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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT VADEMECUM

OF VENICE COMMISSION OPINIONS AND REPORTS CONCERNING CONSTITUTIONAL PROVISIONS FOR AMENDING THE CONSTITUTION

**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.*

A. Introduction

1. This compendium is a summary of the Venice Commission's opinions referring to constitutional provisions for amending the constitution. It is structured in a thematic manner in order to present the general lines adopted by the Commission.

2. The aim of this document, known as a *vademecum*, is to serve as a source of reference for drafters of constitutions, researchers and the members of the Commission. It is based on Parliamentary Assembly Recommendation 1791(2007) on the state of human rights and democracy in Europe and the request for comments to the Council for Democratic Elections.

3. This document should serve as a basis for further discussion and for introduction of new points of view.

B. Adoption of a new constitution

"126. Article 155 addresses the case of change of the constitution in both a narrow and a broad sense, thus including the adoption of a new constitution. It is inappropriate to give parliament the power to adopt an entirely new Constitution. This power risks undermining the stability of the constitutional system."
(CDL-AD(2007)047 Opinion on the Constitution of Montenegro)

C. Constitutional Stability

"This Chapter makes it clear that the drafters want to have a rigid constitution difficult to amend. This should contribute to the stability of the constitutional system in Ukraine…
It seems excessive to require for the submission of a draft law introducing amendments to certain chapters of the Constitution the participation of two-thirds of the deputies. This is the majority required for the adoption of an amendment."
(CDL-INF(1997)002 Opinion on the Constitution of Ukraine, Chapter XIII)

"70. According to the proposed new Article 111.1, constitutional amendments may also be adopted through a qualified majority of the National Assembly (on the initiative by the President or by one-third of Deputies), without submitting them to a referendum. This proposal would make constitutional amendments more flexible, while at the same time maintaining the requirement of a referendum in issues of a fundamental nature, and is thus supported by the Commission."
(CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia)

"The constitutional amendments introduced in November 2000 modified to some extent the composition of the House of Counties, which previously allowed for former Presidents to be life-long members and also provided for up to five members to be nominated by the President but is now to be composed only of representatives elected from the Counties. This House could be seen essentially as a guardian of fundamental rights and the rights of local and regional self-government, with a right to participate through debates and opinions in a wide range of decisions of the parliament. The drafting with regard to the House of Counties was especially sophisticated with respect to the protection of fundamental freedoms, the rights of minorities and the principles of local self-government. It passed decisions on an equal footing with the House of Representatives on a series of matters, in particular in the adoption of "the laws which elaborate constitutionally determined freedoms and rights of man and citizen" (Article 81 as

amended to November 2000) – a role which may be especially important in relation to minority rights.

However, this upper house of parliament was abolished by the amendments adopted in March 2001. It may be regretted that the Constitution was revised twice in a very short space of time, with the result that full advantage could not be taken of the possibilities that the House of Counties could have offered after the first revision of the Constitution, in terms of the representation of new local and regional authorities but also of new self-governing bodies for minorities that are in the process of creation under the new law on the rights of minorities. It may also be noted that the House of Counties was abolished just before the organisation of local elections and at a time when the constitutional law of minorities had not yet been adopted. Although there is no element in the European constitutional heritage that requires the existence of an upper house of the legislature, it would be regrettable if the unicameralism instituted by the March 2001 amendments were to make future constitutional revision too easy and weaken constitutional stability".
(CDL-INF(2001)015 Opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia, 4)

D. Amendments further restricting human rights and fundamental freedoms

"112. Article 14 contains a provision which would restrict amendments to the Constitution. The provision would add to Article 103 of the existing Constitution a new paragraph 2 which would provide that no changes and amendments are to be permitted in the Constitution that restrict fundamental Constitutional human rights and freedoms, rule of law principles and a revision of the Georgian statehood. A reference to international human rights treaties to which Georgia is a party should also be included here. There are some concerns about this provision if it had the effect of freezing everything which is contained in the proposed new Charter of rights particularly when the provisions in the Charter are so detailed. However, a provision which would prevent abolition of the most fundamental rights could be desirable but it would seem important to clarify the precise ambit of the provision. Presumably the question of whether or not a proposed amendment to the Constitution comes within the terms of this new provision is to be determined by the Supreme Court but there do not seem to be any provisions which deal with the question expressly."
(CDL-AD(2005)003 Joint Opinion on a Proposal for a Constitutional Law on Changes and Amendments to the Constitutional of Georgia)

E. Referendums

"36. …Sections 3 and 4 strongly limit the possibility for constitutional amendments. These provisions, especially read together with Section 5, are not at all clear. According to section 4 Chapters 4 to 7 may be amended by the Constitutional Assembly and such decisions may be confirmed by referendum according to section 5. According to Section 3, Chapter 1 may not be amended. It seems that section 5 has to be understood, although this is not made explicit, in the sense that other chapters may be amended by referendum if two thirds of the Constitutional Assembly so propose."
(CDL-AD(2003)002 Opinion on the Draft Constitution of the Chechen Republic)

"101. An important element in the procedure to amend the Constitution is the possibility (Article 203.6) and in some cases the obligation (Article 203.7) to have it endorsed by the citizens in a referendum. It strikes the Commission that the list of constitutional amendments subject to referendum is very broad, especially since "the system of authority" as such is mentioned. In the original language of the Constitution the same term is used for the heading of Part V. If this

implies that the notion "the system of authority" in article 203.7 is to be read in connection with Part V, the result would be that every amendment of Articles 98 to 165 would have to be subject to a referendum. It would be wise to determine more precisely to which principles of the "system of authority" Article 203.7 of the Constitution applies

102. Article 203.8 provides only two basic principles for the organisation of a referendum. As the principle of the rule of law applies to referendums, further regulation will have to be enacted. The Commission draws attention to its Guidelines on the holding of Referendums [1] and especially to point II. 2. a, that states: “Apart from rules on technical matters and details (which may be included in regulations by the executive), rules of referendum law should have at least the rank of a statute.” In order to apply article 203, the Serbian legislator will have to adopt legislation on the organisation of the constitutional referendum which should be in compliance with the principles set out in the above-mentioned ‘Code of good practice on Referendums’.“
(CDL-AD(2007)004 Opinion on the Constitution of Serbia)

F. Procedures for constitutional amendments

1. Consensus

“28. In its previously mentionned opinion of 13 December 2003 (CDL-AD(2003) 019), the Venice Commission stressed the need to secure the legitimacy of any constitutional reform in Ukraine. It notes the complicated and hurried way in which a variety of constitutional amendments have been proposed, introduced, amended and voted on with each proposal being subjected to process of further amendments in the process. It wishes to stress that constitutional amendments should only be made after extensive, open and free public discussions and in an atmosphere favouring such discussions. Amendments should, as a rule, be based on a large consensus among the political forces and within the civil society.”
(CDL-AD(2004)030 Opinion on the Procedure of Amending the Constitution of Ukraine)

2. Procedures in general

“99. It strikes the Venice Commission, first of all, that the procedure drafted is very complex, as it involves two or even three steps: first, the National Assembly has to adopt, by a two-thirds majority of all deputies, a proposal to amend the Constitution (Article 203.3), and then the same National Assembly has to adopt an act amending the Constitution by a two-thirds majority of all deputies (Article 203.6). Finally, Article 205 seems to require the adoption, again by a two-thirds majority, of a further constitutional law for the enforcement of the amendments to the Constitution.100. A number of questions arise as to the significance and use of this procedure. What is the legal effect of the adoption of the proposal to amend the Constitution? What is the relationship between the votes held by the National Assembly? What is the use of the complexity that results from this procedure? The Venice Commission draws attention to the drawbacks of an excessively rigid procedure for amending the Constitution, as was experienced in Armenia and in Serbia itself under the Constitution of 28 September 1990.”
(CDL-AD(2007)004 Opinion on the Constitution of Serbia)

“The procedure for amending the Constitution looks very complex. This impression may be partly due to the fact that the wording of the relevant provisions is sometimes very clumsy.”
(CDL-INF(1996)006 Opinion on the Draft Constitution of Ukraine, Section XIII)

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

"This Chapter makes it clear that the drafters want to have a rigid constitution difficult to amend. This should contribute to the stability of the constitutional system in Ukraine. ...

It seems excessive to require for the submission of a draft law introducing amendments to certain chapters of the Constitution the participation of two-thirds of the deputies. This is the majority required for the adoption of an amendment."
(CDL-INF(1997)002 Opinion on the Constitution of Ukraine, Chapter XIII)

"38. Pursuant to the revised Article 113, in order for the referendum on the constitutional reform to be considered valid, ¼ (instead of previously 1/3) of registered voters must effectively express their vote. In the Commission's view, this simplification is to be welcomed."
(CDL-AD(2005)025 Final Opinion on Constitutional Reform in the Republic of Armenia)

"70. According to the proposed new Article 111.1, constitutional amendments may also be adopted through a qualified majority of the National Assembly (on the initiative by the President or by one-third of Deputies), without submitting them to a referendum. This proposal would make constitutional amendments more flexible, while at the same time maintaining the requirement of a referendum in issues of a fundamental nature, and is thus supported by the Commission. "
(CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia)

3. *State organs involved in the procedure*

"45. According to the new Article 96 § 2, the President would have an absolute veto power over amendments to Articles 7, 46 and 58 of the Constitution, which regulate the general division of powers as well as the respective powers of the Jogorku Kenesh and the President. This would further enhance the central position of the President within the constitutional structure. Furthermore, it remains unclear whether the provision in question would concern only cases when the Constitution is amended by Parliament (Art. 97) or even when it is amended through a referendum."
(CDL-AD(2002)033 Opinion on the Draft Amendments to the Constitution of Kyrgyzstan)

"47. As set forth above, a presidential veto against draft laws can be overruled only by a two-thirds majority. A presidential veto against constitutional amendments can be overruled only by a majority of three fourths of the total number of deputies. It is thus nearly impossible for the Jogorku Kenesh to adopt constitutional amendments reducing the powers of the President."
(CDL-AD(2007)045 Opinion on the Constitutional Situation in the Kyrgyz Republic)

"69. According to the Constitution currently in force, constitutional amendments introduced by the *qualified majority* of National Assembly shall be submitted to a popular referendum (Article 111 § 4, emphasis added). The proposed new paragraph of Article 111 of the Constitution allows for constitutional amendments to be adopted *by the majority* of the National Assembly, if the initiative originates from the President of the Republic. This difference, which strengthens the role of the President with regard to the National Assembly, does not seem to be justified."
(CDL-AD(2004)044 Interim Opinion on Constitutional Reforms in the Republic of Armenia)

"7. The revision is adopted by a two-thirds majority vote in each house, the Chamber of Deputies and Senate (Article 147.1). This is a difficult majority to attain; even the coalition supporting the government of Mr Nastase (PSD, UDMR) cannot achieve this figure. For the revision of the Constitution to be adopted, it will have to receive the approval of the opposition parties, such as the Liberal Party. That should induce the parties supporting the Government's action to open negotiations with the opposition in order to put forward a parliamentary proposal for revision if appropriate, as Article 146.1 permits. But at all events the initiative lies with the President. Nor is it certain that the Senate would agree to a reduction of its powers, at all

events not by a two-thirds majority. The revision procedure is governed by Articles 146, 147 and 148 of the Constitution. The initiative lies with the President, at the proposal of the Government or at least a quarter of the Chamber of Deputies or Senate, or at least 500,000 citizens in possession of their electoral rights (Article 146.1). Obviously the first possibility applies, as the text forwarded to the Venice Commission is the Government's proposal. The revision is adopted by a two-thirds majority vote in each house, the Chamber of Deputies and Senate (Article 147.1)."
(CDL-AD(2002)012 Opinion on the Draft Revision of the Romanian Constitution)

"The constitutional amendments introduced in November 2000 modified to some extent the composition of the House of Counties, which previously allowed for former Presidents to be life-long members and also provided for up to five members to be nominated by the President but is now to be composed only of representatives elected from the Counties. This House could be seen essentially as a guardian of fundamental rights and the rights of local and regional self-government, with a right to participate through debates and opinions in a wide range of decisions of the parliament. The drafting with regard to the House of Counties was especially sophisticated with respect to the protection of fundamental freedoms, the rights of minorities and the principles of local self-government. It passed decisions on an equal footing with the House of Representatives on a series of matters, in particular in the adoption of "the laws which elaborate constitutionally determined freedoms and rights of man and citizen" (Article 81 as amended to November 2000) – a role which may be especially important in relation to minority rights.

However, this upper house of parliament was abolished by the amendments adopted in March 2001. It may be regretted that the Constitution was revised twice in a very short space of time, with the result that full advantage could not be taken of the possibilities that the House of Counties could have offered after the first revision of the Constitution, in terms of the representation of new local and regional authorities but also of new self-governing bodies for minorities that are in the process of creation under the new law on the rights of minorities. It may also be noted that the House of Counties was abolished just before the organisation of local elections and at a time when the constitutional law of minorities had not yet been adopted. Although there is no element in the European constitutional heritage that requires the existence of an upper house of the legislature, it would be regrettable if the unicameralism instituted by the March 2001 amendments were to make future constitutional revision too easy and weaken constitutional stability".
(CDL-INF(2001)015 Opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia, 4)

4. Required votes

"99. It strikes the Venice Commission, first of all, that the procedure drafted is very complex, as it involves two or even three steps: first, the National Assembly has to adopt, by a two-thirds majority of all deputies, a proposal to amend the Constitution (Article 203.3), and then the same National Assembly has to adopt an act amending the Constitution by a two-thirds majority of all deputies (Article 203.6). Finally, Article 205 seems to require the adoption, again by a two-thirds majority, of a further constitutional law for the enforcement of the amendments to the Constitution."
(CDL-AD(2007)004 Opinion on the Constitution of Serbia)

"This Chapter makes it clear that the drafters want to have a rigid constitution difficult to amend. This should contribute to the stability of the constitutional system in Ukraine. …

It seems excessive to require for the submission of a draft law introducing amendments to certain chapters of the Constitution the participation of two-thirds of the deputies. This is the majority required for the adoption of an amendment."
CDL-INF(1997)002 Opinion on the Constitution of Ukraine, Chapter XIII)

"7. The revision is adopted by a two-thirds majority vote in each house, the Chamber of Deputies and Senate (Article 147.1). This is a difficult majority to attain; even the coalition supporting the government of Mr Nastase (PSD, UDMR) cannot achieve this figure. For the revision of the Constitution to be adopted, it will have to receive the approval of the opposition parties, such as the Liberal Party. That should induce the parties supporting the Government's action to open negotiations with the opposition in order to put forward a parliamentary proposal for revision if appropriate, as Article 146.1 permits. But at all events the initiative lies with the President. Nor is it certain that the Senate would agree to a reduction of its powers, at all events not by a two-thirds majority. The revision procedure is governed by Articles 146, 147 and 148 of the Constitution. The initiative lies with the President, at the proposal of the Government or at least a quarter of the Chamber of Deputies or Senate, or at least 500,000 citizens in possession of their electoral rights (Article 146.1). Obviously the first possibility applies, as the text forwarded to the Venice Commission is the Government's proposal. The revision is adopted by a two-thirds majority vote in each house, the Chamber of Deputies and Senate (Article 147.1)."
CDL-AD(2002)012 Opinion on the Draft Revision of the Romanian Constitution)

"38. Pursuant to the revised Article 113, in order for the referendum on the constitutional reform to be considered valid, ¼ (instead of previously 1/3) of registered voters must effectively express their vote. In the Commission's view, this simplification is to be welcomed."
(CDL-AD(2005)025 Final Opinion on Constitutional Reform in the Republic of Armenia)

G. Hierarchy of norms

"36. Section 2 of this Article provides that amendments to the Constitution may be adopted by a Constitutional Assembly without specifying in any way the composition of this Assembly. This cannot however be left to an ordinary law…."
(CDL-AD(2003)002 Opinion on the Draft Constitution of the Chechen Republic)

H. Lack of clarity

"36. Section 2 of this Article provides that amendments to the Constitution may be adopted by a Constitutional Assembly without specifying in any way the composition of this Assembly. This cannot however be left to an ordinary law. Sections 3 and 4 strongly limit the possibility for constitutional amendments. These provisions, especially read together with Section 5, are not at all clear. According to section 4 Chapters 4 to 7 may be amended by the Constitutional Assembly and such decisions may be confirmed by referendum according to section 5. According to Section 3, Chapter 1 may not be amended. It seems that section 5 has to be understood, although this is not made explicit, in the sense that other chapters may be amended by referendum if two thirds of the Constitutional Assembly so propose."
(CDL-AD(2003)002 Opinion on the Draft Constitution of the Chechen Republic)

"125. These articles have been left unchanged in respect of the draft constitution of August 2007. The Venice Commission had previously expressed the opinion that it was necessary to clarify whether the adoption of the Act on the Change of the Constitution is the final step or it has to be followed by the public hearing provided for in Art. 156. In this and other respects, Articles 155 and 156 overlap in a potentially confusing way.

126. Article 155 addresses the case of change of the constitution in both a narrow and a broad sense, thus including the adoption of a new constitution. It is inappropriate to give parliament the power to adopt an entirely new Constitution. This power risks undermining the stability of the constitutional system.

127. Article 157, read with earlier provisions, does not make clear the circumstances."
(CDL-AD(2007)047 Opinion on the Constitution of Montenegro)

"45. According to the new Article 96 § 2, the President would have an absolute veto power over amendments to Articles 7, 46 and 58 of the Constitution, which regulate the general division of powers as well as the respective powers of the Jogorku Kenesh and the President. This would further enhance the central position of the President within the constitutional structure. Furthermore, it remains unclear whether the provision in question would concern only cases when the Constitution is amended by Parliament (Art. 97) or even when it is amended through a referendum. "
(CDL-AD(2002)033 Opinion on the Draft Amendments to the Constitution of Kyrgyzstan)

J. Reference documents

1. CDL-AD(2007)047 Opinion on the Constitution of Montenegro

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

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

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

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

6. CDL-INF(1996)006 Opinion on the Draft Constitution of Ukraine

7. CDL-INF(1997)002 Opinion on the Constitution of Ukraine

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

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

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

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

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

13. CDL-INF(2001)015 Opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia