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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS  
ON THE DRAFT AMENDMENTS  
TO THE CONSTITUTION OF REPUBLIKA SRPSKA**

by  
**Mr Michael Hansen JENSEN**  
**(Substitute member, Denmark)**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents..*

1. The following comments to the proposed amendments are more sporadic and of very general nature. They are based only on document CDL(2008)047 (the text of the Constitution), document CDL(2008)048 (draft amendments to the constitution) and the Opinion on the compatibility of the Constitutions of the Federation of Bosnia and Herzegovina and the Republika Srpska with the Constitution of Bosnia and Herzegovina (CDL(1996)056fin). It should be noted that I have no relevant working experience with/knowledge of the constitutional development and situation in the Republika Srpska.

## 2. Article 12, Amendment CXXVII

According to this amendment no one shall be held in slavery or servitude. It should be considered to incorporate this amendment into article 14, paragraph 1, instead. According to article 14, paragraph 1, no one may be subject to torture, cruel, inhuman or degrading treatment or punishment.

## 3. Article 13, Amendment CXXVIII

It is not advisable to let "human dignity, physical and spiritual integrity" be subject to the exceptions in ECHR article 8 as ECHR article 3 on prohibition of torture and inhuman treatment does not allow exceptions.

The problem also arises in relation to article 49, paragraph 5.

## 4. Article 15, Amendment CXXIX

It should be considered whether there is a need for this amendment ("No one shall be deprived of his liberty merely on the ground of inability to fulfill a contractual obligation"). The proposed provision is of a very special nature.

## 5. Article 20, amendment CXXX

According to this amendment article 20, paragraph 2, reads as follows:

"Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

It is recommended that "law" is followed by "by a decision of the court" or – as in the original provision – "by a final decision of the court".

## 6. Article 54, Amendment CXXXVI

According to the amendment article 54 reads as follows:

"Private and public property shall be guaranteed.

Public property shall be the ownership of the Republika Srpska (entity level) and of the local self-government.

All forms of ownership shall enjoy equal legal protection.

Natural resources in the territory of the Republika Srpska, assets for which it has been prescribed by law that they are of general interest and immovable assets the authorities of the Republika Srpska dispose of shall be the property of the Republika Srpska. Among the items of the Republika's property may also be other assets and rights, in accordance with law.

Natural and legal persons may acquire certain rights to certain assets in general use, under terms and methods prescribed by law.

Natural resources shall be exploited under terms and methods prescribed by law.”

It is not advisable to establish a constitutional protection of property belonging to the state/Republica Srpska which corresponds to the protection of the property owned by individuals and private legal persons.

It is – at least from a general perspective – difficult to see the need for such constitutional protection of state owned property. A protection of state owned property is merely an expression of the protection of the interests of the state against state intervention.

And there is a danger that equal protection of public property owners and private property owners can have a negative impact on the level of the constitutional protection of legal positions of private owners.

The amendment should be reconsidered.

#### 7. Article 56, Amendment CXXXVII

According to the amendment article 56 reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law.”

The idea behind this amendment is clearly to formulate a general provision on protection of property that reflects the model in article 1 of the First Protocol to ECHR.

According to the original provision in article 56 the right to ownership may be restricted or taken away by law “against fair indemnity”.

However, the amendment does not contain a requirement for compensation in the case of expropriation.

It is recommended that article 56 guarantees compensation in case of expropriation.

It must be remembered that traditionally a central idea behind constitutional protection of property is to ensure that an individual who owns property which must be surrendered for the public good should not thereby suffer a financial burden. The financial burden should be borne by society at large, in whose interest the intervention is made.

#### 8. Article 58, Amendment XXXI and CXXXVIII

According to these amendments to article 58 (paragraph 2) public owned property may as a rule be alienated only according to the market criteria.

It is not clear whether this provision also applies in case of expropriation. Compare above under 5 (article 54) and under 6 (article 56).