Taming regressive constitutional amendments: The African Court as a continental (super) Constitutional Court

Adem Kassie Abebe*

*Editor, ConstitutionNet, International Institute for Democracy and Electoral Assistance (IDEA), Constitution Building Programme. Extraordinary Lecturer, Centre for Human Rights, University of Pretoria. Email: adem.abebe@gmail.com.

The African Court on Human and Peoples' Rights has the required substantive basis to func-tion, and has in fact shown the willingness to operate, as a constitutional court for Africa. The Court has invalidated not only laws but also a constitutional provision as incompatible with relevant continental and sub-regional standards. The article argues that this extensive power of the African Court has implications for the empowerment of domestic constitutional courts to review the substantive validity of constitutional amendments. In combination with other constitutional and popular mechanisms of control, such an empowerment would constitute an additional veto point to stymie self-serving efforts undermining fundamental constitu-tional principles, so common in the African context. The express judicial empowerment and regulation of the review of constitutional amendments would allow constitutional design-ers to define the scope of the power, identify the enforceable substantive limits, and establish procedural and decision rules cognizant of the higher level of political consensus underwrit-ing amendments. Counterintuitively, therefore, the recognition of domestic judicial review of constitutional amendments would limit judicial venture into constitutional politics.

1. Introduction

The principle of constitutional supremacy inheres in the notion of constitutional democracy, and it is founded on the idea that transient political groups exercising government power should play according to the rules of the political game. The establishment of limits on contemporary majoritarian decision-making processes, in the form of either substantive or procedural requirements, lies at the heart of constitutional

law. In the absence of constitutional constraints, fleeting democratic majorities may use, and have used, their powers to entrench their positions and to undermine political competition.

Nevertheless, such constitutional constraints limit the power of the people to constitute and reconstitute their polity through constitutional amendments that seek to adapt the system to changing needs, demands, and circumstances. Indeed, constitution-making and amendment processes may advance fundamental rights, including justiciable socio-economic rights, and institutionalize political competition. New constitutions have introduced multi-party democracy. Constitutional amendments have similarly widened access to the polls, including to prisoners, women, and racial majorities and minorities, expanded the panoply of enforceable rights, and established institutions to promote human rights, the rule of law, and good governance.

Constitution-making processes and amendments have also been used to achieve regressive goals.[1] The extent to which the Egyptian Muslim Brotherhood in 2012[2] and the Egyptian military in 2014[3] used the constitution-making process to constitutionally embed their ideologies and interests is only a recent example.[4] In Swaziland, political parties remain legally banned.[5] In some cases, political actors dominating constitution-making processes have cleverly avoided establishing significant institutional constraints on their powers, despite extensive substantive guarantees and semblances of inclusive reform processes, as was for instance the case in Ethiopia.[6]

While the above examples indicate abuse at the time of constitution-making, constitutional amendment processes have been employed with more frequency to undermine initial concessions in the form of constraints on power at the time of constitution-making. In the African context, constitutional amendment processes have been used to entrench elite interests, narrow political-civil space, establish one-party systems, enhance powers of and abolish term and age limits on incumbents, reverse politically inconvenient court decisions, and undermine the rights

1 David Landau, *Abusive Constitutionalism*, 47 U.C. Davis L. Rev. 189 (2013).

2 L. Lavi an Examination of Egypt's Draft Constitution Part I: Religion and State—The Most Islamic Constitution in Egypt's History, Inquiry & Analysis Series Report No. 904 (2012), *available at* https://www.memri.org/reports/examination-egypts-draft-constitution-part-i-religion-and-state-%E2%80%93-most-islamic-constitution.

3 *Carter Center Urges Dialogue and Constitutional Change to Strengthen Democratic Governance in Egypt*, The Carter Center News, Mar. 12, 2014, *available at* http://www.cartercenter.org/resources/pdfs/news/pr/egypt-constitution-031214.pdf, noting the "extraordinary privileges for the Supreme Council of the Armed Forces."

4 Elliot Bulmer, *Exclusionary Constitutionalism: Developments in Chile and Hungary*, *in* Annual Review of Constitution Building Processes: 2014 61 (Melanie Allen et al. eds., 2015), noting how 1980 Chilean and 2011 Hungarian constitutions "provide constitutional protections not just for a regime, but also for a political ideology."

5 Dimpho Motsamai, *Swaziland's Nonparty Political System and the 2013 Tinkhundla Elections*, Institute for Security Studies, Situation Report, Aug. 12, 2014, *available at* https://www.files.ethz.ch/isn/151815/Swaziland_Sit_Rep_14Aug12.pdf.

6 Adem K. Abebe, *A Constitution without a Guardian: Is The Ethiopian Constitution Really Supreme?*, 5 Ethiopian Human Rights Law Series 9 (2013); Kevin L. Cope, *South Sudan's Dualistic Constitution*, *in* Social and Political Foundations of Constitutions Ch. 11 (Denis J. Galligan & Mila Versteeg eds., 2013).

of minorities.[7] Since the early independence period, dominant political forces in almost all African countries have used constitutional amendments to abolish or postpone multi-party politics and to dismantle "undesirable" institutions, including parliaments.[8] While procedural safeguards, the regular political process, and popular opposition have at times successfully precluded efforts to adopt self-serving constitutional amendments (e.g. failed amendments seeking to remove presidential term limits in Nigeria (2006), Malawi (2002), Zambia (2001), Burkina Faso (2014), and Benin (2006, 2009)), such safeguards have often succumbed to pressure from dominant political groupings or personalities.

Political institutions in many African countries, from Algeria to Zimbabwe, are dominated by a single political group, rendering regular supermajority requirements for constitutional amendment ineffective.[9] Perhaps there is no better manifestation of this pattern than the routine removal of presidential term, and increasingly age, limits.[10] President Yoweri Museveni of Uganda used the dominance of the ruling party to adopt constitutional amendments that removed term limits in 2005, and presidential age limits, the last barrier against Museveni's life rule, in December 2017, enabling him to run again in the planned 2021 elections.[11] Beyond term limits, the Zimbabwean ruling party removed crucial aspects of the 2013 Constitution to enhance the president's appointment powers over the judiciary, despite the carefully crafted checks and balances in the initial inclusive drafting process that led to the adoption of the Constitution.[12] Even popular referenda have been manipulated, thanks partly to vote rigging and incapacitated or unwilling and complacent electoral management bodies (e.g. Congo in 2015), or the popularity of the person leading the reforms (e.g. Cote d'Ivoire in 2016). At times, popular referenda have been used to bypass stubborn resistance from established political institutions, such as parliament and constitutional courts (e.g. Niger in 2009).

The possibilities of and experiences with regressive constitutional amendments have informed the development of normative and pragmatic justifications for

[7] Charles Fombad, *Constitution-Building in Africa: The Never-Ending Story of the Making, Unmaking and Remaking of Constitutions*, 13 Asian & Afr. Stud. 429 (2014) [hereinafter *Constitution-Building in Africa*]; Charles Fombad, *Some Perspectives on Durability and Change under Modern African Constitutions*, 11 Int'l J. Const. L. 382, 382 (2013) [hereinafter *Some Perspectives*].

[8] V. Le Vine, *The Rise and Fall of Constitutionalism in Africa*, 35 J. Mod. Afr. Stud. 181 (1997), noting that in most African countries rulers had little difficulty changing or replacing constitutions.

[9] Fombad, *Constitution-Building in Africa*, *supra* note 7.

[10] Charles Fombad, *Presidential Term Limits through Constitutional Amendments in Africa: Deconstructing Legitimacy*, *in* Checks and Balances: African Constitutions and Democracy in the 21st Century 45 (Grant Masterson & Melanie Meirotti eds., 2017); Ken Opalo, *Term Limits and Democratic Consolidation in Sub-Saharan Africa: Lessons from Burundi*, ConstitutionNet, July 30, 2015, *available at* http://www.constitutionnet.org/news/term-limits-and-democratic-consolidation-sub-saharan-africa-lessons-burundi.

[11] *Uganda Lawyers Petition Court to Annul Recently Signed Law Removing Presidential Age Limit*, Xinua, Jan. 16, 2018, *available at*. http://www.xinhuanet.com/english/2018-01/16/c_136897825.htm.

[12] David T. Hofisi, *Clawing Back the Gains of Popular Participation—The First Amendment to the Constitution of Zimbabwe (2013)*, ConstitutionNet, Sept. 26, 2017, *available at* http://www.constitutionnet.org/news/clawing-back-gains-popular-participation-first-amendment-constitution-zimbabwe-2013.

constraints on the amendment power.[13] Beyond the theoretical debates, in response to, and in anticipation of, experiences of self-serving constitutional amendments, constitutional drafters have established various mechanisms to slow down and preclude such amendments, in addition to supermajority procedural requirements common in most constitutions. In some cases, domestic courts have been empowered (e.g. Benin) or have claimed the authority to review and challenge certain constitutional amendments (e.g. Kenya and India), even in the absence of specific legal authorization.

This article seeks to assess a new dimension to the debate on limits on the amending power, namely, the role of supranational judicial organs in Africa in constraining domestic constitution-making and amendment processes. In particular, it assesses the legal basis and actual practice of the African Court on Human and Peoples' Rights (African Court) in reviewing the compatibility of constitutional provisions and other ordinary laws with relevant continental instruments.

Section 2 briefly discusses the normative debate on substantive limits on constitutional amendments.[14] The section merely presents but does not engage the extensive scholarship on the issue.[15] Section 3 summarizes the various creative ways constitutional designers have employed to limit constitutional amendments. Constitutional drafters may draw on a combination of these mechanisms to protect some of the most vulnerable provisions in the African context, such as term and age limits on the presidency. Section 4 explores the normative basis and practice of the African Court in reviewing the validity of constitutional amendments. It also discusses the implications of the power of the African Court to the empowerment of domestic courts to review constitutional amendments. The last section concludes the article.

While concluding that the possibility of continental judicial review of domestic constitutional amendments should justify the empowerment of domestic review of amendments, the article does not discuss the scope, intensity, and extent of the review. It has been suggested that the extent of judicial review of constitutional amendments should depend on the level of consensus and popular participation in the amendment process.[16] Others argue that constitutional courts should consider the practice

[13] Oran Doyle, *Constraints on Constitutional Amendment Powers, in* The Foundations and Traditions of Constitutional Amendment (Richard Albert, Xenephon Contiades, & Alkmene Fotiadou eds., 2017); John Rawls, Political Liberalism 231 (1996), writing about "constitutional essentials"; C. A. Kelbey, *Are There Limits to Constitutional Change? Rawls on Comprehensive Doctrines, Unconstitutional Amendments, and the Basis of Equality*, 72 Fordham L. Rev. 1487 (2004); S. Macedo, Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism 183 (1990). *See also* Richard Albert, *Four Unconstitutional Constitutions and Their Democratic Foundations*, 50 Cornell Int'l L.J. 169 (2017), discussing the possibility of unconstitutional constitutions.

[14] This article focuses on the substantive review of constitutional provisions. It assumes that constitutional arbiters can review the procedural validity of constitutional amendments, whether or not this power is expressly granted. Also in countries with multiple amendment procedures, courts have the implied power to assess the substance of constitutional amendments with a view to ascertain whether the specific amendment has been enacted in accordance with the valid procedure.

[15] *See* Doyle, *supra* note 13.

[16] *See* Yaniv Roznai, *Amendment Power, Constituent Power, and Popular Sovereignty*, *in* The Foundations and Traditions of Constitutional Amendment (Richard Albert, Xenephon Contiades, & Alkmene Fotiadou eds., 2017).

of other countries and the level of cross-country consensus before invalidating an amendment as unconstitutional based on unamendable provisions or implicit limits on the amendment power.[17] Overall, whether or not the exercise and intensity of judicial review of constitutional amendments is democratically legitimate and legally acceptable requires a case-by-case and contextual analysis.

2. On limits on the constituent power

It is now a largely accepted principle that the power to constitute the constitutional rules (constituent power) theoretically belongs to the people, in whom sovereignty lies and who have the power of self-government.[18] The people may exercise this awesome power through their representatives, and/or directly through referendums. The extensive participation of the people in constitution-making and amendment powers has also fast become a common occurrence.[19] The concept of the constituent power was initially conceived as a limit on what the king (executive), and, subsequently, parliament may do.[20] The people, as founders of the polity, delegate their power to govern to the government. As principals, the people impose broad parameters on what the government (the agent) may do and may not do.

The practical understanding of the constituent power raises issues on the possibility of identifying its concrete content and on the timing of its exercise. The constituent power is assumed to have been exercised in times of comprehensive and participatory constitution-making processes, which is seen as a form of "original" constituent power.[21] In such instances, there are few, if any, limits on the choices of constitutional authors. As an original power, its constitutional decisions may only be modified or displaced by a subsequent original constituent power of equal character—largely similar to the formation and modification or displacement of peremptory norms of international law (*jus cogens*).[22] The constituent power is thus not static, and constituent powers exercised at different times are co-original and coequal.

[17] *See* Rosalind Dixon & David Landau, *Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment*, 13 Int'l J. Const. L. 606 (2015); David Landau & Rosalind Dixon, *Constraining Constitutional Change*, 50 Wake Forest L. Rev. 859 (2015).

[18] Yaniv Roznai, Unconstitutional Constitutional Amendments—The Limits of Amendment Powers (2017); Roznai, *supra* note 16.

[19] Some African constitutions impose a duty to consult the people in constitutional amendment processes. The South African Constitutional Court has invalidated a constitutional amendment on the ground that there was no sufficient participation of the affected people. *See* Karen Syma Czapanskiy & Rashida Manjoo, *The Right of Public Participation in the Law-Making Process and the Role of the Legislature in the Promotion of this Right,* 19 Duke J. Comp. & Int'l L. (2008) 1; Linda Nyati, *Public Participation: What Has the Constitutional Court Given the Public?*, 12 Law, Democracy & Dev. 102 (2010).

[20] Daniel L. Negretto, *Constitution Making in Comparative Perspective*, *in* Oxford Research Encyclopedia of Politics (William R. Thompson ed., 2017).

[21] Roznai, *supra* note 16, § II. X. Contiades & A. Fotiadou, *Models of Constitutional Change*, *in* Engineering Constitutional Change: A Comparative Perspective on Europe, Canada and the USA (X. Contiades ed., 2012).

[22] Vienna Convention on the Law of Treaties, concluded at Vienna on May 23, 1969, entry into force January 27, 1980, art. 53, https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf

On this line, one constituent power limiting a subsequent constituent power is a conceptual impossibility. The dynamic nature of the constituent power may address concerns over the rule of the long hand of past generations constraining the sociopolitical choices of future generations. Nevertheless, it raises problems of ascertainment as to when exactly a displacement has occurred. Such determination is necessary to decide whether subsequent constitutional changes constitute violations of the constituent power by a lower authority, or whether such exercise of power cannot be judged against the earlier constituent power, itself having such character.

In practice, while most constitution-makers often start with no a priori limitations, constitution-making processes in some countries have proceeded in such a way that predetermined principles constrained the choices of constitutional drafters. A paradigmatic example is the 1996 Constitution of South Africa where certain constitutional principles were agreed between principal political groups with no official popular mandate.[23] The principles limited the choices of the drafters of the final constitution, who could, as directly elected representatives, claim more democratic pedigree. The principles were also judicially enforceable. Indeed, the Constitutional Court rejected parts of the initial draft constitution.[24]

In addition, while often not specifically recognized, international treaties that a relevant country has ratified theoretically provide certain substantive limits on the constitution-making power. Since domestic law, including constitutional law, may not be invoked to justify violations of international law,[25] the avoidance of international responsibility requires subsequent governments to either withdraw from or make

[23] Jeremy Sarkin, *The Drafting of South Africa's Final Constitution from a Human-Rights Perspective*, 47 Am. J. Comp. L. 67, 69 (1999); Christina Murray, *A Constitutional Beginning: Making South Africa's Final Constitution*, 23 U. Ark. at Little Rock L.J. 809 (2001).

[24] Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (CCT37/96) [1996] ZACC 24, 1997 (1) BCLR 1, 1997 (2) SA 97 (Dec. 4, 1996); Albie Sachs, *The Creation of South Africa's Constitution*, 41 N.Y. L. Sch. Rev. 669, 669 (1997), describing the certification process as "a unique jurisprudential and political event in the world."

[25] Vienna Convention on the Law of Treaties, concluded at Vienna on May 23, 1969, entry into force January 27, 1980, art. 27, https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf. While the status of international law at the domestic level does not affect the mandate or procedures of international tribunals, it may determine the substantive options of domestic courts and other actors in framing their opinions, including in relation to constitutional provisions. Most Francophone African countries follow a monist approach where ratified international treaties become part of domestic law (subordinate to the constitution). Before their ratification, constitutional courts must review such treaties for their compatibility with the constitution. As such, international law may not provide a yardstick to scrutinize the validity of constitutional amendments. Most Anglophone countries, with few exceptions such as Kenya, follow the dualist approach where a treaty must be domesticated before it may provide a basis for a judicial cause of action. In practice, however, courts in Anglophone countries are more likely to refer to supranational instruments and judgments than their Francophone counterparts. (Magnus Killander & Horace Adjolohoun, *International Law and Domestic Human Rights Litigation in Africa: An Introduction*, in International Law and Domestic Human Rights Litigation in Africa 3 (Magnus Killander ed., 2010).) I am not aware of an African country where an international treaty is granted a status above the Constitution. In addition, the French/Latin American concept of the "constitutional block," where ratified international human rights treaties are considered part of the Constitution, is uncommon in African constitutional practice.

reservations, if permitted, to the relevant treaties, if they wish to deviate from the obligations enunciated in the relevant treaties.

Some scholars have also noted that procedures for the ratification of draft constitutions impose implied limits on the drafters.[26] Constitution drafters must constantly monitor and identify the views and interests of the organs or groups in charge of ratifying the Constitution. Failure to address the concerns of such "downstream" limits enhances the risk of rejection of the whole Constitution. This conception may be seen as part of the constituent power, rather than a limit to it, particularly where the downstream consideration is popular, or even parliamentary, ratification.

Overall, therefore, constitution-makers practically operate within constraints—both domestic and increasingly international. The idea of an unlimited constituent power, while theoretically conceivable, is practically more nuanced.

While the constituent power is considered unlimited, the existence of substantive limits on the amendment power is contested. Constitutions conventionally contain mechanisms to amend or modify their contents. The idea that the amendment power is inferior to the constituent power has led to normative arguments in favor of substantive limitations on the former.[27] Despite the significant political consensus that it may require, the amendment power is seen merely as a delegated power subject to the original power of the constituent power, that is, the amendment power is a form of "secondary" constituent power. Hence, the inclusion of limits on the amendment power is normatively acceptable.

In contrast, a conception of amendments as exercises of the constituent power implies that reforms need not be comprehensive to signify the exercise of such power, that is, the constituent power may reveal itself in bits and pieces. The substantive validity of amendments enacted in line with established procedures may not be questioned.[28] Accordingly, the inclusion of unamendable constitutional provisions is normatively unacceptable, and so is the concept of substantively unconstitutional constitutional amendments.[29] In a sense, the amendment power is seen as a new constituent power displacing an older one. In particular, constitutional amendment procedures may objectively be more cumbersome than the process of adoption of existing constitutions, therefore requiring broader political and social consensus, sometimes

[26] John Elster, *Forces and Mechanisms in the Constitution-Making Process,* 45 Duke L.J. 364 (1995).

[27] *See* Roznai, *supra* note 18.

[28] J. Rubensfeld, Freedom and Time: A Theory of Constitutional Self-Government 174 (2001), arguing that "constitutionalism always permits the possibility of legitimate rupture, of a revolutionary process of popular rewriting that takes place, in part or in whole, outside every existing political institution"; C. L. Eisgruber, Constitutional Self-Government 120 (2001) claiming that "a constitutional procedure that enables people to entrench good rules and institutions will also enable them to entrench bad rules and institutions"; W. Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process,* 97 Harv. L. Rev. 431 (1983), arguing that "the formal amendment process set forth in Article V [of the US Constitution] represents a domestication of the right to revolution."

[29] Richard Albert, *Counterconstitutionalism*, 31 Dalhousie L.J. 47, 47–48 (2008), arguing that "unamendability clauses are objectionable as a matter of theory because they chill constitutional discourse and prevent reconsideration of the constitutional text, the very document that is the embodiment of a people's nationhood and their vision for themselves and their state."

reflected through referendum.[30] In such instances, it is possible to argue that the amendment process claims normative co-originality, if not democratic superiority, to the inaugural constituent power that produced the constitution.

Any assumption that the amendment power is inferior to the initial constitution-making power creates conceptual difficulties in instances where the amendment procedure is relied upon to introduce unamendable provisions. For instance, the 2016 amendments to the Algerian Constitution established two term limits on the presidency—reversing an earlier amendment removing a similar limit.[31] Furthermore, the recent amendment incorporated the two-term limit in the list of unamendable provisions. The 2016 Senegalese amendments also reduced the length of presidential terms and included the amendment in the list of unamendable provisions.[32] While the amendments in Senegal were finally approved in a referendum, in Algeria there was no constitutional referendum. The avoidance of a normative confusion between the amending and the constituent power requires a concession that at least some amendments constitute coequal exercises of the constituent power.

3. Constraining the power of constitutional amendment

In practice, while all constitutions can be amended, they commonly establish constraints on the power of amendment.[33] The constraints often take the form of procedural requirements. In addition, some constitutions include substantive limits on the power of constitutional amendment in line with scholarly assertions that the amendment power is inferior to the original constituent power. In some countries, courts are empowered, or have claimed the mandate to, review the validity of constitutional amendments.

3.1. Procedural (and time) limits on the power of amendment

In response to or in anticipation of abusive constitutional amendments, constitutional drafters in various countries have established hurdles to prevent capricious amendments. The establishment of constitutional amendment procedures more cumbersome than the regular lawmaking process is fundamental to claims of constitutional supremacy. The simultaneous empowerment and distrust of transient democratic majorities characterizes all constitutional democracies. While the possibility of constitutional amendment empowers future political authorities, the distrust is reflected in the establishment of unique procedural hurdles, often in the form of legislative

[30] Roznai, *supra* note 16, at 23–49 arguing that "the more similar the characteristics of the secondary constituent power are to those of a democratic primary constituent power . . . the less it should be bound by limitations, and vice versa."

[31] Revised Const. of Algeria (2016), art. 212(8).

[32] Revised Const. of Senegal (2001), art. 103.

[33] Francesco Giovannoni, *Amendment Rules in Constitutions*, 115 Pub. Choice 3 (2003); Donald S. Lutz, Principles of Constitutional Design ch. 5 (2006).

supermajority approval requirements, on the power of modifying constitutional provisions.

The most common way of protecting fundamental constitutional principles is by establishing high thresholds for amendments. In some constitutions, the level of consensus required for amendments varies depending on the perceived value of the provision—a form of "constitutional escalator."[34] For instance, in Mauritius, 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-quarters of the votes cast in a referendum.[35] Other provisions in the Mauritian constitution require a three-quarters or a two-thirds approval of all the members of the legislature. Amendments to fundamental provisions of the South African Constitution require a three-quarters support in the National Assembly and support from six of the nine provincial votes in the National Council of Provinces.[36] Other provisions only need approval by a two-thirds majority in the Assembly, and, as necessary, approval of six of the nine provincial votes in the Council.

In addition, constitutions may require approval in a referendum.[37] Africa is a "pro-referendum region" where about two-thirds of constitutions require constitutional referendums for the approval of some or all amendments.[38] Referendum requirements may increase the cost of resort to constitutional reform, provide additional constraints on unpopular amendments, and force dominant political groups to compromise. Indeed, in Seychelles (1992), Zimbabwe (2000) and Kenya (2005), draft constitutions approved with the support of politically dominant groups were defeated, partly because of opposition campaigns for the rejection of the proposed amendments.

The referendum requirement may be mandatory for some or all amendments, or an alternative to the supermajority requirement, or subject to a request from a political minority. In Benin, constitutional amendments must be approved with at least a three-quarters majority in parliament.[39] A referendum is required except in cases where a four-fifths majority is achieved. The Constitution of Togo similarly requires a constitutional referendum if the proposal is not approved with a four-fifths majority. Indeed, in September 2017, the ruling party adopted a constitutional amendment reinstating presidential term limits under pressure from intense popular protests.[40] Opposition parties refused to support the reforms and boycotted the parliamentary

[34] Richard Albert, *Constitutional Handcuffs*, 42 Ariz. St. L.J. 663, 707–711 (2010) [hereinafter Albert, *Constitutional Handcuffs*]; Richard Albert, *The Expressive Function of Constitutional Amendment Rules,* 59 McGill L.J. 225 (2013) [hereinafter Albert, *Expressive Function*]; Landau, *supra* note 1.

[35] Const. of Mauritius (1968), art. 47.

[36] Const. of South Africa (1996), § 74.

[37] X. Contiades & A. Fotiadou, Participatory Constitutional Change: The People as Amenders of the Constitution (2017); Stephen Tierney, Constitutional Referendums: The Theory and Practice of Republican Deliberation (2012).

[38] Dag Anckar, *Constitutional Referendums in the Countries of the World*, 7 J. Pol. & L. 12, 19 (2014).

[39] Const. of Benin (1990), arts. 154 & 155.

[40] Kangnikoe Bado, *Togo's Popular Protests and Demands for Constitutional Reform*, Constitutionnet, Sept. 25, 2017, *available at* http://www.constitutionnet.org/news/togos-popular-protests-and-demands-constitutional-reform.

session unless the amendments were given retroactive effect, thereby precluding the incumbent, who is already serving a third term, from running again. The amendment failed to receive the required four-fifths parliamentary majority and must be approved in a constitutional referendum.

In Namibia, a referendum is conceived as an alternative to supermajority approval in the senate. If an amendment is approved with a two-thirds majority in the lower house, but fails to secure a two-thirds majority in the senate, the president of the republic may refer the amendment bill to a referendum.[41] The bill would be approved if it receives the support of a two-thirds majority of the votes cast in the referendum. Similarly, in Italy, an amendment passed with an absolute majority in each house may be referred to a referendum at the request of one-fifth of the members of either the lower house or the senate, 500,000 voters, or five regional councils.[42] If the amendment is approved with a two-thirds majority in each house, a referendum is not held. Indeed, the 2016 constitutional amendments were referred to, and rejected in, a referendum after failing to secure the required two-thirds majority.[43] In Spain, referendums are mandatory for some provisions, while in other cases referendums are held only at the request of one-tenth of the members of either legislative house.[44]

While referendums allow the people to directly decide on constitutional amendments, they may be used to bypass institutional resistance.[45] The referendum possibility or requirement may also undermine incentives to seek broad political consensus in representative institutions. The Togolese case above provides a topical example. Instead of negotiating with opposition groups on a broad range of demands for constitutional reform, the ruling party completely ignored the demands, and formulated its own proposals on presidential term limits and proceeded to call for a referendum to "settle" the disagreement with opposition groups. In Burundi, the President bypassed parliament and submitted extensive constitutional amendments to a referendum in May 2018, an alternative process that seemingly does not require even the legislative consideration of proposed amendments. In 2015, parliament rejected a proposed amendment, forcing the President to approach the Constitutional Court for an interpretation that controversially allowed him to run for a third term.[46] In Turkey, constitutional amendments must be approved with a two-thirds majority. If an amendment receives a three-fifths majority support but does not reach the two-thirds threshold, it must be referred to a referendum. The

41 Const. of Namibia (1990), art. 132(3).

42 Const. of Italy (1948), art. 138.

43 Francesco Clementi, *Italian Constitutional Reforms: Towards a Stable and Efficient Government*, ConstitutionNet, June 23, 2016, *available at* http://www.constitutionnet.org/news/italian-constitutional-reforms-towards-stable-and-efficient-government.

44 Const. of Spain (1978), arts. 167 & 168.

45 William Partlett, *The Dangers of Popular Constitution-Making*, 38 Brook. J. Int'l L. 1 (2012); David Landau, *Constitution Making Gone Wrong*, 64 Ala. L. Rev. 923 (2013).

46 Stef Vandeginste, *Burundi's Constitutional Referendum: Consolidating the Fait Accompli in the run-up to the 2020 Elections*, ConstitutionNet, Jan. 23, 2018, *available at* http://www.constitutionnet.org/news/burundis-constitutional-referendum-consolidating-fait-accompli-run-2020-elections.

lower threshold for the referral to a referendum allowed the Turkish ruling party to push through amendments empowering the president despite serious opposition.[47]

To reduce instances where the possibility of resort to referendums encourages rather than discourages political compromise, the requirement could be coupled with, rather than be an alternative to, normal parliamentary supermajority requirements. For instance, under the 2002 Constitution of Cote d'Ivoire, amendments affecting the mandate and office of the president must mandatorily be referred to a constitutional referendum, in addition to a two-thirds supermajority approval in parliament.[48] While this double requirement is not bulletproof—amendments to the Cote d'Ivoire constitution enhancing the powers of the president were adopted in 2016[49]—they could be effective in countries with minimal levels of political pluralism. In addition, provisions allowing the legislative minority to refer constitutional amendments to referendum, as is the case in Italy and Spain, may encourage cross-party dialogue and limit instances where dominant ruling parties push through amendments without seeking compromise. For instance, the 2017 amendments to the Constitution of Uganda abolishing presidential age limits were removed despite poll evidence suggesting that the overwhelming majority of the people disapproved the reforms.[50] In the absence of a referendum requirement or possibility, the popular opposition did not impact the reforms, instead allowing the members of parliament to receive a quid pro quo extension of terms by two years.

The referendum requirement can be particularly effective when a minimum turnout threshold for a valid outcome is prescribed.[51] For instance, constitutional amendments in Zambia were defeated, despite approval in a referendum, for failure to reach the 50 percent voter turnout threshold, after opposition groups successfully mobilized their electorate to boycott the constitutional referendum.[52] In contrast, the absence of a similar turnout threshold allowed the 2016 Cote d'Ivoire constitutional referendum to pass, despite the relatively low turnout (42 percent) undermining the legitimacy of the new constitution.[53] In Botswana, a constitutional amendment was approved in 2001 on a turnout of less than 5 percent.[54] Some constitutions require

[47] Bertil Emrah Oder, *Turkey's Ultimate Shift to a Presidential System: The Most Recent Constitutional Amendments in Details*, ConstitutionNet, Jan. 31, 2017, *available at* http://www.constitutionnet.org/news/turkeys-ultimate-shift-presidential-system-most-recent-constitutional-amendments-details.

[48] Const. of Cote d'Ivoire (2000), arts. 124–127.

[49] Pierre Lobe, *Innovations of the Draft Constitution of Cote D'Ivoire: Towards Hyper-Presidentialism?*, ConstitutionNet, Oct. 24, 2016, *available at* http://www.constitutionnet.org/news/innovations-draft-constitution-cote-divoire-towards-hyper-presidentialism.

[50] *85% of Ugandans Opposed to Age Limit Amendment—Survey*, The Observer, Dec. 9, 2017, *available at* http://observer.ug/news/headlines/56340-85-of-ugandans-opposed-to-age-limit-amendment-survey.html.

[51] Thresholds may be necessary in relation to constitutional amendments, considering their significance, although the thresholds may not apply or be lower in relation to regular referendums.

[52] Cephas Lumina, *Zambia's Failed Constitutional Referendum: What Next?*, ConstitutionNet, Sept. 12, 2016, *available at* http://www.constitutionnet.org/news/zambias-failed-constitutional-referendum-what-next.

[53] *Ivory Coast Backs New Constitution in Landslide Vote, Opposition Cries Foul*, France 24, Nov. 2, 2016, *available at* http://www.france24.com/en/20161102-ivory-coast-approves-new-constitution-referendum-opposition-boycott.

[54] *Botswana: 2001 Referendum*, EISA, *available* at https://www.eisa.org.za/wep/bot2001referendum.htm.

a supermajority approval in referendums. Amendments to certain provisions of the 1997 Constitution of the Gambia require approval by 75 percent of voters in a referendum, with a turnout threshold of 50 percent of eligible voters (article 226(4)). These possibilities could be useful in the African context in protecting the most vulnerable provisions, such as presidential term limits.

Nevertheless, the referendum requirement may also scuttle efforts to guarantee the demands of minority groups.[55] For instance, in Zambia (August 2016), the referendum turnout threshold precluded the adoption of constitutional reforms that could have advanced human rights and the role of the people in future amendments. In Mali, all constitutional amendments must be approved in a referendum.[56] The government is making efforts to ensure peace with minority groups in the northern part of the country, which have repeatedly risen up in insurrection, through constitutional guarantee of autonomy.[57] Nevertheless, the reforms have been partly seen as securing the interest of minorities at the expense of the majority. This popular tendency, coupled with other controversial issues, such as enhancement of the powers of the president, led to the delay of the reforms, despite high legislative consensus.[58] These possibilities should be relevant considerations in deciding which constitutional amendments should require approval in a referendum.

Some constitutions require the approval of constitutional amendments more than once in different parliamentary sessions.[59] In Spain, concerning total or partial revisions affecting specified constitutional provisions, each house must approve the amendments with a two-thirds majority. The houses are then dissolved. The amendments must be approved again by a two-thirds majority in newly constituted legislative houses, and in a referendum.[60] In addition to serving as a cooling period, this procedure ensures that euphoric and fleeting triggers do not lead to systemic institutional reforms. The intervening electoral requirement creates the possibility where new electoral majorities could decide on proposed constitutional amendments, heightening the incentive for political consensus and compromise on such reforms. It also enhances the public and political debate on the constitutional reforms by making the issue at the heart of the elections. In some countries, there is a duty to seek the views of the public once the amendment has been proposed.[61]

[55] Referendums may be used to undermine minority interests. J. N. Eule, *Judicial Review of Direct Democracy* 99 Yale L.J. 1503 (1990), advocating for the judicial review of direct democracy outcomes to protect the rights of minorities.

[56] Const. of Mali (1992), art. 118.

[57] Sidi M. Diawara, *Mali: Peace Process, Constitutional Reform and an Uncertain Political Future*, ConstitutionNet, July 20, 2017, *available at* http://www.constitutionnet.org/news/mali-peace-process-constitutional-reform-and-uncertain-political-future.

[58] *Id.*

[59] Richard Albert, *Temporal Limitations in Constitutional Amendment*, 21 Rev. Const. Stud. 37 (2016).

[60] Const. of Spain (1978), art. 168.

[61] *E.g.*, Const. of South Africa (1996), § 59(1)a; Const. of Zimbabwe (2013), art. 328(4); Const. of Kenya (2010), art. 252(1).

The desire to ensure broad consensus on constitutional amendments may also be achieved through requirements of cross-party approval, in addition to legislative supermajority support. This procedure ensures that no single political group can make constitutional changes, regardless of its parliamentary dominance. The 2016 Constitution of Thailand provides that amendments must be approved by an absolute majority of members of the lower house and the senate in a joint session.[62] At least 20 percent of representatives of parties in the lower house with no members as ministers or as president or vice president of the lower house must support the amendment. The danger of this approach is that it can make constitutional amendments nearly impossible and allows political minorities to effectively block potentially desirable or even necessary amendments. Such power may be used to obtain concessions on unrelated policy areas, rather than precluding capricious amendments. It may be worthwhile to consider this procedure only in relation to amendments to certain fundamental constitutional provisions.

Another potentially effective hurdle to preclude self-serving constitutional amendments is to make amendments inapplicable to existing incumbents who could directly benefit from the changes. For instance, changes to the mandate and term of presidents or members of parliament may only apply to those who take up office after the amendment takes effect. This is the case in Zimbabwe where an amendment to a term-limit provision, the effect of which is to extend the length of time that a person may occupy any public office, does not apply in relation to any person who held or occupied that office, or an equivalent office, at any time before the amendment.[63] This reduces the incentives of office holders to make changes to serve their personal interests, although it may not be able to preclude amendments intended to benefit political groupings. The requirement is also limited to directly beneficial issues, such as term limits, but not to broader institutional changes, such as those affecting judicial appointment rules in Zimbabwe, which were approved with very little institutional resistance in 2017.[64]

3.2. Substantive limits on the power of constitutional amendment in Africa and their judicial enforcement

In addition to the procedural hurdles discussed above, some constitutional theorists have promoted the idea of normative/substantive limits on the amendment power.[65] Doyle has usefully categorized the arguments for substantive limits into positive (explicitly or impliedly based on actual constitutional text), normative (based on moral reasoning), and conceptual (based on the distinction between "amendment" and "replacement").[66]

[62] Const. of Thailand (2017), art. 256. In addition, Senators comprising not less than one-third of the total number of existing members of the Senate must approve amendments.

[63] Const. of Zimbabwe (2013), art. 328(7).

[64] Hofisi, *supra* note 12.

[65] Roznai, *supra* note 18.

[66] Doyle, *supra* note 13.

In practice, constitutions increasingly contain unamendable provisions or principles.[67] These unamendable provisions vary across constitutions and may not always overlap with the substantive limits promoted by constitutional theorists. The unamendable principles may be judicially enforceable. Nevertheless, the judicial power to review constitutional amendments does not necessarily flow from the existence of unamendable provisions. In some cases, the power to review constitutional amendments may be established without corresponding unamendable provisions, which creates questions as to the standard of review (e.g. South Africa).[68]

Unamendable provisions are common in African constitutions, particularly in Lusophone and Francophone countries. This may partly be due to the influence of the Constitution of Portugal—which contains an extensive list of unamendable provisions, and the French Constitution with its emphasis on secularism and republicanism. In contrast, unamendable provisions are uncommon in Anglophone African countries. The most common protections relate to secularism, republicanism, and multi-party democracy. Nevertheless, there are exceptions. In Somalia, Algeria, and Tunisia, provisions relating Islam to the state are unamendable.[69] Prohibitions of amendments to presidential term limits are also popular (e.g. Guinea, Madagascar, Mauritania, Congo, Senegal, and Algeria). In Rwanda, the only unamendable provision is the amendment procedure itself.[70] Quite interestingly, with some notable exceptions, fundamental rights are not always protected against amendments. The Namibian constitution prohibits any amendment that "diminishes or detracts from the fundamental rights and freedoms."[71] Similarly, the constitutions of Algeria, Angola, Cape Verde, and Mozambique provide that amendments must respect fundamental rights.[72] In addition to the specific protection of fundamental rights, in countries that protect democracy or democratic principles against amendment, some rights may by implication be protected.

The idea of unamendable provisions, while increasingly popular, has certain fundamental weaknesses. Unamendable provisions, especially when they relate to institutional aspects, such as federalism or the unitary nature of the state, constrain the right to self-definition of the people.[73] Unamendable provisions may also be incompatible with majoritarian conceptions of democracy. A good example is the entrenchment of the principle of equal state representation in the US Senate. An amendment that modifies the principle of equal state representation toward a proportional representation

[67] Roznai, *supra* note 18, at 20, 21, noting that more than half of the constitutions adopted after 1989 contain unamendable provisions. Some African scholars have criticized the inclusion of unamendable provisions as impractical and for permanently undermining the freedom of popular choice and right to self-definition. Fombad, *Some Perspectives*, *supra* note 7; Albert, *Constitutional Handcuffs*, *supra* note 34.

[68] *See* Adem K. Abebe, *The Substantive Validity of Constitutional Amendments in South Africa*, 131 S. Afr. L.J. 656 (2014).

[69] Const. of Algeria (2016), art. 212; Const. of Tunisia (2014), art. 1; Provisional Const. of Somalia (2012), art. 132(1).

[70] Const. of Rwanda (2003), art. 175. The 1990 Namibian Constitution similarly prohibits amendments that seek to reduce or detract from the majority threshold in parliament and in a referendum (art. 132(4)).

[71] Const. of Namibia (1990), art. 131.

[72] Const. of Algeria (2016), art. 210; Const. of Angola (2010), art. 236; Const. of Mozambique (2004), art. 292; Const. of Cape Verde (1992), art. 313.

[73] Doyle, *supra* note 13; Albert, *Constitutional Handcuffs*, *supra* note 34.

could be democratically defensible. Nevertheless, such an amendment will not only violate the constitutional prohibition, it will also undermine the necessary compromise that provided the basis for the federal arrangement.[74] The use of unamendable provisions could also fall short of protecting principles that are equally fundamental but are nonetheless amendable, simply because the principle or provision does not feature in the list of unamendable provisions. For instance, as indicated above, fundamental rights are not always among the list of unamendable provisions in a number of African constitutions. As such, the inclusion of unamendable provisions may not only lead to antidemocratic consequences but may also be limited.

Any acknowledgment of substantive limits on the constituent power, including the amendment power, does not necessarily imply their enforceability, in particular by non-elected judicial organs. In the context of the judicial review of new constitutions, the most notable exception is South Africa where a number of principles agreed upon by unelected political groups limited the drafting of the final constitution.[75] A Constitutional Court with the power to review the compatibility of the draft constitution with the principles was established. The Court rejected certain institutional aspects of the initial draft. The drafting organs duly complied with the decisions and addressed the issues according to the court's guidance.

The idea of enforceability of unamendable provisions is more common than the enforceability of limits on the constitution-making power.[76] The Constitution of Algeria requires the submission of proposed amendments to the Constitutional Court before the president presents the proposal for popular referendum.[77] The Tunisian Constitutional Court must review all amendments to ensure that they are not incompatible with unamendable provisions.[78] The Constitutional Court of Angola is similarly empowered to review constitutional amendments.[79] In Guinea, the Constitutional Court is empowered to review amendments, but only when there is a dispute between the legislature and the executive on the amendment's "receivability."[80] The express powers of constitutional courts may be limited to checking compliance with procedural requirements (e.g. Burkina Faso).[81] Although the South African Constitution empowers the Constitutional Court to review constitutional amendments, such empowerment arguably applies to procedural requirements, with substantive limits implied in the existence of different amendment procedures.[82]

Nevertheless, a number of constitutions, including some that include unamendable provisions, do not specifically empower courts or other entities to review constitutional amendments. In practice, as well, unamendable provisions have actually been

[74] *See, however*, Douglas Linder, *What in the Constitution Cannot Be Amended?*, 23 Ariz. L. Rev. 717 (1981), arguing that an amendment of the provision on senate representation would be valid.

[75] *Supra* note 25.

[76] Yaniv Roznai, *Unconstitutional Constitutional Amendments—The Migration and Success of a Constitutional Idea,* 61 Am. J. Comp. L. 657, 670–710 (2013).

[77] Const. of Algeria (2016), art. 176.

[78] Const. of Tunisia (2014), art. 144.

[79] Const. of Angola (2010), art. 227.

[80] Const. of Guinea (2010), art. 86.

[81] Const. of Burkina Faso (1991), art. 154.

[82] Abebe, *supra* note 68.

amended. For example, presidential term limits in the Congo were abolished in 2015 despite a provision making term limits unamendable, under the pretext of adopting a "new" constitution.[83] To the extent that unamendable provisions are unenforceable, they principally serve expressive purposes, that is, they simply reflect the higher value attached to the provisions thereby potentially raising the political cost of tampering with such provisions.[84] In this sense, such provisions are similar with non-justiciable principles of state policies that are often unenforceable.[85]

In practice, some African courts have found constitutional amendments unconstitutional. In 2017, the Constitutional Court of Mali ordered the president to refer the draft constitution, which was set to be voted on in a referendum on July 9, to parliament with a view to "correct" provisions lacking in clarity, including an order requiring presidential oaths to refer to the duty to protect the independence and territorial integrity of the country (as is the case in the 1992 Constitution).[86] While the decision did not invalidate any parts of the amendment, it reset the reform process, opening possibilities for more consensus and consultation. The Court had similarly rejected proposed constitutional amendments in 2001.[87] The then president had amended the draft constitution after its examination in parliament but before the planned submission to a referendum. This irregularity led to the annulment of the amendments.

In 2009, the Constitutional Court of Niger declared invalid a call by the then president to hold a referendum to extend presidential terms, effectively abolishing the constitutional two-term limit, which was unamendable under the constitution.[88] Nevertheless, the president dissolved parliament and the Court, and organized a referendum in August 2009, which approved the term extension. The president was subsequently removed (in February 2010) from power by the army, in response to popular protests. A new constitution retaining term limits and prohibiting their amendment was approved in a referendum the same year.

In June 2006, the National Assembly of Benin in a closed parliamentary session amended the Constitution to extend the duration of parliamentary terms (applicable retrospectively to the then existing legislature) from four to five years. The Beninese Constitutional Court invalidated the amendment holding, among others, that due to the importance of the principle of "national consensus" in the adoption of the Constitution, constitutional amendments should follow a public and open process.[89]

[83] Const. of Congo (2002), art. 185 (prior to 2015 amendments). The unamendable provisions in Portugal have also been amended—*see* Yaniv Roznai, *Amending 'Unamendable' Provisions*, const. making & const. change, Oct. 20, 2014, *available at* http://constitutional-change.com/amending-unamendable-provisions.

[84] Albert, *Expressive Function*, *supra* note 34.

[85] *E.g.*, Const. of Nigeria (1999), art. 6(6)(c), expressly declaring certain policy principles judicially unenforceable.

[86] *Top Mali Court Orders Changes to Controversial Referendum*, Daily Mail/AFP, July 5, 2017, *available at* http://www.dailymail.co.uk/wires/afp/article-4669034/Top-Mali-court-orders-changes-controversial-referendum.html.

[87] Sissoko Bamassa & Guisse Aboubacar, *Mali's Promising Constitutional Reform Process: Cementing Peace through Devolution of Power*, ConstitutionNet, Oct. 13, 2016, *available at* http://www.constitutionnet.org/news/malis-promising-constitutional-reform-process-cementing-peace-through-devolution-power.

[88] *Upholding Niger's Constitution*, globalization 101, May 20, 2010, *available at* http://www.globalization101.org/upholding-nigers-constitution-2/.

[89] Const. Court of Benin, Judgment No. DCC 06-074, July 8, 2006.

In 2011, the Court invalidated a referendum law because it only excluded from a referendum the expressly unamendable provisions of the Constitution.[90] Despite the lack of specific reference, the Court held that presidential term limits, the minimum and maximum age for presidential candidates, and the presidential nature of the political system should also have been excluded from referendums. The Court essentially extended the list of unamendable constitutional provisions. In another interesting case in 2014, the Court ruled that a widely publicized call urging the president to revise the constitution to allow third terms was unconstitutional, as term limits are unamendable as established in the Court's jurisprudence.[91] This decision essentially banned even official discussions of the possible amendment of the unamendable provisions, raising issues on the implications of unamendable provisions to the freedom of expression.

In a 2004 case, the Kenyan High Court relied on the concept of the constituent power to hold that normal amendment processes could not be used to adopt a completely new constitution, largely based on a conceptual distinction between amendment and replacement, the latter being reserved to the constituent power of the people.[92] Under the law outlining the process of adoption of the draft constitution, a referendum was contingent on the absence of consensus at the National Constitutional Conference, which was in charge of drafting the constitution, or the results of a vote in favor of a referendum. The Court ruled that the exercise of the constituent power required "nothing less than a compulsory referendum." The then Kenyan Constitution did not have unamendable provisions or provisions on the adoption of a new constitution.

4. The African Court on Human and Peoples' Rights as a constitutional court for Africa

The African Court was established as the only judicial organ at the African level following the necessary number of ratifications of the Protocol to the African Charter on Human and Peoples' Rights (African Charter) on the Establishment of the African Court. The Protocol was adopted in 1998 and came into force in 2004, and the Court officially started operations in 2006. The Court complements the protective mandate of the African Commission on Human and Peoples' Rights (African Commission), which also has promotional functions.[93] The Court has 11 members appointed by the African Union (AU) Assembly of Heads of States and Governments. Its broad jurisdiction extends to all cases and disputes concerning the application and interpretation of the African Charter, and any other applicable human rights instruments ratified by the relevant state.[94] As at November 2018, 30 states have ratified the Protocol.

[90] Const. Court of Benin, Judgment No. DCC 11–067, Oct. 20, 2011.

[91] Const. Court of Benin, Judgment No. DCC 14–199, Nov. 20, 2014.

[92] Rev. Dr. Timothy M. Njoya et al. v. The Hon. Attorney General et al., March 25, 2004, [2004] 1 E.A, 194 (HCK).

[93] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court (2004), art. 2.

[94] *Id.*, art. 3.

As at November 2018, nine states have made special declarations allowing individuals and NGOs (nongovernmental organizations) with observer status before the African Commission direct access to the Court, as required under article 34(6) of the Protocol.[95]

The Court had a slow start, issuing its first finding of a violation on the merits only in June 2013.[96] The Court has since decided an increasing stream of cases. It has also received a number of requests for advisory opinions and finalized a few.[97] While the Court started slow, its decisions finding a violation have involved crucial issues relevant beyond the specific respondent country. Overall, the Court has gone beyond the specific case and parties and found laws and even a constitutional provision incompatible with the African Charter and other relevant human rights instruments. These expansive findings of the Court are founded on article 27 of the Court Protocol empowering it to issue "appropriate orders," including the payment of fair compensation or reparation, to remedy a violation.[98]

Interestingly, the first case to be decided on the merits involved the compatibility of a provision in the Tanzanian Constitution banning independent candidates from running for office at all levels, namely, presidential, legislative, and local elections.[99] The legal dispute in the case first started in the High Court of Tanzania, which found a legislative ban on independent candidates unconstitutional.[100] The Government of Tanzania appealed to the Court of Appeal, the highest court in the land. While the case was being considered on appeal, parliament preempted the ruling with an amendment to the constitution prohibiting independent candidates and requiring that political participation must be through political parties, essentially reversing the decision of the High Court. The High Court subsequently found the constitutional amendment unconstitutional. The case reached the African Court after the Court of Appeal reversed the decision of the High Court and declined to review the substantive validity

[95] The nine states are Benin, Burkina Faso, Côte d'Ivoire, The Gambia, Ghana, Mali, Malawi, Tanzania, and Tunisia. Rwanda withdrew its article 34(6) declaration following the submission of a case involving a suspect convicted of genocide by domestic courts.

[96] Christopher R. Mtikila and Others v. Republic of Tanzania, Application Nos. 009/2011 and 011/2011, Judgment of June 14, 2013, *available at* http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Application%20009-011-2011%20Rev%20Christopher%20Mtikila%20v.%20Tanzania-1.pdf.

[97] Pending and finalized cases and requests for advisory opinions are accessible at http://www.african-court.org/en/index.php/cases#latest-decisions.

[98] Unlike in the European system, the appropriate orders need not be limited to "just satisfaction to the *injured party*" (emphasis added)—European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 41. The Inter-American Convention on Human Rights similarly empowers the Inter-American Court of Human Rights to ensure the rights of "injured party"—art. 63.

[99] Christopher Mtikila, *supra* note 96.

[100] For details on the case, *see* Adem K. Abebe, *The Right to Stand for Elections as an Independent Candidate in the African Human Rights System: The Death of the Margin of Appreciation Doctrine?*, AfricLaw, August 19, 2013, *available at* https://africlaw.com/2013/08/19/right-to-stand-for-elections-as-an-independent-candidate-in-the-african-human-rights-system-the-death-of-the-margin-of-appreciation-doctrine-2/; Oliver Windridge, *A Watershed Moment for African Human Rights:* Mtikila & Others v. Tanzania at the African Court on Human and Peoples' Rights, 15 Afr. Hum. Rts. L.J. 299 (2015).

of the constitutional amendment, which it held had the same status as other constitutional provisions—rejecting any implied hierarchy within the constitution. The Court of Appeal specifically considered the basic structure doctrine developed by the Indian Supreme Court but found it inapplicable in Tanzania, finding that the Constitution clearly allows amendments to any provision.[101] Quite interestingly, despite the existence of bans on independent candidates in a number of African countries, no member state to the Court Protocol intervened in the proceedings.

The African Court ruled that the ban on independent candidacy violated the *individual* right to equal protection of the law and the prohibition against discrimination, the right to association, which specifically includes the right *not* to associate, and the right to political participation guaranteed in the African Charter. The Court also held that Tanzania did not satisfactorily argue that the ban on independent candidacy served a legitimate interest. In any case, the Court found that the absolute ban on independent candidacy was disproportional to any stated aim of fostering national unity and solidarity. The Court ordered Tanzania to review relevant provisions of the Constitution. While the decision is yet to be implemented, draft constitutional provisions developed as part of the constitutional reform process could allow independent candidacy, although the reform process has largely stalled following the postponement of the constitutional referendum initially planned for April 30, 2015. The case represents the first time a supranational tribunal prohibited bans on independent candidates. In fact, it directly contradicted the conclusions of an earlier decision of the Inter-American Court of Human Rights that a Mexican ban on independent *presidential* candidates did not violate relevant guarantees in the American Convention on Human Rights.[102]

While the African Court only had one occasion to review the compatibility of a constitutional provision with relevant continental standards, it has reviewed the validity of laws on other occasions. The Court found the composition of the Electoral Commission of Cote d'Ivoire incompatible with the African Charter on Democracy Elections and Governance (Charter on Democracy), the Economic Community of West African States (ECOWAS) Protocol on Democracy and Good Governance, and the African Charter, which require the establishment of an independent and impartial electoral management body.[103] Under the law regulating the composition of the electoral management body, an issue increasingly regulated constitutionally, most members were appointed by and representatives of personalities and political parties contesting the elections. The African Court ruled that the Charter on Democracy constituted a human rights instrument, therefore falling within its material jurisdiction.

[101] For discussion on the basic structure doctrine, *see* S. Krishnaswamy, Democracy and Constitutionalism in India: A Study of the Basic Structure Doctrine (2011).

[102] Case of Castañeda Gutman v. Mexico, Inter-American Court on Human Rights, Judgment of Aug. 6, 2008. For a distinction in the legal basis and details between the cases, see Abebe, *supra* note 100.

[103] Actions Pour la Protection des Droits de L'Homme (APDH) v. The Republic of Cote d'Ivoire, App. No. 001/2014, Judgment of Nov. 18, 2016, *available at* http://www.african-court.org/en/images/Cases/Judgment/JUDGMENT_APPLICATION%20001%202014%20_%20APDH%20V.%20THE%20REPUBLIC%20OF%20COTE%20DIVOIRE.pdf.

On the substance of the case, it held that the inclusion of direct political appointees does not ensure sufficient guarantee for the independence and impartiality of the members. Crucially, the Court ruled that the number of representatives of the ruling government and the incumbent president far outnumbered that of the opposition groups and their candidates. Considering that the electoral management body makes decisions through a simple majority, the Court found that the imbalance undermined the independence and impartiality of the body. The overrepresentation of the incumbent president compared to other candidates further undermined the right to equality before the law. Accordingly, the African Court ordered the state to revise the law regulating the composition of the electoral body.

The African Court has also found that the imprisonment of a journalist on charges of defamation was incompatible with the African Charter.[104] Crucially, the Court found the criminal law imposing imprisonment for defamation incompatible with the African Charter and ordered Burkina Faso to review the relevant laws. The Court did not stop at finding that the rights of the applicant were violated and must therefore be redressed. As the violation had a direct legal basis, it went beyond the individual applicant and decided on the compatibility of the relevant law with the African Charter and other relevant international human rights instruments.

It is important to note that, in addition to the broad mandate of the African Court to issue "appropriate orders" to remedy the causes of violations of rights beyond the immediate interests of the injured party, the material jurisdiction of the Court is significantly wider than other regional and international judicial and quasi-judicial organs. While both the Inter-American Court of Human Rights and the European Court of Human Rights have jurisdiction to apply and interpret the Inter-American Convention[105] and the European Convention on Human Rights and related protocols,[106] respectively, the jurisdiction of the African Court includes the interpretation and application of the African Charter and "any other relevant instrument" ratified by the state concerned.[107] These relevant instruments include the African Charter on Democracy, and similar instruments at the sub-regional level, such as the ECOWAS Protocol on Democracy and Good Governance. Indeed, the decision in relation to the independence of the electoral commission of Cote d'Ivoire was mainly based on the provisions of the two instruments. While decisions of the African Court based on the Charter on Democracy will only apply to countries that have ratified the Charter,[108] the Court may also rely on it as an interpretative guide and as an elaboration of relevant

[104] Lohe Issa Konata v. Burkina Faso, App. No. 004/2013, Judgment of Dec. 5, 2014, *available at* http://www.african-court.org/en/images/Cases/Judgment/Judgment%20Appl.004-2013%20Lohe%20Issa%20Konate%20v%20Burkina%20Faso%20-English.pdf.

[105] Statute of The Inter-American Court of Human Rights, adopted by the General Assembly of the OAS at its Ninth Regular Session, held in La Paz Bolivia, October 1979 (Resolution No. 448), entry into Force, January 1, 1980, art. 2, https://www.oas.org/xxxivga/english/reference_docs/Estatuto_CorteIDH.pdf.

[106] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, entry into force, September 3, 1953, art. 32, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

[107] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court, adopted June 10, 1998, entry into force January 25, 2004, art. 3, https://au.int/en/treaties/protocol-african-charter-human-and-peoples-rights-establishment-african-court-human-and.

[108] As of January 2018, 30 of the 55 African countries have ratified the Charter on Democracy. https://au.int/en/treaties/african-charter-democracy-elections-and-governance.

provisions of the AU Constitutive Act, even in relation to countries that have not ratified the Charter.

Crucially, the scope of the substantive mandate of the African Court resembles an actual constitution. In addition to the human rights provisions contained in the African Charter, which largely correspond with human rights provisions in domestic constitutions, the African Charter on Democracy contains provisions and principles common in domestic constitutions. For instance, the Charter on Democracy affirms the principle of separation of powers (article 3(5)) and requires the establishment of an independent election management body (article 17(1)) and independent and autonomous public institutions that promote and support democracy and the constitutional order (article 15). More specifically, it requires member states to ensure that the process of constitutional amendment or revision "reposes on national consensus, obtained if need be, through referendum" (article 10(2)), and prohibits any amendment or revision of the constitution or legal instruments that constitute an "infringement on the principles of democratic change of government" (article 23(5)). Accordingly, the African Court has the authority to enforce these and other guarantees including against constitutional provisions, whether existing or amendments.

The broad mandate of the African Court to review constitutional provisions, as well as other laws, and its extensive substantive arsenal lay the background for the Court to serve as an effective constitutional court for Africa. Indeed, in two of the cases discussed above, the Court found laws incompatible with the African Charter and other relevant instruments. Its assertion of the power to assess the validity of constitutional provisions based on substantive grounds much wider than is possible at the domestic level, as seen in the case against Tanzania, provides it with a status as a powerful (super) constitutional court.[109] Because of its supranational character, the African Court is independent of specific countries, particularly in relation to its composition, which can be useful in impartially assessing the propriety of constitutional amendments, without fear of, for instance, court packing or other forms of direct attacks. To this extent, the Court may serve as an additional and effective safeguard in the menu of tools available for domestic actors to challenge regressive constitutional amendments.

In addition, the Court may complement the growing practice of the AU to suspend member states that have experienced unconstitutional changes of government. While the AU has largely shown zero tolerance to traditional coup d'états, it has been inconsistent in its response to "soft coups" combining popular opposition and military involvement (e.g. Egypt 2013, Zimbabwe 2017) and largely reluctant to respond to unconstitutional retention (and exercise) of government power through constitutional reforms.[110] The AU does not have an independent mechanism to authoritatively

[109] A defining feature of (centralized) constitutional courts is their power to review the validity of legislation with *erga omnes* effect, beyond the specific facts and parties of the case. To the extent that a supranational court exercises comparable functions, it can be characterized as a constitutional court covering several countries. The prefix "super" is added to signify the power to review constitutional amendments on grounds much wider than is the case at any domestic level.

[110] Philip Roessler & Layla Abi-Falah, *Blurry Lines: The African Union's Imbalanced Regime of Constitutionalism and Its Consequences* (Oct. 2017), *available at* https://ssrn.com/abstract=3056703.

determine when the standards in the African Democracy Charter, and other relevant instruments, prohibiting the unconstitutional retention of government power, have been contravened. Accordingly, the AU may seek the advisory opinion of the African Court to determine whether significant constitutional changes have been adopted in compliance with principles of democratic change of government, as required in the Democracy Charter, even when the established process of constitutional amendment has been ostensibly followed. The AU may also submit cases to the Court in relation to countries that have ratified the Court Protocol. The AU resort to the Court may be crucial in view of the fact that only nine countries have made declarations allowing the African Court to receive applications from individuals and NGOs, which limits the extent to which non-state actors in a large majority of African countries may resort to the Court to challenge regressive constitutional amendments.

The expansive potential of the African Court is not without challenges. Individual states may withdraw from the Court Protocol. Indeed, Rwanda withdrew the declaration empowering the Court to receive applications from individuals and NGOs, without withdrawing from the Protocol, after the Court received an application on behalf of a person convicted of genocide, long before the Court had the chance to pass any decision on the merits.[111] In November 2017, the Ghanaian Supreme Court refused to stay the execution of a judgment, despite an interim measure of the African Court ordering the stay.[112] More critically, the Southern African Development Community (SADC) Tribunal was suspended following a decision limiting the land policy of the Zimbabwean government.[113] Similar possibilities of backlash and experiences may in the future prod the African Court to be more prudent in sensitive cases, especially against countries that have the political sway to influence decisions regarding the Court, such as its budget.

The ability of the Court to survive such challenges and to serve as an effective constitutional court, including in controlling constitutional provisions, requires the support of the AU and its organs. As the share of the increasing stream of democratically elected heads of state and government controlling the reins of power and therefore the corridors of the AU advances, support for the Court is likely to increase. In addition, if and when the planned merger of the African Court with the African Court of Justice materializes,[114] the stature and relevance of the joined Court will likely be enhanced. Beyond the institutional support, the African Court must work toward establishing a strong constituency among domestic judicial actors, national human rights entities, academic institutions, and the people across Africa. In this regard, the Court's Annual Judicial Dialogue bringing together representatives of the highest courts provides a useful platform. The Court should also enhance its efforts to reach out to and engage civil society actors, the media, and African citizens to strengthen its presence in African popular consciousness.

[111] *Rwanda Withdraws from African Court Declaration*, The New Times, Mar. 5, 2016, *available at* http://www.newtimes.co.rw/section/read/197697/.

[112] *Decision of the African Court Is Final—Chief Justice*, Modern Ghana, Dec. 12, 2017, https://www.modernghana.com/news/822182/decision-of-the-african-court-is-final-chief-justice.html.

[113] Nicole Fritz, *Quiet Death of an Important SADC Institution*, Mail & Guardian, Aug. 24, 2014, available at https://mg.co.za/article/2014-08-29-quiet-death-of-an-important-sadc-institution.

[114] Protocol on the Statute of the African Court of Justice and Human Rights (2008).

The practice of reviewing constitutional and legal provisions for their compatibility with relevant regional and international standards constitutes a wide continental practice and is not limited to the African Court. While this article focuses on the African Court, as the principal continental judicial organ, the African Commission, and the African Committee on the Rights and Welfare of the Child have had instances where they reviewed the compatibility of constitutional provisions with relevant African human rights instruments. The decisions were not limited to the specific cases of the applicants but broadly involved the compatibility of the applicable law with the relevant human rights standards. The African Commission found that the membership of the Cameroonian President as chair of the Higher Judicial Council—composed of the president as chair, the minister for justice, as vice chair, three members of parliament, three members of the bench, and an independent personality—violated guarantees of judicial independence in article 26 of the African Charter.[115] The Commission recommended the reform of the Higher Judicial Council, by ensuring that it is composed of personalities other than the president, the minister for justice, and other members of the executive branch. In a case involving the definition of the age of a child, the Committee on the Rights and Welfare of the Child accepted the withdrawal of the case following assurances from Malawi, in anticipation an adverse finding, that it will amend the constitution, which was subsequently done.[116] In 2015, the ECOWAS Court of Justice found that a new electoral law of Burkina Faso banning the participation of politicians suspected of supporting a popularly ousted president violated the right to political participation.[117]

While the European Court has been described as a constitutional court, it "does not possess the competence to invalidate legal norms that are found to be incompatible with fundamental rights,"[118] instead deciding on the validity of their application in

[115] Kevin Mgwanga Gunme et al. v. Cameroon, Communication 266/03 (May 2009). The Commission arrived at similar conclusions in a recent case against the DRC where it found that the African Charter guarantees the separation of powers. Jose Alidor Kabambi and Others v. DRC, Communication 408/11 (Nov. 15, 2016), paras. 81–90.

[116] Luke Bisani, *Malawi MPs Change Law to End Child Marriage*, Malawi 24, Feb. 15, 2017, *available at* https://malawi24.com/2017/02/15/malawi-mps-change-law-end-child-marriage/.

[117] Adem K. Abebe, *Striking a Difficult Balance: Transitional Justice, Lustration Laws, and Human Rights*, I·CONnect, Dec. 4, 2015, http://www.iconnectblog.com/2015/12/striking-a-difficult-balance-transitional-justice-lustration-laws-and-human-rights/.

[118] Alec Stone Sweet, *On the Constitutionalisation of the Convention: The European Court of Human Rights as a Constitutional Court* (2009), Faculty Scholarship Series. 71, https://digitalcommons.law.yale.edu/fss_papers/71. The European Court has had occasions to rule on the compatibility of constitutional provisions with the European Convention. Nevertheless, it merely focused on the validity of the application of the constitutional provision to the specific applicant/s, rather than the validity of the constitutional provision itself. Case of Pilav v. Bosnia and Herzegovina, App. No. 41939/07, Eur. Ct. H.R. (Fifth Section), Judgment (Merits and Just Satisfaction) of June 9, 2016; Sejdićand Finci v. Bosnia and Herzegovina, App. No. 27996/06, Eur. Ct. H.R., Judgment of Dec. 22, 2009. The European Court has developed "pilot judgments" through which it seeks to address structural deficiencies leading to repetitive cases, such as when a violation has its base in a law. The process allows the Court to induce states to reform the structural deficiencies, including through the reform of laws. Nevertheless, the process does not entail the Court invalidating a legal provision. Dominik Haider, The Pilot-Judgment Procedure of the European Court of Human Rights (2013). *See also* Lech Garlicki & Zofia A. Garlicka, *External Review of Constitutional Amendments: International Law as a Norm of Reference*, 44 Israel L. Rev. 343 (2011) arguing that the review of constitutional amendments at the European level could complement domestic judicial efforts to counter amendments undermining fundamental constitutional structures.

the specific instance of the injured party. In contrast, the African Court can and has reviewed not only laws but also constitutional provisions, which exceeds even the typical functions of domestic constitutional courts. Some scholars have also described the Inter-American Court as a constitutional court mainly on the ground that it requires a "conventionality control" where national actors are expected to consider the American Convention as well as the jurisprudence of the Court.[119] Indeed, the Court has found a Chilean constitutional provision incompatible with the Convention.[120] It has similarly ordered the revision of laws in other cases, including particularly amnesty laws in several countries.[121] These decisions resemble the decisions of the African Court. Nevertheless, the African Court has a much wider substantive basis to review the compatibility of laws as well as constitutional provisions/amendments including not only traditional fundamental rights but also several institutional aspects such as the separation of powers.

5. Implications to the empowerment of domestic constitutional adjudicators

The power of the African Court to review the substance of constitutional amendments could have significant implications for the power of domestic courts. If a regional court has the power to review constitutions and constitutional amendments, it makes sense to also empower domestic courts to review amendments with a view to avoid referrals to the regional court. For instance, in the case against Tanzania, the African Court was seized of the matter after the Tanzanian Court of Appeal declined to review the validity of the constitutional amendment owing to the lack of jurisdiction. Nevertheless, the Court of Appeal advised the government to reconsider the ban on independent candidacy, in view of the international responsibilities of the state. Had the Court of Appeal had the power, it would likely have invalidated the ban, considering its suggestion, thereby avoiding the reference to the African Court. While the consequences of supranational judicial review on the empowerment of domestic courts to review the constitutionality of ordinary laws has attracted some scholarly attention,[122] its broader impact on the substantive review of constitutional provisions and amendments has not been sufficiently addressed, particularly in the African context.

[119] Ariel E. Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 Tex. Int'l L.J. 45 (2015).

[120] Olmedo-Bustos et al. v. Chile (Case of "The Last Temptation of Christ"), Judgment of February 5, 2001 (Merits, Reparations and Costs), para. 103(4). Chile subsequently amended the constitution in line with the decision.

[121] For a discussion of the constitutional and legislative reforms that followed decisions of the Inter-American Court, *see* Jo M. Pasaqualucci, The Practice and Procedure of the Inter-American Court of Human Rights 321–324 (2013).

[122] *E.g.*, Ran Hirschl, *The Nordic Counternarrative: Democracy, Human Development, and Judicial Review*, 9(2) Int'l J. Const. L. 449 (2011); Pasquale Pasquino, The New Constitutional Adjudication in France: The Reform of the Referral to the French Constitutional Council in Light of the Italian Model, *available at* https://www.pravo.unizg.hr/_download/repository/Pasquino_New-Constitutional-adjudication-France.pdf.

As briefly noted above, a number of constitutional courts in Africa have been empowered to review constitutional amendments. Some courts have also found constitutional changes unconstitutional. Despite these examples, courts in a number of African countries do not have the power to review the substantive validity of constitutional amendments. In fact, in some countries, even the constitutional review of statutes is only allowed prior to their enactment. In others, the power of constitutional review is effectively absent,[123] or belongs to a political entity rather than an independent judicial arbiter.[124] And even when they do, the power of review is limited to the compatibility of proposed amendments with any unamendable provisions, as is the case in most Francophone African countries. Compared to the extensive mandate of the African Court to review the substantive validity of constitutional amendments based on a broad range of fundamental human rights standards and institutional requirements, principles of judicial independence and separation of powers, the powers of even the most empowered domestic constitutional courts are insignificant. Accordingly, to avoid the referral of cases to the African Court, and the international scrutiny that comes along with it, African constitution-makers may consider expressly empowering and/or expanding the mandate of their highest courts to review the substantive validity of constitutional amendments.

While domestic courts could possibly claim an implied power to review constitutional amendments, considering that constitutional amendment is a principal channel to tackle countermajoritarian challenges posed by judicial review of ordinary legislation,[125] the judicial arrogation of such an awesome power is likely to be rejected. Crucially, in practice, courts are unlikely to invoke such power, especially in countries without unamendable constitutional provisions. Indeed, the Tanzanian Court of Appeal rejected the existence of an implied right to review the substance of constitutional amendments. Even if courts were to claim the right, it is likely to be narrowly tailored, to avoid charges of judicial supremacy. The invocation of an implicit judicial power to review constitutional amendments lacks basic notions of clarity and allows judges themselves to define the nature and scope of and limits to their power, which is incompatible with principles of the rule of law. Considering the political stakes involved in constitutional amendment processes, allowing courts to be judges of their own power stands on a trembling stool. Moreover, the idea of implicit limits, while it may be justifiable in certain circumstances, exposes judges to unnecessary pressure and criticism of usurpation of power.

In recognition of the possibility of judicial review of constitutional provisions and amendments at the African level, the express authorization of domestic courts to review constitutional amendments has several advantages. First, it puts judicial

[123] For instance, Cameroon, *see* Charles Fombad, *The Cameroonian Constitutional Council: Faithful Servant of an Unaccountable System*, *in* Constitutional Adjudication in Africa 80 (Charles M. Fombad ed., 2017).

[124] Adem K. Abebe, *Unique but Ineffective: Assessing the Constitutional Adjudication System in Ethiopia*, *in* Constitutional Adjudication in Africa 181 (Charles M. Fombad ed., 2017).

[125] Rosalind Dixon, *Constitutional Amendment Rules: A Comparative Perspective*, *in* Comparative Constitutional Law 96, 98 (Tom Ginsburg & Rosalind Dixon eds., 2011).

review of constitutional amendments on a firm legal footing. Second, express regulation allows constitutional designers to properly define the scope of the power, including exclusions if necessary. In cases where courts claim implicit powers to review constitutional provisions or amendments, they rely on decision and quorum rules that are similar to the rules applicable in ordinary judicial decision-making procedures, despite the heightened level of consensus and deliberation involved in constitution reform processes.

The specific inclusion of the power of judicial review of constitutional amendments allows the possible establishment of special procedures cognizant of the high level of political consensus underwriting constitutional law. Constitutions may exclude the judicial review of amendments approved through double supermajorities: by a legislative supermajority and a supermajority in a referendum. Considering the stakes involved in reviewing constitutional amendments, constitutional drafters may also wish to include stringent procedural requirements, such as higher quorum (e.g. requiring the presence of all judges) and decision (e.g. support of two-third of all judges) rules.[126] While uncommon in relation to the review of ordinary legislation, judicial supermajority requirements may be acceptable for the review of constitutional amendments. Indeed, such requirements exist in some national jurisdictions in relation to certain constitutional decisions (e.g. in Germany in relation to the ban of political parties), and also in a few state constitutions in the United States.[127] In countries with diffused constitutional adjudication systems, where all courts may review statutes for compatibility with the constitution, constitution drafters may expressly establish the exclusive authority of the highest constitutional court to decide on the validity of constitutional amendments, as is the case in South Africa.

The invocation of implied judicial powers to review constitutional amendments could potentially create a possibility where a constitutional court only needs a simple majority to invalidate a constitutional amendment, which often requires extraordinary levels of political consensus, while decisions that arguably require less political consensus necessitate higher levels of judicial consensus. For instance, in Germany, the forfeiture of fundamental rights, the unconstitutionality of political parties, the impeachment of the president, and dismissal of judges require the support of a two-thirds majority of the judges in the Constitutional Court.[128] Since the issue of review of constitutional amendments has not been specifically addressed, if the Court claims an implied power to review constitutional amendments, the normal decision rules of the Court (simple majority) will apply. The express regulation of the conditions and procedures for the judicial review of constitutional amendments precludes such potentially incongruous possibilities.

[126] For similar proposals in the review of primary statutes, *see* Martin Wishnatsky, *Taming the Supreme Court*, 6 Liberty U. L. Rev. 597, 673 (2012), observing that "[j]udicial repeal of legislation is surely as solemn and significant an event as an impeachment trial, expulsion of a legislator, override of a Presidential veto, or ratification of a constitutional amendment"; Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 Ga. L. Rev. 893, 994 (2003).

[127] Sandra B. Zellmer & Kathleen Miller, *The Fallacy of Judicial Supermajority Clauses in State Constitutions*, 47 U. Toledo L. Rev. 73 (2015).

[128] Act on the Federal Constitutional Court, sec. 15(4).

The express recognition of the judicial power to review amendments is therefore normatively and practically superior to an invocation of enforceable implied limits on constitutional amendments. Such express recognition will obviously empower courts, but it will at the same time limit the power. Moreover, while the idea of specific judicial empowerment may raise strong normative resistance as the ultimate form of the countermajoritarian dilemma,[129] the emerging recognition of the powers of supranational tribunals to review laws and decisions, including constitutional decisions, should provide sufficient impetus for the empowerment of domestic courts to review the substance of constitutional amendments.

6. Conclusion

The possibility of constitutional amendment is necessary and desirable in any constitutional system. As Edmund Burke aptly observed, "[a] state without the means of some change is without the means of its own conservation."[130] Indeed, constitutional amendment provisions are the most common features of written constitutions and underscore the constant need and desire for adaptation. At times, however, constitutional amendment procedures have been used to advance self-serving and capricious proposals. In the African context, the amendment procedure has largely been employed to serve personal interests and ambitions or to dismantle the post-1990 semblance of constitutional constraints and checks and balances.[131] This article has discussed a number of procedural mechanisms that could, if employed strategically, scuttle regressive amendments. The express applicability of the amendment procedure to all instances of change, including the adoption of "new" constitutions, may preclude possibilities where incumbents may bypass the constraints on the pretext of adopting a new constitution, as was the case regarding presidential term limits in the Congo in 2015.

The irregularity in the practice of including enforceable substantive limits on the power of constitutional amendment reflects the schism in the theoretical debate on the existence or propriety of fundamental principles that lie beyond politics, including constitutional politics. In the African context, the existence of enforceable unamendable provisions has on occasion allowed the rejection of regressive amendments. While the failure of some of the regressive reform initiatives may not be exclusively attributed to the enforceable limits on the amendment power, the existence of the formal process of review certainly contributed to their defeat.

The article also brings into focus the largely unexplored role of supranational judicial organs in limiting the making and amendment of constitutions. In particular, the African Court has the necessary substantive basis and jurisdictional mandate to review

[129] Alexander Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–17 (1986).

[130] Edmund Burke, *Reflections on the Revolution in France*, *available at* http://www.constitution.org/eb/rev_fran.htm.

[131] Fombad, *Constitution Building in Africa*, *supra* note 7.

and invalidate constitutional provisions. Indeed, it has done so in an actual case. The resistance to the inclusion of judicially enforceable limits on constitutional amendments at the domestic level does not make much sense in the presence of comparable powers at the regional level, which arguably enjoys less democratic legitimacy than domestic limits on the amendment power. Accordingly, domestic constitutional drafters may consider specifically empowering their highest courts to review the substantive validity of draft constitutions and constitutional amendments. In combination with other constitutional and popular mechanisms of control, such an empowerment will establish additional veto points to slow down and potentially stymie self-serving efforts undermining fundamental constitutional principles.

There is no illusion that such empowerment would necessarily lead to better levels of constitutionalism and democracy. Despite intuitive assumptions, both among academics and policymakers, the role of courts to "build" democracy in fledgling democracies and post-authoritarian contexts remains unclear.[132] Some have argued that the establishment of strong-form judicial review, where courts have final authority to invalidate legislation, could put judicial independence in new democracies under stress by triggering political backlash.[133] The invalidation of sensitive constitutional amendments may overrun the "tolerance interval"[134] of decisive political actors and attract even stronger backlash, including to the African Court itself, as was the case in relation to the SADC Tribunal. Moreover, even where courts have been granted the formal power to interpret the constitution, there is no guarantee that they will exercise it in a way that limits executive recalcitrance. Indeed, the highest courts in Burkina Faso (2005), Senegal (2012), Burundi (2015), and DRC (2016) have interpreted relevant constitutional provisions allowing incumbents effectively to extend their presidential terms.

The procedural mechanisms to delay and scuttle self-serving amendments should therefore be given priority. Nevertheless, the role of courts as a last resort should also be recognized. Despite continuous challenges facing courts around Africa, the examples from Benin and Mali in relation to constitutional amendments, the recent invalidation of a presidential election by the Kenyan Supreme Court,[135] and experiences of the South African Constitutional Court and the Ghanaian Supreme Court, among others, demonstrate that formal empowerment may in fact translate into actual impact, even in high-stakes instances.[136] While the African Court will continue

[132] Tom Gerald Daly, *The Alchemists: Courts as Democracy-Builders in Contemporary Thought*, 6 Global Constitutionalism 101 (2017).

[133] Stephen Gardbaum, *Are Strong Constitutional Courts Always a Good Thing for New Democracies?,* 53 Colum. J. Transnat'l L. 285 (2015).

[134] Lee Epstein, Olga Shvetsova, & Jack Knight, *The Role of Constitutional Courts in the Establishment of Democratic Systems of Government*, 35 Law & Soc'y Rev. 117 (2001).

[135] Ken Opalo, *Kenya's Supreme Court Just Declared the Aug. 8 Elections Invalid. Here's What This Means*, The Washington Post, Sept. 5, 2017, *available at* https://www.washingtonpost.com/news/monkey-cage/wp/2017/09/05/kenyas-supreme-court-just-declared-the-aug-8-elections-invalid-heres-what-this-means/?utm_term=.90026cc77dad.

[136] H. Kwasi Prempeh, *Africa's "Constitutionalism revival": False Start or New Dawn?,* 5(3) Int'l J. Const. L. 492 (2007), observing that Africa's "emboldened" judiciaries "are beginning to make constitutions and constitutional law matter."

to be relevant in checking domestic constitutional processes, the empowerment of domestic courts allows them to assess reforms with high regard to their peculiar history and context, an insight the continental court may be ill-equipped to provide. Such domestic empowerment is not only likely to reduce resort to the African Court, considering the relevance, though minimal, of the margin of appreciation doctrine in the African human rights system,[137] the African Court will also benefit from and accord due respect to the analysis of domestic courts. The formal possibility of judicial review may also discourage political actors from pushing forward blatant amendment proposals undermining fundamental constitutional and democratic principles.[138]

The express judicial empowerment and regulation of the review of constitutional amendments allows constitutional drafters to define the scope of the power, to identify the enforceable substantive limits, and to establish procedural and decision rules cognizant of the higher level of political consensus driving the amendments. Counterintuitively, therefore, the recognition of judicial review of constitutional amendments can limit judicial venture into constitutional politics.

Overall, a conception of the constituent power as unlimited has led to a situation where the domestic judicial review of the substantive validity of constitutional amendments is largely the exception. The changing national and international legal spheres necessitate a pragmatic solution to the express empowerment of domestic constitutional adjudicators to review constitutions and their amendments, including based on continental and sub-regional substantive standards. As the second half of the twentieth century saw the expansion of the power of courts to review the constitutionality of ordinary legislation, if the thesis of this article is accepted, the power of domestic African courts to review constitutional provisions, including amendments, may go mainstream in the twenty-first century.

[137] Abebe, *supra* note 100.

[138] Georg Vanberg, *Abstract Judicial Review, Legislative Bargaining, and Policy Compromise*, 10 J. Theoretical Pol. 299 (1998), noting that political actors anticipate and consider the potential judicial positions in the legislative process to avoid challenges to the constitutionality of their measures.