


Chapter 2

The Concept and Functions of Constitution

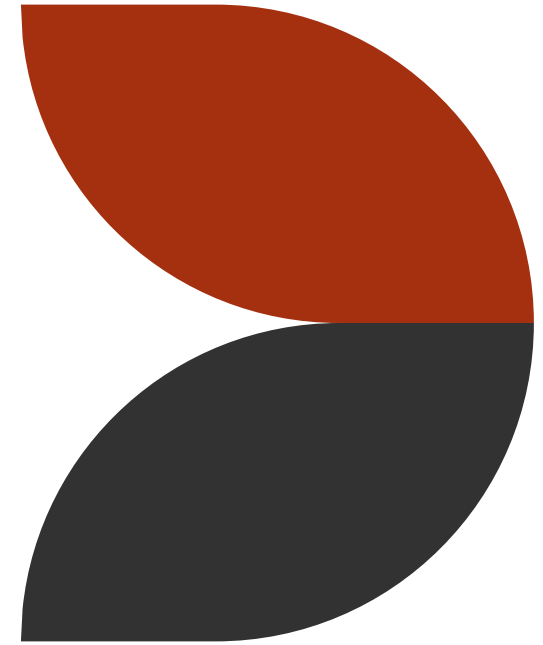
- What is “constitution”?
 - Classification of constitutions
 - Structure of constitutions
- 

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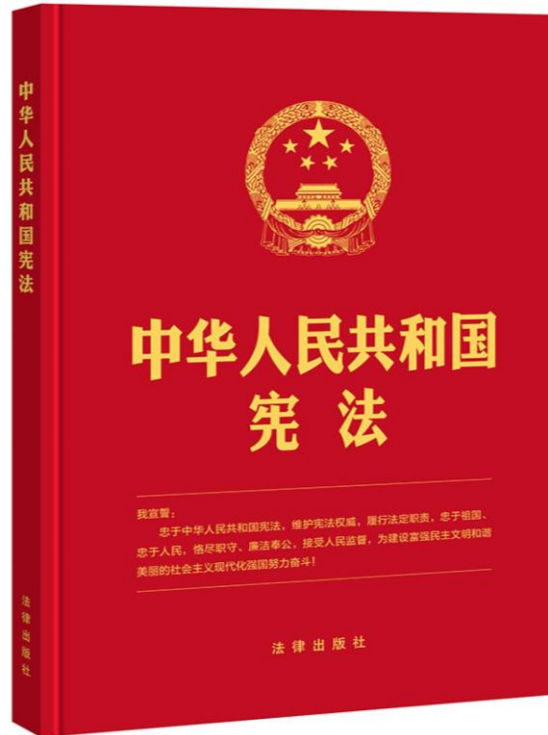
1. What is “constitution”?
 - Meanings of “constitution”
 - Status of constitutions
 - Function of constitutions
2. Classifications of constitutions
3. Structures of constitution
 - Source of law
 - Structure of the code

What is “constitution”?

Concepts and principles



Images about “constitutions”



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China

The Constitution of the People's Republic of China

《中華人民共和國憲法》

- Preamble (序言) + 4 Chapters (章)
- 143 articles (條文)

Images about “constitutions”



Source of picture:
<https://www.uc.edu/news/articles/2021/08/n21026012/jcr:content/image.img.cq5dam.thumbnail.500.500.jpg/1629488951853>

The United States of American

The Constitution of the United States of American

- Preamble + 7 articles
- 4 pages
- Written on parchment
- Regarded as the first modern constitution in the world
- 27 amendments (修正案)

Images about “constitutions”

Germany

Grundgesetz für die Bundesrepublik Deutschland
(GG)

The Basic Law for the Federal Republic of Germany

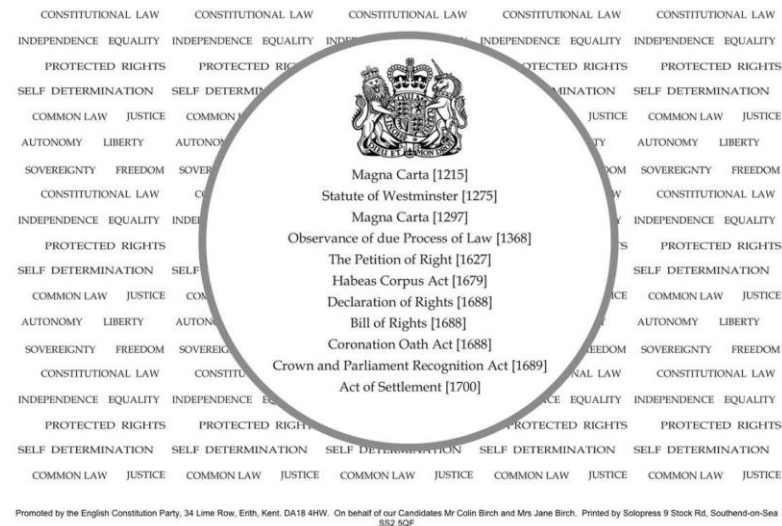
《德意志聯邦共和國基本法》

- Preamble + 11 Chapters
- 146 articles
- Written and approved in 1949
- Before the reunification of Germany, it was effective only in West Germany. Later in 1990, after the reunification, it was retained as the constitution of Germany.



Source of picture: http://www.bmi.bund.de/SharedDocs/bilder/EN/schmuckbilder/verfassung/grundgesetz.jpg?__blob=poster&v=3

Images about “constitutions”



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The United Kingdom of Great Britain and Northern Ireland

- No single “constitution” in the UK
- Combined by different constitutional laws (憲制性法律)
- Only partially written down

Meanings of “constitution”

1. The formal* meaning (形式意義)

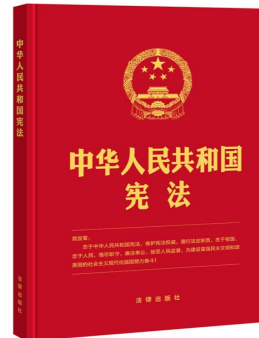
- A particular normative legal document
- A code (典籍)

ATTENTION

the word “formal”:

- ✗ official, public, not casual or informal
- ✓ that of a form

It has more to do with the name of the document than to the content.



Source of picture: <https://images-na.ssl-images-amazon.com/images/I/61PEEcGYJML.jpg>



Source of picture: <https://www.uc.edu/news/articles/2021/08/n21026012/jcr:content/image.img.cq5dom.thumbnail.500.500.jpg/1629488951853>



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Meanings of “constitution”

2. The actual meaning (實質意義)

The rules and practices that determine the composition and functions of the organs of central and local government in a state and regulate the relationship between the individual and the state.

2.1 the inherent meaning (固有意義)

The constitution is the set of rules that determines the governance of a country. It is also known as the “fundamental law” or the “basic law” of a country.

Any law that deals with the basis and formation of the governing power of a state can be known as a “constitution”.



Meanings of “constitution”

The Code of Hammurabi

- A set of 282 laws composed by the Babylonian King in about 1755-1750 BC
- Inscribed on a stone which is now in the Louvre Museum
- Considered to be the first constitution in ancient time
- Broad scope: laws about state organization, criminal law, civil law, property law, commercial law etc.

“I am Hammurabi, the shepherd, selected by the god Enlil”



Source of picture:
<https://www.worldhistory.org/uploads/images/6930.jpg?v=1638362703>

Meanings of “constitution”

2.2 the meaning of “constitutionalism” (憲政)

The constitution is the set of fundamental laws that, by restricting **the governing power**, protects **the basic rights of the people**.

- first appeared in the western world
- also known as the “modern constitution”
- the fundamental basis is *liberalism*
- widely believe to be the best type of “constitution”

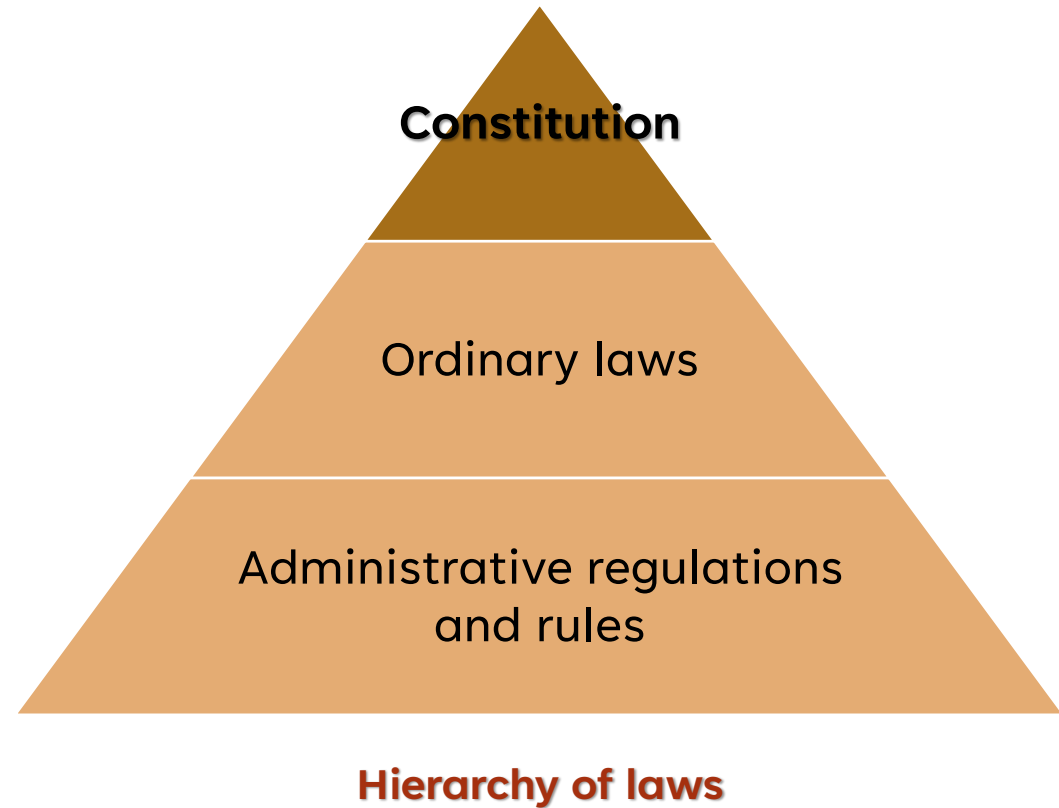


Status of constitutions

Constitutions are considered to be the supreme law in a country.

Constitutions are usually understood to be a higher law than ordinary legislation, in the sense that laws inconsistent with the constitution are invalid.

Constitutions sometimes are said to be the mother of all laws, but this expression is not so accurate.



Constitution as the supreme law

Being the supreme law in a country, the constitution has the following characteristics:

1. Constitutions regulate the utmost foundation of a country.
2. The process of creation and amendment of constitutions are more stringent than that of ordinary laws.
3. Constitutions are of the highest source of authority, and all other laws must adhere.

What is “constitution”?

The function of a constitution

According to Prof. Lin Laifan, a famous scholar in the legal field, constitutions ought to be:

1. the basic law that establishes the foundation for existence of a country;
(A constitution declares the nature of a country, its objectives, its fundamental systems, its political structure and organizations. It is the law that defines the basis of a country.)
2. the fundamental law that safeguard the dignity and basic rights of the people; and
(Why do we, the people, need a country? What is the fundamental reason for the existence of a country? Why do we pay tax to support its existence and operation? It is because the country safeguards the dignity and rights of everyone.)
3. a norm of authorization and also a norm of restriction.
(A constitution authorizes power to the state, it also limits or restricts that power.)

Classifications of constitutions



Different classifications

1. Codified vs. uncoded
2. Rigid vs. flexible
3. Imperial, democratic and 'mixed' type
4. Federal vs. unitary
5. Republican vs. monarchical
6. Capitalist vs. socialist
7. Normative, nominal and semantic
8. ...



1. Codified and uncodified constitutions

Some scholars may use the term “written” and “unwritten”, but there is a difference between the two pairs of concepts.

Codified	Written in one single document	Most of the world, examples: <ul style="list-style-type: none">• The United States• China
Uncodified	Fully written (in a number of documents)	Examples: <ul style="list-style-type: none">• Israel: 14 documents• San Marino: 6 books of the <i>Statutes of 1600</i> and the <i>Declaration of Citizen Rights of 1974</i>
	Partially written	Examples: <ul style="list-style-type: none">• The United Kingdom• Canada• New Zealand

Parliamentary sovereignty

- *Magna Carta 1215*
- *Bill of Rights 1689*
- *Parliament Act 1911, 1949*
- ...

Constitutional conventions
International laws
Rule of law
....

2. Rigid and flexible constitutions

The classification of whether a constitution is rigid or flexible is mostly related to its procedure of amendment.

James Bryce, a British scholar and politician, proposed this classification in 1901. According to Bryce, a **rigid constitution** is one that can only be amended by a supermajority or special majority in the legislature, while a **flexible constitution** can be amended through ordinary legislative process. Bryce also believed that a rigid constitution is higher than any ordinary laws in the a country, but a flexible one is not.

3. Imperial, democratic and ‘mixed’ constitutions

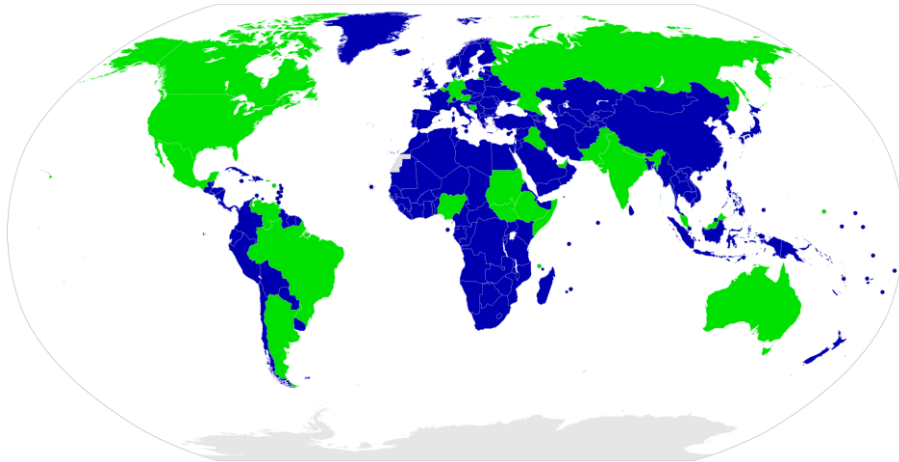
An **imperial constitution** is a constitution made in the name of a monarchy.

- The *Constitution of Prussia* 1850
- The *Constitution of the German Empire* 1971 (also known as *Bismarck’s Imperial Constitution*)
- The *Meiji Constitution* 1890
- *The *Outline of Imperial Constitution* in the Qing Dynasty 《欽定憲法大綱》

A **democratic constitution** or a **popular constitution** is a constitution made in the name of the people.

A third type is a constitution that is made under the agreement between the imperial and the people. The best example is the *Magna Carta* of the United Kingdom.

4. Federal and unitary constitutions



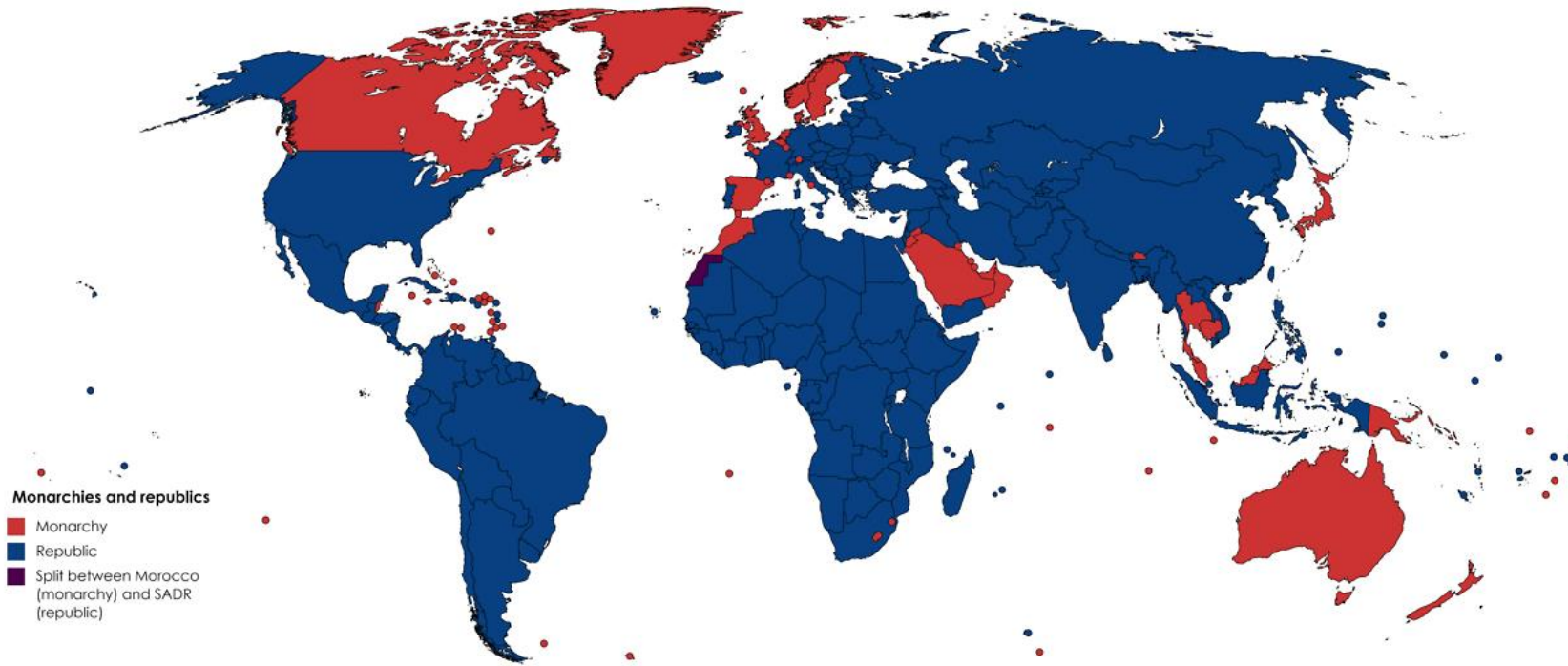
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- Federal states
- Unitary states

In a federal constitution, the powers divided between the federal government and states or provinces will be clearly set down in the document.

In a unitary constitution, how the powers are authorized by the central government to the local governments are stated.

5. Republican and monarchical constitutions



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6. Capitalist and socialist constitutions

Socialist constitutions are not the same as constitutions of socialist countries. Some countries that have always been considered as capitalist also have constitutional references to socialism, for example:

Preamble, the *Constitution of the Portuguese Republic*

The Constituent Assembly affirms the Portuguese people's decision to defend national independence, guarantee citizens' fundamental rights, establish the basic principles of democracy, ensure the primacy of a democratic state based on the rule of law and open up a path towards a **socialist society**, with respect for the will of the Portuguese people and with a view to the construction of a country that is freer, more just and more fraternal.

Preâmbulo, *Constituição da República Portuguesa*

A Assembleia Constituinte afirma a decisão do povo português de defender a independência nacional, de garantir os direitos fundamentais dos cidadãos, de estabelecer os princípios basilares da democracia, de assegurar o primado do Estado de Direito democrático e de abrir caminho para uma **sociedade socialista**, no respeito da vontade do povo português, tendo em vista a construção de um país mais livre, mais justo e mais fraterno.

7. Normative, nominal and semantic constitutions

This is an ontological classification by Karl Loewenstein, a German philosopher. It is a classification that concerns the real effectiveness of the constitutional text and how the constitution is assimilated by the social body.

Normative constitutions (規範憲法)

A constitution is normative if its rules operate as effective controls of the power-holders and as effective protection of the power-addressees against governmental arbitrariness. The normative constitution, in addition to being legally valid, is faithfully observed and complied with by all concerned. They exist in most of the old-established constitutional democracies – the United States, France, etc.

7. Normative, nominal and semantic constitutions

Nominal constitutions (名義憲法)

A nominal constitution does not lack legal validity but existential reality either as a whole as is the case frequently in the new development countries, or at least as to some individual provisions which, though formally valid have not, or not yet, been activated in actual practice. In such cases, the factual situation does not, or not yet, permit the transformation of the constitutional norms into political reality.

Semantic constitutions (語義憲法)

A semantic constitution is nothing but the outward formalization, in constitutional terms, of the existing political configuration for the benefit of the present power-holders, be it an individual person, the “dictator,” or a specific collectivity such as a party, a committee, or even an assembly as constituted organ of government. Lip service is paid to the principles of constitutionalism or even democratic constitutionalism.

What kind of constitutions are they?

The United States of America

1. Codified vs. uncoded
2. Rigid vs. flexible
3. Imperial, democratic and 'mixed' type
4. Federal vs. unitary
5. Republican vs. monarchical
6. Capitalist vs. socialist
7. Normative, nominal and semantic

The United Kingdom of Great Britain and Northern Ireland

1. Codified vs. uncodified
2. Rigid vs. flexible
3. Imperial, democratic and 'mixed' type
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The People's Republic of China

1. Codified vs. uncoded
2. Rigid vs. flexible
3. Imperial, democratic and 'mixed' type
4. Federal vs. unitary
5. Republican vs. monarchical
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7. Normative, nominal and semantic



Structures of constitutions

Source of law of the constitution

Structure of the constitution code



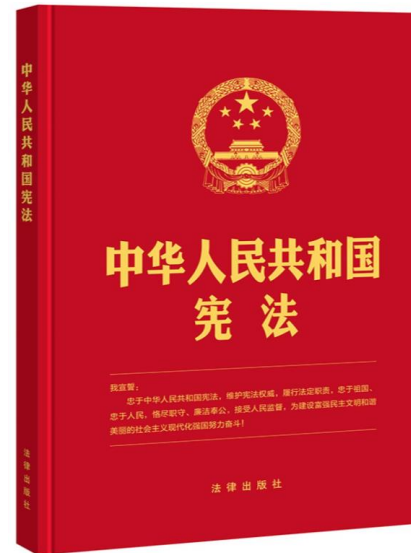
Source of law of the constitution

1. Constitution code 憲法典
2. Constitutional laws 憲制性法律
3. Precedents – the judge-made laws 憲法判例
4. Interpretation by the authority 有權機關的憲法解釋
5. Conventions of the constitution 憲法慣例
6. International treaties 國際條約



Source of law of the constitution

1. Constitution code
2. Constitutional laws
3. Precedents – the judge-made laws
4. Interpretation by the authority
5. Conventions of the constitution
6. International treaties



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Source of law of the constitution

1. Constitution code
2. Constitutional laws
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5. Conventions of the constitution
6. International treaties

In countries without a codified constitution, constitutional laws are those sets of rules that functions as a constitution, such as the *Bill of Rights*, the *Parliament Act*, the *Succession to the Crown Act* in the United Kingdom.

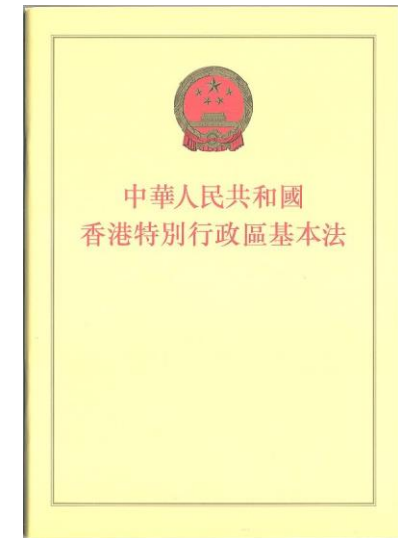
In countries with a codified constitution, constitutional laws usually refer to those laws that regulate the government organizations, the elections and the basic rights of the people. In a strict sense, these are all ordinary laws. Therefore, in China, the term “laws related to the Constitution” is preferred.

Source of law of the constitution

1. Constitution code
2. Constitutional laws (laws related to the constitution 憲法相關法)
3. Precedents – the judge-made laws
4. Interpretation by the authority
5. Conventions of the constitution
6. International treaties



Source of picture:
<http://a1.mzstatic.com/us/r30/Purple1/v4/39/ab/b9/39abb94c-27e5-6abb-663f-5a369f686122/screen320x480.jpeg>



Source of picture: <https://www.vjmedia.com.hk/wp-content/uploads/2012/12/basiclaw.jpg>

Source of law of the constitution

1. Constitution code
2. Constitutional laws
3. **Precedents – the judge-made laws**
4. Interpretation by the authority
5. Conventions of the constitution
6. International treaties

The system of constitutional review

- Judicial review
- Attribute by a political organ

Source of law of the constitution

1. Constitution code
2. Constitutional laws
3. Precedents – the judge-made laws
4. Interpretation by the authority
5. Conventions of the constitution
6. International treaties

Interpretation of the constitution is usually found in the judgement of legal cases under the system of constitutional review. When there is not a system of constitutional review, an authority may provide interpretation whenever it is necessary.

Source of law of the constitution

1. Constitution code
2. Constitutional laws
3. Precedents – the judge-made laws
4. Interpretation by the authority
5. Conventions of the constitution
6. International treaties



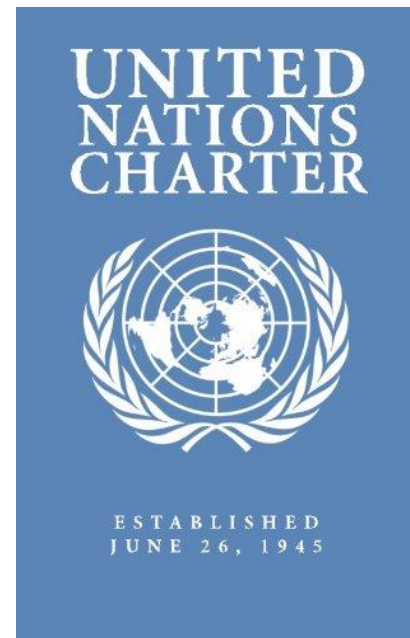
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Source of law of the constitution

1. Constitution code
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Economic, Social and Cultural Rights



International Covenant on
Economic Social and Cultural Rights

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International Covenant on
Civil and Political Rights

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Source of law of the constitution in the People's Republic of China

1. Constitution code 憲法典
2. Laws related to the constitution 憲法相關法
- ~~3. Precedents — the judge-made laws 憲法判例~~
4. Interpretation by the authority 有權機關的憲法解釋
5. Conventions of the constitution 憲法慣例
- ~~6. International treaties 國際條約~~



Structures of the constitution code

The genre or discourse structure:

1. Preamble
2. Articles
3. Appendix

The structure of contents:

1. Plan or frame of government
2. Bills of rights of the people



Functions of the Constitution



What is the “constitution” for this course?

When we come to the discipline of the study of constitution, we can look into the idea of constitution in general. However, it is a usual practice that scholars or students will study the constitution in their own country. If there is a codified constitution, the current version of it is always the content for the study.

Important knowledge points

1. The status of the constitution – the supreme law in a country and its characteristics as the supreme law.
2. What are the functions of the constitution?
3. What are the source of law of the constitution of the People's Republic of China?

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