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COMPILATION

OF VENICE COMMISSION OPINIONS

**CONCERNING CONSTITUTIONAL PROVISIONS
FOR AMENDING THE CONSTITUTION¹**

¹ *This document will be updated regularly. This version contains extract from opinions adopted up to and including the Venice Commission's 104th Plenary Session (23-24 October 2015)*

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I. Introduction

This document is a compilation of extracts taken from opinions adopted by the Venice Commission on issues concerning constitutional and legal provisions for amending the constitution. The aim of this compilation is to give an overview of the Venice Commission findings and recommendations in this field.

The compilation is intended to serve as a source of reference for drafters of constitutions, researchers, as well as for the Venice Commission's members, who are requested to prepare opinions and reports on mechanisms of constitutional amendment. When referring to elements contained in this compilation, please cite the original document but not the compilation as such.

The compilation is structured in a thematic manner in order to facilitate access to the general lines adopted by the Venice Commission on various issues in this area. It should not, however, prevent members of the Venice Commission from introducing new points of view or diverge from earlier ones, if there is a good reason for doing so. The compilation should be considered as merely a frame of reference.

The reader should also be aware that most of the documents from which extracts are cited in the compilation relate to individual countries and take into account the specific situation there. The quotations will therefore not necessarily be applicable in other countries. This is not to say that recommendations contained therein cannot be of relevance for other systems as well.

The main document of the Venice Commission in this field is the Report on Constitutional Amendment (CDL-AD(2010)001) adopted by the Venice Commission at its 81st Plenary Session (Venice, 11-12 December 2009). The Report describes and discusses the existing procedures and challenges for national constitutional amendment in the selected states and seeks to present general standards for all member and observer States of the Venice Commission. The present Compilation does not include extracts from the Report on Constitutional Amendment which is of a more general application in order not to impair its integrity. The Report on Constitutional Amendment is attached to the present Compilation as an annexe and both documents should be read together.

Each quotation in the compilation has a reference that sets out its position in the opinion or report/study (paragraph number, page number for older opinions), which allows the reader to find it in the opinion or report/study from which it was taken. In order to gain a full understanding of the Commission's position on a particular issue, it would be important to read the complete chapter in the Compilation on the relevant theme you are interested in. Most of further references and footnotes are omitted in the text of quotations; only the essential part of the relevant paragraph is reproduced.

The compilation is not a static document and will be regularly updated with extracts of recently adopted opinions by the Venice Commission. The Secretariat will be grateful for suggestions on how to improve this compilation (venice@coe.int).

II. General Remarks

A. No unique model for constitutional amendments

“34. It is neither possible nor desirable to try to formulate in the abstract a constitutional amendment optimal model. The point of balance between rigidity and flexibility may be different from one state to another, depending on the social and political context, constitutional culture, age, level of detail and the characteristics of the constitution, and number of other factors, especially as this balance is not static and can move over time according to social, economic and political transformations.”

CDL-AD(2013)029, Opinion on three draft Constitutional Laws amending two constitutional Laws amending the Constitution of Georgia

B. Purpose of constitutional amendments / constitutional stability

“105. (...) Constitutional stability is an important element for the stability of the country as a whole and one should not adopt a new Constitution as a “quick fix” to solve current political problems.”

CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine

“70. The Commission reiterates its position that even a good Constitutional text cannot ensure stability and democratic development of society without there also being the relevant political will of different political forces, further legislation in line with democratic standards and a sound system of checks and balances that sets the basis for its implementation.”

CDL-AD(2010)015, Opinion on the draft Constitution of the Kyrgyz Republic

“It may be regretted that the Constitution was revised twice in a very short space of time, with the result that full advantage could not be taken of the possibilities that the House of Counties could have offered after the first revision of the Constitution, in terms of the representation of new local and regional authorities but also of new self-governing bodies for minorities that are in the process of creation under the new law on the rights of minorities. It may also be noted that the House of Counties was abolished just before the organisation of local elections and at a time when the constitutional law of minorities had not yet been adopted. Although there is no element in the European constitutional heritage that requires the existence of an upper house of the legislature, it would be regrettable if the unicameralism instituted by the March 2001 amendments were to make future constitutional revision too easy and weaken constitutional stability”.

CDL-INF(2001)01, Opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia.

“47. As for the substantial side of the envisaged constitutional reform process, the Venice Commission reiterates its recommendation that a constitutional reform should result in an “effective strengthening of the stability, independence and efficiency of state institutions through a clear division of competencies and effective checks and balances” and “should also introduce additional mechanisms and procedures of parliamentary control over the actions and intentions of the executive”. In addition, it “should also include changes in the provisions on the judiciary aiming at “laying down a solid foundation for a modern and efficient judiciary in full compliance with European standards”.

CDL-AD(2011)002, Opinion on the concept paper on the Establishment and Functioning of the Constitutional Assembly of Ukraine

“31. In its Report on Constitutional Amendment, the Venice Commission expressed its concern with regard to excessively rigid procedures and warned against the difficulty of engaging in constitutional reform in such cases. In other cases, the Commission has been confronted with the opposite challenge, where amendments, or attempted amendments, to the constitution happen on a too frequent basis, which may also negatively affect constitutional and political stability. The Commission has thus stressed that a constitution cannot “be amended in conjunction with every change in the political situation in the country or after a formation of a new parliamentary majority”.

CDL-AD(2015)014, Joint Opinion on the Draft Law “On Introduction of changes and Amendments to the Constitution” of the Kyrgyz Republic

C. Consensus, transparency and legitimacy

“17. [...] the adoption of a new and good Constitution should be based on the widest consensus possible within society and [...] *“a wide and substantive debate involving the various political forces, non-government organisations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards. Too rigid time constraints should be avoided and the calendar of the adoption of the new Constitution should follow the progress made in its debate.”*

CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland

“28. In its previously mentioned opinion of 13 December 2003 (CDL-AD(2003) 019), the Venice Commission stressed the need to secure the legitimacy of any constitutional reform in Ukraine. It notes the complicated and hurried way in which a variety of constitutional amendments have been proposed, introduced, amended and voted on with each proposal being subjected to process of further amendments in the process. It wishes to stress that constitutional amendments should only be made after extensive, open and free public discussions and in an atmosphere favouring such discussions. Amendments should, as a rule, be based on a large consensus among the political forces and within the civil society.”

CDL-AD(2004)030, Opinion on the Procedure of Amending the Constitution of Ukraine.

“26. According to the information available, it appears that [...], no public debate has been held at the initiative of the authorities with regard to the preliminary draft. Moreover, no meetings of the Constitutional Committee have been held, before early February 2014, to discuss on the substance the preliminary draft - and available comments - in view of its revision.

27. The Commission finds all the more unfortunate that such a complex process, requiring thorough assessment of long-term political choices for the Romanian society, could not benefit from a genuine exchange between the majority and the opposition, as well as from the input of important institutional actors (such as the Superior Council of Magistracy), professional associations and other interested stakeholders having expressed their wish to contribute to the process.

[...]

“30. Informed public debate of the main changes and novelties that might be introduced and their impact for the Romanian society is of key importance, in terms of legitimacy and sense of ownership of the future constitution, for a successful revision process. This is all the more important in Romania in the light of the constitutional requirement that any amendment to the Constitution needs popular approval by referendum”.

CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania.

“42. The Venice Commission commends the proposal to mandate the constitutional assembly in Ukraine to prepare the constitutional reform package and to secure the participation in the drafting process of all relevant actors of society, while guaranteeing the

respect for the regular constitutional procedure for the adoption of constitutional amendments.”

CDL-AD(2011)002, Opinion on the concept paper on the Establishment and Functioning of the Constitutional Assembly of Ukraine

“18. The Commission would like to recall that transparency, openness and inclusiveness, adequate timeframe and conditions allowing pluralism of views and proper debate of controversial issues, are key requirements of a democratic Constitution-making process.

19. In its opinion, a wide and substantive debate involving the various political forces, nongovernment organisations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards. Too rigid time constraints should be avoided and the calendar of the adoption of the new Constitution should follow the progress made in its debate.”

CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary

“14. The wide range of - sometimes innovative - consultation mechanisms which have been used throughout the drafting process launched in 2010 - organization of a national forum, selection among the population of the members of the Constitutional Council to prepare the draft new Constitution, extensive informal consultation and involvement of the public by way of modern technology means, consultative referendum in the fall of 2012 - have given this process a broad participatory dimension and have been widely praised at the international level.

CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland

“32. As for the process of amending the Constitution, it is noted that this process should be marked by the highest levels of transparency and inclusiveness – in particular in cases where draft amendments, such as the current ones, propose extensive changes to key aspects of the Constitution, such as the roles of the highest court and its constitutional chamber, the immunity and loss of mandate of deputies, and the process of appointing/dismissing heads of local administration. In this context, it should be borne in mind that the Constitution itself, in its Article 52, specifically states that citizens shall have the right to participate in the discussion and adoption of laws of republican and local significance, which surely applies in the current case.

33. It is thus recommended to ensure, in this and further attempts to amend the Constitution, that all relevant stakeholders, including civil society, and the wider public, are aware of the proposed changes, and are included in various platforms of discussion on this topic, so that, once draft amendments are presented to the *Jogorku Kenesh* for adoption, they are also representative of the will of the people.”

CDL-AD(2015)014, Joint Opinion on the draft Law “On Introduction of changes and amendments to the Constitution” of the Kyrgyz Republic.

“86. The Venice Commission notes that, on the basis of its opinion, the Draft concept paper will be revised and submitted to the President of the Republic of Armenia. Thereafter, the Draft will have to be transformed into a concrete set of constitutional amendments. The Venice Commission encourages the Armenian authorities and the constitutional reform commission to pursue their efforts to involve the public and all stakeholders, in particular political parties.”

CDL-AD(2014)027 Opinion on the Draft Concept Paper on the Constitutional Reforms of the Republic of Armenia

“135. Already in its Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary, the Venice Commission expressed its concern regarding the constitution-making process in Hungary. During the various visits of its delegation, the Commission learned about the lack of transparency of the process of the adoption of the new Constitution and the inadequate involvement of the Hungarian society. The Commission criticised the absence of sincere consultation and noted with regret that the consensus among political forces and within society generally required for the legitimacy of a constitution was absent.

[...]

137. [...] The Commission never denied the sovereign right of Parliament to adopt the constitution or to amend it, but it criticized the procedure and methods of doing so in Hungary. The Constitution of a country should provide a sense of constitutionalism in society, a sense that it truly is a fundamental document and not simply an incidental political declaration. Hence, both the manner in which it is adopted and the way in which it is implemented must create in the society the conviction that, by its very nature, the constitution is a stable act, not subject to easy change at the whim of the majority of the day. A constitution's permanence may not be based solely on arithmetical considerations stemming from the relationship between the numerical strength of the ruling and opposition parties in parliament. Constitutional and ordinary politics need to be clearly separated because the constitution is not part of the 'political game', but sets the rules for this game. Therefore, a constitution should set neutral and generally accepted rules for the political process. For its adoption and amendment, a wide consensus needs to be sought

CDL-AD(2013)012 Opinion on the Fourth Amendment to the Fundamental Law of Hungary

“54. The procedure has been criticised as non-transparent. Indeed, it has apparently not been made fully clear to the public on 7th May 2010 that the opening of Article 195 for amendment would allow for the possibility to create an amendment procedure which would give up the traditional step 2 of constitutional amendment, even if some indications were given about possible amendments to the Constitution going beyond the list adopted by the preconstituante.

[...]

56. [...] the principle of transparency does not require that parliament announces legal steps which are factually unforeseeable. In the past, numerous declarations for constitutional amendment in Belgium have not resulted in any constitutional amendment at all after the renewal of both Houses of Parliament. The uncertainty about the exact content and scope of future amendments is inbuilt in the protracted amendment process over two legislative periods, and does not seem to violate the principle of transparency.”

CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium.

42. The next main challenge will be to organise an appropriate referendum campaign leading to the adoption of the new Constitution for Armenia. The Commission encourages the Armenian authorities to do their utmost to ensure the success of the constitutional reform in November 2005. The reform must be presented in due time and form to the Armenian people. To this end, it is crucial that the referendum campaign be fairly, adequately and extensively broadcast by the media.

CDL-AD(2005)025 Final Opinion on Constitutional Reform in the Republic of Armenia.

D. Scope: constitutional amendments / adoption of a new constitution

“12. As a result of the economic crisis, Iceland has also been facing, in recent years, a crisis of trust of the population vis-à-vis the political class and, by extension, the institutions. The need for more active involvement and more direct participation of citizens in the country's governance and the management of its resources seems to meet a wide consensus today in Iceland.

13. It is in this context that emerged the idea of the drafting of a new Constitution, a unifying project designed to restore confidence and to lay, in a modern and comprehensive way, new foundations for a more just and more democratic Icelandic society.”

[...]

15. During its dialogue with the various stakeholders involved, the Venice Commission also witnessed diverging views, including on the question whether it is appropriate to offer Iceland today an entirely new Constitution. The alternative would be, in a perspective of giving greater importance to continuity, to adopt only limited constitutional amendments, indispensable to the country at this moment, in relation to matters that could more easily meet a sufficiently broad consensus.”

CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland

“105. The draft examined is the draft of an entirely new Constitution. In view of this it is surprising that the draft is a fairly conservative text which is clearly based on the text of the current Constitution. While there are many amendments to the present text, a radical departure from existing solutions is generally avoided. Under these circumstances, it is not at all clear why the approach of adopting an entirely new Constitution was chosen. The changes could have been done through amendments to the current Constitution. This approach would have the advantage of symbolic continuity and would enhance constitutional stability. Constitutional stability is an important element for the stability of the country as a whole and one should not adopt a new Constitution as a “quick fix” to solve current political problems.”

CDL-AD(2008) 015, Opinions on the Draft Constitution of Ukraine

E. Duration of process

“55. If we look at the time-table of the adoption of the amendment, it becomes evident that the procedure was rather quick. This may look strange as the possible amending of Article 195 has been an issue for long time both in the political and the scientific community. The very rigid way of the amendment procedure was more and more considered an obstacle to the efficiency of the constitutional system.”

[...]

“57. The shortness of the formal debate does not mean that the issue was not properly considered. In fact, the substantive issues were discussed during the lengthy elaboration of the “institutional agreement”. Given the long time this had already taken its implementation without delay was rational, if not indispensable.”

CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium.

19. In its opinion, a wide and substantive debate involving the various political forces, nongovernment organisations and citizens associations, the academia and the media is an important prerequisite for adopting a sustainable text, acceptable for the whole of the society and in line with democratic standards. Too rigid time constraints should be avoided and the calendar of the adoption of the new Constitution should follow the progress made in its debate.”

CDL-AD(2011)001, Opinion on Three Legal Questions Arising in the Process of Drafting the New Constitution of Hungary

III. Procedure of constitutional amendment

30. The procedure for amending the constitution is one of the most sensitive issues of any constitution. It is also a highly political issue that can only be determined in light of the history of the country and its political and legal culture.

CDL-AD(2013)029, Opinion on three draft Constitutional Laws, amending two Constitutional Laws amending the Constitution of Georgia

A. Respect for constitutional provisions on constitutional amendment

“23. Provisions outlining the power to amend the Constitution are not a legal technicality but they may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself. Equally important, a wide acceptance of these amendments needs to be ensured.”

[...]

“26. Even if “the national parliament is the most appropriate arena for constitutional amendment, in line with a modern idea of democracy” [...] “it is to be stressed that the use of referendums should comply with the national constitutional system as a whole. As a main rule, a referendum on constitutional amendment should not be held unless the constitution explicitly provides for this.”

CDL-AD(2015)014, Joint Opinion on the Draft Law “On Introduction of changes and Amendments to the Constitution” of the Kyrgyz Republic

B. Bodies and institutions involved. Initiative for constitutional amendment

“12. Under Article 154 of the Bulgarian Constitution (Constitution of the Republic of Bulgaria, hereinafter CRB), the process of amending the Constitution may be initiated by one quarter of the members of the National Assembly (NA) or the President of Bulgaria.

13. As stipulated by Article 155 CRB,

*“(1) A constitutional amendment shall require a majority of three quarters of the votes of all Members of the National Assembly in three ballots on three different days.
(2) A bill which has received less than three quarters but more than two-thirds of the votes of all Members shall be eligible for reintroduction after not fewer than two months and not more than five months. To be passed at this new reading, the bill shall require a majority of two-thirds of the votes of all Members.”*

14. According to 153 CRB, “*the National Assembly shall be free to amend all provisions of the constitution except those within the prerogatives of the Grand National Assembly*”. The five prerogatives of the Grand National Assembly are listed in an exhaustive manner in Article 158 CRB and they include also the power to decide on “*any changes in the form of State structure or form of government*”. In such cases, elections for the Grand National Assembly (composed of 400 elected members) need to be convened through a resolution of the National Assembly supported by two-thirds of the votes of all MPs, and the mandate of the National Assembly expires at the date when the elections are held (see Articles 153-163 CRB).”

CDL-AD(2015)022 Opinion on the Draft Act to Amend and Supplement the Constitution (in the field of judiciary) of the Republic of Bulgaria

“36. Section 2 of this Article provides that amendments to the Constitution may be adopted by a Constitutional Assembly without specifying in any way the composition of this Assembly. This cannot however be left to an ordinary law (...)”

CDL-AD(2003)002, Opinion on the Draft Constitution of the Chechen Republic

“45. According to the new Article 96 § 2, the President would have an absolute veto power over amendments to Articles 7, 46 and 58 of the Constitution, which regulate the general division of powers as well as the respective powers of the Jogorku Kenesh and the President. This would further enhance the central position of the President within the constitutional structure. Furthermore, it remains unclear whether the provision in question would concern only cases when the Constitution is amended by Parliament (Art. 97) or even when it is amended through a referendum.”

CDL-AD(2002)033, Opinion on the Draft Amendments to the Constitution of Kyrgyzstan

“47. As set forth above, a presidential veto against draft laws can be overruled only by a two-thirds majority. A presidential veto against constitutional amendments can be overruled only by a majority of three fourths of the total number of deputies. It is thus nearly impossible for the Jogorku Kenesh to adopt constitutional amendments reducing the powers of the President.”

CDL-AD(2007)045, Opinion on the Constitutional Situation in the Kyrgyz Republic

“69. According to the Constitution currently in force, constitutional amendments introduced by the *qualified majority* of National Assembly shall be submitted to a popular referendum (Article 111 § 4, emphasis added). The proposed new paragraph of Article 111 of the Constitution allows for constitutional amendments to be adopted *by the majority* of the National Assembly, if the initiative originates from the President of the Republic. This difference, which strengthens the role of the President with regard to the National Assembly, does not seem to be justified.”

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia

“7. The revision is adopted by a two-thirds majority vote in each house, the Chamber of Deputies and Senate (Article 147.1). This is a difficult majority to attain; even the coalition supporting the government of Mr Nastase (PSD, UDMR) cannot achieve this figure. For the revision of the Constitution to be adopted, it will have to receive the approval of the opposition parties, such as the Liberal Party. That should induce the parties supporting the Government's action to open negotiations with the opposition in order to put forward a parliamentary proposal for revision if appropriate, as Article 146.1 permits. But at all events the initiative lies with the President. Nor is it certain that the Senate would agree to a reduction of its powers, at all events not by a two-thirds majority. The revision procedure is governed by Articles 146, 147 and 148 of the Constitution. The initiative lies with the President, at the proposal of the Government or at least a quarter of the Chamber of Deputies or Senate, or at least 500,000 citizens in possession of their electoral rights (Article 146.1). Obviously the first possibility applies, as the text forwarded to the Venice Commission is the Government's proposal. The revision is adopted by a two-thirds majority vote in each house, the Chamber of Deputies and Senate (Article 147.1).”

CDL-AD(2002)012, Opinion on the Draft Revision of the Romanian Constitution

“27. The law on the revision of the Constitution shall be signed and promulgated by the President of Georgia in accordance with a procedure provided for by Article 68 of the Constitution. Like for ordinary Laws, the President may return the draft to the Parliament with reasoned remarks. The Parliament shall put to the vote the remarks of the President. Remarks of the President shall be rejected by no less than three fourths of the total number of the members of the Parliament.”

CDL-AD(2013)029, Opinion on the Three Draft Constitutional Laws amending two Constitutional Laws amending the Constitution

“208. Under the terms of Article 140, the President shares the right of initiative with the Assembly of People’s Representatives, in the latter case at the initiative of one third of its members. However, amendments initiated by the President shall take precedence (Article 140).”

CDL-AD(2013)032, Opinion on the final draft constitution of the Republic of Tunisia

“77. The revision of the Constitution also depends on the joint consent of the Prince and the National Council (Article 94). (...)

78. ‘In case of initiative on the part of the National Council, proceedings may be taken only by a two-thirds majority vote of the normal number of members elected at the assembly’ (Article 95). This provision, construed literally, means that an initiative on the Prince’s part would need only a relative majority and therefore the Prince could amend the Constitution by means of law. This is what appears to have happened in the case of Law No. 1249 of 2 April 2002.⁵¹ This imbalance is regrettable and ought to be rectified.”

CDL-AD(2013)018 Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco

“63. The abrogation of the President’s right to initiate a referendum on a modification of the Constitution (former Article 98 para. 2) is in line with the general changes of the constitutional system from a presidential to a parliamentary system.”

CDL-AD(2010)015, Opinion on the draft Constitution of the Kyrgyz Republic

C. Striking a balance between rigidity and flexibility

“99. It strikes the Venice Commission, first of all, that the procedure drafted is very complex, as it involves two or even three steps: first, the National Assembly has to adopt, by a two-thirds majority of all deputies, a proposal to amend the Constitution (Article 203.3), and then the same National Assembly has to adopt an act amending the Constitution by a two-thirds majority of all deputies (Article 203.6). Finally, Article 205 seems to require the adoption, again by a two-thirds majority, of a further constitutional law for the enforcement of the amendments to the Constitution. A number of questions arise as to the significance and use of this procedure. What is the legal effect of the adoption of the proposal to amend the Constitution? What is the relationship between the 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 itself under the Constitution of 28 September 1990.”

CDL-AD(2007)004, Opinion on the Constitution of Serbia

“The procedure for amending the Constitution looks very complex. This impression may be partly due to the fact that the wording of the relevant provisions is sometimes very clumsy.”

CDL-INF (1996)006, Opinion on the Draft Constitution of Ukraine, Section XIII

“31. The Venice Commission has devoted an extensive study to the process of revising the Constitution (CDL-AD(2010)001). It stressed that there is no "magic formula". The challenge is to balance the requirements of rigidity and flexibility. The report states, however, that "if there is not a "best model", then there is at least a fairly wide-spread model – which typically requires a certain qualified majority in parliament (most often 2/3), and then one or more additional obstacles – either multiple decisions in parliament (with a time delay), or additional decision by other actors (multiple players), most often in the form of ratification through referendum”

CDL-AD(2013)029, Opinion on three draft Constitutional Laws amending two constitutional Laws amending the Constitution of Georgia

“34. It is neither possible nor desirable to try to formulate in the abstract a constitutional amendment optimal model. The point of balance between rigidity and flexibility may be different from one state to another, depending on the social and political context, constitutional culture, age, level of detail and the characteristics of the constitution, and number of other factors, especially as this balance is not static and can move over time according to social, economic and political transformations.”

CDL-AD(2013)029, Opinion on three draft Constitutional Laws amending two constitutional Laws amending the Constitution of Georgia

“58. As concerns the procedure for revising the constitution, the reinstatement of the current procedure - one vote at 2/3 majority of the total number of MPs - cannot be considered satisfactory. When analysing the 2010 revision of this procedure, which introduced two votes at three months of interval at the same majority, the Venice Commission welcomed the reform and noted that it provided a limited protection of constitutional stability. The removal of the two subsequent votes without any measure to compensate but combined with a return to the 2/3 majority requirement can only be considered as a step back. An appropriate balance must be found between flexibility and constitutional stability. In this respect, the Venice Commission refers to its previous opinions on the draft constitution of Georgia as well as to its Report on constitutional amendment (CDL-AD(2010)001).”

CDL-AD(2013)029, Opinion on three draft Constitutional Laws amending two constitutional Laws amending the Constitution of Georgia

“201. The current procedure for amending the Constitution requiring a qualified majority of the two Chambers followed by approval by popular referendum (see article 151 of the current Constitution), is a rigid procedure. Under the Romanian referendum law, in addition to the majority of 50 % plus one for approval, a participation quorum is required for the referendum to be considered valid.”

CDL-AD(2014)010, Opinion on the draft Law on the Review of the Constitution of Romania

“18. The current version of Article 195 figures, together with the procedure of article V of the United States Constitution of 17 September 1787 and Article 137 of the Dutch Constitution, among the most rigid amendment rules in the contemporary legal world.

19. This constitutional revision procedure is rigid in particular as it requires consent in two consecutive legislative periods. This feature is specifically Belgian to the extent that the other elements of Article 195 are owed to its ancestor, the Constitution of the Netherlands of 24 August 1815. Only this element had been added in the Belgian Constitution of 1831. Therefore, in view of the fact that the initiation of the constitutional amendment procedure by the declaration of the pre-constituante brings about dissolution of parliament and in consequence a new parliamentary election, it may be said that it strengthens the democratic legitimacy of the constitutional revision. However, it may in many situations turn out to be a severe impediment to sometimes urgent reforms and/or necessary fundamental reforms of the state.”

[...]

“58. [...]Adoption of constitutional revisions through a heavier procedure, involving dissolution of Parliament, higher majorities and/or a referendum is not the rule and cannot be considered as a European standard.”

CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium

“39. It has been asserted that spreading the revision of the Constitution over two legislatures is a democratic minimum. The supporters of the revision within a single legislature demonstrate an authoritarian tendency „[l]e fait d'étaler la révision de la Constitution sur

deux législatures est un minimum démocratique. Les partisans de la révision au sein d'une seule et même législature font preuve d'une dérive autoritariste."

40. This assertion is not correct in the light of a comparative review of the European procedures of constitutional amendment. Only very few other Constitutions of the world possess such a requirement. It can thus not be held to constitute a democratic minimum."

CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium

"99. It strikes the Venice Commission, first of all, that the procedure drafted is very complex, as it involves two or even three steps: first, the National Assembly has to adopt, by a two-thirds majority of all deputies, a proposal to amend the Constitution (Article 203.3), and then the same National Assembly has to adopt an act amending the Constitution by a two-thirds majority of all deputies (Article 203.6). Finally, Article 205 seems to require the adoption, again by a two-thirds majority, of a further constitutional law for the enforcement of the amendments to the Constitution."

CDL-AD(2002)012 Opinion on the Constitution of Serbia

"172. The special procedure provided for amendments to **Chapter II** combines the constraints of the existing system, while introducing a referendum as an additional requirement. One may note however that this procedure is intended to apply to any revision of Chapter II, including the establishment of new rights or the extension or reinforcement of existing rights, and not only to revisions which have the effect of limiting the rights or restrict their scope. In the Venice Commission view, this would be a disproportionate and excessively rigid procedure.

173. More generally, the current procedure for constitutional amendment seems to be both tightened and softened under the new mechanism proposed by the Bill for changes in the Constitution other than those relating to Chapter II. On the one hand, by abolishing the time-related guarantee of the division of the task between two successive parliaments, increased flexibility is introduced. On the other hand, the procedure becomes harder since any amendment to the Constitution shall, after having been adopted by the Althing, be submitted to a popular referendum.

[...]

175. In the view of the Venice Commission, amendment procedures under Article 113 of the Bill are overly cumbersome and would deserve further consideration. The introduction of a qualified majority requirement in the Althing, a solution followed by almost all European countries in which the constitutional revision does not require a referendum,³² should be taken into account, while limiting to some specific cases the referendum option or that of spreading the operations over time. Exceptionally, in the absence of such a requirement in the parliament, an approval quorum in referendum might be justified. In any case, if the approach chosen for the Bill were to be adopted, it is almost certain that it would be politically impossible to amend it, as voters will never be ready to give up to the new power that has been assigned to them."

CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland

"30. (...) It is noted that already a two-thirds majority is a difficult hurdle that would appear to prevent frequent amendments to the Constitution. Raising the bar for such amendments further would lead to a situation where it may become very difficult to amend the Constitution in future. To retain the flexibility of the system, it is recommended to delete this amendment from the draft Law.

"31. In its Report on Constitutional Amendment, the Venice Commission expressed its concern with regard to excessively rigid procedures and warned against the difficulty of engaging in constitutional reform in such cases. In other cases, the Commission has been confronted with the opposite challenge, where amendments, or attempted amendments, to the constitution

happen on a too frequent basis, which may also negatively affect constitutional and political stability. The Commission has thus stressed that a constitution cannot “be amended in conjunction with every change in the political situation in the country or after a formation of a new parliamentary majority”.

CDL-AD(2015)014, Joint Opinion on the Draft Law “On Introduction of changes and Amendments to the Constitution” of the Kyrgyz Republic

D. Special majority in Parliament and / or popular referendum

“175. In the view of the Venice Commission, amendment procedures under Article 113 of the Bill are overly cumbersome and would deserve further consideration. The introduction of a qualified majority requirement in the Althing, a solution followed by almost all European countries in which the constitutional revision does not require a referendum, should be taken into account, while limiting to some specific cases the referendum option or that of spreading the operations over time. Exceptionally, in the absence of such a requirement in the parliament, an approval quorum in referendum might be justified. In any case, if the approach chosen for the Bill were to be adopted, it is almost certain that it would be politically impossible to amend it, as voters will never be ready to give up to the new power that has been assigned to them.”

CDL-AD(2013)010, Opinion on the draft New Constitution of Iceland

“70. According to the proposed new Article 111.1, constitutional amendments may also be adopted through a qualified majority of the National Assembly (on the initiative by the President or by one-third of Deputies), without submitting them to a referendum. This proposal would make constitutional amendments more flexible, while at the same time maintaining the requirement of a referendum in issues of a fundamental nature, and is thus supported by the Commission. ”

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia

“221. In this context, it is recalled that the Venice Commission has previously taken the view, on the basis of several experiences in Europe over the last 20 years, that “there is a strong risk, in particular in new democracies, that referendums on constitutional amendment are turned into plebiscites on the leadership of the country and that such referendums are used as a means to provide legitimacy to authoritarian tendencies. As a result, Constitutional amendment procedures allowing for the adoption of constitutional amendments by referendum without prior approval by parliament appear in practice often to be problematic, at least in new democracies”. It should therefore be explicitly stipulated that the President of the Republic may not submit a constitutional law to referendum until it has been passed by the Assembly of People’s Representatives.”

CDL-AD(2013)032 Opinion on the Final Draft Constitution of the Republic of Tunisia

1. Special majority in Parliament

“70. According to the proposed new Article 111.1, constitutional amendments may also be adopted through a qualified majority of the National Assembly (on the initiative by the President or by one-third of Deputies), without submitting them to a referendum. This proposal would make constitutional amendments more flexible, while at the same time maintaining the requirement of a referendum in issues of a fundamental nature, and is thus supported by the Commission.“

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia

“23. Provisions outlining the power to amend the Constitution are not a legal technicality but they may heavily influence or determine fundamental political processes. In addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution aim at securing broad consensus; this strengthens the legitimacy of

the constitution and, thereby, of the political system as a whole. It is of utmost importance that these amendments are introduced in a manner that is in strict accordance with the provisions contained in the Constitution itself. Equally important, a wide acceptance of these amendments needs to be ensured.”

CDL-AD(2015)014, Joint Opinion on the draft Law “On Introduction of changes and amendments to the Constitution” of the Kyrgyz Republic

“30. In this context, it is noted that already a two-thirds majority is a difficult hurdle that would appear to prevent frequent amendments to the Constitution. Raising the bar for such amendments further would lead to a situation where it may become very difficult to amend the Constitution in future. To retain the flexibility of the system, it is recommended to delete this amendment from the draft Law.”

CDL-AD(2015)014, Joint Opinion on the Draft Law “On Introduction of changes and Amendments to the Constitution” of the Kyrgyz Republic

“69. According to the Constitution currently in force, constitutional amendments introduced by the *qualified majority* of National Assembly shall be submitted to a popular referendum (Article 111 § 4, emphasis added). The proposed new paragraph of Article 111 of the Constitution allows for constitutional amendments to be adopted *by the majority* of the National Assembly, if the initiative originates from the President of the Republic. This difference, which strengthens the role of the President with regard to the National Assembly, does not seem to be justified.”

CDL-AD(2004)044, Interim Opinion on Constitutional Reforms in the Republic of Armenia

2. Referendum

“102. Article 203.8 provides only two basic principles for the organisation of a referendum. As the principle of the rule of law applies to referendums, further regulation will have to be enacted. The Commission draws attention to its Guidelines on the holding of Referendums ^[2] 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 organisation of the constitutional referendum which should be in compliance with the principles set out in the above-mentioned ‘Code of good practice on Referendums’.”

CDL-AD(2007)004, Opinion on the Constitution of Serbia

“26. Even if “the national parliament is the most appropriate arena for constitutional amendment, in line with a modern idea of democracy” [...] “it is to be stressed that the use of referendums should comply with the national constitutional system as a whole. As a main rule, a referendum on constitutional amendment should not be held unless the constitution explicitly provides for this.”

CDL-AD(2015)014, Joint Opinion on the Draft Law “On Introduction of changes and Amendments to the Constitution” of the Kyrgyz Republic

“22. The nature of a referendum varies according to whether it is mandatory or optional, and depends on the body competent to call it. To hold a referendum might be mandatory (on certain well-defined issues as constitutional amendments) or optional. A referendum is mandatory when certain texts are automatically submitted to referendum, before or after their adoption (e.g. by Parliament). It is generally related to constitutional revisions.

CDL-AD(2008)010, Opinion of the Constitution of Finland

² European Commission for democracy through law (Venice Commission), Guidelines on the holding of Referendums, CDL-AD(2006)027rev.

“101. An important element in the procedure to amend the Constitution is the possibility (Article 203.6) and in some cases the obligation (Article 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 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”

CDL-AD(2007)004 Opinion on the Constitution of Serbia.

“74. According to Article 201, a referendum would no longer be needed for all constitutional amendments but only for, in addition to a new constitution, certain chapters and provisions (see paragraph 34 above). That would make constitutional change more flexible and is to be welcomed.

75. The Draft proposes introducing a popular initiative for constitutional amendments, both for those requiring a referendum and those lying in the power of the National Assembly. The number of signatures needed is relatively high – 200 000 resp. 150 000 – and even in the case of a referendum a qualified majority in the National Assembly supporting the initiative is necessary. This reduces the risk of political instability which frequent popular initiatives might otherwise engender.”

CDL-AD(2015)038, Second Opinion on the Draft Amendments to the Constitution (in particular chapters 8, 9, 11 to 16) of the Republic of Armenia

a. Turn-out quorum and required votes for approval

“38. Pursuant to the revised Article 113, in order for the referendum on the constitutional reform to be considered valid, $\frac{1}{4}$ (instead of previously $\frac{1}{3}$) of registered voters must effectively express their vote. In the Commission’s view, this simplification is to be welcomed.”

[...]

“101. When the rules on referendum require not only a majority of the votes cast, but also the consent of a certain percentage of the electorate, then the result will depend on the turnout – which may in many countries make constitutional amendment almost impossible in practice. This is for example the case in Denmark, where the requirement for a referendum to amend the constitution is a majority of votes that must also reflect 40 % of the electorate. Even in a small and politically mature democracy like Denmark, with traditions for relatively high voter turnout in elections, this in effect creates a very high obstacle to constitutional reform.”

CDL-AD(2005)025, Final Opinion on Constitutional Reform in the Republic of Armenia

“202. The Venice Commission has taken a general stand against both forms of quorums in referendum: a turn-out quorum tends to foster abstention, whereas in case of an approval quorum the majority might feel that they have been deprived of victory without an adequate reason. The Commission however acknowledges that the system in place in Romania for Constitutional revision has been devised so in order to protect the new democratic order when the 1991 Constitution was adopted. In addition, the requirement of popular approval through referendum appears to be, like the direct election of Romania’s President, firmly rooted in the national tradition.

“203. The draft revision law proposes to amend the provision relating to the constitutional referendum to provide the same rule as applies, under the new article 90 (3), for the consultative referendum. According to that rule, the referendum is valid if at least 30 % of the number of persons registered in the electoral lists takes part in it. Since this proposal constitutionalizes a recent amendment to the referendum law diminishing the participation quorum required for the validity of referendums from 50% to 30% of the people on the register,

it may be seen as a step in the direction of a less rigid procedure. It is however noted that the Constitutional court recommends its deletion, as of the provisions of the new article 90(3).”

CDL-AD(2014)010, Opinion on the draft Law on the Review of the Constitution of Romania

IV. Limitations to constitutional amendments

A. Unamendable provisions

“66. An overview in comparative constitutional law shows that most Constitutions do not provide for unamendable provisions, and these are not required by international standards. Moreover, nearly all unamendable provisions are substantive, and therefore not related to the procedure for the revision of the Constitution. Some Constitutions do contain “unamendable” (or intangible) provisions, i.e. provisions that are legally precluded from revision. [...]”

CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium

B. Special limitations on constitutional amendment. Constitutional provisions on fundamental rights

“112. Article 14 contains a provision which would restrict amendments to the Constitution. The provision would add to Article 103 of the existing Constitution a new paragraph 2 which would provide that no changes and amendments are to be permitted in the Constitution that restrict fundamental Constitutional human rights and freedoms, rule of law principles and a revision of the Georgian statehood. A reference to international human rights treaties to which Georgia is a party should also be included here. There are some concerns about this provision if it had the effect of freezing everything which is contained in the proposed new Charter of rights particularly when the provisions in the Charter are so detailed. However, a provision which would prevent abolition of the most fundamental rights could be desirable but it would seem important to clarify the precise ambit of the provision. Presumably the question of whether or not a proposed amendment to the Constitution comes within the terms of this new provision is to be determined by the Supreme Court but there do not seem to be any provisions which deal with the question expressly.”

CDL-AD(2005)003, Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitutional of Georgia

V. Review of constitutional amendments. Involvement of the Constitutional Court

“49. In its “Report on constitutional Amendments”, the Venice Commission however emphasised that only “in a few countries the Constitutional Court has been given a formal role in the constitutional amendment procedures”. The Commission stated that an a priori review is a “fairly rare procedural mechanism”. And although the Commission declared that a posteriori review by the Constitutional Court is “much more widespread”, it cannot be seen as a general rule. Such control cannot therefore be considered as a requirement of the rule of law. Belgium stands in the tradition of countries such as France which firmly reject judicial review of constitutional amendment. The Conseil Constitutionnel argued “that because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution.)”²⁴ Although in Austria and Germany there exists the possibility of review, these cases do not stand for a common European standard.

50. Most constitutional systems operate on the assumption that all constitutional provisions have a similar normative rank, and that the authority which revises the Constitution has the authority to thereby modify pre-existing, other constitutional provisions. The result is that, in

general, one constitutional provision cannot be „played out“ against another one. The absence of a judicial scrutiny of constitutional revisions is owed to the idea that the constitutional revision is legitimised by the people itself and is an expression of popular sovereignty. The people is represented by parliament which acts as a constituante. The authority of the decision to amend the Constitution is increased by the specific requirements for constitutional amendment (qualified majority).

51. It is a matter of balancing the partly antagonist constitutional values of popular sovereignty and the rule of law whether to allow for rule-of-law induced barriers against constitutional revision, or for judicial scrutiny. Most Constitutions have placed a prime on popular sovereignty in this context. The Belgian proceedings are well within the corridor of diverse European approaches to this balancing exercise and do not overstep the limits of legitimate legal solutions.”

CDL-AD(2012)010, Opinion on the Revision of the Constitution of Belgium.

“100. Article 12.3 of the Fourth Amendment amends Article 24.5 of the Fundamental Law, which reads: *“The Constitutional Court may only review the Fundamental Law and the amendment thereof for conformity with the procedural requirements laid down in the Fundamental Law with respect to its adoption and promulgation. ...”*

101. The Hungarian Government argues that this provision broadens the jurisdiction of the Constitutional Court, because prior to the Fourth Amendment the Court had no competence to review constitutional amendments at all, i.e. not even from a procedural point of view. In this respect, the Government refers to case-law of the Constitutional Court excluding judicial review of constitutional provisions.

[...]

103. The idea that a Constitutional Court should not be able to review the content of provisions of Fundamental Law is common ground as a general rule in many member States of the Council of Europe. In its Opinion on the Revision of the Constitution of Belgium, the Commission stated:

“49. [...] Belgium stands in the tradition of countries such as France which firmly reject judicial review of constitutional amendment. The Conseil Constitutionnel argued ‘that because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the Constitution.)’ Although in Austria and Germany there exists the possibility of review, these cases do not stand for a common European standard.

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104. As pointed out in that Opinion, in some states constitutional courts are able to review constitutional amendments under certain circumstances, as for instance in Austria, Bulgaria, Germany or Turkey. Article 288 of the Constitution of Portugal provides substantial limits for constitutional amendments and their conformity with these limits can be controlled by the Constitutional Court. In 2009, the Constitutional Court of the Czech Republic annulled a constitutional amendment shortening the term of office of the Chamber of Deputies. A special case is the adoption of the Constitution of South Africa, which was certified by the Constitutional Court as being in conformity with constitutional principles agreed beforehand.

105. In Austria, the Constitutional Court is able to examine constitutional provisions as to whether they are in compliance with the fundamental principles of the Constitution. For instance, in 2001, the Austrian Constitutional Court declared void a constitutional law provision as it prevented the Constitutional Court from controlling the constitutionality of that provision. In Bulgaria, constitutional amendments can be reviewed as to whether they change the “*form of state structure or form of government*”. The Fundamental Law of Germany contains unamendable provisions and the Constitutional Court can review whether these provisions have been infringed. 87 In Turkey too, the Constitution contains unamendable provisions. Article 148 of the Turkish Constitution provides that the Constitutional Court is limited to control the procedure of adoption of constitutional amendments, but it seems that the Court has a wider interpretation of its power to review constitutional amendment. In all these cases, the constitution has an inner hierarchy (unamendable provisions or basic principles) and ‘ordinary constitutional law’ is reviewed against these higher provisions or principles.

106. Such an inner hierarchy is not a European standard, although it is a feature that arises more and more in States where Constitutional Courts are competent to annul unconstitutional laws. [...]”

CDL-AD(2013)012, Opinion on the Fourth Amendment to the Fundamental Law of Hungary.

“216. The Constitutional Court is involved in the revision process in two ways: first, in order to ascertain that the proposal does not affect any matters whose amendment is prohibited (Article 142, 1st paragraph), and second, to verify that the formal procedures for amending the Constitution have been complied with (Article 117, 1st paragraph, 3rd bullet point). In such cases the initiative for referring the matter to the Constitutional Court falls exclusively to the Speaker of the Assembly of People’s Representatives. For laws and treaties, it is the President of the Republic who is competent (Article 117, 1st paragraph, 1st and 4th bullet points) (See Chapter V). This difference in treatment should be justified.

217. Moreover, it is essential to enable a given number of members of the Assembly (i.e. the opposition) to refer a matter of constitutional revision to the Constitutional Court, as the Speaker of the Assembly, who in virtually all situations will belong to the same party as the heads of the executive, will rarely be inclined to bring the amending law before the Court.

218. The procedure provided for in Article 142 is, however, difficult to understand. First of all, the Constitutional Court must ascertain whether the amendment relates to matters which cannot be amended. This decision can be taken only on the basis of the finalised “constitutional draft law”. Next, the Assembly of People’s Representatives must approve “the principle of the amendment” by an absolute majority and subsequently pass the amendment by a majority of two thirds “without prejudice to Article 141” (the non-amendable clauses). The sequence of these three steps does not seem logical: the decision in principle by the

Assembly should take place first of all, before the constitutional draft law has been finalised; it is difficult to understand otherwise why the Assembly would vote on the bill first of all, requiring an absolute majority and then a second time, with a two-thirds majority. The judicial review should take place after the decision in principle and before it is passed by the Assembly. Moreover, it should be stipulated that if the bill is substantively modified by the Assembly in the debates prior to its being passed, it should be submitted once more for review by the Constitutional Court, since if such is not the case, the authority of the Court could be circumvented.

219. The Venice Commission has previously expressed reservations regarding judicial review of the merits of constitutional amendments on the basis of “non-amendability”; the Commission believes that “non-amendable” provisions and principles should be interpreted and applied narrowly and that judicial review should be conducted with prudence and moderation, leaving a margin of appreciation to the authors of the Constitution.”

CDL-AD(2013)032, Opinion on the final draft constitution of the Republic of Tunisia

VI. Reference documents

CDL-AD(2015)014, Joint Opinion on the draft Law “On Introduction of changes and amendments to the Constitution” of the Kyrgyz Republic.

CDL-AD(2015)038, Second Opinion on the Draft Amendments to the Constitution (in particular chapters 8, 9, 11 to 16) of the Republic of Armenia.

CDL-AD(2015)022 Opinion on the Draft Act to Amend and Supplement the Constitution (in the field of judiciary) of the Republic of Bulgaria

CDL-AD(2014)027, Opinion on the Draft Concept Paper on the Constitutional Reforms on the Republic of Armenia.

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A P P E N D I X