

5-1-2014

An Analysis of Different Constitutional Amendment Models

James Julius Baber

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship

Recommended Citation

Baber, James Julius, "An Analysis of Different Constitutional Amendment Models" (2014). *Law School Student Scholarship*. 435.
https://scholarship.shu.edu/student_scholarship/435

THESIS

A constitution is the heart of a nation. It codifies the fundamental theories and definitive laws that a nation has accepted as the ultimate expression of national identity. Due to its unique nature and complete and overriding authority it is a logical conclusion that a constitution must not be easily changed.¹ This is not to say that amending or even rewriting a constitution must be placed outside the realm of thought, but merely that such editing follow a strict and formal procedure to ensure that mere dictatorial whim or frantic mob rule can dominate the legal proceedings.² If the constitution is the heart of a nation, then it follows that an amendment process be a triple bypass surgery. It is not a process that should be entered into lightly, but when it does occur it must be executed with the skill and precision of a master surgeon to keep the patient from dying.

The reason behind my thought is that a stable constitution leads to a stable government, and that a stable government is the best bulwark against tyranny and oppression.³ To be sure, there are examples that go against the grain. For example, the Soviet Union had a magnificently crafted constitution that was in effect “just a parchment guarantee.”⁴ To clarify, I believe that a constitution that is created and adopted with the aim of fostering a healthy republic or

¹ Rasch, Erik Bjorn; *Foundation of Constitutional Stability*, <http://verfassungswandel.files.wordpress.com/2008/10/bjc3b8rn-erik-rasch-constitutional-rigidity-and-formal-amendment-procedures1.pdf>

² *Id.*

³ Landau, David; *Abusive Constitutionalism*, 47. U.C. Davis L. Rev. 189

⁴ “The bill of rights of the former evil empire, the Union of Soviet Socialist Republics, was much better than ours. I mean it literally. It was much better. We guarantee freedom of speech and of the press, big deal! They guaranteed freedom of speech, of the press of street demonstrations and anyone who is caught trying to suppress criticism of the government will be called to account” Scalia said speaking to a Senate Judiciary Committee. Scalia also asserts that the Soviet Constitution is “wonderful” but only words on paper, “just a parchment guarantee.” <http://americanpatriottoday.net/2012/02/supreme-court-justice-antonin-scalia-soviet-constitution-is-better-than-united-states-constitution/>

constitutional monarchy, and is crafted to be sufficiently stable, is the best way to prevent the rise of a despotic government.

However, there is a caveat. A stable constitutional amendment process does not necessarily relate to a stable government. The Egyptian constitution of 2012 is a prime example of that.⁵ The Constitutional amendment process was thoroughly strict, and yet the government that promulgated the constitution was out of power within a year.⁶ This means that there is no “one size fits all” quality for constitutions. Different nations need different things at different times in order to either maintain or create stability.

My conclusion is that there are different constitutional amendment procedures necessary during different times of a country’s development. In a well-established and prominent democracy such as the United States, a difficult amendment procedure is needed to maintain order. In a transitioning state, such as Germany post World War II, a more flexible amendment procedure is called for, so as to adapt to fast moving developments in national and international politics. In a state like Egypt, there must be an amendment process that does not rely too heavily

⁵ Constitution of the Arab Republic of Egypt.

“Article 217

The amendment of one or more of the Constitution articles may be requested by the President of the Republic or the House of Representatives. The request shall specify the articles to be amended and the reasons for the amendments, and if initiated by the House of Representatives shall be signed by at least five House of Representatives Members. In all cases, the House of Representatives and Shura Council shall debate the request within 30 days from the date of its receipt; each council shall issue its decision to accept the request in whole or in part by two-thirds majority of its members.

If the request is rejected, the same amendments may not be requested again before the next legislative term.

Article 218

If the amendment request is approved by both Houses, each of them shall discuss the text of the articles to be amended within 60 days from the date of approval; if approved by a two-thirds majority of each House, the amendment shall be put to public referendum within 30 days from the date of approval.

The amendment shall be effective from the date of announcement of the referendum result.”

⁶ Coup topples Egypt’s Morsy; http://www.cnn.com/2013/07/03/world/meast/egypt-protests/index.html?hpt=hp_t1

on barriers to change, as the situation on the ground changes drastically from day to day. In addition, the amendment procedures must take into account the nature of the country in question.

The United States is a rare exception to this conclusion. Unlike most other national constitutions, which were written for an already existing state, the Constitution of the United States *created* the nation. Germany, Hungary, Egypt, and Colombia had all already existed, in some form or another, for periods of time up to a thousand years.⁷

In order to support my thesis, I will first analyze several constitutional models and provide the pros and cons of each method. This will be a county by country analysis using both nations that are stable and ones that are in the grips of near dictatorial regimes and even borderline anarchy.

DIFFERING APPROACHES TO THE CONSTITUTIONAL AMENDMENT MODEL

Different nations take different approaches to their constitution. Ulrich K Preuss stated that there are three different overarching constitutional paradigms;

“Thus we can point to three categories of constitutional states: those with a continuous tradition like Britain and the USA; a country with an erratic constitutional development like Germany, and finally the post-communist states of East and Central Europe which have to achieve that nation state, a civil society, and democratic structures at the same time.”⁸

Mr. Preuss conducted his analysis several years after the dissolution of the Soviet sphere of influence in 1991. At this time, the nation states of Europe that had thrown off the yolk of Soviet

⁷ The commonly accepted dates of statehood are Hungary in 1000, Modern Germany in 1871, Colombia in 1810, and Egypt in 3,200 BC

⁸ Preuss, Ulrich K *Patterns of Constitutional Evolution and Change in Eastern Europe*. Comparative Constitutional Law course book.

oppression were struggling to transition to modern democratic states.⁹ The current analogue to this situation is the Arab Spring revolts in the Middle East and Africa. Similar to the former communist bloc, the new Arabic regimes, Egypt in particular, are struggling with the transition to democracy and an attempt to stabilize their governments.¹⁰ To be certain, a long and democratic history is beneficial to ensuring the stability of a government, but it is by no means the only factor involved. Germany, for example, suffered through an absolute monarch, a military dictatorship, a uselessly weak republican government, and the Nazis all within the span of a single century.

A Constitution that is Difficult to Amend: The United States

The first constitutional arrangement singled out by Mr. Preuss is that of the United States. It is a commonly agreed conclusion that the constitution of the United States possesses one of the most burdensome constitutional amendment procedures.¹¹ The Constitution is not amended in the way of editing. Instead, the new amendments are tacked onto the end of the document, and even if they overrule a previous part, that part is left in.¹²

The Framers of the Constitution believed that the American Constitution should be a document that doesn't grant rights, but one that prevents the government from imposing its will on the people.¹³ In the words of Judge Posner; "Our Constitution is a charter of negative rights rather than positive liberties... The men who wrote the Bill of Rights were not concerned that

⁹ Encyclopedia Britannica, 1989 annus mirabilis, <http://www.britannica.com/EBchecked/topic/291225/20th-century-international-relations/32993/1989-annus-mirabilis>

¹⁰ Kirkpatrick, David; Army Ousts Egypt's President; <http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>

¹¹ Bjorn, page 21

¹² Constitution of the United States; Amendment 18 and Amendment 21

¹³ Kende, Mark, *Why the South African Constitution is BETTER than the United States*; <http://academic.udayton.edu/race/06hrights/georegions/africa/safrica03.htm>

government might do too little to the people but that it might do too much to them.”¹⁴ To aid this attempt, the rights that are spelled out in the Bill of Rights are overarching and vague without any specifics laid down. This was to ensure that the government could not encroach on these rights in any way or form without inviting scrutiny. This skepticism of government action is also evident in the high standard needed to attain a constitutional amendment. To quote the Constitution;

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several State

U.S. Const. art. V

This is clearly a sufficiently high bar to prevent the whims of a few or the fiat of the government to radically alter the constitution to suit the needs of the moment. The Framers were quite apprehensive of the ability of a strong central authority to hold dictatorial rule over the entire nation, and so crafted a Constitution, and a constitutional amendment procedure, that ensured that the will of the people would not be infringed. The procedures laid down in the Constitution do not allow for an easy editing process. This difficulty defends the core of the document against being rewritten to fit the political expediency of the moment. . To quote Chief Justice Burger; “Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government...”¹⁵

Clearly, the largest failing of this current model is obvious when one recognizes that two-thirds of the House and the Senate cannot agree if the sky is blue or not or whether we actually

¹⁴ Jackson v City of Joilet, 715 F 2d 1200 (7th Cir. 1983)

¹⁵ *Ins v Chadha*, 462 US, 919 (1983)

need a budget, to say nothing of the political firestorm that would erupt should one party or the other attempt to change the Constitution.¹⁶ However, this is not as serious a problem as it might seem. Given my earlier presumption, this is exactly the time when a constitution should not be amended. When a country is in turmoil then it is time to rely on the constitution to guide the nation. The amendment process can be saved for sunnier days when the goal of the government is not partisan bickering but leadership of the nation.

A Constitution that is Moderately Difficult to Amend: Federal Republic of Germany

The history of the German nation, whether *Kaiserreich*, *Großdeutsches Reich* or *Bundesrepublik*, has proven the need for a powerful source of law to contain a government that staggered from dominance to atrocity more times than can be believed.¹⁷ The Basic Law of the German Republic contains a forceful provision that “The Basic law can be amended only by a law which expressly amends or supplements the text thereof.”¹⁸ Similar to Article V of the United States, an amendment must be passed by an absolute two-thirds majority of the *Bundestag* & simple two-thirds majority of the *Bundesrat*.¹⁹

The history of the Basic Law of Federal Republic of Germany (hereinafter “Basic Law”) shows a more adaptable model than that of the United States, but not one so permissible as to allow for a headlong rush into anarchy.²⁰ There are three periods in the history of the Basic Law, one of regular changes, one of near complete stability, and one of intense activity surrounding

¹⁶ Weisman, Jonathan; *Government Shuts Down in Budget Impasse*

<http://www.nytimes.com/2013/10/01/us/politics/congress-shutdown-debate.html>

¹⁷ Encyclopedia Britannica, Germany, <http://www.britannica.com/EBchecked/topic/231186/Germany>

¹⁸ Section 79 of the Basic Law for the Federal Republic of Germany

¹⁹ *Id.*

²⁰ Bjorn, page 28

the Reunification of Germany after the fall of the German Democratic Republic.²¹ The first was the attempt to override some of the weaknesses in the Basic Law at its inception.²² Once that plateau of stability had been achieved, there was a long period of tranquility in which the Basic Law was barely touched.²³ However, the defining test of the German constitutional amendment model came in the early 1990s.

The amendment process in Germany is a stringent one, but it still allows for the necessary changes to react to nationwide events and international problems. The swift decline of the Soviet Union and the release of its Eastern European vassals initiated a wave of support inside, though not necessarily outside, Germany for reunification. The Basic Law could not merely be extended to incorporate new territory.²⁴ This created a quandary for those in the German government that wished to reunify the country as quickly as possible without invoking the clauses of the Basic Law that seemed to indicate that a new constitution would need to be created upon reunification.²⁵ However, there seemed to be an opening in Article 23 that provided for the constitution to be extended in “other parts of Germany after their accession.”²⁶ To this end, the German government swiftly and decisively amended article 146 through the amended by Unification Treaty of 31 August 1990 and a federal statute on 23 September 1990 so that it was possible to merely admit the states of the former German Democratic Republic into the Country.²⁷ Article

²¹ *Id.* Quoting Busch

²² Bjorn, page 28

²³ Bjorn

²⁴ Mathias Reimann, Takeover: German Reunification Under A Magnifying Glass the Imperfect Union: Constitutional Structures of German Unification. by Peter E. Quint. Princeton: Princeton University Press. 1997. Pp. Xi, 482. \$75., 96 Mich. L. Rev. 1988, 1995-96 (1998)

²⁵ *Id.* “In 1949, when the division of Germany became clear, the FRG’s Grundgesetz (Basic Law), drafted as a temporary constitution for the new republic, expressly endorsed future reunification in its preamble. The document listed two options to accomplish that goal. On the one hand, article 146 provided that “this Basic Law will lose its validity on the effective date of a constitution that has been chosen by the German people in a free decision.” Thus, it seemed to envisage the drafting of a new constitution on the occasion of reunification.”

²⁶ Section 23 of the Basic Law for the Federal Republic of Germany

²⁷ Amended Section 146 of the Basic Law for the Federal Republic of Germany

146 was thusly amended to read that; “This Basic Law, which is valid for the entire German people following the achievement of the unity and freedom of Germany, shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force.”²⁸ Originally, this article was seen as providing that there should be a new election called for a new constitution when the possibility of unity came about.²⁹ The quick and decisive amendment process allowed for events on the ground (popular sentiment for reunification, opposition by France, and the freefall of the East German State) to be quickly accounted for.

A Constitution that is Easy to Amend: Colombia

If the United States is the exemplar of a constitution that is difficult to amend, then Colombia is the polar opposite.³⁰ Article 375 of the Constitution states that, in order for an amendment to be considered; “The government, 10 members of the Congress, 20 percent of councillors or deputies, or citizens totaling at least five percent of the electoral rolls in force, may introduce legislative Acts.”³¹ This limit can easily be surpassed in order to amend the constitution in a very short period of time. Article 375 allows for an amendment to the Constitution to be passed through Congress through two rounds of voting, the first of which requires a simple majority, and the second of which requires an absolute majority.³² This is one of the most lenient constitutional amendment processes on the planet.³³

²⁸ Article 146 of the Basic Law for the Federal Republic of Germany

²⁹ The original text of Article 146 read that “This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.”

³⁰ See Constitution of Colombia; Article 375.

³¹ *Id.*

³² *Id.*

³³ See Constitution of Colombia, art. 375.

The amendment process of the Colombian constitution was most strenuously tested after the 2002 election of President Alvaro Uribe Velez.³⁴ The new President used his vast popularity and the weak restraints of the amendment process to push through an amendment that would grant the President the ability to run for a second term.³⁵ The Constitutional Court agreed that the second term amendment was allowable, but declined to extend it to a third term four years later.³⁶

The President and his supporters used the lenient Colombian model to push through an amendment that would allow him a second term in office.³⁷ This leniency could easily have become a problem if the Constitutional Court had not stepped in and barred the President from a third term. The perils of the Colombian model will be discussed at length in the next section.

The pros of such a system allow for an easy amendment process if the people of the nation or the government find it so desirable. Indeed, it was the supporters of the former President that wanted him to stay in power for a third term, and attempted to change the constitution to allow it.³⁸ This, however, could easily be abused if the governing authority is more interested in maintaining its own authority. The Colombian model is one that I find to be dangerously lax.

THE DANGERS OF A WEAK CONSTITUTION AND THE THREAT OF “ABUSIVE CONSTITUTIONALISM”

Now that the varying models of constitutional amendment procedures has been established, we must look to how these models have gone awry.

³⁴ Landau, David; *Abusive Constitutionalism*, 47. U.C. Davis L. Rev. 189

³⁵ Landau, David; *Abusive Constitutionalism*, 47. U.C. Davis L. Rev. 189

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

David Landau, a law review writer for the University of California at Davis, defines the term abusive constitutionalism as “the use of mechanisms of constitutional change in order to make a state significantly less democratic than it was before.”³⁹ He highlights the regimes of Egypt, Hungary, and Colombia as places in which this abuse of the constitution has presented situations of governmental overreach.⁴⁰ The systems in place in these nations were all different. This allows for a thorough investigation into the possible issues raised by a weak constitution (Colombia), ways in which a strong constitutional amendment procedure might fail (Hungary), and a case study in how everything that can possibly go wrong when writing a constitution did (Egypt).

Constitutional Amendment Problems in Colombia

The case of the former President Uribe has already been discussed briefly in this paper, but here I would like to show the dangers of the system that produced the possibility of a governmental overreach more clearly. The only thing that prevented the President from assuming the ability to run for a third term in office was the Constitutional Court.⁴¹ A system that relies so heavily on unelected judges to determine the fate of a nation is one that is rife with the ability to corrupt. Constitutional Court Justices are appointed by the President in Colombia. Had Uribe had the opportunity to “pack the Court” then the only real effective check on his power would have been swept away. This possibility is one that underscores the weakness of a weak constitutional amendment process. Merely having one branch of the government shouldering the burden of protecting the constitution is a horrendous idea on several levels. The first, as mentioned, is the possibility of corruption. The second, and perhaps more subtle, is that

³⁹ Landau, David; *Abusive Constitutionalism*, 47. U.C. Davis L. Rev. 189

⁴⁰ *Id.*

⁴¹ *Id.*

the people themselves could come to see the Court as a burden to the progress of the nation. Where this to happen, then it provides an opening for the President and/or the legislature to rally support for them to take care of the problem by removing the authority of the Court to please the will of the people. This would effectively leave the Constitution in Colombia open to interpretation on the whim of either the Executive or the Legislature.

Constitutional Rewriting in Hungary

Hungary has not had a history of constitutional excellence. After the country was overrun by Soviet troops following the end of World War II, a constitution was implemented that effectively made the small republic a vassal state of the Soviet Union.⁴² This constitution was amended after the fall of the Eastern Bloc, but was not rewritten as were the rest of the constitutions of the nations of the Soviet sphere.⁴³ This became an issue after the Hungarian Parliamentary Election of 2010. The center right party Fidesz-Hungarian Civil Alliance (In Hungarian Fidesz – Magyar Polgári Szövetség) swept the election with an absolute majority of the Parliament.⁴⁴ With this newfound power, a vote for a new constitution was called.⁴⁵ This was widely seen both inside and outside of the country as an overreach of legislative power.⁴⁶

Hungary provides both the strongest example and the greatest danger of my thesis. A constitution should be difficult to change, but when those difficulties are overcome, it is possible that the result is not the consensus of a broad group of parties but the fiat of a near dictatorship. The Hungarian governmental revolution exposes some seemingly dangerous gaps in my theory.

⁴² Library of Congress: Country Studies <http://lcweb2.loc.gov/frd/cs/hutoc.html>

⁴³ Library of Congress: Country Studies <http://lcweb2.loc.gov/frd/cs/hutoc.html>

⁴⁴ Fidesz wins Hungary election with strong mandate; <http://www.reuters.com/article/2010/04/12/us-hungary-election-idUSTRE63A1GE20100412>

⁴⁵

⁴⁶ Orban Constitution Threatens Hungary Laws, Expert Says; <http://www.bloomberg.com/news/2013-06-14/orban-constitution-threatens-hungary-laws-experts-says.html>

But, with the proper analysis, it will be shown that this bolsters my argument instead of sinking it. The Hungarian Constitution of 1989 provided precisely the kind of safeguards that I have been arguing for. Article 24 of the Constitution stated that “A majority of two-thirds of the votes of the Members of Parliament is required to amend the Constitution and for certain decisions specified therein.”⁴⁷ This is language similar to the American Constitution. Given that the language was sufficiently strong, what was it that caused the government to be enabled to force a new constitution down the throat of the young republic? The answer is simple, a catastrophic failure of the socialist government from 2004 to 2009 to adapt to the problems that the nation was facing.⁴⁸ The Prime Minister was caught in a speech stating that the party had lied to get back into power and that they must now move forward.⁴⁹ This caused widespread unrest and revolt in the country.⁵⁰ The idea that a government could fail so catastrophically that the opposition could ride a wave of support that allows it to change the constitution by fiat is one that would have seemed outside the realm of possibility even six years ago. I think that the risk of this happening is low enough that it is not an inherent threat in the system, but the worst possible conflagration of events.

This is a prime example of how not to rework a Constitution. There were widespread protests about the decision, as some saw it as an attempt to install a near one-party system.⁵¹ There are, however, some that say that this was the best way to promote a more stable Hungary in the future, as traditionally every election since the fall of the communist state has produced a new government. The ham-stringing of the Constitutional Court seems to provide a strong

⁴⁷ Hungarian Constitution of 1949, http://lapa.princeton.edu/hosteddocs/hungary/1989-90%20constitution_english.pdf

⁴⁸ Riots over Hungarian PM's “lies”; <http://news.bbc.co.uk/2/hi/5358546.stm>

⁴⁹ Excerpts: Hungarian ‘lies’ speech; <http://news.bbc.co.uk/2/hi/europe/5359546.stm>

⁵⁰ See Footnote 43

⁵¹ Karasz, Palko; Opposition Protests Constitution in Hungary; <http://www.nytimes.com/2012/01/03/world/europe/rare-opposition-protests-in-hungary.html>

opposition to this view. The current Prime Minister, Victor Orban, has been quoted as stating that he is intentionally tying the hands of successive governments by limiting what they can and cannot do in regards to governing the Country.⁵²

THESIS AS A RUBRIC FOR CONSTITUTIONAL AMENDMENT PROCEDURES AT DIFFERING STAGES OF NATIONAL DEVELOPMENT

Now that the analysis of various constitutional models has been completed, the difficult work of applying the various theories to assemble the perfect model for amending the constitution must begin. The formula is broken down into three divisions.

The first will be termed the “fledgling state.” A fledgling state will be defined as one that has recently been released from dictatorial rule or one that has recently become an independent nation in its own right. Examples of fledgling nations would be the Republic of Hungary in 1989, the United States of America in 1776, and the Federal Republic of Germany in 1949. A fledgling nation is host to a wide array of problems. Whether it has recently thrown off the shackles of dictatorial oppression (Hungary & Egypt), fought a bitter revolution (the United States) or recently been utterly and ruthlessly dominated through war (Germany), a new nation is beset by a vast amount of problems. First and foremost amongst those are what shape the new nation will take, and what its core beliefs are. Is a belief sufficiently widespread and engrained in the national consciousness to merit inclusion into the constitution or is it something that should best be left to the realm of statutory interpretation? It is because of these problems that a new constitution should not possess the rigid barriers to amendment that keep the more entrenched countries stabilized. A prime example of the problems of creating such a constitution can be seen today in Egypt.

⁵² Orban says constitutional changes “tying the hands of the next ten governments”; <http://www.politics.hu/20110614/orban-says-constitutional-changes-tying-hands-of-next-ten-governments/>

The second tier I have termed the “transitional state.” This is a state that has weathered the fledgling phase and has attained a level of stability that comes with a well-established constitutional order. Examples of these nations are Germany today and the United States in the early 1900s. Once a state has entered the transitional phase the constitutional order that is most preferable is one that is open to change, sometimes rapid, in order to adapt to external and internal developments. Germany is a good example of both the fledgling nation and the transitional nation paradigm. In the first 25 years of its existence, the basic law was changed with an almost clockwork regularity.⁵³ This was in response to the changes that were occurring in the new nation and stands as a testament to the ability of the West German government to whether the changes involved. After this period, there was roughly a decade and a half of relative inactivity.⁵⁴ Then, something interesting happened. The Soviet dominated Eastern bloc collapsed, and the Soviet dominated German Democratic Republic found itself without the one thing that kept it as a viable state. With the collapse of the Moscow backed government, events began to quickly accelerate towards German unification. As mentioned previously, it was the ability of the German amendment model to quickly change Article 146 of the Basic Law that allowed for a quick German reunification.

The third and final tier has been designated the “established state.” This state is seen as relatively removed and secure from any constitutional crises. It has survived the problems in the transitional phase and has emerged with a clearer and more bedrock like constitutional order. An example of this state is the Kingdom of Denmark. The Kingdom of Denmark has existed in

⁵³ Bjorn

⁵⁴ *Id.*

some form or another since its consolidation in the 8th Century.⁵⁵ The Constitution of Denmark lays down a rigid procedure for constitutional amendments.

When the Parliament passes a Bill for the purposes of a new constitutional provision, and the Government wishes to proceed with the matter, writs shall be issued for the election of Members of a new Parliament. If the Bill is passed unamended by the Parliament assembling after the election, the Bill shall within six months after its final passing be submitted to the Electors for approval or rejection by direct voting. Rules for this voting shall be laid down by Statute. If a majority of the persons taking part in the voting, and at least 40 per cent of the Electorate has voted in favor of the Bill as passed by the Parliament, and if the Bill receives the Royal Assent it shall form an integral part of the Constitution Act.⁵⁶

Although at first blush it does not seem that Denmark is overly strict, Professor Rasch explains that the referendum requirement is a rather onerous burden needed to pass.⁵⁷ The referendum does not require 40% of those voting to approve, it requires 40% of *the entire electorate* to pass. As it is spelled out in a constitutional pamphlet promulgated by the Danish government;

“Finally, the constitutional amendment must be the subject of a referendum...It is not enough for there to be a majority in favour of the constitutional amendment. The majority must consist of at least 40 per cent of all citizens who are entitled to vote. In fact, this means that all persons entitled to vote count, even if they do not vote or they abstain. If a lot of people stay at home instead of voting, it can be hard to get a constitutional amendment passed into law.”⁵⁸

The Kingdom of Denmark has changed its constitution very rarely since it was first promulgated in 1849.⁵⁹ This is due both to the stringent constitutional amendment procedures as well as the

⁵⁵ Encyclopedia Britannica; *Denmark*, <http://www.britannica.com/EBchecked/topic/157748/Denmark>

⁵⁶ Constitution of Denmark, Part X, Sec. 88

⁵⁷ Bjorn, at 21

⁵⁸ *My Constitutional Act*; http://www.eu-oplysningen.dk/upload/application/pdf/0172b719/Min_Grundlov_eng.pdf

⁵⁹ http://www.thedanishparliament.dk/Democracy/The_Constitutional_Act_of_Denmark.aspx

willingness of the Danish Parliament to adhere to loose interpretations of the general language of the law instead of being confined by stricter wording.⁶⁰

EXCEPTIONS TO THE RUBRIC; EGYPT AND THE UNITED STATES

In the realm of constitutional amendments, as in most things, the United States is an exception. Time and again it rears its head and makes my formulas and rubrics a mess. The Constitution of the United States was, for lack of a better term, a Great Experiment. It was an ambitious and untried idea for forming a nation. The nation followed the Constitution, not the other way around. Hungary, for example, was a unified state as early as 1000, but its extant constitution dates from a mere three years ago.⁶¹ Germany was unified in 1871, but the Basic Law only came into effect in 1949.⁶² For most nations, the constitution is the code of ideals that a nation has accumulated and found to be sufficiently important for inclusion into a constitution. For the United States, the Constitution *is* the nation.

It is with this unique historical fact in mind that the United States will be stated as a rare exception to my constitutional amendment rubric. The United States has one of the most difficult constitutions in the world to amend.⁶³ This makes it unsuitable for inclusion into my rubric, which recommends that fledgling nation states have a constitution that, while stable, should be relatively easy to amend. Although the United States works for my example now that it is an

⁶⁰ *Id.* “The Constitutional Act of Denmark is one of the oldest constitutions in the world. It has only been amended a few times since it was enacted in 1849. This is partly because making an amendment is a rather complex procedure, requiring that both the Danish Parliament and the Danish people agree to it. However, another important reason is that the wording in the Constitutional Act is so general that it can still be applied today, despite major changes in society and political life over the past 160 years.”

⁶¹ Constitution of the Republic of Hungary, 2011

⁶² Basic Law of the Federal Republic of Germany, 1949

⁶³ Bjorn

established nation, at the time of its inception the Constitution possessed the same rigid structure that it does today.⁶⁴

THE DANGERS OF A STRONG CONSTITUTIONAL AMENDMENT PROCESS AT THE WRONG STAGE OF DEVELOPMENT

Egypt is a special case. The country has been in a state of total flux since the ousting of the dictator cum President Hosni Mubarak.⁶⁵ After the Arab Spring revolts that provided hope of a genuine democratic reform, the country abruptly turned a hundred and eighty degrees and marched right back into dictatorship. To first understand what must go right with Egypt, we must first examine all that went wrong.

Egypt's Constitution was passed by former President Mohammed Morsi in 2012, one year after the overthrow of Mubarak.⁶⁶ The Constitution was put to a popular vote, but there were certain irregularities. Although the Constitution passed by 63.8% voting yes, only 10.9 Million of the 83 Million people in the Country voted.⁶⁷ This became decidedly problematic for the President, as it was soon declared by many in the country that he and his party had hijacked the nation.⁶⁸ This eventually led to his ouster, and the process of rewriting the constitution began once again.

⁶⁴ Constitution of the United States, Art. V

⁶⁵ Encyclopedia Britannica, Egyptian Uprising of 2011, <http://www.britannica.com/EBchecked/topic/1756982/Egypt-Uprising-of-2011>

⁶⁶ Kirkpatrick, David; Army Ousts Egypt's President; <http://www.nytimes.com/2013/07/04/world/middleeast/egypt.html>

⁶⁷ Egyptian Constitution 'approved' in referendum; <http://www.bbc.co.uk/news/world-middle-east-20829911>

⁶⁸ Brown, Jeffrey; Egyptian Army Steps In After Violent Overnight Clashes at Presidential Palace; http://www.pbs.org/newshour/bb/world/july-dec12/egypt1_12-06.html

Part of the fatal flaw of the Egyptian Constitution of 2012 was the perception among the people of Egypt, and the world, that it did not convey enough religious freedoms.⁶⁹ This presumption was led by the overwhelming influence of the Islamist Muslim Brotherhood network.⁷⁰ However, if we look at the amendment procedures contained in the Constitution, they are sound.⁷¹ The procedures called for a two-thirds majority vote in both houses of Parliament, followed by a secondary vote calling for the same majority, and then finally a public referendum.⁷² This Constitution, the first of its “democratic era” was riddled with flaws. Although it was put to a popular vote, this vote was representative of only a small number of the actual population, allowing widespread resentment and anger. The strict amendment procedures did not help this anger. If a large segment of the population is dissatisfied with a constitution, and they can see that the barriers to changing it are too high, then they can easily dissolve into revolt. These amendment procedures were an attempt to ensure the stability of the constitution in the face of radical change. However, Morsi was completely misguided in his attempt. New democracies are turbulent places. There must be an adaptable nature of the constitution to conform to the realities of a nation that does not yet have a sense of identity in the new regime.

Although I think that there should be a level of amendment procedures higher than an ability to change in the wind, this barrier was too high for a nation struggling to regain its footing after a major governmental change.

The problem with Egyptian democracy at the current time is not only of a constitutional nature, it is one of history. Up until 2011, Egypt had never had an elected government. All of

⁶⁹ Religious Freedom in Egypt “quite tenuous”; <http://www.reuters.com/article/2012/07/30/us-usa-religion-idUSBRE86T1DM20120730>

⁷⁰ Religious Freedom in Egypt “quite tenuous”; <http://www.reuters.com/article/2012/07/30/us-usa-religion-idUSBRE86T1DM20120730>

⁷¹ Egyptian Constitution of 2012, Article 217

⁷² Egyptian Constitution ‘approved’ in referendum ;<http://www.bbc.co.uk/news/world-middle-east-20829911>

the previous rulers dating back to antiquity had been strongmen (or women) that ruled the country essentially as a personal fiefdom.⁷³ The people of Egypt have only recently climbed out of a dictatorial regime that has lasted for decades and “Most Egyptians are not practiced in civic activism after being disenfranchised for decades under President Hosni Mubarak, who was ousted in 2011.”⁷⁴ This underdeveloped civic duty has manifested itself in the overthrow of the Morsi regime that followed the overthrow of Mubarak.⁷⁵ The constitution promulgated by that government was seen as a block to the democracy growing in Egypt.⁷⁶ However, part of the problem was that the constitution was not easily amendable.⁷⁷ If the new government is able to promulgate a constitution that can be shown to both assuage the fears of the populace and to be amended to change what the people do not accept, then it will be a substantial step in the right direction.

Further complicating the Egyptian matter is the repeated influence of the Muslim Brotherhood. The Muslim Brotherhood is the oldest organized Islamist group in the world, and was wildly influential during the overthrow of former President Mubarak.⁷⁸ The group is avowedly and staunchly conservative Islamist group.⁷⁹ It was, in fact, the problems inherent in the overwhelming presence of the Brotherhood in the new government that was one of the chief reasons for both the dissatisfaction over the 2012 constitution and the subsequent overthrow of President Mohammed Morsi.⁸⁰

⁷³ Encyclopedia Britannica, *Egypt*; <http://www.britannica.com/EBchecked/topic/180382/Egypt>

⁷⁴ *Egypt's Latest Constitution*; <http://www.nytimes.com/2013/12/05/opinion/egypts-latest-constitution.html>

⁷⁵ *Id.*

⁷⁶ Constitution of the Arab Republic of Egypt, 2011

⁷⁷ *Id.*

⁷⁸ Encyclopedia Britannica, *Muslim Brotherhood*; <http://www.britannica.com/EBchecked/topic/399387/Muslim-Brotherhood>

⁷⁹ *Id.*

⁸⁰ *Id.*

Faced with such a group, one that is staunchly anti-secular, how can the desire for democracy be balanced with the need for establishing order in this coup-prone nation? Simply put, it must be shown that an orderly transfer of power is possible. This is to say that the Brotherhood must be convinced of the merits of a democratic system. This would best be accomplished by the ability to amend the new constitution easily in addition to a popular referendum that requires a high percentage of the electorate to approve it, similar to the situation in Denmark.

It has been argued that one cannot argue with a religiously based organization. That is generally true. However, the Muslim Brotherhood in Egypt is not al-Qaeda in Pakistan. Yes, it is a group based around religious ideals. So are nearly half of the political parties in power today. The leadership of the Brotherhood is nothing if not practical. They survived the British, the Egyptian Monarchy, and then nearly fifty years of dictatorial regimes of varying serenity.⁸¹

Showing the Brotherhood that they can have a say in politics is the first way towards achieving the peace that Egypt so sorely needs. It must be proven to them that they will not be marginalized or removed from the picture in one way or another. I believe that this goal will be greatly aided by a more relatively loose amendment procedure to the new constitution.

My original idea was to have a very loose model for a state such as Egypt (fledgling state) and that the constitutional model should be very easy to amend. However, after some consideration that does not seem to be fully applicable. Not quite so easy as Colombia, but not quite something so stringent as Germany. Due to the unpredictable and rapid changes possible in the Egyptian political landscape the most important thing is to get all the warring sides to sit

⁸¹ Encyclopedia Britannica, *Muslim Brotherhood*; <http://www.britannica.com/EBchecked/topic/399387/Muslim-Brotherhood>

down and agree to talk to one another. If both sides can be confident that 1) their voices will be heard and 2) they will not be marginalized after the process is complete. Furthermore, and possibly even more important, there must be a strict referendum procedure in place that reflects both the needs of the Egyptian populace and takes into account the myriad issues with the previous constitution. I believe that the best way to accomplish this would be a referendum on the new constitution that requires a high percentage, not of the people voting, but of the total electorate. In this regard, we should look to Denmark and its constitutional amendment process, specifically, the 40% of the electorate that is required to pass an amendment. This referendum would necessarily be a higher bar than the low requirements needed for the Parliament to pass the proposed change. The referendum would need to be a three-quarters majority in order to pass muster. Part of the issue with the 2011 constitution was that although there was a 60% approval rate, the voter turnout was low.⁸²

With a timing that can only be seen as cosmically humorous, the Egyptian government agreed on a draft of the new constitution on December 2, 2013.⁸³ The new constitution was approved by a committee of fifty members that are appointed by the interim President, Adli Mansour.⁸⁴ While the Muslim Brotherhood dominated the original constitutional proceedings, it only had one representative on the new committee, albeit an ultraconservative one.⁸⁵ While not totally representative of the Egyptian populace, the committee seems more able to handle the country's transition to democracy; "Various unions, syndicates, and state bodies were allowed to choose their own representatives, and the president peppered the body with some prominent

⁸² *Egyptian Constitution 'approved' in referendum*; <http://www.bbc.co.uk/news/world-middle-east-20829911>

⁸³ *Egypt's Committee of 50 rewrites the Constitution-again*;
<http://america.aljazeera.com/articles/2013/11/11/egypt-constitutioncommitteeof50.html>

⁸⁴ *Egypt's Daring Constitutional Gang of 50*;
http://mideastafrica.foreignpolicy.com/posts/2013/09/20/egypts_daring_constitutional_gang_of_50

⁸⁵ *Id.*

politicians and intellectuals.”⁸⁶ The translation of the newly draft of the constitution is not yet available in English. However, there is a comparison of the 1971 Mubarak Constitution, the 2011 Morsi Constitution and the 2013 (Sisi?) constitution. Although the document does not deal specifically with the amendment process to be included in the new constitution, we can glean what that process might be from the actions of the Committee itself.

As stated by the Carnegie endowment;

Egyptians will soon vote in a referendum on a new constitution, their second in just over a year. Following the removal of then president Mohamed Morsi from office on July 3, Egypt’s military-backed government began a two-phase process of creating a new constitution. During the first phase, the regime tasked a committee of ten legal experts with drafting a list of constitutional amendments. In the second phase, it appointed a committee of 50 representatives from various state institutions and social groups to build upon these amendments and write a new constitution. The draft, which was finalized on December 1, 2013, is meant to replace Egypt’s 2012 constitution, which was written by an Islamist majority and approved by a December 2012 referendum with 63 percent of the vote.⁸⁷

The process by which the Committee came up with the amendments to the Constitution was one of debate and intellectual discourse.⁸⁸ The minutes and the deliberative processes that the Committee engaged in are not yet translated into English. However, what we can ascertain is that the process was much more representative of a modern democracy than the previous constitutional committee, which was essentially an organ of the Muslim Brotherhood. Despite the problems inherent in Egypt today, there is a light at the end of the tunnel. The Egyptian people have shown that they have no problem with overthrowing a dictatorial regime. If the

⁸⁶ *Id.*

⁸⁷ <http://carnegieendowment.org/files/Comparing-Egypt-s-Constitutions.pdf>

⁸⁸ *Egypt’s Daring Constitutional Gang of 50*;
http://mideastafrica.foreignpolicy.com/posts/2013/09/20/egypts_daring_constitutional_gang_of_50

military, as many fear, attempts to remain in power for an indeterminate future, they will find themselves on the same side of history as Mubarak and Morsi.

Despite the more rosy future painted by the process by which the new constitution was drafted, there are still problems on the horizon. The Muslim Brotherhood has rejected the new constitution.⁸⁹ Despite this, there is the possibility that the Brotherhood can be placated in the future. As stated in USA Today;

“The one ultraconservative Islamist on the panel, Mohammed Ibrahim Mansour of the al-Nour Party, said the document struck a good balance between the teachings of Islam and civil freedoms. His support comes despite the removal of several provisions that ultraconservative Islamists had introduced into the Morsi-era charter, worrying liberals who feared they could be a prelude toward stricter implementation of Islamic law, or Shariah.”⁹⁰

This is the first stage towards reconciliation and eventual symbiosis between the formerly frantic Brotherhood and the new government of Egypt. If an ultraconservative cleric can be welcomed into the debate process and help to pave the way for a constitution that will be more acceptable to all, then maybe Egypt isn't as far-gone as some would like to believe.

⁸⁹ *Egypt's Muslim Brotherhood Rejects Draft Constitution.*

[http://mideastafrica.foreignpolicy.com/posts/2013/12/02/egypt_s_muslim_brotherhood_rejects_draft_constituti
on](http://mideastafrica.foreignpolicy.com/posts/2013/12/02/egypt_s_muslim_brotherhood_rejects_draft_constituti
on)

⁹⁰ *Egypt Overhauls constitution, empowers military;*

<http://www.usatoday.com/story/news/world/2013/12/02/egypt-overhauls-constitution-military/3812457/>

CONCLUSION

Nothing works in a vacuum, and this is especially true of politics. The Constitution itself is just words on a page: a paper that defines the nation. In order to truly protect liberty there must be something protecting the spirit of those words. I think that the best safety procedure for a constitution is an amendment process that allows for the natural maturation of a constitution, yet sets a very high bar to change. A constitution should not be changed on a whim or to suit the needs of a particular moment. As the ultimate expression of national self-identity, a constitution should be the bedrock foundation upon which the law of the nation is built.