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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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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 constitutional amendments are democratically appropriate (§ 17.19)[1] *and whether the current national arrangements for changing the constitution require a sufficiently high approval level to prevent abuses of democracy (§ 17.20).*

2. At its 2007 session the Council of Europe's "Forum for the Future of Democracy" encouraged the Venice Commission to pursue its reflexion on this matter. The Venice Commission's Sub-Commission on Democratic Institutions decided to carry out a study on constitutional provisions for amending the constitution.

3. This preliminary draft 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.

4. 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.[2]

5. The issues raised in this preliminary draft report were examined and discussed by the Sub-Commission on Democratic Institutions at its … session on 13 June 2008 and … session on 11 June 2009 in Venice.

II. Preliminary observations

6. There are many questions raised by the procedure for amending the constitution from the perspective of the democratic principles. The Venice Commission has, so far, addressed this topic on an *ad hoc* basis only, mostly in the context of country-specific opinions on constitutional reforms. The Venice Commission has therefore not tried to develop general principles on this matter.

7. The rules and principles applicable to the revision of the constitution go to the heart of constitutional theory and the foundations of the State. Common European standards are largely lacking in this field and comparative analysis is therefore essential to try and develop a best model approach. A systematic and succinct presentation of the relevant constitutional provisions of all member States of the Venice Commission has been compiled with a view to supporting the analysis made in this study. This compilation clearly indicates that in Europe, there is a great variety in the procedures and mechanisms chosen to amend the constitution.

8. A major difficulty to bear in mind is, however, the difficulty to compare the wording of the national constitutional provisions without going into national legal interpretation of these provisions, and the national political and legal context within which they operate. Constitutional reality and constitutional culture may indeed be as important as the written text of the

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[1] **Shaded paragraphs and sentences strikethrough represent additions, respectively deletions as compared to the initial version of this text (CDL-DEM(2008)002rev), which was discussed in Venice on 13 June 2008**.

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

constitution in order to understand the contents and function of any given constitution, and the possibility for change.[3] In other words, formal rules on amendment do not necessarily indicate the actual threshold for change. Hence it is all the more important to take a close look at the domestic constitutional case-law and practice.[4]

9. Given the above-mentioned complexities, the scope of this study will necessarily be limited in that it will neither cover in detail all aspects of the constitutional amendment procedure, nor take into account the constitutional case law and practice of all States covered in the compilation. This would simply be too ambitious for a general study of this type. This preliminary draft report will try to articulate, in a systematic way, the main characteristics of the amendment procedure observed in the countries under review. A couple of sub-questions will then be addressed in more detail, namely the admissibility of absolute material limitations to constitutional amendments and the threshold for amending the constitution. After a short analysis, the report will put a few theses for discussion. The report will draw, where appropriate, on findings and recommendations contained in earlier opinions and reports of the Venice Commission, as well as, occasionally, on national practice.

10. This study will not take into account the specificities of certain constitutional situations which could merit further reflection as to the procedure for amending the constitution. This is in particular the case of Federal States, where the coexistence of federal structures and federated entities with their own constitutions entail additional challenges. This is also the case of those constitutions which are the result of international agreements and for which the people was not the constituent power. Finally, the study will not address the specificities of unwritten constitutions.

11. The topic chosen for the study, namely the constitutional provisions for amending the constitution, excludes the analysis of the circumstances under which the original constitutional power set out the constitution, for example after a revolution which eliminated the previous constitutional order. In other words, the study only envisages a situation of "constitutional continuity", which implies the duty to respect the existing procedures for amending the constitution, either through a partial or a total revision. Admittedly though, this duty can be more easily accepted for those constitutions which are the result of broad democratic processes with a high degree of legitimacy than for those which have been more or less imposed, or which were drawn up by more or less totalitarian governments or interests groups.

III. Overview of existing constitutional provisions for amending the constitution

A. Adopting an entirely new constitution instead of amending it

12. 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.).[5]

[3] The Venice Commission was already given the opportunity to underline the gap between constitutional reality and the wording of the constitution, e.g. in its opinions on Belarus (CDL-INF(96)8 § 74) and the then Federal Republic of Yugoslavia (CDL-AD(2001)023 § 5).

[4] For a telling example, see Opinion on the Constitutional and Legal Provisions relevant to the Prohibition of Political Parties in Turkey, CDL-AD(2009)006, §§ 90-103; see also Opinion on the Constitution of Bulgaria, CDL-AD(2008)009, § 7.

[5] 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)

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

a. Temporal limitations

13. 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~~

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

15. 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.[6]

16. ~~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.).~~

~~ii. Specific limitations~~

17. 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.

18. ~~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.).~~[7]

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

[7] ~~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)~~

19. 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.

~~20. 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.8~~

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

a. Initiative

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

i. Parliament

22. 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

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

24. 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

25. 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

26. 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

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

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

27. 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.).

28. 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

29. 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

30. 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

31. 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

32. 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

33. 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

34. 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.

35. 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.

36. 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.

37. 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.

38. 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[9]

(2) Bicameral systems

39. 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

40. 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

41. 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

42. 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.

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

(2) Upon decision by the Head of State

43. 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.

44. 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

45. 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

46. 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

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

iii. Organization of referendums[10]

48. 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

49. 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).

50. 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

51. 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

[10] 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).

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

52. 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)

53. 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.

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

54. 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. Admissibility of absolute material limitations (unamendable provisions)

A. In general

55. Scholars distinguish several types of absolute material limitations (or unamendable provisions). For example, a distinction is often made between *explicit* and *tacit* limitations. The former are stated by the text of the constitution, while the latter are simply inferred from the overall constitution. Absolute limitations may also be distinguished between those stemming from another (*heteronomous*) order, which is generally considered superior, and those deriving from the constitutional (*autonomous*) order itself. A classical example of the former would be the prohibition to adopt amendments violating *ius cogens* and examples of the latter would include a given form of government or the federal nature of a state.

56. The usefulness of such distinctions is not always evident. These distinctions may, however, be helpful to understand the complex nature of unamendable provisions. While it seems difficult to provide a clear and single answer to the question of the admissibility of absolute limitations, it is important to be mindful of the problems they raise, both from a political and legal perspective. There are at least three main problems which may be mentioned, namely the impossibility to adapt the constitution to changing realities, the challenges linked to an authoritative procedure for adjudication and the conflict with democratic principles.

B. Problems raised by unamendable provisions

a. Impossibility to adapt the constitution to changing realities?

57. A living democracy must allow a permanent questioning of its functioning and open discussion in the public arena on proposals to develop the basic rules on which state power is organised. Economic, social, political and cultural conditions evolve over time, as do international relations. New technologies and new threats appear and expectations from the populations may change in the light of these and other factors. It is therefore essential that constitutional traditions keep a possibility of development to make the emergence of new solutions possible. Although these solutions may not always, or not immediately, be supported by the majority, open and democratic debate makes it easier for those groups which are in a minority to accept the decision of the majority.

58. It is at least arguable that the sovereign people can waive its right to change its own governing rules and thereby that a generation can subject future generations to its law. This is in particular the case for those rules which govern the form of government and the organisation of the state, since reforms in this field may prove indispensable when time elapses. In this context, it is probably less difficult to admit the existence of absolute limitations stemming from a superior order, such as imperative norms of international law (*ius cogens*), than autonomous limitations deriving from the constitutional order itself.

59. Another argument which suggest that absolute limitations are rather formal but perhaps not able to prevent developments is that the meaning of the concepts they are meant to protect often evolve over time. For example, the very notion of "democracy" and "democratic principles" is not understood in the 21st century as it was in the 19Th or in 20th centuries. Other examples include legal concepts such as "sovereignty" or "territorial integrity": in an increasingly interdependent world, with rapidly developing legal cooperation and integration between states, it is clear that such concepts can no longer mean the same as they did only a few decades ago. Another case in point is the notion of "federalism": even if this form of organisation of a given State is considered unchangeable, experience shows that this cannot prevent the gradual and growing transfer of powers to the federal authorities, without this movement becoming suddenly unconstitutional. It is rather the meaning of the notion of federalism which changes.

60. In sum, the impossibility to adapt the constitution to changing realities due to the existence of unamendable provisions can probably not be carved in stone for the eternity. Indeed, for constitutions that function over any period of time, it might be pointed out that absolute entrenchment will never be, in practice, absolute. If the context changes enough, or if the political pressure gets too strong, then even "unamendable" rules will be changed. This can be done through formal amendment, for example through the abrogation of the provisions declaring certain articles unchangeable. It can also be done by way of interpretation, or a new supplementary constitutional convention, or by being simply ignored.

b. Challenges linked to an authoritative procedure for adjudication

61. A significant difficulty entailed by absolute limitations is the question of the possible sanction: is there an authoritative procedure able to prevent the adoption of those amendments which would contradict absolute limitations ? Should for example unchangeability be enforceable before a court ? Or should the argument of the constitutional permissibility of an amendment be left to the political debate, without a formal procedure preventing its adoption ?

62. In countries with a constitutional court, this court would *a priori* seem to be the obvious choice for such an authoritative adjudication. The justiciability of absolute substantive limitations to constitutional amendments is, however, a complicated issue. Indeed it clearly differs depending on whether unamendable provisions are actually "hard law" that might be invoked

before a court, or whether they are just a declaration that might serve a function, but which cannot be used by a court to declare an adopted amendment unconstitutional.[11] It seems that although such "absolute entrenchment" of certain basic norms may serve a certain restraining function, there are few cases in practice where an absolute entrenchment has been invoked as the basis for a judicial review on the substance of constitutional amendments which have been adopted in compliance with formal procedural requirements. Even in those cases where the constitutional Court is vested with an explicit competence to verify the material validity of constitutional amendments, rulings declaring an amendment invalid for violation of an unamendable provision may become a matter of serious controversy.[12]

63. The way in which a number of unchangeable provisions are worded, especially when reference is made to general notions such as democratic principles or a given form of government, adds to the uneasiness to accept a court adjudication. General formulations generate ambiguity and, inevitably, cause problems of interpretation. Such problems are exacerbated in the case of tacit absolute limitations, for which divergences of interpretation will be more likely. In sum, if a given society goes through the elaborate and democratic process of amending the constitution – usually with a special majority and other obstacles – why should a court then be allowed to overrule this ?

c. Conflict with democratic principles

64. A third difficulty, which is clearly interlinked with the other two, is due to the conflict between absolute limitations and democratic principles. In any democratic state, the constituent power belongs to the sovereign people and their freely elected representatives. As a result, amendments to the constitution have to be adopted by the people and/or the parliament. The constituent power cannot be shared with, or be subject to, another state organ.

65. From a conceptual point of view, it is therefore quite problematic to accept that another state organ, including a judicial body, can place itself above the constituent power and be entrusted with the final say on the validity of a constitutional amendment, save for the voting procedure and other formal requirements. This is indeed a different exercise than that of reviewing the constitutionality of a law, the place of which is clearly under the constitution according to the principle of the hierarchy of norms.

66. This conceptual difficulty is perhaps even more apparent in cases where the people have a more direct role as the constituent power through their right to submit constitutional initiatives, as the citizen's right to initiative - be it of legislative or constitutional nature - is increasingly

[11] A good example can be found in Article 112 of the Norwegian constitution, which is seemingly an "absolute entrenchment" of the basic "principles" of the constitution. 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.

[12] In this context, see decision of the Constitutional Court of Turkey of 5 June 2008 cancelling Law 5735, which would have authorised, *inter alia*, the wearing of headscarves in universities. Numerous critics have in particular argued that Article 148 of the Turkish Constitution only allows the Constitutional Court to review a constitutional amendment with respect to form, not substance, and that the constituent power belong only to the people and their freely elected representatives.

regarded as a means to develop democracy.[13] The existence of a citizen's right to constitutional initiative may therefore make unamendable provisions even more problematic to accept.[14]

67. To sum up, the idea of super-constitutionality, which is inherent to the existence of unamendable provisions, can hardly be reconciled with the principle of sovereignty of the people,[15] who exercise the constituent power together with their freely elected representatives. In the light of these principles, it becomes extremely difficult to justify why the constituent power would at least not be entitled to abolish, through a regular amendment procedure, a provision declaring certain articles unamendable.

C. The particular case of absolute limitations prohibiting the lowering of human rights

68. 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.

69. Another aspect to bear in mind is that any 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, 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 is primarily carried out by governmental representatives, with little participation from civil society and other non-state actors. When it comes to the ECHR control mechanism, however, such shortcomings in terms of democratic legitimacy cannot be observed since the Court enjoys strong legitimacy resulting *inter alia* from the legal requirements to be met by the judges and the election system by the Parliamentary Assembly. Furthermore, the Court has consistently underlined that the national authorities are better placed to decide what fits the national context best and, consequently, the Court does not substitute its appreciation to that of the national authorities according to the subsidiarity principle.

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[13] See Report on Legislative initiative, CDL-AD(2008)035, §§ 67-83 and 145; Opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan, CDL-AD(2009)010, § 38.

[14] This is for example the case in Switzerland, where the greatest restrain prevails to declare a popular constitutional initiative invalid for non-compliance with the only existing absolute material limitation, namely norms of *ius cogens* (see Feuille fédérale 1997 I 368 and 367).

[15] See, for example, Decision of the French Constitutional Council N° 92 – 312 of 2 September 1992, ad § 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*"

70. Against this background, 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.[16] This is the case for all democratic States governed by the rule of law, and not only for those which 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.[17] 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 gogens*, such as the non-refoulement principle, the prohibition of torture or the prohibition of slavery.

V. Threshold for amending the constitution

A. Variety of procedures and way in which reforms are carried out in practice

71. European constitutions display a great diversity as concerns the rules of procedure for amending the constitution. This is not only the case for the rules of parliamentary procedure, but also for the provisions on constitutional referendums. There is, however, consensus on one thing: the constitution is superior to (ordinary) law. This superiority is materialised in two respects: on the one hand the constitution can only be amended through a qualified procedure in comparison with ordinary legislation; on the other hand a constitutional provision can derogate from a law, but a law cannot derogate from the constitution. Given its superiority, the constitution enjoys stronger legitimacy than a law.

72. The procedure for amending the constitution is obviously determined by the rules which govern it. One should bear in mind though that constitutional rules for amending the constitution do not necessarily indicate the actual threshold for carrying out a successful constitutional reform in practice, in line with democratic principles. In other words, the analysis of the relevant rules is not sufficient to determine the difficulty to undertake a constitutional reform, the frequency of the attempts to bring about such reforms and the general compliance of adopted constitutional reforms with key rights and principles such as freedom of expression, freedom of the media, freedom of assembly, free and fair elections, etc. It is therefore also necessary to look at the practice in a given state to be able to assess the actual threshold for changing the constitution.

B. Quest for constitutional stability

73. The stability of the constitutional order is achieved through rendering the amendment procedure more rigid, but 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 are involved in the procedure, either through referendum or through elections following the dissolution of Parliament.

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

[17] 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.

74. It is not possible to take a stance, *in abstracto*, on what the good balance is between rigidity and flexibility. Several forces may influence the balance beside the formal provisions on amendment. The point of balance is not static, but a dynamic concept, which may shift over time. Also, 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.

75. In this respect, it seems that two potential problems may be identified:

- On the one hand 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. This situation is perhaps more likely to arise in new democracies.

- On the other hand 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.

C. Amendment procedures influence the legitimacy of the constitution

a. Excessive rigidity or flexibility

76. Both situations can raise problems in terms of legitimacy of the constitution and should, therefore, be a matter of equal concern. The Venice Commission has on occasions been faced with overly rigid constitutional amendment procedures and warned against the difficulty to bring about constitutional reform.[18] Generalisations remain, however, extremely difficult even at the regional level and among new democracies, to which the major part of the opinions of the Venice Commission is devoted. Indeed even in these countries, the Venice Commission was – although more rarely - also confronted with the opposite risk, namely that too frequent amendments of (or attempts to amend) the constitution might negatively affect constitutional stability.[19]

77. One factor to bear in mind is that in democracies which are not yet fully consolidated, even very rigid rules on constitutional changes, such as a qualified majority in both Chambers of Parliament within a short time limit, or even a compulsory referendum, can often be easily overcome, at least when the initiative for change comes from the President or the ruling power.[20] Conversely, even flexible rules may prove extremely hard to comply with should the

[18] 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.

[19] 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.

[20] Admittedly, the requirement to hold a referendum, although it constitutes the expression of a democratic choice, may turn out to be a serious obstacle preventing the adoption of a constitutional reform if the power in place does not support it. In this context, the guidance and influence of international bodies and organisations

initiative for a constitutional reform originate from the opposition and/or civil society. The author of the proposed reform is therefore often key, but a mature democracy should make the wind of change possible irrespective of the direction it comes from.

78. In other regional contexts, significant differences can also be noticed. For example, the three neighbouring Scandinavian 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.

79. The threshold for amending the constitution can also be affected by problems of interpretation as to the procedural way to be followed. A constitutional reform adopted following serious controversies on the procedure itself may undermine political stability and, ultimately, the legitimacy of the constitution itself. It is therefore important that rules on amending the constitution be drafted in a clear and simple manner.

b. Choice of procedural avenue

80. Problems linked to the choice of the procedural avenue have in particular been noticed in relation to the use of constitutional referendum. As stated earlier, provisions on constitutional referendums display a great variety, depending, *inter alia*, on the general approach to referendums adopted in the Constitution. Thus, there are constitutions with no provision on constitutional referendums; constitutions with provisions on mandatory referendums on all constitutional amendments; constitutions with mandatory referendums for total constitutional revisions or for amendments concerning certain provisions or chapters of the constitution; and constitutions which allow for referendums, but leave the decision to have one to constitutional bodies, that is the Parliament or the President.

81. These differences notwithstanding, the use of referendums must comply with the legal system as a whole and, especially, the rules governing revision of the Constitution. In particular, referendums cannot be held if the Constitution does not provide for them, for example where constitutional reform is a matter for Parliament's exclusive jurisdiction.[21] In several national contexts, the Venice Commission has stressed the danger of circumscribing a specific procedure for amending the constitution by the general recourse to referendum.[22] It also regretted the lack of clarity as to the circumstances in which a referendum is required for amending the constitution.[23] Indeed democracy cannot be reduced to a simple reflection of the popular will and states must act in accordance with the rule of law principle. In other

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could be a matter of further analysis as these factors may also have an impact on the democratic legitimacy of the constitution.

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

[22] 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.

[23] 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).

words, the sovereignty of the people established in the framework of a constitutional legal system cannot be mistaken for the constituent power and it is perfectly compatible with popular sovereignty to require that its exercise has to follow specific procedures.

c. Context of the adoption of a constitutional reform

82. The conditions in which a constitutional amendment is being prepared, examined an eventually voted upon by the constituent power is perhaps as important as the formal respect of the procedural rules. It can at least contribute significantly to the legitimacy and sense of ownership of the constitution and, ultimately, to the emergence and consolidation of democratic constitutional traditions over time. It is therefore one of the indicators of the threshold for changing the constitution in a given country.

83. Against this background, the Venice Commission has repeatedly stressed the need for the authorities to promote open and free public discussion on all aspects contained in a constitutional reform, which inevitably takes time and makes constitutional reforms rushed trough less likely to generate wide consensus and sense of ownership.[24] There are other implications as well, for example 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.[25]

D. Amending rules on governance versus amending basic rights

84. 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.

85. These two main elements 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 quite different.

86. 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

[24] 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.

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

more or less relevant inspiration from the different national solutions offered by comparative constitutional law.

87. 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 context and arguments for and against constitutional change are different between the two sets of provisions.

88. 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.

89. The situation as regards changes to national constitutional provisions on human rights is rather different. As was already stated, amending human rights with a view to lowering their level of protection is quite difficult and would have limited effects in practice. Admittedly, democratic requirements also make bill of rights and their endorsement by the constituent power important. The need for formal amendment of human right provisions is, however, 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 and international levels. This is obviously the case for human rights provisions understood as substantial guarantees, not for the judicial machinery that goes with it. Indeed constitutional provisions such as those providing the constitutional court with the power to review individual complaints for alleged violation of human rights can hardly be changed by way of interpretation.

90. It is therefore suggested 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.

VI. Analysis

91. 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.

92. 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.

93. 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.

94. 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.

95. 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.

96. 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.

97. 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.

98. 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.

99. 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.

VII. Theses for discussion

100. 1) Unamendable provisions should preferably be avoided since they reduce the arena for democratic politics, hampers adaptation to changing realities and do not easily lend themselves to authoritative adjudication

101. 2) The prohibition to lower the level of protection of human rights is widely accepted essentially on the premise of the primacy of international law, irrespective of the existence of explicit unamendable provisions

102. 3) Amendment procedures are characterised by a marked diversity - including at regional level - with no best model to follow. Amendment procedures do not indicate the actual threshold for carrying out successful constitutional amendment

103. 4) Amendment procedures and practices must avoid both excessive rigidity and flexibility to avoid democratic deficits, reinforce legitimacy of the constitution and sense of ownership, as well as facilitate the emergence of democratic constitutional traditions

104. 5) Specific amendment procedures must not be circumvented by general recourse to referendum and rules on amendment procedures should be clear and simple to avoid controversies on the procedural avenue chosen

105. 6) Institutional provisions are more exposed to demands for formal amendment than human rights and less easy to change by way of dynamic interpretation