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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS ON THE CONSTITUTION OF SERBIA (Preamble and Parts I, III, IX)

by

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I. PREAMBLE

The preamble to the new Constitution confirms that the status of Kosovo is one of **"substantial autonomy within the Sovereign State of Serbia".**

An examination of the Constitution, and more specifically of Part 7, makes it clear that this substantial autonomy of Kosovo is not at all guaranteed at the constitutional level, as the Constitution delegates almost every important aspect of this autonomy to the legislator. In Section One on the Constitutional principles, article 12 deals with provincial autonomy and local self-government. It does so in a rather ambiguous way: on the one hand, in the first paragraph it provides that state power is limited by the right of citizens to provincial autonomy and local self-government, yet on the other hand it states that the right of citizens to provincial autonomy and local self-government shall be subject to supervision of constitutionality and legality. Hence it is clear that the law can restrict the autonomy of the Provinces.

This possibility of restricting the autonomy of the Provinces by law is confirmed by almost every article of Part 7 of the Constitution, and more specifically by:

- Article 182, par. 2: "The substantial autonomy of the Autonomous Province of Kosovo and Methohija shall be regulated **by the special law** which shall be adopted in accordance with the process envisaged for amending the Constitution."
- Article 183. par. 4: "The territory of autonomous provinces and the terms under which borders between autonomous provinces may be altered shall be regulated **by the law** …"
- Article 183, par. 2: "Autonomous provinces shall, **in accordance with the law**, regulate matters of provincial interest in the following fields …"
- Article 183, par. 3: "Autonomous provinces shall see to it that human and minority rights are respected, **in accordance with the Law**."
- Article 183, par. 5: "Autonomous provinces shall manage the provincial assets **in the manner stipulated by the Law."**
- Article 183, par. 6: "Autonomous provinces shall, **in accordance with the Constitution and the Law,** have direct revenues, …"
- Article 184, par. 1 to 3: "An autonomous province shall have direct revenues for financing its competences. The kind and amount of direct revenues shall be **stipulated by the Law**. **The Law** shall specify the share of autonomous provinces in the revenues of the Republic of Serbia."

Hence, in contrast with what the preamble announces, the Constitution itself does not at all guarantee substantial autonomy to Kosovo, for it entirely depends on the willingness of the National Assembly of the Republic of Serbia whether self-government will be realized or not.

As to the future status of Kosovo, the Venice Commission does not want to interfere in the responsibilities which Resolution 1244 (1999), adopted by the Security Council at its 4011th meeting on 10 June 1999, lays on the international civil authorities, more specifically the responsibility of "facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords" (11. e) and the responsibility of, "in the final phase, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement."

PART I – CONSTITUTIONAL PRINCIPLES

1. Article 5: Political Parties

Article 5, § 3, of the Constitution stipulates that activities of political parties aimed at a forced overthrow of the constitutional system, violation of guaranteed human or minority rights, inciting racial, national or religious hatred, shall be prohibited.

Since this article might imply restrictions on the freedom of expression, the freedom of assembly and the freedom of association for political parties, it is important that its application is subjected to article 20 of the Constitution concerning restrictions on the exercise of human and minority rights. This article reads as follows: "Human and minority rights guaranteed by the Constitution may be restricted by the law if the Constitution permits such restriction and for the purpose allowed by the Constitution, to the extent necessary to meet the constitutional purpose of restriction in a democratic society and without encroaching upon the substance of the relevant guaranteed right. Attained levels of human and minority rights may not be lowered. When restricting human rights and minority rights, all state bodies, particularly the courts, shall be obliged to consider the substance of the restricted right, the pertinence of the restriction, the nature and extent of the restriction, the relation of the restriction and its purpose and the possibility of achieving the purpose of the restriction with less restrictive means."

According to article 18, § 3 of the Constitution, provisions on human and minority rights "shall be interpreted to the benefit of promoting values of a democratic society, pursuant to valid international standards in human and minority rights, as well as of international institutions which supervise the implementation". In this context, it might be useful to bear in mind some of the fundamental principles underlying the jurisprudence of the European Court of Human Rights relating to articles 10 and 11 of the European Convention on Human Rights.

1. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. It is not only applicable to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness, without which there is no "democratic society".[1]

2. While precious to all, freedom of expression is particularly important for political parties and their active members. They represent their electorate, draw attention to their preoccupations and defend their interests.[2] Political parties play an essential role in ensuring pluralism and the proper functioning of democracy.[3] Inasmuch as their activities form part of a collective exercise of the freedom of expression, political parties are also entitled to seek the protection of Article 10 of the Convention. [4] It is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena. In view of their role, any measure taken against them affects freedom of association and therefore the state of democracy in the country concerned.[5]

3. The freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain "restrictions" or "penalties" (art. 10 and 11, § 2) …The test of "necessity in a democratic society" requires the Court to determine whether the "interference" complained of corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient.[6] The Court looks at the impugned

interference in the light of the case as a whole, including the content of the speech and the context in which it was delivered.[7]

4. One of the principal characteristics of democracy is the possibility it offers of addressing through dialogue, without recourse to violence, issues raised by different strands of political opinion, even when they are irksome or disturbing. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group that complies with fundamental democratic principles solely because it has criticised the country's constitutional and legal order and sought a public debate in the political arena.[8] A political party may campaign for a change in the law or the legal and constitutional structures of the State on two conditions: firstly, the means used to that end must in every respect be legal and democratic, and secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which does not comply with one or more of the rules of democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds.[9] Under Article 10, § 2 of the Convention there is little scope for restrictions on political speech or debates on questions of public interest.[10] Moreover, the limits of acceptable criticism are wider with regard to the government[11] or a politician acting in his public capacity than in relation to a private individual, as the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must display a greater degree of tolerance. [12]

5. Only very serious breaches such as those which endanger political pluralism or fundamental democratic principles could justify a ban on the activities of a political party.[13] When political parties incite to violence against an individual, a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.[14] Moreover, a political party cannot rely on the Convention to engage in activity or perform acts aimed at the destruction of any of the rights and freedoms set forth in it.[15] In view of the very clear link between the Convention and democracy, no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society.[16] Tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), provided that any "formalities", "conditions", "restrictions" or "penalties" imposed are proportionate to the legitimate aim pursued.[17] The Court reiterates, however, that the exceptions set out in Article 11 are, where political parties are concerned, to be construed strictly; only convincing and compelling reasons can justify restrictions on such parties' freedom of association.[18]

2. Article 10: Language and script

Article 10 of this Constitution deals with the official language and script in Serbia. It reads as follows: "The Serbian language and Cyrillic script shall be in official use in the Republic of Serbia. Official use of other languages and scripts shall be regulated by the law based on the Constitution." It is striking that, compared to the 1990 Constitution, there is a decreased protection of linguistic rights of minorities, as Article 8 of that Constitution expressly provided that the Latin alphabet also "shall be officially used in the manner established by law."[19]

As it appears from the articles 14, 18, § 2, and 75 to 81 of the Constitution, it is clearly the intention of the drafters to have the rights of minorities protected on a constitutional level. It is therefore not clear to the Venice Commission for what reasons the legal protection of the use of

the Latin alphabet, which is preferred by most of the minorities, is no longer expressly mentioned in the Constitution. This is the more astonishing as, according to article 20, § 2, of the Constitution, the attained level of human and minority rights may not be lowered.

3. Article 16: International relations

Article 16 deals with the international relations of the Republic of Serbia. It also determines the status of international treaties in Serbian law. The article points out that ratified international treaties shall be an integral part of the legal system in the Republic of Serbia and shall be applied directly. It also states that ratified international treaties must be in accordance with the Constitution. This principle is repeated in article 194 of the Constitution.[20] The compliance of ratified international treaties with the Constitution shall be examined by the Constitutional court.[21] (art. 167, 2°C)

The relation between international law and the Serbian Constitution needs to be further clarified, as it raises various questions.

First of all, attention has to be paid to the Vienna Convention on the law of treaties[22]. According to art. 27 of this Convention, a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. [23] The only exception to this principle is determined in article 46 of this treaty, which reads as follows: "1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. 2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith.

If the above-mentioned article 16 of the Serbian Constitution is to be interpreted as enabling the Constitutional Court to deprive ratified international treaties of their internal legal force when they do not comply with the Constitution, then the Serbian State, in order not to violate its international obligations deriving from ratified treaties, would either have to amend the Constitution – which will not always be possible in view of the complex procedure drafted in article 203 – or denounce the treaty or withdraw from it, if the possibility to do so is provided for in the treaty itself or is in compliance with article 56 of the Vienna Convention on the Law of Treaties.

As the international liability of the Serbian State might be at stake, it would be preferable to try to avoid these situations by organizing an *a priori* verification of the compliance of a treaty with the Constitution, before the treaty is ratified. The procedure for the "assessment of the constitutionality of the law prior to its coming into force", provided for in article 169 of the Constitution, could therefore be expanded to the assessment of the constitutionality of treaties prior to their ratification.

Another problem that has to be dealt with is the relation between article 16 of the Serbian Constitution, which stipulates that ratified international treaties must be in accordance with the Constitution, and article 97 of this Constitution, which states that the "Republic of Serbia shall organise and provide for 1° … its international status and relations with other countries and international organisations." The question arises whether article 97, 1°, implies the possibility for the Republic of Serbia to conclude a treaty which transfers powers to international or supranational organizations. If this were not possible, article 16 and article 167, § 1, 2. of the Constitution would apply and the treaty would have to be considered to be in contradiction with the Constitution. This would mean that the Constitution would have to be amended before the Republic of Serbia could become a member state of an international or supranational organization which exercises competences that according to article 97 belong to the Serbian

Republic**.** It is important to elucidate this very key question regarding the interpretation of the above-mentioned articles of the Serbian Constitution.

4. Article 17: Status of foreign nationals

Article 17 deals with the status of foreign nationals. It stipulates that foreign nationals in the Republic of Serbia shall have all rights guaranteed by the Constitution and the law, with the exception of rights to which only the citizens of the Republic of Serbia are entitled under the Constitution and the law. The way it is phrased, article 17 doesn't protect foreigners against discrimination by the law.

The principle of non-discrimination is of course also confirmed in international treaties to which the Republic of Serbia is a party, such as in article 14 of the European Convention on Human Rights and Fundamental Freedoms and in article 26 of the International Covenant on Civil and Political Rights. It is not clear whether these articles prevail over article 17 of the Constitution. On the one hand, article 16, § 3, of the Constitution states that ratified international treaties must be in accordance with the Constitution, which seems to imply that foreign nationals will not be able to invoke these articles before the Serbian Courts; on the other hand, article 18, § 1, of the Constitution stipulates that the Constitution "shall guarantee and as such directly implement human and minority rights, guaranteed by the generally accepted rules of international law, ratified international treaties and laws", which seems to imply that the above-mentioned articles of the international treaties on human rights are integrated in the Constitution, and thus neutralize the effects of article 17 on the status of foreign nationals.

The question needs to be elucidated. As the principle of non-discrimination is essential to a democratic society, an unequal treatment of foreigners by law should not be possible without proper justification.

The same remark has to be made with regard to article 85 of the Constitution, which reads as follows: "Foreign natural and legal entities may obtain real property, in accordance with the Law or international contract. Foreigners may obtain a concession right to natural resources and goods, as well as other rights stipulated by the law."

PART III – ECONOMIC SYSTEM AND PUBLIC FINANCES

1. Article 88: Land

Article 88, § 2, of the Constitution provides that "the law may restrict the modes of utilization and management, that is, stipulate terms of utilization and management, in order to eliminate the danger of causing damage to the environment or to prevent violation of rights and legally based interests of other persons."

Insofar as land is the object of private property, article 88 will have to be read in conjunction with article 58 of the Constitution, on the "Right to Property", and with articles 18 and 20 of the Constitution, on the "Direct implementation of guaranteed rights" and on the "Restriction of human and minority rights". In this context it might be useful to remember the jurisprudence of the European Court of Human Rights pertaining to article 1 of the first Additional Protocol to the European Convention on Human Rights and Fundamental Freedoms. Under the second paragraph of Article 1 of Protocol No. 1 (P1-1), the Contracting States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose. However, as this provision is to be construed in the light of the general principle enunciated in the first sentence of the first paragraph, there must exist a reasonable relationship of proportionality between the means employed and the aim sought to be realised.[24] In striking the fair balance thereby required between the general interest of the community and the

requirements of the protection of the individual's fundamental rights, the authorities enjoy a wide margin of appreciation.[25]

2. Article 91: Taxes and other revenues

Article 91, § 2, provides that the obligation of paying taxes and other dues shall be general and "based on the economic power of taxpayers". This article seems to exclude (indirect) taxes – such as the Value Added Tax (VAT) – which are not based on the economic power of taxpayers. Since VAT was recenty introduced in Serbia, this can not be explained otherwise than as an oversight on the part of the drafters. Probably their intention was that economic power be relevant only for direct taxation. The text should be adapted.

PART IX – AMENDING THE CONSTITUTION

Articles 203 and 204 deal with the amending of the constitution.

It strikes the Venice Commission that the procedure drafted is very complex, as it involves two steps: first the National Assembly has to adopt, by a two-thirds majority of all deputies, a proposal to amend the Constitution (art. 203, § 3 and 4), and then the same National Assembly has to adopt an act amending the Constitution by a two-thirds majority of all deputies (art. 203, par. 5 and 6).

A number of questions arise as to the significance and use of this two-step procedure. What is the legal effect of the adoption of the proposal to amend the Constitution? What is the relationship between the two votes held by the National Assembly? What is the use of the complexity that results from this procedure? The Venice Commission draws attention to the drawbacks of an excessively rigid procedure for amending the Constitution, as was experienced in Armenia and in Serbia under the Constitution of 28 September 1990.

An important element in the procedure to amend the Constitution is the possibility (art. 203, § 6) and in some cases the obligation (art. 203, § 7) to have it endorsed by the citizens in a referendum. It strikes the Commission that the list of constitutional amendments subject to referendum is very broad, especially since "the system of authority" as such is mentioned. In the original language of the Constitution the same term is used for the heading of Part V. If this implies that the notion "the system of authority" in article 203, § 7, is to be read in connection with Part V, the result would be that every amendment of the articles 98 to 165 would have to be subject to a referendum. It would be wise to determine more precisely to which principles of the "system of authority" article 203, § 7 of the Constitution applies.

Article 203, § 8, provides only two basic principles for the organisation of a referendum[26]. As the principle of the rule of law applies to referendums, further regulation will have to be enacted. The Commission draws attention to the "Code of good practice on Referendums"[27] and especially to point II. 2. a, that states: "Apart from rules on technical matters and details (which may be included in regulations by the executive), rules of referendum law should have at least the rank of a statute." In order to apply article 203, the Serbian legislator will have to adopt legislation on the organization of the constitutional referendum which should be in compliance with the principles set out in the above-mentioned "Code of good practice on Referendums".

Endnotes:

[1]See inter alia, ECHR, Handyside v. the United Kingdom, judgment of 7 December 1976, § 49; ECRM, Lingens v. Austria, 8 July 1986, § 41; ECHR, Oberschlick v. Austria, 23 May 1991, § 57; ECRM, Castells v. Spain, 23 April 1992, § 42; ECRM, Jersild v. Denmark, 23 September 1994, § 37; ECRM, Vogt v. Germany, 26 September 1995, § 52;. ECHR, Incal v. Turkey, 9 June 1998, § 114;

ECHR, Ceylan v. Turkey, 8 July 1999, § 44; ECHR, Sürek v. Turkey, 8 July 1999, § 132; ECRM, Gündüz v. Turkey, 4 December 2003, § 20; ECHR, Unabhängige Initiative Informationsvielfalt, v. Austria; 26 February 2002, § 2...

[2] ECHR, Incal v. Turkey, 9 June 1998, § 114

[3] ECRM, United Communist Party of Turkey and Others v. Turkey, 30 January 1998, § 44; ECHR, Christian Democratic People's Party, 14 February 2006, § 57.

[4] ECHR, (GC) Refah Partisi and others v. Turkey, § 142-143; ECHR, Partidul Communistilor (Nepecerist) aind Ungureanu v. Romania, 3 February 2005, § 45.

[5] ECHR, OuranioToxo and others v. Greece, 20 October 2005, § 34; ECHR, Socialist Party of Turkey (STP) and Others v. Turkey, 12 November 2003, § 36.

[6] ECHR, The Sunday Times v. the United Kingdom, 26 April 1979, § 62; ECRM, Gündüz v. Turkey, 4 December 2003, § 21; ECHR, Unabhängige Initiative Informationsvielfalt, v. Austria, 26 February 2002, § 3.

[7] ECHR, case of Yarar v. Turkey, 19 December 2006, § 36 ECHR, Halis v. Turkey, 11 January 2005, § 102; ECRM, Gündüz v. Turkey, 4 December 2003, § 25.

[8] ECHR, Partidul Communistilor (Nepeceristi) en Ungureanu v. Romania, 3 February 2005, § 55.

[9]ECHR, Refah Partisi v. Turkey, 13 February 2003, § 152-154; ECHR, *Socialist Party and Others v. Turkey*, 25 May 1998, §§ 46-47; ECHR, Partidul Communistilor (Nepeceristi) and Ungureanu v. Romania, 3 February 2005, § 46-48.

[10] ECHR, *Sürek v. Turkey (no. 1)* [GC], § ... ECHR, Wingrove v. the United Kingdom, 25 November 1996, § 58.

[11] ECHR, Ceylan v. Turkey, 8 July 1999, § 46; ECHR, Sürek v. Turkey, 8 July 1999, § 135.

[12] ECHR, Unabhängige Initiative Informationsvielfalt, 26 February 2002, § 4.

[13] ECHR, Christian Democratic People's Party, 14 February 2006, § 71.

[14] ECHR, Ceylan v. Turkey, 8 July 1999, § 46; ECHR, Sürek v. Turkey, 8 July 1999, § 135.

[15] ECHR, United Communist Party of Turkey and Others, cited above, § 60.

[16]ECHR, Refah Partisi v. Turkey, 13 February 2003, § 152-154; see *Communist Party (KPD) v. Germany*, no. 250/57, Commission decision of 20 July 1957, Yearbook 1, p. 222.

[17]ECRM, Gündüz v. Turkey, 4 December 2003, § 23, 29.

[18] ECHR, Refah Partisi v. Turkey, 13 February 2003, § 152-154.

[19] "In the Republic of Serbia the Serbo-Croatian language and the Cyrillic alphabet shall be officially used, while the Latin alphabet shall be officially used in the manner established by law.

In the regions of the Republic of Serbia inhabited by national minorities, their own languages and alphabets shall be officially used as well, in the manner established by law."

[20] Article 194, third phrase : "Ratified international treaties and generally accepted rules of international law shall be part of the legal system of the Republic of Serbia. Ratified international treaties may not be in noncompliance with the Constitution."

[21] Article 167, § 1, 2°: "The Constitutional Court s hall decide on … 2° compliance of ratified international treaties with the Constitution."

[22] … has ratified the VCLT, which is considered to be a restatement of customary law.

[23] Art. 27. A party may not invoke the provisions of its internal law as justification

for its failure to perform a treaty. This rule is without prejudice to article 46.

[24] ECHR, Tre Traktörer Aktiebolag v. Sweden, 7 July, § 59.

[25] ECHR, Agosi v. United Kingdom, 24 October 1986, § 52; ECHR, Almlan Jacobson v. Sweden, 25 Octobre 1989, § 55.

[26] "When the act on amending the Constitution is put forward for endorsement, the citizens shall vote in the referendum within no later than 60 days from the day of adopting the act amending the Constitution. The amendment to the Constitution shall be adopted if the majority of voters who participated in the referendum voted in favour of the amendment."

[27] European Commission for democracy through law (Venice Commission), "Code of Good Practices on Referendums, Guidelines on the holding of Referendums and Draft Explanatory Memorandum", CDL-EL (2006)033.