Undermining the constitution by constitutional means; some thoughts on the new constitutions of Southern Africa

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Introduction
The 1990s has seen a transformation of the constitutional order in southern Africa with new constitutions in Namibia (1990), Zambia (1991), Lesotho (1993), South Africa (1994) and Malawi (1994) which all provide for the protection and promotion of fundamental rights and the rule of law; multi-party politics and the establishment of democratic institutions. Whilst this is encouraging, the question remains whether, given the chequered history of constitutionalism in Africa, these 'new constitutions of southern Africa' (NCSA) are equipped to counter executive attempts to undermine their operation and effectiveness.

This article seeks to provide at least a partial answer by examining the NCSA in three key areas: amending the constitution; use of the presidential pardon; and use of emergency powers. In doing so it will compare and contrast the experience of Zimbabwe where executive action in these areas has arguably led to the 'undermining of the constitution by constitutional means'.

Amending the constitution
Constitutional stability is greatly enhanced if the constitution itself enjoys wide-spread support and respect. In this way a tradition of constitutionalism is established thus rendering it more difficult for any organ of state to operate contrary to the spirit and intent of the document. It follows that any constitution which is subject to frequent amendment may retain little or no respect and become an ineffective guardian of fundamental rights and the rule of law. As the Chairman of the Uganda Constitutional Commission has rightly noted, a lack of respect for a constitution can lead to 'dictatorial tendencies and the erosion of democracy, violation of human rights, collapse of the rule of law and the absence of accountability of leaders'. Accordingly many written constitutions entrench fundamental provisions so that any amendments require a special parliamentary majority. In Zimbabwe, for example, the constitution provides that a constitutional Bill may not be introduced into

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parliament unless its text has been published in the *Government Gazette* not less than thirty days beforehand; and shall not be deemed to have been duly passed by parliament unless at the final vote thereon it receives the affirmative votes of not less than two-thirds of the total parliamentary membership. The legislature is seen here as a crucial safeguard and places on parliamentarians the responsibility of

not allowing amendments to fundamental rights provisions in the Constitution to be rushed through Parliament. The people should expect their parliamentarians to consider with great care the implications of any measures which will have the effect of diluting fundamental rights provisions. The people expect Parliament to uphold fundamental rights and not to acquiesce in a process which weakens these rights. Fall suggests that legislatures have this role because they are

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

The Zimbabwean experience is valuable here in that it illustrates the limitations on this type of safeguard.

Since independence in 1980, the Constitution of Zimbabwe has been amended on thirteen occasions. Given the circumstances of its birth, some amendments were inevitable and entirely desirable. The same cannot be said for some of the others. Thus constitutional amendments have, amongst other things, specifically sought to oust the jurisdiction of the courts, to prevent the Supreme Court from hearing a case relating to the scope of the fundamental rights provisions; and to overturn its decisions thereon. For example, in 1990 in *Chibeya v S* the Supreme Court asked for full argument on the issue of whether the use of hanging constituted inhuman or degrading treatment or punishment contrary to section 15(1) of the constitution and a date was set down for the hearing. The response of government was immediate. Shortly before the hearing, a constitutional amendment Bill was published which included a provision specifically upholding the constitutionality of executions by hanging. The Minister of Justice, Legal and Parliamentary Affairs told

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2S 52.

3See the editorial entitled 'A regrettable amendment' in (1994) 6 *Legal Forum* 1-2.


6Constitution of Zimbabwe Amendment (No 12) Act 1993, s 2 of which amended s 16(1)(e) of the constitution.

7S 24 of the constitution gives the Supreme Court original jurisdiction to 'hear and determine' issues relating to fundamental rights and to 'make such orders ... and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights'.

8Supreme Court of Zimbabwe SC 64/90 unreported.

9This later became s 15(4) of the constitution.
Undermining the constitution by constitutional means

parliament that any holding to the contrary 'would be untenable to government which holds the correct and firm view that Parliament makes the laws and the courts interpret them'. He added that the abolition of the death sentence was a matter for the executive and legislature and that 'government will not and cannot countenance a situation where the death penalty is de facto abolished through the back door ....'. As discussed below, there was little parliamentary debate on this aspect of the Bill and members overwhelmingly approved the measure.

The second instance further highlights the problem. In Catholic Commission for Justice and Peace in Zimbabwe v Attorney-General the court held that the dehumanising factor of prolonged delay, viewed in conjunction with the harsh and degrading conditions in the condemned section of the holding prison, meant that executing four condemned prisoners would have constituted inhuman and degrading treatment contrary to section 15(1) of the constitution. Accordingly, the court directed that the death sentences be commuted to sentences of life imprisonment. It also gave a series of directives on the procedure for dealing with condemned prisoners and suggested that petitions of mercy should be dealt with expeditiously by the executive and considered three months as a possible time-frame. This landmark decision was later followed by the Judicial Committee of the Privy Council in Pratt and Morgan v Attorney-General for Jamaica and received warm approval from several commentators. Even so, it drew a critical response from government and within weeks the Constitution of Zimbabwe Amendment (No 13) Act 1993 was passed which retrospectively exempted the death penalty from the scope of section 15(1). Once again members of parliament overwhelmingly approved the Bill.

Whilst such amendments were constitutionally permissible, the Zimbabwean experience highlights the problem of relying on the legislature as the major safeguard on constitutional changes. Firstly, Zimbabwe, in line with several other African states such as Zambia and Namibia, has one dominant political party so that of the 150 members of parliament there are only three non-government supporters. This inevitably means that the enhanced parliamentary majority has limited practical value.

Secondly, it is questionable whether all members of parliament are able and/or prepared to undertake a critical and informed approach to the proposed changes. For example, in the parliamentary debate on the 1993 Act, the few members of parliament who did speak seemingly did not understand the Supreme Court decision and believed its effect was to abolish the death penalty.

10 Parliamentary debates 6 December 1990.
11 1993 (4) SA 239. The decision of the five-man bench was given by Gubbay CJ.
12 [1993] 4 All ER 769.
13 See, for example, WA Schabas 'Soering's legacy: the Human Rights Committee and the Judicial Committee of the Privy Council take a walk down death row' (1994) 43 ICLQ 913. It is also worth noting that Zimbabwean government criticism of the judgment ceased after the Pratt and Morgan decision.
penalty itself.\textsuperscript{14} Indeed just one member managed to state and analyse the ruling accurately.\textsuperscript{15} Regrettably, members were certainly not assisted by the Minister of Justice, Legal and Parliamentary Affairs who informed them that the decision 'allowed the \textit{de facto} abolition of the death sentence by the judiciary' and that the judgment 'was to the effect that from the day a person is sentenced to death by the High Court, three months should be the maximum. If three months pass before he is executed ... then there is a delay, which in the opinion of the Supreme Court, vitiates the execution'.\textsuperscript{16} As noted above, that was certainly not the ruling of the Supreme Court. A failure to appreciate the importance of constitutional amendments was also demonstrated when the final vote on the Bill had to be nullified and retaken because of an oversight that it required a two-thirds majority.

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

Finally, the 'failure' of the legislative safeguard may cause the judiciary to take additional steps towards protecting fundamental rights. This is well illustrated by the response of the judiciary to the \textit{Chileya} affair. At the opening of the High Court in February 1991, the Chief Justice launched a thinly veiled attack on the amendments to section 15. He stated that there are certain basic principles enshrined in the Declaration of Rights which are not subject to curtailment and that the courts would seek to protect them. In doing so, he was seemingly preparing the ground for the possible adoption by the Supreme Court of the 'essential features' or 'basic structure' doctrine \textit{te} that a constitution cannot be amended so as to abrogate any of its 'essential features'.\textsuperscript{17} A detailed discussion on the merits of the doctrine cannot be undertaken here.\textsuperscript{18} Suffice to say that the doctrine is extremely nebulous as it requires the judges themselves to divine what are the 'essential features' of the constitution and there is by no means complete agreement on this issue. Fortunately the Supreme Court has not, as yet, adopted it for it would almost

\textsuperscript{14}Just 26 of the 150 members made any contribution to the debate on the Second Reading and, seemingly, only 5 of these were not in favour of the Bill although their contributions on the matter were not always very clear. Thus one member asserted that 'the proposal should be supported and we should remove [the] death sentence for the democratic development of our nation' (Mr Nyashanu \textit{Parliamentary Debates} 28 September 1994).

\textsuperscript{15}See the contribution of Mr Malunga in \textit{Parliamentary Debates} 22 September 1994.

\textsuperscript{16}\textit{Parliamentary Debates} 22 and 28 September 1993.

\textsuperscript{17}As formulated in the Indian case of \textit{Kesavananda v State of Kerala} AIR 1973 SC 1461. See also the Bangladesh case of \textit{Anwar Hossain Chowdury v Bangladesh} 41 DLR (AD) 1989 165.

\textsuperscript{18}For a useful discussion of the doctrine see DG Morgan 'The Indian essential features case' (1981) 30 \textit{ICLQ} 307.
certainly provoke a confrontation between the judiciary and the executive. Even so, reference to it was clearly the result of judicial frustration with the current situation which effectively leaves constitutional rights completely open to abrogation or derogation at the whim of the executive.

Given the performance of other legislatures in Africa, the Zimbabwean experience is certainly not atypical and both challenges the view of Fall that parliaments and parliamentarians are the ‘unsung heros of human rights’ and highlights the need for constitutional drafters to consider other mechanisms by which to secure constitutional rights. In this regard, the NCSA provide a number of alternative approaches.

Approval by parliament and the people

The additional requirement for a referendum is included in several of the NCSA. Thus the Constitution of Malawi provides that any amendment to the ‘fundamental principles’ or human rights provisions requires a simple parliamentary majority provided the proposed amendment has received the support of the majority of those voting in a national referendum. A very similar approach is adopted in both Zambia and Lesotho although here the referendum must take place between two and six months after the Bill has received parliamentary approval.

Arguably, decisions by referendum are the most legitimate of all because they encourage the full participation of the people. Further they can generate wide publicity for the proposed amendment(s) and engender full public debate; counterbalance the influence of the executive over a rubber-stamp parliament; and avoid the indecent haste with which constitutional amendments have taken place elsewhere. Of course such a system has its own drawbacks. Thus resort to referenda will inevitably delay the strengthening of fundamental rights provisions; the actual wording of the question(s) may greatly influence the result; and they are extremely expensive and time-consuming. However, this approach carries with it a greater chance of proposed constitutional amendments receiving the sort of serious and objective consideration they deserve.

19Indeed the day following the handing down of judgment in Kesavananda it was announced that Sikri CJ, one of the majority who upheld the doctrine, was to retire. Against all tradition, his successor was named as Ray J who was the most senior member of the minority in Kesavananda: see Morgan n 18 above at 335-6.
20See, for example, the activities of the Zambian parliament discussed below.
21If the amendment ‘would not affect the substance of [sic] the effect of the Constitution’ a two-thirds majority of the National Assembly will suffice: see ss 195-197.
22Article 79. An amendment of any provision other than that relating to fundamental rights requires a two-thirds majority of all the members of the National Assembly at both the Second and Third Readings.
23Chapter VII of the Constitution of Lesotho.
25Although this might also inhibit efforts to make frequent amendments to the constitutional document.
A related question is the size of the majority required. Arguably, because of the importance of the issue, an increased majority is needed. This approach worked well in The Seychelles where the referendum on the 1992 draft constitution failed to achieve a sixty per cent affirmative vote and led to re-drafting of a far more acceptable document. 26

**Approval by a second chamber**

Second chambers became un fashionable in most African countries but this trend is reversed by the NCSA where provision is made for them in Malawi, Lesotho, South Africa and Namibia. The role of the second chamber as regards constitutional amendments varies. In Malawi and South Africa the approval of the upper chamber is required in the same manner as the lower house, whilst in Lesotho the Senate has little power being in the same position as that relating to an Appropriation Bill. 27 In Namibia, and when a constitutional amendment is permissible (see below), the procedure is the same as that in Malawi except that if a two-thirds majority is obtained in the lower house only, the President may make the Bill the subject of a national referendum. 28

The effectiveness of an upper chamber essentially depends upon its make-up. In the case of the NCSA, the members of the second chamber are all indirectly elected but only in Malawi is there a requirement that they represent a wide cross-section of society. 29 Without this, there is a danger that members will merely reflect existing political loyalties with a resultant lack of objectivity in the second chamber.

**Requirement for the publication of the bill**

Amongst the NCSA, only the Zambian Constitution requires the publication of the text of any constitutional amendment Bill in the Government Gazette thirty days before the first reading in the National Assembly. 30 The need for a referendum may have persuaded constitutional drafters elsewhere to exclude such a provision. In fact it remains a potentially useful additional means of encouraging public debate although to have any practical value wide publicity of the Bill is essential. This can only occur if there is a constitutional requirement to publish full details of the proposed amendment(s) in the major news media including those in the vernacular. 31

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27 This requires the Senate to pass the Bill 'without delay' failing which the Bill is presented to the King for assent.

28 Article 132(3)(a).

29 32 of the 80 senators must come from 'interest groups' including representatives of women's organisations and the disabled, and from education, farming and business sectors and from trade unions.

30 Article 79(2).

31 The Land Acquisition Act 1992 in Zimbabwe provides a useful precedent. S 5 states that an intention to acquire any land other than by agreement must be signified by a notice to this effect published once in the Government Gazette and twice 'in a newspaper circulating in the area in which the land is to be acquired is situated and in such other manner as the acquiring authority thinks will best bring the notice to the attention of the owner'.
No amendment to fundamental rights provisions

In Namibia no repeal or amendment of any provision of the constitution is permitted in so far as this

diminishes or detracts from the fundamental rights and freedoms contained in [the constitution] and no such purported repeal or amendment shall be valid or have any force or effect.\textsuperscript{32}

The advantage of this approach is that fundamental rights can be strengthened as appropriate but not abrogated, thus preventing the possibility of a repeat of the Zimbabwe experience.\textsuperscript{33} Of course its very rigidity could prove troublesome if a widely held view developed that a constitutional amendment were required. This means that the contents of the Declaration of Rights must meet the aspirations of the people and international human rights obligations in the first place.

Overall, the above discussion has highlighted the importance of putting in place effective safeguards against the erosion of fundamental rights by means of constitutional amendments. It is argued that even special parliamentary majorities have serious drawbacks and thus it is important to look for alternative or additional safeguards. This is particularly significant in the context of South Africa where any amendment to the current Interim Constitution (other than to the ‘Constitutional Principles’ which cannot be amended) requires a two-thirds majority of all members of both chambers. This is likely to remain the position in the ‘final’ document.\textsuperscript{34} The NCSA provide some useful alternatives. It is suggested that the approach in Namibia is to be preferred as regards the protection of fundamental rights whilst the use of a referendum requiring a sixty per cent affirmative vote is desirable for the making of other changes.

The use of the presidential pardon

Section 311 of the Constitution of Zimbabwe empowers the President to grant a pardon to any person concerned in or convicted of a criminal offence against any law; or grant a respite, either indefinite or for a specified period, from the execution of any sentence for such an offence. In 1993 concern over the exercise of such powers was raised in the cases of Elias Kanengoni (an official of the ruling party, ZANU(PF)) and Kizito Chivamba (a member of the Central Intelligence Organisation (CIO)). Both were convicted in the High Court of Zimbabwe of attempted murder and sentenced to seven years' imprisonment. Their victim was a leading opposition candidate whom they shot and seriously wounded whilst he was campaigning for the 1990 general election. Following the dismissal of their appeals by the Supreme Court, the

\textsuperscript{32}Article 131.

\textsuperscript{33}A further approach is to require the assent of all members of the legislature to a constitutional amendment. This was the case in Zimbabwe up to 1990 with regard to the Declaration of Rights. This prevented any amendments thereto but was an inflexible mechanism.

\textsuperscript{34}The Constitutional Principles provide that amendments to the ‘final’ constitution will require special procedures involving special majorities: Constitution of South Africa, Schedule 4 par XV.
two men were granted a presidential pardon and released. The decision gave rise to considerable criticism from legal and human rights bodies, especially as this was not the first time that persons committing violence against members of other political parties had been granted a pardon.

The power to pardon, which is normally vested in the head of state, is a worldwide phenomenon. It exists because 'it has always been thought essential to vest in some authority other than the courts the power to ameliorate or avoid particular criminal judgments'. Of course, the granting of a pardon strikes at the independence of the judiciary because the whole criminal justice process is nullified when a convicted person is freed by executive order for its effect is to expunge the conviction absolutely from the record. This means that the exercise of the power must be accompanied by adequate checks otherwise it is liable to be used for political purposes, a point seemingly exemplified in the Kanengoni case.

It is argued that there are three pre-conditions for the exercise of the power. Firstly, because of the danger it poses to the operation and credibility of the criminal justice system, the exercise of a pardon must be undertaken in consultation with others who are in a position to give objective advice. In Zimbabwe the President must act on the advice of the Cabinet. However, it is interesting to note that with regard to the Kanengoni case the Minister of Justice reportedly said that the President 'has absolute power to pardon whoever he wishes' which is perhaps an insight into the decision-making process within the administration.

Secondly, a pardon is justified only as a means of preventing injustice, so it is possible to specify in advance the sorts of reasons for clemency. These should be on legal grounds or where there is a later ascertainment of innocence or a real doubt as to guilt, or, as Taft CJ neatly puts it:

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relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt.\textsuperscript{46}

This view differs significantly from that taken in Zimbabwe where the presidential decision to pardon Kanengoni and Chivambga was based on so-called 'social' grounds (see below). This is defensible only if, as Bentham has pointed out, a pardon is the exercise of 'free grace' and can thus be granted on any ground the executive may regard as sufficient. Given the potential for abuse, such a view is surely untenable.

Thirdly, in order to assuage public disquiet and speculation over its use, there should be a duty to disclose the reasons for the granting of the pardon. In the Kanengoni case, for example, the Minister of Justice stated that the decision was taken on 'social grounds'. There was no elaboration and one is left with the uneasy suspicion that the pardon was granted simply because the perpetrators were government supporters whilst the victim was a political opponent.

Whilst the NCSA all provide the head of state with a similar pardoning power, they adopt a variety of safeguards on its exercise. In Malawi the power is exercisable in consultation with the Advisory Committee on the Granting of Pardon, whose composition and formation will be determined by a future statute.\textsuperscript{47} A similar procedure is adopted in Zambia and Lesotho.\textsuperscript{48} In South Africa the President is required to consult the Executive Deputy Presidents. The composition of such a review body is potentially crucial in ensuring an objective assessment of individual cases and, in this respect, the approach in Lesotho merits particular attention. Here the three members of the Pardons Committee on the Prerogative of Mercy are appointed 'by the King acting in accordance with the advice of the Judicial Service Commission from among persons who are not public officers or members of the [legislature].\textsuperscript{49} This has the capacity to be relatively objective particularly because of the make-up of the membership of the commission.\textsuperscript{50} In Namibia a different approach is adopted. Here the exercise of the presidential power or pardon can be reviewed, reversed and corrected following a resolution passed by a two-thirds majority of all the members of the legislature.\textsuperscript{51}

The recognition in at least some of the NCSA that the granting of a pardon is

\textsuperscript{46}Ibid. A good illustration of this is the case of James Bassoppo-Moyo. He was a former Deputy Speaker of the House of Assembly who was convicted of attempted murder but pardoned on account of his terminal illness.

\textsuperscript{47}S 89(2).

\textsuperscript{48}Articles 59 and 60 (Zambia) and s 101–2 (Lesotho).

\textsuperscript{49}S 102(1).

\textsuperscript{50}S 132 of the constitution provides that the commission will consist of the Chief Justice, Attorney-General, Chairman of the Public Service Commission, and members from amongst persons who hold or have held high judicial office.

\textsuperscript{51}This has the advantage of requiring an explanation to parliament although the ever-present problem of a rubber-stamp legislature makes this safeguard less attractive than it might otherwise seem.
based on objective advice to the head of state goes a long way towards avoiding the controversy engendered by the Kanengoni case. Overall, given the widespread executive domination of legislatures in Africa, it is suggested that the approach in Lesotho is preferable. Even so, it is regrettable that none of the NCSA provide for either of the two other points discussed above.

Emergency powers
There comes a time in the life of almost every nation when a situation arises which threatens its security. Even in peacetime a government may legitimately declare a state of emergency and obtain additional powers in order to combat some grave danger. This represents the international law equivalent of an individual's right to self-defence under the criminal law. The danger, as evidenced by the experience of many southern African states, is that an unscrupulous executive may use a state of emergency as an excuse to suspend key constitutional provisions and effectively rule by decree for long periods, a situation that is rightly called the 'permanence of the temporary'.

In Zimbabwe, the constitution provides that the President, without needing to give any reasons, may declare that a state of public emergency exists. Such a declaration remains in force for fourteen days and then ceases to have effect unless the affirmative votes of more than one-half of the members of parliament is obtained. If this occurs, it then remains in force for up to six months. Subject to similar parliamentary approval, it can be renewed for further periods of up to six months. In practice, this system has proved virtually useless as a safeguard. Between 1980 and 1990 the Zimbabwean government produced a bewildering variety of reasons for retaining the state of emergency including increasing crime; security threats from South Africa; civil unrest; re-structuring of the economy; economic problems; and industrial unrest. There is no doubt that based on article 4 of the International Covenant on Civil and Political Rights (ICCPR) (which states that a public emergency requires that there be 'a threat to the life of the nation' and which was the declared basis of the state of emergency in Zimbabwe), these reasons did not justify the retention of the state of emergency. At best reliance on them demonstrated a lack of understanding as to the grounds for issuing an emergency proclamation. At worst they illustrated a desire to use emergency powers to circumvent the normal constitutional process and to rule by decree. Despite this, every six months, members of parliament meekly obeyed their political masters and voted to approve the renewal of the state of emergency with little or no meaningful debate. Whilst this procedure at least permitted some public

52For a full analysis see J Hatchard Individual freedoms and emergency powers in the African context: a case study of Zimbabwe (1993).

53A phrase used by A Mathews & R Albino in their article 'The permanence of the temporary: an examination of the 90 and 180 day detention laws' (1966) 83 SALJ 16.

54S 31(1).

55The state of emergency was originally declared in 1965 just prior to the Unilateral Declaration of Independence by the Rhodesian government.

56See the discussion in Hatchard n 52 above at 17 ff.
debate on the issue, in practice the domination by the ruling party ensured that the consent of the legislature was always a foregone conclusion. A related problem concerned the power to suspend or derogate from key provisions of the Declaration of Rights. This resulted in a plethora of emergency powers regulations many of which had no connection with the reasons for the emergency but which severely impacted on constitutional rights and enabled the executive to control almost all aspects of life.\textsuperscript{37}

The Zimbabwean experience highlights the importance of providing adequate safeguards in this area. The manner in which the NCSA deal with these issues can now be examined.

\section*{Safeguards on the declaration of a state of emergency}

Given the experience of Zimbabwe, it is surprising that the constitutions of Lesotho and Zambia contain virtually identical provisions. The weakness of the safeguard is further demonstrated in the Zambian context. In June 1992 in a speech at a human rights conference, Vice-President Levy Mwanawasa condemned the previous government of Kenneth Kaunda for 'perpetuating a state of emergency for 27 years during which time thousands of people were detained without trial' and pledged to ensure that such a situation would not recur.\textsuperscript{38} Just a few months later, the President accused members of the former ruling party of plotting to overthrow the government, proclaimed a state of emergency and ordered the detention of several persons (including one of the participants at the June conference). No convincing case was established for the declaration and there was a real hope that the National Assembly would refuse to approve it. In fact, following strong pressure from ministers, members meekly complied with presidential wishes.

There is little doubt that the parliamentary safeguard on the declaration of a state of emergency is of only limited value and needs either replacement or reinforcement. The NCSA provide several other possibilities. Firstly, in South Africa, Malawi and Namibia there is an attempt to strengthen the role of the legislature by requiring the approval of two-thirds of the total parliamentary membership. Whilst this is an improvement as it emphasises the seriousness of the decision and requires a degree of unanimity on the matter, its effectiveness is still dependent upon a legislature not dominated by a single party.

Secondly, in Malawi the declaration itself cannot be made without the approval of the Defence and Security Committee of the National Assembly. This is a new body which represents proportionally the political parties having

\textsuperscript{37}See Hatchard n 52 above especially chapter 9. The considerable scope for executive action in the most unlikely of situations was well illustrated in 1981 when a dispute arose between the Minister of Health and the Family Planning Association over the supply of a certain kind of contraceptive. Unhappy with the reluctance of the association to supply the device, the minister made emergency regulations which permitted him to take possession of the entire assets of the association: see Emergency Powers (Family Planning) Regulations 1981 SI 643/81.

seats in the National Assembly. It may be assembled at any time, notwithstanding that parliament stands adjourned.\textsuperscript{39} Certainly, with no party having an overall parliamentary majority in Malawi, the committee could play a useful role but its value remains limited where a single party dominates the legislature.

A third approach is to establish a separate body tasked with making an objective assessment of the need for a state of emergency or its continuance. A possible model is one based on the Council of State in Lesotho where the declaration of a state of emergency may be revoked at any time by the Prime Minister acting in accordance with the advice of the council.\textsuperscript{60} This body comprises up to fourteen persons with a majority being non-government appointees and including two judges, two members of the National Assembly, a traditional chief and a private legal practitioner.\textsuperscript{61} Whilst security considerations may well preclude full public debate on the issue, the requirement for such a body to approve the original declaration and provide a continual monitoring of the situation could prove to be a more effective safeguard. Finally the role of the judiciary also requires consideration. In both South Africa and Malawi, the courts are competent to enquire into the validity of an emergency declaration (and any extension) and any action taken thereunder, including the making of any emergency regulations.\textsuperscript{62}

In addition, the length of an emergency declaration is crucial. The Constitutions of South Africa and Zambia provide that it can remain in force for up to three months without renewal, whilst in Namibia and Lesotho the period is six months. Whilst it is rarely possible to predict the duration of an emergency situation, the shorter period is surely preferable in that it emphasises the temporary nature of the declaration and provides for a frequent public reassessment of its retention.

Overall, some of the NCSA move hesitantly towards the establishment of meaningful safeguards on the declaration of a state of emergency. However, they do not go far enough. It is argued that what is needed is a body organised along the lines of the Council of State in Lesotho but with powers similar to the Malawian Defence and Security Committee. This would have several advantages including helping to ensure that the declaration is in compliance with the state's international human rights obligations; preventing the continuation of the state of emergency based on spurious grounds; ensuring an objective monitoring the emergency; and removing (or reinforcing) the role of the legislature. In reality a Human Rights Commission could well fulfil this role. Whilst all the NCSA provide for the office of the ombudsman (or equival-

\textsuperscript{39}S 162.
\textsuperscript{60}S 23(3).
\textsuperscript{61}S 95.
\textsuperscript{62}It is curious that there is no similar provision in Lesotho where the High Court held that the 1988 Declaration of a state of emergency and the emergency regulations made thereunder were null and void because they were not made in accordance with the procedure prescribed by the Emergency Powers Act 1982: see Law Society of Lesotho v Minister of Defence 1988 LRC (Const) 226.
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The constitutions of both South Africa and Malawi also provide for a Human Rights Commission (HRC) which will consist of members from a broad range of national life. A primary function of both institutions is the promotion, protection and investigation of violations of constitutional rights. Incorporating a safeguarding role along the lines discussed above is both practicable and desirable.

Safeguards on the use of emergency powers

The Zimbabwean experience also highlights the importance of the furnishing of reasons for an emergency proclamation. With the exception of Zambia, all the NCSA specifically provide the grounds upon which an emergency proclamation can be made. These cover situations such as war, natural disasters, serious public disorder which threatens the life of the nation or constitutional order. Whilst these are necessarily somewhat general, they fall within the ambit of article 4 of the ICCPR and have the merit of directing attention to whether the declaration (or its continuation) is actually necessary. However this does not go far enough for, as the Zimbabwean experience illustrates, there is a real danger that wide-ranging emergency regulations will be made concerning issues far removed from the stated reasons for the state of emergency. Thus the need to give clear and unambiguous reasons for the emergency should be coupled with a requirement that regulations are limited to areas directly connected with the emergency; have a limited life span; and obtain specific parliamentary approval. Such principles should be enshrined in all the NCSA.

Suspension of fundamental rights

Although the ICCPR prohibits the suspension of certain fundamental rights even during a state of emergency, it is far from clear which other rights demand similar constitutional protection. Whilst the scope of a Declaration of Rights inevitably varies from country to country, Table 1 demonstrates remarkable differences within the NCSA as to which rights are considered 'dangerous' enough to merit possible suspension. (See Table 1 on page 35)

This raises several points. Firstly, there is no unanimity as to which right(s) should be liable to suspension. Indeed, whilst all the NCSA provide for detention without trial, even here the Constitution of Malawi still otherwise protects the right of personal liberty against suspension.

Secondly, the number of rights liable to suspension differs considerably. Thus the Constitution of Lesotho permits the suspension of just three whereas in South Africa the number is nineteen. Thirdly, it is often difficult, if not impossible, to find any link between an emergency situation and the need to suspend some rights. For example, there is surely no justification for the suspension of the rights to education, a healthy environment and freedom of

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63 Article 131 Constitution of Malawi; S 115 Constitution of South Africa.
64 In Namibia the ombudsman also has a similar function: see J Hatchard 'The ombudsman in Africa revisited' (1991) 40 ICLQ 937.
conscience. A fortiori the power to undermine the right to a fair trial. Fourthly, there are also some strange inconsistencies. For example, the right of young persons to protection from exploitation can be suspended in Zambia but not in South Africa or Malawi, whilst the right of young persons to basic health care can be suspended in South Africa but not in Malawi. One is thus left with the feeling that insufficient thought has gone into the list of suspensions. The danger is that the wider the list, the greater the power of the executive to rule by decree with the result that constitutional rights have little or no meaning at a time when they are most needed.

Overall, the provisions in the NCSA concerning safeguards on the use of emergency powers are disappointing. With most of the countries having experienced human rights abuses during periods of states of emergency, it is vital to provide for effective safeguards rather than to rely on those which failed so miserably in the past. Two things are clear. Firstly, the legislature is not an adequate safeguard. What is needed is a rapid and on-going objective assessment of the need for the declaration or retention of a state emergency. In this the approach in Lesotho merits attention. Secondly, the power to suspend or derogate from fundamental rights must be strictly limited. This means that the present chaotic situation in the NCSA must be the subject of a complete re-appraisal. Thirdly, none of the NCSA deal with the problem of the making of wide-ranging emergency regulations which have no connection with the reasons for the emergency. This is an omission which should be remedied otherwise the abuses as demonstrated in Zimbabwe may well occur elsewhere.

Conclusion
The Zimbabwean experience demonstrates the care that is needed in building effective institutions and mechanisms for the protection of fundamental rights and the rule of law into national constitutions.

In general, the safeguards in the NCSA are an improvement on earlier models, of which the Constitution of Zimbabwe is an example. Nevertheless, this article has demonstrated that, given the record of African legislatures, the continued reliance on such institutions as the major safeguarding agency is misplaced. Whilst this may be appropriate in Western countries, it is clear that in developing countries the 'rubber-stamp' nature of legislatures demands the development of new institutions and mechanisms discussed above.

As a result, it is important that southern African states start to re-assess their constitutional safeguards. A good starting point would be in Zambia where a constitutional commission is expected to report in 1995 on its proposals for a new constitution and in South Africa where work on the 'final' constitution is underway. Whatever new documents are forthcoming, it is hoped that the safeguards advocated here will receive serious attention and encourage other

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65 The provision in the Zambian Constitution regarding the suspension of the freedom of conscience is in direct contravention of article 6 of the ICCPR.
Undermining the constitution by constitutional means

countries, and not just those in the sub-region, to undertake a similar review.66

**TABLE 1**

**Fundamental rights provisions liable to suspension during a state of emergency in the NCSA**

(Key: L = Lesotho; M = Malawi; N = Namibia; SA = South Africa; Z = Zambia)

<table>
<thead>
<tr>
<th>Fundamental rights provisions</th>
<th>M</th>
<th>Z</th>
<th>SA</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Freedom of expression</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freedom of information</td>
<td>M</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Freedom of movement</td>
<td>M, N</td>
<td>Z</td>
<td>SA</td>
<td></td>
</tr>
<tr>
<td>Freedom of assembly</td>
<td>M, N</td>
<td>Z</td>
<td>SA</td>
<td></td>
</tr>
<tr>
<td>Detention without trial</td>
<td>M</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right of personal liberty</td>
<td>N</td>
<td>Z</td>
<td>L</td>
<td>SA</td>
</tr>
<tr>
<td>Arbitrary arrest and detention</td>
<td>N</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Right to privacy</td>
<td>N</td>
<td>Z</td>
<td>SA</td>
<td></td>
</tr>
<tr>
<td>Right to political activity</td>
<td>N</td>
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<tr>
<td>Right to property</td>
<td>N</td>
<td>Z</td>
<td>SA</td>
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<tr>
<td>Right to education</td>
<td>N</td>
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<tr>
<td>Right to participate in cultural activity</td>
<td>SA</td>
<td></td>
<td></td>
<td></td>
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<tr>
<td>Right to withhold labour</td>
<td>N</td>
<td></td>
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<td></td>
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<tr>
<td>Freedom of conscience</td>
<td>Z</td>
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<tr>
<td>Freedom from discrimination</td>
<td>Z</td>
<td>L</td>
<td></td>
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<tr>
<td>Protection of young persons from exploitation</td>
<td>Z</td>
<td></td>
<td></td>
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<tr>
<td>Right of a child to parental care, security, basic nutrition and basic health and social services</td>
<td>SA</td>
<td></td>
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<tr>
<td>Right to equal protection of the law</td>
<td>L</td>
<td>SA</td>
<td></td>
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<tr>
<td>Access to court</td>
<td>SA</td>
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<td></td>
<td></td>
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<tr>
<td>Access to information</td>
<td>SA</td>
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<tr>
<td>Right to administrative justice</td>
<td>SA</td>
<td></td>
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<tr>
<td>Right to a fair trial</td>
<td>SA</td>
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<tr>
<td>Right to engage in economic activity</td>
<td>SA</td>
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<tr>
<td>Right to collective bargaining</td>
<td>SA</td>
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<tr>
<td>Right to a healthy environment</td>
<td>SA</td>
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</tbody>
</table>

66Both Nigeria and Kenya are also likely to produce new constitutional documents during 1995.