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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

REVISED DRAFT REPORT

ON CONSTITUTIONAL AMENDMENT

on the basis of comments by

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

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I. Introduction

1. The present report is a study on the procedures and thresholds for national constitutional amendment in the member states of the Council of Europe. It is primarily a descriptive and analytical text. How constitutional amendment should be regulated, is a matter for the national constitutional legislator to decide. There are no common "European standards" in this field, and the Venice Commission does not propose to introduce such standards, neither in the form of guidelines nor as any sort of "best model". However, the subject does call for an analytical study as well as certain reflections of a potentially operational and normative nature.

2. In April 2007 the Parliamentary Assembly of the Council of Europe (PACE) adopted Recommendation 1791(2007) on the state of human rights and democracy in Europe. Here the 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).

3. 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.

4. As a preliminary step, the Venice Commission compiled the relevant national constitutional provisions on constitutional amendment in its Member States, Observer States and South Africa (which has a special co-operation status with the Commission). The results can be found in three separate documents: one on limits to constitutional amendments, one on rules on parliamentary procedure, and one on the use of referendums, the role of constitutional courts and the adoption of entirely new constitutions.[1] The full text of the constitutions can be found in the Venice Commission's CODICES database.[2]

5. The Venice Commission then proceeded to make a study on the subject of constitutional amendment, highlighting issues of particular interest. The report was adopted at the … Plenary Session of the Commission in Venice on … 2009, on the basis of contributions by Ms Gret Haller, Mr Fredrik Sejersted, Mr Kaarlo Tuori and Mr Jan Velaers. Preliminary discussions on earlier drafts took place in the Sub-Commission on Democratic Institutions in October 2008 and June 2009.

II. Preliminary observations

6. The question of constitutional amendment lies at the heart of constitutional theory and practice. Constitutionalism implies that the basic 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. 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.

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[1] See CDL-DEM(2008)002add, CDL-DEM(2008)002add2, and CDL-DEM(2008)002add3.

[2] http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm.

7. It is a basic 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 state ratification.

8. These are the common basic 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.

9. When constructing and applying rules on constitutional amendment, the basic challenge is to find a proper *balance between rigidity and flexibility*. This has been stated so often as to become quite a cliché, but it is nevertheless true – and the point of departure for any analysis.

10. 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?

11. 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.

12. However, there is also 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.

13. 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.

14. Both these challenges will be addressed in the following. The analysis is based on a systematic compilation of amendment provisions in the constitutions of the member states of the Council of Europe. The provisions are collected in three separate documents – one on the rules of parliamentary procedure for constitutional amendment, one on limits to constitutional amendment, and one on referendums, the role of constitutional courts and the possibility of

adopting new constitutions instead of amending the old one.[3] The compilations clearly illustrate the great variety and richness of the European constitutional tradition.

15. 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 formulation of more general standards and principles. The present request is therefore the first time that the Venice Commission has been invited to study the issue in general and in the abstract.

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. The Venice Commission is not aware that this applies to any European state at the moment. Sooner or later, however, it will. Furthermore, the present study might 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. This is the perspective from which the Venice Commission has approached the issue. The present report is a study, and it will not attempt to formulate any new European "best model" or standards for constitutional change. This is neither possible nor desirable. The report will, however, try to identify and analyse some basic characteristics and challenges of constitutional amendment, as well as offer some operative and normative reflections.

18. The scope of the present 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 (desuetude), 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. The scope of the study is limited to the formal *provisions* on constitutional amendment, not how these in practice have been interpreted and applied. The Venice 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 however an emerging literature on the subject in political science, and references will be made to this where appropriate.[4] The studies conducted indicate the important point that the formal rigidity or flexibility of a given constitution does not necessarily determine the actual threshold for constitutional change, nor the number of times that the amendment procedure has been used in practice, nor the importance of each reform (great or small). [5] Political, economic and other social factors are at least as important, and so is the national "constitutional culture" (conservative or dynamic).

[3] See CDL-DEM(2008)002add, CDL-DEM(2008)002add2, and CDL-DEM(2008)002add3.

[4] See inter alia Rasch and Congleton "Amendment procedures and Constitutional Stability", in …, with further references, and Andrew Roberts "The politics of constitutional amendment in postcommunist Europe", Const. Polit. Econ (2009) 20:99-117.

[5] 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).

20. The Venice Commission still holds that 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 actually changed. The formal rules matter – directly and indirectly.

21. The study is concerned with amendment of *existing* constitutions, not with the making of entirely new constitutions, setting aside the old system and replacing it with a new order. In other words this study only considers situations of "constitutional continuity". From a formal standpoint the distinction is readily identifiable, depending on whether the existing amendment procedures have been applied.[6] 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.[7] 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 Venice Commission will not address the question of *legitimacy* of constitutional change, as long as this is done by constitutional (as opposed to irregular and "unconstitutional") means. In country-specific reports the Commission considers itself competent and qualified to consider the legitimacy and suitability of any given constitutional amendment where so appropriate, but it will not attempt to do this on an abstract and general basis. 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.[8] Still, the Venice Commission strongly holds as a general principle that any major constitutional change should preferably be done according to the prescribed formal amendment procedures.

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 Venice Commission holds in general that the legitimacy of proposals for amendment is stronger if the constitution was originally conceived "in sin" – by undemocratic regimes, or by regimes on the way out, wanting to entrench their opinions and interests before handing over power to democratically elected successors. Still, even this point is subject to possible modification. Constitutions introduced by non-democratic means may over time prove themselves suitable for democratic and effective governance, just as perfectly democratically construed constitutions may over time be in need of radical reform. The age of today's written European constitutions varies by almost two hundred years, which make comparative analysis based on democratic origin difficult.[9]

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[6] Some constitutions prescribe different amendment procedures for partial and total revision, for example … (Spain). But in such systems, even a total revision will not formally be a "new" constitution, as long as it derives its basis from the amendment procedure laid down in the old order. More on this in section …

[7] 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…

[8] 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.

[9] 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

24. Finally, the report will not address the particular question of constitutional change in federal states, where the coexistence of federal structures and federated entities with their own constitutions entails additional challenges. Neither will it discuss the particularities of unwritten constitutional systems (the UK), nor those constitutions which are the result of international agreements and in which the people was not the constituent power (Bosnia-Herzegovina).

25. The report will, however, address the important fact that in many countries in recent years European integration, as well as basic 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), the reality in Europe in the last two decades is that it has increasingly also become a European issue as regards standards for democracy, rule of law and human rights.

26. The report will cover the following elements:

- An overview of national provisions on constitutional amendment
- General observations on constitutional amendment
- An analysis of the purpose of constitutional binding
- An analysis of the mechanisms used for ensuring constitutional binding
- An analysis of a certain important factors when striking a proper balance between constitutional rigidity and flexibility
- An analysis of the use of "unamendable" provisions and principles

27. 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

A. General comments

*28. * The text in this part (§§ 12 to 54) is a brief descriptive overview of existing provisions for constitutional amendment, which has so far not been substantially changed since it was last presented in June 2009, and which is still in need of a revision.*

*29. * One example – at the very beginning of the overview – § 12 on "adopting an entirely new constitution instead of amending it" mentions 8 countries with provisions on this – but this is not precise as far as I know, since what these provisions regulate is not "entirely new" constitutions, but rather what is normally known as "total revision", following the prescribed amendment procedures. The interesting point is that these 8 countries use a distinction between partial and total revision of the existing constitution – which is not made in other constitutions. This should be held apart from the act of making "a totally new" constitution, which is a revolutionary act, falling outside of the scope of the present constitutional system.*

*30. * The next part – "B. Limits to constitutional amendment" (§§ 13-20) also does not function so well. For the most part, these are issues dealt with in greater detail further on (under "parliamentary procedure"). But even so, this introduction should be a bit more substantial. § 13 on "temporal limitations" is too brief and probably not exhaustive – and there is a great difference between the two temporal limitations mentioned – I think this paragraph should start by stating that a number of constitutions have rules on temporal limitations as compared to*

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recent new constitution in Europe is that of … [*Which one is it? The Finish one of 2000? Several important recent amendments in other countries, but are there more recent new constitutions?*]

ordinary legislation (special delays), in the form of a certain lapse of time between readings, or the requirement of adoptions in successive parliamentary periods, or that a certain period has to lapse since the last amendment (Greece and Portugal), etcetera. Then there can be a separate paragraph on the rule that in many countries constitutions can not be amended in times of emergency – spelling out the contents of this particular principle a bit more.

*31. * Also, in §§ 14-20 on "Material limitations" a much sharper line should be drawn between in this order: (i) substantive limitations on constitutional amendment in general (as compared to ordinary legislation), which almost all states have, albeit with very different thresholds, and (ii) unamendable provisions, which only some states have, and then usually just for a few provisions or principles. As for the first category, it would be interesting to note which of the countries compiled do not have any sort of material limitations (I suspect the UK, but are there any others?). As for the second, since this is later on going to be a major issue, I think we should have a pretty exact overview of which national constitutions contain "unamendable" provisions (and which do not) – and also the extent of such "unamendability" – how many provisions does it cover, and how wide? Also, there are countries that do not have absolutely "unamendable" provisions, but still have a two-level system, so that some provisions are harder to amend than others. This might be the subject of a separate paragraph.*

*32. * And so on. The overview should not be turned into an analytical chapter – it should remain descriptive and brief – but there is certainly room for some improvements.*

B. Adopting an entirely new constitution instead of amending it

33. The constitutions of *Austria*, *Azerbaijan*, *Bulgaria*, *Montenegro*, the *Russian Federation*, *Slovakia*, *Spain* and *Switzerland* allow for the adoption of an entirely new constitution CDL-DEM(2008)002add3, II.).[10]

[This should be revised, inter alia to distinguish between "total revision" and the issue of a "entirely new constitution" – which is something different – also this paragraph should be moved down to para 53.]

C. Limits to constitutional amendments (CDL-DEM(2008)002add)

a. Temporal limitations

34. A number of constitutions provide that amendments may not be made in times of emergency (times of war, application of martial law, state of siege etc.). The *Portuguese* and the *Greek* constitutions stipulate that the 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 (CDL-DEM(2008)002add, A.).

b. Material limitations

35. In the case of material (or substantive) limitations, amendments are either excluded (unamendable provisions) or possible through qualified procedures. The specific challenges raised by unamendable provisions are dealt with more in detail below under chapter IV.

[10] In respect of the constitution of Montenegro the Commission remarked that giving Parliament such broad powers could undermine constitutional stability (CDL-AD(2007)047 Opinion on the Constitution of Montenegro).

36. Qualified procedures usually require an increased majority in Parliament, a referendum, convening a special body to adopt the amendment, the dissolution of Parliament or elections for a special body to adopt the amendment (CDL-DEM(2008)002add), etc. Material provisions requiring a qualified procedure are more frequent than unamendable provisions as such.[11]

37. The constitutions of the following countries contain material limitations to amendments: Albania, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, the Czech Republic, Estonia, France, Georgia, Germany, Greece, Israel, Italy, Kazakhstan, Latvia, Lithuania, Moldova, Montenegro, Norway, Poland, Portugal, Romania, Russia, Serbia, South Africa, Spain, Switzerland, Ukraine and the "former Yugoslav Republic of Macedonia". Such material limitations aim at protecting human rights, the rule of law, the provisions governing amendments to the constitution, territorial integrity, sovereignty of the people, the form of government, federalism, the legislature, the election system, the balance of powers, the protection of the concept of marriage or the power of regions.

38. Certain constitutions explicitly render a very limited number of provisions unamendable at any time and under any circumstances. Examples include Article 79 III of the German Constitution, Article 89 V of the French Constitution, Article 182 of the Cypriot Constitution, Article 4 of the Turkish Constitution, Article 157 of the Ukrainian Constitution, Article 112 of the Norwegian Constitution, Article 9 of the Czech Constitution, Article 288 of the Portuguese Constitution, Article 139 of the Italian constitution and Article 152 of the Romanian Constitution.

D. Procedure for amending the constitution (CDL-DEM(2008)002add2)

a. Initiative

39. In most cases there are two or more parallel avenues to initiate an amendment procedure.

i. Parliament

40. All constitutions give Parliament a right to initiate the amendment procedure. The necessary number of members of Parliament in favour of the initiative is, for example, one-fifth (Albania, Croatia, Poland), one fourth (Lithuania, Romania), one-third (Andorra, Moldova, Serbia, Ukraine), more than one-half (Georgia, Korea) or two-thirds (Japan). In Belgium every Member of Parliament has the right to initiate the amendment procedure. The *Polish* and *Romanian* constitutions also provide for the right of initiative for the Senate (upper house). In *Bulgaria* the number of members of Parliaments is one-fourth in general, but at least one-half for certain provisions.

ii. Head of State

41. Some constitutions give the Head of State a right to initiative (Azerbaijan, Bulgaria, Croatia, Georgia, Kyrgyzstan, Montenegro, Ukraine).

42. In *France*, the President may propose an amendment upon the recommendation by the Prime Minister. In *Romania* the President may initiate the amendment procedure upon the proposal by the Government. 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.

[11] See the compilation "Constitutional Provisions for Amending the Constitution – Limits to Constitutional Amendments", CDL-DEM(2008)002add.

iii. The Government

43. In some States, the Government may propose constitutional amendments (Belgium, Croatia, Liechtenstein, Moldova, Montenegro, Serbia, Slovenia, the "former Yugoslav Republic of Macedonia").

iv. Popular initiative

44. In a number of countries, the procedure may be initiated by referendum (Georgia, Liechtenstein, Lithuania, Moldova, Romania, Serbia, Slovenia, Switzerland, "the former Yugoslav Republic of Macedonia"). The constitutions of *Moldova* and *Romania* link the number of votes in favour of the constitutional amendments to the regions the voters come from, thus requiring the participation of a minimum number of voters in at least half of those regions.

v. Local authorities

45. In *Liechtenstein* the communes themselves have the right to initiate the procedure if at least four communes are in favour.

b. Involvement of the Constitutional Court (CDL(2008)086add3, III.).

46. In five countries, the constitutional court is involved in the amendment procedure (Azerbaijan, Kyrgyzstan, Moldova, Turkey and Ukraine). According to the constitution of *Azerbaijan*, the constitutional court should give its conclusions before the proposal is voted upon; however, this is solely foreseen if the changes to the text of the constitution are proposed by Parliament or the President. The *Kyrgyz* constitution apparently stipulates that the Parliament may submit a proposal to amend certain provisions of the constitution to the constitutional court for its assessment. Should the proposal be declared unconstitutional it is returned to Parliament. The constitution of *Moldova* states that proposals for constitutional amendments shall be submitted to Parliament on the condition that the constitutional court issued the "appropriate recommendation" supported by at least four out of six judges. The *Turkish* constitution indicates that the constitutional court may examine the form, but not the substance of constitutional amendments. This may be requested by the President or by one-fifth of the members of Parliament. The *Ukrainian* constitution provides that, before submitting the draft to Parliament, the constitutional court needs to verify that the proposal does not run counter to the limits to constitutional amendments as set by the constitution (see paragraph 7 above).

c. Parliamentary procedure

i. Election of a special body

47. 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.

ii. Convening a special body

48. The *Russian* constitution calls for convening the Constitutional Convention if certain provisions of the constitution shall be changed.

iii. Lapse of time between the initiative and the first reading

49. Some constitutions stipulate that a certain period of time needs to pass between the initiative and the debate in Parliament. 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. The *Georgian* constitution states that the debate shall begin after one month. The constitution of *Korea* stipulates that the vote shall take place within sixty days of the public announcement of the proposed amendment. The constitution of *Moldova* foresees that at least six months but not more than twelve months have to pass between the initiative and the vote. In *Poland* the first reading needs to take place within one month after the bill's introduction.

iv. Dissolution of Parliament

50. The constitutions of *Denmark, Iceland*, *the Netherlands* and *Spain* provide for the dissolution of Parliament after a first adoption of the amendment. The amendment then needs to be confirmed by the newly elected Parliament. In *Spain* this procedure applies only to the adoption of a new constitution or the amendment of certain constitutional provisions. In *Switzerland* both chambers are dissolved if the people demand the adoption of a new constitution.

v. Number of readings

51. The *Estonian* constitution requires three readings with an interval of at least three months between the first and the second reading and an interval of at least one month between the second and third reading. The *Italian* constitution demands two readings in each house with an interval of not less than three months. The *Finnish* constitution calls for three readings, while the *Turkish* constitution requires two readings.

vi. Voting and required majorities

(1) Unicameral systems

52. In unicameral systems the number of required votes may be, for example, three fifths, (Slovakia) or two-thirds (Albania, Andorra, Georgia, Hungary, Korea, Lithuania, Montenegro, Portugal, San Marino, Serbia, Slovenia, Ukraine, the "former Yugoslav Republic of Macedonia") of the members of Parliament. The *Finnish* constitution requires a two-thirds majority of the votes cast.

53. The constitution of *Bulgaria* stipulates that an amendment requires a majority of three-fourths of the members of the National Assembly in three ballots on three different days. A bill which received less than three-fourths but more than two-thirds of the vote may be re-introduced after not less than two months, but not more than five months. It may then be adopted by a two-thirds majority of all members of the National Assembly in one ballot. An amendment to be adopted in the Grand National Assembly requires a two-thirds majority in three ballots on three different days. The constitution of *Lithuania* requires two subsequent votes with a three-month interval. The *Azerbaijani* constitution also calls for two subsequent votes, but requires a six-month interval.

54. The constitution of Croatia requires three steps following the initiative to amend the constitution. 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.

55. The constitution of *Montenegro* also requires three steps following the initiative to change the constitution. First, the proposal to amend the constitution needs to be adopted with a two-thirds majority. Second, the draft act to change the constitution requires the adoption with a two-thirds majority. Third, the act on the change of the constitution needs to be adopted with a two-thirds majority.

56. The *Serbian* constitution stipulates that, following the decision to initiate the procedure, the proposal to amend the constitution requires a two-thirds majority of the Members of Parliament. The amendment itself requires a two-thirds majority to be adopted. For the amendment to enter into force, a law needs to be passed by a two-thirds majority. The constitution therefore also requires three steps following the initiative.[12]

(2) Bicameral systems

57. An absolute majority of the members of each house is required in *Italy*, while a two-thirds majority in each house is required in *Romania*. In *Germany*, a two-thirds majority of the members of the Bundestag (lower house) and a two-thirds majority of the votes in the Bundesrat (upper house) is required. 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. Under the *Belgian* constitution two-thirds of the members of each house need to be present. The amendment needs a two-thirds majority to be adopted.

vii. Adoption in two successive legislative periods

58. The *Finnish* constitution provides that an amendment, which has already been adopted, needs to be confirmed by the next elected Parliament to enter into force. However, an amendment may be adopted within the same legislative period if five-sixths of the members of Parliament declare it urgent. The *Greek* constitution provides that a proposal for an amendment requires a three-fifths majority in two ballots, held one month apart. However, the amendment may only be adopted by an absolute majority of the members of Parliament after the next parliamentary elections. The *Estonian* constitution provides that the constitution may be amended by two successive Parliaments. The proposal needs the majority of the members of Parliament and may then be adopted by the next Parliament with a three-fifths majority. However, a proposal may also be adopted within the same legislative period if the Parliament decides so with a four-fifths majority. The amendment then needs a two-thirds majority to be adopted.

d. Referendums (CDL(2008)086add3, I.)

i. Mandatory

59. Some constitutions require that any amendment passed by Parliament should be submitted to a referendum (Andorra, Azerbaijan, Denmark, ~~France~~, Ireland, Japan, Korea, Romania, Switzerland). Several constitutions call for a referendum as a reinforced procedure for amending provisions enjoying special protection as outlined in paragraph 7 (Iceland, Latvia, Lithuania, Montenegro, Poland, Serbia, Spain).The *Austrian* and *Spanish* constitutions provide for a referendum to adopt a new constitution.

[12] The Venice Commission questioned this very complex procedure warning of excessively rigid procedures (CDL-AD(2007)004 Opinion on the Constitution of Serbia).

ii. Optional

(1) Upon decision by Parliament

60. Some constitutions provide for the possibility for Parliament to submit the amendment to a referendum (Albania, Austria, Estonia, Italy, Liechtenstein, Slovenia, Spain). The *Italian* constitution, however, excludes a referendum if the amendment was adopted with a two-thirds majority in both houses.

(2) Upon decision by the Head of State

61. The constitution of *Kazakhstan* provides that the President of the Republic may call for a referendum on his own initiative. In *Kyrgyzstan* a referendum is called by the President of the Republic with the consent of the majority of the members of Parliament.

62. The *French* President may decide not to hold an otherwise mandatory referendum by submitting the proposal to Parliament convened in congress.

(3) By popular initiative

63. The *Italian* constitution also foresees the possibility to demand a referendum by popular initiative, but only, as stated above, if the amendment was adopted with less than a two-thirds majority in both houses.

(4) By local authorities

64. The *Italian* constitution also provides for the possibility for regional councils to demand a referendum, but only, as stated above, if the amendment was adopted with less than a two-thirds majority in both houses.

(4) Upon decision by local authorities

65. The constitution of *Liechtenstein* provides that also at least four communes may request that a referendum be held.

iii. Organization of referendums[13]

66. The *Estonian* constitution stipulates that the referendum may not be organized earlier than three months after the Parliament decided to hold it. The *Korean* and *Romanian* constitutions require that the referendum be held no later than thirty days after the amendment was passed by Parliament.

iv. Required majorities

67. Several constitutions spell out the majority needed for the amendment to be approved by referendum (Austria, Denmark, Ireland, Italy, Japan, Kazakhstan, Korea, Latvia, Liechtenstein, Lithuania, Montenegro, Poland, the Russian Federation, Serbia, Slovenia, Switzerland, Turkey). Some constitutions do not contain such rules (Andorra, Azerbaijan, Iceland, Spain), while others state expressly that this is regulated by a special law (Albania, Kyrgyzstan).

[13] 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 December 2000, MDA 2000-3-10 (CODICES).

68. A number of constitutions require a majority of more than one-half of the votes cast (Austria, Ireland, Italy, Japan, Kazakhstan, Korea, Liechtenstein, Poland, the Russian Federation, Serbia, Slovenia, Switzerland, Turkey). The constitution of *Montenegro* requires a majority of more than three-fifths of the votes cast. Some of those constitutions refer to valid votes (Italy, Liechtenstein, Turkey) while the others refer to the votes cast

69. Some of the aforementioned constitutions require a minimum participation of the electorate. The constitutions of *Kazakhstan*, *Korea*, *Latvia*, the *Russian Federation* and *Slovenia* demand a participation of more than one half of the eligible voters. More than one-half of their votes are needed for the amendment to pass. 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").

e. Veto powers

70. Two constitutions provide for a veto power of the Head of State. In *Denmark* an amendment requires the Royal Assent to enter into force. The Constitution of *Liechtenstein* stipulates that any amendment, with the exception of an amendment to abolish the monarchy, needs the assent of the Prince Regnant.

Special Procedure for total revision (CDL(2008)086add3)

71. The *Austrian*, *Azerbaijani*, *Spanish* and *Swiss* constitutions call for a referendum. In *Switzerland* and *Spain* the procedure to adopt a new constitution leads to the dissolution of Parliament. The *Russian* constitution requires convening a special body, the Constitutional Assembly. The *Bulgarian* constitution requires the election of the Grand National Assembly. In *Slovakia* and *Montenegro* there is no special procedure, since adopting a new constitution requires the same majority as amending it.
[*The issue is primarily what is usually referred to as a "total revision", which should be distinguished from a "new constitution". Also, this should be seen together with para 12*.]

Re-introduction of rejected proposals for amendments (CDL-DEM(2008)002add2)

72. Certain constitutions provide that the same proposal may not be re-submitted for a period of one year (Estonia, Kyrgyzstan, Montenegro, Serbia, Lithuania). According to the *Bulgarian* constitution, a proposal may be re-introduced after not less than two months and not later than five months if it obtained less than three-fourths, but more than a two-thirds majority in the National Assembly. According to the *Albanian* constitution one year has to elapse after the rejection by Parliament and three years after the rejection by referendum.

IV. General observations on constitutional amendment

73. 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.

74. The basic challenge of striking a good balance between constitutional rigidity and flexibility is common to all democratic states. And in almost all states this has been achieved by provisions which make constitutional amendment more difficult than changing ordinary legislation, though not impossible, given the necessary social need and political will.

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

76. 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.

77. 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 18th or early 19th 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 20th century new constitutions were introduced to replace the earlier ones.

78. 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 the US Constitution (Article V) – as 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 unalterable (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.

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

80. 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.[14]

81. 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

[14] This was in particular argued in an influential article by the American professors Stephen Holmes and Cass Sunstein, "The Politics of Constitutional Revision in Eastern Europe", in Sanford Levinson (ed.) "Responding to Imperfection. The Theory and Practice of Constitutional Amendment" (Princeton 1995) pp. 275-306.

Russia) and countries were it is relatively easier (including the Czech republic, Estonia and Slovenia).

82. 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 was in effect totally new constitutional regimes still in the great majority of cases were done following the existing formal amendment procedures in the earlier constitutions.[15] This procedure was supported by the Venice Commission (*was it? – check!*) as an instrument of peaceful reform, which also served to strengthen the principle of the rule of law.

83. The Venice Commission has not done empirical studies on how often the constitutional amendment rules in Europe are in fact applied, or how and when and following what kind of forces and initiatives. This is an area for political science, and one where there has traditionally been little research. In the last few years, there is however an emerging literature on the subject, which to some extent relies on empirical studies – both in the "old" and "new" democracies. These studies indicate that there is a certain correspondence between the rigidity/flexibility of formal rules on constitutional amendment and how often they are in practise applied, but that this should not be exaggerated, as many other factors will also influence this.

84. 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 countries, it is demonstrated that the political and social context has been far more important for the number of amendments than the rigidity or flexibility of the formal amendment rules.[16] 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.

85. 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. And the amendments passed have for the most part been such as to reduce executive power (and strengthen parliament), improve the guarantee of human rights, and ensure integration into European and international bodies. The study argues that the two main factors have been international pressure and inspiration (including the work of the Venice Commission) and a broad domestic political consensus to promote and improve liberal constitutional democracy.

86. To this the Venice Commission would add the importance both for the "old" and "new" democracies of Europe that their constitutional systems are flexible enough to allow for further peaceful cooperation and integration – and for continued and strengthened compliance with basic common European standards on democracy, rule of law and human rights.

V. Purpose of constitutional commitment

87. The Venice Commission holds that 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. 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?

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[15] 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.

[16] See Andrew Roberts "The politics of constitutional amendment in postcommunist Europe", Const. Polit. Econ (2009) 20:99-117.

88. This question lies at the hearth of "constitutionalism" and has been considered as such by constitutional and political theory for a long time. A basic 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).

89. In the same line, it has been pointed out that "Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in their day of frenzy" (Stockton), and that "a constitution is a tie imposed by Peter when sober on Peter when drunk" (Hayek). 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.[17] 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.

90. 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.

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

- political stability and predictability
- 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

92. 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.

93. 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 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.

94. Last but not least, constitutions serve the classical constitutionalist concern of protecting minority and individual rights and interests. All democratic constitutions 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 basic rights of the minority.

[17] The Ulysses metaphor has been used by many constitutional observers, but it has been particularly explored by political theorist Jon Elster in two books: *Ulysses and the Sirens*, … and then *Ulysses Unbound. Studies in Rationality, Precommittment and Constraints*. Cambridge University Press 2000.

95. 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.

96. 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.[18]

97. 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 basic rights

98. 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.

99. 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 comprehensibly, 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 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."*[19]

100. 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.

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[18] 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." (cited from Elster p. 95)

[19] Cf. Holmes and Sunstein "The Politics of Constitutional Revision in Eastern Europe", in Levinson (ed.) *Responding to Imperfection. The Theory and Practice of Constitutional Amendment* (Princeton 1995) p. 302-3.

101. 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".[20]

102. 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.

103. On this basis the Venice Commission holds 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. The final balance 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

104. 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,[21] 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 (temporal limitations)
- State ratification (in federal systems)
- Ratification by popular referendum (including state referenda in federal systems)

105. 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.

106. 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 – typically 3/5, 2/3, 3/4 or 5/6 – with 2/3 as the most widely used in Europe. The length of temporal limitations also varies, from a relatively short period between two readings in the same parliament to a requirement that the second vote can only

[20] Op.cit. p. 279, and also at p. 301 on how democratic legitimacy rests "on the foreseeable opportunity to "throw the rascals out"".

[21] Cf. Jon Elster 2000. *Ulysses Unbound. Studies in Rationality, Precommittment and Constraints*. Cambridge University Press, p. … .

take place following new general elections. State ratification in federal systems may require unanimous acceptance or the acceptance of a certain majority of the states. 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.

107. The two most widely used mechanisms in European constitutions are (i) qualified majority in parliament and (ii) time delays. Most constitutions have these two mechanisms in their amendment procedures, although designed and combined in a number of different ways. In most constitutional systems this is seen as sufficient, with no other requirements. This in effect keeps the amendment process within the parliamentary system. In quite a few countries, however, ratification outside of parliament is also required, most often by recourse to popular referendum – which may be mandatory or optional.

108. 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.

109. The main purpose and effect of a *qualified majority* requirement is to (i) to ensure broad political consensus (and thereby strengthen the legitimacy and durability of the amendment), and (ii) to 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.

110. The main purpose and effect of *time delays* (between readings or multiple decisions) is by contrast not primarily to protect minority interests, but rather to give the majority time to cool down and reconsider, and for the political passion of the moment to pass away. This also provides 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.[22]

111. 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 based more or less on single constituencies[23] the ruling 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.

112. 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. Along the same line, if a qualified majority is necessary in both chambers,

[22] 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.

[23] *What is the proper terminology for first-past-the-post systems, again? And do the Venice Commission have any opinion on whether this is good or not?* 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 situation this can function both ways – making it harder or easier to muster the qualified majority necessary to pass a constitutional amendment.

as for example in the German parliament, where constitutional amendments require 2/3 both in the Bundestag and the Bundesrat, 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.

113. 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, and of course on 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.

114. A recent study by Rasch and Congleton instead focuses on *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.[24] 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.

115. If the rules on referendum requires 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 in effect make constitutional amendment almost impossible. 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, which is reflected in the fact that the Danish Constitution has not been amended since 1953.

116. 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).

117. The general point for the Venice Commission to make is that when drafting and applying formal provisions on constitutional amendment, there is need for great awareness of the potential effects and functions of such rules – which require both general and comparative analysis as well as thorough knowledge of the national constitutional and political context. If this

[24] Cf. Rasch and Congleton "Amendment Procedures and Constitutional Stability", in Congleton and Swedenborg (eds.) *Democratic Constitutional Design and Public Policy: Analysis and Design*, Cambridge 2006. This is further developed by Rasch in "Foundations of Constitutional Stability: Veto Points, Qualified Majorities, and Agenda-Setting Rules in Amendment Procedures", paper 2008.

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

118. So far the Venice Commission 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 basic challenge introduced earlier, of striking a proper balance between constitutional rigidity and flexibility. Ideally, this balance will allow for necessary reforms, while still ensuring constitutional predictability and protection. If and when a political system achieves such a balance, this may significantly contribute to the stability and durability of the national constitutional regime.

119. Whether or not a given constitutional system has managed to strike a good constitutional balance is something that may 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.

120. In cases regarding the new democracies of Central and Eastern Europe, the Venice Commission has on occasion been faced directly or indirectly with the question of constitutional amendment procedures. The Commission has several times been critical of overly rigid procedures and warned against the difficulty of constitutional reform.[25] 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.[26]

121. While the Venice Commission considers itself competent to assess the amendment rules in any given political system, it is neither possible nor desirable to try to formulate *in abstracto* a best model for constitutional amendment. Several factors may influence the balance between rigidity and flexibility beside the formal amendment provisions. The point of balance 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 changes.

122. What the Venice Commission can do, however, is 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.

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[25] See Opinion on the Constitution of Serbia, (CDL-AD(2007)004), §§ 15, 100 and 104; Interim Report on the Constitutional Situation of the Federal Republic of Yugoslavia, (CDL-INF(2001)023), § 19; see also 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 (CDL-AD(2005)025, § 42.

[26] See Opinion on the Amendments of 9 November 2000 and 28 March 2001 of the Constitution of Croatia, (CDL-INF(2001)015 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; Opinion on the Constitution of Montenegro, (CDL-AD(2007)047, § 126); Opinion on the Draft Constitution of Ukraine, (CDL-AD(2008)015), § 105.

B. Formal and informal constitutional change

123. Formal amendment is not the only form of constitutional change, and in some systems perhaps not even the most important. As observed by Holmes and Sunstein "Every functioning liberal democracy depends on a variety of techniques for introducing flexibility into the constitutional framework". 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.

Judicial interpretation

124. 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 26 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 have been adopted by almost all the countries of Central and Eastern Europe.

125. 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.

126. 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 very difficult to reconcile with constitutional traditions in the great majority of European states.

Constitutional custom and convention

127. 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.

128. 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.

129. The Venice Commission recognises 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.

Constitutional culture

130. 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.

131. 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 in may also be the case in established systems, such as that of Sweden, where the rules on constitutional amendment are flexible and often applied.

132. 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.

133. 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

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

Origins

135. Within any given constitutional system it is impossible to assess calls for amendment without addressing the *origins* of the national constitution. Here a basic 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.

136. The Venice Commission does not hold that all constitutions that were originally adopted by way of undemocratic procedures automatically are in need of amendment. Such constitutions may over time prove themselves suitable for democratic and effective governance, and thus gain the legitimacy that they originally lacked. But the Commission does hold that such constitutions should not be too rigid, and that 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.

Age

137. The *age* of the present constitutional documents of Europe varies considerably, ranging from the 1814 Norwegian constitution to the … (*which is the most recent one – the 2000 of Finland?*). Most of constitutions date from after 1945, but many of these contain elements that are a direct continuation of far older (19th 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.

138. 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 basic 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.

139. The Venice Commission does not hold that old age is 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. The Commission does however hold that 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.

Level of detail

140. 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,[27] 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.[28] Some European constitutions distinguish between two separate categories of constitutional provisions, with different thresholds for amendment – one that includes the most basic 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 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.

Justiciability

141. 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 accept. In modern times, the constitutional tradition of Europe have "hardened" substantially, and the constitutions are now for the most part subject to judicial protection and interpretation, either by the ordinary courts 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. (Whether or not a primarily symbolic constitutional text is amended is of lesser importance). At the same time, the more 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 types of constitutional provisions

142. When analysing constitutional amendment, a fundamental distinction should be made between the two main elements – or sets of provisions – which are to be found in any constitution:

- The institutional rules – the provisions on "the machinery of government" – on the electoral system, the competences and procedures of the main state organs, separation and balance of powers, procedures for law-making, budget-passing, scrutiny, international cooperation, etc.

- The bill of rights – the catalogue of human rights, which protects the individual and regulates the basic relationship between the state and the individuals.

143. These two main categories are rather different. They raise different questions and require a different approach, not least when it comes to the question of constitutional change by formal amendment. While the formal amendment process (procedures, delays, thresholds) will usually be the same for the two categories, the context and arguments are rather different.

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[27] In his recent study on constitutional amendment in 17 countries of Central and Eastern Europe, Andrew Roberts found that the average number of articles were 143.

[28] A good example is the Swedish constitution of 1975, which is combined of … (four?) constitutional texts, of relatively great length and detail, and which have very flexible rules on amendment, that are often applied.

144. One observation is that while “bills of rights” today are relatively (and increasingly) universal, with more or less the same basic content, the provisions on the machinery of government vary much more. There is a basic model of constitutional democracy with some form of separation and balance of power between the executive, legislative and judicial branches of government – but on top of 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.

145. Furthermore, 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.

146. As regards amending provisions on the state machinery, each state is free to do so as long as certain basic 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 governance. 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 usually more difficult to introduce change by way of interpretation.

147. 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 interpretation and legal evolution. Second, they are continuously being invoked before the courts, and thereby developed through case law. And thirdly, the national constitutional bills are supplemented by international law, inter alia by the UN treaties on human rights, and in Europe by the ECHR and the EU Charter, as well as a number of other treaties. The protection offered by international law supplements the national catalogue – especially so with regard to the ECHR which can be invoked directly before the courts in almost all European countries, in addition to the national bill of rights. However, such national provisions may still be in need of amendment on the same level as provisions on governance, as will be discussed below.

148. A special category of constitutional provisions are those that regulate national participation in international and European cooperation and integration, including provisions protecting “sovereignty” and provisions on delegation of competences. As regards provisions on national “sovereignty” the Venice Commission holds that this is a complicated concept, with different meaning in different jurisdictions, which has evolved dynamically over time both in international and national law. The same goes for rules on delegation of national competence (or sovereignty). The Venice Commission holds that it is important for national constitutional law to recognise that these are dynamic concepts, and to interpret and apply them as such. Furthermore, to the extent that dynamic interpretation is not possible, the Venice Commission holds it to be of particular importance that the national constitutional systems are flexible enough to allow for the amendments necessary to facilitate European cooperation.

149. * [Draft:] On amendments strengthening the executive power – and the persons in power. When revising and reforming rules on government, it may of course be completely legitimate to want to strengthen the executive power (at the cost of the legislative) as long as this is within a democratic framework. Such amendments should however be subject to special scrutiny, to check that they are not in fact reversing democratic development.

150. * A special category is formed by those amendments that are designed to keep the incumbent head of state in power beyond the limits (number of terms) laid down in the constitution. In general, the Venice Commission is very sceptical of such amendments. And if they are proposed and adopted, then this should be after a general assessment that it is necessary to strengthen the executive, not because of the desires of any individual persons.

151. * In 2009 the Venice Commission criticised a constitutional amendment in Azerbaijan for …. (briefly summarize the assessment)

152. * If such amendments are considered, then a sound principle would be that they can only come into force with effect for future heads of state, not for the incumbent one. (Expand on this – would be a new invention, and perhaps not realistic – but would be a good idea.)

E. More on the challenges of amending basic rights

153. Since the 19th century, human rights and fundamental freedoms have been increasingly protected at the constitutional level through explicit guarantees. Even though most constitutions now contain a rather comprehensive catalogue of such rights, the question of their redefinition through constitutional amendments remains topical. Human rights are more or less based on a "natural law" idea, which gives them a high degree of universal validity and makes it difficult to change them so as to weaken the level of protection of the individuals. Human rights, however, also have another source, namely the sovereignty of the people, which ensures democratic legitimacy. These two origins proceed from different constitutional traditions: natural law tends to limit the ruling power, whereas democracy tends to legitimise it. Both dimensions are equally important and must be taken into account.

Historical development: from natural law to democratic legitimation

154. Although these two dimensions are equally important, between the two a chronological sequence can be observed. For as long as human rights were derived exclusively from religious- or metaphysically-based natural law, the question did not arise as to whether basic rights could be amended or were unalterable. All law was subordinate to the eternal validity of moral norms. Because religious- or metaphysically-based natural law had been predetermined by higher powers all that was required was to discover it accurately.

155. With the increasing tendency to couch human rights in positive law, the justification for these laws began to be grounded on a purely rational - i.e.non-religious - understanding of natural law. Indeed, natural law that claims to be merely rational, not relying on religious assumptions and beliefs, is still based on human nature and human nature is yet seen as something pre-determined, so that all that is necessary is to identify this pre-determination precisely. While religious and metaphysical grounds hardly permit rational argument, rational grounds, however, can by all means be discussed. As a consequence, the advent of the positivisation of human rights led inevitably to debate also on the content of those rights.

156. In modern, pluralistic societies it is scarcely possible to resort to pre-ordained principles regardless of whether they be religious, metaphysical or rational. The natural law legitimisation of human rights has been replaced by elements of democratic legitimation. For this reason human rights must be negotiated by the bearers of those rights in a deliberative process, and find expression in a respective catalogue of fundamental rights. Natural law is no longer the sole basis of human rights; it has been supplemented or replaced by democratic legitimation.

157. The progression from human rights based on natural law to human rights based on democratic theory was not entirely linear. In particular, the international positivisation of these rights led to a reawakening of the natural law viewpoint. The reasons for this were twofold: first, international treaties are negotiated by the governments of the State parties and then simply

ratified by national parliaments with the result that the opportunity for democratic negotiation on the national level is minimal. Second, horror at the violation of human rights during the second world war led understandably to a resurgence of natural law principles. Nevertheless, historically and in the long term, a universal shift in the rationale behind human rights from natural law to democratic theory can be observed.[29]

The meaning of democratic legitimation today

158. Human rights guarantee a sphere of private autonomy, they facilitate individual self-determination. The prerequisite for this, however, is the public autonomy which collective self-determination makes possible. Human rights have to be transformed into positive law before individuals can invoke them. The act of positivisation can only be a collective act and must be preceded by democratic debate on the question of the content of the respective law. Public autonomy and collective self-determination are therefore the prerequisites for private autonomy and individual self-determination. Collective self-determination gives human rights their democratic legitimation.

159. Debate prior to the positivisation act, and this democratic act itself, is important because it is through deliberation that the individual ensures that his rights are compatible with the rights of all the other beneficiaries. 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.[30] Defining the limits to human rights is in special need of collective - democratic - safeguards. It is the definition of those limits which ensures the compatibility of rights between individuals.

160. To return to the historical development of human rights, the democratic legitimation of these rights also indirectly includes grounds based on natural law, albeit in an exclusively deliberative form. Groups and individuals shape the deliberative process by their own understanding of the rights to be positivised which they base on what they believe is just and what unjust; what they believe is good, or what, for example, they understand by the term "freedom" - the extent of that freedom and where their freedom impacts on the freedom of others. By this means, very often an idea of "human nature" is addressed, allowing elements of natural law, which can have religious or metaphysical origins, to re-enter the debate. The difference between the historical foundations of human rights which flowed from natural law and individual natural law concepts today, lies in the fact that originally natural law was regarded as pre-determined and hence unalterable, whereas individual natural law concepts today are subjected to a testing deliberation process.

The performative significance of human rights

161. Every codification of human rights represents a negative experience, it articulates suffering and a resultant collective learning process. Viewed in this light human rights reflect injustice and fear. This is never explicitly expressed but is an important part of a politically vibrant culture where human rights can be thematised at all. This explains why one also speaks of the performative significance of human rights, which means that these rights can never be entirely and conclusively explained. The codification of fundamental and human rights must "be capable of being supplemented and extended once new experiences of

[29] See Jürgen Habermas, Über den internen Zusammenhang von Rechtsstaat und Demokratie, in: Ulrich K. Preuss, Zum Begriff der Verfassung, Frankfurt (Main) 1994, p.84 ff

[30] 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.

injustice and fear need to be articulated, or when new aspects of past narratives are discovered and recognised." [31] Just how important this collective memory of injustice and fear is, is reflected for example in the fact that future generations bear the resultant responsibility.

162. The political culture, within whose parameters the performative significance of human rights becomes a reality, presupposes an awareness by citizens not only to preserve the collective memory of injustice and fear, but also to keep reworking it by their involvement in debate about the shape of basic rights. For this reason, human rights also have a "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".[32]

International supplementation of national basic law

163. National constitutional bills of rights are supplemented by international (and supranational) law, especially by the UN treaties on human rights, and in Europe by the ECHR and the EU Charter, as well as a number of other treaties on torture, discrimination, children's rights, gender equality, national minorities, workers' rights, etc. The protection offered by international law supplements the national catalogue and may suggest that the exact content of the latter is less important – especially so with regard to the ECHR which can be invoked directly before the courts in almost all European countries, in addition to the national bill of rights. The idea of democratic legitimacy, however, emphasises the importance of the national constitutional frame to address the scope and development of human rights, where the citizens have a meaningful role to discuss and adopt human rights guarantees, including to go beyond the scope of protection resulting from ratified international treaties which represents a minimum standard only. This is less the case at the regional and universal levels, where discussions on the development of human rights through new instruments and additional protocols are primarily carried out by governmental representatives.

164. When it comes to the ECHR control mechanism, however, such shortcomings in terms of democratic legitimacy cannot be observed to the same extent as is the case at the global level. Already in the run-up to the adoption of the ECHR in 1950, the Parliamentary Assembly - then merely a "consultative assembly" - played a significant part. However, its ambitious proposals were downsized by the Committee of Ministers as, for example, with reference to individual applications and the jurisdiction of the European Court of Human Rights. The consultative assembly proposed that both elements be obligatory, but in the final version the Committee of Ministers contented themselves with a facultative arrangement.[33] The influence of the Parliamentary Assembly on the implementation of human rights within the framework of the Council of Europe did not, however, have the same effect in the member states which could have compensated for the lack of debate on basic rights at the national level. Particularly in the Member States of the European Union, interest in the Council of Europe is limited.

165. The Charter of Fundamental Rights of the European Union – even though it had not yet formally come into force – was also influenced by members of the national parliaments and the European parliament. Note, however, that the last word on the Charter lay at the level of government.

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[31] Klaus 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.

[32] Ibid., p.194.

[33] See Pieter Van Dijk / Fried van Hoof / Arjen van Rijn / Leo Zwaak, Theory and Practice of The European Convention on Human Rights, Antwerp / Oxford 2006, p.3 f.

Interdependence between the national and international level

166. The supplementation of national fundamental rights with human rights at the international level means that it is widely seen as impractical and problematic to amend national constitutional bills of rights in any way that would diminish the protection of the individual.[34] This is the case for all democratic States governed by the rule of law, and not only for those that have constitutionally enshrined the prohibition to lower the level of protection of human rights. 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 right and level of protection.[35] The possibility of denouncing the ECHR and other human rights treaties would of course remain on the table, but this seems to be a rather theoretical option. In any case, a denunciation of human rights treaties would never release a state from its obligations under *ius cogens*, such as the non-refoulement principle, the prohibition of torture or the prohibition of slavery.

167. Here one may observe yet another dimension to the interdependence between the national and international level. It concerns the citizens' permanent discussions concerning the content of basic rights. As shown above, the role of the democratic sovereign in shaping international human rights instruments is limited or non-existent. For this reason, it is all the more important that constant debate on these rights takes place at the national level. Only at the national level can basic rights be endowed with the necessary democratic legitimation. The national negotiation process, through which the bearers of those rights express their aspirations, not only endows basic rights with democratic legitimation, but raises citizens' awareness that they must not only preserve the "collective memory of injustice and fear" (§68.9), but constantly renew it.

168. In this respect, the negotiation process has a dual function: on the one hand, it promotes awareness of the significance of fundamental rights at the national level and ensures - as outlined above - the compatibility of an individual's rights with the rights of the other bearers of those rights. On the other hand, the national process also impacts on the international level where the shaping of human rights by democratic means is only possible indirectly, i.e., by governments. The process at the national level contributes to creating an awareness that the bearers of rights belong to an international human rights community, and that there is also an international "collective memory of injustice and fear" for which they must assume responsibility.

Conclusion concerning the challenges of amending basic rights

169. Basic rights must be constituted by the bearers of rights themselves in a collective - democratic - act, and adapted by an on-going process to new social realities. It is here that historical influences and experiences are voiced. Traumatic experiences in particular may lead to certain rights and their limits being developed in a specific way, so that it is necessary to evaluate precisely whether they accord with international standards. As the latter are in any case minimum requirements, it is necessary to determine in the constituent act and in the on-going process how far this minimum may be exceeded.

170. It may well be that a sovereign people orientates itself on the experiences of massive violations of human rights to which they themselves have not been exposed. This can in particular be the case if it orientates itself on the experiences of a wider community of

[34] Development the other way, increasing the protection and extending the catalogues, is certainly not as problematic, and has been widespread in recent years.

[35] 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.

States, and consequently adopts standards whose normative truths have been compiled by others. Such orientation can create a sound basis; however, this basis must be actively adopted in a constitutive act based on a democratic process of deliberation. If this does not happen, those basic rights will suffer from a deficiency of collective self-determination and democratic legitimation which, in the long term, can undermine their core.

171. The process of drafting a constitution - and therefore also constitutional amendments - does not relate to the time when basic rights are being implemented; instead it relates to the stage shaping and positivising these rights which, by necessity, precedes their implementation. Only in the positivisation phase is it possible to provide basic rights with democratic legitimation. A negotiation process on the content of human rights and fundamental freedoms by parliamentary representatives or constitutional and legislative assemblies can only take place when it leads to tangible results in shaping these laws; in other words when amendments are constitutionally admissible. And what is equally important for the citizens' perception of human rights is that the public discussion is tied to the debate in these committees.

172. On this basis the Venice Commission holds that amending basic right provisions is no less important than amending rules on governance. There is no reason to set the hurdles higher, or otherwise to make it any more difficult, to revise the catalogue of basic rights than to revise any other constitutional provisions.

F. Particular amendment rules for states in democratic transition?

173. In an article from 1995 American professors Stephen Holmes and Cass Sunstein 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. The best model in their view was that: “The procedure for constitutional modification best adapted to Eastern Europe today sets relatively lax conditions for amendment, keeps unamendable provisions to a core of basic rights and institutions, and usually allows the process to be monopolized by parliament, without any obligatory recourse to popular referenda”.[36]

174. The argument for this position was, inter alia, that the changes in Central and Eastern Europe had come about rapidly as the result of Soviet withdrawal, 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”.

175. 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. In a recent study on recent constitutional amendment in 17 of these states, Andrew Roberts argues that the variations in formal rigidity have not significantly affected the number of amendments actually adopted.[37] Indeed the number of amendments 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

[36] Cf. Stephen Holmes and Cass Sunstein, “The Politics of Constitutional Revision in Eastern Europe”, in Sanford Levinson (ed.) “Responding to Imperfection. The Theory and Practice of Constitutional Amendment” (Princeton 1995) pp. 275-306.

[37] Cf. Andrew Roberts “The politics of constitutional amendment in postcommunist Europe”, Const. Polit. Econ (2009) 20:99-117.

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.

176. The Venice Commission for its part holds 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.

177. On this basis the Venice Commission holds 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 basic changes in politics and society.

G. Parliamentary amendment procedures and popular referenda

178. In almost all European states the basic arena for constitutional amendment is the *parliament*, with the exception of a few countries where a special constitutional assembly is called for. In many countries parliament is the *only* institution involved in constitutional change. This is for example the case in Germany, where the only requirement is that amendments are passed in both houses by a 2/3 majority.

179. In some systems the *executive* is 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, the executive may have the competence to decide between different procedures for amendment (France). And in some jurisdictions a constitutional amendment will have to be sanctioned by the head of state before being enacted. 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.

180. In some system 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. In such states, the requirement is really that 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 election process also 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 inv the campaigns.

181. The Venice Commission holds that it is a good model that the national parliament is the main arena for constitutional amendment – as the institution best placed to debate such issues.

182. In a number of countries there is then a requirement or possibility of popular referendum – usually with the formal function of either ratifying or rejecting the amendment decided in parliament, but sometimes also coming before the parliamentary decision. There are four main models for this:

- constitutions with no provision on constitutional referendum
- constitutions with mandatory referendum for all constitutional amendments
- constitutions with mandatory referendum for some constitutional amendments (of some provisions, or for total revision)

- constitutions with optional referendum, usually upon the demand of either parliament, the executive (the president), or local or popular initiative of a certain size

183. The different models reflect different national constitutional traditions, and it is not for the Venice Commission to point out one or the other as the best. The main point is that for constitutional reform, it is equally legitimate either to include or not include a popular referendum as part of the procedure.

184. The Venice Commission does however hold that the use of referendums should comply with the national constitutional system as a whole. As a main rule, referenda on constitutional amendment should preferably not be held unless the constitution explicitly provides for this.[38] In constitutional systems with no mention of referenda, 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.

185. The Venice Commission would also stress that recourse to a referendum should not be used in order to circumvent parliamentary amendment procedures. 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 stressed the danger that this may have the effect of circumventing the correct constitutional amendment procedures.[39]

186. 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 transparence, and which presents the electorate with clear and precise alternatives. Again, the Venice Commission has several times criticized national rules and procedures on referenda for lacking in such clarity.[40]

187. In almost all constitutions with rules on popular referendum, the requirement is an ordinary majority of the votes cast.[41] However, 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. The first of these alterntives is a questionable criterion in the view of the Venice Commission, since it makes it possible for opponents of reform to influence the outcome simply by staying home. The second alternative – for a certain percentage of the electorate to vote in favor – does not have such

[38] See Guidelines for constitutional reforms at national level (CDL-INF(2001)010) Chapter II.B.3.

[39] 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.

[40] See Opinion on the Constitution of Montenegro, (CDL-AD(2007)047) § 127; questions linked to the referendum procedure have also been raised in the 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, (CDL-INF(2001)26, §§ 5 and 18; Opinion on the draft amendments to the Constitution of the Republic of Azerbaijan, (CDL-AD(2009)010) § 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 (in its Decision N° 62 – 20 of 6 November 1962, the French Constitutional Council declared itself not competent to review the constitutionality of this way of proceeding).

[41] 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.

negative implications. But one should be aware that unless national traditions for voter turnout are very high, then such a requirement may easily in effect amount to an almost insurmountable obstacle to constitutional change – which is problematic.

H. Transparency and democratic legitimacy of the amendment process

188. Finally, the Venice Commission would emphasize the need for constitutional amendment procedures to be drafted in a clear and simple manner, and for them to be applied in ways as open, transparent and democratic as possible. This is perhaps just as important as the finer details and requirements of the rules themselves.

189. 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 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.

190. On this basis, the Venice Commission has repeatedly stressed the need for the authorities to promote open and free public discussion on all aspects of constitutional reform, even if this inevitably takes time and effort.[42] And it will do so again in the future if necessary. There are other implications as well, including in terms of positive obligations from the state to enable 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.[43]

VIII. On absolute limits to constitutional amendment (unamendable provisions and principles)

A. General reflections on unamendability

191. The most rigid and conserving mechanism of all is to declare the constitution or certain parts of it unamendable, referred to sometimes as “absolute entrenchment”.

192. In historical times it was not altogether uncommon to declare important legislation as “eternal” and not subject to change. In modern times this is not usual, and there are no constitutions today that proclaim themselves to be completely unamendable. Rather, as earlier explained, the possibility to change the basic rules, following stricter than usual procedures, is seen as an important and integral part of constitutionalism.

193. There are however constitutions that declare some basic parts – certain particularly important provisions or principles – to be unamendable or unalterable. This is an old element of constitutionalism in some systems.[44] But it is by no means dominant. A large number of

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

[43] See Final opinion on constitutional reform in the Republic of Armenia, (CDL-AD(2005)025), § 42.

[44] 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*

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 judiciable 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.

194. When analysing rules on unamendability, an important distinction should be made 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.

195. Examples of constitutions that declares certain *provisions* to be absolutely unamendable, include for example Article 4 of 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*". Similar examples are to be found in some other constitutions, as for example in article 110 (1) of the Greek Constitution, Article 148 of the Romanian Constitution, and Article 158 of the Constitution of Azerbaijan. [45]

196. By contrast, constitutions that only declare certain *principles* to be unalterable include Article 89 last paragraph of the French Constitution, which 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*".

197. In the German Constitution Article 79 (3) states that "*Amendments to this Basic 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*". As regards the basic constitutional rules on the division of states and their legislative participation, these are unamendable in the strict sense. However, other constitutional amendments are only restricted to the extent that they affect the "principles" laid down in Article 1 and 20. This leaves more room for the constitutional legislator (although subject to review by the Constitutional Court).

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.

[45] The Greek Constitution Article 110 (1) 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*". The Romanian Constitution Article 148 (1) 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*" and in 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*".

198. 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 very long and detailed, but the extent to which this actually functions as a limitation is… (*should be checked*).

199. 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.

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

201. A special sort of unamendability is the one laid down in the Swiss Constitution Article 193 (4) that amendments must respect the principle that "The mandatory provisions of international law may not be violated". From an international law perspective ius cogens should of course always take precedent over national law, and most states would be very reluctant to pass constitutional amendments in breach of clear international obligations of this kind. It is however unusual to make this an explicit limitation on the national constitutional legislator.

202. Some constitutions that do not have absolutely unamendable provisions still distinguish between two sets of provisions, making some more difficult to change than others.[46] In some cases the requirement set for amending the most protected provisions are so strict as to almost mean unamendability in effect. Whether or not this is so is difficult to assess without going into national political context, to see whether the particular amendment rules may realistically be fulfilled or whether they in effect form an impassable hurdle.[47]

203. The Venice Commission does not hold any general view as to whether a given national system should include provisions on unamendability or not. This is in general not a necessary element of constitutionalism. On the other hand, in system which do have such provisions, this can often be explained by legitimate historical reasons, and often forms an integral part of the national constitutional culture. It should therefore not be criticised as such.

204. The Venice Commission however holds that "unamendability" is a potentially problematic constitutional instrument which, if at all, should be applied with great care and only after thorough analysis and assessment. A living constitutional democracy should in general allow for a permanent and open discussion on even its most basic principles and structures of government. Furthermore, as long as the constitution contains relatively strict rules on amendment, then this should in itself be seen as an adequate and necessary guarantee

[46] This is a fairly widespread technique, which is to be found inter alia in the constitutions of … (Spain, …., …, Estonia, …). The degree of difficulty for the best protected of the two sets of constitutional provisions differs, from only slightly more difficult to almost impossible. In some countries the only difference is that amendment of some provision require ratification by referendum, as for example under article 162 of the Estonian constitution.

[47] 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.

against abuse – and if the required majority following the prescribed procedures wants to adopt reform, then this is a democratic decision which should not be limited.

205. To this should be added that 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.

206. 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.

207. One important consequence of this is that the principles and concepts protected by unamendability provisions should to a certain extent be open to dynamic interpretation. Such provisions often invoke concepts like "sovereignty", "democracy", "republicanism", "federalism", "basic rights". These 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 21st century as it was in the 19th or the 20th 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. Another example is the notion of "federalism", which can cover a number of different state structures, changing dynamically over time.

208. 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 Venice Commission does not have any opinion on national interpretation, but it does hold as a general view that the issue of unamendability should preferably itself be within the competence of the national constitutional legislator.

209. If there are no special provisions on unamendability, then it can usually be inferred that all parts of the constitution are subject to possible amendment.[48] There may however within the national constitutional system still be possible to question whether some basic principles are protected in the sense that it would be "unconstitutional" to change them. This is for national constitutional law to decide. The Venice Commission however holds as a general view that invocation of "implicit unamendability" is not a preferable way of protecting basic constitutional principles. The Commission would for example for its part be highly critical of a national amendment that would weaken basic democratic principles – but this should be criticised on substance (and on the basis of binding international law and European standards) – not by invoking unwritten and unclear principles of implicit unamendability.

210. A substantial number of constitutions have provisions stating that amendment is not possible in times of war, emergency or similar situations.[49] This is a restriction on constitutional

[48] 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…".

[49] Examples include the Belgium Constitution Article 196 "*No constitutional revision may be undertaken or pursued during times of war or when the Chambers are prevented from meeting freely on Federal territory*"; the Spanish Constitution Article 169 "*The process of constitutional amendment may not be initiated in time of war or under any of the states contemplated in section 116*"; the French Constitution Article 89 (3) "*No amendment procedure shall be commenced or continued where the integrity of national territory is placed in jeopardy*"; the Portuguese Constitution Article 289 "*No act involving the revision of this Constitution shall be undertaken during a state of siege or a state of emergency*"; and the Estonian Constitution Article 161 (2) "*Amendment of the*

amendment – but it is *temporal* by nature, and the rationale is very different from that of substantial unamendability. The Venice Commission considers this an appropriate principle, but it would emphasize that it should preferably be for the legitimate constitutional legislator itself to decide when such an extraordinary situation exists. It may be problematic if such rules in effect provide the executive power with the competence to block legitimately proposed reform by declaring a state of emergency. The concept of "war" in such provisions should be understood restrictively, such as for example not to include national participation in international military conflicts.

B. Judicial review of unamendability?

211. 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 substantial judicial review by the courts or a special constitutional court.

212. 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.

213. In the European constitutional tradition, the basic model is that many constitutions do not have unamendable provisions or principles – and for those that have, these are usually *not* justiciable. In other words, the courts are not placed above the constitutional legislator. [50]

214. A widespread European approach can be exemplified by the French tradition, under which it is not considered within the competence of the Conseil Constitutionnel (or any other court) to review constitutional amendments. 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.[51] The same point has been made in several later judgements.[52] 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). [53]

215. In countries with special constitutional courts, their powers of review will often be explicitly listed, like in the French system. If review of constitutional amendments is not on the list, then it can usually be inferred that the court does not have such competence – although this is of course for national constitutional interpretation to decide. In those countries where judicial review is left to the ordinary courts (and the national Supreme Court), then again it is a question for national law whether the review competence includes constitutional amendments. Often it

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Constitution shall not be initiated, nor shall the Constitution be amended, during a state of emergency or a state of war". Most of the constitutions adopted in Central and Eastern Europe in the 1990s include such provisions.

[50] For a comparative study, see Kemal Gõzler, *Judicial Review of Constitutional Amendments*, Ekin Press 2008.

[51] 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».

[52] Cf. inter alia the French Constitutional Council No 2003-469DC, 26th March 2003.

[53] 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"

does not – and even if it formally does, there are few if any examples of constitutional amendments actually having been set aside by the courts. [54]

216. Amongst the few 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 Constitutional Court (the Bundesverfassungsgehricht), and has been assessed in a number of cases. [55]

217. 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 Constitutional Court stressed in the 1970 Klass 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 they may not be *modified* by the legislator in a manner consistent with the constitution. [56]

218. In Switzerland constitutional amendment is subject to the requirement that it must not violate ius cogens, and this is something that in principle may be subject to judicial review. Given the scope and extent of ius cogens, it is in principle a potentially wide basis for such review. In practice, however, the Swiss courts have exercised great restraint in reviewing the constitutional legislator.[57]

219. 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

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[54] 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 against any of the 26 amendments passed since 1787. The basis for such action would anyway be limited, as the unamendable contents of Article V is 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, even though the 1814 constitution has been amended more than two hundred times, including several major reforms. In practice it is impossible 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 basic "principles" of the constitution.

[55] *Here we should include a list of the most important cases in which the Bundesverfassungsgehricht has examined constitutional amendments on the basis of article 79 (3). But are there any examples that the BVerfG has actually set aside (partially or totally) constitutional amendments as being in breach of article 79 (3) ? If so, how many ? The recent judgment on the Lisbon Treaty – did that include an element of this ?*

[56] 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 basic constitutional principles in a system-immanent manner."

[57] Cf. Feuille fédérale 1997 I 368 and 367. [*Check with Gret Haller – and has there been any examples that a constitutional amendment has been set aside by the Swiss courts as violating ius cogens?]*

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.[58]

220. It is not for the Venice Commission to criticize on a general basis national systems that allow for judicial review of constitutional amendment. In a few countries this is seen as an integral part of the national constitutional system, with its own historical background and justification.

221. The Venice Commission however holds that substantive judicial review of the constitutionality of constitutional amendments is a problematic instrument, which neither is nor should be common in the constitutional tradition of Europe, which should only be exercised in those countries where it already follows from clear and established doctrine, and even there with the utmost care and consideration, allowing a margin of appreciation for the constitutional legislator.

222. This basic scepticism rests on considerations both of principle and practice. First, the Venice Commission favours the basic 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.

223. 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 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.

224. 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

225. * The idea in this section would be to briefly summarize the main normative reflections of the text in a concise list, which can serve as an operational basis for future assessment of rules on constitutional amendment or actual proposals for amendment. Finalizing such a list of reflections should be done after we have discussed the contents of the report, and the following is therefore only to be seen as a first indication on how it might look.

226. * Provisions establishing a certain threshold for formal constitutional amendment are a common feature of national constitutions. The Venice Commission holds this to be an important element of democratic constitutionalism, which helps ensure political stability, efficiency and quality of decision-making and the protection of non-majority rights and interests.

[58] Cf. decision of the Constitutional Court of Turkey of 5th 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.

227. * The Venice Commission holds 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. The final balance 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

228. * The Venice Commission in general holds it to be a good model that the national parliament is the main arena for constitutional amendment – as the institution best placed to debate such issues. A suitable amendment procedure would then require (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. Recourse to a popular referendum to ratify the decision should preferably be confined to those political systems in which this is laid down in the constitution, and should not be used as an instrument in order to circumvent parliamentary procedures.

229. The Venice Commission furthermore holds:

- that when drafting and applying provisions on constitutional amendment, there is need for awareness of the potential effects and functions of such rules – which require both general and comparative analysis as well as knowledge of the national constitutional and political context

- that 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.

- that constitutional reform is a process which requires free and open public, and sufficient time for public opinion to consider the issues and influence the outcome

- that 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 – and that in the case of substantive informal (unwritten) changes these should preferably be confirmed by subsequent formal amendment.

- that constitutions that were originally adopted by undemocratic regimes should be open to democratic debate, reassessment and relatively flexible amendment

- that it should be possible to discuss and amend not only constitutional provisions on governance, but also provisions on basic rights and all other parts of the constitution

- that constitutional amendments strengthening the position of the executive should be subject to special scrutiny, and that changes allowing new periods of high office should preferably only have effect for future incumbents

- that “unamendable” provisions and principles are not in general a necessary part of a stable constitutional system – and that they should be interpreted and applied narrowly

- that the unamendability of constitutional provisions should as a main rule not be subject to substantive judicial review, except in states where this is a firmly established part of constitutional law, and even there only with the utmost care and consideration, allowing a margin of appreciation for the constitutional legislator.