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

**PRELIMINARY DRAFT REPORT**  
**ON CONSTITUTIONAL PROVISIONS**  
**FOR AMENDING THE CONSTITUTION**

**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.*

## I. Introduction

1. In its recommendation 1791(2007) on the state of human rights and democracy in Europe, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers draw up guidelines on the elimination of democratic deficits to engage member states to take measures to remedy certain problems. The Parliamentary Assembly recommended *inter alia* examining whether the current national arrangements for changing the constitution require a sufficiently high approval level to prevent abuses of democracy. At its 2007 session the Council of Europe's "Forum for the Future of Democracy" encouraged the Venice Commission to pursue this matter. The Venice Commission's Sub-Commission on Democratic Institutions decided to carry out a study on constitutional provisions for amending the constitution.

2. The present report contains an analysis of the relevant constitutional provisions of Venice Commission member States, Observer States and South Africa, which enjoys a special co-operation status with the Venice Commission.

3. The constitutional provisions examined are compiled in documents CDL-DEM(2008)002add (limits to constitutional amendments), CDL-DEM(2008)002add2 (rules of parliamentary procedure) and CDL-DEM(2008)002add3 (referendums, adopting an entirely new constitution, role of constitutional courts). The full text of the constitutions can be found in the Venice Commission's CODICES database.<sup>1</sup>

## II. Constitutional provisions for amending the constitution

### A. Adopting an entirely new constitution instead of amending it

4. 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.).<sup>2</sup>

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

#### a. Temporal limitations

5. 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

##### i. General provisions

6. The constitution of *Norway* prohibits any amendments running counter to the "principles" of the constitution, while the constitution of *Azerbaijan* provides that an amendment must not contradict the "main text" of the constitution. The Czech constitution states that "any changes in the essential requirements for a democratic state governed by the rule of law are impermissible" (CDL-DEM(2008)002add, A.).

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<sup>1</sup> <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>

<sup>2</sup> 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)

ii. Specific limitations

7. 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.

8. Either amendments are excluded altogether or reinforced procedures apply. Those reinforced procedures 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).

9. As regards limits to lowering the level of protection of human rights, these limitations are either formulated in a general manner or refer to specific rights (DEM(2008)002add, C.).<sup>3</sup>

10. The constitution of *Bosnia and Herzegovina* sets an absolute prohibition of amending the entire catalogue of human rights and fundamental freedoms. Article X of the constitution provides that “no amendment to this constitution may eliminate or diminish any of the rights and freedoms referred to in Article II of this constitution or alter the present paragraph.” (DEM(2008)002add, C.) The wording of this catalogue, referred to in Article II of the constitution, is identical to the provisions of the European Convention on Human Rights.<sup>4</sup>

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

a. Initiative

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

i. Parliament

12. 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

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

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<sup>3</sup> The Venice Commission has expressed concern about absolute substantive limitations in respect of the protection of human rights if they have the effect of “freezing” the content of provisions, especially if they are very detailed.

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

<sup>4</sup> <http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm>.

14. 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.

iii. The Government

15. 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

16. 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

17. 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.).

18. 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

19. 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

20. 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

21. 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

22. 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

23. 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

24. 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.

25. 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 *Azeri* constitution also calls for two subsequent votes, but requires a six-month interval.

26. 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.

27. 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.

28. 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<sup>5</sup>

## (2) Bicameral systems

29. 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

30. 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

31. 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.

#### ii. Optional

### (1) Upon decision by Parliament

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<sup>5</sup> The Venice Commission questioned this very complex procedure warning of excessively rigid procedures. (CDL-AD(2007)004 Opinion on the Constitution of Serbia)

32. 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

33. The constitution of *Kazakhstan* provides that the President of the Republic may call for a referendum at 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.

34. 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

35. 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

36. 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

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

iii. Organization of referendums<sup>6</sup>

38. 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

39. 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).

40. 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

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<sup>6</sup> As regards the timetables of referendums, the Moldovan Constitutional Court declared a statute on the organization of referendums unconstitutional because the time-limits for the steps were excessive and therefore impeded the people's rights to exercise their constitutional right (Decision of the Constitutional Court of 7 December 2000, MDA 2000-3-10 (CODICES)).

41. 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

42. 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.

*D. Special Procedure for adopting an entirely new constitution instead of amending it (CDL(2008)086add3)*

43. The *Austrian*, *Azeri*, *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.

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

44. 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.

### III. Analysis

45. As can be seen from the comparison of existing constitutional provisions, there is a great variety of procedures to amend the constitution. Due to their stricter requirements, the procedures are distinct from any other legislative procedure, thus bearing witness to the extraordinary importance attached to the constitution as the foundation of the state.

46. Despite the variety of procedures, it appears that the provisions aim at realising one or more of the following objectives: a) guarantee stability, b) determine material limits to amendments, c) strengthen the constitution’s democratic legitimacy and d) protect the free decision-making process of amending the constitution.

47. The stability of the constitutional order (a) is achieved through rendering the amendment procedure more rigid, while the degree of rigidity varies considerably. Establishing rules for amending the constitution is always a search for a balance between rigidity and flexibility. States often employ the following safeguards, either alone or in combination, to prevent amendments from being achieved too easily. First, the procedure is carried out in several phases and exceptionally provides for the dissolution of Parliament. Second, an increased majority is required in Parliament. Third, the people is involved in the procedure, either through referendum or through elections following the dissolution of Parliament.

48. Most constitutions contain material limits to amendments (b), mostly protecting the foundations of the state, such as its sovereignty, its territory, its democratic institutions or the



respect for human rights. Some of these limitations seem to be the expression of a natural law concept, thus declaring some values to be of universal value. Furthermore, several constitutions protect the form of government or the prevailing division of powers. Amendments are either prohibited altogether or a reinforced procedure applies.

49. Furthermore, the provisions examined aim at strengthening the democratic legitimacy of the constitution and its amendments (c). Both overly flexible and overly rigid constitutions may lead to democratic deficits. An easy procedure might allow for the destruction of the state's democratic foundation. A rigid procedure, e. g. requiring a large majority of votes or the existence of a veto right, might render it almost impossible to amend the constitution. Thus, the people would be deprived of its right to democratic participation, either through their elected representatives or through a referendum. Furthermore, material limitations which only serve the purpose of preserving the existing political situation or the division of power impair the democratic character of the constitution. In a truly democratic state, all provisions which are not essential to the legal order of the state must be amendable.

50. The fourth identified objective (d) of the provisions at issue is to guarantee the free decision-making process by ensuring that those taking the decision may do so freely and after an extensive public debate. Therefore, a number of constitutions contain temporal limitations prohibiting amendments in times of war or emergencies. In this context, it might however be useful to draw attention to provisions such as Article 15 of the European Convention on Human Rights or Article 4 of the International Covenant on Civil and Political Rights, which indicate that under such circumstances derogation is possible, if certain substantive and procedural conditions are met.

51. In states which completed the transition towards democracy only recently, it is necessary to protect the newly established democratic order against any retrograde steps. However, as soon as the new constitutional tradition has been firmly established, those restrictions may prove problematic. Provisions "carved in stone" always carry the notion of natural law pretending that they enjoy universal validity and do not need to be redefined or developed through the democratic process. Yet democracy is a constant questioning of the existing in order to find better solutions. Therefore, democracy needs a certain constitutional dynamism. However, constitutional provisions should only be assessed in light of the historical and geographical context. Two identical provisions contained in two constitutions may prove to be beneficial to one state, but may be an obstacle to the development of democracy in another state.

52. A state's constitutional tradition is also not static, but requires room to develop. A constitution might have been adopted under such turbulent circumstances that a certain period of time has to elapse before a constitutional tradition may be born. This possibility of development has been one of the reasons for the rich constitutional heritage ("patrimoine") in Europe.

53. In light of the great variety of constitutional provisions and existing traditions it does not seem appropriate for the Venice Commission to adopt substantial guidelines at this stage, neither of a "positive" nor a "negative" nature. The Venice Commission can only re-affirm that the constitutional provisions should strike a balance between rigidity and flexibility to avoid democratic deficits.