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Constitutional Amendment Procedures as a Challenge to New Democracies*

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The article discusses the issues on the efficiency of constitutional amendment procedures. It gains particular importance in case those changes are related to that of power system and it is most clearly manifested during post-Soviet transformation. The cases observed in Venice Commission indicate that the major challenge with regard to the efficiency of constitutional amendments directed to the redistribution of powers between branches of power is to find the right balance between flexibility and rigidity in the scope of amendment procedures. Rigidity protects democracy from the attempts of temporary majority aimed at the increase and strengthening of its power. Flexibility is a must since in the period following one-party system establishment not all solutions made are effective in the long run. This controversial situation is particularly common to young democracies. The article investigates the mechanisms of ensuring a balance between rigidity and flexibility. It concludes that those mechanisms can not entirely exclude the return to more authoritarian system, since democracy is fully functioning only in those societies that provide sufficient public support to democratic system. Yet, such mechanisms can become serious obstacles in cases the elected presidents are seeking to concentrate in their hands the powers capable to distort the system of checks.

Keywords
Constitutional amendment, new democracies, procedures, Venice Commission, constitutional stability.

Introduction

At first sight the constitutional provisions for constitutional amendment seem to be of a technical nature and of less interest than the

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provisions on fundamental rights, the system of government, territorial organisation and the judiciary. The practical experience of the Venice Commission nevertheless shows that in practice these provisions are of huge importance. In most of the constitutional "battles", in which the Venice Commission was involved, the interpretation of the rules on how to amend the Constitution was of crucial importance.

The Venice Commission therefore devoted a lot of attention to this issue, not only in its opinions on the respective constitutional reforms but also in its reports of a general character. Since the role of referendums in constitutional reform processes in the new democracies proved particularly problematic, in 2001 the Venice Commission adopted guidelines for constitutional referendums at national level[1],followed in December 2009 by a comprehensive report on constitutional amendment[2], discussing in detail the main issues arising with respect to constitutional amendments. My intention is not to summarise this report but rather to address those aspects of constitutional amendment rules which, in the experience of the Venice Commission, have proved particularly problematic and important. The major conflicts the Venice Commission encountered concerned proposed constitutional reforms altering the system of government. I will therefore focus on reforms pertaining to the distribution of powers between the state organs and not address specific issues arising in the area of the protection of fundamental rights.

Fundamental challenge of constitutional amendment: balance between rigidity and flexibility

When constructing and applying rules on constitutional amendment, the fundamental challenge is to find a proper balance between rigidity and flexibility.

The Venice Commission noted in its report[3] that there are two potential pitfalls:

1 CDL-Inf (2001)010.
2 CDL-AD(2010)001.
3 CDL-AD(2010)001, paragraph 12.

1. That the rules on constitutional change are too rigid. The procedural and/or substantial rules are too strict, creating a lock-in, cementing unsuitable procedures of governance, blocking necessary change. This means too tight confinements on democratic development, and disenfranchisement of the majority that wants reform.
2. That the rules on constitutional change are too flexible. The procedural and/or substantial rules are too lax, creating instability, lack of predictability and conflict. Democratic procedures, core values and minority interests are not sufficiently protected. The issue of constitutional reform becomes in itself a subject of continuous political debate, and the political actors spend time arguing this instead of getting on with the business of governing within the existing framework. This latter tendency has been aptly characterised by the Parliamentary Assembly of the Council of Europe with respect to Ukraine as the habit of the politicians to play *with* the rules instead of *by* the rules.

The reasons why Constitutions should be relatively rigid are well known and have been discussed quite often[4]. It is in the very nature of Constitutions that there are devices for self-binding. This rigidity is a condition for the stability and predictability of the constitutional system and safeguards the rights of individuals and minorities. Most importantly, this rigidity protects the democratic system itself against attempts by temporary majorities to increase and cement their power. This is of particular importance in new democracies, where there is often a "winner takes all" mentality, assigning to the person or party which won the elections the right to govern without restraint. In particular, the Venice Commission was often confronted with attempts by elected Presidents to increase and perpetuate their powers through constitutional referendums. The purpose of amending the Constitution in these cases was to move back towards a more authoritarian political system.

This does not mean that utmost rigidity is the best solution. Countries can be confronted with crisis situations requiring constitutional reforms. Societies change and this has to be reflected in the Constitution.

[4] CDL-AD(2010), paragraphs 72 et seq.

Sometimes, a reinterpretation of the text by the constitutional court may make a formal amendment unnecessary. However, especially if the constitution is fairly detailed and precise, it is indispensable to amend the text. Ultimately, it is also a requirement of democracy that the system of government can be changed by democratic means.

For new democracies it is quite characteristic that the drafters of the Constitution try to prevent any backsliding to the previous system by means of specific constitutional provisions. On the other hand, a certain flexibility is also needed since it is unlikely that all the solutions adopted immediately following the end of one-party rule will prove appropriate in the long term.

Devices for ensuring the stability of the constitutional system

The aim is therefore not to establish a completely rigid system but to strike the right balance by using the appropriate instruments for ensuring the stability of the constitutional system. There are a number of devices traditionally used in this respect:

- The existence of unamendable provisions;
- Adoption by a qualified majority in parliament;
- Time delays;
- The need to confirm previously adopted constitutional amendments by referendum.

A more innovative safeguard, which can be found in many constitutions of Eastern Europe, is the requirement to involve the constitutional court in constitutional amendment procedures.

A major role is also played by constitutional culture. In many older democracies there is a tradition of compromise and consensus on constitutional issues. Such a culture tends, however, to be lacking in new democracies. In new democracies there is therefore a stronger need to rely on formal legal tools.

The most far-reaching tool to maintain stability of the text is to declare some provisions unamendable. As regards the system of government, this tool seems of limited usefulness. There is no justification to provide that the detailed arrangements regarding the division of powers are unamendable. Typically, some flexibility is required in this area. Only

big principles – democracy, separation of powers, the republican form of government – can be declared unamendable. Apparently small changes in many provisions may, however, cumulatively change the balance of powers. For a constitutional court in a new democracy it will be very difficult to declare such changes unconstitutional as being in contradiction with the main, unalterable principle.

The most important safeguard for constitutional stability tends to be the requirement of a qualified majority for the adoption of constitutional amendments. Such requirements are found in many constitutions, e.g. a requirement that, at least in the final reading, a constitutional amendment requires a two-thirds majority in parliament. The rationale for such rules is that a fairly broad consensus of the main political forces should be required for constitutional amendments and that normally such a qualified majority will require the support of at least part of the opposition. However, the actual strictness of the requirement will depend on other factors such as the electoral system. In Hungary, on the basis of a mixed electoral system, the governing party (together with a minor ally) now enjoys for the second time a constitutional majority in parliament and the same situation existed in Georgia some years ago. Governing parties could therefore amend the constitution at will.

In a bicameral system there are additional possibilities for safeguards at the parliamentary level. However, the usefulness of a second chamber for constitutional amendment procedures is not, on its own, sufficient justification for the establishment of a second chamber and most unitary countries[5] in Eastern Europe have only one chamber.

Requirements for time delays before constitutional amendments are finally voted on are also a useful safeguard. The Constitution should not be amended rashly, based on the emotions of the moment, rather there should be sufficient time for reflection and discussion. On the other hand, this should not be overdone. There may be a need to amend the Constitution rather quickly, especially in a new democracy. The need to allow for more decentralisation in Ukraine in the current situation is an example. Systems requiring parliament be dissolved and amendments voted on again by the

[5] In federal countries the consent of (some) federated entities may be required for constitutional amendments as a supplementary safeguard.

new parliament, following the adoption of constitutional amendments,, seem unsuitable at least for new democracies, which typically have fairly detailed constitutions. The Venice Commission has been critical of such a system in its relation to a constitutional reform planned in Iceland [6] and the consequence of the rule indeed appears to be that no reform will take place, despite a wide-spread wish for that reform in Iceland. Other delays may be useful but are unlikely to be sufficient, for example as a safeguard against determined attempts by a president to increase his or her powers.

Another traditional safeguard is to require that constitutional amendments voted by parliament have to be approved by referendum. Referendums undoubtedly provide additional legitimacy and, when a constitution is adopted for the first time, it is certainly advisable to hold a referendum. On the other hand, submitting all constitutional amendments to referendum risks making the Constitution excessively rigid. Some constitutional amendments may seem quite technical and of little interest to the ordinary voter. Holding a referendum on such amendments may seem excessive and too costly. In countries where there is a requirement that a certain percentage of those entitled to vote approves the amendment, it may be quite difficult to undertake *any* constitutional reform. This is particularly true in countries such as Armenia where a large part of the citizens lives temporarily or permanently abroad. For these reasons the Venice Commission reacted favourably to a proposal in Armenia that some constitutional amendments could henceforth be adopted by a qualified majority in the National Assembly without submitting them to referendum[7].

In the experience of the Venice Commission, referendums are often used or rather abused not to make constitutional reform more difficult but rather to make the constitution easier to amend. I will deal with this phenomenon below.

Before I'd like to discuss a further tool to make constitutions more rigid, which is quite typical for Eastern Europe: the obligation that constitutional amendments be submitted before their adoption to the constitutional court. Such ex-ante control by the constitutional court makes sense if the constitution establishes an internal hierarchy between basic

[6] CDL-AD(2013)010, paragraphs 168 et seq.
[7] CDL-AD(2004)044, paragraph 70.

principles and more technical provisions. This approach appears to be motivated by the fear that positive achievements of new democratic constitutions could be undermined by constitutional amendments.

I will not discuss the theoretical merits of this approach. In practice, constitutional courts have tended to interpret their mandate broadly and in a formalistic manner, requiring that all textual amendments be submitted or re-submitted to the court, even if there was obviously no risk of contradiction with the general principles they had to protect. As a consequence, drafts had to be submitted repeatedly, delaying the process and complicating discussions in parliament. In the case of Ukraine, the Constitutional Court used the violation of the obligation to again submit modified constitutional amendments to the Court as a pretext for annulling these amendments several years after their adoption[8]. During a constitutional conflict in Moldova, a compromise text was prepared by a joint parliamentary-presidential commission with the assistance of the Venice Commission.[9] However, partly because the compromise proposal would have had to be sent back to the constitutional court for another round of review, the parliamentary majority decided instead to adopt a text that had previously been cleared by the court. Thus the compromise in the joint committee was thwarted, and an amendment adopted against the will of the president, which later proved to be a source of considerable political instability.

Moreover, the principle of the *unitary* state tends to be one of the principles to be protected by constitutional courts. In countries such as Moldova, Turkey and Ukraine this can make it more difficult to settle conflicts through compromise solutions deviating from the traditional concept of the unitary state.

On the whole, the mandatory ex-ante involvement of the constitutional court in constitutional amendment procedures seems to have been more a source of additional complications than a useful mechanism.

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[8] The opinion of the Venice Commission on the constitutional situation in Ukraine, CDL-AD(2010)044 (which is quite critical of this decision of the Constitutional Court).

[9] Co-operation between the Venice Commission and the Republic of Moldova on constitutional reform, CDL-INF(2001)3.

Adoption of constitutional amendment: referendum or qualified majority in parliament

To sum up, in general the requirement of a qualified majority in parliament for the adoption of constitutional amendments seems the best tool to protect constitutional stability. However, this requirement is not effective if a political party has managed to obtain a dominant position in the country, including a constitutional majority in parliament, as has been the case in Hungary. In such situations other tools are, however, also likely to be ineffective. Such parties are likely to be able to win referendums as well. The best protection in such situations would probably be the rule that constitutional amendments have to be adopted by two parliaments. But, as pointed out above, this rule seems excessively rigid.

By contrast, the requirement of a qualified majority in parliament is of particular importance in situations of actual or latent conflict between president and parliament as a safeguard against attempts by presidents to increase their powers by means of constitutional amendments. In such situations, the parliamentary opposition tends to have at least a sufficient number of votes in parliament to block such attempts. The situation in Ukraine since the year 2000 is a typical example in this respect but such situations have also arisen in Belarus in 1996 and Kyrgyzstan in 2007.

Referendums tend to be ineffective as a check on attempts to increase presidential power, at least in new democracies. Such referendums tend to be turned into plebiscites on the leadership of the country. Presidents are able to use the wish of the population for strong leadership and tend to always win such referendums. In some cases the vote may not have been free and fair but it seems likely that in most cases the result of the referendum indeed reflected the mood in the population. As an example, the Venice Commission criticised the proposed constitutional amendment in Azerbaijan allowing the President to remain in power for more than two terms of office[10] but this proposal was nevertheless approved by an overwhelming majority in the referendum. In that case, the Constitution provided for an amendment procedure by referendum. It should also be mentioned that the Venice Commission was quite critical of an attempt to

[10] CDL-AD(2009)010.

extend by referendum the powers of the Head of State in an old democracy, Liechtenstein.[11] In this case the referendum was constitutional and the majority required for the adoption of the amendments was obtained.

The situation was quite different in Belarus in 1996 and Ukraine in 2000. In these countries the Constitutions provided for amendment procedures requiring a qualified majority in parliament and the presidents called constitutional referendums based on articles in the constitution providing that important matters could be put to referendum without specifying whether this provision was applicable to constitutional amendments.[12] In both cases the Venice Commission took a clear position that it was not possible to amend the Constitution by referendum alone, without a vote in parliament by a qualified majority.[13] In Belarus the Constitutional Court ruled that the referendum was unconstitutional but this ruling was ignored by President Lukashenko, leading to the isolation of the country in Europe. In Ukraine the Constitutional Court took an ambiguous decision[14] and the referendum results were never implemented, also due to the weakening of the position of President Kuchma following the Gongadze case.

In Kyrgyzstan there was a similar conflict in 2007. In line with the wishes of the President of the Republic, the Constitutional Court annulled the existing Constitution enabling President Bakiev to have a new Constitution adopted by referendum.[15] However, only two-and-a-half years later there was a revolution against President Bakiev, a new Constitution was adopted and the results of the 2007 referendum overturned.

These examples show that at least in the post-communist countries, referendums were mainly used not as a tool to protect the constitutional order but rather used as a tool by presidents to increase their power, often bypassing the requirement of a qualified majority in parliament provided for in the articles on the constitutional amendment procedure. This confirms the

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11 CDL-AD(2002)32.

12 The same issue arose also in Moldova in 2010. The purpose of the proposed amendments there, however, was to resolve a political deadlock and not to increase presidential powers.

13 CDL-Inf(1996)008 and CDL-Inf(2000)011.

14 CDL-Inf(2000)014, particular paragraph 7.

15 Cf. CDL-AD(2007)045, Opinion on the constitutional situation in the Kyrgyz Republic, paragraphs 4 et seq.

need to be very careful when drafting the respective constitutional provisions: it should be made crystal clear that referendums may be required as an additional step in the constitutional amendment procedure but may not replace approval by parliament by the required majority. Otherwise the constitutional provisions on the referendum may open the door to attempts to revert to a more authoritarian system.

Conclusion

To conclude, it would be too much to expect that the constitutional provisions on for constitutional amendment can, on their own, prevent a return to a more authoritarian system. Constitutions should not be too rigid and in the final count, democracy can only function if there is sufficient support within society for a democratic system. It appears difficult to prevent through constitutional provisions situations in which a single political party manages to obtain a constitutional majority and abuses this majority to adopt constitutional amendments reducing democracy.

However, carefully crafted constitutional amendment procedures can ensure that returning to a more authoritarian political system is much more difficult. In particular, it is important to ensure that no amendments can be adopted – including by referendum – unless these are approved by a qualified majority in parliament. Such provisions can be an obstacle to attempts in particular by elected presidents to concentrate excessive powers in their hands. Constitution drafters especially but not only in new democracies are therefore well advised if they pay great attention to the rules on amending the Constitution.