well as through the strengthening of the independence of the judicial authority.

Key words: constitution, constitutional revision, accession to the European Union, political system of Serbia.

КЉУЧНЕ УСТАВНЕ ПРЕПРЕКЕ ЧЛАНСТВУ СРБИЈЕ У ЕВРОПСКОЈ УНИЈИ

Апстракт

У овом раду аутори се у контексту постојећег уставно-правног оквира баве анализом кључних препрека приступању Србије Европској унији и успешном окончању приступних преговора. За разлику од других студија у овој области, аутори анализирају формалне и материјалне препреке које се тичу не само техничких промена Устава, попут уношења интегративне клаузуле или преузимања права Европске уније, већ и промене које сматрају есенцијалним, попут редефинисања политичког система и, самим тим, успешног довршетка процеса демократске консолидације у Србији. Аутори анализирају и однос уставне ревизије и преговарачког поглавља 35, које се тиче преговора Београда и Приштине у оквиру Брисел-

ског процеса. У посебном поглављу аутори анализирају конкретне могућности за унапређење политичког система у Србији, кроз јачање слободног посланичког мандата, јачање парламентарног система, али и промену у начину избора судија и тужилаца и јачање независности судске власти.

Кључне речи: устав, уставна ревизија, приступање Европској унији, политички систем Србије.

INTRODUCTORY OBSERVATIONS

The Constitution of the Republic of Serbia, adopted by the electorate at the referendum at the end of October and officially adopted by the National Assembly of the Republic of Serbia on 8th November 2006, is one of the most criticized constitutions in the modern constitutional, legal, and political history of Serbia. The particularity of the current supreme law is that it has been extensively criticized from the ideological spectrum of both left and right wing. Therefore, it has been frequently named the temporary Constitution, whose main comparative advantage *in relation to the Constitution of the Republic of Serbia from 1990* is that it can be changed more easily, being the so-called *soft constitution*. Whereas some critics of the Constitution emphasize that it is the Constitution of continuity from the previous one, that the new constitutional text has serious legal deficiencies and that it has “mainly a political purpose” (Marković, 2007), others point out that the supreme law adopted *ex tempore* and with no inclusive public debate will not contribute to the democratic consolidation (Džamić, 2014).

As Linz and Stepan state in their study on democratic transition and consolidation, the existence of the rule of law institutionalized through democratic constitution is one of the five *arenas of democratic consolidation* (Linz and Stepan, 1998). The experience of the countries in the region that have acceded or are acceding to the European Union has shown that the constitutional revision is the necessary part of that process. The Republic of Slovenia, admitted to the membership in 2004, changed its constitution even two times, while, due to the judiciary, this change has been conducted in the Republics of Croatia and Montenegro, and there are clear indications that, owing to the same reasons and the judgement of the European Court of Human Rights in the Sejdić and Finčić case, it could be conducted in Bosnia and Hercegovina by the end of this decade.

The Ministry of Justice of the Republic of Serbia in its National Judicial Reform Strategy, adopted at the National Assembly in the summer 2013, stipulated that it is “necessary to conduct the constitutional framework amendments by 2018” (National Judicial Reform Strategy, 2013). The process of the accession of Serbia to the European Union (EU) and the official beginning of negotiations in 2013, i.e. the opening of the first negotiation chapters, including the most significant Chapters 23 and 24, additionally actualized the issue of constitutional framework amendments.

In its regular annual Progress Report on Serbia, the European Commission states that it is necessary to perform constitutional revision and harmonize it with the EU standards and the Opinion of the Venice Commission of the Council of Europe (Progress Report on Serbia, 2015). When compared to the previous Report from 2014, which even states that “the Constitution is largely in line with European standards” and that the amendments to the Constitution should be considered as soon as possible “generally speaking” (Progress Report on Serbia, 2014), it is clear that the external pressures constitute one of the main reasons this issue received a great attention of the political scene and relevant institutions.

The Republic of Serbia cannot become a fully-fledged member of the EU with this constitutional framework. Thus, the special attention will be paid to the formal and material obstacles in the current supreme law of Serbia, due to which it has to be revised before the finalization of the accession negotiations. According to the aforementioned, they unequivocally are the following: the capacity to adopt the EU *acquis (acquis communautaire)*, the introduction of the integrative clause in the constitutional text, and the redefining of the system of authority in relation to providing substantial independence to the judicial authority from the legal and executive authority and political parties *en generale*. However, we consider that there are, apart from the stated formal and obvious reasons, indirect reasons why the current Constitution is the obstacle to the European integration of Serbia, and they are concerned with the inability to completely consolidate the democratic system with the current constitutional and legal framework.

CONSTITUTIONAL REVISION AND CHAPTER 35

The process of the accession of Serbia to the EU is specific in comparison to all other countries of the region since, only in the case of Serbia, the Chapter 35, which generally encompasses the so-called *other issues* in the accession negotiations, essentially includes the issue of the territorial integrity of the country and its sovereignty on the whole territory within the internationally acknowledged state borders. Even though there are numerous ideas on using the constitutional revision for redefining the state politics on Kosovo and Metohija, we believe that such solution is unfeasible in reality, because there is no two-thirds majority in the parliament for this solution and it is almost certain that citizens would reject this constitutional change in a referendum. On the other hand, a preamble as a non-normative part of the Constitution is neither formal nor material obstacle to the fully-fledged membership of Serbia in the EU and it is in accordance with the other documents the accession negotiations are based on.

In accordance with the Resolution 1244/99 of the United Nations Security Council (UNSC), Kosovo and Metohija is the part of the territory of

the Republic of Serbia under the protectorate of the United Nations (UN). Within the Brussels Agreement signed by the Serbian Government and mediated by EU High Representative for Foreign and Security Policy, Catherine Ashton, and then by Federica Mogherini, it is clearly defined that negotiations with Kosovo*¹ are status-neutral. Furthermore, we should remember the Stabilisation and Association Agreement (SAA), signed in 2008, whose Article 135 clearly states that this Agreement does not apply on the territory of Kosovo and Metohija, which is under the UN administration on the basis of the UNSC Resolution 1244 and that “it is without prejudice to the current status of Kosovo or the determination of its final status under that Resolution” (Stabilisation and Association Agreement, 2008).

Even though the Constitution makers completely carelessly, whether by mistake or intentionally, inconsistently used two terms in the Constitution in 2006: Province and Autonomous Province, it is crucial to clearly emphasize the asymmetry of the two *autonomous provinces* during the Constitution revision and to explain this asymmetry with the fact that the status issue is in the field of the International Public Law, on the basis of the international resolutions and status-neutral dialogue with the representatives of the Interim Administration in Kosovo and Metohija.

This solution should be applied *mutatis mutandis* to all other articles of the Constitution of the Republic of Serbia that are concerned with the vertical separation of power and the position of the autonomous provinces within the Republic of Serbia. This solution would not endanger the right of the Government of the Republic of Serbia to, within a defined state policy, continue the negotiations in the Brussels process.

THE CAPACITY TO ADOPT THE EU ACQUIS

The current Constitution does not enable the Republic of Serbia to adopt the EUacquis; more precisely it makes its direct effect and application, which are the basic principles of the acquis, impossible. The Article 16 of the Constitution of the Republic of Serbia states that “Generally accepted rules of international law and ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and applied directly.” However, in contrast to the previously said, it also states that “Ratified international treaties must be in accordance with the Constitution.” (Constitution of the Republic of Serbia, 2006)

The Law of the EU is *de facto* and *de jure* international law. The Treaty of Accession to the European Union is, according to its legal nature, an international agreement, the same as the Treaty of Lisbon, the current legal framework of the EU, is also an international agreement. It is not

¹ This designation is without prejudice to positions on status, and is in line with UNSCR 1244/99 and the ICJ Opinion on the Kosovo declaration of independence.

possible for the Republic of Serbia to transfer a part of its sovereignty to the EU, which is *conditio sine qua non* for membership, and it is not possible for these treaties to be valid on its territory until this Article of the Constitution is amended.

Kosta Čavoški, an academic, warns about the absurdity of this constitutional norm in his study, though for other reasons, claiming that this Article of the Constitution is “its distinct flaw” and that the Constitution makers missed the opportunity to make a distinction between the legislative agreements that are subject to ratification in the legislative body and executive agreements concluded by the government, which are directly implemented without the ratification procedure (Čavoški, 2007).

The absurdity of this solution is additionally supported by the Vienna Convention on the Law of Treaties, whose signatory is Serbia, as the legal successor to the ex-Yugoslavia. The Article 27 of this Convention states that a country may not invoke the provisions of its international law as justification for its failure to implement a treaty. In other words, even if it was *post festum* determined that one of the signed international agreements is contrary to the Constitution, Serbia could not invoke that as the argument for the non-performance of the undertaken contractual obligations.

Taking into account that the direct effect, as well as the immediate implementation of the EU law sources, is one of the key features of this legal system valid in all 28 Member States, this Article of the constitution has to be unequivocally amended to set the priority of international law over the national one, as was the case with the Constitutional Charter of the State Union of Serbia and Montenegro which stipulated that ratified international agreements and generally accepted rules of international law have *the priority over the laws of Serbia and Montenegro and the laws of the Member States* (Constitutional Charter of Serbia and Montenegro, 2003).

THE CONSTITUTIONAL REFORM AND TRANSFER OF (A PART OF) SOVEREIGNTY

Even though the Section IV of the current Constitution of the Republic of Serbia is titled “Competences of the Republic of Serbia”, the accession to the EU will require the redefining of this Section of the Constitution, as well. As the Treaty of Lisbon, which will at the moment of the accession become the international agreement with the highest legal power in the Republic of Serbia, equal to the Constitution, stipulates: Serbia agrees to completely transfer a part of its jurisdiction to the EU institutions, whereas the other part comprises of the shared EU-Member State Jurisdiction and the third part of the jurisdiction which is kept exclusively to itself², *ex contractu*.

² In accordance with the principle of subsidiarity, on the basis of the provisions of the Treaty of Lisbon on the European Union

Bearing in mind the transfer of (a part of) its sovereignty to the European institutions, within the Constitutional revision, it is necessary to determine the so-called integrative clause. Following the example of other countries that joined the EU, it is necessary to clearly state that the exercise of rights that arise from the EU *acquis* equals to the exercise of rights guaranteed by the legal system of the Republic of Serbia. Although some authors (Međak, 2016) state that the EU membership does not imply the sovereignty loss, but just the transfer of a part of sovereignty to a supranational organization (the EU and its institutions), the fact is that a country *de facto* loses its sovereignty and that it no longer has the supreme, indivisible and non-transferable jurisdiction on its complete territory³ while it is the EU Member State, with the possibility to leave this community in accordance with the provisions of the Article 50 of the Treaty of Lisbon.

In addition, in this context, it is necessary to emphasize in a special Article of the Constitution that the legal acts and decisions accepted by the Republic of Serbia in the EU institutions shall apply on the territory of the Republic of Serbia in accordance with the EU *acquis*. Therefore, it is important to point out that courts protect subjective rights acquired in accordance with the EU *acquis* and that all public government bodies on the territory of the Republic of Serbia, government institutions, autonomous provinces, and the units of local self-government consistently implement the EU *acquis communautaire*.

In accordance with the rights of the EU citizens, i.e. the citizens of the EU Member States, the constitutional reform has to enable the legal equality of the citizens of all Member States on the territory of the Republic of Serbia and provide them with active and passive right to vote in the elections for the European Parliament, as well the right to diplomatic and consular protection of any Member State, the equal protection of its own citizens in the third country where Serbia does not have its diplomatic mission, as well the right to address the EU institutions, in accordance with the provisions of the Treaty of Lisbon.

REDEFINING THE SYSTEM OF GOVERNANCE

Even though the professional community frequently argues the need for the amendment of the constitutional framework particularly for joining the EU and finalizing the process of European integration, there are other relevant reasons that can indirectly improve the European integration, but that can also accelerate the complete democratic consolidation in the Republic of

³ In 16th century, in his work *Six Books of the Commonwealth*, Jean Bodin, defining the sovereignty as one of the key theories of the creation of a modern country, derived the term sovereignty from the Latin *maiestas* - *majesty* and claimed that the sovereignty is original, indivisible, non-transferable, and inalienable supreme power of a country over its territory.

Serbia. According to our judgement, there are three significant changes that need to be conducted: enabling the free parliamentary mandate, in accordance with the suggestions of the European Commission and the Venice Commission of the Council of Europe, changing the manner of electing judges and prosecutors in order to guarantee their autonomy and independence in relation to the other branches of government and, finally, substantially changing the political system with the aim of raising its democracy and efficiency.

FREE PARLIAMENTARY MANDATE

Fragile and, still, unconsolidated democracy in Serbia created, to some extent understandable, need to establish in the new Constitution, in 2006, the possibility of placing the parliamentary mandate at the disposal of the political party whose list the candidate is elected from, i.e. to practically limit the free parliamentary mandate with this possibility. Even though the Article 2 clearly postulates that sovereignty is vested in citizens who exercise it through freely elected representatives (*deputies; members of parliament*, authors' note), the Article 102 states that the parliamentary mandate can be *irrevocably put at disposal to the political party upon which proposal (...) has been elected* (Constitution of the Republic of Serbia, 2006). Thus, it is frequently concluded that the so-called Mitrovdan Constitution from 2006 is a step backwards in comparison to the Constitution of Serbia from 1990 (Jovanović, 2007).

In a pragmatic sense, this solution was believed to be able to contribute to the reduction of the unprincipled change of a political party after elections, but it essentially led to numerous criticisms from international institutions such as the Venice Commission of the Council of Europe and the European Commission itself. Thus, in its Opinion, the Venice Commission points out that this solution is "a serious violation of the freedom of a deputy" and that "It concentrates excessive power in the hands of the party leaderships." (Opinion 405/2006) In its regular Progress Report on Serbia, just one year after the declaration of the Constitution, the European Commission states that there are serious flaws that imply the undemocratic nature of this solution (Progress Report on Serbia, 2007). Some prominent constitutional and legal experts also warned that this solution is not in accordance with international standards (Pajvančić, 2009:128).

Regardless of the fact that the Constitutional Court of Serbia determined that "the mandate is a public law relation between voters and a national representative and it cannot be the subject of any private law agreement", it is of utmost importance to amend these colliding norms of the Constitution and to unambiguously *ex constitutione* determine that the parliamentary mandate is free, in accordance with the best practice in the consolidated European democracies, EU Member States, and the highest

legal standards. Every different solution would present a serious deviation from the achieved European standards in this area.

CHANGING THE PROCEDURE OF ELECTING JUDGES AND PROSECUTORS

The procedure of electing judges is one of the main indicators of the position of judges in the constitutional and legal system of a country (Pajvančić, 2011). One of the main criticisms of international organizations referred to the large influence of political parties on the procedure of electing judges. Namely, during the many years of observation of the situation in the Republic of Serbia, the European Commission, the same as the Venice Commission of the Council of Europe, suggested on numerous occasions that the procedure of the election of judges defined in the current Constitution leaves plenty of space for political abuse and political influence on judges and judicial authority and that these constitutional provisions need to be changed as soon as possible.

The Action Plan for the Negotiation Chapter 23 devoted to judiciary precisely defines that the analysis of the Constitution of the Republic of Serbia was performed and that it is necessary to change the constitutional framework in order to provide higher independence of the judicial authority in relation to the other two branches of authority (Action Plan for the Negotiation Chapter 23, 2016:22). However, although it is clearly stated that the end of 2015 is the deadline for the concrete proposals for the amendment of the Constitution in this segment, those proposals were not formulated, nor did the holder of the constitutional authority, i.e. the National Assembly, discuss those proposals at any forums, whether plenary or in boards.

Even though the Action Plan determined that the procedure for the constitutional revision would be initiated by the authorized proposers *ex constitutione* in the third quarter of 2016, it also did not happen. From all this, it can be concluded with certainty that the public debate on the constitutional revision, as well as on the concrete constitutional norms that are to replace the current ones on the manner of electing judges and prosecutors, will be significantly overdue. This means that, owing to the complicated procedure of the Constitution amendment, which requires a two-thirds qualified majority in the National Assembly and the referendum for the citizens, in accordance with the Article 203 of the Constitution of the Republic of Serbia, it is practically impossible for a draft Constitution to be sent to the Venice Commission at the beginning of 2017 and to be adopted by the end of 2017 (*Ibidem*: 30).

Formally, it is not possible to finalize the accession negotiations and to close the Chapter 23, which will be open during the whole negotiation process, without the constitutional revision and fulfilment of the provisions of the Action Plan the country committed to. This means that the

constitutional revision is a formal condition of the full membership of Serbia in the EU and that Serbia with this Constitution cannot become the fully-fledged member, which is one of the key paradigms the political reality in Serbia has been founded on since 2006.

CONSTITUTIONAL MOMENT FOR DEMOCRATIC CONSOLIDATION

As we have already stated, the stable, democratic Constitution is one of the conditions for the substantial rule of law as one of the arenas of consolidated democracy. The fact that the Constitution of the Republic of Serbia was adopted in 2006 without any public debate and that the constitutional text was not suggested by the competent Committee on Constitutional Issues of the National Assembly of the Republic of Serbia, present serious formal deficiencies embedded into the Constitution. In addition, one should not ignore the serious breaches of the referendum procedure during the citizens' vote on the draft Constitution and numerous objections submitted to the Supreme Court of Serbia on the course of the referendum.

The need to change the Constitution due to the European Integration of Serbia is a good *constitutional moment* to correct the serious deficiencies of the current Constitution, both the material ones and the ones regarding the linguistic and technical revision of the constitutional text. The constitutional moment can be the opportunity to make the work of the legislative body more efficient and available to citizens, and to harmonize the citizens' right to propose laws with the European standards, even though that is not a formal request of European institutions.

In that context, it is significant that the number of deputies (MPs) is in accordance with the demographic characteristics of the Republic of Serbia⁴. The Constitution also needs to be amended in the part that refers to the number of citizens necessary for proposing a law. Even though, in the introductory part of the Constitution, the Republic of Serbia is defined as a country committed to European values, the criteria for citizens to propose laws are twice harsher than in the previous Constitution from 1990. Thus, it is stipulated that thirty thousand citizens can propose a law in comparison to the previous fifteen thousand, while for a referendum, it is envisaged that 150,000 citizens can do it, in comparison to the previous 100,000.

The constitutional revision is also to clarify the position and role of the independent regulatory institutions (e.g. as the fourth branch of public

⁴ The only formal proposal for amending the Constitution was submitted by the Serbian Progressive Party led by the then president of the party, Tomislav Nikolić, in 2012, with more than 300,000 citizens' signatures, to halve the number of deputies in the National Assembly of the Republic of Serbia.

government and to constitutionalize the most significant ones, in order to reduce the dependence of these bodies on political parties and parliamentary majority (Gajin, 2014).

In an effort to make the Constitution permanent and to provide the finalization of the democratic consolidation in Serbia, it should also be considered to change the competences of the National Assembly and possible election of the President of the Republic in the legislative body, modelled by the parliamentary democracies with the protocolar role of the head of state. Alternatively, within an inclusive public debate, the competences of the President of the Republic should be increased, thus providing the real meaning to the direct presidential elections.

Even though this issue is not of great interest to, nor it was much criticized by the European Commission in its regular annual progress reports on Serbia, the change of the election of Constitutional Court judges should also be considered. The tripartite election has its serious deficiencies, as well as the right of the Constitutional Court judges for re-election.

In an attempt to strengthen democracy, it is necessary to change the procedure of amending the Constitution and to introduce the obligation of a public debate in the duration of no less than three to six months before putting the proposal for amending the Constitution into parliamentary procedure. This provision, which currently does not exist in the constitutional text, would additionally increase the significance of the constitutional issue and, in our opinion, make it more permanent and stable than the previous one.

FINAL OBSERVATIONS

According to the Action Plan for the Chapter 23 and the Government of the Republic of Serbia policy, the citizens of Serbia are undoubtedly going to face a referendum on the amendment of the Constitution. This referendum can be a part of the citizens' voting on the membership of Serbia in the European Union, which is a mandatory part of the accession, though, due to the time frame, it is not likely that these votes could occur at the same time.

In accordance with the Article 203 of the Constitution of the Republic of Serbia, every constitutional amendment changing the system of authority must be endorsed by the citizens. Therefore, it is of utmost importance to start the public debate on the constitutional revision as soon as possible, as well as to reach a consensus of all relevant political entities in the Republic of Serbia. In our opinion, there are a few open issues.

First, will the amendment of the Constitution of the Republic of Serbia be partial or the authorized proposers of the constitutional amendment will opt for writing a new Constitution? There are numerous views of the professional public, even of the Constitutional Court judges, that this constitutional text is beyond repair and that the new one must be written. The

objective obstacle is reaching the two-thirds majority in the National Assembly, as well as the majority in the referendum, which would confirm that solution, since a part of the public has a rather firm objection to amending the Constitution.

Second, will the constitutional amendment for the European integration of Serbia be the only one or, maybe, the second constitutional revision will ensue changing the political system? From a rational aspect, with a good and inclusive public debate and the participation of all political entities, there is no reason to change the Constitution on several occasions, but it can be performed in one constitutional revision.

Finally, when will the amendment of the Constitution be conducted? Even though all adopted documents state that the deadline is the end of 2017, the breaking of the Action Plan deadlines implies that this deadline could again be moved, thus postponing the finalization of the accession negotiations. Not meeting these deadlines could also imply great external pressures regarding the negotiation Chapter 35, which refers to the negotiation process between Belgrade and Priština, with the mediation of the European Union. All these obstacles are objective and they have a significant impact on the fact that the constitutional issue is still not formally on the agenda of the National Assembly.

REFERENCES

- Akcioni plan za Poglavlje 23. [Action Plan for Chapter XXIII] <http://www.mpravde.gov.rs/files/Akcioni%20plan%20Poglavlje%2023-sa%20semaforom.pdf>
- Izveštaj Evropske komisije o napretku Srbije 2007. [The European Commission Progress Report on Serbia, 2007] http://www.seio.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/godisnji_izvestaj_ek_2007_sr.pdf [11. 9. 2016]
- Izveštaj Evropske komisije o napretku Srbije 2014. [The European Commission Progress Report on Serbia, 2014] http://www.seio.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/Izvestaj_o_napretku_dec14.pdf [25. 9. 2016]
- Izveštaj Evropske komisije o napretku Srbije 2015. [The European Commission Progress Report on Serbia, 2015] http://www.seio.gov.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/godisnji_izvestaj_15_final.pdf [25. 9. 2016]
- Jovanović, M. (2007). Mišljenje Venecijanske komisije o Ustavu Srbije: slučaj slobodni mandat. [The Venice Commission Opinion on the Constitution of Serbia: case free mandate]. *Godišnjak Fakulteta političkih nauka 2007*, 242–255.
- Marković, R. (2007). Ustav Republike Srbije od 2006 – kritički pogled. in: Ustav Srbije – kritička analiza (str. 9–57). [The Constitution of the Republic of Serbia from 2006 – critical review in: The Constitution of Serbia – critical analysis]. Beograd. Beogradski forum za svet ravnopravnih
- Međak, V. (2016). Da li je potrebno menjati Ustav Republike Srbije usled pristupanja Evropskoj uniji – analiza politike [Is necessary to amend the Constitution of the Republic of Serbia because of the accession to the European Union]. Beograd. Evropski pokret u Srbiji. ISBN 978-86-80046-14-3

- Mišljenje 405/2006 Evropske komisije za demokratiju putem prava (Venecijanske komisije) Saveta Evrope [The Venice Commission Opinion 405/2006 on the Constitution of the Republic of Serbia] (translation of the Office of the CoE in Belgrade). [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2007\)004-srb](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2007)004-srb) [15. 9. 2016]
- Pajvančić, M. (2009). Komentar Ustava Republike Srbije. [Comment on the Constitution of the Republic of Serbia]. Beograd. Fondacija Konrad Adenauer
- Pajvančić, M. (2011). O sudskoj vlasti u ustavnom sistemu Srbije u kontekstu međunarodnih standarda [On judiciary in the constitutional system of Serbia in term of international standards]. Zbornik radova Pravnog fakulteta u Novom Sadu 3/2011, 7–21.
- Ustav Republike Srbije [The Constitution of the Republic of Serbia], Službeni glasnik Republike Srbije 98/2006
- Sporazum o stabilizaciji i pridruživanju 2008.[The Stabilisation and Association Agreement]. http://seio.gov.rs/upload/documents/sporazumi_sa_eu/ssp_prevod_sa_anexima.pdf [31. 8. 2016]
- Ustavna povelja Državne zajednice Srbija i Crna Gora [The Constitutional Charter of the State Union of Serbia and Montenegro], Službeni list Srbije i Crne Gore 1/2003
- Čavoški, K. (2007). Neuki i neodgovorni tvorci novog Ustava Srbije. u: Ustav Srbije – kritička analiza (str. 57–71). [Incompetent and irresponsible makers of the new Constituion of Serbia in: The Constitution of Serbia – critical analysis] Beograd. Beogradski forum za svet ravnopravnih
- Džamić, V. (2014). Neophodnost promene Ustava Republike Srbije: položaj i značaj Narodne skupštine, [Necessity of the constitutional revision: role and importance of the National Assembly]. Beograd. Evropski pokret u Srbiji. <http://www.emins.org/uploads/useruploads/forum-it/01-PB-Neophodnost-promene-Ustava.pdf> [11. 9. 2016]
- Gajin, S. (2014). Položaj i uloga četvrte grane javne vlasti u sadašnjem i budućem ustavnom uređenju Republike Srbije [The position and role of the fourth branch of public authorities in the current and future constitutional arrangements of the Republic of Serbia] http://www.emins.org/uploads/useruploads/forum-it/02PB_Položaj-i-uloga-cetvrte-grane-javne-vlasti.pdf [11. 5. 2017].

КЉУЧНЕ УСТАВНЕ ПРЕПРЕКЕ ЧЛАНСТВУ СРБИЈЕ У ЕВРОПСКОЈ УНИЈИ

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Резиме

Приступни преговори државе-кандидата за чланство у Европској унији подразумевају усаглашавање са европским правним тековинама у преко тридесет области друштвеног, економског, правног и политичког поретка. Државе бивше Југославије и региона Западног Балкана које су постале чланице Европске уније од 2004. године надаље, као и оне које имају статус кандидата за чланство и/или се налазе у приступним преговорима, морале су да изврше ревизију својих устава. Пракса је показала да уставни транзиционих постсоцијалистичких држава нису били

темељни акт на ком је било могуће преузети европске правне тековине. Словенија је два пута мењала свој устав, док је сличне уставне ревизије имала и Хрватска уочи чланства у Европској унији, док је ова тема веома актуелна и у Црној Гори, држави која се увелико налази у приступним преговорима.

Република Србија не може са оваквим уставом постати пуноправна чланица Европске уније. Разлог томе лежи у чињеници да су у уставни текст уткане бројне формалне препреке које онемогућавају директно дејство и непосредну примену европских правних тековина на територији Републике. Такође, Митровдански устав, који је усвојен без икакве јавне расправе и без формалног предлога надлежног парламентарног одбора за уставна питања, од почетка приказиван као привремени меки устав, прати баласт нелегитимности. Управо то значајно отежава процес демократске консолидације у Србији и успостављање потпуне владавине права као једне од арена консолидоване демократије, по угледу на развијене државе-чланице Европске уније.

Како би преговарачко поглавље 23 могло да буде затворено, а самим тим и процес преговарања окончан, имајући у виду да је ово поглавље отворено током читавог преговарачког процеса, нужно је да Устав Републике Србије претходно буде промењен, у складу са процедуром коју предвиђа сам Устав. Уставна ревизија у овом контексту недвосмислено мора обухватити промену начина избора судија и тиме повећа уставне гаранције за независност судске власти. Такође, уставном ревизијом мора се успоставити примат међународног права над националним и унети клаузула која обезбеђује директно дејство и непосредну примену европских правних тековина у Републици Србији, у складу са преношењем дела суверенитета на наднационалне институције Европске уније.

Са аспекта преговарачког поглавља 35, преамбула и уставни третман покрајинске аутономије не представља ни формалну ни материјалну препреку пуноправном чланству Србије у Европској унији. То пак не значи да постигнуте споразуме, као и међународне документе којима се у оквирима међународног јавног права гарантује сувереност и целовитост Републике Србије, не треба укључити у уставни текст у поступку ревизије Устава.

Имајући у виду да уставна реформа којом се мења систем организације власти свакако захтева референдумско потврђивање од стране грађана, овај уставни тренутак треба да буде искоришћен за кориговање других делова Устава на које јесу и на које нису изнете замерке европских институција, али јесу изнете озбиљне замерке стручне и академске јавности, попут: слободног посланичког мандата, начина избора судија Уставног суда, положаја и интегренције независних регулаторних тела, као и језичке и техничке редакције уставног текста.