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

**FINAL DRAFT REPORT**

**ON CONSTITUTIONAL AMENDMENT PROCEDURES**

**on the basis of comments by**

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## I. Introduction

1. In its Recommendation 1791(2007) on the state of human rights and democracy in Europe the Parliamentary Assembly of the Council of Europe (PACE) recommended that the Committee of Ministers should draw up guidelines on the elimination of deficits in the functioning of democratic institutions, taking into account existing Council of Europe legal instruments. Among the issues listed for examination were the questions of “whether the current constitutional arrangements are democratically appropriate” and “whether the current national arrangements for changing the constitution require a sufficiently high approval level to prevent abuses of democracy” (§§ 17.19 and 17.20).

2. At its 2007 session the Council of Europe’s “Forum for the Future of Democracy” encouraged the Venice Commission to reflect on these issues. On this basis, the Venice Commission’s Sub-Commission on Democratic Institutions decided to carry out a study on constitutional provisions for amending national constitutions.

3. As a preliminary step, the Venice Commission compiled the relevant national constitutional provisions on constitutional amendment in the Council of Europe Member States and a number of other States. The results can be found in a separate document on constitutional provisions for amending the constitution (CDL(2009)168add1). The full text of the constitutions can be found in the Venice Commission’s CODICES database.<sup>1</sup>

4. Ms Haller, Messrs Sejersted, Tuori and Velaers were nominated as rapporteurs. The present report describes and discusses the existing procedures and thresholds for national constitutional amendment in the selected states. It concludes with a number of reflections which can serve for future assessments of the existing or draft rules on constitutional amendment. Preliminary discussions on earlier drafts took place in the Sub-Commission on Democratic Institutions in October 2008, June and October 2009. The report was adopted at the ... Plenary Session of the Commission (Venice, ... 2009).

## II. Preliminary observations

5. The question of constitutional amendment lies at the heart of constitutional theory and practice. Constitutionalism implies that the fundamental rules for the effective exercise of state power and the protection of individual human rights should be stable and predictable, and not subject to easy change. This is crucial to the legitimacy of the constitutional system. At the same time, even quite fundamental constitutional change is sometimes necessary in order to improve democratic governance or adjust to political, economical and social transformations. To the extent that a society is formed by its written constitution, the procedure for changing this document becomes in itself an issue of great importance. The amending power is not a legal technicality but a norm-set the details of which may heavily influence or determine fundamental political processes.

6. It is a fundamental feature of all written constitutions (unlike ordinary statutes) that they contain provisions for amending themselves. In almost all constitutions such change is more difficult than with ordinary legislation, and typically requires either a qualified parliamentary majority, multiple decisions, special time delays or a combination of such factors. Sometimes ratification by popular referendum is required, and in federal systems sometimes ratification by the entities.

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<sup>1</sup> <http://www.codices.coe.int>.

7. These are the common fundamental elements of constitutional amendment mechanisms, but they are designed and combined in almost as many ways as there are written constitutions. Even within Europe there is great variety – ranging from states in which constitutional amendment is quite easy to states where in practice it is almost impossible. There is no common European “best model” for constitutional amendment, much less any common binding legal requirements. Neither has there been any attempt so far at articulating any common European standards.

8. When constructing and applying rules on constitutional amendment, the fundamental challenge is to find a proper *balance between rigidity and flexibility*.

9. From this point can be induced two potential challenges. The first is the one referred to in the recommendation from the PACE when it asks for an examination of “whether the current national arrangements for changing the constitution require a sufficiently high approval level to prevent abuses of democracy”. In other words, are the constitutions of the member states sufficiently strong and rigid to create stable conditions for democratic development?

10. While this question might certainly be asked in any member state, it is in general most important with regard to countries that have relatively recently undergone democratic reform, and which are still in the process of developing a new constitutional system and culture.

11. The second is the opposite challenge – that a constitution might be too strict and rigid. This might be a problem both in old and new democracies. In old and established democracies once suitable constitutions may over time become less so, blocking necessary reform. And as for new democracies, their constitutions sometimes still bear the marks of former undemocratic regimes, or they were adopted in times of transition, laying down and cementing strict rules that were sensible at the time, but less so as democracy matures.

12. On this basis, the Venice Commission holds that there are two potential pitfalls:

1. That the rules on constitutional change are too rigid. The procedural and/or substantial rules are too strict, creating a lock-in, cementing unsuitable procedures of governance, blocking necessary change. This means too tight confinements on democratic development, and disenfranchisement of the majority that wants reform.
2. That the rules on constitutional change are too flexible. The procedural and/or substantial rules are too lax, creating instability, lack of predictability and conflict. Democratic procedures, core values and minority interests are not sufficiently protected. The issue of constitutional reform becomes in itself a subject of continuous political debate, and the political actors spend time arguing this instead of getting on with the business of governing within the existing framework.

13. Both these challenges will be addressed in the present report. The analysis is based on a systematic compilation of amendment provisions in the constitutions of the member states of the Council of Europe and a number of other States (see above, §3). The compilations clearly illustrate the great variety and richness of the European constitutional tradition.

14. The Venice Commission has over the years had the opportunity to reflect on constitutional amendment clauses and procedures several times, but so far only in the context of specific opinions on constitutional reforms in a given country, which did not give rise to the discussion of more general standards and principles. The present request is therefore the first time that the Commission has been invited to study the issue in general and in the abstract.

15. Generally speaking, in addition to guaranteeing constitutional and political stability, provisions on qualified procedures for amending the constitution, aim at securing broad consensus as well as the legitimacy of the constitution and, through it, the political system as a whole.

16. The relevance of such a study is most obvious for states that are in the process of formulating entirely new constitutions, or amending the amendment formula in their existing constitutions. Furthermore, it may also be of interest when evaluating whether existing amendment provisions are functioning satisfactory, either in order to try to reform them, or at least in order to identify constitutional challenges that might be dealt with by other means. Finally, the present study may be of interest to countries outside of Europe that are in the process of constitutional reform and look for inspiration.

17. The present report is primarily a descriptive and analytical text and will not attempt to formulate any new European “best model” or standards for constitutional change. This is neither possible nor desirable. Neither will it will critically assess the existing national constitutional amendment procedures. The report aims at identifying and analysing some fundamental characteristics and challenges of constitutional amendment, as well as offering some and normative reflections.

18. The scope of the study is limited to *formal* constitutional amendment, meaning change in the written constitutional document through formal decisions following prescribed amendment procedures. The substantial contents of a constitution may of course be altered in many other ways – by judicial interpretation, by new constitutional conventions, by political adaptation, by disuse (*désuétude*), or by irregular (non-legal and unconstitutional) means. The study will not examine these issues in depth, but it will to some extent address the relationship between formal amendment and other forms of constitutional change.

19. While the Commission has not conducted an empirical study on how the amendment formulas have actually functioned over time in the member states of the Council of Europe, there is an emerging literature on the subject in political science, and references will be made to this where appropriate.<sup>2</sup> The studies conducted indicate that the formal rigidity or flexibility of a given constitution does not necessarily determine the actual threshold for constitutional change, the number of times that the amendment procedure has been used in practice, nor the importance of each reform (great or small).<sup>3</sup> Political, economic and other social factors are at least as important, and so is the national “constitutional culture” (conservative or dynamic).

20. Nevertheless, under normal political conditions there will usually be a significant correspondence between how the formal amendment rules are construed and how often the constitutions are changed. The formal rules matter – directly and indirectly.

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<sup>2</sup> See for example, A. Roberts *The politics of constitutional amendment in post communist Europe*, *Const. Polit. Econ* (2009) 20:99-117, and Rasch and Congleton, *Amendment Procedures and Constitutional Stability*, in Congleton and Swedenborg (eds.), *Democratic Constitutional Design and Public Policy: Analysis and Design*, Cambridge 2006. Earlier empirical studies have been made by D.S. Lutz, cf. *inter alia* *Toward a Theory of Constitutional Amendment*, in Sanford Levinson (ed.) *Responding to Imperfection, The Theory and Practice of Constitutional Amendment* (Princeton University Press 1995) pp 237-274. This volume contains a number of articles on the subject, including S. Holmes and C. Sunstein, *The Politics of Constitutional Revision in Eastern Europe* (pp. 275-306). In political theory, constitutional amendment has been discussed in detail by J. Elster in *Ulysses Unbound. Studies in Rationality, Precommitment and Constraints*, Cambridge University Press 2000.

<sup>3</sup> The Venice Commission has addressed the gap between the wording of the constitution and political reality on several occasions, *inter alia* in its opinions on Belarus (CDL-INF(96)8 § 74) and the then Federal Republic of Yugoslavia (CDL-AD(2001)023 § 5).

21. The study addresses amendments to *existing* constitutions and the adoption of a new constitution following the procedure laid down in the previous one. These are cases where constitutional continuity is preserved. By contrast, the study does not address the creation of entirely new constitutions, replacing the old system with a new order, following a constitutional break or revolution. From a formal standpoint the distinction is readily identifiable, depending on whether the existing amendment procedures have been applied.<sup>4</sup> From a more substantive standpoint the distinction is less clear. First, there is the possibility that limited constitutional reforms may be proposed in the form of a totally new constitution.<sup>5</sup> Second, there are many examples that new political orders, which are in effect entirely new constitutions, have been introduced by way of constitutional continuity, respecting the amendment provisions in the old constitutions. This is the way in which constitutional change took place in almost all the new democracies of Central- and Eastern Europe in the 1990s.

22. The study however, does not address the question of *legitimacy* of constitutional change, as long as this is done by constitutional (as opposed to irregular and “unconstitutional”) means. Sometimes even irregular constitutional reform or revolutionary acts may be considered legitimate and necessary, for example in order to introduce democratic governance in non-democratic countries or overcome other obstacles to democratic development. Originally unconstitutional acts of change may also over time gain wide-spread acceptance and legitimacy<sup>6</sup>, just as perfectly democratically construed constitutions may over time be in need of radical reform. By the same token, the Venice Commission wishes to stress as a general principle that any major constitutional change should preferably be done according to the prescribed formal amendment procedures. Indeed, one of the central objectives of qualified procedures is to guarantee the legitimacy of constitutional change.

23. It follows that the study will not delve deeply into the question of the *origins* of constitutions, even if this will often be closely related to the question of reform. The age of today’s written European constitutions varies by almost two hundred years, which make comparative analysis based on democratic origin difficult.<sup>7</sup>

24. The report does not specifically address the question of unwritten constitutional systems (the UK), nor those constitutions which are the result of international agreements. On the other hand, it refers to the fact that in many countries in recent years the European integration, as well as fundamental rules and principles developed by international and European courts and organisations, have served not only as indirect inspiration but even as a direct driving force for national constitutional reform. While constitutional amendment has traditionally been considered a national and domestic issue (with a few exceptions after WW2), today it has become also a European issue as regards standards for democracy, rule of law and human rights.

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<sup>4</sup> Some constitutions prescribe different amendment procedures for partial and total revision, such as Spain for example. However, in such systems, even a total revision will not formally be a “new” constitution, as it derives its basis from the amendment procedure laid down in the old order.

<sup>5</sup> A potential problem arises if this is done in order to circumvent the amendment requirements, for example the requirement of a qualified majority in parliament. See more in section VII.E.

<sup>6</sup> An example is De Gaulle’s 1962 amendment to the 1958 French Constitution, establishing universal suffrage for the election of the French President. De Gaulle submitted his proposed amendment to a popular referendum, ignoring the Constitution’s amendment provisions. This was accepted by the political community, and was not turned down by the Constitutional Council, which expressed that it did not have the competence to review the case. Whether this is an example to be followed is of course debatable.

<sup>7</sup> The oldest constitution still in force in Europe is the Norwegian one, which was adopted in May 1814. (It is the second oldest in the world, following the 1787 constitution of the USA). Over the centuries it has however been amended more than two hundred times, and only approximately 1/3 of the 112 articles remain completely in their original form. Elements and remains of earlier constitutional rules can be found in many present constitutions, such as the reference in the preamble of the French constitution of 1958 to the Declaration of 1789. The most recent new constitution in Europe is that of Montenegro of 2007.

25. The report will, where appropriate, draw on findings and recommendations made in earlier opinions and reports of the Venice Commission.

### III. Overview of existing constitutional provisions for amending national constitutions

26. For the purposes of the present study the Venice Commission has examined the amendment procedures in the written constitutions of the member states of the Council of Europe and a number of other states (see above, § 3). The overall picture is that of a great variety, although the fundamental elements creating special obstacles to constitutional change are for the most part the same: a qualified majority, multiple decisions, time delays, referendums or a combination of such factors. These are however designed and combined in many different ways as to make almost as many amendment formulas as there are countries.

27. Specific procedural modalities of the different constitutions will not be dealt with in detail in this study. The following sections give a descriptive, general overview of the current constitutional procedures in the states covered by the present study. The overview is based on the text of the provisions, which does not necessarily give a precise impression as to how they are interpreted and applied. Nevertheless, it gives a useful background for further analysis.

28. Various constitutional amendment procedures are examined as they relate to the initiative for amendment (a), parliamentary procedure (b), intervention of actors other than parliament (c), procedure for total revision and adoption of a new constitution (d), and the limitations on constitutional amendment (e). Some repetitions and omissions will be inevitable.

#### A. Initiative

29. Proposals for constitutional amendment may arise in many different ways, as a popular demand from below or as a political project from above, on the spur of the moment or as a long-planned process. This has to be channelled into the formal institutional procedure, and all constitutions have rules on the right of initiative for constitutional amendment. In some countries the threshold is low, in others quite high. In many countries there are two or more parallel avenues to start an amendment procedure, which gives competence to several actors.

30. In all state constitutions examined, **Parliament** has a right to initiate the amendment procedure. A number of constitutions give the competence to introduce a proposal for constitutional change to the individual members<sup>8</sup> of Parliament. Others require that a specific percentage of the members support the initiative. Usually the requirement is for a qualified minority – such as one-sixth,<sup>9</sup> one-fifth,<sup>10</sup> one fourth,<sup>11</sup> or one-third.<sup>12</sup> But some constitutions require an ordinary majority,<sup>13</sup> or even a qualified majority of two-thirds<sup>14</sup> of the members for initiating an amendment procedure. In other countries the requirement is for a certain number (but not a percentage) of the parliamentarians.<sup>15</sup>

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<sup>8</sup> Including Belgium, Cyprus, France, Luxembourg, Norway, Portugal and Switzerland.

<sup>9</sup> Greece.

<sup>10</sup> Albania, Croatia, Estonia, Poland, Russia (one fifth of the total number of one of the Chambers).

<sup>11</sup> Bulgaria, Lithuania, Romania

<sup>12</sup> Andorra, Moldova, Serbia, Ukraine and Turkey.

<sup>13</sup> Armenia, Azerbaijan Republic, Georgia, Korea.

<sup>14</sup> Japan, "the former Yugoslav Republic of Macedonia", United States (both Houses).

<sup>15</sup> Montenegro (25 members of the total 81 of the unicameral Parliament) and Slovenia (20 deputies of the total 90 of the unicameral National assembly).

31. A higher number of members of parliament may be required if the amendment proposal relates to the most important constitutional provisions. Thus for example, the Constitution of Ukraine requires a two-third majority of the deputies for initiating amendments to the provisions on general principles, elections, referendum and the amendment procedure itself. In Switzerland, a total revision of the Federal Constitution may be proposed by the People or by one of the Chambers, or may be decreed by the Federal Parliament.

32. Some constitutions also give the right to initiate the amendment procedure to the **Government**,<sup>16</sup> to the **Head of State**,<sup>17</sup> and to **local authorities**.<sup>18</sup>

33. Several constitutions provide for a possibility for **citizens**<sup>19</sup> entitled to vote to introduce the proposal for constitutional amendment.

34. Even though the formal right of initiative always rests exclusively with the national political actors, the actual initiative can sometimes come from abroad.<sup>20</sup> It has been quite common in Europe in recent years for countries to amend their constitutions in order to comply with requirements necessary in order to join for example the EU or the Council of Europe. Within the framework of the process of monitoring of compliance with commitments accepted by member states, the Council of Europe Parliamentary Assembly and Committee of Ministers have often required countries to undertake constitutional reforms in order to conform to the commitments taken when becoming members of the organisation.<sup>21</sup>

## B. Parliamentary procedures

35. In most countries Parliament serves both as ordinary legislator and as the constitutional legislator.<sup>22</sup> The function as constitutional legislator is almost always subject to special procedures and requirements. The most common features are a time delay between the initiative and the first reading, the requirement of multiple readings, special voting requirements, and sometimes the call for intervening elections.

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<sup>16</sup> Belgium, Croatia, Cyprus, Kazakhstan, Liechtenstein, Moldova, Montenegro, Serbia, Slovenia, the "former Yugoslav Republic of Macedonia", Russia and Switzerland.

<sup>17</sup> Armenia, Azerbaijan, Bulgaria, Croatia, Cyprus, France (upon the proposal by PM), Georgia, Kyrgyzstan, Monaco, Montenegro, Netherlands, Romania (upon the proposal by the Government), Russia, Serbia, "the former Yugoslav Republic of Macedonia" and Ukraine. Under the *Kazakh* constitution, amendments may only be introduced by referendum, but the latter has to be held following the decision of the President at his own initiative, or upon recommendation by Parliament or the Government.

<sup>18</sup> Liechtenstein (at least four communes).

<sup>19</sup> Georgia (at least 200.000 voters), Kyrgyzstan, on certain provisions only (300.000 voters), Latvia (not less than one tenth of the electorate), Liechtenstein (1500 voters), Lithuania (300.000 voters), Moldova (200.000), Romania (500.000, under certain conditions), Serbia (150.000 voters), Slovenia (30.000 voters), Switzerland (100.000 voters), "the former Yugoslav Republic of Macedonia" (150.000 voters).

<sup>20</sup> In some cases, international influence may be such that the control over both process and substance of constitutional reform is in the hands of international actors (e.g. BiH, Iraq and Sudan).

<sup>21</sup> For example with regard to Armenia, Montenegro, Turkey and Ukraine.

<sup>22</sup> In a few countries, however, a special body has to be elected or convened in order to pass constitutional amendments. The *Bulgarian* constitution requires elections for a special body, the Grand National Assembly, for adopting a new constitution or for amending specific provisions. Establishing this special body leads to the dissolution of Parliament. Once the Grand National Assembly has carried out its mandate, namely adopting the constitutional amendments, new parliamentary elections take place. The *Russian* constitution calls for convening the Constitutional Convention if certain provisions of the constitution shall be changed.



36. Some constitutions require a certain **time delay** between the initiative and the first debate in Parliament. It varies between one month,<sup>23</sup> two months,<sup>24</sup> between three and six<sup>25</sup> and between 6 and 12 months.<sup>26</sup>

37. In several countries constitutional amendments require **multiple readings** in parliament,<sup>27</sup> When provided for, the lapse of time between the readings goes from three<sup>28</sup> to six months,<sup>29</sup> In Norway, the constitutional amendment is submitted to parliament one year before the next elections; and it is the task of the subsequent parliament to decide on the proposal after the elections.

38. The degree of consensus and protection of substantial minority interests are most often increased through explicit voting requirements. In almost all European countries there is the requirement of a **qualified majority** in parliament for the adoption of constitutional amendments.<sup>30</sup>

39. In *unicameral systems*, the number of required votes ranges between three fifths,<sup>31</sup> two-thirds,<sup>32</sup> and three-fourths<sup>33</sup> of the members of Parliament.

40. *Bicameral* systems normally – but not exclusively - require separate approvals by both chambers of the legislature. The number of required votes ranges between a majority of those voting,<sup>34</sup> an absolute majority of the members of each house,<sup>35</sup> two-thirds majority in each

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<sup>23</sup> Georgia, Poland.

<sup>24</sup> Korea.

<sup>25</sup> The *Bulgarian* constitution indicates that a bill may not be discussed in Parliament earlier than one month and not later than three months since its introduction. Bills subsequently to be submitted to the *Bulgarian* Grand National Assembly may not be debated before the lapse of two months, but not later than five months since their introduction to the National Assembly.

<sup>26</sup> Moldova.

<sup>27</sup> Two readings are required in Azerbaijan, Denmark, Iceland, Italy, Lithuania, Netherlands, Montenegro and Turkey. Three readings are required in Bulgaria, Croatia, Estonia, Finland, Georgia, Greece, Latvia, Serbia and the Former Yugoslav Republic of Macedonia.

<sup>28</sup> Estonia, Italy, Lithuania.

<sup>29</sup> Azerbaijan.

<sup>30</sup> There are however a few countries in which an ordinary majority in Parliament is enough, such as in Denmark, Iceland, Ireland, Israel, Malta (except when they affect provisions of the Constitutions listed in sections 2 and 3 of Art. 169 of the Constitution), and Sweden. Usually this is then supplemented by other requirements, such as referendum (Denmark, Ireland). In Iceland and Sweden the requirement is that the amendment must be passed again in the next parliament, after elections – but both times only by a simple majority, which makes this a low threshold for change.

<sup>31</sup> Estonia, Greece, Slovakia and Turkey.

<sup>32</sup> Albania, Andorra, Austria (in the presence of at least half the members of the National Council), Croatia, Finland, Georgia, Hungary, Korea, Latvia, Lithuania, Luxembourg (three-quarter of the members of the Chambers must necessarily be present), Malta, Moldova, Montenegro, Norway, Portugal, San Marino, Serbia, Ukraine, the “former Yugoslav Republic of Macedonia. The *Finnish* constitution requires a two-thirds majority *of the votes cast*. In Croatia, the Parliament needs to decide by an absolute majority of the members whether to pursue the amendment procedure. The draft amendment subsequently needs to be determined by an absolute majority of the members before being submitted for adoption. The amendment itself then requires a two-thirds majority to be adopted.

<sup>33</sup> Bulgaria, Liechtenstein, Sweden.

<sup>34</sup> Switzerland (in each Chamber).

<sup>35</sup> Italy.

house,<sup>36</sup> a combination of the last two,<sup>37</sup> three-fifths of the members of each house,<sup>38</sup> two-thirds majority in only one of the two houses,<sup>39</sup> or a three-fifth majority.<sup>40</sup>

41. The majority required to adopt an amendment may differ from one reading to another, for certain provisions of the constitution or from one chamber to the other. For example, the Spanish constitution requires a two-thirds majority of the members of each House if it is a total revision of the Constitution that is proposed, or a partial revision thereof affecting the Preliminary Title, the provisions on human rights and freedoms or on Spaniards and foreigners.<sup>41</sup> For the adoption of an amendment relating to the rights of members of communities, the Constitution of “the former Yugoslav Republic of Macedonia” requires a two-thirds majority of the votes of all the deputies, which must include a majority of the votes of the total number of deputies claiming to belong to the communities not in the majority in the population of the country.

42. In some countries, the constitution requires **intervening elections**, with the consent from two different parliaments – the one before and the one after the following elections.<sup>42</sup> This can be the ordinary procedure, or a procedure reserved only for amendment of some particularly important provisions. In one case, when a draft constitutional amendment is presented, the Parliament is dissolved without a vote on the proposed amendment.<sup>43</sup>

43. In at least two countries, an amendment may nevertheless be adopted within the same legislative period provided that certain conditions are fulfilled,<sup>44</sup> notably in urgent cases.

44. A number of constitutions also require convening of a special body for the purpose of amending specific provisions or adopting a new constitution.<sup>45</sup>

45. In the great majority of countries the executive will not have a direct role in the parliamentary constitutional amendment process, though of course representatives from the government may participate in the debate according to ordinary procedures. In a few countries, however, the head of state had been given a formal role, with the competence to make

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<sup>36</sup> Belgium (requiring also the presence of two-thirds of the members composing each house), Germany, Japan, the Netherlands, Poland, Romania (but the two Chambers can also vote jointly and the amendment is approved if supported by a majority of three-quarters of the total number of Deputies and Senators), Russia.

<sup>37</sup> In *Poland* a two-thirds majority of at least half of the members of the lower house and an absolute majority of the votes of at least half of the members of the upper house is required. . In Spain, if approval is not found through the required qualified majority of three-fifths in both chambers, the draft amendment can be passed by absolute majority in the Upper House, and with a two-third majority in the Lower House).

<sup>38</sup> Spain, Slovak Republic.

<sup>39</sup> Bosnia and Herzegovina, requiring the qualified majority in the sole House of Representative for those members present and voting. Cyprus, requiring a majority vote comprising two-thirds of the total number of Representatives belonging to the Greek Community and two-thirds of the total number of representatives belonging to the Turkish Community. Slovenia, whose constitution require approval by the qualified majority in the sole Lower House (National Assembly).

<sup>40</sup> Czech Republic, France (when the President submit the bill to the Parliament convened in Congress), Spain.

<sup>41</sup> For other amendments a majority of three-fifths of the members of each House is required.

<sup>42</sup> Belgium, Denmark, Estonia, Finland, Greece, Iceland, Luxembourg, the Netherlands, Norway, Spain, Sweden and Switzerland.

<sup>43</sup> Luxembourg.

<sup>44</sup> In *Finland*, it can be adopted provided that five-sixths of the members of Parliament declare it urgent and in *Estonia*, a proposal for amendment may be adopted within the same legislative period if the Parliament decides with a four-fifths majority that it is a matter of urgency.

<sup>45</sup> Bulgaria and Russia.

proposals on the draft amendments before they are voted for the first or the second time by the Parliament.<sup>46</sup>

### C. Referendums

46. In many European countries the whole of the constitutional amendment process takes place in parliament. In a number of countries, however, there is also the requirement of a popular referendum, which may be mandatory or optional.

47. The analysis of the constitutions of the selected countries shows that a referendum on amendments may be required:

- on a mandatory basis for any amendment passed by Parliament;<sup>47</sup>
- on a mandatory basis as a reinforced procedure for amending provisions enjoying special protection;<sup>48</sup>
- on a mandatory basis for "total revision" or adoption of a new constitution;<sup>49</sup>
- on an optional basis, upon demand by parliament,<sup>50</sup> by popular initiative,<sup>51</sup> by local authorities<sup>52</sup> or upon decision of the Head of State.<sup>53</sup>

48. There is often a prescribed time limit for the organisation of the referendum after the decision of parliament to amend the constitution. When provided for, it varies from three months after the Parliament decided to hold a referendum,<sup>54</sup> to fifteen,<sup>55</sup> thirty,<sup>56</sup> sixty,<sup>57</sup> ninety<sup>58</sup> days, six months<sup>59</sup> or twelve months<sup>60</sup> after the amendment was passed by Parliament.<sup>61</sup>

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<sup>46</sup> Armenia (within 21 days from the submission of the draft constitutional amendment), Turkey.

<sup>47</sup> Andorra, Azerbaijan, Denmark, France (however, the President may decide to submit the proposal to Parliament convened in congress and not to hold a referendum), Ireland, Japan, Korea, Romania, Switzerland

<sup>48</sup> Estonia, Iceland, Latvia, Lithuania, Malta, Moldova, Montenegro, Poland, Serbia, Spain, Russia and Ukraine.

<sup>49</sup> Austria, Spain and Liechtenstein.

<sup>50</sup> Albania (when requested by two-thirds of its members), Austria, Estonia, Italy (by one-fifth of the Members of a House), Liechtenstein, Slovenia, Spain (if requested by one-tenth of the members of either House) and Sweden (by motion of one tenth of members, provided at least one third of members concur in supporting the motion).

<sup>51</sup> Italy (if requested by 500.000 electors, and provided that the amendment was adopted with less than a two-thirds majority in both houses in the second vote, but with at least an absolute majority), and Liechtenstein (provided that at least four communes request it).

<sup>52</sup> Italy (provided that the amendment was adopted with less than a two-thirds majority in both houses) and Liechtenstein (if at least four communes introduce a demand).

<sup>53</sup> Turkey.

<sup>54</sup> Estonia.

<sup>55</sup> Spain.

<sup>56</sup> Korea and Romania.

<sup>57</sup> Albania, Poland, Serbia.

<sup>58</sup> Italy.

<sup>59</sup> Denmark, Malta.

<sup>60</sup> Switzerland.

<sup>61</sup> As regards the timetables of referendums, the Moldovan Constitutional Court declared a statute on the organization of referendums unconstitutional because the time-limits for the steps were excessive and therefore impeded the people's rights to exercise their constitutional right (Decision of the Constitutional Court of 7/12/2000, MDA 2000-3-10 (CODICES)).

49. Several constitutions spell out the majority needed for the amendment to be approved by referendum<sup>62</sup> or entrust the determination of the majority to a special law.<sup>63</sup> The required majority is generally more than one-half of the valid votes<sup>64</sup> or of votes cast.<sup>65</sup> The constitution of *Montenegro* requires a majority of more than three-fifths of the votes cast. The Swedish Instrument of Government provides that the amendment proposal is rejected before being submitted to the second Parliament for approval if a majority of those taking part in the referendum vote against it, and if the number of those voting against exceeds half the number of those who registered a valid vote in the election.

50. A few constitutions demand a minimum participation of the electorate in the referendum. The requirement can be that at least half of the eligible voters participate,<sup>66</sup> or in one case at least one fourth.<sup>67</sup> The *Danish* constitution demands a majority of the votes cast, but only if more than 40% of the electorate participated. The *Lithuanian* constitution requires a majority of more than three-fourths of the electorate if Article 1 of the Constitution is to be amended (“Lithuania is an independent democratic republic”).

#### D. Special limitations to constitutional amendments

51. The general requirements for amending the constitution are in most countries quite strict. In many constitutions there are however special limitations for some forms of amendment, which make it even more difficult. These are of two main types: substantive and temporal ones.

52. Some constitutions explicitly render a limited number of provisions or principles **unamendable** at any time and under any circumstances.<sup>68</sup> This typically refers to issues such as territorial integrity, fundamental rights, the fundamental form of government, or federalism.

53. Other constitutions operate a distinction between different sets of constitutional provisions, making some harder to change than others, through **special procedures**.<sup>69</sup> Such procedures may require an increased qualified majority in parliament, a referendum, the dissolution of parliament or the convening of a special body (assembly) to adopt the amendment. Depending on the strictness of the special procedures, this may in some cases in effect be almost equivalent to making the provisions unamendable.

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<sup>62</sup> Austria, Denmark, Ireland, Italy, Japan, Kazakhstan, Korea, Latvia, Liechtenstein, Lithuania, Malta, Montenegro, Poland, the Russian Federation, Serbia, Slovenia, Switzerland, Turkey.

<sup>63</sup> Albania, Kyrgyzstan.

<sup>64</sup> Armenia, Italy, Liechtenstein, Malta, Turkey.

<sup>65</sup> Austria, Ireland, Italy, Japan, Kazakhstan, Korea, Latvia, Liechtenstein, Poland, the Russian Federation, Serbia, Slovenia, Switzerland (the majority of those voting and the majority of the Cantons must approve the amendment), and Turkey.

<sup>66</sup> Kazakhstan, Korea, Latvia, the Russian Federation and Slovenia.

<sup>67</sup> Armenia.

<sup>68</sup> This includes Belgium, the Czech Republic, Cyprus, Germany, France, Italy, Luxembourg, Moldova, Romania, Russia, Turkey and Ukraine. The Portuguese constitution also states a number of fundamental principles which may not be altered by amendment. The issue of “unamendability” is discussed below in section VIII.

<sup>69</sup> This is to be found in the constitutions of Albania, Austria, Azerbaijan, Belgium, Bulgaria, Canada, the Czech Republic, Estonia, Greece, Israel, Kazakhstan, Latvia, Lithuania, Moldova, Montenegro, Poland, Russia, Serbia, South Africa, Spain, Switzerland (this only concerning the mandatory provisions of international law), Ukraine and the “former Yugoslav Republic of Macedonia.”

54. The most common **temporal limitations** refer to situations of emergency such as times of war, application of martial law, state of siege or extraordinary measures.<sup>70</sup>

55. A different kind of temporal limitation consists of a specific time period within which a constitution cannot be modified<sup>71</sup> and mainly aims at avoiding that constitutions be changed too often.<sup>72</sup> A number of constitutions also specifically provide that a rejected proposal for a constitutional amendment may not be re-submitted within the same legislature<sup>73</sup> or within a certain time period. This period varies between two and five months<sup>74</sup> and one year.<sup>75</sup>

#### **E. Total revision and adoption of a new constitution**

56. In most constitutions the amendment procedure is the same regardless of whether the amendment only relates to a single provision, or to large parts, or even the whole. A number of constitutions however; expressly provide for a special, reinforced procedure for a total revision of the constitution<sup>76</sup> or for the adoption of a new constitution.<sup>77</sup> With regard to the latter term, it is to be stressed that it is not intended to mean a break in the constitutional continuity. In one country, Montenegro, the constitution does not differentiate between procedure for amendment and the one for the adoption of a new constitution, although changes to some specific provisions are to be submitted to referendum.

#### **F. Involvement of the Constitutional Court**

57. In a few countries, the Constitutional Court has been given a formal role in the constitutional amendment procedures.<sup>78</sup> In Moldova for example, a proposal for constitutional amendment may be submitted to Parliament only if it has obtained the support of at least four judges of the Constitutional court.<sup>79</sup> In Ukraine, the opinion of the Constitutional Court on the conformity of the proposed constitutional amendment with the relevant constitutional provisions is the pre-condition for the consideration of an amendment proposal by Parliament.

58. The intervention of the constitutional court in the amendment procedure may be subject to certain conditions.<sup>80</sup>

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<sup>70</sup> Albania, Belgium, Estonia, France, Georgia, Lithuania, Luxembourg (under regency, with regard to the provisions concerning the constitutional prerogatives of the Grand Duke, his status and the order of succession), Moldova, Montenegro, Portugal, Romania, Serbia, Spain, Ukraine.

<sup>71</sup> Greece and Portugal. Both provide that a constitution may only be amended after a lapse of five years since the last amendment. However, in *Portugal* the Parliament may decide to amend the constitution at an earlier point of time by a majority of four-fifths.

<sup>72</sup> See CDL-DEM(2008)002add, A.

<sup>73</sup> Ukraine (an amendment on the same issue and related to Chapter I on general principles, Chapter III, on elections and referendum, or Chapter XIII, on amendment procedure).

<sup>74</sup> Bulgaria. However, the same proposal may be re-introduced if it obtained less than three-fourths, but more than a two-thirds majority in the National Assembly.

<sup>75</sup> Albania (three years if the rejection of the amendment occurred by referendum), Estonia, Kyrgyzstan, Lithuania, Montenegro, Serbia and Ukraine.

<sup>76</sup> Austria, Spain, Switzerland (both chambers are dissolved if the people demand the adoption of a new constitution).

<sup>77</sup> Azerbaijan, Bulgaria, Montenegro, Slovakia, Spain and Russia.

<sup>78</sup> Azerbaijan, Kyrgyzstan, Moldova, Turkey and Ukraine.

<sup>79</sup> The Constitutional Court is composed of 6 judges.

<sup>80</sup> For example, in Azerbaijan the constitutional court should give its conclusions before the vote on the proposal if the changes to the text of the constitution are proposed by Parliament or the President, and not by citizens. In Sweden, the Council of Legislation (comprising justices of the Supreme Court and justices of the Supreme Administrative Court), upon request by the Government or by a committee of the Parliament, must issue an opinion on the draft

#### IV. General observations on constitutional amendment

59. The overview of provisions for constitutional amendment illustrates the rich European constitutional heritage, which in itself is a legacy to democracy and the rule of law, and on which the Venice Commission has often commented.

60. The challenge of striking a good balance between constitutional rigidity and flexibility while also paying due attention to the requirements of constitutional legitimacy is common to all democratic states. In most states, it has been achieved by provisions which make constitutional amendment more difficult - though not impossible - than changing ordinary legislation.

61. Within this common general tradition, there is however great variance in detail – with almost as many amendment formulas as there are states.

62. A few states stand out from the rest as having particularly strict or flexible rules, but apart from this the great majority of European states are somewhere in the middle. 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.

63. The differences between the rules on amendment are to a large extent as old as the written constitutional systems of Europe, which usually date back to the late 18<sup>th</sup> or early 19<sup>th</sup> century. Early constitutionalist theory did not agree on one single preferred amendment formula – and each nation designed their own, sometimes inspired by each other, but always influenced by the domestic political context and compromises. These amendment formulas are often older than the age of the present constitutions, as many of them were followed and kept on when during the 20<sup>th</sup> century new constitutions were introduced to replace the earlier ones.

64. To the extent that it is possible to identify a common Continental (West European) tradition for constitutional amendment, then this is a balanced approach, which is by comparison more flexible than for example the rather strict amendment rules in article V of the US Constitution. This can be illustrated by the German and French procedures. In Germany the requirement is a 2/3 majority in each of the two chambers (the Bundestag and the Bundesrat), with no other external requirements and no time delays, but with the exemption that the principles embodied in some of the provisions are unamendable, subject to judicial review. In France there are two alternative procedures – either by simple majority decision in each chamber followed by a popular referendum (simple majority), or upon proposal by the president with a 3/5-majority requirement in parliament, but no referendum. The republican form of government cannot be changed, but this is not subject to judicial review. While quite different in character, both the German and the French amendment procedures are flexible enough to allow considerable opportunity for amendments given the necessary political consensus.

65. Even European countries that are politically, historically and culturally close may have different constitutional cultures and very different amendment rules. This for example applies to the three neighbouring Scandinavian countries of Denmark, Norway and Sweden, which have very different procedures and material rules on constitutional change – ranging from comparatively very easy in the 1975 Swedish constitution to very difficult in the 1953 Danish constitution, with the 1814 Norwegian constitution somewhere in the middle. The fact that these

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amendment before the vote of the Parliament. In Turkey, the constitutional court intervenes in the process only when requested by the President or by one-fifth of the members of Parliament. It can review the compliance with procedural requirements, but not the substance of a constitutional amendment.

three countries have otherwise quite similar political systems is a reminder against exaggerating the importance of formal constitutional differences.

66. During the processes of constitution writing in Central and Eastern Europe in the 1990s there was considerable debate on what should be the correct threshold for future amendments. The dominant view was that the new democracies should adopt rigid constitutions, with strict rules on amendment, in order to protect the new democratic order and constrain executive power. Others, however, argued strongly that the particular aspects of this major transition to democracy required a more flexible form of constitutionalism, with relatively easy access to amendment, in order to adjust to the fundamental changes taking place.<sup>81</sup>

67. The result was different amendment rules, although a majority of the new democracies chose a middle-of-the-road solution, usually with the requirement of a 2/3 parliamentary majority and a certain time delay, but without other very strict obstacles. There are however countries in which amendment is more difficult than average (including Bulgaria, Romania and Russia) and countries where it is relatively easier (including the Czech republic, Estonia and Slovenia).

68. An important element of the constitutional processes in Central and Eastern Europe in the 1990s is the fact that the drafting and adoption of what were in effect totally new constitutional regimes have been introduced in the great majority of cases following the existing formal amendment procedures in the earlier constitutions (see above, § 21).<sup>82</sup> This procedure was supported by the Venice Commission as an instrument of peaceful reform, which also served to strengthen the principle of the rule of law.

69. As mentioned, there is a certain correspondence between the rigidity/flexibility of formal rules on constitutional amendment and how often they are in practice applied. However, a number of other factors may be at least as important (see above, §19).

70. This seems in particular to apply to the amendments adopted in Central and Eastern Europe after the introduction of the new constitutions. In a recent study on constitutional change in 17 post-communist countries, it is demonstrated that the political and social context has been far more important for the number of amendments than the formal amendment rules.<sup>83</sup> Democratic development and European integration influence have been major driving forces behind the amendments, leading to changes even in states with quite rigid amendment rules. The study also shows that there has on average in fact been *fewer* amendments adopted in the Central and Eastern European countries since the introduction of new constitutions than what is the average over time in the countries of Western Europe.

71. As for the constitutional changes in Central and Eastern Europe in recent years, the Venice Commission notes that they have to a large extent been such as to reduce executive power (and strengthen parliament), improve human rights, and ensure integration into European and international bodies. This is a very positive trend, which is due partly to a fairly broad domestic political consensus in many countries to promote and improve liberal constitutional democracy, and partly to international and European advice and inspiration (including the work of the Venice Commission). However, the Venice Commission notes that there have also been examples of less positive constitutional reforms processes, including several, and sometimes

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<sup>81</sup> This was in particular argued by *S.Holmes and C.Sunstein, cit. note 2, pp. 275-306.*

<sup>82</sup> The same applies for example to the peaceful transition of Spain to constitutional democracy in the mid-1970s, which proceeded without a break in legality, ending with the 1978 Constitution, which has also later been substantially amended several times.

<sup>83</sup> See *A. Roberts, cit., note 2, pp. 99-117.*

successful, attempts to strengthen presidential powers in a way detrimental to democratic development.<sup>84</sup>

## V. Purpose of constitutional commitment

72. In order to understand the mechanisms of constitutional amendment, it is first necessary to consider why constitutions are and should be more inflexible than ordinary legislation. This issue can be approached by posing the following question: Why should a democratic society precommit itself in the sense that it lays down constitutional rules that cannot be changed by the majority when need arises, even following perfectly democratic procedures?

73. According to some theorists, this question lies at the hearth of “constitutionalism”. A fundamental point is that constitutions are “devices for precommitment or self-binding, created by the body politic in order to protect itself against its own predictable tendency to make unwise decisions” (Elster).

74. In the same line, a quite widely used metaphor is that of Ulysses, ordering in advance his crew to tie him to the mast in order not to be tempted by the song of the Sirens.<sup>85</sup> In the same way, the political majority by adopting a rigid constitution “ties itself to the mast”, in order not to be tempted or distorted by short-term political gains and passions.

75. Another related perspective is that the constitution should be elevated above “ordinary politics”. The constitution should be “a framework for political action, not an instrument for it” (Elster). And to the extent that constitutional change is allowed, then this should preferably be slow and incremental and following other procedures than those of everyday politics.

76. Among the most important reasons normally listed for why a political system should enter into such constitutional “precommitment” are the following:

- Political and economic stability and predictability
- protection of democratic procedures
- protection of the political opposition
- protection of individual and minority rights and interests
- protection of the independence of certain institutions
- increase the legitimacy of the constitutional order

77. These reasons are supplementary and to a certain degree interrelated. Political stability and predictability should in democratic systems be seen as an aim in itself, but it will also contribute to efficiency in decision-making, making long-time planning easier. A predictable political system will in turn benefit the economy, creating stable conditions for investment and development. Economic prosperity will also benefit from constitutional guarantees for rule of law and protection of property – as well as the constitutional protection of the independence of institutions like the courts and the central bank. The legitimacy of the constitutional order will depend on the other elements being fulfilled, and increased legitimacy will in turn help them.

78. The perhaps most important function of constitutional binding in a democracy is to protect democracy itself – against any attempts at directly or indirectly undermining it. By cementing rules on democratic elections and representation, the constitution serves to protect present and

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<sup>84</sup> On several occasions this has been done by appealing directly to the voters in a popular referendum in a way which the Venice Commission has criticised, see more on this below in section VII.E.

<sup>85</sup> The Ulysses metaphor has been used by many constitutional observers, but it has been particularly explored by political theorist *J. Elster* in two books: *Ulysses and the Sirens*, Cambridge University Press, 1984, and *Ulysses Unbound. Studies in Rationality, Precommitment and Constraints*. Cambridge University Press, 2000.



future democratic majority rule against abuse from those temporarily in power. This in particular applies to rules governing the relationship between the legislative and executive power. Many of the constitutional rules on governance also serve to protect the political opposition, ensuring representation and voice, and thereby guaranteeing the opportunity for the opposition to compete for majority power in future elections.

79. Last but not least, constitutions serve the classical constitutionalist concern of protecting minority and individual rights and interests. Almost all democratic constitutions today include lists of fundamental rights, which are usually subject to judicial review, and which block or at least reduce the ability of the majority to violate the fundamental rights of the minority.

80. The list illustrates that there are in principle several good and supplementary reasons why a society should “tie itself to the mast”, and commit itself to certain rules and standards that may not be revoked and changed overnight, even by a democratically legitimate majority.

81. At the same time, there are also arguments *against* strict constitutional confinement. First, it is a historical and empirical observation that constitutional binding is sometimes simply not possible. If the forces calling for political reform are strong enough, then changes will be made, regardless of the formal constitutional rules. In such cases, it will normally be highly preferable for the changes to be done through formal constitutional amendment rather than by revolution and upheaval, breaking the too-strict formal constitutional chains at huge cost to society.<sup>86</sup>

82. Second, even if the alternative is not revolution or other forms of unconstitutional change, there will still be a number of situations where formal constitutional amendment is highly desirable. Main reasons include:

- democracy in the traditional sense (majority rule)
- improvement of decision-making procedures
- adjustment to transformations in society (political, economical, cultural)
- adjustment to international cooperation
- flexibility and efficiency in decision-making
- ensuring, adjusting or reconfirming fundamental rights

83. These are among the main reasons why almost all constitutions contain rules on their own amendment, although of very different strictness. This reflects the broad understanding that it is simply not possible for the makers of a constitution to create a text which is eternal, and which can serve society through processes of development and transformation.

84. While there is broad consensus that constitutions neither can nor should be entirely unchangeable, there is wide room for discussion as to how flexible they should be. This is closely linked to the question of what a constitution is and should be, as pointed out by Holmes and Sunstein, in their distinction between positive and negative constitutionalism:

*“A constitution is not simply a device for preventing, tyranny. It has several other functions as well. For instance, constitutions do not only limit power and prevent tyranny; they also construct and guide power and prevent anarchy. More comprehensively, liberal constitutions are designed to help solve a whole range of political problems: tyranny, corruption, anarchy, immobilism, collective action problems, absence of deliberation, myopia, lack of accountability, instability, and the*

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<sup>86</sup> Or as already observed by Tocqueville: “I have long thought that, instead of trying to make our forms of government eternal, we should pay attention to making methodical change an easy matter. All things considered, I find that less dangerous than the opposite alternative. I thought one should treat the French people like those lunatics whom one is careful not to bind lest they become infuriated by the constraint.” (quoted by *Elster*, p. 95).

*stupidity of politicians. Constitutions are multifunctional. [...] Theorists should therefore place greater emphasis than they have hitherto done on positive constitutionalism. The task is to create limited government that is nevertheless fully capable of governing.*<sup>87</sup>

85. While a negative vision of constitutionalism will normally imply reluctance to constitutional change, a more positive perspective will recognise that amendments may often be necessary or desirable in order to promote effective democratic governance and ensure legitimacy.

86. On a deeper level, it can also be held that the very legitimacy of a given constitutional system rests on the premise that the present day electorate can amend and change it. This has been emphasized by Holmes and Sunstein, who argue that “political legitimacy in liberal systems ultimately depends upon the option to bring about change, used or held in reserve. The legitimacy of a liberal constitution has a similar foundation, paradoxically, in its liability to revision. It is accepted, or deserves to be accepted, partly because it can be changed”.<sup>88</sup>

87. It can furthermore be argued that although the Ulysses metaphor captures an important element of constitutionalism, it is not wholly accurate, in the sense that constitutional binding is seldom an act of “self-binding”. Rather, it is often the binding of others. Sometimes constitutions are imposed by political regimes on the way out, in order to protect their interests against the democratic will of their successors. And even if this is not so, then all constitutions of a certain maturity reflect not the precommitment of the present generation, but rather that of earlier generations. Critics have pointed out that too much resistance to amendment and reform implies a democratically questionable principle of allowing society to be “ruled from the grave” – by letting the (sometimes mythologized) will of the “founding fathers”, as interpreted by judges and academics, determine the political problems and challenges of today.

88 The Commission notes that there are good reasons both why constitutions should be relatively rigid and why there should be possibilities for amendment. The challenge is to balance these two sets of requirements, in a way that allows necessary reforms to be passed without undermining the stability, predictability and protection offered by the constitution by making the adoption of the constitutional amendment too difficult to achieve or practically impossible.<sup>89</sup>The final balancing act can only be found within each constitutional system, depending on its specific characteristics. But the balancing act can be more or less successful, depending on a general understanding of the mechanisms and principles involved.

## **VI. Mechanisms for constitutional binding**

89. As illustrated by the overview of national amendment provisions, there are a number of different legal mechanisms that may be used for creating obstacles to constitutional change. These can be categorised in different ways. A good list is provided by Elster,<sup>90</sup> who has identified six “main hurdles for constitutional amendments”:

- Absolute entrenchment (unamendable provisions or principles)
- Adoption by a qualified majority in parliament (“supermajority”)
- Requirement of a higher quorum than for ordinary legislation
- Time delays

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<sup>87</sup> Cf. *Holmes and Sunstein, cit.*, note 2, pp. 302-3.

<sup>88</sup> *Ibidem*, p. 279, and also at p. 301 on how democratic legitimacy rests “on the foreseeable opportunity to “throw the rascals out”.

<sup>89</sup> See the Venice Commission opinion on constitutional reform in Romania (CDL-AD(2002)012), in Ukraine (CDL-AD(2004)030) and in Serbia (CDL-AD(2007)004).

<sup>90</sup> Cf. *J. Elster*, 2000, *cit.*, note 85, p. 101.

- State ratification (in federal systems)
- Ratification by popular referendum (including state referendums in federal systems)

90. While some constitutions use only one of these mechanisms, most have combinations of two or more, which may be combined in a number of more or less complex ways. In general, the more of these instruments are applied, the more difficult the amendment procedure.

91. Each of the six mechanisms can be designed as more or less strict. Absolute entrenchment can cover large or small parts of the constitution. The requirement of a qualified parliamentary majority can vary with 2/3 as the most widely used in Europe. The length of time delays also varies, from a relatively short period between two readings in the same parliament to a requirement that the second vote can only take place following new general elections. Ratification by the entities in federal systems may require unanimous acceptance or the acceptance of a certain majority of the entities. And while the general requirement in a popular referendum is usually simple majority, this requirement can be made much stricter by also requiring that a certain percentage of the electorate vote in favour (see above, Section III).

92. The two most widely used mechanisms in European constitutions are (i) qualified majority in parliament and (ii) time delays. In most constitutional systems this is seen as sufficient, with no other requirements. This in effect keeps the amendment process within the parliamentary system.

93. All the mechanisms listed may have the effect of cementing the existing constitutional system, and thus increase political and economic stability, at the potential cost of democratic flexibility and efficacy. But apart from this, they may serve rather different functions.

94. The main purpose and effect of a *qualified majority* requirement is to (i) ensure broad political consensus (and thereby strengthen the legitimacy and durability of the amendment), and (ii) protect the interests and rights of the political opposition and of minorities. Such a requirement in effect gives a minority (of a certain size) a veto on constitutional amendment.

95. As for the purpose and effect of *time delays* (between readings or multiple decisions), these rather aim to give the majority time to cool down and reconsider, and for the political passion of the moment to pass away.<sup>91</sup> They also provide time for a more thorough decision-making process, as well as for public debate. In systems that require the second decision to be passed only after general elections, the electorate is in effect invited to consider the proposed amendment – although it may in practice vary greatly whether or not this is in fact an issue of importance in the elections.<sup>92</sup>

96. The actual strictness of each of the mechanisms may often depend on *external* factors beside the content of the provision itself. This in particular applies to requirements for qualified parliamentary majority. Whether or not a requirement of for example 2/3 of parliament is in effect strict or flexible depends heavily on the electoral system. Electoral systems with proportional representation and a low threshold will typically give a large number of parties representation in parliament, which in effect may make a qualified majority very hard to attain. In contrast, in electoral systems with single constituencies and “first-past-the-post”,<sup>93</sup> the ruling

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<sup>91</sup> See the VC opinion on the regulatory concept of the Constitution of the Republic of Hungary (CDL-INF(1996)002), §.17.

<sup>92</sup> Such a system can be found for example in Sweden, which has comparatively very flexible rules on constitutional amendment – requiring only a simple majority in parliament, but subject to the requirement of two decisions, with parliamentary elections in between. Alternatively, amendments can be passed by parliament in one decision, but then only with a 5/6 majority.

<sup>93</sup> Parliaments can also be fragmented for other reasons than the electoral systems – typically if the democratic system is still new, so that a stable party system has not yet had time to settle and mature. Depending on the political

party will usually have a comfortable majority in parliament, which may often be large enough for a qualified majority. In such systems, this may therefore in effect not be a very strict requirement.

97. In bicameral parliamentary systems there is usually the requirement that a constitutional amendment be passed *in both chambers*, either by ordinary or qualified majority. If the two chambers are elected and composed by different criteria (which is usually the case), then even the requirement of ordinary majority in both will in effect have to reflect a broader underlying political consensus.<sup>94</sup> Along the same line, if a qualified majority is necessary in both chambers, as for example in the German parliament, then this may in effect be a stricter requirement than 2/3 in a unicameral system. In the Netherlands, both chambers must agree to the amendment twice, before and after elections, with simple majority in the first round and 2/3 in the second. In Ireland the requirement is simple majority in both houses followed by simple majority in a popular referendum, but even this in effect will have to reflect broader consensus.

98. A quite widespread traditional view has been that qualified majority in parliament is the single most important mechanism in constitutional amendment provisions, which is both necessary and sufficient for achieving a stable and moderate amendment rate. This view, however, has been challenged in recent empirical studies, which indicate and argue that other factors are more important for determining the actual rigidity or flexibility of a given constitutional system, and the number of times the constitution is actually changed. First, it depends also on the national constitutional tradition, the concrete political context, and the driving forces behind the call for change. Second, it may also be that a parliamentary supermajority requirement is often in effect not as strict as it may seem, because there is wide consensus on constitutional issues in parliament, or because the ruling party is able to muster wide support.

99. A recent study by Rasch and Congleton point to *the number of decisions and the number of actors* involved (“veto points” and “veto players”) as the two most important elements for determining the actual rigidity or flexibility of a constitutional amendment procedure.<sup>95</sup> Their empirical findings indicate that there is little general correspondence between the strictness of parliamentary qualified majority requirements and the number of amendments actually passed. Instead “the salient factor seems to be multiple decisions with voter involvement”. This can be either a system with two parliamentary decisions with a general election in between, or a parliamentary decision followed by ratification by popular referendum (or by the states in federal systems). These in general appear to be by far the most rigid constitutional systems, though in any single country the actual degree of rigidity will also depend on other factors.

100. The requirement to obtain consent from two different parliaments (see above, § 43-45) will be weighted by the political parties against a number of other kinds of considerations before initiating the constitutional change, and can thus severely restrict the possibilities for change.

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.

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situation this can function both ways – making it harder or easier to muster the qualified majority necessary to pass a constitutional amendment.

<sup>94</sup> See e.g. the VC opinion on the Draft Revision of the Romanian Constitution (CDL-AD(2002)012), § 7.

<sup>95</sup> Cf. *Rasch and Congleton, cit.*, note 2; This is further developed by *Rasch*, Foundations of Constitutional Stability: Veto Points, Qualified Majorities, and Agenda-Setting Rules in Amendment Procedures, paper 2008.

102. The effects of different amendment mechanisms are thus complex and will depend on a number of factors in addition to the formal provisions themselves. Obstacles to change that look strict on paper may sometimes in practice turn out not to be so. On the other hand, seemingly easy requirements, as that of popular referendum, may in effect turn out to have very restrictive effects (or not).

103. The Commission wishes to stress that when drafting and applying formal provisions on constitutional amendment, there is a need for great awareness of the potential effects and functions of such rules – which requires both general and comparative analysis as well as thorough knowledge of the national constitutional and political context.<sup>96</sup> If this is not done properly, then one might end up with very different actual thresholds for constitutional change than originally planned and envisaged.

## **VII. Striking a balance between rigidity and flexibility**

### **A. The quest for constitutional stability**

104. So far the present study has considered the reasons for constitutional commitment, the arguments against too strict rules, and the various legal mechanisms that may be used when designing amendment rules. This leads up to the fundamental challenge introduced earlier, of striking a proper balance between constitutional rigidity and flexibility, which also meets the requirement of constitutional legitimacy. Ideally, this balance will allow for necessary reforms, while still ensuring constitutional predictability and protection.

105. Whether or not a given constitutional system has managed to strike a good constitutional balance is something that can be evaluated on a case-to-case basis. Even in old and established constitutional democracies it is often far from certain that the balance is optimal, though such systems usually over time develop mechanisms to compensate for imbalances, one way or the other – either by repairing too strict amendment rules by flexible interpretation or by supplementing too flexible amendment rules with conservative political conventions. If this is not achieved, demands for radical constitutional change will sooner or later inevitably arise.

106. When faced with the question of constitutional amendment procedures, the Venice Commission has several times expressed its concern over excessively rigid procedures and warned against the difficulty of constitutional reform.<sup>97</sup> In other cases, the Commission has been confronted with the opposite challenge, that too frequent amendments of (or attempts to amend) the constitution negatively affect constitutional and political stability.<sup>98</sup> It has thus stressed that the 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”.<sup>99</sup>

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<sup>96</sup> See CDL-AD(2007)004, Opinion on the Constitution of Serbia, §99 et s.

<sup>97</sup> See for example, CDL-AD(2007)004, Opinion on the Constitution of Serbia, §§ 15, 100 and 104; CDL-INF(2001)023, Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia, § 19; CDL-AD(2005)025, Final Opinion on Constitutional Reform in the Republic of Armenia, where the Venice Commission welcomed the lowering from 1/3 to 1/4 of the minimum number of registered voters for validating a constitutional referendum, § 42.

<sup>98</sup> See e.g. CDL-INF(2001)015, Opinion on the Amendments of 9 November 2000 and 28 March 2001 of the Constitution of Croatia, item 4 and conclusions, where the Venice Commission regretted that the Constitution had been amended twice in a very short space of time (5 months) and warned that the suppression of the second chamber should not make future constitutional revisions too easy and weaken stability; CDL-AD(2007)047, Opinion on the Constitution of Montenegro, § 126; CDL-AD(2008)015, Opinion on the Draft Constitution of Ukraine, § 105.

<sup>99</sup> CDL-INF(2001)003, Report on Co-operation between the Venice Commission and the Republic of Moldova on constitutional reform, §26.

107. It is neither possible nor desirable to try to formulate *in abstracto* a best model for constitutional amendment. The point of balance between rigidity and flexibility may be different from state to state, depending on the political and social context, the constitutional culture, the age, detail and characteristics of the constitution, and a number of other factors. Also, this balance is not static, but may shift over time, reflecting political, economic and social transformations.

108. It is, however, possible to identify factors that may be relevant for the assessment of a given constitutional system, and which may be of use in analysing how strict a given amendment formula actually is, and whether it should be reformed or compensated by other means. Some of these factors may also be relevant when assessing whether a given proposal for constitutional change is legitimate or not.

## **B. Formal and informal constitutional change**

109. Formal amendment is not the only form of constitutional change, and in some systems not even the most important. Leaving aside revolutionary or unlawful acts, the two most important alternative ways of legitimate constitutional change are through judicial interpretation and through the evolvement of unwritten political conventions supplementing or contradicting the written text. How this functions in a given constitutional system influences the need for formal amendment.

### **1. Judicial interpretation**

110. It is well known from many constitutional systems that even quite substantial change can take place without altering the text, through judicial interpretation. The classic example is the way in which the US Supreme Court has developed the contents of the 1787 constitution over the years, far beyond the 27 formal amendments made. While there are no European examples of courts playing quite such a prominent role in constitution shaping, there are clearly also in Europe a number of courts that have substantially contributed to developing their constitutions through dynamic interpretation and application. This in particular applies to countries with “constitutional courts” – a model that in recent years has been adopted by almost all the countries of Central and Eastern Europe.

111. The extent to which courts consider themselves competent to develop their constitutions by way of interpretation clearly differs between jurisdictions, depending on national doctrine, tradition and context. Over time this may interact with the level of rigidity of the constitutional amendment procedures. The more difficult it is to amend a given constitution, the more likely it is that calls for change will be channelled into legal action, and the more likely the courts will be to follow such invitations. This will in turn reduce the need for formal amendment. On the other hand, in a system with flexible rules on amendment, the need for dynamic judicial interpretation will be less, and so often also the legitimacy. The interaction and possible mutual compensation effects between the two are complex, and clearly varies from country to country.

112. The Venice Commission has repeatedly welcomed and endorsed the model of “constitutional courts” which is now widespread in Europe. This is a model that in general is favourable to judicial constitutional interpretation. Such courts may legitimately contribute to developing their national constitutional systems. Nevertheless, the Venice Commission still holds that for major constitutional change, a deliberative and democratic political procedure following the prescribed procedures for constitutional amendment is clearly preferable to a purely judicial approach. The US model of very strict formal amendment procedures and quite flexible judicial interpretation is not necessarily an example to be followed, and would also be difficult to reconcile with constitutional traditions in the great majority of European states.

113. A role comparable to that of constitutional courts in constitutional change can also be played by non-judicial bodies involved in constitutional review, such as the constitutional law committee of the Parliament of Finland.

114. Constitutional change through judicial interpretation is most widespread with regard to provisions on fundamental rights, which are by their nature far more often invoked before the courts than institutional and other provisions. These provisions are also typically formulated in an open way and are therefore in need of continuous interpretation and specification. For the member states of the Council of Europe the national constitutional fundamental rights are supplemented by the rights laid down in the European Convention on Human Rights (ECHR) and developed through the dynamic case law of the European Court of Human Rights, which are binding on the national authorities. This Court of course does not interpret national constitutional provisions as such. But its interpretation of the rights enshrined in the ECHR not only supplements, but in many countries also directly influences the interpretation of national constitutional fundamental rights provisions. In this way, the case law of the Court in Strasbourg plays an important role in the shaping of a common European constitutional tradition for the protection of fundamental human rights.<sup>100</sup>

## 2. Constitutional custom and conventions

115. Another legitimate and quite common form of constitutional change is through the evolvement of political customs within the legislative and executive bodies. In many systems the status of such custom is reflected and recognised in the established concept of a “convention”, or even “constitutional convention”. This is particularly clear in the UK, but can be found also in a number of countries with written constitutions. A constitutional convention is “unwritten” in the sense that it is not laid down in any formal document or judgment, but it can be recognised by the courts, though it is seldom regarded as “hard law”. Such conventions are not created by courts, and they are not “decided” or “adopted”, but rather evolve over time, reflecting the actions and normative perceptions of the political actors.

116. Whether or not a national system recognises “convention” as part of the constitutional system varies, as do the criteria used for identifying them, and their relative strength and importance. But in many countries, especially with old or very strict constitutions, they play an important role. Usually they will supplement the provisions of the written constitution, or cause the provisions to be interpreted and applied in ways quite different from that indicated by the wording. In some cases convention may even directly contradict and set aside the written provisions. In other cases convention may result in the non-use of certain articles, which may or not may be legally recognised as “desuetude”. In the same way as for judicial interpretation, the existence and recognition of the concept of constitutional “convention” will affect the need and possibilities for formal amendment. The role of constitutional conventions is especially important as a complement to the institutional provisions of the constitution.

117. The Commission considers convention as an integral and important part of the constitutional order in a number of European states, which contributes to the flexibility and adaptability of the national system. It nevertheless holds as a general preferred position that substantive constitutional change should take place by way of the prescribed procedures rather than through the actions of the state organs, and if binding conventions do evolve, these should then preferably be put to the test of formal codification, to see if they fulfil the requirements.

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<sup>100</sup> For the member states of the EU the same applies a fortiori to the dynamic case law of the European Court of Justice (the ECJ) to the extent that this directly or indirectly influences national constitutional law.

### 3. Constitutional culture

118. In addition to judicial interpretation and political convention, the way in which provisions on formal amendment function also depends on the more vague concept of “constitutional culture”. By this is meant both national norms on constitutional interpretation (strict or flexible), unwritten metanorms regulating to what extent change is considered legitimate, the symbolic value of the constitutional text, the conservatism or dynamism of the leading constitutional actors (politicians, judges, professors, key civil servants), and other relevant factors.

119. In some states there is a culture of “constitutional conservatism” that restricts change even if the formal procedures are not very restrictive. Or as Elster puts it: “In countries with a long constitutional tradition, powerful unwritten conventions may also deter politicians from constantly tinkering with the constitution to promote short-term or partisan ends.” Conversely, in other countries, constitutional amendment may be regarded as a rather ordinary matter, not very much different from ordinary legislation. This may be the case in countries with relatively new constitutional systems, in which the “founding fathers” (and mothers) are still politically active. But it may also be the case in established systems, such as that of Sweden, where the rules on constitutional amendment are flexible and often applied.

120. Constitutional culture develops and shifts over time within the national context, and varies from country to country. This is an important element of the common European constitutional heritage, and it is neither desirable nor possible to try to harmonize it. It does, however, mean that a given system of constitutional amendment can only be adequately assessed within its own context – taking into account a number of other factors in addition to the formal rules.

121. Judicial interpretation, constitutional “convention” and the general national constitutional culture and context clearly influence the way in which formal amendment provisions are applied. These factors may also serve to repair imbalances in the amendment system. In systems with too flexible rules on amendment this may be compensated by a conservative convention. In systems with too rigid rules this may be compensated by traditions of judicial interpretation or by unwritten conventions for supplementing, bypassing or ignoring unalterable constitutional obstacles to necessary reform.

#### **C. Origin and characteristics of the national constitution**

122. What is a good balance between constitutional rigidity and flexibility depends considerably on the character and contents of the written constitutional text itself – e.g. its origins, democratic legitimacy, form, age, length, way of wording, degree of detail, level of justiciability. Here again there are great differences between the constitutions of Europe.

##### 1. Origins

123. Within any given constitutional system it is impossible to assess calls for amendment without addressing the *origins* of the national constitution. Here a fundamental distinction must be drawn between constitutions that are the result of broad democratic processes with a high degree of legitimacy, and constitutions that were originally imposed by undemocratic means, or by outgoing regimes in order to cement certain rules and interests before an anticipated transition to democracy. Is the constitutional precommitment a result of legitimate “self-binding”, or a binding by other interests than those presently in democratic majority? Clearly constitutions can be both – but the distinction is important to the legitimacy of calls for change, and thus for the finding of a proper balance between rigidity and flexibility.



124. In several country-specific opinions, the Commission has pointed out that the procedure for adoption of constitutional amendments must abide by the provisions of the Constitution in force.<sup>101</sup> This however does not mean that all constitutions that were originally adopted by way of undemocratic procedures automatically are in need of replacement. Such constitutions may over time prove themselves suitable for democratic and effective government, and thus gain the legitimacy that they initially lacked, just as perfectly democratically construed constitutions may over time be in need of radical reform. But the Commission does hold that such constitutions should not be too rigid, and that during the transition phase, it should be relatively easy to open up debate on constitutional change in such systems – which may then lead either to reform or to renewed confirmation of the existing rules, thereby strengthening their legitimacy.

## 2. Age

125. The *age* of the present constitutional documents of Europe varies considerably, ranging from the 1814 Norwegian constitution to the 2007 Constitution of Montenegro. Most of constitutions date from after 1945, but many of these contain elements that are a direct continuation of far older (19<sup>th</sup> century) constitutions. The present constitutions of Central and Eastern Europe are all from a substantive point of view new, and were for the most part adopted in the 1990s, though some are formally seen as the continuation of older texts.

126. The age of a given constitutional document may influence amendment in different ways. On the one hand, it can be argued that the older the text, the more it will be in need of flexible amendment procedures in order to adjust to fundamental transformations in politics and society. On the other hand, very old constitutional texts may over time obtain a particular symbolic value, creating a constitutional culture in which amendment is very difficult. If this is the case, then the substantive contents of the constitutional system may be expected to develop nevertheless, through judicial interpretation and political convention.

127. The Commission notes that old age is not an argument against a national constitution. On the contrary, constitutional stability over time may be greatly beneficial to democratic governance, and the symbolic value of an old constitutional text may serve positive and important functions. At the same time however, old constitutional texts are in particular need of flexibility in order to adjust to transformations in society, if they are to retain their importance as a relevant and operational framework for political action.

## 3. Level of detail

128. The need for amendment in a given system is also dependent upon the length and level of detail of the constitutional text. Here again, there are great variations. Most European constitutions have somewhere between 100 and 200 articles,<sup>102</sup> but these vary greatly in length and detail, and are of course of very different importance. The lengthier and more operational a constitutional text is, the more it resembles ordinary legislation, and the more prone it should and will be to relatively frequent amendment.<sup>103</sup> Some European constitutions distinguish between two separate categories of constitutional provisions, with different thresholds for amendment – one that includes the most fundamental rules and principles and which is very difficult to amend, and another that contains the more detailed rules on the machinery of government and which is easier to change. In some states, for example, rules on parliamentary

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<sup>101</sup> See e.g. CDL-INF(2001)003, cit. not 96.

<sup>102</sup> In his recent study on constitutional amendment in 17 countries of Central and Eastern Europe, A. Roberts found that the average number of articles were 143 (*cit.*, note 2).

<sup>103</sup> A good example is the Swedish constitution of 1975, which is combined of four constitutional texts, of which three are of relatively great length and detail, and which have very flexible rules on amendment, that are often applied.

procedure are included in the most flexible part of the constitution, while in (most) others these rules are not formally part of the constitution at all, but rest on a lower level in the hierarchy of norms.

#### 4. Justiciability

129. In older times, the constitutions of the European tradition were (unlike in the US) often not regarded as “hard law”, in the sense that they could not be invoked before the courts in order to set aside laws and administrative decisions. The constitutional provisions were of course still important as a framework for political action, but they were not justiciable, and their strength ultimately rested on political acceptance. In modern times, the constitutional tradition of Europe has “hardened” substantially, and the constitutions are now for the most part subject to direct applicability, judicial protection and interpretation, either by the ordinary courts and/or (in most states) by special constitutional courts. This also affects the need for amendment. In general, it may be held that the more legally operational a constitutional text is, the more flexible it should be.<sup>104</sup> At the same time, the more often a constitution is invoked before the courts, the more room there is for reform through judicial interpretation – making the need for formal amendment less.

#### **D. Amending the different categories of constitutional provisions**

130. When analysing constitutional amendment, a distinction should be made between the various categories of provisions found in most constitutions. The two most important are:

- The institutional rules – on “the machinery of government” – the electoral system, the competences and procedures of the main state organs, separation and balance of powers, procedures for legislation, budget, scrutiny, the court system, and etcetera.
- The bill of rights – the catalogue of human rights, which protects the individual and regulates the fundamental relationship between the state and the individuals.

139. In most constitutions there are also some provisions which do not fall neatly into any of these two categories, such as provisions on national sovereignty, delegation of powers to international organisations, national symbols, languages. In federal systems the institutional rules will also include provision on the division of competences between the federal and state levels of government, and other federal issues.

131. The different categories of constitutional provisions raise different questions and often require a rather different approach as regards interpretation, application and potential amendment. While the formal amendment procedures and requirements will usually (though not always) be the same for the all categories, the legal and political context is often rather different.

132. While “bills of rights” today are relatively (and increasingly) universal, with more or less the same fundamental content, the provisions on the machinery of government vary much more. There is a fundamental model of constitutional democracy with some form of separation and balance of power between the executive, legislative and judicial branches of government – but apart from this there are as many variations as there are constitutions. Thus there is a temptation to continuously try to “perfect” the system – drawing more or less relevant inspiration from the different national solutions offered by comparative constitutional law.

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<sup>104</sup> Whether or not a primarily symbolic constitutional text is amended is arguably of lesser importance.

133. Institutional and rights-provisions also differ as to the typical mechanism of informal change. The former are complemented by constitutional conventions, while the latter are reinterpreted and specified by courts and other bodies involved in constitutional review.

134. Institutional provisions are usually clearer and more inflexible than those on “rights”, which are formulated as legal standards open to interpretation and legal evolution. An institutional procedure laying down a specific government procedure or competence should be clear-cut, in order to create political stability and predictability – and usually is. The same cannot be said about fundamental rights – where content is what matters. Therefore the arguments for and against constitutional change are different between the two sets of provisions.

135. As regards amending provisions on the state machinery, each state is free to do so as long as certain fundamental democratic requirements of international law are fulfilled. The variations are legion, and there is no “best model” of universal applicability. There will often be a more or less continuous flow of proposals for reform, large or small, even in established democracies, as it is always, at least in theory, possible to further perfect a system of government. The main factors to be weighed against each other are on the one hand the need for political stability and predictability, and on the other hand the envisaged benefits of change, whether in terms of efficiency, democracy or other gains. Compared to provisions on “rights”, it is more difficult to introduce change by way of judicial interpretation, as these rules are seldom invoked before the courts. Change through “constitutional convention” is more common, as the political norms and procedures evolve in ways supplementing or adjusting the text of the written constitution.

136. As regards changes to national constitutional provisions on human rights the context is different. First, these provisions are usually formulated in a general and abstract way, which is open to legal interpretation. Second, they are continuously being invoked before the courts, and thereby developed through case law. Finally, the national constitutional bills are supplemented by international law (*inter alia*, the UN treaties on human rights, in Europe the ECHR and the EU Charter on fundamental rights (now strengthened by the Lisbon Treaty). The protection offered by international law supplements the national catalogue – especially so with regard to European countries where the ECHR can be invoked directly before the courts.

137. The following sections will elaborate somewhat more particular questions when amending provisions on machinery of government, human rights and national sovereignty.

#### 1. Amending provisions on government

138. While all constitutions lay down a fundamental structure of government, the level of detail varies greatly. Some constitutions have very detailed provisions on the competences and procedures of the state organs, while others only state the fundamental principles, leaving the rest to be regulated in ordinary legislation (or in some systems by “organic laws”) or in the rules of procedure of the institutions (parliament, government, the courts).

139. The need for constitutional amendment naturally corresponds to this. The more detailed the institutional provisions, the greater will be the perceived need for periodic or even continuous reform. Another important factor is the degree of flexibility of the provisions, determining to what extent their application can be adjusted to shifts in the political landscape. A third factor is how formalistic the national constitutional culture is, and to what extent it recognizes as legitimate the evolvement of institutional procedures through “convention”, based on the normative perceptions and actual behaviour of the main political actors.

140. Many constitutional rules on the machinery of government will directly or indirectly serve to protect the rights and interests of the political opposition, large or small. This goes both for the fundamental electoral rules, which are often enshrined in the constitution, and for rules on

the fundamental parliamentary procedures, which ensure that the opposition (and individual MPs) have the right to participate in the processes, and to debate, scrutinize and criticise the decisions and actions of the majority and the government. Constitutional amendment of such rules should be subject to particular attention; to see that legitimate political minority interests are not weakened

141. The most important proposals for amending constitutional rules on the state machinery are often those that seek to alter the balance of power between the legislative and executive branches of government, one way or the other. These should also be subject to particular care and consideration. In general, amendments strengthening parliament are normally meant to make the system more democratic, while amendments strengthening the executive are meant to make it more efficient and effective.<sup>105</sup> But there may also be hidden or more personal motivations, which are less legitimate.

142. Since new constitutions were first adopted in most of Eastern and Central Europe in the mid-1990s, there have been later amendments in several countries further strengthening the national parliaments. In this regard, the Commission has repeatedly stated that the choice between a presidential and a parliamentary system is a political one to be freely made by each single state. However, the system chosen should be as clear as possible, and the provisions should not create room for unnecessary complications and political conflicts. In a parliamentary system, fundamental requirements arising from the principle of the separation of powers should be respected. If a presidential system is chosen, in turn, certain minimum requirements of parliamentary influence and control should be fulfilled.<sup>106</sup>

143. In almost all countries with elected presidents there is a constitutional limit as to how many consecutive terms a person may serve. In such countries there may from time to time be a temptation for the ruling president to propose constitutional amendment in order to get another term, or to abolish the restriction altogether. The Venice Commission has in recent years assessed two such amendments – in Belarus in 2004 and Azerbaijan in 2009 – and both times the assessment was highly critical.<sup>107</sup> In the most recent opinion, it was stated, *inter alia*, that “As a rule, it can be said that the abolition of existing limits preventing the unlimited re-election of a President is a step back, in terms of democratic achievements”.<sup>108</sup>

144. To the extent that constitutional amendments strengthening or prolonging the power of high offices of state are proposed, the motivation should be to promote the machinery of government as such – not the personal power and interests of the incumbent. A sound principle would therefore be that such amendments (if enacted) should have effect only for *future* holders of the office, not for the incumbent. At present, the Venice Commission is not aware of any constitutional systems which apply this kind of restrictions. But it holds that this may be a good general standard against which to measure the democratic implications of such amendments.

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<sup>105</sup> See e.g. CDL-AD(2009)024 Opinion on the Draft Law of Ukraine amending the Constitution presented by the President of Ukraine; CDL-INF(2001)003 Co-operation between the Venice commission and the Republic of Moldova on constitutional reform; CDL-INF(1996)002, Opinion on the regulatory concept of the Constitution of the Republic of Hungary.

<sup>106</sup> See e.g. CDL-AD(2003)019 Opinion on three draft laws proposing amendments to the Constitution of Ukraine; CDL-AD(2005)016 Second interim opinion on constitutional reforms in the Republic of Armenia, §§6-8; CDL-AD(2002)033 Opinion on the Draft Amendments to the Constitution of Kyrgyzstan, §§45-47.

<sup>107</sup> Cf CDL-AD(2004)029 on Belarus, and CDL-AD(2009)010 on Azerbaijan.

<sup>108</sup> Cf CDL-AD(2009)010 § 13. See also § 16, where the Venice Commission held that “Explicit constitutional limitations on the successive terms of a president are particularly important in countries where democratic structures and their cultural presuppositions have not yet been consolidated. In the opinion of the Venice Commission, the elimination of the present limitation in Article 101(V) of the Constitution may therefore appear as a serious set-back on Azerbaijan’s road to a consolidated democracy”.

## 2. Amending provisions on fundamental rights

145. Most constitutions today contain a significant number of provisions on fundamental rights, either scattered throughout the text, or contained in special sections, as a national “bill of rights”. These provisions regulate the fundamental relationship between the individual and the state, providing negative rights of freedom from the state and positive rights of participation in the state. They also ensure legal certainty and predictability, and protect individual and minority interests against misuse of power by the majority. They can also protect individuals from other private or legal persons.

146. Some constitutions have had provisions on fundamental rights for a long time, as for example the 1787 US Constitution and the French Declaration of 1789, although these were often not justiciable before the courts (the American one was, the French not). The model for laying down detailed catalogues of rights as *positive* (hard) law in the national constitutions is a relatively recent tradition, which has only gradually become widespread in Europe after 1945.

147. In recent decades there has been great development of the human right dimension in national constitutions in Europe, both when drafting new constitutions and when amending old ones.<sup>109</sup> In general this has been a one-way process – introducing new rights and extending the scope and protection of existing ones. This process is still clearly going on. But there are also signs that in the future there may be more calls for adjusting or limiting or even reducing the legal reach of some constitutional rights; either because they must be balanced against other conflicting rights, or because they have in some cases been developed too far, thereby unduly restricting the legitimate democratic powers of parliament and the government.

148. Constitutional amendment of fundamental right provisions can either serve to extend or to restrict the protection of the individual. The first alternative has been by far the most widespread in Europe in recent decades, and is normally uncontroversial, though further progress may be subject to debate in the years to come. The second alternative has been rare in Europe in recent times,<sup>110</sup> and will normally be controversial, but might occur more often in the future.

149. As earlier indicated, the legal and political context for amending constitutional provisions on fundamental rights differs from that of changing institutional rules in several ways. First, the normative basis and content of human rights is different. Second, the relationship to international and European law is different. And thirdly, the courts play a much more important role in developing fundamental rights than they do with institutional rules.

### i. The normative basis for introducing or amending fundamental rights

150. Fundamental rights can historically be said to derive from two possible sources, or traditions. One is the idea of “natural law”, seen as more or less universal, and based either (originally) on religious concepts or on the concept of rights derived from human nature. The other source is democracy, based on the sovereignty of the people, under which fundamental legal rights are the result of positive decisions made by democratically elected representatives.

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<sup>109</sup> Almost all the new constitutions of Eastern and Central Europe include extensive fundamental right provisions. But the same also applies to most countries of Western Europe. For example, the 1949 German Constitution starts with a first chapter on “Fundamental rights” (articles 1 to 19), and so does the Dutch Constitution (articles 1 to 23), while in the Belgian it is the second chapter (articles 8 to 32). The recent Finish Constitution of 2000 has a first section on “Fundamental provisions”, but the next is on “Fundamental rights and liberties”, listing 17 rights (articles 6 to 23), which was a great improvement in the protection of human rights compared to the previous constitution. Another sign of the times is the commission established by the Norwegian Parliament in 2009 to draft a proper bill of rights to be included in the 1814 Constitution, which today only has a limited number of fundamental right provisions scattered throughout the text.

<sup>110</sup> An example is the amendment of article 16a in the German fundamental Law in 1993, which introduced more detailed provisions aimed at qualifying the very broad phrasing of the previous Article 16 II 2.

151. These two can be combined, but they are still different ideological and constitutional traditions, which provide different perspectives on the function and nature of fundamental right provisions. Overall, the development of human rights theory in modern times has clearly shifted from natural law to democratic theory, though this progress has neither been completely linear nor absolute. On the national level the shift began in the 19<sup>th</sup> century with the increased tendency to transform human rights into positive law, as binding constitutional provisions, which meant that their contents had to be discussed and democratically determined. The development of international human rights after 1945 however to some extent reawakened the natural law viewpoint, both because of the horrors of the war and because of the way the international treaties were drafted, discussed, negotiated and ratified. Parts of this tradition still linger on in the way many perceive the fundamental international and European treaties on human rights. However, the overall picture in modern times is clearly that there has been a universal shift in the rationale behind human rights, from natural law to democratic theory, both on the international and (especially) the national level.<sup>111</sup>

152. This shift has fundamental implications for how one perceives the introduction of new provisions on fundamental rights and the amendment of existing ones. Under natural law theory, whether based on religion or human nature, the fundamental human rights are predetermined, as something to be discovered and identified. Under democratic theory the rights (which are often the same) are something to be discussed and negotiated in a deliberative process, and then voted upon and positively decided. Human rights have to be transformed into positive law before individuals can invoke them, and this act of positivisation should in principle preferably be a collective and democratic decision. This provides fundamental rights with democratic legitimacy.

153. Debate prior to the act of making human rights into positive law, and the democratic decision itself, is also important because it is through deliberation that the individual ensures rights that are compatible with the rights of others. Rights are not legitimised by individual demands for their application alone. In the absence of collective self-determination there is a danger that such rights will not be recognised by other individuals. Human rights have to be mutually acknowledged by the bearers of those rights, and this happens by collective democratic self-determination at the moment of the positivisation of these rights.<sup>112</sup> This is also important when defining the limits of human rights, as it is the limitation that determines the balance between fundamental rights of one person and the rights and interests of others.

154. A democratic perspective on fundamental rights can also include natural law arguments, albeit then in a deliberative form. Groups and individuals shape the deliberative process by their own understanding of the rights, based on what they believe is just and unjust, good or bad, fair or unfair, or what they understand by concepts such as for example "freedom". In such deliberations, ideas having a religious origin, or based on concepts of "human nature", will often re-enter the debate, and legitimately so. The difference between the historical idea of human rights emerging from natural law and individual natural law perceptions today, lies in the way in which natural law arguments can no longer be seen as pre-determined and unalterable, but have to be subjected to a deliberative democratic process.

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<sup>111</sup> See *J.Habermas*, *Über den internen Zusammenhang von Rechtsstaat und Demokratie*, in: Ulrich K. Preuss, *Zum Begriff der Verfassung*, Frankfurt (Main) 1994, p.84 ff.

<sup>112</sup> In most States this happens indirectly though representatives in constitutional and legislative assemblies which are nevertheless embedded in wide public consultation. At the moment direct democratic forms are the exception, although anticipated by the EU in the Lisbon Treaty.

155. Another argument for the need to continuously debate and develop fundamental rights is the idea sometimes presented that codifications of human rights often to some extent represent negative historical experiences, articulating past human suffering, resulting in a collective learning process. Viewed in this light human rights reflect former injustice and fear. And the codification of such lessons into positive human right law must "be capable of being supplemented and extended once new experiences of injustice and fear need to be articulated, or when new aspects of past narratives are discovered and recognised."<sup>113</sup> As human history unfolds, so must the human right response also be a continuous learning process.

156. For individuals of any given political and constitutional community, a continuous debate on the fundamental rights of the individual also ensures that these rights are not taken easily or for granted. Debates on fundamental rights issues in itself have "significance in encouraging people to recognise themselves and each other as self-confident bearers of rights, as equal members of a human rights community which will continue to exist only for as long as the bearers themselves exercise their rights".<sup>114</sup> At the same time it should be emphasized that a continuous democratic debate on the contents and implications of fundamental rights in no way contradicts their entrenchment in the constitution or in international instruments. In this respect it should also be borne in mind that, at least in countries where the constitutional provisions on fundamental rights are not very detailed, regulation and interpretation of fundamental rights is to some extent left for the ordinary legislator. Debates on these issues will therefore more often result in legislative changes than in constitutional amendments. Constitutional and treaty provisions are in need of continuous reinterpretation and specification, and here democratic debate plays an important role, even where the decision in the concrete case of course lies in the hands of a constitutional court or a corresponding body of constitutional review.

#### ii. The interaction between national and European fundamental rights

157. The greatest difference between amending national constitutional provisions on government and provisions on fundamental rights is that the latter category is supplemented by binding international and European law, granting individuals a number of rights, which are meant to be enforceable at the national level, against national authorities before the national courts.

158. The internationalisation of positive human rights law is a relatively recent phenomenon, starting after 1945. But it is a trend that in recent years has developed dramatically. At the UN and other international levels the fundamental original treaties on human rights have been given increased significance and reach, and supplemented by a number of more specific treaties – on torture, discrimination, children's rights, gender equality, national minorities, workers' rights and etcetera.

159. At the European level developments have been even more radical. The contents and reach of the 1950 European Convention on Human Rights (the ECHR) have been drastically increased in recent decades, partly through new protocols and partly through the dynamic interpretation of the European Court of Human Rights in Strasbourg (the ECtHR). The geographical scope of these rules was greatly widened following the democratisation of Eastern and Central Europe. Today the detailed rules of the ECHR can be invoked before the national courts in all European countries,<sup>115</sup> in addition to the national constitutional rights. In the 27 EU member states this is furthermore supplemented by the 2000 Charter of Fundamental Rights of

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<sup>113</sup> K. Günther, Was kann „Universalität der Menschenrechte“ heute noch bedeuten?, in: Evelyn Schulz / Wolfgang Sonne, Kontinuität und Wandel. Geschichtsbilder in verschiedenen Fächern und Kulturen, Zürich 1999, p.177/178.

<sup>114</sup> *Ibid.*, p.194.

<sup>115</sup> With the exception of Belarus.

the European Union, which will be made into hard law by the entry into force of the Lisbon Treaty in late 2009. The Lisbon Treaty also states that the EU as such will sign up to the ECHR, thus adding to it the supranational effects of EU law.

160. The emergence and growing importance of positive and directly enforceable European fundamental rights, often claiming supremacy over national law, naturally has implications for the role and functions of the national constitutional fundamental rights provisions. Fundamental rights are now legally protected at two levels, which are for the most part overlapping or supplementary. To a large extent the legal contents are the same.<sup>116</sup> Sometimes the national constitutional protection will reach further than the European, which is in principle only a minimum requirement. But in many countries the situation will be that the ECHR or other treaties offer legal protection well beyond the national constitutional provisions. In this way, the individual gets the best from both worlds. To some extent it may not matter a great deal to the individual whether he is protected at one level or the other. At the same time, protection under national law is in principle preferable, since this is normally more effective at the national level (it takes less time, carries greater authority, is more easily enforced, and etcetera).

161. The supplementation of national fundamental rights with human rights at the international level means that it is widely seen as problematic and impractical to amend national constitutional bills of rights in a way that would diminish the protection of the individual.<sup>117</sup> In any case, if a country should do so, the legal effect would be small as long as the ECHR or other binding and enforceable treaties guarantee the same rights and level of protection.<sup>118</sup> The possibility of denouncing the ECHR would of course remain, but for most countries this is only a theoretical not release a state from those fundamental rights which are today regarded as belonging to *ius cogens* option, if one at all. And in any case, a denunciation of human rights treaties would

162. The possibility of diminishing the level of constitutional protection of fundamental rights is also linked to the level of detail of the relevant constitutional provisions. Several post-communist constitutions are not phrased in general terms like the provisions of international human rights treaties, but are instead very detailed, at times excessively so. In such cases, the possible decrease of the protection level would not necessarily conflict with international or European law. In similar situations, the Venice Commission has previously warned against possible freezing effects of constitutional provisions limiting or prohibiting constitutional amendments which would diminish the level of protection of fundamental rights in the constitution.<sup>119</sup>

163. To some extent this means that the question of amending national constitutional provisions on fundamental rights is less important than it previously was. It is however still not without interest. First, national constitutional rules may still in many areas of law reach further than the international and European rules, offering better protection to the individual. Second, national constitutional rules may in many countries carry greater legal and actual authority than

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<sup>116</sup> It differs whether or not European and national fundamental rights law are seen as a common whole or as two (or more) separate legal systems. In some countries the two are kept apart, in the sense that the national courts will interpret and test first the one and then the other. In other countries it is accepted by national doctrine that the international or European rules may directly influence the interpretation of national constitutional provisions, so that the two systems are more or less blended together.

<sup>117</sup> Development the other way, increasing the protection and extending the catalogues, is certainly not as problematic, and has been widespread in recent years (the Italian constitution (article 111) was for example amended in 1999 so as to guarantee explicitly the right to a fair trial within a reasonable time).

<sup>118</sup> See Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitution of Georgia, CDL-AD(2005)003, § 112, which recalls the necessity to bear in mind the relevance of human rights treaties in this context.

<sup>119</sup> See CDL-AD(2003)003, para 112.



European rules, thus ensuring better enforcement and a higher level of acceptance. Third, there may be important symbolic value attached to the fact that fundamental rights are not only protected under European law but also by the national constitution.

164. To this can be added that the framework for democratic discourse and development of fundamental rights are by far best at the national level. At the international or European level the main participants in negotiating the text of fundamental rights provisions are the government representatives, which at best only ensures indirect and limited democratic legitimacy.<sup>120</sup> It is also a fact that once a great number of countries have managed to agree on a common legal text, this is then very difficult later on to amend. Fundamental human right treaties may be supplemented by new protocols, but they are seldom themselves formally altered. For this reason it is all the more important that democratic debate on fundamental rights take place at the *national* level, which is the only level on which they can be endowed with full democratic legitimacy. And this may then influence the development of the rights enshrined at the international and European level.

165. In this respect, democratic debates on constitutional amendment of fundamental right provisions on the national level may serve two functions also with regard to the European (and international) level. First it can promote interest of such issues among the citizens, which may also contribute to the awareness of European human rights law and increase its legitimacy. Second, the relationship between national and European law should not be a one-sided process, but should develop through interaction, under which national constitutional amendments on fundamental rights may also influence the future development and interpretation of the ECHR and other treaties.

### iii. The role of the judiciary in developing fundamental rights

166. The role of the courts in developing constitutional human rights is clearly greater than when it comes to institutional rules. In other words, this is the part of the national constitutional system where judicial review usually plays the stronger role in ensuring development and flexibility. Unlike the constitutional legislator, the courts are in a position to assess how the fundamental rights provisions function in practice, and to adjust them where necessary (see above, § 117).

167. Indeed, in many European countries the national courts contribute greatly to constitutional development by dynamically interpreting and applying the fundamental rights provisions. This is especially so in countries with constitutional courts. And it is even more so at the European level, where the ECtHR explicitly pursues a dynamic mode of interpretation with regard to the provisions of the ECHR – extending them in scope and detail far beyond their original content. The same applies, following an initial reluctance, to the European Court of Justice in Luxembourg with regard to fundamental rights in EU law.

168. The normative legitimacy of such judicial activism, both at the European and national levels, is a large and complex issue, which falls outside the scope of the present report, and on which there are conflicting opinions. For this study it suffices to say that it exists, and that it clearly influences the need and possibilities for national constitutional reform.

169. The Commission notes that when it comes to constitutional reform of fundamental rights, there is an important distinction between the first transformation of a given “right” into a provision of positive constitutional law (the “positivisation”), and the subsequent interpretation

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<sup>120</sup> A certain element of democracy is however added also at the European level in the system of the Council of Europe by the Parliamentary Assembly (PACE) and in the EU by the European Parliament.

and application of the same provision.<sup>121</sup> The first step should in principle preferably be done through democratic procedures, while the second legitimately belongs with the courts. However, constitutional review exercised by the courts should also be surrounded by broad public discourses where civil society is involved, too.

170. When fundamental constitutional rights are developed through judicial case law, this may be subject to debate, and in turn to calls for constitutional amendment, in order to change or adjust the new rules made by the court. It does not happen very often in practice, and when it does, it might in some cases be problematic. But in general the possibility of the constitutional legislator altering the new rights developed by the courts through the prescribed amendment procedures is legitimate unless the amendments contradict higher level constitutional law (unamendable provisions or principles), and also serves to strengthen the legitimacy of the judgments themselves. Often the result of a democratic discourse will also be that the judgments are not changed, but instead confirmed, with increased legitimacy.

171. On the European level, adjusting ECtHR case law on the interpretation of the ECHR through new treaty amendments is not a likely option. This judicial system therefore to some extent lacks the extra democratic legitimacy provided by the possibility of democratic constitutional amendment at the national level. Some may argue that this should restrain the Strasbourg Court from going too far in dynamic and activist interpretation. Others may argue that precisely because it is in practice impossible for the member state to change the treaty provisions, this makes it all the more important for the Court to provide flexibility through dynamic interpretation.

#### *Conclusions on amending national constitutional fundamental right provisions*

172. On the basis of the above, the Venice Commission holds that constitutional provisions on fundamental human rights should as a matter of principle be open to debate and amendment, whether in order to extend, confirm or even in some cases restrict their reach and contents. This however has to be done in a careful way, and subject to strict requirements so as not to weaken the function that such provisions have in protecting individual and minority interests against the will and whims of the majority. Furthermore, such national amendment processes have to take into account international legal obligations as well as the legitimate role of national and international courts in developing and protecting human rights.

### 3. Amending provisions on “sovereignty” and international cooperation

173. A small but important category of constitutional provisions are those that regulate national participation in international and European cooperation and integration. On the one hand, constitutional provisions on the “sovereignty” or “indivisibility” of the nation state may be invoked in order to restrict or limit international obligations. On the other, there are provisions explicitly allowing for the delegation of competence to international or European institutions, and laying down procedures for such cooperation. Many countries have recently amended such provisions in particular, for the purpose of membership to the European Union, NATO or the ratification of the Rome Statute.

174. International cooperation and European integration represent a means of promoting democracy, rule of law and human rights. In this context, the Commission notes that concepts such as national “sovereignty” are dynamic and complex, with different meanings in different jurisdictions, and evolving over time both at the international and national level. The same applies to the concept of delegation of national competence to international organisations. The

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<sup>121</sup> This distinction between creating new legal rights and extending old ones through interpretation is of course not always clear. But usually it is. And it is a useful point of departure.

Commission considers that it is important for national constitutional law to recognise that these are dynamic concepts, and to interpret and apply them as such.<sup>122</sup> Further, to the extent that dynamic interpretation is not possible, the national constitutional systems should be flexible enough to allow for the amendments necessary to facilitate European and international cooperation.

### **E. Parliamentary amendment procedures and popular referendums**

175. In almost all European states the fundamental arena for constitutional amendment is *parliament*. In some countries it is the *only* institution involved in constitutional change.<sup>123</sup>

176. The *executive* may be involved in the constitutional amendment procedure in one way or the other. First, the executive will often share a right of initiative with parliament. Second, it may have the competence to decide between different procedures for amendment (France), or a constitutional amendment has to be sanctioned by the head of state before being enacted.<sup>124</sup>

177. In some systems the competence of parliament to pass constitutional amendments is subject to the requirement of *multiple decisions*, taking place both before and after general parliamentary elections (see above, Section III).<sup>125</sup> In other words, two *different* parliaments should both adopt the amendment – in some states with ordinary majority in both rounds, in others with qualified majority either in one or both. The intervening election process means that the electorate is invited to consider the proposed amendments, although it may of course vary a lot to what extent this is actually an issue of importance in the campaign.

178. The Commission is of the opinion that the national parliament is the most appropriate arena for constitutional amendment, in line with a modern idea of democracy.<sup>126</sup>

179. As previously seen, the legitimacy of the constitutional amendment may be strengthened by direct involvement of the people in the amendment procedure by means of referendum (see above, Section III.C). In this regard, the Commission considers that for constitutional reform, it is equally legitimate either to include or not include a popular referendum as part of the procedure.<sup>127</sup>

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<sup>122</sup> See for example, CDL(2008)096, on Constitutional issues raised by the ratification of the Rome Statute. See also the recent discussion by the German Federal Constitutional Court on the concept of “sovereignty” in the German Fundamental Law in its judgment on the Lisbon Treaty of 28 June 2009 paras 222 et seq. The Court strongly emphasised that the principle of sovereignty is compatible with the objective of integrating Germany into an international and European legal order. At the same time, the Court laid down limits as to how much further Germany can participate in further integration before violating the national constitutional order.

<sup>123</sup> Thus for example, in Germany where the only requirement is that amendments are passed in both houses by a 2/3 majority.

<sup>124</sup> In the old monarchies, where the constitution still states that royal consent is required, this is however for the most part a primarily formal requirement, with the monarch being more or less constitutionally obliged.

<sup>125</sup> In most countries ordinary parliamentary elections will be set for a fixed date, which means that the adoption of the constitutional amendment will have to wait until after this date – which may result in different time delays, depending on what time during the parliamentary period the proposal is put forward. The alternative is to dissolve parliament in order to speed up the constitutional amendment process. If parliament in effect has to be dissolved in order to pass a constitutional amendment this will normally function as yet another (potentially high) hurdle against change – making this also dependent on who has the competence to call for new elections (parliament itself, the executive, or both).

<sup>126</sup> Cf. for example, CDL-INF(1996)002, § 17 cit.; CDL-INF(2000)013 Opinion on the constitutional amendments concerning legislative elections in the Republic of Slovenia; CDL-INF(2001)003, §25.

<sup>127</sup> Cf. CDL-INF(2001)003, §24.

180. Having said that, 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.<sup>128</sup> In some countries this is a well established and integral part of the amendment procedure. But in constitutional systems with no mention of referendum, parliament is the legitimate constitutional legislator, and should be respected as such. Representative democracy is certainly as legitimate as direct democracy on issues such as these, and may often be the more suitable procedure for in-depth discussion and evaluation.

181. A national tradition of holding referendums may contribute to the democratic legitimacy of a constitution. In the view of the Commission, in certain circumstances, it may also reduce the risk that political actors could try unilaterally to change “the rules of the game”.<sup>129</sup> Referendums can also contribute to strengthening the democratic legitimacy of the constitutional protection of human rights.

182. At the same time, the requirement that *all* constitutional amendments be submitted to referendum risks making the Constitution excessively rigid, and the expansion of direct democracy at the national level may create additional risks for political stability.<sup>130</sup>

183. The exercise of referendums should be developed carefully and not imposed from outside. At the same time, one should keep open the opportunity to initiate and develop learning processes, by for example promoting awareness on the role of referendums in ensuring constitutional legitimacy.

184. The Commission also wishes to stress that recourse to a referendum should not be used by the executive in order to circumvent parliamentary amendment procedures.<sup>131</sup> The danger and potential temptation is that while constitutional amendment in parliament in most countries requires a qualified majority, it is usually enough with simple majority in a referendum. Thus, for a government lacking the necessary qualified majority in parliament, it might be tempting instead to put the issue directly to the electorate. On several occasions the Venice Commission has emphasized the danger that this may have the effect of circumventing the correct constitutional amendment procedures.<sup>132</sup> It has insisted on the fact that it is expedient in a democratic system upholding the separation of powers that the legislature should always retain power to review the executive’s legislative output and to decide on the extent of its powers in that respect.<sup>133</sup>

185. The Venice Commission also recalls that in the last 15 years it has been confronted with several referendums on constitutional reform in countries of Central and Eastern Europe and

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<sup>128</sup> See Guidelines for constitutional referendums (CDL-INF(2001)010) Chapter II.B.3.

<sup>129</sup> Cf. CDL(1996)020 Opinion on the draft constitution of Ukraine (Conclusions).

<sup>130</sup> See CDL-AD(2009)024 § 136; CDL-AD(2004)044, Interim Opinion on constitutional reforms in the Republic of Armenia, §§ 69-70.

<sup>131</sup> Opinion on the amendments and addenda to the Constitution of the Republic of Belarus, §§ 42-44; CDL-AD(2008)015, Opinion on the draft constitution of Ukraine, §§ 106-107; CDL-AD(2009)007, Amicus curiae brief for the constitutional court of Albania on the admissibility of a referendum to abrogate constitutional amendments, §§ 8, 15-16; CDL-INF(2001)023, Interim Report on the constitutional situation of the Federal Republic of Yugoslavia, §§ 16-17 (in the context of a declaration of independence).

<sup>132</sup> See Opinion on the amendments and addenda to the Constitution of the Republic of Belarus, (CDL-INF(1996)008), §§ 42-44; Opinion on the draft constitution of Ukraine, (CDL-AD(2008)015) §§ 106-107; Amicus curiae brief for the constitutional court of Albania on the admissibility of a referendum to abrogate constitutional amendments, (CDL-AD(2009)007) §§ 8, 15-16; in the context of a declaration of independence, see also Interim Report on the constitutional situation of the Federal Republic of Yugoslavia, (CDL-INF(2001)023) §§ 16-17.

<sup>133</sup> Cf. CDL-INF(2001)003, §§24-25.

Central Asia, which have had as the main aim to strengthen the powers of the Head of State and to weaken the position of parliament – notably in the countries of Belarus, Ukraine, Kyrgyzstan, Azerbaijan and Moldova. In all these cases the Commission voiced criticism both of the texts submitted to the vote of the people and of the procedure followed.<sup>134</sup> Furthermore, the Commission has also been critical of amendments to the Constitution of Liechtenstein submitted to referendum by the Princely House in 2002.<sup>135</sup>

186. These cases indicate 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.

187. In this regard, it is also important that the relevant rules on referendum are sufficiently clear and precise.<sup>136</sup> Moreover, if and when a popular referendum is held, it is of great importance that this is done properly, in a way which ensures clarity and transparency, and which presents the electorate with clear and precise alternatives.

188. In almost all constitutions with rules on popular referendum, the requirement is an ordinary majority of the votes cast.<sup>137</sup> In some countries there is also the additional requirement that a certain percentage of the electorate has participated, or that a certain percentage of the electorate must have voted in favor.<sup>138</sup> The first alternative is a questionable criterion, since it makes it possible for opponents of reform to influence the outcome simply by staying home. As for the latter, one should be aware that unless national traditions for voter turnout are very high, such a requirement may easily amount to an almost insurmountable obstacle to constitutional change in practice. This can be problematic when there is no an alternative competence for parliament to pass amendments.

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<sup>134</sup> These cases cover the constitutional amendment proposals successfully submitted by President Lukashenka in Belarus to referendum in 1996 (CDL-INF(96)8) and 2004 (CDL-AD(2004)029), the constitutional referendum in Ukraine of 14 April 2000 (CDL-INF(2000)011), which was never implemented, the new version of the Constitution of the Kyrgyz Republic approved by referendum on 21 October 2007 (CDL-AD(2007)045) and the amendments to the Constitution of Azerbaijan approved by referendum of 18 March 2009 (CDL-AD(2009)010). A consultative referendum called by President Lucinschi of Moldova in June 1999 also had a result favourable to the strengthening of the powers of the President but was never implemented (cf. the Interim Report on Constitutional Reform in the Republic of Moldova – CDL(99)88).

<sup>135</sup> See CDL-AD(2002)32, Opinion on the Amendments to the Constitution of Liechtenstein proposed by the Princely House of Liechtenstein, in which the Venice Commission warned that the proposals would constitute “a serious step backwards”.

<sup>136</sup> See e.g. CDL-AD(2007)047, Opinion on the Constitution of Montenegro, § 127; CDL-AD(2003)002, Opinion on the Draft constitution of the Chechen Republic, §36; CDL-INF(2001)26, Opinion on the draft constitutional law of the Republic of Azerbaijan on “Safeguards for the vote of confidence to the cabinet of ministers by the Milli Majlis, §§ 5 and 18; CDL-AD(2009)010, Opinion on the draft amendments to the Constitution of the Republic of Azerbaijan, § 7. Controversies on the admissibility of the use of the referendum procedure instead of the normal amendment procedure have also arisen in established democracies, for example in France in 1962 when De Gaulle introduced the direct election of the President following a referendum organised on the basis of Article 11 of the Constitution and not through the amendment procedure under Article 89 of the Constitution.

<sup>137</sup> Among the few exceptions to this is the constitution of Montenegro, which requires a 3/5 majority of the votes cast for certain forms of constitutional change.

<sup>138</sup> In Switzerland for example, a referendum for amending the constitution demands a simple majority of the votes cast and in addition a majority of the Cantons (states). Based on this the Swiss constitution appears formally rather rigid. In practice it has however turned out to be quite flexible: Since 1848 the constitution has been amended 172 times, an average of more than once a year. In total there have been 379 referendums on constitutional amendments, 207 of which were rejected. Of these, there were only 8 cases (2 % of the total) in which the amendments were supported by the majority of the population, but not the majority of the Cantons. The requirement of a majority of Cantons is therefore in practice less significant than often presumed.

## F. Mandatory involvement of the Constitutional Court

189. A fairly rare procedural mechanism, which is however to be found in some of the new democracies, is to include mandatory and systematic review by the national Constitutional Court *before* a proposal for constitutional amendment can be adopted by parliament.<sup>139</sup> Such a requirement is to be found in particular in Azerbaijan, the Kyrgyz Republic, Moldova and Ukraine.<sup>140</sup> In Ukraine, the Constitutional Court is required to verify compliance with the constitutional provisions on amending the Constitution. In the other countries, the task of the court is not so clearly defined.

190. As far as the Venice Commission can judge, the experiences with such mandatory a priori judicial review of proposals for constitutional amendment are mixed. On the one hand, there are some examples that the constitutional courts have made useful contributions, which have improved and served as guidance for the subsequent parliamentary and public debates.<sup>141</sup> On the other hand, there are also examples that the a priori involvement of the court has brought excessive rigidity to the amendment process. This is particularly so if any (even the smallest) change made in the amendment proposal following the ruling of the court would mean that the revised version would again have to be submitted back to the court. It can also be argued that a priori judicial review of this kind constitutes a rather strict limitation on parliament – posing the risk that some proposals are cut away without even having the chance to be democratically debated.

191. The Venice Commission has also had the chance to observe that the requirement of a priori judicial review of proposals for constitutional amendment can have unintended consequences. This happened with the constitutional reform debate in Moldova in 2000, during which there was strong antagonism between parliament and the president. With the involvement of the Venice Commission it was possible to establish a joint parliamentary-presidential commission that was able to agree on a compromise text.<sup>142</sup> However, partly because the compromise proposal would have had to be sent back to the constitutional court for another round of review, the parliamentary majority decided instead to adopt a text that had previously been cleared by the court. Thus the compromise in the joint committee was thwarted, and an amendment adopted against the will of the president, which later proved to be a source of considerable political instability.

## G. Particular amendment rules for states in democratic transition?

192. Holmes and Sunstein have argued that the transition to democracy taking place at the time in Central and Eastern Europe required a more flexible form of constitutionalism than in the established constitutional democracies (see above, § 70).<sup>143</sup>

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<sup>139</sup> Such a *a priori* review of amendment proposals by the Constitutional Court is not to be confused with the much more widespread *a posteriori* review of whether the correct procedures for constitutional amendment have been respected. In some constitutional systems, the Constitutional Court may also conduct substantive a posteriori review that the amendment adopted is not in breach of “unamendable” provisions or principles, see below in section VIII B.

<sup>140</sup> See article 153 of the Constitution of Azerbaijan, article 98 of the Constitution of the Kyrgyz Republic, Article 141.2 of the Constitution of Moldova, and Article 159 of the Constitution of Ukraine.

<sup>141</sup> For Ukraine cf. the references to decisions of the constitutional court in the Opinion on the procedure for amending the Constitution of Ukraine, CDL-AD(2004)030.

<sup>142</sup> See document CDL-INF(2001)3: Co-operation between the Venice Commission and the Republic of Moldova on constitutional reform.

<sup>143</sup> See S.Holmes and C.Sunstein, *cit.*, note 2, pp. 275-306.

193. The argument for this position was, *inter alia*, that the changes in Central and Eastern Europe had come about rapidly, without giving the new democracies time to develop their own constitutional traditions based on their own special needs and characteristics. Furthermore the transformations taking place would require constitutional adjustment for many years to come. This should be done politically, through democratic amendment procedures, rather than through judicial interpretation or in other more informal ways. Holmes and Sunstein argued this “with some ambivalence”, stating that “under better conditions, a sharper split between constitutional law and ordinary law would be preferable”.

194. What actually happened was that the new democracies during the 1990s adopted different constitutional amendment models, ranging from quite strict to relatively flexible, with the majority rather balanced in the middle. As for the number of amendments, it has on the average been lower than the average over time in Western Europe. To the extent that amendments have been passed, the driving forces have for the most part been political and social, including European integration, and these have been strong enough to ensure reform even in systems with quite restrictive amendment rules (see above, § 75).

195. The Commission notes that one should be careful in advocating different amendment rules in old and new democracies. First, all democracies have at one point in history been “new”, and for most of them this happened in times of radical transition. It is not easy for a constitutional system to change its amendment rules once the first period of change has passed, and there might be quite different views on when that is. What a new democracy should aim for is therefore rather an amendment formula designed to last for a while. Second, new democracies are not only in special need of flexibility, but arguably also in more need of constitutional stability and rigidity than more established democratic systems. Third, even old and mature constitutional systems may be in need of substantive constitutional reform in order to improve effective and democratic governance.

196. In this sense, the Commission is of the opinion that there should not be special constitutional amendment rules for states “in transition”. Rather, all constitutional systems should preferably have amendment rules flexible enough to adjust for fundamental changes in politics and society, and rigid enough to ensure the requirement of constitutional legitimacy.

#### **H. Transparency and democratic legitimacy of the amendment process**

197. The constitutional amendment procedures should be drafted in a clear and simple manner, and applied in an open, transparent and democratic way. This is perhaps just as important as the finer details and requirements of the rules themselves.

198. In many countries the competence to formally propose constitutional amendments, and to initiate the procedures, is given to several actors – for example both to Parliament (a single member of a qualified minority) and to the executive. This can lead to situations in which there are a number of competing proposals, which may complicate the process. In such situations it is particularly important to have structured and balanced procedures, involving all the political actors as well as civil society, as the Venice Commission has observed on several occasions.<sup>144</sup>

199. In this sense, properly conducted amendment procedures, allowing time for public and institutional debate, may contribute significantly to the legitimacy and sense of ownership of the constitution and to the development and consolidation of democratic constitutional traditions over time. In contrast, if the rules and procedures on constitutional change are open to

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<sup>144</sup> See in particular opinions on the constitutional reform in Ukraine in 2004 (CDL-AD(2004)030) and in Armenia in 2004 (CDL-AD(2004)044).

interpretation and controversy, or if they are applied too hastily or without democratic discourse, then this may undermine political stability and, ultimately, the legitimacy of the constitution itself.

200. In this sense, the Commission has repeatedly stressed that a duly, open, informed and timely involvement of all political forces and civil society in the process of reform can strongly contribute to achieving consensus and securing the success of the constitutional revision even if this inevitably takes time and effort.<sup>145</sup> For this to happen states' positive obligations to ensure unhindered exercise of freedom of peaceful assembly, freedom of expression, as well as a fair, adequate and extensive broadcasting of the arguments by the media are equally relevant.<sup>146</sup>

## VIII. Unamendable provisions and principles

### A. General reflections on unamendability

201. The most rigid and conserving mechanism for constitutional binding is to declare the constitution or certain parts of it unamendable (referred to sometimes as "absolute entrenchment").

202. While declaring important legislation as "eternal" and not subject to change was not uncommon in the past, there are no constitutions today that proclaim themselves to be completely unamendable. Rather, providing for stricter procedures for amendments is seen as an important and integral part of constitutionalism (see above, Section V).

203. There are however constitutions that declare certain *parts* – certain provisions or principles – to be unamendable or unalterable. This is an old element of constitutionalism in some systems.<sup>147</sup> But it is by no means dominant. A large number of European constitutions do not have any rules on unamendability, and many of those who have confine this to a very small part of the constitution, or to principles which are so vague and general as not to impose in effect any actual limitation. Furthermore, unamendability is only judicable in a few of those constitutional systems that have such rules (see section 8.2). In the other systems, such rules serve more as political declarations than as legal limitations on the constitutional legislator.

204. When analysing rules on unamendability, a distinction should be drawn between provisions and principles. A relatively small number of constitutions have rules stating that certain *provisions* as such can not be altered – meaning that any proposed amendment to the wording of the provision is unacceptable. The more widespread technique is, however, to declare that certain *principles* in the constitution may not be altered. This is a far more flexible approach, which allows for a certain degree of change as long as the core elements of the principles protected are maintained.

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<sup>145</sup> See e.g. CDL-AD(2007)045, Opinion on the constitutional situation in the Kyrgyz Republic, § 57; CDL-INF(2001)023, Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia, § 5; CDL-AD(2009)010, Opinion on the draft amendments to the Constitution of the Republic of Azerbaijan, § 6; CDL-AD(2004)029, Opinion on the referendum of 17 October 2004 in Belarus, § 14; CDL-AD(2007)004, Opinion on the Constitution of Serbia, § 103-104; CDL-AD(2005)016, Second interim opinion on constitutional reforms in the Republic of Armenia, § 31; CDL-INF(2001)015, Opinion on the Amendments of 9 November 2000 and 28 March 2001 of the Constitution of Croatia, item 4 and conclusions.

<sup>146</sup> See Final opinion on constitutional reform in the Republic of Armenia, (CDL-AD(2005)025), § 42.

<sup>147</sup> The 1787 Constitution of the United States Article V allows amendment (under very strict procedures) of all parts of the constitution, with the exception "*that no state, without its consent, shall be deprived of its equal suffrage in the Senate*". The 1814 Norwegian Constitution Article 112 allows for amendment of all provisions, but subject to the requirement that "*Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution*". This may in 1814 have been envisaged by the founding fathers as a substantial entrenchment, but in practice it has never functioned as such, and the Norwegian constitutional system has undergone a number of important amendments since 1814.



205. Example of constitution that declares certain *provisions* to be absolutely unamendable is the Turkish Constitution, which states that “*The provision of Article 1 of the Constitution establishing the form of the state as a Republic, the provisions in Article 2 on the characteristics of the Republic, and the provision of Article 3 shall not be amended, nor shall their amendment be proposed*” (Article 4).<sup>148</sup> Similar examples are to be found in some other constitutions.<sup>149</sup>

206. Among the special *principles* protected by unamendability are the following: the fundamental democratic (or republican) form of government, the federal structure, sovereignty, territorial indivisibility, and certain fundamental rights and freedoms. For example Article 89 last paragraph of the French Constitution, states that: “*The republican form of government shall not be the object of any amendment*”. This does not mean that the provisions on the form of government are unamendable, but merely that reforms should not be so radical as to change the core republican form of government. Similar provisions are to be found in several constitutions, as for example in Article 139 of the Italian Constitution stating that “*The form of Republic shall not be a matter for constitutional amendment*”, and in Article 9 (2) of the Czech Constitution stating that “*Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible*”.

207. In the German Constitution Article 79 (3) states that “*Amendments to this Fundamental Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible*”. This provision was introduced as a reaction to the rise of the totalitarian Nazi-regime which was established in a formally constitutional way but completely depleted the former German constitution of substance. Its rationale was at least to repeal another constitutional coup and to deprive it of constitutional legitimacy, if not to prevent it entirely. Article 1 of the German Fundamental Law reads: “Human dignity shall be inviolable”. Article 20 refers to the principle of a federation. It does not prevent a change of the form of the federation, for instance the reduction of the number of Laender, or to alter the distribution of power between the Laender and the federal government. Constitutional amendments are only restricted to the extent that they affect the “principles” laid down in Article 1 (1) and 20. This leaves room for the constitutional legislator (although subject to review by the Federal Constitutional Court).

208. The Portuguese Constitution article 288 contains a list of 14 principles that a constitutional amendment “shall respect”, ranging from (a) National independence and the unity of the state, through (c) Citizens’ rights, freedoms and guarantees, to (o) The political and administrative autonomy of the Azores and Madeira archipelagos. The list is long and detailed, but the extent to which it functions as a legal limitation is more arguable, and it has never been invoked in order to set aside a proposed constitutional amendment.<sup>150</sup>

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<sup>148</sup> On the history and application of these provisions, see e.g. E. Ozbudun, *Judicial Review of Constitutional Amendments in Turkey*; in *European Public Law 2009*.

<sup>149</sup> See for example, the Greek Constitution states that: “*The provisions of the Constitution shall be subject to revision with the exception of those which determine the form of government as a Parliamentary Republic and those of articles 2 paragraph 1, 4 paragraphs 1, 4 and 7, 5 paragraphs 1 and 3, 13 paragraph 1, and 26*” (Article 110 (1)), the Romanian Constitution states that “*The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian State, the Republican form of government, territorial integrity, independence of the judiciary, political pluralism and official language shall not be subject to revision*” (Article 148 (1)), and in Article 148 (2) that “*Likewise, no revision shall be made if it results in the suppression of the citizens’ fundamental rights and freedoms, or the safeguards thereof*”. The Azerbaijani Constitution Article 158 states that: “*There cannot be proposed the introduction of additions to the Constitution of the Azerbaijan Republic with respect to provisions envisaged in Chapter I of the present Constitution*”.

<sup>150</sup> Since the approval of the new Portuguese Constitution in 1976 there have been seven revisions (1982, 1989, 1992, 1997, 2001, 2004 and 2005). None of these have been challenged on the basis of the “unamendable” principles in article 288.

209. The Ukrainian Constitution Article 157 (1) states that: “The Constitution of Ukraine shall not be amended, if the amendments foresee the abolition or restriction of human and citizens' rights and freedoms, or if they are oriented toward the liquidation of the independence or violation of the territorial indivisibility of Ukraine”. Similar provisions are to be found in several of the new constitutions of Central and Eastern Europe.

210. Among the special principles protected by unamendability is usually to be found one or several of the following: the fundamental democratic (or republican) form of government, the federal structure, sovereignty, territorial indivisibility, and certain fundamental rights and freedoms.

211. Some constitutions do not have absolutely unamendable provisions but provide for reinforced procedure for amending specific protected provisions that is so strict as to almost mean unamendability in practice.<sup>151</sup>

212. In systems which do have provisions on unamendability, this can often be explained by legitimate historical reasons, and often forms an integral part of the national constitutional culture.

213. The Commission considers that in a truly democratic State all the elements of the constitutional order which cannot be considered essential to the legal order of any state, must be susceptible to be amended. Furthermore, as long as the constitution contains relatively strict rules on amendment, this should in itself be seen as an adequate and necessary guarantee against abuse - if the required majority following the prescribed procedures wants to adopt reform, then this is a democratic decision which should not be limited.

214. All historical evidence indicate that for constitutions that function over any period of time, absolute entrenchment will never in practice be absolute. If circumstances change enough, or if the political pressure gets too strong, then even “unamendable” rules will be changed – one way or the other. In such situations, constitutional unamendability may even have the negative effect of unduly prolonging conflicts and thereby building up pressure and increasing the costs to society of eventually necessary reform.

215. On this basis the Venice Commission would as a general principle advocate a restrictive and careful approach to the interpretation and application of “unamendable” provisions.

216. In the light of the foregoing, the principles and concepts protected by unamendability provisions should, to a certain extent, be open to dynamic interpretation. Concepts like “sovereignty”, “democracy”, “republicanism”, “federalism” or “fundamental rights” are all concepts that over the years have been subject to continuous evolvement, both at international and national level, and which should properly continue to be so in the years to come. The notion of “democracy” and “democratic principles” is for example not understood in the 21<sup>st</sup> century as it was in the 19<sup>th</sup> or the 20<sup>th</sup> century. The same goes for concepts like “sovereignty” and “territorial integrity”, which both under international law and in most European states today have a different meaning from what they had only a few decades ago.

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<sup>151</sup> For example, article 157 of the Constitution of Montenegro states that amendment of nine specified provisions requires consent by a popular referendum in which 3/5 of the total electorate must vote for reform. Whether this is at all possible in practice will depend on the national political culture and context as well as the substance of the proposed reform. It is certainly a very high hurdle, which in effect may be almost equivalent to unamendability. By comparison, the provision in article 88 of the Danish constitution requires consent by at least 40 % of the electorate in a popular referendum for *all* constitutional amendments, which is less strict, but which still has contributed to the fact that there has not been a single constitutional amendment passed since 1953. See also, Article 158 of the Constitution of Bulgaria and Article 44.3 of the Austrian Constitution.

217. Whether or not a constitutional provision on unamendability is in *itself* amendable will depend on national constitutional law. A few such articles explicitly include themselves in the list of provisions that may not be changed, but most do not, and this may then be a question of interpretation (and potential conflict). The Commission is of the opinion that the issue of unamendability should preferably itself be regulated by the national constitutional legislator.

218. If there are no special provisions on unamendability in the constitution, then it can be inferred that all parts of the constitution are subject to possible amendment.<sup>152</sup> There may however, within the national constitutional system, still be possible to question whether some fundamental principles are protected in the sense that it would be “unconstitutional” to change them. While this issue is for each national constitutional law to decide, the Commission considers that invocation of “implicit unamendability” is not a preferable way of protecting fundamental constitutional principles.

219. As mentioned earlier, a substantial number of constitutions have provisions limiting constitutional amendment in times of war, emergency or similar situations (see above, Section III, § 52-53). While this represents a restriction on constitutional amendment, it is *temporal* by nature, and the rationale is very different from that of substantial unamendability. In this regard, the Commission wishes to emphasize that it should preferably be for the constitutional legislator itself to decide when such an extraordinary situation exists. It may be problematic if such rules result in providing the executive power with the possibility to block legitimately proposed reform by declaring a state of emergency. Thus for example, the concept of “war” should be understood restrictively, such as not including national participation in international military conflicts.

## **B. Judicial review of unamendability**

220. One thing is for a constitution to contain unamendable provisions or principles. Another question is whether such unamendability is legally enforceable, in the sense that it is subject to substantive judicial review by the courts or a special constitutional court.

221. There is no automatic link here, nor any necessary logical correlation. Even if there is no judicial review of unamendability, such rules may still serve a political and practical function as declarations, which may have a restraining effect. In other words, unamendability provisions are often not “hard law”. Whether or not they are respected is then left to practice, like many other political questions, on which there is no recourse to formal procedures for solving disputes.

222. In the European constitutional tradition, the fundamental model is that many constitutions do not have unamendable provisions or principles – and for those that have, these are often not justiciable. But there are also countries in which they are.<sup>153</sup>

223. Even in constitutions with unamendable provisions or principles it is not often explicitly stated whether this is subject to judicial review or not, and if so, on what terms. This will then be for the national constitutional system to interpret and sort out. In some countries this has not yet been put to the test, and the legal situation is unclear. In other countries, judicial review has been rejected, on the argument that the courts can not place themselves above the constitutional legislator. In other countries, judicial review of constitutional amendments is in theory possible, but has never been applied in practice.<sup>154</sup> And even in those countries which

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<sup>152</sup> The Irish constitution is precise on this point, in that it explicitly states in article 46 that “Any provision of this Constitution may be amended, whether by way of variation, addition, or repeal...”

<sup>153</sup> For a comparative study, see Kemal Gözler, *Judicial Review of Constitutional Amendments*, Ekin Press 2008. Countries that have justiciable unamendable provisions include Austria, Bulgaria, Germany and Portugal.

<sup>154</sup> Under the US constitution, it is possible to challenge whether new constitutional amendments were adopted following the correct procedures (formal review). But there are no examples of legal action on a substantive basis

do from time to time conduct judicial review of constitutional amendments, these are very rarely if at all set aside as breaching unamendable principles or provisions.

224. A system which has firmly rejected judicial review of constitutional amendments is the French, under which this is not considered within the competence of the Conseil Constitutionnel (or any other court). This was first stated by the Conseil Constitutionnel itself in 1962, when it declared that the constitutional provisions giving it competence to review legislative acts did not cover constitutional amendments, and that it therefore did not have the jurisdiction to do so.<sup>155</sup> The same point has been made in several later judgements.<sup>156</sup> But the Council has also argued along the line that because the constitutional legislator is sovereign, therefore constitutional amendments cannot be subject to review by other bodies (themselves created by the constitution).<sup>157</sup>

225. Amongst the European states to have substantive judicial review of constitutional amendment, the best known model is that of Germany. Under article 79 (3) of the German constitution amendments are inadmissible if they affect the federal division, the legislative powers of the states, "or the principles laid down in Articles 1 and 20". This is regarded as being subject to review by the Federal Constitutional Court (the Bundesverfassungsgericht), and has been assessed in a number of cases.<sup>158</sup> The review has often been rigorous. However, there are no examples of the Federal Constitutional Court actually setting aside constitutional amendments as being in breach of article 79 (3), even if on two occasions there were string dissenting minority opinions calling for this.<sup>159</sup> Such examples are however to be found in other countries, including Austria and Bulgaria, where the Constitutional Courts have invalidated constitutional amendments.<sup>160</sup>

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against any of the 27 amendments passed since 1787. The basis for such action would anyway be limited, as the unamendable contents of Article V are very limited. In Norway the formal requirement in Article 112 that new constitutional amendments must not "contradict the principles embodied in this constitution" is in principle subject to judicial review before the ordinary courts (there is no "constitutional court"), but in close to two hundred years of practice this has never been applied by the courts to set aside a constitutional amendment, even though the 1814 constitution has been amended more than two hundred times, including several major reforms. In practice it is extremely difficult to imagine the Norwegian Supreme Court declaring invalid a constitutional amendment that has been properly adopted by a 2/3 parliamentary majority because it is against the fundamental "principles" of the constitution.

<sup>155</sup> Cf. the French Constitutional Council No 1962-20DC, 6th November 1962, where it stated, *inter alia*, that. «Considering that the competence of the Conseil constitutionnel is strictly limited by the Constitution [...] the Conseil constitutionnel cannot be called upon to rule on matters other than the limited number for which those texts provide».

<sup>156</sup> Cf. *inter alia* the French Constitutional Council No 2003-469DC, 26th March 2003.

<sup>157</sup> Cf. the French Constitutional Council No 92 – 312 of 2nd September 1992, § 34: "Considérant que, dans les limites précédemment indiquées, le pouvoir constituant est souverain ; qu'il lui est loisible d'abroger, de modifier ou de compléter des dispositions de valeur constitutionnelle dans la forme qu'il estime appropriée"

<sup>158</sup> BVerfGE (Official Digest) 1, 14 – Southwestern State (1951); 3, 225 – Equality of rights (1953); 4, 157 – Saar Statute (1955); 30, 1 – Eavesdropping (1970); 34, 9 – Standardization of remuneration (1972); 84, 90 – Expropriations before 1949 (1991); 87, 181 – Financing of broadcasting (1992); 89, 155 – Maastricht (1993); 94, 12 – Exclusion of restitution (1996); 94, 49 – Safe Third Countries (1996); 95, 48 – Restitution and avoidance of transactions (1996); 102, 370 – Jehovah's Witnesses (2000); 109, 279 – Acoustic Surveillance (2004); 113, 273 – European Arrest Warrant Act (2005); Neue Juristische Wochenschrift (NJW) 2009, 2267 - Lisbon Treaty (2009).

<sup>159</sup> Cf. BVerfGE 30, 1 (33 *et seq.*) – Eavesdropping and BVerfGE 109, 279 (382 *et seq.*) – Acoustic Surveillance.

<sup>160</sup> For the Austrian example, cf. the decision of the Constitutional Court G 12/00 *et al.*, of 11 October 2001 (Bulletin 2001/1, AUT-2001-1-003). For the Bulgarian example, cf. the decision of the Constitutional Court 03/04 of 5 July 2004 (Bulletin 2004/2, BUL-2004-2-001) and the decision 06/06 of 13 September 2006 (Bulletin 2006/3, BUL-2006-3-002).

226. When assessing constitutional amendments, it appears that even in systems with established judicial review the courts will usually respect a certain margin of discretion for the constitutional legislator. In the German system, the majority of the Federal Constitutional Court stressed in the 1970 eavesdropping case that although article 79 (3) states that the principles laid down in articles 1 and 20 may not be affected by constitutional revision, this does not mean that the actual way of applying them may not be *modified* by the legislator in a manner consistent with the constitution.<sup>161</sup>

227. In its recent judgment on the compatibility of the Lisbon Treaty with the Fundamental Law, the Federal Constitutional Court reviewed the constitutional amendments made in this regard (in articles 23, 45 and 93) and found them to be in compliance with article 79 (3). The Court, however, took the opportunity to express itself in some detail on the nature and contents of the “eternity clause” in article 79 (3) and the limits it sets for Germany’s integration in the EU, even if done by way of constitutional amendment.<sup>162</sup>

228. Another country with judicial review of constitutional amendment is Turkey. In article 4 of the Turkish constitution it is stated that articles 1, 2 and 3 may not be amended, and these are broad provisions, covering a number of principles, including the federal and secular nature of the state. These concepts have also been interpreted rather widely, so that the extent of “unamendability” under Turkish constitutional law is very wide compared to European traditions. Furthermore, they are subject to judicial review by the Constitutional Court, although according to article 148 (1) only on form: “*Constitutional amendments shall be examined and verified only with regard to their form*”. In a 2008 judgment the Court nevertheless conducted substantive review of an adopted constitutional amendment that would allow for the wearing of headscarves in universities, declaring it to be in violation of the unamendable provision on the secular nature of the state in article 2. This led to great political and legal controversy.<sup>163</sup>

229. The Venice Commission holds that substantive judicial review of constitutional amendments is a problematic instrument, which should only be exercised in those countries which have a hierarchy of norms within their Constitution and where it follows from clear and established doctrine. And even there, such review should be conducted with care, allowing a margin of appreciation for the constitutional legislator.

230. This consideration rests both on principle and practice. First, with the above exception, the Venice Commission favours the fundamental idea of most European constitutional systems, that the constitutional legislator should be the sovereign and supreme master of the constitution, and not subject to review by other state organs themselves set up by the same constitution.

231. Second, the Venice Commission considers that as long as the special requirements for amendment in the constitutions of Europe are respected and followed, then these are and should be a sufficient guarantee against abuse. In most countries such decisions require a

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<sup>161</sup> Cf. 30 BVerfGE 1 (1970), where the Constitutional Court stated, inter alia, that: “The purpose of Art. 79, par. 3, as a check on the legislator’s amending the Constitution is to prevent both abolition of the substance or basis of the existing constitutional order, by the formal legal means of amendment [...] and abuse of the Constitution to legalize a totalitarian regime. This provision thus prohibits a fundamental abandonment of the principles mentioned therein. Principles are from the very beginning not “affected” as “principles” if they are in general taken into consideration and are only modified for evidently pertinent reasons for a special case according to its peculiar character... [...] Restriction on the legislator’s amending the Constitution [...] must not, however, prevent the legislator from modifying by constitutional amendment even fundamental constitutional principles in a system-immanent manner.”

<sup>162</sup> Cf. judgment of 30 June 2009, §§ 401-404, cf §§ 216-218 and 261-264.

<sup>163</sup> Cf. decision of the Constitutional Court of Turkey of 5<sup>th</sup> June 2008 cancelling Law 5735. Turkish legal scholars have argued that this was in breach of Article 148, and that the Court transgressed its jurisdiction. See *E. Özbudun*, cit., note 138.

qualified majority of the elected representatives in parliament, as well as other requirements. Constitutional decisions adopted following such procedures will in general enjoy a very high degree of democratic legitimacy – which a court should be extremely reluctant to overrule.

232. What is said so far applies to *substantive* judicial review of constitutional amendments, on the basis of “unamendability”. Quite another matter is a purely *formal* control in order to check and ensure that the amendments have been adopted following the prescribed constitutional procedures. Here the Venice Commission would strongly support all systems that allow for effective and democratic supervision of the way in which the constitutional amendment procedures have been respected and followed. And if there is reason to believe that the amendments have been passed in breach of the constitutional requirements, then this is an issue which may suitably be tried before a court.

## **IX. Conclusions on constitutional amendment**

233. The Venice Commission is of the opinion that having stronger procedures for constitutional amendment than for ordinary legislation is an important principle of democratic constitutionalism, fostering political stability, legitimacy, efficiency and quality of decision-making and the protection of non-majority rights and interests.

234. There are good reasons why constitutions should be both relatively rigid and flexible enough to be changed if necessary. The challenge is to balance these requirements in a way which allows necessary reforms to be passed without undermining the constitutional stability, predictability and protection. The final balance can only be found within each constitutional system, depending on its specific characteristics. But the balancing act can be more or less successful, depending on a general understanding of the mechanisms and principles involved.

235. The Commission considers that the main arena for procedures of constitutional amendment should be the national parliament, as the institution best placed to debate and consider such issues.

236. A good amendment procedure will normally contain (i) a qualified majority in parliament, which should not be too strict, and (ii) a certain time delay, which ensures a period of debate and reflection

237. Recourse to a popular referendum to decide on constitutional amendment should be confined to those political systems in which this is required by the constitution, applied in accordance with the established procedure, and should not be used as an instrument in order to circumvent parliamentary procedures.

238. When drafting provisions on constitutional amendment, there is a need for awareness of the potential effects of such rules; this requires both general and comparative analysis as well as a good knowledge of the national constitutional and political context.

239. Rules and procedures on constitutional amendment should be as clear and simple as possible, so as not to give rise to problems and disputes of their own.

240. Constitutional reform is a process which requires free and open public debate, and sufficient time for public opinion to consider the issues and influence the outcome.

241. Constitutional change should preferably be adopted by way of formal amendment, respecting the democratic procedures laid down in the constitution, and not through informal change. In case of a substantive informal (unwritten) changes these should preferably be confirmed by subsequent formal amendment.

242. Constitutions that were originally adopted by undemocratic regimes should be open to democratic debate, reassessment and relatively flexible amendment.

243. It should be possible to discuss and amend not only constitutional provisions on government, but also provisions on fundamental rights and all other parts of the constitution.

244. Constitutional amendments strengthening the position of the executive should be subject to special scrutiny, and changes allowing for longer periods of high office should preferably only have effect for future incumbents.

245. "Unamendable" provisions and principles should be interpreted and applied narrowly.

246. The unamendability of constitutional provisions should not be subject to substantive judicial review except in states where this is a firmly established part of constitutional law, and where there is an established hierarchy within the constitution. Such review should be carried out with care and consideration, allowing a margin of appreciation for the constitutional legislator.