Strasbourg, 27 May 2009

CDL-DEM(2009)004*
Eng.Only

Study 469 / 2008

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

COMMENTS

ON CONSTITUTIONAL PROVISIONS FOR AMENDING THE CONSTITUTION

by

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1. Purpose of the report – what are the challenges?

The preliminary draft report of 10 October 2008 “On constitutional provisions for amending the constitution” sums up the vast underlying material that has been collected in a clear and concise manner, which gives a good overview of the great variety of national norms for constitutional amendment, both as regards procedures and the substantive threshold. In contrast, the final chapter on “Analysis” (paras 45-53) is fairly brief. There are several good observations, but on the whole it seems a bit unfinished. Clearly the material at hand gives a basis for some further reflections, and perhaps also some more operational observations.

To one who has not been involved in the process, it is a bit unclear what the purpose and function of this report is meant to be. What if any are the underlying challenges, and to what extent should we try to address them more directly than what is done so far? Who are the potential receivers of this report?

According to the preliminary draft report, the recommendation from the PACE asked, inter alia, 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? Though this is certainly a question that might be asked in any of the member states, it is most important with regard to the “new democracies”, and other countries which have recently undergone constitutional reform, and which are still in the process of developing and cementing a new constitutional system and culture.

While I agree with the draft that it will be difficult for the Venice Commission to draw up substantial “guidelines” for constitutional amendment, based on some kind of “best model” approach, I still think we might attempt to formulate some more operational reflections on what is the best balance between constitutional rigidity and flexibility in any given state at any time of its political and constitutional development.

Basically, there seems to be two potential challenges:

1. That the rules on constitutional change are too strict and rigid. The procedural and/or substantial threshold is too high, creating a lock-in, rendering it impossible to make amendments that might be necessary or at least highly desirable. This means too strict confinements on democratic development, and a potential disenfranchisement of the majority that wants change.

2. That the rules on constitutional change are too lax and flexible. The procedural and/or substantial threshold is too low, creating instability, lack of predictability and unnecessary political conflict. Core values are not sufficiently protected. The issue of constitutional reform becomes in itself a subject of continuous political debate, and the political actors waste time arguing perpetually over this, instead of getting on with the business of governing within the existing framework.

The PACE recommendation seems mostly concerned with the second challenge. Are the new constitutions that have been adopted in recent years in a number of European states sufficiently strict to create strong and stable foundations for good governance and democratic development? Or is too much time and energy still spent arguing over what should be the rules of the game?

By way of contrast, it was argued during our debate on the draft report that in practice the main and most widespread challenge is the opposite. In many states, including many of the “new democracies”, the constitutions are too strict and rigid. They have typically been adopted during a time of political transition, and contain rules that may have seemed wise and necessary at the time, but which are less than optimal as democracy develops and matures. States that were mentioned in this regard include Armenia, Azerbaijan and Serbia.

If this is indeed the factual situation, then that is interesting, and should be further explored and analyzed. We might draw on the collective knowledge of the VC members and challenge them to give their thoughts on the subject, with examples from their own countries. One might also consider case studies, of states that appear to have a less than optimal balance between constitutional stability and flexibility.

For my part, I might include some reflections on the Scandinavian experience, which is interesting, since the otherwise quite similar three neighboring countries of Denmark, Norway and Sweden have very different procedures and material rules on constitutional change – ranging from comparatively very easy in the 1975 Swedish constitution to effectively impossible in the 1953 Danish constitution, with the 1814 Norwegian constitution somewhere in the middle.

We should be aware that the subject of this report from a theoretical point of view is a very big issue, which goes to the heart of “constitutionalism”. Why should democratic states impose binding restrictions on themselves by way of written constitutions that cannot be altered by ordinary majority voting, and what should be the character and extent of such restrictions? Is there an optimal model for this, and if not, might one at least formulate some normative observations?

Any attempt at doing this is really a very big ambition, and if we are to do so we should at least to some extent go into the constitutional theory. We should be aware that this is a core question, which has been studied and debated for a long time. Even if the approach of the VC is more practical and operational, and even if our aim should not be to produce a scholarly work, we still have to relate to the underlying theories if we are to produce anything of interest. Here again we might draw upon the collective knowledge of the VC members.

For my part, I would like to draw the attention to the work of the Norwegian social and political theorist Jon Elster, who is currently professor at Columbia and Collège de France, and who has written extensively on the subject of constitutional precommitment (including both “self-binding” and the binding of others) as well as “unbinding” (change). His book “Ulysses Unbound” (Cambridge University Press 2000) deals with the subject in length in Chapter II on “Ulysses Unbound: Constitutions as Constraints” (pp 88-174). This is a highly interesting analysis, which has a lot to offer as a theoretical foundation for the more operative and practical reflections that I suggest we should try to formulate.

2. The balance between constitutional rigidity and flexibility

The main element in the chapter on analysis so far is the introduction of a concept of “balance between rigidity and flexibility”. It is stated, inter alia, that establishing rules for amending the constitution “is always a search for a balance between rigidity and flexibility” (47), and in the final paragraph (57) it is somewhat defensively said that the only thing the Venice Commission can do on this subject is to “reaffirm that the constitutional provisions should strike a balance between rigidity and flexibility in order to avoid democratic deficits”.

While I think I agree on the idea of a “balance” between opposing interests and requirements, this is surely something that would benefit from further elaboration. If this is a question of “balance”, what are the factors being balanced against each other? What forces influence the

"balance" beside the formal provisions on amendment? How does the point of balance shift in time and space? Clearly this balance is not static, but a dynamic concept, which may shift over time. And the point of balance will be different from state to state, depending on the political and historical context, the constitutional culture, the nature and status of the constitution, enforceability, and a number of other factors.

3. The aim behind provisions on constitutional amendment

According to para 46 of the draft report, the aims behind procedural provisions on constitutional amendment appear to be one or more of the following:

a) Guarantee stability
b) Determine material limits to amendment
c) Strengthen democratic legitimacy
d) Protect the free decision-making process of amending the constitution

Again, this is something we might want to consider further, and it seems that some of the aims stated relate to different levels of objective. The first is a substantive purpose. The second in contrast refers to the content of the amendment rules. The third is open to argument, that procedural and substantive thresholds to amendment by way of ordinary majority voting might not be the most "democratic", in the way this concept is usually understood. The fourth is an ancillary objective, that there should be provisions safeguarding the amendment process as such.

In contrast, the approach of Elster is to ask why a political system should want to enter into constitutional "precommitment", by laying down rules and procedures in the constitution that may not be altered by ordinary majority vote. Among the main "reasons for precommitment" that he lists are:

a) Preempt political passion[1]
b) Overcome partisan interest
c) Increase efficiency of decision-making (by extending the time horizon, reducing transaction costs and eliminating cycles)

While it is difficult to identify one set of "correct" reasons for constitutional precommitment and resistance to change, it would be constructive to discuss this further, for example by contrasting the objectives identified in the draft report with those argued by Elster. It would then be necessary also to identify and discuss the objections and obstacles to such precommitment, in order to describe also the contents of the other scale in the "balancing act". Again, this is something Elster discusses thoroughly, distinguishing between situations where precommitment is not possible in practice (constitutions are not necessarily as binding as they might seem), and situations where precommitment is not desirable – because it conflicts either with efficiency or with democracy.

[1] This is the reason for precommitment which may be the one most widely referred to in constitutional theory. Elster refers to the view 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", and quotes such remarks as "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 "a constitution is a tie imposed by Peter when sober on Peter when drunk" (Hayek), see Elster pp 88-89.

4. Main legal instruments for restricting constitutional change

The overview of national provisions in part II of the draft report is outlined in a way which categorizes the different obstacles to constitutional change that are typical of provisions on constitutional amendment. This is done in a clear and systematic manner. It might however be constructive to try to analyse this further, to identify and describe the main categories and the main combinations.

Again we might draw inspiration from Elster, who identifies six “main hurdles for constitutional amendments”:

- absolute entrenchment
- adoption by a supermajority in parliament
- requirement of a higher quorum than for ordinary legislation
- delays
- state ratification (in federal systems)
- ratification by referendum

Elster elaborates each of these (pp 101-103), and how they are often combined in different ways. According to him, the two most important and widespread devices are those of *supermajorities* and *delays* – but he then points out that the rationales for using the one or the other are quite different. This is an observation which is interesting in our context, and which we might explore.

5. Challenges of comparative constitutional law

The present study illustrates the challenges of comparative constitutional law, which I suppose are familiar to many VC projects. These are briefly mentioned in the last part of paragraph 51 in the draft report, which refers to the difficulty of comparison, and observes that identical provisions on amendment in two constitutions may prove to be beneficial in one of the states, and an obstacle to democratic development in the other. But this point might be elaborated a bit more, and introduced earlier on in the analysis.

When trying to assess and compare different national constitutional requirements, there are a number of challenges. First, it is difficult to compare national constitutional provisions without going into national legal interpretation of these provisions, and the national political and legal context within which they operate. Furthermore, constitutions differ widely in a number of ways that make comparison difficult – with regard to the level of detail, the way of wording, how legally operational they are (degree of justiciability), how open to dynamic interpretation, to what extent they are supplemented by constitutional conventions, and etcetera. The national “constitutional culture” is a vague and difficult concept, but arguably as important as the written text itself in order to understand the contents and function of any given constitution, and the possibility for change.

The formal rules on amendment in any given constitution therefore do not necessarily indicate the actual threshold for change, which will depend not only on the political context in each state, but also on the national constitutional culture – whether this is dynamic or conservative. Still it might as a general observation be held that the stricter the formal requirements for constitutional change, the less amendments will be made, and the more rigid the system.

6. *Amending rules on governance versus amending basic rights*

When analyzing 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:

1. 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, and etcetera.

2. The bill of rights – the catalogue of "human rights", which protects the individual and regulates the basic relationship between the state and the citizens.

These two main elements are rather different. They raise different questions, and they 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 quite different.

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 & 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 vast smorgasbord of different national solutions offered by comparative constitutional law.

Furthermore, institutional provisions are usually more clear and 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. There is a certain analogy to rules on sports games. The fact that the rules are clear, and known beforehand by all the players, is arguably as important as their substantial content, at least as long as they fulfill basic democratic standards. The same cannot be said about fundamental rights – where content is what matters. Therefore the context and arguments for and against constitutional change are different between the two sets of provisions.

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 many "mature" political systems, as it is always at least in theory possible to further perfect a system of governance. The main factors to be weighted 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, both because the institutional provisions are more clear-cut, and because they are not as often or easily invoked before the courts. Most major adjustments will therefore have to take place by way of formal constitutional amendment.[2]

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[2] That said, it is probably easy in almost all countries of some constitutional maturity to find examples of change in the basic institutional norms which have come about not through formal amendment, but through political shifts and pressures, changing for example the competences and balance of power, or changing procedures through new "conventions" or the disuse of old provisions. The introduction of parliamentarism in the Norwegian constitutional system is a good example. This was gradually introduced as a "convention" between 1884 and 1906 in contradiction to the wording of the written constitution, which (still) states in article 12 that "The King

The situation as regards changes to national constitutional provisions on human rights is rather different.

First, these rules are often more or less based on a "natural law" idea, which gives them a high degree of universal validity and (rightfully) makes it difficult to change them in any way which would diminish the legal protection of the individuals (development the other way, increasing the protection and extending the catalogues, is certainly not as problematic, and has been widespread in recent years).

Second, the national constitutional bill of rights is 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, minorities, workers' rights, and etcetera). The protection offered by international law supplements the national catalogue and makes its exact content 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.

Because of this, it is impractical to amend national constitutional bills of rights in any way that would diminish the protection of the individual, and if a country should do so, the legal effect would anyway be small as long as the ECHR or other binding and enforceable treaties guarantee the same right and level of protection.

The need for formal amendment of human right provisions is also diminished by the fact that these provisions are usually formulated in a general and abstract way, which is open to dynamic interpretation and legal evolution. They are continuously being invoked before the courts, and thereby developed through case law, both at the national level and in international courts, most notably the ECtHR.

To conclude, I would argue that institutional provisions are more exposed to demands for formal amendment than human rights, and less easy to change by way of dynamic interpretation. This is where formal change potentially matters most – whether beneficial or harmful to the political system and democratic development, and where it makes sense to seek the best possible "balance between rigidity and flexibility".

7. On "unamendable" constitutional provisions

The material collected shows that most constitutions contain provisions that are considered more important than others, and therefore enjoy stronger protection against change. Either they are stated to be eternal and unchangeable (absolute entrenchment) or they are subject to especially strict amendment procedures, which in effect make it more or less impossible to change them.

The discussion on the preliminary draft report showed that there are opinions on this subject among the members of the sub-committee that should be further explored. Is it at all a good idea to have "eternal" provisions? If so, should their unchangeability be enforceable before a court? In other words, should this be a political declaration or "hard law"? If a given society goes through the elaborate and democratic process of amending the constitution – usually with a special majority and other obstacles – should a court then be allowed to overrule this?

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himself chooses a Council…". A provision on parliamentarism was not formally adopted (in article 15) until 2007 – more than a century after its establishment as an "unwritten" constitutional convention.

On this point the preliminary draft report contains a normative statement, in para 49, where it is said that "In a truly democratic state, all provisions which are not essential to the legal order of the state must be amendable". I agree. But we might think about the wording, and try to explain what we mean by provisions "essential to the legal order". Perhaps "essential to the basic democratic order" would be better? And we might also try to take the whole discussion further, to include for example the question of whether "eternal" provisions should be subject to judicial review, and whether such "carving in stone" is really at all possible.

As regards the justiciability of "unamendability" it clearly differs whether this is actually "hard law", which might be invoked before a court, or whether it is really just a declaration, which might serve a function, but which can not be used by a court in order to declare an adopted amendment unconstitutional.[3] In many countries it seems that although such "absolute entrenchment" of certain basic norms may serve a certain restraining function, it cannot in practice be invoked as basis for judicial review of properly adopted constitutional amendments.

I might have misunderstood, but it seemed from our discussion that it might be a problem that some of the new constitutions of Central and Eastern Europe have too many "unamendable" provisions – perhaps because this was felt to be necessary at the time of transition – and that this today hinders necessary reform. If this is so, then I suggest we approach the problem more directly than so far done in the draft.

For constitutions that function over any period of time, it might be pointed out that absolute entrenchment will never in practice be absolute. If the context changes enough, or if the political pressure gets too strong, then even "unamendable" rules will be changed, if not through formal amendment then by way of interpretation or a new supplementary constitutional convention or by being simply ignored.

Some "unchangeable" provisions contain legal concepts that may (and should) be open to dynamic interpretation. A practical example might be the concept of "sovereignty" or that of "territorial integrity". In an increasingly interdependent world, with rapidly developing legal cooperation and integration between states, and increasingly more "supranational" legal orders, it is clear that such concepts can no longer mean the same as they did only a few decades ago.

8. Other comments

A few more scattered comments:

On formal amendment provisions and "constitutional culture". For understanding how often and why constitutions are amended, the national constitutional culture is just as important as the formal amendment provisions. By this I refer inter alia to 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, and the conservatism or

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[3] A good example can be found in article 112 of the Norwegian constitution, which lays down the procedure for constitutional amendment (a combination of delay and a 2/3 majority in parliament), but then states that "Such amendment must never, however, contradict the principles embodied in this Constitution, but solely relate to modifications of particular provisions which do not alter the spirit of the Constitution…". This is seemingly an "absolute entrenchment" of the basic "principles" of the constitution, which in 1814 included a number of principles alien to the development of modern democracy. In theory, this part of art 112 can be invoked before the Supreme Court in order to declare amendments unconstitutional. In practice it has never been applied, even though the constitutional system has undergone a number of fundamental changes since 1814, partly through formal amendment and partly through constitutional conventions. Today, it is impossible to imagine a situation where the Supreme Court would declare invalid a constitutional amendment that had been properly adopted by a 2/3 parliamentary majority (after the prescribed delay) because it was against the basic "principles" of the constitution.

dynamism of the leading constitutional actors (politicians, judges, professors, key civil servants). In some states there is a culture of “constitutional conservatism” that restricts change even if the formal procedures are not that restrictive.[4] In other countries constitutional change is regarded as a less extraordinary matter, which is a more or less normal part of political decision-making, only slightly less cumbersome than ordinary legislation. Factors like the age, nature, history, length (degree of detail) and justiciability of the constitution are of course also important.

On the origin of the constitution and in particular on “original sin”. As pointed out during the discussion in the subcommittee one cannot discuss the legitimacy of constitutional amendment without addressing the origin of the text. The distinction is between constitutions which are the result of broad democratic processes with a high degree of legitimacy, versus constitutions that have been more or less imposed, or which were drawn up by more or less totalitarian governments or interest groups in order to cement vested interests before an anticipated transition of power. Is the constitutional precommitment a result of legitimate “self-binding”, or a binding by other interests than those now in democratic majority? Clearly, constitutions can be both[5] – 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.

On adopting a new constitution as a way of bypassing strict rules on amendment. The reason why this might be tempting is the paradox that while most provisions on constitutional amendment require a qualified majority, the constitution itself was often originally adopted merely by ordinary majority. For a government that wants change but do not have the necessary supermajority it can therefore be tempting instead to propose a whole “new” constitution. As far as I remember, there has recently been a debate in the Ukraine on this, and there might be other relevant examples. This is probably a sensitive subject, but one that I think we should address, and point out the dangers inherent in such a strategy.

On the use of a popular referendum for deciding or ratifying constitutional change. If I remember correctly this was addressed during our debate, and concern voiced that this is an amendment criterion that might in some cases altogether block the possibility of constitutional change. The most problematic version is probably the one in which the requirement is not only a majority of the votes, but also a certain percentage of the registered voters. The Danish constitution has such a provision, and the result is that it is almost unamendable, and has not in fact been changed since 1953, if I remember correctly. While Danish democracy has managed to thrive and develop nevertheless (not least thanks to creative interpretation and a relaxed and pragmatic constitutional culture), such rules may be potentially far more dangerous in less stable and mature democracies. If this is considered to be an actual or potential problem in some of the member states of the European Council, then we should indicate so and express our view.

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> *“In fact, attempts to bind society very tightly could have the opposite effect, for two reasons. First, the citizens might react to the very idea of being bound. […] Second, the citizens might find very tight amendment provisions an intolerable obstacle to change.” (Elster p. 95)*

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[4] Or as Elster puts it (p. 100): “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.”

[5] Elster gives examples of both. But a main part of his argument is with the idea of constitutions as “self-binding” and the often-invoked Ulysses metaphor (the incident with the Sirens), and he quotes the Norwegian historian Seip who once said that “In politics, people never try to bind themselves, only to bind others”.

“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.” (Tocqueville, quoted by Elster p. 95).

“Constitutionalism ensures that constitutional change will be slow, compared to the fast lane of ordinary parliamentary politics. The constitution should be a framework for political action, not an instrument for action.” (Elster p. 100)