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'Perfecting imperfections': developing procedures for amending constitutions in Commonwealth Africa

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BACKGROUND

A constitution enjoys a special place in the life of any nation, for it regulates not only the exercise of political power, but also the relationship between political entities and between the state and persons. Being the supreme law, it helps to shape the organisation and development of society both for the present and for future generations, and sets objective standards upon which the people and the international community can judge government performance, thus providing a measure of accountability and transparency in national and local affairs. Further, a constitution sets out the rights and duties of the citizens, and provides mechanisms to enable them to protect their interests. Overall a constitution can contribute to the development of a politically active civil society as well as promoting good governance, accountability and the rule of law.

Prior to the 1990s the history of constitutions and constitutionalism in Commonwealth Africa, as elsewhere on the continent, was bleak. The newly independent states[1] started life with the Westminster export model constitution bestowed upon them by the British. There was little or no opportunity for public debate on the document, and the nationalist leaders themselves had no genuine choice as to its structure and contents.[2] The futility of forcing the model on the newly independent states, in the words of Karugire 'a triumph of hope over experience', inevitably led to constitutional instability and a round of constitution-making and amendment wholly designed to enhance

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[1] The discussion in this section excludes Namibia, Mozambique and Cameroon, which did not join the Commonwealth until the 1990s, and South Africa which also has a very different constitutional history.

[2] For a useful discussion on this issue, see G. W. Kanyeihamba, *Constitutional Law and Government in Uganda* (Nairobi, 1975), p. 56.

executive power, remove checks and balances, and undermine the enjoyment of fundamental rights and freedoms.[3]

The 'new wind of change' in the 1990s brought about a transformation in the constitutional landscape in Commonwealth Africa. The ending of the cold war, the introduction of aid conditionality, and the impact of the 1991 Harare Declaration with its emphasis on good governance, accountability and the rule of law, encouraged many Commonwealth African states to adopt new constitutions. For the first time, much effort went into involving the people in the creation of autochthonous documents. This was crucial to establishing an *ethos of constitutionalism*, i.e. a recognition by the people that the document is 'their constitution', upon which they were consulted and which they endorsed, which contains provisions that are meaningful to them and from which they can derive demonstrable benefits. As a result, the new constitutions generally provide for, amongst other things, a multiparty system, a wide-ranging Bill of Rights, institutions for promoting good governance and accountability (such as human rights commissions), and in many cases, a duty to undertake human rights education programmes for the public and government officials alike.

The making of a constitution is only part of the story. Formal procedural safeguards are also essential in order to protect it against retrogressive amendment. Being the supreme law, a constitution is expected to survive for a lengthy period. Thus its makers do not intend it to be amended in the same way as acts of parliament, but rather protected by special (and more complex) amendment procedures.[4] As Brandon rightly notes, without a special amendment procedure 'a constitution, which is to some extent a device for *preserving* certain states of affairs, might become a device for *undermining* the very states of affairs it is designed to preserve'.[5]

This article therefore critically analyses the various formal amendment procedures adopted in the new constitutions of Commonwealth African countries, and the extent to which they protect the document

[3] For a useful overview see: Lawrence Zimba, 'The origins and spread of one-party states in Commonwealth Africa', in Muna Ndulo (ed.), *Law in Zambia* (Nairobi, 1984), pp. 113–41.

[4] See, for example, the views of Judge President Amissah in the Court of Appeal (Botswana) in *Dow* v. *Attorney-General* in *Law Reports of the Commonwealth* (*Constitutional*) 1992, p. 632.

[5] Mark Brandon, 'The "Original" Thirteenth Amendment and the limits to formal constitutional change', in Sanford Levinson (ed.), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, 1995) at p. 215 (emphasis in the original). See also, John Hatchard 'Undermining the constitution by constitutional means: some thoughts on the new constitutions of Southern Africa', *Comparative and International Law Journal of Southern Africa* (Pretoria) 27 (1995), pp. 21–35.

itself from being 'undermined'. It considers at the outset the need for a power to amend a constitution at all, then examines the amendment procedure contained in some of the new constitutions[6] and considers to what extent they provide suitable safeguards against retrogressive amendment. Particular note is made of the role the people should and do play in the amendment process.

WHY A POWER TO AMEND?

The need for a constitution that is both transgenerational and promotes an ethos of constitutionalism has led some to argue that its fundamental provisions should be unamendable,[7] a point partly reflected in the Namibian constitution (see below). Judicial support for this view comes from India, where a majority of the Indian Supreme Court[8] has held that the basic institutional structure of the state must remain intact and thus parliament could not amend the essential or basic structure of the constitution, even by means of the constitutional amendment process, because this would amount not just to its amendment but its replacement by a new document.[9]

Attractive as this approach may appear at first sight, it overlooks the crucial fact that however rigorous the procedure for its making, a constitution may still contain imperfections. As Washington himself noted in 1787: 'The warmest friends and the best supporters the [US] Constitution has do not contend that it is free from imperfections; but they found them unavoidable and are sensible that if evil is likely to arise there from, the remedy must come hereafter.'[10] Further, as Justice Khanna has noted, no generation has a monopoly on knowledge that entitles it to bind future generations irreversibly, and thus a constitution that denies people the right of amendment invites attempts at extra-legal revolutionary change.[11]

In the African context, the experience of Ghana neatly illustrates a

[6] The constitutions made since 1990 and considered here are those of The Gambia, Ghana, Lesotho, Malawi, Namibia, Seychelles, Sierra Leone, South Africa, Uganda and Zambia.

[7] For example, John Locke's draft of the 1669 Fundamental Constitutions of the Carolinas provided that 'these fundamental constitutions shall be and remain the sacred and unalterable form and rule of government…forever': quoted in Levinson, *Responding to Imperfection*, p. 4.

[8] The case of *Kesavananda* v. *State of Kerala* All India Reports, 1973, Supreme Court, 1461.

[9] For a useful discussion of the doctrine see D. G. Morgan, 'The Indian essential features case', *International and Comparative Law Quarterly* (London) 30 (1981), p. 307.

[10] Quoted in Levinson, *Responding to Imperfection*, p. 1.

[11] See pages 1849 and 1850 of the Indian Supreme Court judgment in *Kesavananda* v. *State of Kerala*.

potential problem with the unalterable constitution. The Constitution of Ghana 1979 came into effect following the handover of power by the Armed Forces Revolutionary Council to a civilian government. Shortly before promulgating the constitution the Council inserted certain unamendable 'Transitional Provisions', the net effect of which was to ensure that neither the incoming administration nor the courts could disturb certain decisions taken by the Council. This struck at the balance of the whole document itself and provoked a storm of protest, from both within and without parliament, against the deprivation of the people's inherent right to amend any provision of the constitution under which they were democratically governed.[12]

An 'inherent right to amend' a constitution in order to 'perfect imperfections' is recognised throughout Commonwealth Africa. Devising an appropriate formal amendment procedure for doing so is another matter.[13] An over-rigid procedure may prevent or deter efforts to strengthen constitutional provisions, whilst a constitution that has 'weak' amendment provisions carries with it the possibility of its wholesale amendment and a resultant undermining of key provisions. In practice, the amendment procedure contained in the Westminster export model still exerts a considerable influence in Commonwealth Africa and is a useful starting point when seeking to devise suitable safeguards against retrogressive constitutional amendment.

THE WESTMINSTER MODEL AMENDMENT PROCEDURE

The Westminster model constitution provided the legislature with the role as 'guardian of the Constitution'. Thus any constitutional amendment bill required approval by a special majority: in most cases not less than two-thirds of the entire parliamentary membership. This was linked to a requirement for the publication of the text of any constitutional amendment Bill in the Government *Gazette* thirty days

[12] In fact the situation in Ghana was never resolved because at the height of the national debate on the subject, the government and constitution were overthrown in a military coup. The Constitution of Ghana 1969 also had provisions that were declared unalterable for all time. These included matters such as the supremacy of the constitution, judicial power to interpret and enforce the constitution and a specific provision that 'Parliament shall have no power to pass a law establishing a one-party state'. This constitution lasted little more than two years before the country experienced yet another military takeover.

[13] Of course there are other ways of 'developing' a constitution, e.g. by judicial interpretation, and this is becoming an increasingly important feature of Commonwealth African states. However, a discussion of this point is outside the scope of this article which is solely concerned with the formal procedures for constitutional amendment.

before the first reading in the legislature. Fall supports this approach, arguing that legislatures are:

> one of the crucial elements in a democratic society and essential in ensuring the rule of law and protection of human rights. In fact, in their daily work of transforming the will of the people into law and in controlling the Executive and public administration, parliaments and parliamentarians are often the unsung heros of human rights.[14]

In fact the special parliamentary majority procedure (SPMP) still forms the basis for formal constitutional amendment in much of Commonwealth Africa. However, as the experiences of Zimbabwe and South Africa demonstrate, the procedure is far from satisfactory.

The Zimbabwe experience

Since independence in 1980, fourteen separate amendment Acts (all of which made multiple changes) have completely reshaped the Constitution of Zimbabwe. Given the circumstances of its birth, some amendments were inevitable and entirely desirable.[15] The same cannot be said for some of the others. Thus constitutional amendments have, amongst other things, specifically sought to oust the jurisdiction of the courts;[16] to prevent the Supreme Court from hearing a case relating to the scope of the fundamental rights provisions; and to overturn its decisions thereon.[17] For example, in 1990 in the *Chileya* case, the Supreme Court asked for full argument on the issue of whether the use of hanging constituted inhuman or degrading treatment or punishment contrary to section 15(1) of the constitution, and a date was set down for the hearing.[18] The response of government was immediate. Shortly before the hearing, a constitutional amendment Bill was published which included a provision specifically upholding the constitutionality of executions by hanging.[19] The Minister of Justice, Legal and Parliamentary Affairs informed parliament that any holding to the contrary 'would be untenable to government which holds the correct

[14] See *Parliament: Guardian of Human Rights*, Inter-Parliamentary Union (Geneva, 1993), p. 5. At that time Fall was the UN assistant-secretary-general for Human Rights.

[15] For example, the removal of the parliamentary seats reserved for non-Africans.

[16] Constitution of Zimbabwe Amendement (No. 12) Act, 1993, section 2 which amended section 16(1)(e) of the constitution.

[17] Section 24 of the constitution gives the Supreme Court original jurisdiction to 'hear and determine' issues relating to fundamental rights and to 'make such orders…and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights'.

[18] See *State* v. *Chileya*, Supreme Court of Zimbabwe, 1990, Case number SC 64/90 (unreported).

[19] This later became section 15(4) of the constitution.

and firm view… that Parliament makes the laws and the courts interpret them'. He added that the abolition of the death sentence was a matter for the executive and legislature, and that 'government will not and cannot countenance a situation where the death penalty is *de facto* abolished through the back door…'.[20] As discussed below, there was little parliamentary debate on this aspect of the Bill and members overwhelmingly approved the measure.

A second example concerns the *Catholic Commission* case,[21] where the Supreme Court held that the dehumanising factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions in the condemned section of the holding prison, meant that executing four condemned prisoners would have constituted inhuman and degrading treatment contrary to section 15(1) of the constitution. Accordingly, the court directed that the death sentences be replaced by sentences of life imprisonment. It also gave a series of directions on the procedure for dealing with condemned prisoners, and suggested that petitions of mercy should be dealt with expeditiously by the executive and considered three months as a possible time-frame. This landmark decision was later followed by the Judicial Committee of the Privy Council[22] and received warm approval from commentators.[23] Even so, it drew a critical response from the government, and within weeks the Constitution of Zimbabwe Amendment (No. 13) Act 1993 was passed, retrospectively exempting the death penalty from the scope of section 15(1). Once again members of parliament overwhelmingly approved the Bill.

Whilst the Acts were passed in accordance with the constitution, the Zimbabwean experience highlights some of the potential weaknesses of centring the amendment procedure around the legislature.[24] Thus Zimbabwe, in line with several other Commonwealth African states, has one dominant political party, ZANU(PF) which controls 147 of the 150 seats in parliament.[25] This inevitably means that the requirement

[20] *Parliamentary Debates*, 6 December, 1990.

[21] *Catholic Commission for Justice and Peace in Zimbabwe* v. *Attorney-General*, *South African Law Reports*, 4 (1993), p. 239. The decision of the court was given by Chief Justice Gubbay.

[22] *Pratt and Morgan* v. *Attorney-General for Jamaica*, *All England Law Reports* 4 (1993), p. 769.

[23] See, for example, W. A. Schabas, '*Soering*'s legacy: the Human Rights Committee and the Judicial Committee of the Privy Council take a walk down death row', *International and Comparative Law Quarterly* (London) 43 (1994), p. 913. It is also worth noting that Zimbabwean government's criticism of the judgment ceased after the decision in *Pratt and Morgan*.

[24] It also demonstrates the limitations of the judicial power to 'develop' constitutional rights.

[25] Commonwealth African countries where the ruling party holds at least two-thirds of the parliamentary seats (percentage in brackets) include: Tanzania (79 per cent), Zambia (85 per cent), Seychelles (81 per cent), Namibia (73 per cent), Mauritius (90 per cent) and Ghana (67 per cent), *Democracy Still in the Making*, Inter-Parliamentary Union (Geneva, 1997), Annex 1.

for a two-thirds majority is so easily met as to have no practical value.[26] Of course it is arguable that a party with a two-thirds majority in the legislature enjoys sufficient popular support to be allowed to pass constitutional amendments. This overlooks reality, as illustrated in Zimbabwe where the executive (and the Central Committee of the ruling party) has exercised and continues to exercise complete control over members of parliament with the resultant rubber-stamping of all constitutional amendments.

Further, it is questionable whether all members of parliament are able and/or prepared to undertake a critical and informed view of proposed constitutional changes. For example, in the parliamentary debate on the 1993 Act, the few members of parliament who did speak seemingly did not understand the Supreme Court decision in the *Catholic Commission* case, and believed its effect was to abolish the death penalty itself.[27] Indeed just one member managed to state and analyse the ruling accurately.[28] Regrettably, members were not assisted by the Minister of Justice, Legal and Parliamentary Affairs who informed them that the decision 'allowed the de facto abolition of the death sentence by the judiciary' and that the judgement 'was to the effect that from the day a person is sentenced to death by the High Court, three months should be the maximum. If three months pass before he is executed … then there is a delay, which in the opinion of the Supreme Court, vitiates the execution.'[29] As noted above, that was certainly *not* the ruling of the Supreme Court. A failure to appreciate the importance of constitutional amendment process was also demonstrated when the final vote on the Bill had to be nullified and retaken because of an oversight that it required a two-thirds majority. Such actions do not reflect well on the role of parliamentarians of:

> not allowing amendments to fundamental rights provisions in the constitution to be rushed through parliament. The people should expect their parliamentarians to consider with greater care the implications of any measures which will have the effect of diluting fundamental rights provisions. The

[26] In fact in the three years of its operation, the interim constitution in South Africa, which contained a similar provision to that in Zimbabwe, was amended no fewer than ten times and gave effect to numerous individual amendments.

[27] Just 26 of the 150 members made any contribution to the debate on the Second Reading and, seemingly, only five of these were not in favour of the Bill although their contributions on the matter were not always very clear. Thus one member asserted that 'the proposal should be supported and we should remove [the] death sentence for the democratic development of our nation' (Mr Nyashanu, *Parliamentary Debates*, 28 September, 1994).

[28] See the contribution of Mr Malunga in *Parliamentary Debates*, 22 September 1994.

[29] *Parliamentary Debates*, 22 and 28 September 1993.

people expect parliament to uphold fundamental rights and not to acquiesce in a process which weakens these rights.[30]

In addition, several constitutional amendment Bills have contained multiple changes which may well have contributed to inadequate discussion and consideration of some of their provisions. For example, the provision preempting the Supreme Court from hearing the appeal in *Chileya* was included in a Bill which also amended the highly sensitive and emotive land provisions, and in the debate was thus almost entirely neglected by members in their eagerness to discuss the land issue.

Overall, these (and other) amendments have undoubtedly enhanced executive power and curtailed the enjoyment of fundamental rights, whilst the role of the compliant 'rubber-stamp' legislature only goes to emphasise the limitations of the special parliamentary majority procedure.[31]

The South African experience

The text of the new constitution was one of the key issues during the Multi-Party Negotiating Process in South Africa. In order to allay concerns that the new document might not sufficiently address the anxieties and fears of minorities, negotiators agreed to a two-stage transition process. An interim government, established and functioning under an interim constitution, would govern the country on a coalition basis with a national legislature, elected by universal adult suffrage, doubling as the constitution-making body for the final constitution.[32]

It was also agreed that the text of the final constitution must comply with certain principles. As the Preamble to the interim constitution stated: 'AND WHEREAS in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles.' The adoption of the '34 Constitutional Principles' (CPs) as they became known (although in reality they covered many more issues) was the key to the adoption of the 1996 Constitution. To ensure that it complied with the CPs, the

[30] See the Editorial entitled 'A regrettable amendment' *Legal Forum* (Harare) 6 (1994), pp. 1–2.

[31] For a fuller account see John Hatchard 'The African–Zimbabwe Constitution: a model for Africa?', *Journal of African Law* (Oxford) 35 (1991), pp. 79–101.

[32] See, generally, John Hatchard and Peter Slinn, 'The path towards a new order in South Africa' XII, *International Relations* (London) 12 (1995), pp. 1–26; Hugh Corder, 'Towards a South African constitution', *Modern Law Review* (London) 57 (1994), pp. 491–533.

process called for an independent determination of the issue by the Constitutional Court. As section 71(2) of the interim constitution provided:

> The new constitutional text passed by the Constitutional Assembly, or any provision thereof, shall not be of any force and effect unless the Constitutional Court has certified that all the provisions of such text comply with the Constitutional Principles....

On 8 May 1996 the Constitutional Assembly adopted the new constitution and the matter was then duly referred to the Constitutional Court. On 6 September 1996, the court delivered its judgement.[33] It recognised that the new constitution represented a 'monumental achievement', particularly given the circumstances of South Africa, and concluded that the document complied with the overwhelming majority of the requirements of the CPs. However, one of the areas it identified for reconsideration by the Constituent Assembly concerned the constitutional amendment provisions.

During the negotiating process, the constitutional amendment provisions were of great concern to several parties, all of whom were anxious to protect the rights of minorities in the new South Africa. Surprisingly, a special parliamentary majority was favoured with the National Party demanding a 75 per cent majority and the ANC offering 70 per cent. Negotiations broke down (over other issues) and when they resumed the National Party was forced to give way and agree to a two-thirds majority and this was included in both the interim constitution and the 1996 document. The adoption of this procedure was extraordinary, particularly because, as the Association of Law Societies rightly noted, it meant that although the Constitutional Court was required to check the new constitutional text with the CPs, the provision left 'parliament free the following day (by a mere two-thirds majority) to amend the new constitution in a way which violates the Constitutional Principles and thus upset the compromises so carefully negotiated'.[34] The court itself focused on the requirement that the amendment procedure have 'special procedures involving special majorities' (as required by CP XV) and decided the section in its present form did not satisfy the CP. The Constituent Assembly

[33] See *Certification of the Constitution of the Republic of South Africa, 1996*, *Butterworths Constitutional Law Reports* 10 (1996), p. 1253.

[34] See ALS written submissions to the Constitutional Court, 31 May 1996, paras 3.2–3. Of course in the 1994 general election the ANC had fallen just short of a two-thirds parliamentary majority but an agreement with another smaller parliamentary party was (and remains) possible.

reconsidered the matter and approved an amended provision which reinforced the special parliamentary majority procedure (see below) and this was then accepted by the Constitutional Court.[35]

REPLACING THE SPECIAL PARLIAMENTARY MAJORITY PROCEDURE

These experiences raise two issues: the first, the possible replacement of the SPMP, is considered in this section. The second, whether parliament is the appropriate body for amending the constitution at all, is discussed in the next section.

The continued popularity of the SPMP is evidenced by the fact that it is retained for all constitutional amendments in Zimbabwe, Zambia and Kenya, and as part of the amendment process in, for example, South Africa, Sierra Leone, Seychelles, Lesotho, Malawi and Ghana. However, there is no consensus as to what constitutes the 'appropriate' special majority. Should it be a two-thirds majority, as required for amending parts of the constitutions of Zambia, Seychelles and Lesotho? A 65 per cent majority as required for amending the constitution of Kenya? A 75 per cent majority, as required for amending part of the new South African constitution?[36] Or a 100 per cent affirmative vote, as formerly required for amending parts of the constitution of Zimbabwe?[37] What happens if the ruling party breaks up into several smaller entities or the legislature is made up of several antagonistic parties so that *any* special majority becomes impossible to achieve?[38]

With changing political conditions and circumstances, it is unrealistic to expect constitutional drafters to devise a satisfactory numerical formula to cover all eventualities. In considering an alternative approach, one must consider two of the basic concerns underlying the SPMP: (i) the need to ensure that no one political party has the sole right to amend the constitution for its own partisan purposes; and (ii)

[35] See *Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996*, *Butterworths Constitutional Law Reports* 1 (1997), p. 1. The revised section is discussed below.

[36] This applies only to the 'Founding Provisions' and the section providing for constitutional amendment: otherwise, only a two-thirds majority is required: see s. 74, Constitution of South Africa 1996.

[37] Up to 1990, i.e. for the first ten years after independence. Certainly this deterred attempts to amend the constitution for it was only after the requirement fell away that the protected provisions were amended.

[38] For example, following the 1994 general election in Malawi, the United Democratic Front won some 48% of the seats, the Malawi Congress Party 30 per cent and the Alliance for Democracy 20 per cent. With great prescience, the drafters of the new constitution did not provide for a SPMP for constitutional amendment, preferring to rely on the holding of a referendum (see below).

the need to protect the position of minorities. To reflect these concerns, it is argued that any constitutional amendment Bill must enjoy all-party support, i.e. the support of the majority of the members of the ruling party together with a majority of the members of the main opposition party (or parties). If this is not achieved, a national referendum on the issue must be held.

This procedure has several advantages. First, it ensures the involvement of a wider range of political opinion by directly including minority parties in the amendment process. Second, it holds out the promise of improving the level of parliamentary debate with the government having to persuade more than just its own parliamentary supporters of the merits of the proposed amendment. Third, it helps develop a more consensual approach towards the amendment process, thus emphasising that the constitution is above partisan politics. Finally, it eliminates the inflexible and unsatisfactory numerical approach.

STRENGTHENING THE AMENDMENT PROCEDURE: SOME ALTERNATIVES

The theory behind the SPMP is that because parliament is made up of the elected representatives of the people, it is ideally placed to take responsibility for approving constitutional amendments. As the Zimbabwean experience demonstrates, in practice this is not necessarily the case, and concern over the effectiveness of the legislature in the amendment process has led the drafters of some of the new Commonwealth African constitutions to re-assess the parliamentary role.

Involving the second chamber in the amendment process

Since 1990, second parliamentary chambers have reappeared in a number of constitutions and are often given a role in the amendment process. This is especially significant when the second chamber has the power to veto the amendment Bill itself. This is the position in Malawi and also in South Africa, where a constitutional amendment Bill requires the supporting vote of at least six (out of the nine) provinces in the upper house as well as a special majority in the lower house.[39] A slightly different approach is taken in Namibia, where if a two-thirds

[39] A weaker and less useful procedure is found in Lesotho where the upper chamber, the Senate, merely has a delaying power.

majority is obtained in the lower house only, the president *may* make the amendment Bill the subject of a national referendum.[40]

The effectiveness of this procedure depends essentially upon the make-up of the upper chamber. For example, in Zimbabwe the Senate was an indirectly elected body that merely reflected the make-up of the lower house – thus giving the ruling party an overwhelming majority and rendering nugatory any effective oversight role.[41] Arguably, the most effective upper chamber is one that represents a wider range of civil society than that found in the lower house. This is the position in Malawi, where 32 of the 80 senators must come from 'interest groups' including representatives from women's organisations, the disabled, and from health, education, farming and business sectors and from trade unions.[42] An alternative is for the upper chamber to reflect regional and provincial interests, as is the case in Namibia and South Africa.

Whilst the 'Malawi model' has some merit, the fact remains that most Commonwealth African countries are uni-cameral and that other alternatives must also be considered.

Requiring approval in a national referendum

The people's right to be involved directly in the constitutional amendment process is recognised for the first time in several constitutions.[43] Thus the Constitution of Malawi provides that any amendment to the 'Fundamental Principles' or Human Rights provisions in the constitution requires a simple parliamentary majority, *provided* that the proposed amendment has received the support of the majority of those voting in a national referendum. A similar approach is adopted in Lesotho,[44] where a constitutional amendment Bill cannot be submitted to the king for assent unless between two and six months after the Bill has received parliamentary approval it is approved in a national referendum. In Uganda, Sierra Leone, The Gambia and the

[40] Art. 132(3)(a). This working is unfortunate as it leaves unclear the circumstances in which the president can exercise his/her discretion and decide not to hold a referendum. A duty to hold a referendum following disagreement between the two chambers is surely preferable.

[41] The Senate played no useful part in the political life of the country and was abolished in 1986.

[42] Art. 68(1) Constitution of Malawi. The other categories are individuals 'who are generally recognized for their outstanding service to the public or contribution to the social, cultural or technological development of the nation' and representatives of the major faiths in Malawi.

[43] This perhaps reflects the reluctance of some judges in the case of *Kesavananda* to concede that parliament represents a majoritarian position: see, for example, the views of Justice Hegde, p. 1629.

[44] Chapter 7 of the Constitution of Lesotho.

Seychelles, any attempt to amend a fundamental part of the constitution requires approval in a national referendum as well as obtaining a special parliamentary majority.[45]

Arguably, decisions by referendum are the most legitimate of all because they encourage the full participation of the people.[46] A referendum carries with it a greater chance of proposed constitutional amendments receiving the sort of serious, critical and objective consideration which they deserve, and counters executive attempts to undermine constitutional rights through the use of a compliant legislature. It can also encourage governments to think twice before seeking changes to fundamental constitutional provisions. For example, in 1996 the Zambian government sought to amend the 1991 Constitution. Some of their proposals were highly controversial, not the least of which was a provision requiring both parents of all presidential candidates to have been born in Zambia: a blatant political ploy to prevent the former head of state, Kenneth Kaunda, from contesting the presidential election.[47] The legislature itself was totally dominated by government supporters, and the two-thirds special majority for the constitutional amendment was easily obtained. However, the 1991 Constitution provided that the amendment of any of its fundamental rights provisions required approval by a national referendum.[48] Whilst the government could rely on a compliant legislature to replace the rest of the 1991 Constitution, it seemingly did not believe it enjoyed sufficient public support for changes to the Bill of Rights and did not pursue the matter.[49]

Special majorities are also provided for in some cases. Thus the 1991 Constitution of Sierra Leone specifically lists provisions, including those relating to the protection of fundamental rights, which can only be amended following approval in a referendum by not less than two-thirds of all the votes cast.[50] This is also the case in Namibia, in the event of a referendum being required (see above). Similarly, in the Seychelles, proposed amendments to specific provisions require the

[45] See Chapter 18, Constitution of Uganda, sec. 108 Constitution of Sierra Leone and Part III of the Constitution of the Seychelles.

[46] A point emphasised by D. Butler and A. Ranney, in Butler and Ranney (eds.), *Referendums: A Comparative Study of Practice and Theory* (Washington DC, 1978), p. 226.

[47] See Muna Ndulo and Robert Kent, 'Constitutionalism in Zambia: past, present and future', *Journal of African Law* (Oxford) 40 (1996), p. 271.

[48] See 79(3) Constitution of Zambia 1991.

[49] The Zambian situation raises an interesting point as to what constitutes an 'amendment' of the constitution as compared to the 'making' of a new one, for almost the entire content of the 1991 Constitution was 'amended' by the 1996 constitutional amendment Act (Act 18 of 1996).

[50] See s. 108(3) and (4). At least 50 per cent of registered voters must also have participated.

approval of not less than 60 per cent of the votes cast, whilst in The Gambia the amendment Bill requires the support of 75 per cent of those who voted. Arguably, because of the importance of the issue, a special majority is necessary.[51] This worked well in the Seychelles, where the referendum on the 1992 draft constitution failed to achieve a 60 per cent affirmative vote and led to the redrafting of a far more acceptable document.[52]

Holding a referendum inevitably has some drawbacks, but these are certainly not insuperable. First, whilst the procedure may lead to some delay in the coming into effect of provisions that strengthen fundamental rights provisions (see, for example, the position in Lesotho noted earlier), this is surely a small price to pay for protecting the constitution. Further, it also prevents hasty and retrogressive amendments being rushed through parliament. Second, it is an inconvenient procedure if the constitutional amendment is of a minor nature. Here the Constitution of Malawi again provides a helpful solution, for where the speaker of the National Assembly certifies that the 'amendment would not affect the substance of [*sic*] effect of the Constitution' the Bill may be passed with a two-thirds majority of the National Assembly.[53] Third, on the face of it, a referendum is expensive to organise and is thus not suitable for use in developing countries with scant resources. In reality, this is not an insuperable problem as assistance, both financial and practical, is now available through organisations such as the Commonwealth Secretariat, USAID and the European Union.[54]

Approval by a constituent assembly

Whilst provision for a referendum is certainly a significant advance, linking it with the need for parliamentary approval is hardly satisfactory. This is because of the fundamental weakness of opposition parties,[55] the unrepresentative nature of parliaments, and the strict

[51] Of course the problems associated with a special parliamentary majority are absent here. Even so, the variations in the size of the special majority required indicate that again there is no 'ideal' figure.

[52] See John Hatchard, 'Re-establishing a multi-party state: some lessons from the 1992 constitutional developments in the Seychelles', *The Journal of Modern African Studies* (Cambridge) 31, 4 (December 1993), pp. 601–12.

[53] See ss. 195–7.

[54] This procedure might also inhibit efforts to make frequent amendments to the constitution.

[55] Witness the efforts, so far largely fruitless, of the Commonwealth to support the operation of opoposition parties: see, for example, the Paper by the Commonwealth Secretariat, 'Democracy and good governance: challenges, impediments and local solutions in Africa', prepared for the Roundtable of Heads of Government of Commonwealth Africa on Democracy and Good Governance in Africa, Gaborone, Botswana, 23–27 February 1997, p. 6, and the text of the Opening Remarks of the Commonwealth secretary-general at the same conference, pp. 2–4.

hegemony of the ruling party, which mean the legislature is unsuited to the task of being the 'guardian of the Constitution'.

The crucial point is that a constitution is the supreme law and must reflect the wishes of the people. Thus, it is they who must make it and they who must be responsible for amending it. Just as many of the new constitutions were the product of a fully representative constituent assembly, so similarly, substantive amendments to that document must be approved by a specially elected constituent assembly whose membership represents a genuine cross-section of civil society. A useful model for such an assembly, albeit in relation to the making of a constitution, comes from Uganda. Here the 1995 Constitution was approved by a Constituent Assembly made up of 214 popularly elected members, 39 women (one from each of the districts)[56] and representatives from, amongst others, the army, trades unions, political parties, youth and the disabled.

A double-locking mechanism that requires a substantive constitutional amendment to obtain approval both of a representative constituent assembly and the people in a national referendum is surely the best way forward, and it is unfortunate that none of the new constitutions of Commonwealth African adopt this approach. Expensive and time-consuming though this may appear at first sight, the procedure allows for 'perfecting imperfections' whilst ensuring that this is done with full public involvement.

Other special procedures

Several constitutions, including those of Zimbabwe, South Africa and Zambia, retain a requirement for the publication of the text of any constitutional amendment Bill in the Government *Gazette* for public comment, thirty days before the first reading in the legislature.[57] There are some refinements: thus, in South Africa there is provision for a further 'cooling-off' period, so that an amendment cannot be put to the vote in the National Assembly within thirty days of its introduction/tabling in the Assembly.[58] Elsewhere, the period of notice is sometimes extended: for example, to three months in The Gambia.

It is questionable whether this 'special procedure' makes a

[56] Indeed one notable aspect was the involvement of women and women's groups throughout the entire process.

[57] See art. 79(2) Constitution of Zambia and sec. 52 Constitution of Zimbabwe. In South Africa, the person or committee introducing the amendment Bill must submit any written comments received from the public and the provincial legislatures to the speaker for tabling in the National Assembly: see sec. 74(6) Constitution of South Africa.

[58] Sec. 74(7).

constitution less vulnerable to amendment, and this may have persuaded some constitutional drafters to exclude it in favour of holding a national referendum. Certainly a 'cooling-off' period, on its own, hardly provides a check on amending the constitution, but it is a potentially useful means of stimulating public awareness and for allowing lobbying on the issue. Given the potential lack of any critical analysis of the proposed amendment by parliamentarians, this process at least allows the NGO community and other elements of civil society to engage government in dialogue.[59]

To enhance its value, wide publicity for the Bill is essential and this is not possible by merely publishing it in the official government organ. Effective dissemination requires that the proposed amendment(s) are published by law in the major news media including those in the vernacular. A useful precedent comes from Zimbabwe, where any compulsory purchase of land must be signified by a notice to this effect published once in the Government *Gazette* and twice 'in a newspaper circulating in the area in which the land is to be acquired is situated and in such other manner as the acquiring authority thinks will best bring the notice to the attention of the owner'.[60]

'*Protecting perfection*': *prohibiting any weakening of fundamental rights provisions*

As noted earlier, the rationale for constitutional amendment is the need to 'perfect imperfections'. But suppose the provisions are considered 'perfect': for example, where the fundamental rights and freedoms provisions in a constitution specifically entrench the universal and 'inalienable' rights provided for in international human rights documents. Should such provisions be unamendable? This is particularly important given the fact that African governments are now publicly committed to observing and protecting such rights.

The drafters of the Namibian constitution seemingly took this point into account. The document, which is notable for its protection of a wide range of civil, political, economic, cultural and social rights, prohibits the repeal or amendment of any provision of the constitution in so far as this 'diminishes or detracts from the fundamental rights and freedoms contained in [the Constitution]' (article 131). This approach

[59] This is well illustrated by the critical response from human rights NGOs in Zimbabwe to plans to amend the constitution to abolish the right of a non-citizen husband to reside in Zimbabwe with his citizen wife. As a result of their pressure, changes were made to the amendment Bill.

[60] Land Acquisition Act 1993, sec. 5.

envisages the strengthening of fundamental rights as appropriate ('perfecting imperfections') but preventing their being weakened (protecting 'perfection'). This certainly has the advantage of avoiding a repeat of the Zimbabwean experience discussed earlier. Even so, what constitutes 'perfection' is debatable, and may vary from time to time in line with changes in public attitudes. Thus a totally inflexible model could introduce serious constitutional tensions. In the Namibian context, for instance, this might occur where, despite overwhelming public support for the re-introduction of capital punishment, this was rejected on the ground that it was not constitutionally permissible.[61] Similarly, changing perceptions regarding participatory democracy might lead to widespread support for a change to a Ugandan-style 'movement political system' rather than the retention of a multiparty state. Again, the Namibian approach would make this impossible.

Amongst Commonwealth African states, article 131 remains unique to Namibia and, it is argued, should not be copied. A constitution should retain some flexibility, for however 'perfect' it may appear at the time of its drafting, some amendment may still become appropriate in the future. This means that the need to provide a satisfactory amendment procedure remains.

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Constitutions are fragile documents, and their history in Commonwealth Africa is one of abrogation, derogation and retrogressive amendment. The 1990s have seen a fresh start with strenuous efforts being made to provide popular and durable national constitutions legitimated by the consent of the people. This article has highlighted the importance of protecting these documents by setting in place effective formal safeguards against their being undermined through constitutional amendment.

Given the 'right of the people to amend' the document in order to 'perfect imperfections', what is striking about the post-1990 constitutions is that so many still base their amendment procedure on the Westminster model, with its emphasis on the role of parliament as the guardian of the constitution. In view of the weakness of many Commonwealth parliaments, arguably that trust is largely misplaced. Indeed this point is recognised by implication, given the efforts in some countries to strengthen the amendment procedure by, in particular,

[61] Article 6 of the Namibian Constitution prohibits, amongst other things, the imposition of the death sentence. The article itself is protected from amendment by article 131.

requiring approval for change in a national referendum. However, if it is considered desirable to retain the legislature as a 'guardian of the constitution' then the unsatisfactory special majorities procedure needs replacing by one that better reflects the views of all parliamentarians.

This article has shown that the current amendment provisions in the new constitutions of Commonwealth Africa are generally unsatisfactory, in that they do not adequately protect the document from retrogressive amendment. The critical issue is to provide a clear distinction between the procedure for amending the constitution, which requires a high level of public debate and participation, and that for the passing of 'ordinary' legislation. The development of a satisfactory procedure means that any amendment of the constitution is legitimised in the eyes of the people, and confidence in the entire document maintained. Although national circumstances must be taken into consideration, because the constitution belongs to the people, inevitably their involvement is fundamental in the amendment process. This is best achieved through approval both by a popularly elected constituent assembly and in a national referendum.