

CONSTITUTIONAL LAW AND COLONIAL HERITAGE: AMENDMENT METHODS IN FORMER BRITISH COLONIES

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ABSTRACT

Although the British Empire does not exist anymore, several studies indicate that Westminster-style government is well and alive, as earlier members of the Empire still apply in their political life relevant devices and techniques. Dealing with constitutional amendment methods in former British colonies, this study adds a further test of a remnant Westminster Rule. In all, fifty-two territories are investigated that have since World War II emerged as independent countries from British rule. The main finding is that the colonies have not imitated the even utterly flexible method of constitutional amendment that has been and is in use in the metropolitan power, and while some former colonies have remained fairly close to the standard, others have not. This is most probably due to the fact that the political conditions in the colonies have not promoted an unconditional adherence to the principle of parliamentary sovereignty which is at the heart of flexible amendment.

INTRODUCTION

During the eighteenth and the nineteenth century Britain became a majestic nation, a dominating imperialistic power who for economic, military, and prestige reasons conquered vast territories and resources. Today, as is well known, only fragments remain of the Empire, like Bermuda, the British Virgin Islands, the Falkland Islands and Gibraltar. However, as the Westminster system that Britain had represented and represents has taken root in the former British territories, observers maintain that the British rule, in a manner of speaking, is still well and alive. A much quoted saying in the literature is "The sun had set on the British Empire but not on Westminster-style

government”; the author in question also states about the Westminster Model that no other political system “has been copied so extensively in such a wide variety of societies and continents” (Wilson 1994, 189).

Indicating that former British colonies indeed behave as a group differently from other states, several studies appear to verify the existence of a lingering Westminster impact. For instance, the colonial heritage is evident when it comes to the reluctance of former British colonies to engage in direct democracy measures, which are alien to the Westminster principle of parliamentary sovereignty (Anckar 2011); in like manner, former British colonies have as independent states to a large extent introduced the British parliamentary model (Anckar 2004 b, 215). Also, as evident from available electoral system mappings, former colonies have largely adopted the single plurality system of the Westminster model (e.g. Lundell 2005). Analyzing constitutional amendment methods in former British colonies, this essay adds a further test of a remnant Westminster Rule. The Westminster Model prescribes amendment by regular parliamentary majority: “exactly the same legislative procedure is followed whether the bill to be passed concerns, say, the placing of restrictions upon the methods of the trainers of performing animals or a radical alteration in the powers of the House of Lords” (Strong 1958, 65). The research task to be addressed here, then, is to investigate to what extent and by what variations states which are freed and independent from British rule, have in fact adopted the metropolitan mode of constitutional amendment. In all, fifty-four territories have since the end of World War II emerged as independent countries from British rule; however, two of these territories are left out from this investigation. South Yemen, freed in 1967 from British control, does not exist any longer as an independent state, and Somalia has not since 1991 a recognized central government. The remaining 52 cases are listed in Table 2 of this presentation.

It needs to be emphasized that amendment by regular parliamentary majority is in full agreement with the doctrine of parliamentary sovereignty, usually conceived of as one defining feature of Westminster Rule, and in fact one center-piece of the Westminster

Model. As described in one old but still valid presentation, the doctrine implies that parliament has "sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws", and that parliament "can, in short, do everything that is not naturally impossible" (Blackstone 1765). Another well-known formulation is that the parliament "has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament" (Dicey 1915, 37-38); indeed, juxtaposing majoritarian and consensual democracy doctrines, Arend Lijphart contends that "parliament sovereignty is a vital ingredient of the majoritarianism of the Westminster model, because it means that there are no formal restrictions on the power of the majority of the House of Commons" (1984, 9). The implication of this is that the test to be undertaken here is not only about an individual device, but also, and even more so, about a metropolitan dogma, from which the device stands derived. The test examines the durability in time and space not only of a technique, but also of a foundation.

The article is divided into four sections. Following this introduction, a second section introduces a typology of amendment methods, which makes up the analytical tool of the investigation. A third section presents and comments on the empirical findings; finally, a concluding fourth section summarizes and reflects in more general terms on the empirical patterns.

A FRAMEWORK FOR ANALYSIS

"Democracies use a bewildering array of devices to give their constitutions different degrees of rigidity", Lijphart writes in his well-known study of "Patterns of Democracy" (1999, 218). Indeed, devices abound, and the literature knows many attempts to sort the devices out by means of typologies and classifications, some of which are quite elaborated (e.g. Suksi 1993; Lorenz 2005). Still, as also pointed out by Lijphart, the many forms can for most analytical purposes be reduced to three basic types: changes in constitutions may have to be approved by special majorities, by a popular referendum, or

merely by a regular parliamentary majority (1984, 189; 1999, 219). For the purposes of this study, a similar and straightforward approach will suffice, the aim of which is to determine the extent to which the devices that are used by the former colonies are at distance from the flexible Westminster-standard of amending the constitution by means of ordinary legislation. The classification that is developed here departs, then, from the usual distinction between rigid and flexible constitutions, and the ground of difference is whether the process of constitutional law-making is or is not identical with the process of ordinary law-making. Introducing distance points as a tool for establishing degrees of identity, a classificatory scheme is presented in Table 1, which arranges distance points on a scale that runs from 0 to 3, the first value denoting a conformity with the Westminster Model and the second denoting an evident deviation from the model. The intermediate values 1 and 2 describe deviations of a less striking magnitude.

The distance points are decided on the basis of the extent to which the methods violate two essential parliamentary sovereignty requirements. First, majorities within legislatures may be authorized to amend the constitution only if and when the majorities are special; in the case of bicameral parliaments, the quantitative requirement is typically for supermajorities in both chambers. This technique introduces rigidity and thereby encroaches on the rights of the parliamentary majority. Second, if modifications cannot be approved by the legislature alone, but require confirmation in referendum or by other ratifying procedures, like, typically, by a majority of states in federal systems, then, obviously, the constitution stands supreme over parliament (Hague and Harrop 2004, 211), which is in violation of parliamentary sovereignty. Indeed: “the supremacy of parliament is really weakened by a device ... the referendum and initiative” (Soltau 1951, 193-194). If qualified majority prescriptions apply to the ratifying procedures as well, this, of course, adds to the extent of rigidity and to the extent of violation. In terms of distance, then: amendment by parliamentary majority is good, amendment by qualified parliamentary majority is bad, amendment by referendum or ratification is bad, amendment by qualified referendum or ratification majority is bad.

Before entering upon a detailed discussion of the contents of Table 1, a particular difficulty in terms of classification needs to be dealt with. This difficulty follows from the fact that several countries apply parallel but different amendment methods, the amendment threshold being higher for certain items than for certain other items. To give one example: Swaziland introduces in the Constitution (2005) a distinction between amendments of specially entrenched provisions (section 246) and amendments of entrenched provisions (section 247), amendments of the first kind requiring a majority of three quarters of all members of the two assembly houses and a majority of votes cast at a referendum, and amendments of the second kind requiring a majority of two thirds of all members of the two houses. Similar distinctions where a referendum mode of amendment pertains to those constitutional provisions that are designed to protect essential elements of the constitution are fairly common in the materials at hand. Following a suggestion by Lijphart (1999, 221-222), the classification of these cases is guided here by a simple but reasonable principle, stating that the most rigorous requirement counts, except when evident that the requirement is valid for some very specific article or purpose only. For example, in St Vincent and the Grenadines the stipulation is that bills to alter the constitution must be approved on a referendum, when and if they concern the election of representatives, the appointment of Senators, matters of finance and public service, and the like (Constitution, article 38). It is evident from this listing that the referendum device, although in use for a defined set of matters only, is common enough to direct classification. In rare cases and for very specific and fundamental questions only, the possibility of amendment is altogether denied. This is the case, for instance, in Jordan, where the Constitution states (article 126) that “No amendment of the Constitution affecting the rights of the King and the succession to the Throne may be passed during the period of regency”. In Maldives, the rule is (article 267) that “No amendment shall be made to any provision of the Constitution during the existence of a state of emergency”; in Guyana the Constitution states (article 284) that “No amendment to the Constitution may affect the democratic and republican nature of the State”. These and other constitutional bans on amendment are not registered in the present analysis.

Table 1
Amendment Methods, as Classified in Terms of Deviations from Westminster Rule

Popular Involvement:	Parliamentary Involvement:		
	None	Singular Majority	Qualified Majority
None	3	0	1
Singular Majority	3	1	2
Qualified Majority	3	2	3

In all, Table 1 reports four categories. In the first category are constitutions that prescribe amendment by regular parliamentary majorities; these, then, are cases that repeat the Westminster method. In this same category may be placed cases of majority decisions in two legislatures with intervening parliamentary elections: again, the majority remains unrestrained and minorities have no formal veto power. The next category is about cases that are close but not identical to the ideal method; cases in this category are at some but not at decisive distance from the Westminster standard and they therefore score one distance point. In this group are cases that carry out amendments by means of a legislative decision by qualified majority, the legislative quantitative requirement threshold typically being two thirds or three fourths. Other amendment methods are at a longer distance still from the Westminster-standard and score two distance points. In this camp, again, variations may be found. One method requires, first, a legislative decision by qualified majority, and, second, a confirmation of this decision by simple majority in referendum or through other forms of ratification; other methods represent a combination of a legislative majority decision and a ratifying referendum by qualified majority. Also in this group is a rather unusual amendment procedure that is adopted in Ghana. This procedure requires for the amendment of several entrenched provisions a referendum decision by a majority of three quarters of the voters; when the amendment is approved at the referendum, Parliament shall pass it and the President shall assent to it (Constitution, article 290). By prescribing a qualified referendum stage and virtually excluding a true parliamentary participation, this method introduces two important distance-promoting conditions.

Finally, in a group of cases at maximum distance from the Westminster Model are countries that prescribe legislative supermajorities and repeat this requirement for a referendum phase that applies a fortified rigid method. Among former colonies in this category is Kiribati, where amendments require a two-thirds legislative majority, to be confirmed, in so far as amendments are about fundamental rights, in referendum again with a two-thirds majority. In St Kitts and Nevis, to give another example, the requirement is for a two-thirds majority followed by similar majorities in separate referendums in St Kitts as well as Nevis. Also in this group are methods that do not prescribe preference inclusions at all; in such cases, amendments are decided by a decree of the ruler or by similar methods. One example from the materials at hand concerns Brunei, as it is said in the Constitution (article 85) that “His Majesty the Sultan and Yang Di-Pertuan may by proclamation amend or revoke any of the provisions of the Constitution ..., and this Constitution shall not otherwise be amended”. Libya provides another example, the intermittent Constitutional Proclamation stating (article 37) that the proclamation “will be amended by the Revolutionary Command Council only in the case of necessity and in the interest of the Revolution”.

EMPIRICAL FINDINGS

The empirical results of this study are reported in Table 2, which assigns each former colony a position on the distance point scale from 0 to 3. The positions are decided on the basis of a close reading of the constitutions of the countries. As evident from the table, the spreading of colonies on positions is fairly even. However, only two cases, namely Israel and New Zealand, are classified in a category which answers fully or closely to the Westminster ideal. These two countries became independent without having written constitutions, and are still today lacking formal constitutional frameworks. Israel departed on independence in 1948 with a multiparty democratic system, the origin of which in fact predates the founding of the state (e.g. Sager 1985; Reich and Kieval 1999). Upon independence a draft constitution was drawn up and discussed, but it was decided in 1950 that a number of fundamental laws should be passed which could later be combined into a constitution (Kohn 1953, 78-88). Although the Jewish Holy Book stands out in Israel as

an important source of political authority, this combination has not materialized so far. Concerning New Zealand, the framework of the constitutional arrangements consists of the so-called Treaty of Waitangi of 1840 and several Acts of the New Zealand parliament; furthermore, customs and conventions provide the unwritten practices by which the Constitution operates (Angelo and Gordon 2001).

Close to one third of the former colonies, namely 16 out of 52 (=31 percent), are in a category which is still fairly close to the Westminster model (1 distance point). These are colonies which amend their constitutions by means of qualified parliamentary majorities; within this general frame, variations in detail may certainly occur, as evident from some examples. The Constitution of Tanzania (article 98) prescribes for amendment that the bill in question is supported by not less than two-thirds of all the members of Parliament, whereas in United Arab Emirates (Constitution, article 144), the requirement is for two-thirds of the votes of Union National Assembly members present. In Kenya (Constitution, article 47), the corresponding requirement is for not less than sixty-five percent of the total number of members of the Assembly. In bicameral Barbados, amendment requires the affirmative vote of not less than two-thirds of the total membership of each House (Constitution, article 49). Solomon Islands combines two majority thresholds, as the amendment of specially entrenched provisions requires a majority of not less than three-quarters of all the members of Parliament, whereas the threshold for other amendments is not less than two-thirds (Constitution, article 61). Guyana, finally, has adopted another version of this combination strategy: whereas bills for introducing amendments as a rule need to be supported by a majority of the elected members of the Assembly, bills to alter any of a substantial number of provisions must also be submitted to vote and be decided by a majority of electors in referendum. However, the referendum stage may be avoided, as submission to referendum is not necessary when and if the specially entrenched provisions are supported by two-thirds of all the elected members of the Assembly (Constitution, article 164).

Table 2
Amendment Method Deviations from the Westminster Standard: Positions of Former British Colonies

Distance Points:	
0	Israel, New Zealand (N=2)
1	Bahrain, Barbados, Belize, Fiji, Guyana, Jordan, Kenya, Malaysia, Mauritius, Solomon Islands, Sudan, Tanzania, Trinidad and Tobago, Tuvalu, United Arab Emirates, Zimbabwe (N=16)
2	Bahamas, Botswana, Cyprus, Dominica, Grenada, India, Jamaica, Lesotho, Malawi, Maldives, Malta, Myanmar, Nauru, St Lucia, Singapore, Sri Lanka, Swaziland, Uganda, Vanuatu, Zambia (N=20)
3	Antigua-Barbuda, Brunei, Gambia, Ghana, Kiribati, Kuwait, Libya, Nigeria, Oman, Qatar, St Kitts-Nevis, St Vincent, Seychelles, Sierra Leone (N=14)

A total of fourteen colonies are at maximum distance (3 points) from the Westminster ideal, and a total of 20 colonies are at a closer but still considerable distance (2 points) from the ideal. In the first category are, to mention only a couple of cases, Kuwait and the Seychelles. In Kuwait, amendment requires approval by a two-thirds majority vote of the assembly members, and the revision comes into force only after being sanctioned and promulgated by the Amir (Constitution, article 174); in Seychelles, a proposed alteration of entrenched provisions must be approved on a referendum by not less than sixty percent of the votes and passed also by the National Assembly by a two-thirds majority (Constitution, article 91). In the second category, again to mention a couple of cases, are Bahamas and Myanmar. In Bahamas, dependent on degree of entrenchment, amendment requires approval by two thirds or three quarters of all members of both Houses and in addition approval by the majority of electors in referendum (Constitution, article 54); in Myanmar, amendment requires a vote of more than seventy-five percent of the representatives of the Pyidaungsu Hluttaw, followed, for entrenched provisions, by a majority approval in referendum (Constitution, articles 436-436a). In all, then, 34 colonies, amounting to close to two thirds of the population (=65 percent), flock together in these categories, renouncing flexible amendment, and connecting to currents that plead for rigidity instead.

The above pattern, however, does not yet confirm the non-validity of a diffusion model. While the overall finding certainly is that the colonies have displayed a withdrawal from the even utterly flexible Westminster mood of amendment, it may still be the case that the colonies, when compared to other states, have remained more under metropolitan influence, and have, in consequence, maintained a closer distance than other states to the Westminster standard. What is needed, therefore, to settle the issue, is a systematic comparison of the above findings with corresponding findings for a different set of nations, preferably the remaining states of the world. While this may seem an insuperable task in terms of effort, an available data set enables an approximate comparison. This set lists amendment methods applied in the democracies of the world in 1999 (Anckar and Karvonen 2002), democracies being defined as countries recognized as “Free” in the well-known and frequently consulted Freedom House ratings of states and territories in the world (Karatnycky 2000, 187-200). In this listing, out of a total of 193 independent states, 85 are “Free”; of these states, 25 are former British colonies. When these 25 former colonies are excluded from the list to avoid double counting, there remain 60 states, and when the amendment methods of these 60 states are transformed to correspond to the classification logic of this investigation, a compilation emerges which provides a basis for comparison. Confronting, then, the frequency of amendment methods in the former British colonies with the corresponding frequencies in the group of non-British states, the comparison, which is to be found in Table 3, promotes three general remarks:

Table 3
Amendment Methods in Former British Colonies Compared to Other States:
Percentage Distributions on Distance Point Categories

Distance Points:	Former British Colonies (N=52)	Other States (N=60)
0	4	5
1	31	60
2	38	28
3	27	7
Total:	100	100

First, while the flexible Westminster mood of amendment is not well represented among the colonies, the same is true also of other states. In fact, amendment by ordinary parliamentary majority exists only in a small handful of states; among these are the Nordic democracies Iceland and Sweden, where the constitution is amended by means of two successive parliamentary majority decisions between which parliamentary elections must be held. Commentaries on the Swedish Constitution assert that the flexible way of amending the constitution has been important for maintaining a peaceful development of society (Holmberg and Stjernquist 1998, 14); most probably, the frequent need in pre-1970 Sweden to depart from prescriptions in the outdated but then still formally valid 1809 Constitution has contributed much to this appreciation of a flexible formula.

Second, while the 2-distance-point-category is somewhat better represented among the former colonies than among the other states, the situation is reverse in regards to the 1-distance-point-category. Whereas about three colonies out of ten are classified in this category, the same is true of six states out of ten in the control group, which therefore appears in this regard more Westminster than ever the colonies. The distinction between the two first distance categories on the one hand, and the third and fourth categories on the other is really, to introduce still one terminology, one between subordinate and superior constitutions, i.e. constitutions that can be amended by the legislature acting alone and constitutions that stipulate the participation of other bodies or groups (Wolff-Phillips 1968, xvi); colonies, then, have been far less inclined than other states to adopt subordinate patterns.

Three, another obvious deviation concerns the 3-distance-point-category, which is represented among the colonies to a much higher extent than among other states. This distribution, then, speaks again against a diffusion model and any lingering effect of Westminster standards. One needs to observe, though, that a particular feature of the comparison group may introduce into the analysis a bias, which contributes to explaining the difference. As noted earlier, the comparison group consists of democracies only, and this family of nations may, of course, be expected to distance itself from non-

parliamentary and authoritarian methods of amendment. The validity of this explanation is in fact visible to some extent by an analysis of the colony category alone. Of 14 colonies in this 3-distance-point-category, a majority of nine consists of non-democracies, as compared to an even distribution of democracies and non-democracies in the 2-distance-point-category.

DISCUSSION

An authoritative comparative politics textbook notes that all written constitutions provide for amending procedures, and emphasizes that the choice of a correct procedure represents balancing between two extremes. On the one hand, if amendments are easy, important constitutional protections may be jeopardized; on the other hand, if amendments are difficult, basic decision rules cannot be adapted and cannot respond to changes in citizen values or unforeseen circumstances (Almond, Dalton, Powell and Strom 2006, 109). As separate countries face different contextual and circumstantial challenges and problems, the balancing takes in separate cases different forms and produces different results. Overarching patterns, therefore, are not easily discernible. However, the main finding from this investigation is evident enough, and the finding is that a mechanical application of a diffusion framework is not very helpful. Former British colonies have not imitated the flexible method for constitutional amendment of the metropolitan power, and while some of them have still remained fairly close to the standard, others have not.

To understand the dissociation, several frames of reference may be applied. One line of thought would be that differing degrees of British involvement in the independence processes of the colonies make a difference: the deeper the involvement, the more do the constitutional prescriptions reflect a British heritage, i.e. a flexible mode of amendment. It is certainly true that the British presence in the processes leading to independence declarations and independence constitutions was varying in kind, and that there was a great variation in the extent to which metropolitan efforts were carried out to mould and shape colony preparedness for democracy. In some instances no real efforts were made,

in other instances the efforts were half-hearted at the best, in still other instances the efforts were serious enough, but did not always succeed. However, these variations do not seem to be connected systematically to the variations in terms of amendment that were displayed in Table 2. In fact, it would even seem that a close presence of the metropolitan power in the independence process and the preparation of constitutional frameworks have in many cases advanced or at least been connected to the adoption of quite rigid or at least semi-rigid amendment methods. As evident from the findings, such cases may be found in the Pacific area (Ghai 1988, 6-24), and especially in the Caribbean hemisphere.

Another point of departure would build upon rationality assumptions, and state, as a hypothesis, that the choice of countries of supermajority thresholds and other methods of rigidity may largely be explained by reference to principles of rational action. In fact, this hypothesis is to some extent substantiated in research, as an examination of amendment rigidity in 34 democracies with plural electoral systems suggests that countries that have experienced at the dawn of independence a dominant party system or an extreme ethnic heterogeneity have as a rule opted for the three-fourths threshold rather than the two-thirds threshold and, in consequence, for a powerful constraint (Anckar 2004 a, 239-249). In the present context, which represents a blend of democracies and non-democracies and a blend also of plural and other electoral systems, the hypothesis remains, however, unsubstantiated. Applying measures of ethnic fragmentation in the countries of the world (Anckar, Eriksson and Leskinen 2002) to the countries in the various distance point categories does not reveal any substantial average differences. On a heterogeneity scale running from 0 to 1, colonies in a first category (0-1 distance points) score an average value of .46, whereas colonies in a second category (2 distance points) score an average value of .42 and colonies in a third category (3 distance points) score a corresponding value of .44. This absence of positive findings is consistent with some earlier findings from the study of amendment methods which suggest that choices in terms of constitutional amendment do not mirror a broad and reflected constitutional orientation and strategy. For instance, no links appear to come to the fore between majoritarianism

and flexible amendment on the one hand and between consensualism and rigid amendment on the other (Anckar and Karvonen 2002, 19).

This is not to say, however, that choices of amendment methods tend to be un-reflected or half-conscious at the best. Most probably, they are not. Or, more precisely, whereas they may be less than well-informed and even accidental in matters of detail, as in selecting between thresholds of two-thirds or three-fourths magnitudes, they are still conscious about the general need for balancing, by some means or technique, between the merits and pitfalls of flexibility on the one hand and the corresponding merits and pitfalls of rigidity on the other. On this very point of constitutional engineering, while emphasizing flexibility to the very disregard of rigidity, the Westminster model is even remarkable radical, different and unique. True, the model is coherent and logical in so far as it derives from an unconditional interpretation of the doctrine of parliamentary sovereignty; at the same time, however, precisely this interpretation has most probably for the colonies carried difficulties and implementation obstacles in its wake. One classic work in the study of diffusion emphasizes that similarities between the involved countries go a long way to advance diffusion from one country to another (Rogers and Shoemaker 1971, 14-15); in the interplay between the metropolitan power and the colonies, however, this essential condition has not been fulfilled. In most colonies political life has been different, marked to a high degree by ethnic, social and rigidity-promoting heterogeneity, less inclined to endorse a principle of unconditional parliamentary sovereignty, more imbued by challenges to the legitimacy of the government. The resulting pattern from this investigation, then, has two ingredients. On the one hand, the colonies have made differing amendment method choices and it must remain unclear why some cases are in some choice categories and other cases in other categories. On the other hand, in one central aspect the choices are even surprisingly coincident. They do not reflect the procedure of constitutional development that is followed and advocated by the metropolitan power.

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