Constitutional Amendment Procedures

September 2014

Overview

What?	• A constitutional amendment alters the content of a constitutional text in a *formal* way.
Why?	• Constitutions need to be amended over time to adjust provisions that are inadequate, to respond to new needs, including supplementing rights, etc. Otherwise, the text of a constitution cannot reflect social realities and political needs over time. Yet the constitution also needs to be protected from short-sighted or partisan amendments.
Why not?	• Some form of formal amendment procedures are a near-universal feature of contemporary constitutions. Thus, for constitution-makers, the relevant question is not so much whether there should be a provision addressing formal amendments, but what needs to be considered while drafting it.
Where?	• All democratic countries in the world have a provision in their constitution regulating the conditions for amending it.

About this series

These constitution-building primers are intended to assist in-country constitution-building or constitutional-reform processes by: (i) helping citizens, political parties, civil society organisations, public officials, and members of constituent assemblies, to make wise constitutional choices; and (ii) helping staff of intergovernmental organizations and other external actors to give good, well-informed, context-relevant support to local decision-makers. The primers are designed as an introduction for non-specialist readers, and as a convenient aide-memoire for those with prior knowledge or experience of constitution-building. Arranged thematically around the practical choices faced by constitution-builders, the primers aim to explain complex issues in a quick and easy way.

About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

What Is the Issue?

A constitution is the supreme law of a country. In contrast to ordinary legislation, a constitution embodies the fundamental choices made by a country and its people that establish the basis for political and social life. Constitutions establish the system of government, distribute and constrain power, protect the rights of citizens and deal with various additional issues of identity or substantive policy that are considered foundational in the specific context of a particular country.

However, while intended to be both foundational and enduring, constitutions are not intended to be immutable; if they are to endure, they must be able to respond to changing needs and circumstances. Motivations for changing the written text of a constitution differ. Some amendments are made for the public interest, for example: (i) to adjust the constitution to the environment within which the political system operates (including economics, technology, international relations, demographics, changes in the values of the population etc.); (ii) to correct provisions that have proved inadequate over time and (iii) to further improve constitutional rights or to strengthen democratic institutions.

On the other hand, changes to a constitution may be motivated by selfish or partisan goals. Since a constitution sets the rules of the 'political game', those in power may be tempted to change the rules to extend their tenure in power, to secure their position, to marginalize the opposition or minorities, or to limit civil and political rights. Such changes may weaken, or even undermine, democracy.

Similarly, constitutions have to be responsive to social change and to changes over time in social mores and values, but they need to be protected against short-term changes or changes hastily approved without due reflection and consideration.

The challenge, then, is to design an amendment process that allows a constitution to be changed for the public good, when necessary, when supported by a sufficient consensus, and after careful deliberation, but that prevents it from being changed for self-interested, partisan, destructive or short-term motives.

An additional challenge, in federal states and in composite societies (those in which two or more distinctly recognised national, ethnic or linguistic communities co-exist), is to design an amendment formula that enables states or communities to protect their rights and to have continuing control over the compact between them.

Deciding on the framework and acting within the framework

'Constitutionalism lives on a differentiation between the constitutional level and the level of ordinary law. [..] A constitution determines the principles and procedures for political decisions which are made on the basis and within the framework of the constitution on a day-to-day-basis, and according to the preferences of those who have won elections. […] If politicians can decide on the framework in the same way they are allowed to act within the framework, the difference between constitution making and law making, and the difference between the constitutions for political decisions and these decisions themselves, disappears. The constitution loses its function. […] [Thus], constitution making should differ from law making not only in terms of the quorum, but also in terms of actors and procedures.'

(Quoted from D. Grimm, 'The Basic Law at 60: Identity and Change', 11.1 *German Law Review* (2000), 33 (39-40))

This primer is intended to help constitutional drafters achieve this balance between stability and flexibility. As there are many possible amendment procedures, and no best model to follow in all circumstances, it aims to inform the search for appropriate options that fit the given context. It does so by highlighting some pertinent questions constitutional drafters have to consider while drafting the amendment clause. These include:

- What is the difference between a constitutional amendment and a total revision?
- Who should be able to initiate a constitutional amendment?
- Who should be involved in amending the constitution?
- What kind of special constraints might be helpful in the constitutional amendment process?
- Should the public be involved in the amendment process—either directly or indirectly?
- Should there be alternative amendment procedures available to choose between?
- Should all constitutional provisions be subject to the same amendment procedure?
- What special provisions should be in place for federal or composite societies?
- Should some provisions be unamendable?

Amendment Formulas: Basic Design Options

Although contemporary constitutions make use of a wide variety of amendment formulas that make the process of amending the constitution more difficult than enacting ordinary laws, most are based on one or more of the following mechanisms: (i) a supermajority rule in the legislature; (ii) a referendum; (iii) double-decision rules, which may include specified time delays or an intervening election or (iv) reference to the constituent states, provinces, regions or other territorial units of the polity.

Legislative Supermajority

In most constitutional amendment procedures, the legislature needs to pass an amendment law with a greater majority than is required for ordinary legislation. Various degrees of a qualified majority are in place, ranging from an absolute majority (50 per cent of all members plus one) to a four-fifths majority of all members.

The most common qualified-majority formulas are three-fifths (60 per cent) or two-thirds (66.7 per cent) of the membership. These figures are somewhat arbitrary: there is no reason why a 65 per cent or 70 per cent majority could not be used instead. Nevertheless, the principle is that by requiring a larger than usual majority, the incumbent majority cannot unilaterally approve amendments and is required to negotiate with the opposition or other parties in order to make changes.

Supermajorities come with advantages and disadvantages. On the one hand, they prevent incumbents from easily or unilaterally changing fundamental rules and ensure that any changes are supported by a broad range of the political spectrum. On the other hand, a very high majority allows a small group in the legislature to act as a 'spoiler', and may make it overly difficult to amend the constitution when necessary.

Defining the supermajority: A three-fifths, two-thirds or three-fourths majority, or any other specified majority, may be defined in two ways—as a fraction of the votes cast (i.e. of the members present and voting) or as a fraction of the total available votes. The latter is the higher threshold, since it counts abstentions, in effect, as negative votes. For example, if in a body of 100 members, a proposal is approved by 60 members and opposed by 20 members, with 20 abstentions, then the requirement for a two-thirds majority of votes cast would be met but a two-thirds majority of the total membership (67) would not be achieved. Without further specification, a supermajority of votes cast could allow a relatively small percentage—perhaps even a minority—of members to approve an amend-

ment, provided that there is no strong opposition. To counteract this, combinations of votes cast and total membership may be used. In India, for example, the requirement for amendments is two-thirds of the votes cast, but these must amount to at least an absolute majority (50 per cent plus one) of the total membership.

Bicameral legislatures: If the national legislature is **bicameral**, the upper house's approval is often required as well, even if its approval is not always necessary for ordinary legislation. Majority thresholds may differ here from what is required in the lower house. In Spain, for example, an amendment may be passed either by a three-fifths majority in both houses or by a two-thirds majority in the lower house and an absolute majority in the Senate. In some cases, amendments must be approved by both houses in a joint session (e.g. in Bhutan, a three-fourths majority of the members of parliament in a joint session is needed). In cases where a joint session is held, the real distribution of power depends on the relative sizes of the two houses: if the upper house is small, it may be easily outvoted by the lower house, but if the upper house is large, its members will have a proportionally stronger voice. In some cases, where upper houses are designed to represent particular communities or territories whose constitutional autonomy or special rights have to be protected, it may be important to give the upper house veto power over some or all amendments.

Reference to the People (Direct Democracy / Referendum)

Considering a constitution as the legal and political foundation of a state, its legitimacy needs to derive from the people. This reflects the idea that the people are the source of sovereignty—a basic concept of democratic governance. This doctrine is mirrored by the real involvement of the people in most of today's constitution-making exercises, be it through a direct election of the members of the constitutional assembly at the beginning of the process and/or a referendum at the end. An amendment procedure may be established with the idea in mind of involving the people in the process as well, as a continuing expression of their ultimate sovereignty.

The most direct way to involve the public in amending the constitution is through a referendum, usually following a vote by the legislature. Around 40 per cent of current constitutions make provision for the use of referendums in constitutional amendments, although the specific circumstances in which a referendum may or must be held can vary:

- Some countries demand a referendum for all constitutional amendments, no matter how small, inconsequential or uncontroversial (e.g. Australia, Denmark, Ireland and Japan).

- Some countries require a referendum only if the most fundamental provisions are amended or if the amendment entails a total revision (e.g. Austria, Jamaica, Latvia and Spain).

- In some countries, there is a requirement for a referendum on amendments unless the bill is passed by a sufficiently high supermajority in the legislature (e.g. four-fifths in Benin). The rationale behind this is that a referendum is not required if parliament has almost unanimously consented to the amendment. It is widely accepted that such amendments are likely to be relatively minor and uncontroversial.

- An alternative approach allows a minority of the members of the legislature to exercise discretion in deciding whether an amendment should be subject to a referendum. The minority is thereby given the option of letting the people decide against a constitutional amendment that it could not prevent within the legislature. This power may be exercised by 20 per cent of the members of parliament in Italy, by 25 per cent of the members of parliament in Luxembourg and by 33 per cent in Slovenia and Sweden. A slight variation of this approach, adopted in Italy, allows a referendum only if a bill passes with the required majority (50 per cent plus one) but remains below a specific qualified majority (66 per cent). Non-legislative actors may also be involved: in Italy, five regional councils or 500,000 voters may collectively demand a referendum as well; in Luxembourg, 25,000 voters (the difference reflecting the difference in the population size) may do so.

- Presidents may have a discretionary authority to refer amendments to the people. If the president can put an amendment before the people at his or her own initiative, this will greatly strengthen presidential power at the expense of the legislature, leading towards 'hyper-presidentialism', and such processes are rare in democracies. More usually, the president may refer an amendment to the people only after it has been approved by the legislature. The President of Tunisia, for example, may call a referendum on any proposed amendment after it has been approved by a two-thirds majority in parliament.

Concerns have been raised that a referendum might not be the best way to ensure the constitutional protection of minorities. In response to this concern, some constitutions require not only a nation-wide majority in a referendum but also that the voters in the majority of subunits also vote in favour of a constitutional amendment (Australia, Switzerland) or that the voter turnout be at least 20 per cent in a majority of subunits (Kenya).[1]

The requirements for a referendum should be carefully considered since they also contribute to achieving an adequate balance in terms of how flexible or rigid an amendment is. Having no threshold with regard to voter turnout may mean that a very small percentage of the population might be sufficient for amending the constitution (e.g. in Botswana in 2001, several constitutional amendments were approved on a turnout of less than 5 per cent). On the other hand, a threshold that is too high in terms of voter turnout might be difficult to achieve. Constitutions that have addressed a minimum amount of voter turnout range between 40 per cent (Denmark) and 50 per cent (South Korea) of the electorate.

Required majorities for referendums also differ. In some countries, a majority of more than 50 per cent of the (valid) votes cast is necessary. Again, these rules must be crafted with regard to local circumstances and political conditions. In some places, a 50 per cent turnout may be difficult to achieve if polling places are understaffed, if people have to travel a long way to get to the polls or if electoral registers are not up to date. In some cases, an even higher majority is required (between three-fifths and three-fourths majorities): this may make a provision, in effect, unamendable. Indeed, this may be the intention. In Mauritius, for example, no change to extend the term of office of members of parliament beyond five years may be made unless approved by the unanimous consent of the legislature and by three-fourths of the votes cast in a referendum.

Double-Decision Rules

Time delays: Some constitutions require that a proposed amendment be passed twice, in substantially the same form, with a stated interval—usually three months or 90 days—between them (e.g. Estonia, Italy, Jamaica). The intention of rules is that hasty amendments are avoided, time for reflection is offered and the chances for a public debate are increased.

Intervening general elections: A variation on the double-decision rule requires parliamentary elections to be held between the first approval and final approval of an amendment. This is a widely used formula that may provide an indirect way of involving the people as part of the process for constitutional amendments. Through this process, the constitutional amendment can become part of the electoral campaigns for the legislature. It is left with the individual voter to decide on how far the suggested amendment might impact his/her voting decision. The disadvantage of such an option might be that either the constitutional amendment overshadows other important political issues normally relevant in elections or, in turn, the amendment might be sidelined in a general campaign.

[1] For further information, see International IDEA's constitution-building primer: Direct Democracy.

- In some countries that rely on intervening elections, draft amendments are put on hold until the next regular elections (Finland, Greece and Panama).

- In other countries, the legislature is immediately dissolved after adoption of the amendment and new elections held (e.g. Iceland and Netherlands). In these cases, the usual practice is to limit constitutional proposals until near the end of the projected legislative term, such that an additional, early election is avoided. The effect, then, is not so much to increase the frequency of elections as to limit the frequency of amendments.

Combining double-decision rules with supermajorities: The requirement for an intervening election may be combined with supermajority rules: in the Netherlands, for example, an amendment must be approved twice by parliament, with an intervening general election, and on the second occasion a two-thirds majority vote in both houses is required for the adoption of an amendment.

Reference to States/Provinces/Regions

In many federal, decentralised or composite states, the constitution, representing an agreement or compact between the various units, can be amended, in whole or in part, only by the consent of these units or by a specified majority of them. This consent may be expressed through state or provincial legislatures (Canada, India, South Africa and the United States) or through referendums in each of the states (Australia and Switzerland). Where the subunits do not have a direct vote, there is likely instead to be a role for the upper house of parliament, which represents state or provincial interests at the central or federal level (e.g. Germany).

The requirement for a reference to states/provinces may apply only to certain parts of the constitution, such as those dealing with the federal system or respective powers of levels of government.

Think Point: What are the most important reasons for making the constitution harder to amend than ordinary laws? Is it to preserve the sovereignty of the people, to protect minorities, to protect 'constitutional bargains' between different communities or levels of government or to prevent incumbents from changing the rules and abusing power? How are these different purposes—which may overlap—achieved through different types of amending formulas?

Further Design Considerations

Amendment vs Total Revision

Some countries (e.g. Austria, Bulgaria, Costa Rica, Nicaragua and Spain) distinguish between a constitutional amendment and a **constitutional revision**, with the latter often requiring a higher threshold for the adoption of an entirely new constitution compared to a constitutional amendment. Such a distinction follows the assumption that the authority to amend a constitution implies the introduction of adjustments, modifications or changes within the constitution but does not include the power to exchange/replace it or its original structure. Acknowledging the concept of the people as the *pouvoir constituant* (the power that creates the constitutional order) in democratic societies, a total revision in these countries usually requires the people's immediate involvement, be it through the election of a constituent assembly (Bulgaria, Costa Rica and Nicaragua) or an obligatory referendum (Austria and Spain).

Who Should Be Allowed to Initiate a Constitutional Amendment?

The right to initiate a **constitutional amendment** procedure is generally vested in the legislature, and the process of adopting an amendment usually broadly mirrors (albeit with the additional requirements and restrictions discussed in this document) the process for proposing and enacting ordinary laws. In countries with a bicameral legislature, lower houses almost always enjoy the right to initiate the process, as do the majority of upper houses. In some constitutions, a certain number or percentage of members is required in order to initiate an amendment, which may be much higher than the number required to propose an ordinary law. For example, this figure is set at one-third of the members in Tunisia, one-fourth of the members of either house in Romania. The majority of constitutions also allow other actors to trigger the process. Most prominent in this regard is the executive, be it through the head of state (especially in presidential or semi-presidential systems) or the Ministers.

Occasionally, the highest court in a country might also initiate an amendment (Guatemala and Panama). The rationale behind including courts in the group of initiators stems from an appreciation of their role as constitutional guardians and from a recognition of their technical expertise in constitutional matters. However, if the courts possess an active power to propose constitutional amendments this may further politicise the judiciary, and may reduce their reputation for impartiality and neutrality.

In about 15 per cent of all countries, the people can propose an amendment if a certain number of voters, usually by means of a petition, make such a request. Such a provision reinforces the idea that a constitution is a living document that springs from the sovereign people and is open to considering the people's concerns. Since a successful initiation requires a certain amount of prior campaigning, it might also serve as an early indication of the people's ideas.The number of signatures required to trigger the process varies widely (e.g. 10 per cent of voters in Latvia; 0.3% in Peru), but as a general principle it should be large enough to prevent frivolous proposals, but small enough to have a realistic chance of being used. In Romania, there is an additional threshold in order to prevent initiatives from regional/ethnic groups: in addition to the requirement that 500,000 voters throughout the country support the initiative, at least 20,000 voters in half of the counties in the country must also endorse the initiative.

In federal states, a representative organ of the states, regions or provinces also generally has the right to suggest amendments, be it through the upper legislative chamber at the national level or through one or more parliaments from the subunits (Brazil).

Should All Constitutional Provisions Be Subject to the Same Amendment Procedure?

In an attempt to identify the right balance between rigidity and flexibility in constitutional amendments, many constitutions offer different thresholds for different constitutional provisions. This may help provide stability, certainty and strong guarantees for some parts of the constitution that need to be more rigid, while allowing flexibility in other areas. Two questions are relevant in this context:

Which provisions should be specially protected? Depending on the circumstances of the country in question, its previous experiences and the bargains achieved during the constitution-making process, different parts of the constitution may need to be protected by additional procedures or thresholds. Typically, the provisions requiring a more rigid amendment procedure can include the system and form of government, the type of elections, the integrity of internal borders, the rules for holding referendums, the provision for amending the constitution, national languages, religion, fundamental rights, national values and principles and provisions that affect subunits and their powers.

What kind of additional threshold might be introduced? The usual ways of increasing the threshold for amendment include: (i) increasing the size of the required supermajority; (ii) requiring or allowing a

referendum; (iii) referring to sub-national legislatures. Identifying the appropriate kind of an additional threshold again depends on the individual situation in a country, and, in particular, on the reason why an additional threshold is needed. For example, if there is a desire to protect minorities that are geographically concentrated, it may be advantageous to allow sub-national legislatures that represent those minorities to have a veto over amendments. In Canada, for example, amendments concerning language rights cannot be adopted without the consent of all provincial legislatures, or, if the amendment applies to only one or several provinces, of all the provincial legislatures to which the amendment applies. This ensures that language rights in any province cannot be changed without the consent of the legislature of that province. If the desire is to prevent the political elite from undermining basic democratic principles, a referendum requirement might be appropriate.

Think Point: Which parts of a constitution are most truly fundamental—what are the crucial ground rules that define the state's identity? Should these be given greater protection from hasty or unilateral amendment? If so, what additional features of the amendment process—higher majorities, a referendum or reference to sub-national units—are most relevant?

Should Some Provisions Be Unamendable?

In addition to various degrees of *procedural* limitation discussed above, some constitutions also place *substantive* limitations on amendments through a clause that prohibits the amendment of certain provisions. Today, more than 70 constitutions around the world include such unamendable provisions.

The content of these provisions differs widely from country to country. Examples of immutable provisions include: national unity (Indonesia), the status of religion (Tunisia), the multiparty system (Romania), the democratic or republican form of government (France), electoral rights (Brazil), basic human rights (Germany) and presidential term limits (Honduras).

These provisions are often the result of past traumas. Constitutional drafters in countries emerging from conflict or dictatorship may desire to create a constitutional order that will prevent previous oppressive structures or practices from ever returning.

Unamendable provisions might also emerge from a process of transition in order to guarantee fragile bargains reached at that time. For example, some parties to the constitutional negotiation may demand that a constitutional commitment to decentralisation be balanced by an 'unamendable' commitment to the indivisible territorial unity of the state.

Examples of Unamendable Provisions in Selected Countries		
Portugal (art. 288) Constitutional revision laws must respect: (a) national independence and the unity of the state; (b) the republican form of government; (c) The separation between church and state; (d) citizens' rights, freedoms and guarantees; (e) the rights of workers, workers' committees and trade unions; (f) the coexistence of the public, private and cooperative and social sectors of ownership of the means of production; (g) the existence of economic plans, within the framework of a mixed economy; (h) the appointment of the elected officeholders of the entities that exercise sovereignty, of the organs of the autonomous regions and of local government organs by universal, direct, secret and periodic suffrage; and the proportional representation system; (i) plural expression and political organization, including political parties, and the right of democratic opposition; (j) the separation and interdependence of the entities that exercise sovereignty; (l) the subjection of legal norms to review of their positive constitutionality and of their unconstitutionality by omission; (m) the independence of the courts; (n) the autonomy of local authorities; (o) the political and administrative autonomy of the Azores and Madeira archipelagos.	**Romania (art. 152)** The provisions of this Constitution with regard to the national, independent, unitary and indivisible character of the Romanian state, the republican form of government, territorial integrity, judicial independence, political pluralism and official language shall not be subject to revision. Likewise, no revision shall be made if it results in the suppression of the citizens' fundamental rights and freedoms, or of the safeguards thereof.	**Cape Verde (art. 313)** The following may not be subject to revision: a. National independence, the integrity of the national territory, and the unity of the state; b. The republican form of government; c. Universal, direct, secret, periodic suffrage for the election of national and local officeholders; d. The separation and interdependence of national bodies; e. The autonomy of local power; f. The independence of the courts; g. Pluralism of expression and political organization, and the right of opposition; […] the rights, liberties, and guarantees established in the Constitution.

The decision to include immutable clauses in a constitution is, however, a delicate one. It comes with considerable side effects and severe consequences that should not be taken lightly:

- By insulating certain principles or provisions from amendment, an intra-constitutional hierarchy is established; the power of the judiciary may be strengthened, because constitutional amendments can themselves be contested in the courts on grounds of constitutionality. In a democratic setting, one might argue, the constituent power belongs to the sovereign people and their freely elected representatives. Entrusting other institutions with a final say about the validity of constitutional amendments (beyond perhaps verifying compliance with formal requirements) would place an unelected and unaccountable body above the constituent power. In some countries, the constitutional court is a recognised part of the amendment process, with responsibility for reviewing proposed amendments before they are voted upon, to ensure that proposed amendments are compatible with the constitution (e.g. Tunisia).

- Vague wording is occasionally used, prohibiting constitutional amendments that run counter to 'democratic principles' or the constitution's general 'principles and spirit' but without specifying what these principles are (e.g. Norway). This may allow for greater flexibility, but the effects of such a provision are unpredictable. The resulting ambiguity could further increase judicial at the expense of popular power. The interpretation of such a provision will greatly depend on political circumstances and particularly on the strength of the constitutional culture and on the relative power of the courts and legislature.

- Unamendable provisions not only restrict the actions available to future politicians within the constitutional framework, they also constrain the choices of future generations to adjust the constitution in the respective areas at all. On a theoretical level, there may be concerns about the extent to which we can legitimately bind future generations. The people may waive their right to change their own governing rules, but can they subject future generations to their law without considerably reducing the arena of democratic politics? On a practical level, can we accurately predict future needs? If an unamendable provision becomes untenable and undesirable in the future, it would be impossible to fix the problem without breaking the whole constitutional settlement.

Even where the constitution does not provide for unamendable provisions, the courts in some countries have developed a doctrine that achieves a similar effect. For example, from 1967 onwards, the Supreme Court of India introduced the 'basic-structure' doctrine, reasoning that 'amendments' to the constitution can take place only in a way that preserves, and is consistent with, the general framework and principles of the constitution as originally adopted. The problem with reliance on judicial mechanisms to define what is unamendable, however, that their decisions may be less legitimate that a clear statement of intent in the constitution.

There is an alternative to unamendable provisions, which is to use different levels of entrenchment as discussed in the previous section. In South Africa, for example, Section 1 of the Constitution outlines four cardinal principles: (i) human dignity, the achievement of equality and the advancement of human rights and freedoms; (ii) non-racialism and non-sexism; (iii) supremacy of the constitution and the rule of law; (iv) universal adult suffrage, a national common voters roll, regular elections and a multiparty system of democratic government, to ensure accountability, responsiveness and openness. These are clearly intended to be foundational and integral to the constitutional order. Yet they are not rendered unamendable. Instead, while most of the constitution can be amended by a two-thirds majority in the National Assembly, these provisions can be amended only by a three-fourths majority. By allowing these provisions to be amended – albeit with great difficulty – ultimate control over the constitution rests in democratically elected, rather than judicial, hands.

Other Restrictions on Amendments

Time restrictions after adoption of a new Constitution: The first few years following the adoption of a new constitution are critical for its success. Public expectations of change may be high, but the legitimacy of the constitution may be fragile. In these conditions, implementation of the constitution (for example, holding elections, vetting officials, establishing new public bodies, and bringing laws and practices into conformity with the constitution) can be a major challenge. After a period of protracted and potentially divisive constitutional negotiations, especially after a period of conflict or repression, not all stakeholders to the constitution will necessarily feel comfortable with, or bound by, the agreement that has been reached; they might be tempted to introduce retrogressive amendments as soon as the opportunity arises. To reduce this risk, and to allow time for consolidation before changes are considered, some constitutions (e.g. Cape Verde and East Timor) require a larger supermajority for amendment during the first few years after their adoption. Conversely, constitutions may allow for easier amendment during an initial period, so that drafting or design faults that become apparent during the implementation phase can be rectified. In considering these approaches, the advantages of certainty and stability need to be balanced against the consequent loss of flexibility.

Time restrictions after the most recently adopted amendment: Some constitutions allow amendment only after a specific period of time, usually several years, has elapsed after a previous amendment. In Greece, for example, amendments are not permitted before the lapse of five years from the completion of a previous amendment. Such temporal restrictions may protect the 'sanctity' of the constitution, marking it out as a stable and enduring law that is not to be changed for superficial or transient reasons, discouraging excessive tampering or meddling with the constitution and helping instead to focus attention on the consolidation of existing reforms. However, this comes with the disadvantage of imposing an artificial chronological rigidity, during which even necessary, urgent and uncontroversial amendments are forbidden. To avoid this rigidity, amendments may be made more difficult during these periods, but not absolutely prohibited. For example, Portugal adopts a variation on this model that requires a higher threshold for frequent amendments: amendments may be made, once a period of five years has elapsed since the previous amendment, by a two-thirds majority in parliament, but the requirement for a five-year delay may be waived if the amendment is approved by a four-fifths majority.

Time restrictions after a failed amendment: Some constitutions place restrictions on the adoption of amendments following a failed amendment bill. In Albania, an amendment cannot be adopted: (i) within one year of the rejection by parliament of a proposed amendment on the same topic; or

(ii) nor within three years of its rejection by a referendum. Such rules may prevent too much legislative time being absorbed by constitutional amendments and may stop the practice of 'neverendums' (never ending referendums), where a persistent minority keeps on proposing an amendment to the people until it finally gets its way.

Requirements for Public Deliberation: There may be a requirement for proposed amendments to be circulated for public consultation before the final vote is taken. This recognises that constitutional change, because of its fundamental nature, is a matter for deeper and more considered public engagement than ordinary law-making. Kenya's constitution, for example, requires parliament to publicise any bill to amend the constitution, and to 'facilitate public discussion about the bill'. The enforceability of these provisions is, however, debateable: what must the government do in order to discharge this duty of consultation? What should the consultation period be? The South African constitution is a little more specific. It requires that proposed amendments be published in the national Government Gazette and circulated for public comment at least 30 days before the amendment bill is introduced. The views of provincial legislatures must also be sought. The written comments of the public and provincial legislatures must then be presented to parliament before the vote.

Restrictions on amendments during states of war, invasion or emergency: Many constitutions prohibit amendments during exceptional times of crisis, like a state of emergency or under the rule of martial law (e.g. Cambodia and Estonia). The reason for this is to prevent amendments taking place under conditions of tension or duress, when those in office may seek to use public fear to usurp additional power, and when opportunities for public deliberation and opposition activity may be limited.

Restrictions on application to incumbents or named individuals: Another type of constraint prevents provisions from being applied to specific individuals: constitutional amendments that address the status of an office or a position do not apply to incumbent officeholders; instead, such amendments only enter into force for those who take up such affected offices/positions after the amendment is passed. For example, an extension of the presidential term limit does not apply to the incumbent president at the time of the amendment (South Korea). This might help to avoid constitutional amendments driven by individuals in government for their own benefit.

Prohibition of implicit and hidden amendments: In several countries, a constitutional amendment can be made only by a bill that must clearly specify that its purpose is to amend the constitution. In Sierra Leone, for example, 'No Act of Parliament shall be deemed to amend, add to or repeal or in any way alter any of the provisions of this Constitution unless it does so in express terms.' A similar rule (found in Ghana, South Africa and Kenya, amongst others) limits constitutional amendment bills to constitutional matters only. This means that a constitutional amendment cannot be hidden in the midst of an otherwise ordinary bill, where it might not be noticed, considered or debated by parliamentarians. The intention of these rules is to ensure that constitutional amendments are given their due importance, are properly debated, and are not made by stealth.

Should There Be Multiple Routes to Amendment?

A number of countries offer more than one route to amending certain constitutional provisions. The existence of multiple routes to amendment (which is not to be confused with having different amendment rules for different parts of the constitution, as outlined in section C) offers a higher degree of flexibility, since an amendment that cannot be passed by one route can, perhaps, be passed by another. Allowing multiple routes to amendment can also make it possible to choose the amendment route that best reflects the content and context of a specific amendment.

In Bulgaria, for example, most constitutional amendments must be adopted by a three-fourths majority in parliament. If this majority is not reached, however, an amendment may be approved by a two-thirds majority, provided that this two-thirds majority is then repeated after an interval of two to five months. Likewise the Finnish constitution may be amended by a five-sixths majority in

a single session, or by a two-thirds majority vote in two successive legislatures with an intervening election. In these cases there is a trade-off between the size of the required supermajority and the ease (in terms of time delays and double-decision rules) with which constitutional decisions can be taken.

Estonia allows for even more flexibility, because it combines the principles found in Bulgaria and Finland with the option of a referendum. An amendment may be passed by: (i) a three-fifths majority of parliament followed by a majority vote in a referendum; (ii) two successive decisions of parliament with an intervening general election, by a three-fifths majority on the second occasion; or (iii) in urgent cases, with the consent of a four-fifths majority of the members of parliament in a single session. Thus, for instance, contested and fundamental questions can be decided by referendum, while technical and uncontroversial amendments might be made by a parliamentary supermajority.

In the United States, the usual method of amendment requires approval by a two-thirds majority in both legislative chambers and ratification by a three-fourths majority of the states. The other method is to hold a constitutional convention (a specially elected body assembled to make constitutional amendments, which can be called by the legislatures of two-thirds of the states). Although a constitutional convention has not been held at the federal level since 1789, the fact that there is another route to amendment, outside of Congress, has been used to push for reforms.

Kenya also permits an additional bottom-up route for constitutional amendments (amendment by popular initiative). Initiated by at least a million voters and approved by a majority of counties, the draft bill is submitted to a referendum if not accepted by the national legislature.

If multiple amendment routes are possible, it is important to consider who has the right to choose between them. In France, for example, the constitution can be amended either by referendum or by a three-fifths majority in a joint session of both houses of parliament, but it is the president who chooses, in the case of amendments proposed by the government, which of these routes to take.

Contextual Considerations

Flexibility/Rigidity Depends on Political Circumstances

In the abstract, it is hard to prescribe a suitable amendment formula that will strike an appropriate balance between rigidity and flexibility. Not only must the amendment formula reflect the specific needs and circumstances of each jurisdiction, but similar amendment formulas may generate different results in different cases, depending on the political culture, the political system and the history of the country in question. In other words, formal amendment rules do not necessarily reflect the actual difficulty of effecting change.

- For example, in parliamentary systems, where the prime minister leads and is responsible to parliament, the real initiative to amend the constitution is often taken by the executive, even if the procedure is formally supposed to start in parliament.

- Depending on the electoral system and the spectrum of political parties, a given supermajority requirement may be hard to reach in some countries, whereas the same threshold is not a high barrier for amending the constitution in other countries. In Hungary, for example, which uses an electoral system favourable to the largest party, 44.5 per cent of the votes (gained by the governing Fidesz-Hungarian Civic Union) produced for that party a two-thirds majority of the seats in parliament, allowing them to amend the constitution at will. In the Netherlands, in contrast, which has a highly proportional electoral system, reaching a two-thirds majority may require agreement between four or more political parties, making it harder to achieve.

- A major determinant of the real rigidity or flexibility of a constitution is the political culture that surrounds it. In some countries, the constitution is revered as the foundation of the nation, and all proposals for change are handled cautiously. In others, there is a habit of making frequent changes to keep the constitution up to date.

Political Considerations on the Ease of Amendments: Hungary

In Hungary, the only actor involved in the amendment procedure is the unicameral legislature, which may amend the constitution with a two-thirds majority of its members. Coupled with an electoral system that provided for such a majority with little more than 50 per cent of the votes cast in the last general election (2010), the threshold to amend the constitution at the will of the governing parties is low. Indeed, since the spring of 2010, Hungary's Fidesz government has been dismantling the system of constitutional checks and balances to create a state that centralizes political control in the hands of one political (coalition) party.

Twelve constitutional amendments in the first year of governing removed most of the institutional checks that could have stopped what the government did next, which was to install a new constitution that has been regarded by many as weakening Hungary's democracy and its rule-of-law standard.

Conventional or Informal Approaches to Amendment Procedures

The formal amendment procedures outlined in a constitution only define the legal process that must be completed in order to make an amendment. The political process necessary to generate legitimacy and support for an amendment may differ from this.

In Slovakia, for example, the constitution is very easy to amend, requiring only a three-fifths majority vote in the single-chamber parliament, with no requirement for an intervening election or cooling-off period. The constitution does not require referendums on constitutional changes. In practice, however, advisory referendums—which are not legally binding but are politically persuasive—have, on several occasions, been held before making substantial changes to the constitution. Although there is no legal requirement, it is now an unwritten rule that such a referendum should be held, and the refusal of the government to hold such a referendum, or to respect the result, would cause controversy.

In Ireland, the constitution can be amended by a parliamentary decision, adopted in the same way as an ordinary law, followed by the approval of a majority of votes cast in a referendum. Nevertheless, a constitutional convention was established in 2012 in response to public demands for constitutional change, with one-third of its members being members of parliament and two-thirds being selected by random lot from among citizens. The convention was tasked with preparing proposals for amendment, although the decision to adopt these proposals was to be made according to the formal amendment rules.

The level of detail and specificity in a constitution is also relevant: if constitutions provide many detailed prescriptions of specific policies, these rules may become more obsolete over time and thus require more frequent amendments; the less fundamental the provisions of a constitution are, the easier they should be to amend.

Constitutional Change beyond Formal Amendment

In countries with a system of constitutional review, the content and the meaning of some constitutional provisions and concepts are not only changed through constitutional amendments, but also adjusted through constitutional interpretation. In general, the more difficult it is to formally amend the constitution, the more likely it is that adjustments will be made through judicial interpretation. For example, due to the political landscape and the rather rigid requirements of the amendment procedure, the US Constitution has been formally amended on only 16 separate occasions (resulting

in 27 amendments altogether) during the last 224 years. In contrast, the US Supreme Court's interpretation of the constitution and some of its provisions have changed frequently over time, thereby altering the meaning of the fundamental text, especially in areas where the constitution is vague.

Judicial review is not the only way by which constitutions can mutate: relations between institutions, such as presidents and prime ministers, may depend as much on political practice and even personal charisma as on constitutional rules. Other rules, such as electoral laws or the procedural rules of legislatures, may also affect constitutional practice and operation, without themselves being part of the constitution. In the Netherlands, for example, a change to the process of ministerial appointments (government formation) to limit the role of the king and increase that of parliament was brought about by means of a change in parliament's standing orders, without requiring formal constitutional change.

Decision-making Questions

(1) How rigid should a constitution be? How strong is the desire to ensure that a constitution cannot be easily, unilaterally or hastily amended? How strong is the desire to allow flexibility?

(2) Can the tension between these desires be resolved by making some parts of a constitution harder to amend than other parts? Are there particular parts of a constitution that demand special entrenchment?

(3) What role should the people have in consenting to constitutional amendments? Do you want the people to have the final word or politicians? What risks (e.g. polarization) might be associated with the use of referendums, and how might these be mitigated?

(4) How can the needs of particular provinces/territories/states/communities, etc. be protected? Should they have a veto, individually or collectively, over amendments concerning their own powers?

(5) What other actors/institutions should be involved in the amendment process (e.g. the head of state, an upper house)? How do the powers of these institutions with regard to constitutional amendments relate to the balance of powers within the constitution as a whole (e.g. if the president can propose amendments to the people, without legislative approval, that might increase the dominance of the president more generally; if the upper house can block constitutional amendments that might give it bargaining power with regard to other decisions as well)?

(6) What is the party-political context (e.g. one dominant party; two strong, disciplined parties; several small parties)? How broad a coalition would be needed, under current and foreseeable political conditions, to achieve an absolute majority, a three-fifths majority, a two-thirds majority, or a three-fourths majority, in the legislature?

Examples

Country	How are proposed amendments initiated?	Legislative approval rules	Other approval rules	Other comments
Luxembourg Democracy since 1919 Parliamentary constitutional monarchy; unitary; unicameral	Introduced in parliament in a manner similar to an ordinary bill	**Two successive votes** at intervals of at least three months; **two-thirds majority vote of total membership** required	Second vote in the legislature can be replaced by a referendum at the request of one-quarter of the members of parliament or 25,000 citizens; referendum decided by majority vote	No amendment concerning the grand duke or order of succession may be made during a regency
Poland Democracy since 1990 Semi-presidential republic; unitary; bicameral	Proposed by one-fifth of the number of deputies, by the Senate, or by the president	Passed by a two-thirds majority of votes cast by the Sejm (lower house) and by an absolute majority of votes cast in the Senate Amendments concerning the fundamental structure and principles of the republic (Chapter 1), rights and freedoms (Chapter 2), or the amendment process itself are subject to a delay of at least 60 days between first reading and adoption.	Amendments concerning the fundamental structure and principles of the republic (Chapter 1), rights and freedoms (Chapter 2), or the amendment process itself may be subject to a confirmatory referendum if requested by one-fifth of the number of deputies, the Senate, or the president; amendment is accepted if approved by a majority of votes cast.	
India Democracy since 1947 Parliamentary republic; federal; bicameral	Introduced in parliament in a manner similar to an ordinary bill	Passed by **two-thirds of the members present and voting** (being at least an absolute majority of the total membership) in each house	Amendments relating to the election of the president, the judiciary, the powers of federal and state legislatures, and the relationship between the central government and the states must also be approved by a majority of the state legislatures.	Courts have developed a 'basic structure' doctrine: no amendment may deviate from the basic structure of the federal, republican, democratic, secular constitution.
Mauritius Democracy since 1968 Parliamentary republic; unitary (with autonomous area); unicameral	Introduced in parliament in a manner similar to an ordinary bill	Amendments concerning the basic structure and the composition of state institutions (presidency, parliament, Council of Ministers, the judiciary), electoral system, rights and freedoms, and fourth-branch institutions must be approved by a **three-quarters majority vote** in parliament; amendments to other parts of the constitution approved by **two-thirds majority vote**		Amendments to extend parliament's term of office beyond five years must be approved by a unanimous vote of parliament followed by a three-quarters majority in a referendum.
Australia Democracy since 1901 Parliamentary constitutional monarchy; federal; bicameral	Introduced in parliament in a manner similar to an ordinary bill	Passed by an absolute majority in each house (Or with consent of the government if passed by an absolute majority in one house twice after a three-month interval)	Approval by the people in a referendum. Must be approved by: (a) a majority of electors in a majority of the states, i.e. four out of six states; AND (b) a majority of total votes cast (including the territories as well as states)	

Chile Democracy since 1988 Presidential republic; unitary; bicameral	Introduced to Congress in a manner similar to an ordinary bill	**Three-fifths majority of total membership of Chamber of Deputies and Senate**. If the amendment concerns the fundamental basis of the state (Chapter 1), rights and duties (Chapter 3), the Constitutional Tribunal (Chapter 8), the armed forces (Chapter 11), the Council of National Security (Chapter 12), or the amendment procedure itself (Chapter 15), a **two-thirds majority of the total membership of each house** is required.	If the president rejects an amendment proposal, the Congress may insist on the amendment by the same majority as that required to approve it. The president may refer a proposed amendment to the people in a referendum.	Made more rigid in practice by the existence of a binomial electoral system that over-represents the main opposition bloc, making it harder to achieve a supermajority
Tunisia Transitioning to democracy since 2011 Semi-presidential republic; unitary; unicameral	May be proposed by the president, one-third of the members of the legislature; amendments proposed by the president have priority.	Amendments must be approved by **a two-thirds majority of the members of the legislature**.	The president may submit an amendment that has been approved by the legislature to the people in a referendum; it is adopted if approved by a majority of the votes cast.	The speaker of the legislature refers proposed amendments to the Constitutional Court before they are voted on by the legislature to ensure they do not change unamendable provisions (which include the number and length of presidential terms, basic definitions of the state, principle of the 'civil state').

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