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European Standards and Constitutional Changes in Serbia

Abstract

The author examines the influence of European integrations on the constitutional process and determines directions of the constitutional reform in the Republic of Serbia. At the time of adoption of the 2006 Constitution, the European Union (EU) and the Council of Europe (CoE) have been monitoring the process and providing good offices. Their objections have been partly incorporated in the supreme legal act of Serbia. Yet, however, this Constitution does not fully meet European standards in terms of the manner of adoption and content of the constitutional matter. This paper critically examines EU and CoE criticism and points to other problems concerning altering the Constitution. Opinion of the Venice Commission was a starting point in reconsideration of European organisations' critiques regarding the Constitution of Serbia. Lack of consensus on institutional and political reforms makes future constitutional review uncertain.

Key words: Serbia, constitution, harmonization of law, European Union, European integrations, political institutions, territorial organization, decentralization, sovereignty transfer clause, political parties.

I. Constitution and European Standards

According to Etienne Balibar, Constitution is the prerequisite for building a new political community and democratic form, such as the European Union. Debate on the European constitution transgresses the

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framework of traditional normative and philosophical stands. Balibar underscores the need for an "expanded" concept of the constitution, in Montesquieu's sense, namely such that comprises a political-social regime, non-hierarchical historical entirety of individual and collective rights, a form of representation of instances and responsibilities in which 'one power curbs the other'… and an 'evolutional' concept… a material order which would concurrently be a principle of institutions' openness to their own transformation and being transcended..."(Balibar 2003: 15-16). In the meantime, a decade has elapsed, the European Union has got closer to an intention to get a constitution in a codified normative form, yet the observations regarding democratic deficit of the integrational processes still hold valid. Balibar observes that "there is much bureaucratism in Europe, but little state in terms of a political institution. In reality there is an obvious split between the actual powers (which are not insignificant, but are limited) and ideological pretensions that contribute to closing the perspectives for building democracy in some abstract alternative" (Ibid).

European Union is a specific tertium genus, a legal creation with confederal and federal elements, which now undergoes a dynamic transformation by the international supranational organization towards a super - state. According to Simon Hix, European Union is a political system, but not a state (Hiks 2007: 24). The continual process of institutional reforms is the process of constitutionalization, with the gradual building of central institutions and transfer of powers (sovereignty) from member states to the European level of powers.

The nature, structure and processes of European integrations have influenced as well the constitutional law of its state members. In this respect, this is increasingly more the issue of "the Europeization of the constitutional law", the effect of the acquis communautaire on the constitutions of its state members (Marinkovic 2007: 60). The influence of so-called European law is channelled through the endorsement of legal principles from the founding (basic) legal documents of the European Union, through the effects of the decisions passed by corresponding courts (European court of justice, European court of human rights)[2] and consensual agreement among state members (e.g. constitutional norm on "currency stability"). Their implementation is not uniform in the basic legal acts of state members.

2 Along these lines, Serbia's judge in the European court of human rights, professor Dragoljub Popović, underscores "constitutional dimension" of court adjudication and quotes enacting terms of judgement in the case Loiziou v. Turkey, saying that the "Convention (European convention of human rights, R. M. note) is a constitutional instrument of the European public law" (Popović 2007: 117-118)..

Constitutions of the member states incorporate different volumes and contents of the norms of the so called European constitutional law. There is a visible difference between the old (founding) and new state members. In their normative acts newly joined state members strive to more thoroughly spell out their belonging to the European Union through the constitutional articulation of its basic legal principles and the catalogue of human rights and liberties. Thereby, their constitutions are identity documents confirming their commitment to European values. On the other hand, more modest contents of the so called European provisions in the constitutions are indirect indicator of loyalty to the traditional dogma on sovereign power and of resistance to law harmonization. However, irrespectively of different juristic interpretations, the conclusion is that all state members have changed their constitutions in the process of European integrations and have harmonized their law systems with the EU legal system (See Marinkovic 2007; Tisma 2011: 185-212). This is not a concluded process; it goes on through incessant alignment of different constitutional systems. In the context of this paper, our attention shall be focused on constitutional changes in EU candidate countries, notably on the constitutional reform in Serbia in the context of European integrations, or acceptance of basic European values and standards.

Meeting of the criteria ("Copenhagen criteria") [3] is conditio sine qua non in order that a country may become an EU member. These conditions can be divided into four categories: geographic, [4] political-legal, economic and other criteria (so called acquis communitaire). When speaking about the political–legal criteria which candidate states must meet in order to join EU, we imply development of an appropriate legal framework that ensures the rule of law (Cf. Stefanovic 2011: 60-61). Translated into the language of constitutional law, this does not mean only the existence of constitution as the supreme legal act, but also corresponding contents of the constitutional-legal norms.

The European Union and the Council of Europe have been closely monitoring constitutional reform in Serbia after the 2000 change in the political regime. Their services comprised monitoring and provision of "good offices". Through their institutions and advisory bodies, such as the European Commission and European commission for democracy through law (Venice Commission), it has indicated the necessity for

3 Set at the European Council session of 21-22 June 1993.

4 Serbia meets this condition, being a European country. Request by Morocco was rejected on this ground in 1987 (See Weidensfeld, W., Wessels, W. 2003: 286).

Serbia to adopt a new constitution,[5] provided criticisms and guidelines regarding Constitution drafts and Proposal for the Constitution, and post festum presented opinion on the new Constitution. Thus the Venice Commission has addressed two general objections concerning the Constitution of 2006. The first concerns the manner of its adoption, and underlines that the Constitution "was however prepared very quickly". In this regard, it notes the partocratic character of this Constitution and absence of a public debate in the process of preparation of its proposal.[6] On the other hand, some specific criticisms concerning constitutional solutions have been spelled out. The Venice Commission presents the following stand on this issue:

"...many aspects of this Constitution meet European standards and adopt the criticisms made in the Venice Commission's 2005 Opinion. However, there are some provisions that still fall well below those standards and others where the hasty drafting is evident in provisions that are unclear or contradictory ".[7]

The opinion of the Venice Commission, although it does not belong to institutional framework of the European Union, is a document with the weight of authority and it is a starting point for reconsideration of the critiques of the European organizations regarding the Constitution of Serbia. In the following part of the text within a thorough analysis of the objections to the abovementioned opinion of the Venice Commission, the author tried to define the main dilemmas and presumptions concerning the changes of the Constitution of Serbia.

5 The EU firstly participated in the constitutional restructuring of the Federal Republic of Yugoslavia, in the creation of the state union of Serbia and Montenegro and the adoption of the Constitutional Charter (2003). It was envisaged under the Constitutional Charter to change constitutions of republic members within certain time. However, Serbia and Montenegro have not harmonized their respective constitutions with the Constitutional Charter. Therefore, it is stated in the National Strategy for the EU accession of Serbia and Montenegro that in regard to the establishment of appropriate legal regulatory rules the most obvious thing is the lack of appropriate constitutional framework. See_"National Strategy for the EU accession of Serbia and Montenegro" (2005) Beograd: European Integration Office, pp. 25-27.

6 "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...". *Ibid,* p. 2.\

7 European commission for democracy through law (Venice commission), *Opinion on the Constitution of Serbia, adopted by the Commission at its 70th plenary sessi-on* (Venice, 17–18 March 2007), CDL-AD(2007)004, http://www.nspm.org.yu/debate_2007/2007_venecijanska_kommisija_kom.htm [Accessed 21 October 2007].

II. Altering the Constitution of Serbia

1. Preamble

Most of the constitutions of EU state members have a preamble (Germany, France, Spain, Portugal, Poland, Slovenia...). A preamble is the part of the text which, as a rule, precedes a constitution, contains guiding principles and motives of the constitution-making authorities in the adoption of this supreme legal act. Certain European constitutions contain in the preamble a proclamation of the intent to live in united Europe or commitment to European principles.[8]

Constitution of Serbia has moved the declarative commitment to European values, inscribed in the Proposal for the Constitution in the preamble, further on into the basic principles (Article 1). The older Serbian institutions did not have a preamble, in contrast to 1990 Constitution. From the standpoint of the process of European integrations, this preamble is one of the most disputable parts of the 2006 Constitution of the Republic of Serbia.

As a side note, theory knows different stands on the character of legal obligatorness of the preamble.[9] The doctrinaire stand is that the answer to the question of legal power of a preamble depends on a sequence of circumstances (the contents of a preamble, its place in the constitution).[10] What adds to the complexity of this question is the fact

8 An example can be found in the German Constitution from 1949, which states in the preamble: „Aware of its responsibility before the God and before people, *determined to serve to the world peace as an equal member of the united Europe*, the German people through the power of constitution-making authorities have adopted this Constitution " (italic by R. M.).

9 Theoreticians who challenge legal obligatorness of the preamble emphasize that by its form it does not have the character of a legal act. From formal and legal perspective it does not have articles, enacting terms or sanctions. It is a declaratory (program) document, which is not an integral part of the Constitution, with the general contents that is not binding for anyone. On the other hand, it has been emphasized that there are constitutions with the preambles which have legal contents (French constitution), so that also by their formal effect they should be deemed as positive legislative rules. See M. Jovičić, M. (2006). "O ustavu". In: Jovicic, M. *Ustav i ustavnost*. Beograd: Pravni fakultet Univerziteta u Beogradu, Službeni glasnik, pp. 110, 124. German law doctrine regards that the preamble has a legally binding character, considering that it is a guideline for the interpretation of the constitutional and legal norms ("indirect effect"), and that its direct effect can be derived from its contents and context. Cf. Šarčević, E. (2005) *Ustavno uređenje Savezne Republike Njemačke (Uvod u njemačko državno* pravo*)*. Sarajevo: KULT/B, Heinrich Böll Foundation, Embassy of the Federal Republic of Germany in Sarajevo, pp. 44-45.

10 A preamble is not legally binding when it does not prescribe any rules and when it precedes the title of the Constitution. Marković, R. (2011) *Ustavno pravo* 15th edition. Beograd: Pravni fakultet Univerziteta u Beogradu, p. 41.

that the text of preamble comes before the title of the Constitution, and also that the Constitution of Serbia has not expressly established legal obligatoriness of the preamble. The constitution-maker could have resolved this dilemma by a norm, that is no novelty in the constitutional legal practice, pursuant to which "the preamble makes an integral part of the Constitution and shall produce legal effect".

The preamble establishes the motives for the adoption of the Constitution and defines the status of Kosovo and Metohija. The Constitution regulates that "constitutional obligation of all state bodies is to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations". The Constitution does not specify "bodies" (sic!), and otherwise only uses the term "state bodies", which are subject to the referred obligation (Cf. Pajvancic 2011: 10). It follows from article 114, paragraph 3, that this is primarily a constitutional obligation of the President of the Republic.[11] Much the same, both the Constitution and law texts fail to define the contents of the "substantial autonomy concept", as an unknown normative concept, in comparative terms. Unclear and imprecise formulations of the preamble cause different interpretation of its legal obligatoreness.[12]

Two arguments challenge the interpretation that the preamble produces legal effect. According to formal criteria, the preamble is not given in the framework of the legal norm and its texts stands before the title of the Constitution. However, it contains "a clear rule of conduct". Any conduct of state bodies that violates the status of Kosovo and Metohija is subject to sanctions.

Serbia and European Union do not have a common stand regarding the status of Kosovo and Metohija. While for Serbia Kosovo and Metohija is "an integral part" of its territory, the majority of the EU member countries (22 out of 27) have recognized the independence of Serbia's southern province. Along these lines, there is an equivocal explanation regarding the possibility that Serbia continues the process of European

11 The text of his oath is as following: "I do solemnly swear that I will devote all my efforts to preserve the sovereignty and integrity of the territory of the Republic of Serbia, including Kosovo and Metohija as its constituent part…"

12 The character of legal obligatorness of the preamble is negated by Ratko Marković, and Kosta Čavoški. Cf. Marković, R. (2007) "Ustav Republike Srbije od 2006" – kritički pregled". In: Marković, R., Brčin, D. (eds.) *Ustav Srbije – kritička analiza*. Beograd: Beogradski forum za svet ravnopravnih, p. 9; Čavoški, K. (2007) "Neuki i neodgovorni tvorci novog Ustava Srbije". In: Marković, R., Brčin, D. (eds.) *Ustav Srbije – kritička* analiza. Beograd: Beogradski forum za svet ravnopravnih, p. 68. According to an opposite opinion (Milosavljević, B., Popović, D. (2008) *Ustavno pravo*. Beograd: Pravni fakultet Univerziteta Union, p. 44), the preamble "comprises a clear rule of conduct" for our state bodies and "has legally binding character".

integrations without recognizing Kosovo. While it is, at least diplomatically, explained that these are two separate processes, in the colloquial addresses by politicians from most influential member countries, progress in the process of association to EU is connected with Serbia's actions towards recognizing independence of Kosovo. In the last report of the European commission, the request that Serbia should make "significant progress" in negotiations with Kosovo, euphemistically hides that fact that the doors for the continuation of negotiations are locked.[13]

In future Serbia shall be faced with a painful dilemma – recognition of Kosovo and Metohija or continuation of the European integrations. The disputable contents of the preamble "binds the hands" to state bodies. In this regard, a decision to recognize independence of Kosovo shall result in altering the Constitution, including not only the preamble, but also the constitutional norms that regulate the status of its southern province.

2. Decentralization

Decentralization is often stated in political debates as a legitimate basis for altering the Constitution. Most of the political parties in Serbia regard that the Constitution provides too tight scope for decentralization. The Constitution, the same as its predecessor, maintains an economically inappropriate and politically undemocratic model of political centralization in the relations among local self-government, territorial autonomy and republic authority. Critics claim that there are powerful institutional mechanisms of control by the executive power over local self-government, inadequate asymmetric territorial arrangement with two provinces, discrepancy between the constitutional-legal and actual status of AP Kosovo and Metohija and violation of proclaimed rights to local self-government and territorial autonomy.

13 On 12 October 2011 the European Commission has issued recommendation to grant Serbia the status of a candidate for EU membership, but the date for the beginning of negotiations has been postponed (See European Commission, *Commission Opinion on Serbia's application for membership of the European Union, Commission Staff Working Paper, Analytical report*, COM(2011)668, Brussels, 12. October 2011, SEC(2011)1208). In the 2010 Report European Commision notes that Serbia "has continued to contest Kosovo's declaration of independence", criticizes its policy on Kosovo, pp. 16-17. Serbia is requested to enable participation of Kosovo in regional fora, and customs and operation of courts in the north of the Serbia's southern province is examined from the standpoint of Copenhagen criteria on regional cooperation. Cf. European Commission, *2010 Progress Report on Serbia (working document), Brussels* SEC(2010) 1330 [online]. Available at: http://www.seio.go.rs/upload/documents/eu_dokumenta/godisnji_izvestaji_ek_o_napretku/izvestaj_o_napretku_srbije_2010_sa_%20aneksom.pdf [Accessed 13 October 2011].

Similar criticism can be found in the Opinion of the Venice Commission, only here the analysis is more focused on legal-technical objections (enunciation of the constitutional matter and vague definitions, for example in the regulation of the separation of powers between the state, autonomous province and units of local self-government, regulation of the status of "substantial autonomy") and lack of guarantee for the financial autonomy of autonomous provinces and local self-governments. The Venice Commission recommends subjecting Government's power to dismiss municipal assembly to the requirement of a prior assessment of the case by the Constitutional Court, and instead of Government to let Constitutional court make a prior assessment of the constitutionality and legality of decisions adopted by the autonomous province (see Article 186 of the Constitution).

In the public discourse of Serbia, often toned by demagogic, politicized and inappropriate approaches, features ununiform and erroneous use of technical notions (regionalism, regions and regionalization)[14], which gives rise to confusion among citizens and blurs attempts at analyzing political parties' stands on decentralization. Certain parties interpret decentralization processes as attempt to decompose the state, other find in them a formula for an efficient and more rational system of government (regionalism), while for some other such processes are a continuation of democratization and suppression of political and institutional centralism (regional state), while for national minorities they represent a step towards political autonomy…

During its nascent and development the European Union was building an institutional system in which powers should be divided between the centre and the periphery, notably the one in which "public policy should be in the hands of different levels in order to produce the best aggregate result" (Hiks 2007: 37). That is one of the basis for encouraging policy of regionalism.[15] An unequivocal conclusion is that, along with the respect for different democratic traditions in state members,

14 For different meanings, see Jovičić, M. (2006) "Regional state", in: Jovicic, M. *Savremeni federalizam.* Beograd: Pravni fakultet Univerziteta u Beogradu, Službeni glasnik, p. 347.

15 Under the Law on regional development (2009) Serbia introduced NUTS regions, specifically the statistical regions (their count was reduced from seven to five based on the 2010 amendments to the Law), with the view to ensure more balanced regional development (see Article 94 of the Constitution). This is in compliance with the EU policy on the enhancement of underdeveloped regions, economic and social transformation and development of certain areas (education, schooling and employment). Through the Committee of regions established under the Treaty of Maastricht, the EU coordinates the so called structural funds and finances structural policy. The Committee, as an advisory body, is tasked to maintain relations with regional and local authorities. In the pre-accession period of the European integrations, constitution of the NUTS regions is of

decentralization is the connective tissue of the institutional architecture. In consideration of the constitutional reform, the task of political elite in Serbia is to determine normative forms of decentralization, adjusted to the needs of the economic development, protection of human liberties and rights, and vertical power policy.

3. Position of the Members of Parliament – Terms of Office

Constitutional provision under which "under the terms stipulated by the Law a Member of Parliament shall be free to irrevocably put his/her term of office at disposal to the political party upon which proposal he or she has been elected a Member of Parliament" (Article102, paragraph 2) has provoked controversial interpretations and strong criticism. Mentioned constitutional norm, much the same as other constitutional solutions, is imprecise. Constitution-maker leaves to the legislator to regulate in more detail the manner and conditions under which a mamber of parliament may put his/her term of office at disposal to the political party. The Law on Members of Parliament and the Law on the National Assembly have failed to regulate this provision in more detail. Another, more important consequence of this constitutional solution is that it practically deforms the nature of the term of office of a Member of Parliament and introduces "a concealed" imperative terms of office (Cf. Jovanovic 2006: 671; Jovanovic 2008: 85-99).

According to this constitutional solution, the Member of Parliament's mandate is not free, but imperative or tied. By signing irrevocable resignation, or a "blank resignation", a Member of Parliament enters contractual relationship with the party. By activating such resignation the party may at any time take off the mandate from a Member of Parliament. This stand was founded on the argumentation that by his/her leaving the political party or coalition on the list of which he/she was elected, a Member of Parliament disturbs the purport of the proportional election system. He/she is not elected by citizens' will, but thanks to the success of the electoral list, thus the party has the right to decide on the fate of his/her mandate. A "blank resignation" in fact, has the character of an educative measure, a threat and sanction against unfit or disobedient Members of Parliament. In the political system of Serbia, it was supposed to serve as a means to prevent trading in Member of Parliament's mandates and reinforce party discipline.

special relevance for Serbia, in order that it may apply for funds from the structural funds. For more information see: http://www.europa.eu.int/comm/regional_policy.

Members' of Parliament "blank resignation" is in contradiction with the constitutional principles (citizens' sovereignty, rule of law, citizens' right to elect holders of power), international standards (International Covenant on Civil and Political Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms) and comparative practice.[16] An imperative mandate or a provision similar to Serbia's constitutional norm cannot be found in any of the European states. In its Opinion on the Constitution of Serbia, Venice commission points to the referred provision as its main shortcoming,[17] and regards that it violates Member of Parliament rights and concentrates excessive power in the hands of the party leaderships.

In practice, after the Constitution came into force, most of the political parties signed agreements on blank resignations with their Members of Parliament and councillors. However, although they often changed Members of Parliament, political parties did not use "blank resignation". According to a research by a Serbian daily, in the period June 2008 - March 2011, 35 Members of Parliament have been replaced, or one out of seven.[18] The question of "blank resignation" was at issue in two cases. After Serbian Progressive Party was formed, over twenty Members of Parliament from the Serbian Radical Party have joined the newly formed party. Serbian Radical Party requested activation of the blank resignations, yet its former vice president who became president of the new party stated that these have disappeared. The other case is even more interesting, because the administrative committee of the National Assembly has interpreted constitutional norm by preventing application of the blank resignation. In the case of a Member of Parliament who in 2010 stepped out of the Democratic Party of Serbia first to become and independent Member of Parliament, and later joining another parliamentary party, the Administrative Committee of the

16 Most of the European constitutions contain the principle of free imperative ma-ndate. Cf. Pajvančić, M. (2005) *Parlamentarno pravo*. Beograd: Konrad Adenauer Foundation, pp. 61-64; Pejić, I. (2007) "Koncept narodnog predstavništva i kontroverze o parlamentarnom mandatu u srpskom ustavu" [online]. Available at: http://www.nspm.rs/debate_2007/2007_pejic1.htm, fn 1. [Accessed 7 October 2011].

17 "The main concerns with respect to the Constitution relate, on the one hand, to the fact that individual members of parliament are made subservient by Art. 102.2 to party leaderships.." The Venice Commission of the Council of Europe also pointed to this solution in its Opinion", No. 405/206 date 19th March 2007 on the Constitution of Serbia, p. 18 [online]. Available at: http://www.venice.coe.int7does/2007/CDL-AD(2007)004.-e.pdf [Accessed 1 October 2011].

18 "Svaki sedmi poslanik otišao iz Parlamenta." *Novosti*, [online]. Available at: http://www.novosti.rs/vesti/aktuelno.69.html:312558-svaki-sedmi-poslanik-otisao-iz-parlamenta [Accessed 14 October 2010].

National Assembly disputed his "blank resignation" (Cf. Goati 2011: 10-11). In formal and legal regard, the ground for his decision was not provided in the positive law but in the decisions of the Constitutional Court of Serbia.

The Constitutional Court gave opinion on the character of representative mandate in three decisions. In May 2003 it has found incompliant with the Constitution the provision under which the mandate of a Member of Parliament, or councillor, shall cease before the end of the term of office in case of cease of such MP's membership in the political party or a coalition on the electoral list of which he/she was elected.[19] In 2010 Constitutional Court repealed Article 43 and 47 of the Law on Local Elections governing the institute of "blank resignations" on the local level. Constitutional Court has then given its stand that "the mandate is a public-legal relationship between voters and the Member of Parliament and cannot be the object of any contract under the private law."[20] In rendering its decision, the Constitutional Court invoked international standards and the case law of the European Court of Human Rights in Strasbourg in the case Gaulidirer vs. Slovakia.[21] Finally, the Constitutional Court repealed Article 84 of the Law on the election of Members of Parliament, based on which submitter of the electoral list could decide on the distribution of MPs' mandates.[22]

In the meantime, most of the political parties showed strong resistance against altering the Constitution and removing disputable provision. After the European Union insisted that Serbia takes measures concerning this issue, drafting of the amendments to the Law on the election of Members of Parliament was undertaken. The proposal for the amendments to the Law on the election of Members of Parliament (April 2011) establishes a procedure that prevents submission of blank resignations.[23] The Venice Commission disputed such solution and

19 Law on the election of deputies (Article 88), Decision of the Constitutional Court of RS IU no.197/02. Službeni glasnik Republike Srbije, no. 57/03.

20 Decision of the Constitutional Court of RS IU no. 52/08, 57/03. 52/08. Službeni glasnik Republike Srbije, no 34/10, 21 May 2010.

21 See European Court of Human Rights, in the *Gaulidirer v. Slovakia* (Application no. 36909/97) Judgment Strasbourg 18 May 2000, [online]. Available at: http:// www.portales.te.gov.mx&internacional/sites/portales.te.gov.mx.internacional/files/CASE_OF_GAULIDIRER.pdf [Accessed 11 October 2011].

22 Decisions of the Constitutional Court of RS IU no. 42/08, 57/03. 52/08. Službeni glasnik Republike Srbije, no 28/11, 26 April 2011.

23 A resignation, certified with the competent court, shall be submitted by a Member of Parliament personally, and it may not be older than three days when submitted to the National Assembly.

stated that "the inclusion of modalities for organizing blank resignations in the election law should be reconsidered as it risks replicating a constitutional provision that has previously been criticized, as well as reinforcing the imperative mandate."[24]

4. Clause on the Transfer of Sovereignty

The integrative clause or the clause on the transfer of sovereignty is a normative instrument that enables direct applicability of the EU law (acquis communautaire) in the national legislations. The integrative clause is a confirmation of supremacy of the acquis communautaire over the laws of the state members.

Taking into consideration that the European Union is not a state, and therefore it is not sovereign, state members confer certain powers to the European Union. Accordingly, acquis communautaire supersedes national laws. States are limiting their sovereign powers in favour of the European Union, notably in favour of a new legal order in the international law. This means that in order to apply EU regulations it is not required to ensure special ratification or adopt special regulations in national legislations (Čavoški 2006: 105).

Over the process of development of the European Union, by confirming founding documents, and /or under decisions of the European Curt for Human Rights or decisions of the national courts, state members have been accepting and positively interpreting the transfer of sovereignty.[25] According to German Constitution, a federal state may transfer its sovereign powers to international organizations (Article 24). Under amendment to its Constitution (Article 3) Slovenia may transfer the exercise of part of its sovereign rights to international organizations.[26] Already in 2010, although it shall officially become member of

24 Joint Opinion on the Draft Law on "altering and amending the Law on election of Members of Parliament" of the Republic of Serbia by the Venice Commission and the OSCE/ODIHR – Adopted by the Council for Democratic Elections at its 36th meeting (Venice, 24 March 2011) and by the Venice Commission at its 86 Plenary Session (Venice, 25-26 March 2011, http://www.venice.coe.int/docs/2011/CDL-AD%282011%29005-e.pdf [Accessed 14 October 2011]. See also CDL-AD(2009)027 Report on the Imperative Mandate and Similar Practices adopted by the Council for Democratic Elections at its 28th meeting (Venice, 14 March 2009) and by the Venice Commission at its 79th Plenary Session (Venice, 12-13 June 2009).

25 In UK this was done by court decisions. For more details see Loveland, I. (2009) *Constitutional Law, Administrative Law and Human Rights (A critical introduction).* Oxford: Oxford University Press, p. 405.

26 Adoption of such decisions, in the form of international treaties, is subject to two-thirds majority vote of all deputies. Slovenia has envisaged that before ratifying a

the European Union only in 2013, Croatia amended its Constitution by introducing the integrative clause.[27]

Absence of integrative clause was criticised in the drafting of the Proposal for the Constitution and after its adoption (Bulajic 2006: 29; Todoric 2006: 6-7). Counter argument is that the "integrative clause is "constitutionally pointless", has a declarative importance and may carry "superfluous overtone of a peculiar political voluntarism", because necessary conditions for its application are not in place (Samardzic 2006: 4-5). More favourable conditions for altering the Constitution and Serbia's rapprochement to European Union shall contribute to developing Constitutional provision on the transfer of powers. It is worth recollecting that Serbia has already unilaterally applied provisions of the Agreement on stabilization and association, which was positively assessed by the European Union.

5. Civil Rights and Liberties

After the dissolution of the state marriage with Montenegro, Serbia has adopted its Constitution in which it has incorporated provisions of the Charter of human rights and liberties, with certain amendments. This is a comprehensive catalogue of liberties and rights (about 70 articles, or one third of the Constitution text constitute the second part of the Constitution under the title "Human and Minority Rights and Freedoms"), featured by the already mentioned shortcomings (incompliance and imprecise formulations), including some addressed by the Venice Commission.[28]

Noteworthy is the provision on the right to enter into marriage and equality of spouses (Article 62). Constitutional solution is contradictory. The Constitution first defines that everyone shall have the right to decide freely on entering or dissolving a marriage (Article 62, paragraph 1), (Cf. Pajvancic 2011: 84), and thereafter says that the condition for entering a marriage is "the free consent of man and woman" (paragraph 2). This means that the Constitution excludes the right to enter into same-gender or gay marriages, and that not everyone has the

treaty it may call a referendum.

27 Croatian Constitution has dedicated a special Chapter to European Union (Chapter VIII), and by Article 143 has regulated conferring of powers. See "The Constitution of the Republic of Croatia (consolidated text)", *"Official Gazette"*, 85/2010.

28 The Venice Commission "expressed the concern that positive social and economic rights might create unrealistic expectations and advocated drafting them as aspirations rather than rights that can be directly implemented through court decisions." European Commission for Democracy through Law (2007: 5).

right to decide freely on entering or dissolving a marriage. Instead of the term divorce, the Constitution uses the term dissolving a marriage as closer to the genius of the Serbian language and legal terminology.[29] However, dissolution of a marriage is not free, because dissolution of a marriage becomes effective only on the basis of a decision by competent court, established ground for divorce or based on spouses agreement (See Draškić 2007: 120).

Constitutional review is an opportunity to "cleanse" Constitutional text, to harmonize it with the EU Charter of fundamental rights, but also to incorporate new rights and liberties, such as: the right to public criticism against public bodies, right of foreign nationals to acquire real property under the same conditions as domestic citizens, right of foreign nationals to participate in local elections, right to good governance and to natural justice, etc. More precise formulation of rights would improve legal security of citizens, and establishment of new rights would present Serbia as a proper candidate for joining European Union.

6. About Judiciary

Judiciary reform and rule of law constitute one of the most difficult tests in the procedure for meeting conditions by future member of the European Union. European Union has also closely monitored judiciary reform in Serbia. Its general assessment is that Serbia has not yet deserved a passing grade. Objections relate to regulations governing judicial power and manner of conducting reappointment of judges. The European Commission, Parliamentary Assembly of the Council of Europe, Venice Commission and Consultative Council of European Judges have informed public bodies and the public in Serbia about all the shortcomings and problems concerning judiciary reform.[30] The primary objection regarding the Constitution of the Republic of Serbia concerns the manner in which it has regulated reappointment procedure for judges.

The Venice Commission has noted that one of the basic guarantees for the independence of judges – the appointment of judges, has

29 Serbian word *raskid (*dissolution*)* implies cease of a bond, relationship, contract..., while Serbian word *razvod* (divorce*)* may also mean arranging, placing, as well as demarcation... Cf. Vujanić, M. et al. (2007) *Rečnik srpskog jezika*. Novi Sad: Matica Srpska, p. 1111, 1130.

30 In its *2010 Progress Report on Serbia* European Commission notes "Serbia made little progress towards further bringing its judicial system into line with European standards, which is a key priority of the European Partnership " and that "…major aspects of the recent reforms are a matter of serious concern ". Available at : http://www.izvestaj_o_napretku_srbije_2010_sa_aneksom.pdf. (p. 10) [Accessed 9 October 2011].

been deformed. The appointment of judges is excessively politicized, because the National Assembly is given too big role in the procedure for the election to judiciary offices (Article 147). This risk is even more prominent, because the Constitution envisages re-election for all holders of judiciary offices. Concern was expressed that the mechanism of "blank resignations", would add to a possibility that the offices in judiciary system be divided between political parties.[31] The National Assembly plays a two-fold role in the election of judges – in the setting up of the High Judicial Council (Article 153) it plays a decisive role in appointing candidates for judiciary posts, and then it takes final decision on the election of judges (Article 99, paragraph 2, point 5, related to Article 147 of the Constitution). Warnings by the Venice Commission and domestic experts were ignored, which has subsequently led to numerous defaults in the reappointment of judges.

7. On other questions concerning altering the Constitution of Serbia

Opinions of the Venice Commission have served as a landmark in the debates on Constitutional changes. Constitutional reform may encompass other questions as well. Some of them shall be underlined here.

7.1. "Golden Budget Rule"[32] – Constitutionalization of the "golden budget rule" in EU state members is the result of the initiative by Germany and France, which invited17 members of the monetary union on 16 August 2011 to set in their respective constitutions, by 2012, the ceiling for budgetary deficit at up to 3% of GDP and for the public debt at up to 60% of the GDP. The purpose of this is to guarantee prevention of excessive budgetary deficit and indebtedness. This constitutional norm has already been adopted in Germany (2009),[33] and Spain did so under the urgent procedure in September 2011. It is expected that Italy

31 European Commission for Democracy through Law (Venice Commission), *Opinion on the Constitution of Serbia (adopted by the Commission at its 70th plenary session),* Venice, 17-18 March 2007. CDL-ADL(2007)004, p. 9.

32 Constitutional norm under which a state cannot spend more than it gets in revenues exists in the constitutions of the most of US states, and in the constitutions of Germany and Switzerland. In the Polish Constitution (1997) there is a norm that prohibits "to contract loans or provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product " (Article 216, point 5). See "Constitution of the Republic of Poland", *Prava čoveka,* no. 5-6,/2003, Biro za zaštitu sloboda i prava u Beogradu, p. 136.

33 Basic Law (Article 115) regulates that federal budget deficit shall not exceed 0.35% of the gross domestic product, "debt break" (Schuldenbremise). Available at: http://www.ifo.de/link/Strukturelles_Defizit [Accessed 8 October 2011].

and France will do the same soon and that their example shall be followed by other members of the Euro-zone. The initiative to adopt such Constitutional norm derives from the economic crisis which has jeopardized the foundations of the European Union – its monetary system. In the Constitutional reform procedure, Serbia could "copy" the norm on budgetary stability.

Serbia has introduced new fiscal rules at the initiative of the International Monetary Fund and European Union. Under the 2010 Amendments to the Law on budget system it is envisaged that in the period 2011-2015 target annual fiscal deficit shall amount 1% of GDP on the medium term while the amount of public debt is limited at 45% of GDP, not taking into account liabilities under the restitution.[34]

7.2. Change in the competences of the Constitutional Court – to disburden Constitutional Court of its competences. Transfer to regular courts certain disputes that are now settled before the Constitutional Court (complaints concerning violation of the right to trial within reasonable time).

7.3. Change in the number of MPs, re-design provisions which define immunity of the holders of public offices, more precisely formulate reasons for dismissing judges, define position and change in the name of the Supreme Court of Cassation, limit National Assembly's right to appoint and dismiss officials, more clearly regulate reasons for the termination of office of certain public officials (e.g. Ombudsman) etc.

III. Conclusion

The procedure of the association of new state-members with the European Union requires harmonization of the domestic law with the EU law. Constitution, as the supreme and basic legal act, inevitably suffers certain changes and adjustments in accordance with this requirement. Key changes indirectly relate to the creation of a constitutional framework which would meet political-legal criteria (rule of law, protection of human rights and liberties, democratic political system), but also to amendment and adoption of specific provisions (e.g. sovereignty clause). This is not a static process, because in keeping with the development of the European Union state candidates face new imperatives, namely prerequisites that are constitutionally and institutionally shaped.

34 See: Article 27e of the Law on Budget System, "Official Gazette of RS", no. 54/09, 73/10 and 101/10)

Constitution of Serbia suffers from two types of shortcomings: deficit of legitimacy and normative insufficiency. Lack of public debate, hasty drafting and complex political moment at the time of its adoption have contributed to a quality of the Constitutional text below the expected. Venice Commission has already pointed to its key shortcomings, and its implementation practice has brought to light also some other deficiencies. The above presented facts speak on the inevitability of Constitutional review.

The dispute on constitutional review concerns three sets of important questions – the procedure for altering Constitution, reaching political consensus and the character of constitutional changes. The procedure for altering Constitution is complex and runs in stages: submission of a proposal, adoption of the proposal by two-third majority vote of the Parliament and calling a referendum, which is mandatory for certain parts of the Constitution (See Article 201 of the Constitution)[35]. Previous remark shows that this is a hard constitution, which can be changed only subject to broad political and social consensus.

Consensus on any political question, even change in the Constitution of Serbia is almost "an impossible mission". Political parties have different views on the need to alter Constitution, on the character of changes but also on the relationship towards European Union. Parties that are against Serbia's membership in the European Union advocate Constitutional status quo. They are, first of all, against the idea of altering the contents of the preamble and introducing regionalism. This is contrary to the principles of territorial sovereignty and integrity of the Republic. Parties advocating change in the Constitution do not share the same view on the constitutional norm to be changed.

Against altering the Constitution (SRS)	*In favour of altering the Constitution*	*No precise stand*
Serbian Radical Party Democratic Party of Serbia (DSS)	DS, LDP, LSDV, URS, SNS, SPO	SPS-JS-PUPS Coalition National minorities' parties

Table 1. Political parties' views on altering the Constitution

35 Referendum is mandatory if a change in the Constitution relates to the preamble, principles, human and minority rights and freedoms, organization of power, declaring state of war and emergency and procedure for altering the Constitution.

Political Party	*Object of Constitutional review*
Democratic party (DS)	– reduce the number of MPs – decentralization
G17 plus (United Regions of Serbia)	– preamble – regionalization and decentralization – bicameral Parliament
Liberal-Democratic party (LDP)	– preamble – altering Constitutional principles (definition of the Republic of Serbia, on the holder of sovereignty, use of language and script...) – human rights and liberties – powers of the Republic of Serbia – organization of power
League of Social Democrats of Vojvodina (LSDV)	– position of Vojvodina (territorial autonomy) – character of representatives mandate (reform of the political system)
Serbian Progressive Party (SNS)	– the number of MPs * Ready to talk on changes in other constitutional provisions
Serbian Revival Movement (SPO)	– preamble – decentralization

Table 2. Overview of political parties' basic views on altering the Constitution

Problems concerning constitutional review are well illustrated by the fate of a proposal initiative for altering the Constitution. In 2010 Serbian Progressive Party, having met a formal request by ensuring signatures of over 300,000 citizens, submitted a motion for changing the number of MPs. According to this proposal the number of MPs would

be halved, from the current count of 250 to 125 (Article 100, paragraph 1), which would contribute to a more efficient work of the Parliament and the Government. The proposal came against a broader political background, due to which it was not welcome by most of the political parties. Through the reduction of the number of MPS, the political scene of Serbia would be "cleansed". Survival of the most of current parliamentary parties would be jeopardized, because a smaller number of mandates would limit their political influence. A similar initiative, advocating regionalization, was proposed by the President of the Republic in the first half of 2009. The number of MPs would be set at 150, and Vojvodina would be just one among the regions.[36] Mentioned initiative by the President of the Republic gave rise to negative reactions, not only among the opposition parties, but of also among his political allies.[37]

Regarding altering the Constitution, three scenarios appear realistic. After parliamentary elections in 2012, subject to ensuring parliamentary support, the Government and coherent political majority would undertake a radical altering of the Constitution. Call for constitutional referendum would be tied with Presidential elections, out of financial reasons and for easier mobilization of voters. The second option, in a situation without political consensus, would be to postpone Constitutional change for an indefinite period of time, until Serbia finally knocks at the door of the European Union. Adoption of the Constitution would precede a referendum on joining European Union. In such situation Constitutional change would be extorted and, as customary, hasty. The third and most dramatic scenario is that due to political obstacles, specifically because of Kosovo and Metohija, Serbia joins Turkey in the status of an "eternal candidate" for the European Union. The imperative of Constitutional reform and constitutional and institutional harmonization of the Serbian law with the European legal system would be postponed to an indefinite time.

36 "Tadić najavio izmenu Ustava Srbije" (online). Available at: http://www.b92.net/info/vesti/index.php?yyyy=209&mm=04&dd=29&nav_category=11&nav_id=358007[Accessed 12 October 2011].

37 In the document under the title: *Serbia 2020 – concept of the development of the Republic of Serbia by 2020 (draft for public debate, December 2010)* it is emphasized that "priority is given to all those changes in the Constitution aimed at ensuring harmonization of the basic Constitutional and legal solutions with the European principles and values and generally accepted principles and rules of the international law" (p. 3). See http://www.predsednik.rs/mwc/dic/doc/srbija_2020_final_18122010.doc [Accessed 12 October 2011].

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