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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT COMPILATION

OF THE VENICE COMMISSION OPINIONS AND REPORTS

ON THE LAW-MAKING PROCEDURES

AND THE QUALITY OF THE LAW

for endorsement at the 126th online plenary session
(19 - 20 March 2021)

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INTRODUCTION

A. Purpose of the compilation

The *"Compilation of Venice Commission opinions, reports and studies on the law-making and the quality of the law"* brings together extracts of opinions and reports adopted by the Venice Commission with the aim of providing an overview of its doctrine on this topic.

It is structured in a thematic manner to facilitate the access to topics dealt with by the Venice Commission over the years. It will be updated on a regular basis with extracts of newly adopted opinions and reports by the Venice Commission.

Each *opinion* adopted by the Venice Commission that is referred to in this Compilation relates to a specific country. Any recommendation made should therefore be seen in the specific constitutional context of the country for which the opinion was adopted.

Each *report* (or *study*) adopted by the Venice Commission that is referred to in this Compilation seeks to present a general standard for all member and observer states of the Venice Commission. Recommendations made in its reports and studies will therefore be of a more general nature. Nevertheless, it should be noted that they may focus on specific models of legal orders systems and certain recommendations made are applicable only to those models.

The brief extracts of all *opinions, reports* and *studies* found in this Compilation must be seen in the specific context of the wider text in which they were adopted by the Venice Commission. Each citation therefore has a reference that leads to its exact position (paragraph number, page number for older opinions) in the text in which it was adopted, which enables the reader to place it within its specific context.

The Compilation may serve as a source of reference for drafters of constitutions and legislation on constitutional courts, for researchers as well as for Venice Commission members, who are requested to prepare comments and opinions on such texts. However, the readers are encouraged to refer to the original text of the opinions and reports, when citing the position of the Venice Commission, and not to this Compilation.

The Venice Commission's position may change or develop over time as new opinions and reports are adopted and on the basis of experience accumulated. In order to gain a full understanding of the Commission's position on a particular issue, it is useful to read the complete chapter in the Compilation on the relevant theme you are interested in.

If you believe that a citation is missing, is superfluous or is filed under a wrong heading, please inform the Secretariat of the Venice Commission at the following e-mail address: venice@coe.int.

B. Structure and selection of topics

Opinions of the Venice Commission cover a vast range of issues relevant to the law-making process: special procedures for constitutional amendments or organic laws, delegated legislation, veto powers, bi-cameralism, etc. This compilation would be too bulky if all these topics were included here. As a result, the Compilation will not deal with the basic features of the constitutional design or of the separation of powers or will refer to them only briefly. Instead, the compilation focuses on those opinions and reports where the Commission examined the procedure of the law-making in the narrow sense, and also on the questions related to the quality of law and techniques of drafting.

1. Level and type of regulations governing parliamentary procedures

77. Clarity about the hierarchy of norms, or which legal acts prevail in the event of a conflict or inconsistency between them, is also an important aspect of the Rule of Law. It helps to ensure that the executive is not left with a discretion which has not been expressly conferred on it but is the result of legal ambiguity.

CDL-AD(2019)025, Opinion on the draft law on legal acts of Kosovo

35. It is important to ensure the stability of [parliamentary procedural rules]. So, in some countries a heightened majority for their amendment is required, or there is an external check by the Constitutional Court on the amendments to those regulations. It is also possible to introduce a delay for the amendments to take effect, so that the incumbent majority cannot be the immediate beneficiary of the measures it proposes. That being said, it is difficult to exclude changes with immediate effect altogether.

36. In some countries, the Rules of Procedure are not laid down in a law but in an autonomous regulation *sui generis* adopted by Parliament. This is explained by the fact that the adoption of a law involves external institutional actors, such as the President, and it may be possible to challenge the law before the Constitutional Court, which may be seen as incompatible with the parliamentary autonomy […].

37. Although it is not the case for all countries, the Venice Commission recommends that those matters are regulated in the Rules of Procedure, rather than in a law, out of respect for parliamentary autonomy. In any event, any regulations in this area should be amendable with a qualified majority […].

38. It is necessary to ensure that the Rules of Procedure are not changed implicitly on an *ad hoc* basis, even if the qualified majority (necessary for the amendments to the RoP) is in favour of a particular course of action in a particular case. Every change of the Rules should be properly discussed and adopted – preferably by a qualified majority – as a formal amendment to the Rules before a specific action in a particular case is taken. The Rules of Procedure should enjoy some stability and not be routinely changed to the detriment of the minority at the beginning of every mandate of the legislature, by the standing orders or otherwise.

39. Constitutional custom is another method of regulating the rights of the opposition, especially in older democracies. Unwritten "constitutional conventions" and best practices complement legal rules and contribute to the development of a constructive political culture in general. In time, such practices and conventions can gain the status of customary norms. Sudden and drastic diminution of the procedural rights of the opposition in parliamentary procedures may be avoided if the Speaker and other governing bodies of the legislature follow customs formed in more peaceful periods of its history. Indeed, to amount to a custom the practice should be consistently followed and obeyed for a prolonged period of time, and be regarded as binding. The practice of the governing bodies of the legislature should be consistent irrespective of who is in the majority and who is in the opposition and should be taken into account in resolving internal disputes.

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

7. […] [S]ome of the rules on internal organisation of the Rada are part of the text of the Constitution itself as, for example, the list of powers of the Speaker […], the constitution of committees, special ad hoc committees and enquiry committees […]. It seems incoherent and superfluous that the same provision indicates that the procedure of the establishment of these bodies is subject to specific legislation.

23. The Constitution of Ukraine provides that the Rules of Procedure are adopted as a law. It is undisputable that the law is higher in the hierarchy of norms than, for example, a by-law. However, in the case of the internal regulation of parliament, regulation by a Law in fact limits the autonomy of the Parliament itself. This happens because a law is elaborated with a certain degree of participation of other "legislative actors", notably the President and the Cabinet of Ministers. In the general framework of the Constitution, Parliament should have an exclusive right to regulate its internal organisation, the role of MP's, its own internal procedure and structure. […] If the parliament wishes to be more efficient, flexible and less rigid in the adoption of its internal regulation, the Ukrainian authorities should take into consideration a differentiated system of regulations. Some issues which concern the right of external subjects should be regulated by a law, but the whole internal procedure of the Rada should be regulated by an internal act of Parliament (regulation). It would be advisable to address this issue in the framework of any next revision of the Constitution.

CDL-AD(2017)026, Ukraine - Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine

106. Article 114 – according to which one quarter of the total number of parliamentarians can ask for "deliberations on urgent topics of public interest" once in a week during the regular session – is an example of those which have been deliberately left into the Constitution, rather than left to the rules of procedure, in order to protect the Parliament minority's rights.

CDL-AD(2015)037, First Opinion on the Draft Amendments to the Constitution (Chapters 1 to 7 and 10) of the Republic of Armenia

30. The Venice Commission urges the drafters […] to state explicitly in the draft that the rules laid down apply to all normative legal acts regardless of who has authored them or which institution is responsible for adopting them and, lastly, to be careful to avoid any confusion or lack of precision concerning the acts covered by this draft

70. Whilst this (desirable) legal stability is an essential factor in the quality of legislation, the legal implications of this principle, as it stands, are not very clear and are likely to conflict with another principle, which derives from the democratic principle and insists that legislation can be amended at any time (principle of the changeability of the law).

CDL-AD(2010)017, Opinion on the Draft Law on Normative Legal Acts of Azerbaijan

62. The Rules of Procedure are a particularly lengthy document, comprising 240 articles. By way of comparison, the Rules of Procedure of the French Senate include only 110 articles.

64. Some of the provisions are indeed highly technical and would have been more appropriate for inclusion in a document setting out general instructions. This applies to Article 19 of the Rules of Procedure, concerning issuance of identity cards and electronic voting cards, and to Articles 100 to 102, which set out the details of voting procedure, going so far as to stipulate that it is necessary to encircle the number preceding a candidate's name, or the word "for" or "against" when voting on a proposal.

CDL-AD(2009)025, Opinion of the Rules of Procedures of the Assembly of "the former Yugoslav Republic of Macedonia"

58. […] [T]he regulation at the Constitutional level of the right of amendment is a delicate and complex issue, insofar as any restriction to this, a parliamentarian essential prerogative, could be interpreted as an infringement of their rights. This may explain why the regulation at the constitutional level is not common to all constitutions.

95. The level of regulation of the […] legislative process and parliamentary stages varies considerably in Europe.

97. Some constitutions […] describe the legislative process in a very detailed way, whereas other constitutions leave the details of the procedure or of the conditions to other laws, and more specifically to parliamentary statutes.

CDL-AD(2008)035, Report on Legislative Initiative

31. […] It should be observed that the constitutional status of Parliament […] requires that it should be recognised as having a right to the independent determination of its own internal structure, the procedure by which it as a whole and its structural sub-divisions function, the procedure by which individual questions are discussed and resolved, including legislative procedures, etc. This is generally determined by parliamentary rules (or statute) with the effect of law, but in contrast to other laws, this one, having been passed by Parliament, is ratified and promulgated by the Chairman of Parliament. This is considered to be an additional guarantee of its autonomy and independence from executive power.

CDL-AD(2005)022, Interim Opinion on Constitutional Reform in the Kyrgyz Republic

2. Laws, individual acts, and internal regulations of Parliament

24. Legal acts can be normative (general and abstract) or special (individual and concrete).

25. Normative (general) acts can be either external (binding all individuals, legal persons, and institutions) or internal (binding only state institutions such as the legislature, the executive or the judiciary including the Constitutional Courts).

26. The top-level external normative act is the Constitution, that should regulate the types of other external normative acts, including primary and secondary legislation.

CDL-AD(2019)025, Opinion on the draft law on legal acts of Kosovo

92. […] A distinction between general decree laws [of a normative character] and individual measures is necessary for respecting the principles of necessity and proportionality and allow for appropriate judicial review. […]

CDL-AD(2016)037, Turkey - Opinion on Emergency Decree Laws N°s667-676 adopted following the failed coup of 15 July 2016

42. It is undeniably necessary, however, to make a clear distinction between legislative acts of a normative nature, that is to say legislative acts laying down rules of law (general and abstract), and non-normative legislative acts. It is equally important to name the different forms which normative legal acts in particular may take.

CDL-AD(2010)017, Opinion on the Draft Law on Normative Legal Acts of Azerbaijan

48. […] [L]aws should contain provisions of an exclusively statutory nature, i.e. which create rights or obligations, set up bodies and define their duties and responsibilities or lay down their procedures.

CDL-AD(2009)018, Opinion on the concept paper for a new Law on Statutory Instruments of Bulgaria

33. […] [M]any legal provisions, and especially the procedure for their application, are governed and made specific by subordinate legislation. It is not possible to implement a law without interpreting the content and sense of specific norms. […]

CDL-AD(2005)022, Interim Opinion on Constitutional Reform in the Kyrgyz Republic

3. Clarity and foreseeability of the law

3.1. Precision of statutory norms

19. Like legality, legal certainty is one of the main pillars of the Rule of Law. It includes in particular accessibility and foreseeability of the laws. […]

20. The principle of legal certainty implies that laws must be accessible: they should be published before entering into force, and easily available, e.g. in an official bulletin. The effects of laws must be foreseeable: they should be written in an intelligible manner and formulated with sufficient precision and clarity to enable people and legal entities to regulate their conduct in conformity with the law's requirements.

CDL-AD(2019)025, Opinion on the draft law on legal acts of Kosovo

58. Foreseeability means not only that the law must, where possible, be proclaimed in advance of implementation and be foreseeable as to its effects: it must also be formulated with sufficient precision and clarity to enable legal subjects to regulate their conduct in conformity with it.

59. The necessary degree of foreseeability depends however on the nature of the law. In particular, it is essential in criminal legislation. Precaution in advance of dealing with concrete dangers has now become increasingly important; this evolution is legitimate due to the multiplication of the risks resulting in particular from the changing technology. However, in the areas where the precautionary approach of laws apply, such as risk law, the prerequisites for State action are outlined in terms that are considerably broader and more imprecise, but the Rule of Law implies that the principle of foreseeability is not set aside.

CDL-AD(2016)007, Rule of Law Checklist

30. One of the consequences of an extensive or concrete drafting, which tries to solve legislatively as many questions as possible, is that it leaves little room for interpretation and discretion to the authorities and courts to develop their policy and their case law, respectively, based on the law. Whether this consequence can be seen as a drawback or a suitable benefit depends on the level of legal development and confidence that can be put in the competent authorities and judiciary. Whereas in old and long-established democracies extensive drafting might be considered as a drawback, it has often been seen as a necessary step in newly established democracies.

CDL-AD(2009)045, Opinion on the Draft Law on Prohibition of Discrimination of Montenegro

3.2. Laws, regulations, and their judicial interpretation

22. Clarity and foreseeability of legal acts are important not only to enable individuals to regulate their conduct, but for separation of powers reasons: […] "legislative provisions should be clear and understandable to enable the executive power to exert discretion only in areas where this is intended and not simply because the law is uncertain or ambiguous."

CDL-AD(2019)025, Opinion on the draft law on legal acts of Kosovo

9. […] [T]he legislator tries to mention or to enumerate all the possible facts which can form the elements of a legal rule. Therefore, the legal texts are quite voluminous and contain elements which are perhaps not necessary, or which could be delegated to subordinate legislation (e.g. a regulation). One negative effect is certain: the rules are difficult to find and to know, also for the practising judge, and, if the law does not provide for a rule for facts in a certain case (no catalogue of facts is complete) the judge might be feeling completely at sea. […]

CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe

48. The amount of regulatory detail contained in the draft could therefore be reduced somewhat. […] [T]he administrative details could be addressed and included in an implementing decree.

CDL-AD(2009)053, Opinion on the draft law on normative acts of Bulgaria

4. Good techniques of legislative drafting

Note: this section deals with more technical aspects of preparation of the legislative texts; legal procedures related to the initiation, amendment, discussion, and adoption of bills are described below, in Section 5.

4.1. Coordination within executive and legislative branches

31. […] [S]ome standardisation of the rules on drafting by the executive and parliament would ensure a degree of uniformity in drafting and language that would greatly contribute to consistent interpretation of legislation.

CDL-AD(2009)053, Opinion on the draft law on normative acts of Bulgaria

135. The drafting process can be centralised or decentralised within the Ministries where specialised law-making/legal drafting sections are set up. The drafting requirements of the conversion into law of the governmental policy have frequently led to the adoption of handbooks of drafting, which are a collection of recommendations of drafting techniques. […]

137. Combining the needs of an effective democratic participation and the purposes of a legislation which should be able to deal with the complexity of the present social and economic requirements is a complex constitutional issue. The solution could be found in the practice and rules of procedure of the Parliaments of Europe, where special commissions devoted to the quality of the drafting are set up. However, a purely internal parliamentary solution might not be seen as sufficient in particular with regard to legislative initiatives which would not come from the executive of the parliamentary power.

CDL-AD(2008)035, Report on Legislative Initiative

4.2. Statements of reasons and explanatory memoranda

17. […] The Venice Commission has also recommended providing explanatory memorandums to draft legislation. […] It should be remembered that law-making is not only

an act of political will, it is also a rational exercise. No meaningful public debate is possible if the reasons for a policy are not put forward.

18. The Draft contains in appendix a brief explanatory note. To a large extent, this note restates the essence of the amendments, without giving the reasons why those amendments are necessary or any assessment of their potential impact. […]

19. The Venice Commission is aware that some of the elements of the proposed reform stem from the recommendations of the international partners of Bulgaria, including the Venice Commission itself. Other proposals – such as the mention of the "national values and traditions" in the preamble – reflect political values. That being said, whoever proposes a bill must at least make a sensible effort to explain the considerations behind each proposal. In the Venice Commission's opinion, this has not been done in the present case, and the existing explanatory note is too sketchy for these purposes.

CDL-AD(2020)035, *Bulgaria - Urgent Interim Opinion on the draft new Constitution*

91. Also, by requiring that the aims and objectives of each bill be stated, the drafters have ensured that the discretionary powers of the administration and judges are that much more clearly defined. The rule of law and legal certainty will be the stronger for it.

CDL-AD(2009)053, *Opinion on the draft law on normative acts of Bulgaria*

29. With regard to the legal technique, the draft presented by the Ministry is a short and rather abstract text, leaving a lot of room for interpretation and discretion (administrative and judicial).

32. Therefore, […]an explanatory memorandum or some other sort of authoritative text on how the act should be interpreted and applied should be provided. Such a memorandum or explanatory report should also provide references, cross-references and links to the other parts of the national legislation, and to the relevant sources on international and European law and standards.

33. Moreover, the choice of another legal technique that would make a longer and more detailed text, trying to legislatively solve as many questions as possible, leaving as little room as possible for interpretation and discretion, could also be further contemplated by the authorities. […]

CDL-AD(2008)042, *Opinion on the Draft Law on protection against discrimination of "the former Yugoslav Republic of Macedonia*

4.3. Consolidated texts

21. Foreseeability also requires that new legislation should clearly state whether, and which, previous legislation is repealed or amended, and amendments should be incorporated in a consolidated, publicly accessible version of the law.

82. The draft law makes provision for the consolidation of legal acts. The incorporation of subsequent amendments into the text of legal acts enhances the accessibility and intelligibility of the laws and therefore promotes legal certainty. It is therefore a positive measure from the perspective of the Rule of Law. […]

86. A procedure for correcting linguistic and technical errors in legal acts, and for publishing the corrected version, enhances the intelligibility and accessibility of the law and so promotes legal certainty.

87. Correction is defined to mean changes "which shall not cause any change in the substance of the legal act.

CDL-AD(2019)025, Opinion on the draft law on legal acts of Kosovo

4.4. Structure, language, and terminology

117. It is noted positively that overall, the Draft Amendments uses gender neutral drafting. However, on some occurrences, certain provisions still use only the male gender. This is not in line with general international practice, which requires legislation to be drafted in a gender-neutral manner. […]

CDL-AD(2016)025, Kyrgyz Republic - joint opinion on the draft law "on Introduction of amendments and changes to the Constitution"

40. Some provisions are too long, however. Mention may be made here of the golden rule for structuring and drafting legislative acts, namely that an article should not contain more than three paragraphs (or subparagraphs), a paragraph should not contain more than three sentences, and a sentence should not contain more than one idea.

CDL-AD(2010)017, Opinion on the Draft Law on Normative Legal Acts of Azerbaijan

51. The clarity of the draft, and of normative acts in general, would be greatly improved if each article had a heading (above it or to the side), providing a basic indication of what it is about. […]

126. […] [It] is important that legal words or phrases be used in the same sense in all normative acts.

127. This requirement is particularly relevant today given the impact that EU instruments have on the laws of individual countries. Bulgarian lawmakers will have to conform to the language used by the European Union, and indeed the language used by the Council of Europe, and avoid introducing any new expressions and terms (or using any obsolete ones) that might conflict with the practice of these organisations.

CDL-AD(2009)053, Opinion on the draft law on normative acts of Bulgaria

3. […] [I]t has to be regretted the option for making extremely long, too detailed, reiterative, confusing and extremely rigid laws, at least in the electoral field where clear rules are especially necessary. The result is a Law which […] is very complex and confusing, and will possibly be very difficult for citizens to understand, for political actors to handle, and for electoral bodies and courts to deal with.

CDL-AD(2009)004, Comments on the Draft Law on the All-Ukrainian Referendum by Mr O. Lavrynovych

4.5. Policy choices and the requirement of clarity of drafting

29. While the content of draft laws does indeed depend on the choices made when drawing up legislative policies, the authors must comply with drafting, doctrinal, terminological, and constitutional rules.

61. Meeting legislative quality requirements would not result in a limitation of the constitutional prerogatives conferred on parliament. In contrast, such requirements would enable parliament to fulfil its responsibility in the legislative field and in the implementation of the policies and strategies it supports.

62. The constitutional rules governing parliament's legislative initiative are designed to ensure that members of parliament are able to initiate and amend statutory instruments in accordance with their political choices and convictions. They should not be interpreted as authorising members of parliament to evade the quality requirements of legal drafting.

CDL-AD(2009)018, Opinion on the concept paper for a new Law on Statutory Instruments of Bulgaria

5. Law-making procedures in Parliament

5.1. Some general principles

Note: this section does not describe exhaustively all principles governing the process of law-making. Rather, it highlights some of those overarching principles which have been identified in the Venice Commission in its documents and which are relevant to several stages of the legislative process at the same time, described more specifically in sections 5.2 – 5.10 below.

5.1.1. Legislative prerogative of Parliament

19. […] Democracy and the rule of law require that, in principle, all of the important legislation be adopted by this legislature. […]

21. Most importantly, however, the legislature should have independent competence and authority to wield the power of legislation. The legislature must have the right to discuss, amend and adopt or rescind proposals for legislation, as well as the right to initiate new legislation. This does not mean that the executive is not allowed to adopt legally binding acts, but it must be entitled to do so by the Constitution or through delegation by the legislature. Transfer of legislative power to the executive should be limited in scope, with strictly defined conditions.

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

5.1.2 Autonomy of Parliament in regulating procedural matters

22. In most modern constitutional and democratic regimes, it is considered that Parliament's "essential property" is its normative and organisational autonomy (as well as the resulting budgetary autonomy). Parliament itself fixes and approves its rules of procedure without interference from any other state body (save the judicial control of compliance of its acts with the Constitution, when necessary).

CDL-AD(2017)026, Ukraine - Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine

20. […] [T[he legislature should be able to adopt and amend its own rules of procedures on an independent basis. Also, the legislature should be free to schedule its sessions, to set its own pace and to determine how much time is needed to draft, review or amend proposed legislation.

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

30. […] [E]xtending the rules governing preparation and drafting, as set out in the law on normative acts, to include parliamentary bills cannot be regarded as an encroachment on the independence of members of parliament, as the draft law is concerned only with technical aspects, it being left to members of parliament to deal with the political issues as they see fit.

CDL-AD(2009)053, Opinion on the draft law on normative acts of Bulgaria

For more quotes see also Chapter 1 of the Compilation.

5.1.3. Effectiveness of the law-making process

129. Parliamentary law must achieve a difficult conciliation between the effectiveness of the legislative process and the protection of the rights of the parliamentarians. At the stage of the discussion of legislative initiatives, the rules must promote a rational progression of the parliamentary debates towards a decision, while permitting the exercise of rights of the members of the assembly in the field of the legislative initiative and the right of amendment.

CDL-AD(2008)035, Report on Legislative Initiative

5.1.4. Rationality

17. […] It should be remembered that law-making is not only an act of political will, it is also a rational exercise. No meaningful public debate is possible if the reasons for a policy are not put forward.

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution

48. [There is a more general] issue of the relationship between democracy and expertise. […] [E]xpertise cannot replace democracy. […] The holder of a public mandate can and should ask for opinions of experts; but in the end, he/she must weigh the arguments and arbitrate from a general point of view.

CDL-AD(2013)011, Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying)

5.1.5. Pursuit of the public interest

25. The fourth principle is that of a shared responsibility of the majority and opposition towards society, or the principle of political solidarity, which should transcend party divisions. Both the majority and the opposition have to act based on the same joint and responsible commitment to the public interest of the citizens, who are the legitimate source of democratic power. This commitment has to come first, surpassing the stakes of any political confrontation – although such confrontations are normal and essential in a democracy. The majority, precisely because it is a majority, has to act in the exercise of power with self-restraint and with respect towards the opposition, in an inclusive and transparent manner, having in mind that probably in the future it will become, in accordance with the democratic rules, an opposition group. At the same time, the opposition or their MPs should not abuse their procedural rights either, and, in criticising the policies of the majority, should not call for violence or get involved in violent acts, or in the physical obstruction of the Parliament's work. However, the opposition must not be prevented from reasonably using tactics which delay or complicate political process, but which are allowed by the rules of procedure or are a part of the political tradition of the country.

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

5.1.6. Participation of the opposition and of the general public in the debates

34. […] Democracy governed by the rule of law is not only about the formal adherence to procedures allowing the majority to govern, but also about deliberation and a meaningful exchange of views between the majority and the opposition. […]

CDL-AD(2020)036, Albania – Joint Opinion of the Venice Commission and the OSCE/ODIHR on the amendments to the Constitution of 30 July 2020 and to the Electoral Code of 5 October 2020

15. The rule of law requires that the general public should have access to draft legislation and have a meaningful opportunity to provide input. […]

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution

67. […] Democracy cannot be reduced to the rule of the majority, but encompasses as well guarantee measures for the opposition […].

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

5.2. Initiation of bills

5.2.1. The Government-sponsored bills

24.[…] [S]ome constitutions will explicitly put the government in a more favourable position and grant exclusively to the Government the right to present bills to the parliament when specific subjects are at stake.

25. […] [F]inancial issues are likely to be constitutionally reserved to Government.

27. The governmental exclusivity will usually apply and be extended to any financial legislation which could introduce new expenses, interfere on the level of taxes or more generally any legislation which would have financial consequences.

28. A similar situation can be observed with regard to international issues. The Government tends to have an exclusive right to propose for adoption by the Parliament bills related to the ratification of international treaties signed by the executive or all regulations related to the implementation of the European Union (EU) directives or judgements of the European Court of Justice, for those countries members of, or in the accession process to, the European Union.

134. Statistically, in the majority of European countries most drafts are elaborated within the ministries. The prevalence of the executive in the exercise of the legislative initiative implies that most laws are, in practice, initiated by the Government. Consequently, the Ministries have the manpower and the expertise to prepare bills.

CDL-AD(2008)035, Report on Legislative Initiative

5.2.2. Role of the head of State in proposing legislation

38. […] [I]t is difficult to agree with the rule that the President may indicate to the Parliament which draft laws are to be examined as a matter of priority. In all countries, the legislature is not only independent in its work, but also a reasonable guardian of public interests. […]

CDL-AD(2017)010, Kazakhstan - Opinion on the amendments to the Constitution of Kazakhstan

30. In many countries, the Head of State, the President or the King may constitutionally hold a right of legislative initiative.

32. However, one might consider that entrusting the President with a right to present Bills to the parliament might cause problems in parliamentary systems of government, since in these systems the President is not as politically responsible before the Parliament as the government. In addition, the parallel initiative of the President and of the government may lead to unnecessary controversies within the executive power or have a negative impact where the President does not have executive functions but exercises a role of guarantee of the functioning of the constitutional bodies of the State and their compliance with the Constitution. It may even result in an unforeseen increase of the power of the presidential administration where that is separate from the administration which supports the government.

CDL-AD(2008)035, Report on Legislative Initiative

5.2.3. Bills proposed by individual MPs, groups of MPs, factions, or committees

62. The constitutional rules governing parliament's legislative initiative are designed to ensure that members of parliament are able to initiate and amend statutory instruments in accordance with their political choices and convictions. […]

CDL-AD(2009)018, Opinion on the concept paper for a new Law on Statutory Instruments of Bulgaria

40. In most European countries the right of legislative initiative belongs explicitly to each member of the parliament, taken individually.

41. Moreover, some constitutions may require a numerical support within the Parliament for legislative initiatives. […]

42. Some constitutions will explicitly specify that parliamentary groups and parliamentary committees also have the right of legislative initiative […]

126. […] Dealing with this multiplicity of legislative initiatives can be done through a common discussion of the concurrent drafts – generally two or three of them; the purposes of the solution chosen is to guarantee a certain coherence in the discussions at the same time as maintaining the right of initiative of the different authors of the amendments. […]

CDL-AD(2008)035, Report on Legislative Initiative

5.2.4 Other actors which may propose legislation (popular initiative, civil society, entities of the federation etc.)

For a detailed description of other possible ways on initiating the legislation see *CDL-AD(2008)035, Report on Legislative Initiative,* paras. 67-90

5.3. Setting of the agenda, order of business

36. […] it would be preferable that the agenda should be drawn up not by the President [of Parliament] alone, but that the President should share this responsibility with the Vice-Presidents and the political groups' coordinators. […]

38. […] [A]lthough the Rules of Procedure require the President to determine the speaking order in debates so as to ensure the participation of members from the different parliamentary

groups […] and to agree beforehand with the political groups' coordinators on participation by members who do not belong to a political group […], Article 165 permits the President to conclude a debate on a bill, amendments or other instruments within the competence of the Assembly by setting a time for the Assembly's vote. The Assembly may in this case vote on legislation without having debated it. In these circumstances opposition members' entitlement to take the floor is in no way guaranteed.

CDL-AD(2009)025, Opinion of the Rules of Procedures of the Assembly of "the former Yugoslav Republic of Macedonia"

103. The governmental primacy in the legislative process will be particularly salient in those few constitutions which contain provisions related to the order of business of the Parliament. The constitution may provide in that case for an automatic priority in the Parliament's agenda for a governmental initiative. […]

104. To counterbalance this governmental advantage and in order to guarantee a minimum exercise of parliamentarian legislative initiative, a few days can be constitutionally specifically devoted to the parliamentarian legislative drafts. […]

111. […] [I]n the vast majority of regimes the inclusion of a legislative initiative is not automatic.

112. According to the principle of parliamentarian autonomy in the field of the internal organization of the Parliament, the Chambers generally are the master of their order of business. Some Chambers have however, decided to provide for the priority of the government on the parliamentary agenda.

CDL-AD(2008)035, Report on Legislative Initiative

5.4. External experts, impact assessments, and fact-finding

17. […] [A]s regards the legislative process, "where appropriate", impact assessments should be made before adopting the legislation.[…]

CDL-AD(2020)035, Bulgaria - Urgent Interim Opinion on the draft new Constitution

77. Not only should the discussions be inclusive (in the sense of involving all political groups in Parliament), they sometimes require hearings with external participants, such as experts (i.e. professionals in the relevant field) […].

78. Hearing of external participants is most appropriate in the relevant parliamentary committees' meetings. Minority members should be able to invite experts […] to be heard at the committee meetings, and such requests should be, as a rule, granted. The choice of external participants should ensure that hearings cover diverse perspectives. […]. Committees should have sufficient resources for the payment of [services of the external experts].

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

54. Obstacles to the effective implementation of the law can occur […] also because the quality of legislation makes it difficult to implement. Therefore, assessing whether the law is implementable in practice before adopting it, as well as checking *a posteriori* whether it may be and is effectively applied is very important. This means that ex ante and ex post legislative evaluation has to be performed when addressing the issue of the Rule of Law.

CDL-AD(2016)007, Rule of Law Checklist

142. The chapter highlights a very important aspect of legislative activity, *ex post* assessment being a key part of any methodical approach to preparing and implementing legislation.

143. The Venice Commission congratulates the authors on having included a chapter on this subject.

144. Given, however, the close link and the need for complementarity between ex ante […] and ex post assessments […], it might be more sensible to combine all these provisions in a separate chapter on assessment of the impact of legislation (or impact studies).

145. The Venice Commission invites the authors to consider grouping ex ante and ex post assessments together in a single chapter on impact studies.

CDL-AD(2009)053, Opinion on the draft law on normative acts of Bulgaria

137. Combining the needs of an effective democratic participation and the purposes of a legislation which should be able to deal with the complexity of the present social and economic requirements is a complex constitutional issue. The solution could be found in the practice and rules of procedure of the Parliaments of Europe, where special commissions devoted to the quality of the drafting are set up. However, a purely internal parliamentary solution might not be seen as sufficient in particular with regard to legislative initiatives which would not come from the executive of the parliamentary power.

CDL-AD(2008)035, Report on Legislative Initiative

5.5. Prior consultations with the public and main stakeholders

28. As the State Language Law contains many provisions which clearly affect speakers of minority languages, representatives of the minorities and indigenous peoples of Ukraine should have been sufficiently and adequately consulted in order to ensure that their needs are understood and taken into consideration. […]

CDL-AD(2019)032, Ukraine - Opinion on the Law on Supporting the Functioning of the Ukrainian Language as the State Language

74. […] Complex and controversial bills would normally require particularly long advance notice, and should be preceded by pre-drafts, on which some kind of (internet-) consultation takes place. The public should have a meaningful opportunity to provide input […].

75. […] [T]he Government should not use the accelerated procedure provided for private bills (i.e. bills introduced by individual MPs of the majority rather than by the Government itself) in order to avoid meaningful public consultations which would otherwise be required for a Government-sponsored bill […]

77. [Parliamentary discussions] sometimes require hearings with […] [external] stakeholders (for instance those who represent social, ethnic, professional, religious etc. groups affected by the policy at issue).

79. External input to the law-making process may be obtained […] also through the process of public consultations in which members of the general public may address their proposals and comments in writing to the relevant committees and to the Plenary, or express their opinion through other means (by signing petitions, for example). […] The process of public

consultations should be accompanied by an (informal) public discussion in the media and in the civil society […].

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

34. The legislative process […] has drawn strong criticism […].

35. Debates took place in a very limited amount of time which did not allow real debate, despite the fact that the amendments were numerous and substantively far-reaching. The input provided by the different sectors of the Romanian judiciary, after extensive and thorough consultations among members of prosecutor's offices and courts throughout the country, as well as the Superior Magistracy Council and the professional associations, was only to a limited extent taken into account. Legal practitioners, including even the High Court of Cassation and Justice, warned that the entry into force of the amendments could have drastic negative consequences for the functioning of the Romanian criminal justice system. A more comprehensive process of discussion, based on dialogue with legal practitioners and society at large, and assessing in detail the impact of the numerous amendments, would have been not only advisable but even necessary.

36. Insufficient transparency as to the agenda and the content of the special committee's discussions made it very difficult for interested stakeholders to follow and to effectively contribute to those discussions.

37. Furthermore, the debate prior to the adoption of the amendments by the two Chambers in the plenary session seems excessively fast, taking into account that more than 300 amendments were made to two particularly important and sensitive codes.

39. The Commission is – as always – highly critical of situations in which acts of Parliament regulating important aspects of the legal or political order were being adopted in an accelerated procedure. Such an approach to the legislative process cannot provide conditions for proper consultations with the opposition or the civil society. Especially when adopting decisions on issues of major importance for society, such as criminal justice and the fight against corruption, wide and substantive consultations are a key condition for adopting a legal framework which is practicable and acceptable for those working in the field.

CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code

11. The Venice Commission and the OSCE/ODIHR remind that any large-scale amendment of electoral legislation needs a thorough public debate and consultation not only among political parties represented in the Parliament, but also among other relevant actors outside the Parliament and civil society, leading to a broad consensus. […]

CDL-AD(2017)012, Republic of Moldova - Joint opinion on the draft laws on amending and completing certain legislative acts (electoral system for the election of the Parliament)

43. […] Lobbying can be seen as enhancing the democratic system by contributing to pluralism. It assists both in balancing interests and representing minorities. The participation of private actors in the policy making process in their field of interests can be viewed as indispensable, as it allows individuals or groups who may not otherwise be able to participate in politics to have a role in the policy process. For example, a citizen organization concerned about human rights may seek to lobby the State to pursue tougher laws regarding abuses of such rights.

45. Another positive aspect is that interest groups offer external information and bring in external expertise when public policies are being formulated. Given the complexity of contemporary regulation, the technical information or expertise provided for by extra-institutional actors can be seen as helping inform policy-makers of different policy choices. Lobbying is then regarded as adding legitimacy and credibility to policy choices.

46. However, it is also important to note that expertise and external information is not confined to lobbyists. Expertise can likewise be provided by independent groups, ad-hoc commissions which would be financed by public funds or by the regular participation in public life (in the framework of conferences, meetings and auditions) of any private body, be it an enterprise, an association or trade unions.

47. Whilst one may consider the expertise provided by external actors as an asset, on the other hand, one must bear in mind that the information provided by any sectorial group entails the risk of being partial. […] [T]heir arguments cannot be considered as neutral expertise. It is the task of the political process itself to resolve such conflicts of special interests.

50. Apart from this aspect, some activities of extra-institutional actors aimed at influencing political decision may raise further concerns with regard to legitimacy, representativeness, transparency and accountability, which are fundamental principles of democracy.

51. One important reason for concern is that lobbyists are not elected officials. […] [T]hey do not represent the whole society and hence cannot pretend representing the interests of the citizens or of the society as a whole. […]

52. Lobbyists are not accountable for their actions […] whereas elected politicians are accountable for their actions when in office and can be voted out of office. […]

53. Another main problem is the very unequal means and resources of different actors. This may become a source of concern since resources do matter. […]

54. In addition, […] conflicts [of interests] typically arise from personal or professional relations with extra-institutional actors. Hence, the line between a normal and an offensive participation or pressure of economically or /and strategically powerful private companies or actors in public policies can be difficult to draw.

CDL-AD(2013)011, Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying)

100. Some constitutions may also require a prior opinion or consent given by a body concerned by the legislative initiative. […]. For these opinions certain time limits are set. They are longer for changes of the Constitution as well as for laws leading to the transfer of power to a supranational or international organisation. In France any governmental legislative must, before being brought to the Parliament, receive an opinion from the Council of State […].

CDL-AD(2008)035, Report on Legislative Initiative

5.6. Preliminary approval of the bill by parliamentary committees; ex ante review of constitutionality by a constitutional court

117. […] In some countries of continental Europe constitutional review is also available in respect of a legislative text as such (*in abstracto*), and sometimes even before a bill becomes law. Availability of the review of constitutionality of laws and bills is a matter of political choice, but where this choice is made, there are good reasons to give the power to trigger such a review also

to a minority group in Parliament […]. For the Venice Commission, submitting a bill to a constitutional court should be possible at the request of "one third or one quarter of the members" […], but the threshold may be even lower, especially where the legislature is much fragmented (for example, 1/5 of all MPs).

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

34. The legislative process […] has drawn strong criticism […]. The amending draft laws, passed through an urgent procedure, have mainly been discussed in the framework of a body established especially for that purpose (a special joint committee of the two chambers of Romanian parliament). The possibilities for a more in-depth examination of an important piece of legislation by two bodies, according to the regular procedure, offered by the Romanian bicameral system therefore were not used.

CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code

44. […] [N]ational practice is very diverse on how to ensure conformity of legislation with the Constitution. While judicial review is an effective means to reach this goal, there may also be other means to guarantee the proper implementation of the Constitution to ensure respect for the Rule of Law, such as a priori review by a specialised committee.

CDL-AD(2016)007, Rule of Law Checklist

68. The Venice Commission welcomes the system of preventive constitutional review introduced by the Bill (Article 62), through a special advisory body (*Lögrétta*) within the Althing, appointed by the Althing, to assess the constitutionality of legislative bills and their compliance with international commitments. It appears that similar bodies in Finland and Sweden function well. […]

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

37. The practice shows that the role of the Constitutional Court in *ex ante* review is accepted in many states beside its main role in *ex post* review. The Venice Commission therefore considers that the Constitutional Court should be seen as the only and best placed body to conduct *ex ante* binding review. Nevertheless, to avoid over-politicizing the work of the Constitutional Court and its authority as a judicial body, the right to initiate *ex ante* review should be granted rather restrictively.

50. The strongest argument against a wide use of *a priori* constitutional review again lies in the possibility that an unconstitutionality of a law may arise though the practice of state organs, and this even in cases where the Constitutional Court had already been called upon to decide on the constitutionality of the law in abstract *a priori* proceedings.

CDL-AD(2011)001, Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary

121. Chapter 6 of the Constitution, dealing with legislation, contains Section 74 on supervision of constitutionality. According to this provision, "The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties". From the wording of the provision it becomes evident that the *ex ante* review of draft legislation by the Constitutional Law Committee for its conformity with the Constitution also comprises review for its relation to international human rights treaties.

124. It is not clear from Section 74 what the status of the statements of the Constitutional Law Committee on constitutionality and relation to international human rights treaties is, and whether a special procedure for the adoption of the legislative proposal applies if the Constitutional Law Committee finds the proposal to be in violation of the Constitution or a treaty.

125. In addition there are other constitutional bodies with the function of constitutional review: the Chancellor of Justice and the Parliamentary Ombudsman. Their review will, of course, also and even mainly concern the human rights provisions of the Constitution. […].

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

5.7. Right of amendment and its limits

107. The question is who is controlling the relevance and the originality of the amendments. The "filtering" function may be entrusted to a relevant committee, to the Speaker etc. It is important, however, that the "filtering" body is a neutral arbiter […] or that this function is exercised by an appropriately composed body where the opposition is properly represented, or there is a possibility of appeal to such a body.

110. In some countries the Government may request a bulk vote on the whole draft without amendments. This permits to avoid delaying the adoption of the bill or its deformation by hundreds of amendments which otherwise can be tabled by the opposition. However, the Venice Commission has expressed strong reserves about this mechanism, since it deprives Parliament of the right of amendment, which is "an essential requirement for the exercise of its legislative function."

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

45. Restrictions can also be foreseen with regard to specific laws, or the content of the law. For instance, the Constitution of France in its art. 40 provides specifically that "Bills and amendments introduced by members of parliament shall not be admissible where their adoption would have as a consequence either a diminution of public resources or the creation or increase of an item of public expenditure".

49. The right of amendment is seen as the parliamentarian prerogative par excellence. Since the exercise of legislative initiative is clearly dominated in practice by the government, the right of amendment has become the principal exercise by the Parliament of its right of legislative initiative.

50. The right of amendment is generally conceived as an individual right belonging to the Member of Parliament, but in practice it is usually performed collectively. The right of amendment can also be constitutionally granted to parliamentary committees, parliamentary groups, government, ministers and State Officials empowered by Ministers […].

51. Since the right of amendment is exercised on the basis of a pre-existent text, it is, inevitably, related to substantial and sometimes specific conditions. Consequently, the right of amendment can be constitutionally framed by criteria of restrictive admissibility.

54. Parliamentary amendments which may increase public expenditure or decrease public incomes are subject to prior governmental approval […].

55. More generally, the right of amendment shall be constitutionally framed by the subject of the Bill it is supposed to amend. […]

119. The text of the amendment must be related to the text which is supposed to be amended. The rules of procedure of the Parliaments of France, Greece, Belgium et Great Britain have enshrined this condition as a matter of admissibility of the introduction and hence discussions of the amendment.

122. The right of amendments cannot be exercised at any moment of the legislative process. It must fit into the logical process of the parliamentary deliberations. The rules of procedure of the Parliament will therefore frame in temporal manner the exercise of this right.

123. The right of amendment is considered as a tool *par excellence* of the discussion of the draft texts within the commissions or the plenary session […]. It will not usually be allowed during the general discussions of the draft law, the purposes of which are to discuss the principal outline of the text.

124. Moreover, the exercise of the right of amendment should not disturb the efforts to tighten the legislative process. To that end, many Parliaments refuse any amendment which would challenge earlier decisions reached during the parliamentary deliberations.

128. […] The discussions of all amendments can bring about a parliamentary obstruction. Every Parliament or chamber will have its own solutions to dealing with this issue. Some chambers prefer to discuss the amendments in a chronological order (like in Greece). Others prefer an order of discussion using the criteria of relevance to initial text to decide the order of discussion.

130. Within the Bundestag, all reported amendments will be deliberated in plenary session, in order of relevancy to the initial text. A Chamber can also decide to join the deliberation related to several amendments on the same issue. In the House of Commons […] the Speaker can select those amendments to be discussed. The Speaker is consequently vested with a large discretionary power and constitutes an efficient procedure to avoid obstructionist practices. In order to leave room for a free expression of any divergent opinions, the neutrality of the Speaker is mandatory.

CDL-AD(2008)035, Report on Legislative Initiative

5.8. Fair parliamentary debates

5.8.1. Political inclusiveness of the debate; allocation of the speaking time

102. Normally, speaking time should be distributed not to individual MPs but to the groups […] in proportion to their weight in Parliament. It is also possible to give the opposition a bigger share of time, especially as regards bills introduced by the Government or private bills sponsored by majority MPs. A particular sequence of taking the floor may be indicated in the RoP or governed by the custom. Allocation of an equal speaking time between majority and opposition, irrespective of their strength, should be privileged under certain circumstances […].

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

5.8.2. Transparency and publicity of the hearings

61. Publicity of the Plenary debate helps the opposition to effectively perform its functions and to attract public attention to problems and weaknesses of the Government's policies. Not all of the debates are of much interest for the public; yet, it is necessary to provide a reasonable accommodation for the members of the public or the journalists who want to follow them (in

person or on-line). The general rule should require reasonable access of the media and of the general public to Parliament during the debates.

62. Rules governing the granting of passes to the media to the building of Parliament or licenses on coverage of the debate may be subject to obvious safety and order requirements. They should ensure the pluralist and non-partisan character of the coverage […].

64. There should be a possibility to conduct debates, exceptionally, in camera, where secret matters are discussed (defence, foreign policy negotiations, etc.). The decision to close the debate may be taken by plenary Parliament, preferably by a qualified majority, provided that the decisions taken at the session in camera are published afterwards.

65. The general rule requiring publicity of deliberations in the committees and recorded individual voting in the committees (on substantive or procedural issues) is a more delicate issue, since it may have side-effects: increase the influence of the lobbyists, transform committee deliberations into a platform for political campaigning, and make political negotiations and compromises more difficult. Committees are more likely to examine classified information. Committee deliberations may be closed for the public, for solidly justified reasons, such as national security.

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

36. Insufficient transparency as to the agenda and the content of the special committee's discussions made it very difficult for interested stakeholders to follow and to effectively contribute to those discussions.

CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code

25. Pursuant to the applicable legislation, the debates were broadcast live […]. Although these are the ordinary broadcasting rules for parliamentary debates, the time slot live TV broadcasting should have been extended due to the importance of the matter and to the continuation of the debates all night.

CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017

5.8.3 Timing of debates, readings

32. The procedure for the adoption of the amendments to the Constitution was extremely hasty. While the Venice Commission and ODIHR will not analyse the conformity of the revision process with internal law, they cannot but remark that the formal procedure in the Parliament was extraordinarily short (about one week), and the whole process from the presentation of the initiative to its adoption lasted only one month. There are no international standards on how long the procedure in the Parliament has to last, but it has to guarantee a public discussion of the amendments in substance. The Albanian authorities informed the Venice Commission and ODIHR that the initiative for the revision of the Constitution was presented on 30 June; that hearings took place with Representatives of civil society in the field of human rights protection on 3 July, with representatives of the academic world on 6 July, with state institutions and international partners on 7 July. However, the hearings were held only a few days after the initiative was presented, which begs the question if the said stakeholders were in a position to properly assess the draft amendments. Even if the Prime Minister explained that the possibility to organise public consultations was limited due to the COVID-19

measures, it remains a fact that the whole process was hasty, given the potential importance of the constitutional amendments for the coming election. Moreover, the adoption of the amendments to the Constitution took place just less than 9 months before next elections. In such a case, the consultation among the political stakeholders and non-governmental organisations is especially important. The same concerns apply to the adoption of the 5 October amendments to such a fundamental legislation as the Electoral Code.

33. This contrasts with the process which led to the 23 July amendments to the Electoral Code, where, positively, the authorities and political parties engaged in an open, inclusive and comprehensive discussion of many components of the electoral reform. This process was also more inclusive, given the specific Albanian political context, since it also included the extra parliamentary opposition. These developments demonstrated a constructive attitude both on the part of the government and on the part of the opposition which enabled addressing some election related recommendations issued in 2015-2019 by ODIHR and national stakeholders. […].

34. While it does not fall within the Venice Commission's and ODIHR's mandate to investigate the political negotiations which may have been conducted behind the scenes and which led to the approval of the 5 October amendments, they cannot but regret once again that the constitutional amendments went against the most basic rules of democratic law-making, even assuming that the object of the amendments had been previously discussed with the extra parliamentary opposition. Democracy governed by the rule of law is not only about the formal adherence to procedures allowing the majority to govern, but also about deliberation and a meaningful exchange of views between the majority and the opposition. […]

CDL-AD(2020)036, Albania – Joint Opinion of the Venice Commission and the OSCE/ODIHR on the amendments to the Constitution of 30 July 2020 and to the Electoral Code of 5 October 2020

71. It is difficult to define *in abstracto* how much time is necessary for debating a bill in Parliament. The legislation or the RoP may provide for certain basic rules preventing rushed adoption of laws, such as intervals between readings and deliberations in a committee.

72. Constitutional amendments should be the result of a "slow and incremental" process and should follow other procedures than those of everyday politics […]. [P]rocedural impediments [may be provided] which are supposed to slow down the process and make the final decision more informed and well-considered. […]

73. As regards ordinary legislation, whether Parliament (and in particular the opposition) has adequate time to discuss the bill should be decided by the body responsible for setting the agenda of Parliament and of its committees in the light of all relevant circumstances, and in particular the complexity and importance of the bill.

74. Laws changing fundamental institutional arrangements – for example, the composition and the principles of functioning of the Constitutional Court – need more time than ordinary legislation […]. Complex and controversial bills would normally require particularly long advance notice, and should be preceded by pre-drafts, on which some kind of (internet-) consultation takes place. The public should have a meaningful opportunity to provide input […]. Allocation of additional time for public consultations increases the ability of the opposition to influence the content of the legislative proposals by the Government or the majority. The majority should not manipulate the procedure in order to avoid such public consultations.

75. By contrast, for the passage of minor and uncontroversial legislation shorter time-frames and simpler procedures (for example, not involving a separate examination in a relevant committee) may be designed. However, such cases shall be clearly defined and tightly

circumscribed in the regulations. […] [T]he Government should not use the accelerated procedure provided for private bills (i.e. bills introduced by individual MPs of the majority rather than by the Government itself) in order to avoid meaningful public consultations which would otherwise be required for a Government-sponsored bill […]

80. The agenda of the upcoming period should be published, and the supporting material made available in advance to the opposition and the general public to prepare for the debates on a particular issue/bill […].

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

35. Debates took place in a very limited amount of time which did not allow real debate, despite the fact that the amendments were numerous and substantively far-reaching. […]

37. Furthermore, the debate prior to the adoption of the amendments by the two Chambers in the plenary session seems excessively fast, taking into account that more than 300 amendments were made to two particularly important and sensitive codes.

39. The Commission is - as always - highly critical of situations in which acts of Parliament regulating important aspects of the legal or political order were being adopted in an accelerated procedure. […]

CDL-AD(2018)021, Romania - Opinion on draft amendments to the Criminal Code and the Criminal Procedure Code

24. The modalities of the parliamentary debate on the constitutional amendments also raised criticism in Turkey. The daily debates lasted, virtually uninterrupted, from the afternoon till the following morning. Such lengthy sessions led to a very quick completion of the procedure: at both readings in the plenary, the amendments were discussed and adopted within twelve days (the debates within the constitutional committee had lasted nine days). However, after the deliberations were completed, the text was kept within parliament for thirteen days, and the President held it for fourteen more days. It is difficult to reconcile the rushed discussions in parliament with these delays.

CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017

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”. […]

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

51. […] The point of prescribing three successive readings of the same piece of legislation by the same Assembly is not apparent, and this provision could be reconsidered.

52. Moreover, although the urgent procedure for examining draft legislation […] wisely groups together the second and third readings during the same session, it precludes holding a general debate, which is most unfortunate. This lack of a general debate is all the more regrettable in that the urgent procedure can be adopted "in order to prevent and avoid major disturbances in the economy or when this is required for the interest of the security and defence of the Republic or in cases of major natural disasters [or] epidemics...". It would be entirely conceivable to require

the holding of a general debate in such cases, which should by their very nature be limited, even if its duration were to be reduced.

CDL-AD(2009)025, Opinion of the Rules of Procedures of the Assembly of "the former Yugoslav Republic of Macedonia"

5.9. Exceptional parliamentary procedures in emergency situation

64. [During the pandemic] three different situations have been identified: (1) Parliaments that have continued their work as usual, by merely changing some of their procedures, but continuing with their normal functions […]; […] (2) parliaments that have suspended their ordinary activities (legislative) and focused only on the review of Covid-19 related activities […]. […] In many countries, decree laws were passed by governments without the participation of parliament (which have in some cases been submitted to parliament for subsequent approval). In order to be more efficient, some governments have created parallel structures to parliament, although not totally excluding parliament. […] This effectively relegates parliament to its very narrow function of checking the work of government on Covid-19 related matters through committees.

71. Decisions on the functions and functioning of parliament during the health crisis have been taken by different bodies and have followed various procedures, which were not always previously in place (undermining legal certainty). Modifications have been introduced with amendments to the Regulations of Parliament (Romania) or decisions of the bureau of Parliament or the presidency of Parliament (Spain). The first and most important one is related to the parliamentary function. The cause of the suspension, due to logistics or linked to functions, affects the response. Accordingly, for the decision to remove all non-essential activities, a definition is needed of what and who should be considered essential and under what procedure. It would be important to modify the regulation (and this must be done in advance, outside an emergency situation) to link the declaration of a state of emergency to a change in the functioning of parliament.

76. Among the solutions adopted by EU Member States that may inspire others, there is the proportional limit of the number of attendees, such as was done in Spain; their rotation; the reduction to essential staff (those who had to intervene) such as was done in France; or the reduction of the minimum quorum that they have established, such as was done in Germany, where the *Bundestag* has done so by introducing temporary modifications […] (reducing it to a quarter of the members for plenary sessions). Others, such as the Belgian Parliament, have amended their Rules of Procedure to allow members, under certain conditions, to be considered "present" in the Commission or in plenary, even if they are not physically present, and to vote at those meetings.

CDL-AD(2020)018, Interim Report on the measures taken in the EU member States as a result of the Covid-19 crisis and their impact on democracy, the Rule of Law and Fundamental Rights

141. […] [O]ne may understand that a single reading of a draft law in a Chamber could be enough to pass the legislation, sometimes even without formal adoption by the Chamber. The Venice Commission finds the amendment to the legislative procedure problematic and recommends the Romanian authorities to reconsider it carefully.

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

5.10. Majorities, quorum, voting, and ascertainment of results

Note: the questions of quorum and qualified majorities go beyond the scope of this compilation, so only few citations (reflecting the most general approach of the Venice Commission to those issues) are given. For more detail see *CDL-AD(2010)001*, *Report on the constitutional amendment*, *CDL-AD(2019)015*, *Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist, and CDL-PI(2018)003rev., Compilation on the qualified majorities and anti-deadlock mechanisms*.

66. The decision-making process should be inclusive, i.e. involve all political groups in Parliament. Rules on quorums give additional legitimacy to the decisions taken by Parliament. Quorum rules should not, however, be unrealistically high […].

67. Certain political processes – such as the amendment of the Constitution – require the broadest political support. Even if the governing majority has the necessary number of votes to pass the amendments, it does not absolve the Government and Parliament from conducting a genuine all-inclusive and open debate in which the media and civil society can also participate. […].

68. It is important to ensure that the process of counting of votes is fair and transparent, that the procedure cannot be manipulated by the majority, and that the opposition has a possibility of controlling the process of counting.

69. There should be procedural mechanisms in place to ascertain the quorum and record the results of the voting, as a general rule, or at the request of a minority group […]. This does not exclude the possibility of relying on the oral vote in some other, less controversial, situations.

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

22. […] [U]nder Article 175 of the Constitution and Article 94 of the National Assembly's Rules of Procedure, the voting had to take place by secret ballot. […]

23. This rule was not fully respected during the parliamentary vote on the constitutional amendments in question. During the vote, several deputies voting for the amendments cast their votes openly, showing the white ballot paper before placing it into the box. The whole procedure was tele-recorded and shown on public media. It was made possible to see the stamp in some deputies' hand. Moreover, unused ballot papers were recollected after the vote and allegedly used to identify those who, especially among the AKP and MHP members, did not vote for the amendments.

26. The Venice Commission is of the view that the breach of the secrecy of vote is a serious flaw of the procedure of constitutional amendment, as it casts a doubt on the genuine nature of the support for the reform and on the personal nature of the deputies' vote. […]

CDL-AD(2017)005, Turkey - Opinion on the amendments to the Constitution adopted by the Grand National Assembly on 21 January 2017 and to be submitted to a National Referendum on 16 April 2017

96. Everything relating to human rights and freedoms falls under the ambit of organic law […]. No doubt this provision is motivated by the best intentions, but there are question marks as to whether it is realistic. Human rights and freedoms are not a separate sector, a watertight category. Every law has the potential to interfere with these fundamental rights. […]

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

129. […] Parliament adopted numerous cardinal laws with the present two-thirds majority, which may be difficult to amend by subsequent – less broad – majorities. This wide use of cardinal laws to cement the economic, social, fiscal, family, educational etc. policies of the current two-thirds majority, is a serious threat to democracy.

130. In its opinion on the new Constitution of Hungary the Venice Commission stated: *"The more policy issues are transferred beyond the powers of simple majority, the less significance will future elections have and the more possibilities does a two-thirds majority have of cementing its political preferences and the country's legal order."*

132. […] [W]hat matters is not the number of cardinal laws, but the issues on which they are enacted and the degree of detail of the provisions raised to 'cardinal level'. Instead of declaring only basic principles within in these laws as cardinal, whole laws including numerous detailed regulations have been raised to cardinal status *en bloc*. The Commission strongly criticised this practice, but to no avail.

133. "Elections […] would become meaningless if the legislator would not be able to change important aspects of the legislation that should have been enacted with a simple majority. When not only the fundamental principles but also very specific and 'detailed rules' on certain issues will be enacted in cardinal laws, the principle of democracy itself is at risk."

134. The tendency of ensuring that following elections future majorities cannot legislate in many areas because they will be bound by cardinal laws is even reinforced by the Fourth Amendment. A number of provisions, which are now included in the Fundamental Law, have no constitutional character and should not be part of the Constitution (e.g. homelessness, criminal provisions on the communist past, financial support to students, financial control of universities). In addition to shielding these provisions from control by the Constitutional Court, this ensures that future governmental majorities in Parliament without a two-thirds majority cannot change these policies.

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

86. The last sentence raises the issue whether it is appropriate for the legislature to establish by simple majority conditions for the right to vote additional to those laid down in the Constitution. This might well lead to a situation where the minority is put at a disadvantage for the next elections.

CDL-AD(2009)057, Interim Opinion on the Draft Constitutional Amendments of Luxembourg

47. This Article maintains the requirement of the current Constitution that nearly all decision of the Rada require the majority of its constitutional membership. This makes decision-making excessively difficult, especially if there is only a thin majority. In accordance with usual parliamentary practice, for most decisions the majority of deputies present and voting should be sufficient once a quorum has been established.

CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine (prepared by a working group headed by Mr V.M. Shapoval)

35. In comparison with the current norm of Art. 62.3 of the Constitution, whereby the quorum is at least two thirds of the total number of deputies, the draft envisages a significant reduction of the quorum. However, even the requirement of at least half of the total number of deputies is extremely high, and under certain circumstances it may reduce the functional efficiency of Parliament. […]

CDL-AD(2005)022, Interim Opinion on Constitutional Reform in the Kyrgyz Republic

6. Control of compliance with procedural rules in Parliament

154. In countries with a strong tradition of parliamentary autonomy (which means, *inter alia*, that the decisions of internal bodies of Parliament are not susceptible to any external review), disputes related to internal procedures […] are usually decided within Parliament itself. […]

156. Another option would be to entrust the function of dispute resolution to an external body – a Constitutional Court or another similar high judicial authority. This model is less respectful to the autonomy of Parliament but better guarantees the independence of the adjudicative body. It is important, however, to make clear which measures of Parliament may be reviewed by the Court or other external body, and which are not subject to such review. Constitutional Courts in many countries may examine the process of the law-making, when analysing constitutionality of the laws. A serious breach of the rights of the opposition may, at least in theory, lead to the invalidation of the law by the Constitutional Court. At the same time, resolution of disputes related to the internal organisation of Parliament and its working procedures may be left to Parliament itself and to its internal bodies, provided that the opposition is adequately represented in such bodies, or that they are formed on the basis of the cross-party consensus.

CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist

88. […] [P]romulgation "is a formal act which attests the existence of the law, authenticates the text of the latter, confirms that the rules governing the adoption of the law were observed and makes the law enforceable". Since deciding whether this power should lie with the Government or the Grand Duke "is a question of expediency, it is for the Luxembourg constitutional writers to decide".

CDL-AD(2019)003, Luxembourg - Opinion on the proposed revision of the Constitution

47. One of the proposals of the draft […] aiming at strengthening the powers of the Parliament is the right of the Speaker to publish a law not signed by the President if the Rada adopts such a law with a majority of two thirds. This is a positive and commendable development in terms of asserting the legislative powers of the Rada as an autonomous Constitutional institution.

48. The proposed amendment to Article 139 of the Rules of procedure on publication of the laws and other acts of the Rada is an assertion of the legislature's right to enact them.

CDL-AD(2017)026, Ukraine - Opinion on the amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine

Appendix - Reference documents

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CDL-AD(2019)015, Parameters on the Relationship between the Parliamentary Majority and the Opposition in a Democracy: a checklist
CDL-PI(2018)003rev, Compilation on the qualified majorities and anti-deadlock mechanisms.
CDL-AD(2016)007, Rule of Law Checklist
CDL-AD(2013)011, Report on the Role of Extra-Institutional Actors in the Democratic System (Lobbying)
CDL-AD(2010)001, Report on the constitutional amendment
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CDL-AD(2016)025, Kyrgyz Republic - joint opinion on the draft law "on Introduction of amendments and changes to the Constitution"
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CDL-AD(2014)010, Opinion on the Draft Law on the Review of the Constitution of Romania
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CDL-AD(2010)017, Opinion on the Draft Law on Normative Legal Acts of Azerbaijan
CDL-AD(2010)003, Joint Opinion on the Draft Law on the Judicial System and the Status of Judges of Ukraine by the Venice Commission and the Directorate of Co-operation within the Directorate General of Human Rights and Legal Affairs of the Council of Europe

CDL-AD(2009)057, Interim Opinion on the Draft Constitutional Amendments of Luxembourg
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CDL-AD(2009)045, Opinion on the Draft Law on Prohibition of Discrimination of Montenegro
CDL-AD(2009)025, Opinion of the Rules of Procedures of the Assembly of "the former Yugoslav Republic of Macedonia"
CDL-AD(2009)018, Opinion on the concept paper for a new Law on Statutory Instruments of Bulgaria
CDL-AD(2009)004, Comments on the Draft Law on the All-Ukrainian Referendum by Mr O. Lavrynovych
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