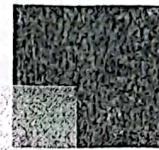


Constitution

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1. Introduction

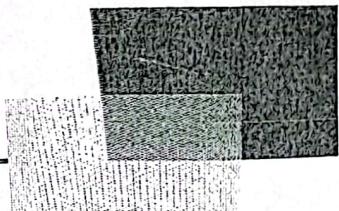


The vast majority of contemporary constitutions describe the basic principles of the state, the structures and processes of government and the fundamental rights of citizens in a higher law that cannot be unilaterally changed by an ordinary legislative act. This higher law is usually referred to as a **constitution**.

The content and nature of a particular constitution, as well as how it relates to the rest of the legal and political order, varies considerably between countries, and there is no universal and uncontested definition of a constitution. Nevertheless, any broadly accepted working definition of a constitution would likely describe it as a set of fundamental legal-political rules that:

1. are binding on everyone in the state, including ordinary law-making institutions;
2. concern the structure and operation of the institutions of government, political principles and the rights of citizens;
3. are based on widespread public legitimacy;
4. are harder to change than ordinary laws (e.g. a two-thirds majority vote or a referendum is needed); and
5. as a minimum, meet the internationally recognized criteria for a democratic system in terms of representation and human rights.

2. The fundamentals of constitutions



The functions of a constitution

- 1. Constitutions can declare and define the boundaries of the political community.** These boundaries can be territorial (the geographical borders of a state, as well as its claims to any other territory or extra-territorial rights) and personal (the definition of citizenship). Thus, a constitution often distinguishes between those inside and outside the polity.
- 2. Constitutions can declare and define the nature and authority of the political community.** They often declare the state's fundamental principles and assumptions, as well as where its sovereignty lies. For example, the French Constitution declares that 'France is an indivisible, secular, democratic and social Republic' and that 'National sovereignty belongs to the people, who exercise it through their representatives and by means of referendums'. The Constitution of Ghana (1992) states that 'The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised'.
- 3. Constitutions can express the identity and values of a national community.** As nation-building instruments, constitutions may define the national flag, anthem and other symbols, and may make proclamations about the values, history and identity of the nation.
- 4. Constitutions can declare and define the rights and duties of citizens.** Most constitutions include a declaration of fundamental rights applicable to citizens. At a minimum, these will include the basic civil

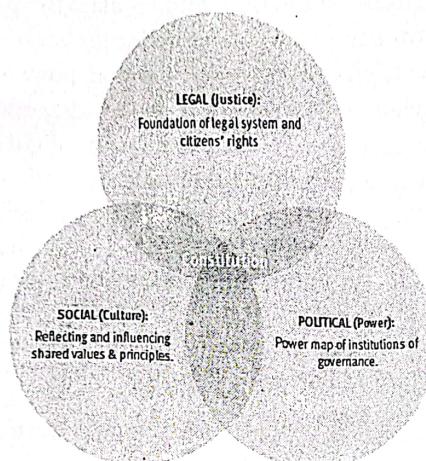
liberties that are necessary for an open and democratic society (e.g. the freedoms of thought, speech, association and assembly; due process of law and freedom from arbitrary arrest or unlawful punishment). Many constitutions go beyond this minimum to include social, economic and cultural rights or the specific collective rights of minority communities. And some rights may apply to both citizens and non-citizens, such as the right to be free from torture or physical abuse.

5. **Constitutions can establish and regulate the political institutions of the community.** Constitutions define the various institutions of government; prescribe their composition, powers and functions; and regulate relations between them. Almost all constitutions establish legislative, executive and judicial branches of government. In addition, there may be a symbolic head of state, institutions to ensure the integrity of the political process (e.g. an electoral commission), and institutions to ensure the accountability and transparency of those in power (e.g. an ombudsman). The institutional provisions typically provide mechanisms for the democratic allocation and peaceful transfer of power (e.g. elections) and for the restraint and removal of those who abuse power or who have lost the confidence of the people (e.g. impeachment procedures).
6. **Constitutions can divide or share power between different layers of government or sub-state communities.** Many constitutions establish federal, quasi-federal or decentralized processes for the sharing of power between provinces, regions or other sub-state communities. These may be geographically defined (as in most federations, such as Argentina, Canada or India), or they may be defined by cultural or linguistic communities (e.g. the 1994 Constitution of Belgium, which establishes autonomous linguistic communities in addition to geographical regions).
7. **Constitutions can declare the official religious identity of the state and demarcate relationships between sacred and secular authorities.** This is particularly important in societies where religious and national identities are interrelated, or where religious law has traditionally determined matters of personal status or the arbitration of disputes between citizens.
8. **Constitutions can commit states to particular social, economic or developmental goals.** This may take the form of judicially enforceable socio-economic rights, directive principles that are politically binding on the government, or other expressions of commitment or intent.

The constitution at the intersection of legal, social and political life

As legal, political and social documents, constitutions are at the intersection of the legal system, the political system and society (see Figure 2.1).

Figure 2.1. A constitution as a legal, social and political document



Constitutions as legal instruments

A constitution 'marries power with justice' (Lutz 2006: 17)—it makes the operation of power procedurally predictable, upholds the rule of law, and places limits on the arbitrariness of power. It is the supreme law of the land, and it provides the standards that ordinary statutes have to comply with.

Constitutions as social declarations

Constitutions often attempt, to varying degrees, to reflect and shape society—for example, by expressing the (existing or intended) common identity and aspirations of the people, or by proclaiming shared values and ideals. These provisions are generally found in preambles and opening declarations, but can also be found in oaths and mottos or on flags and other symbols that are defined by the Constitution. Other substantive provisions of the constitution, particularly those defining socio-economic rights, cultural or linguistic policy, or education, might also belong to this category (Lutz 2006: 16–7).

Constitutions as political instruments

The constitution prescribes a country's decision-making institutions: constitutions 'identify the supreme power', 'distribute power in a way that leads to effective decision making' and 'provide a framework for continuing political struggle' (Lutz 2006: 17). The political provisions show how state institutions (parliament, executive, courts, head of state, local authorities, independent bodies, etc.) are constituted, what powers they have and how they relate to one another.

Two constitutional archetypes

Constitutions balance and reconcile these legal, political and social functions in different ways. Two broad constitutional archetypes can be identified: the procedural and the prescriptive. The differences between these two types of constitutions relate to the nature and purposes of the document itself.

1 Procedural constitutions

A procedural constitution defines the legal and political structures of public institutions and sets out the legal limits of government power in order to protect democratic processes and fundamental human rights.

A procedural constitution may be appropriate in cases where it is difficult to arrive at a common agreement over issues of values or identity, but where it is possible to reach a more limited and pragmatic consensus on using democratic procedures to resolve these differences. The Canadian (1867/1982) and Dutch (1848/1983) constitutions closely reflect the procedural archetype. They proclaim no single vision of a good society but rest only on the minimal commitment to live together, to solve common problems through political institutions and to respect the rights of those who differ or disagree. They make little or no explicit mention of nation-building or of fundamental philosophical or ideological principles. They contain few substantive provisions (provisions settling particular policy issues) except where such provisions reflect pragmatic attempts to settle practical problems of cooperation in a pluralist society (e.g. language rights and ownership of resources in Canada, education in the Netherlands).

2 Prescriptive constitutions

A prescriptive constitution emphasizes the foundational function of the constitution as a 'basic charter of the state's identity', which plays 'a key role in representing the ultimate goals and shared values that underpin the state' (Lerner 2011: 18). It provides a collective vision of what might be considered a good society based on the common values and aspirations of a homogeneous community. In addition to describing how the government functions, the constitution assumes (or attempts to impose) a broad consensus on common

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societal goals that public authorities must strive to achieve. This is reflected in the emphasis placed on the constitution's social content and in the ideological shape of its legal and political content.

A prescriptive constitution may be appropriate in cases where a society wishes to re-establish itself on a shared ethical basis that is both symbolically proclaimed by, and practically embedded in, its supreme law. South Africa (1996) and Ecuador (2008) provide examples of prescriptive constitutions.

It should be remembered that these archetypes are not firm categorizations. Most constitutions contain, to varying degrees, both features. According to South African Constitutional Court Justice Albie Sachs, constitutions can be regarded as 'autobiographies of nations' (Austin 2009). Even a relatively thin procedural constitution will say something about how a society sees itself and about who is included in and who is excluded from the nation's self-narrative. Moreover, in some countries, this autobiographical function is not confined to the constitution as such. It may also be performed by a separate pre-constitutional or extra-constitutional text, such as a declaration of independence or a republic proclamation, which is not part of the legal order of the state but has an important role in maintaining social and political norms.

What does a constitution typically contain?

Divisions

Most constitutions are divided and sub-divided into parts that may variously be known as titles, chapters, articles, sections, paragraphs or clauses.

Arrangement

Constitutions vary in the arrangement of their provisions, although it is now usual for principles and rights provisions to be placed in a separate section near the beginning of the text, for the main institutional provisions to be grouped in the middle of the text, and for independent institutions, miscellaneous provisions and amendments to be placed near the end of the text.

The layout of a typical constitution might resemble the following:

1. Preamble: a statement of the overarching motives and goals of the constitution-making exercise, sometimes referring to important historical events, national identity or values.
2. Preliminaries: a declaration of sovereignty or of basic principles of government; the name and territory of the state; citizenship and franchise; state ideology, values or objectives.

3. Fundamental rights: a list of rights, including their applicability, enforcement, limitations, suspension or restriction during a state of emergency.
4. Social and economic rights or policy directives.
5. Parliament or legislature: its structure, composition, terms of office, privileges, procedures and so on.
6. Head of state: the method of selection, powers, terms of office.
7. Government (in a parliamentary or semi-presidential system): government formation rules, responsibility, powers.
8. Judiciary: Court system, judicial appointments, judicial independence, public prosecutors.
9. Sub-national government: federal or devolved powers, local government.
10. Provisions for referendums.
11. Institutions of the 'fourth branch' or integrity branch (e.g. electoral commission, ombudsman, auditors).
12. Security sector: commander-in-chief, any restrictions on military power.
13. Other miscellaneous provisions: special provisions for particular groups, language laws or institutions.
14. Amendment procedures, implementation timetable and transitional provisions.

Box 2.1. Reading between the lines

The constitutional order can include, in addition to the constitutional text itself, other written legal or quasi-legal instruments with constitutional significance. These may typically include electoral laws, laws on party financing, laws on judicial appointments and on the organization of the courts, international treaties, the standing orders of parliament and judicial decisions (Palmer 2006).

The constitutional order may also include unwritten—and legally unenforceable—rules that are nevertheless regarded by all constitutional actors as politically binding (King 2001). In Canada, for example, 'the conventions of Cabinet government' and the 'firm, though unwritten rule that the government must hold the support of a majority in the House of Commons' are not mentioned in the constitutional text but are well established in the conventional practice of the Canadian constitutional order (Van Loon and Whittington 1987: 172).

2. The fundamentals of constitutions

Size and length

Constitutions vary in length from a few thousand words (Iceland, Latvia) to more than 50,000 words (India). Newer constitutions tend to be longer than older ones, and federal constitutions longer than unitary ones. A national constitution in printed form may vary from the size of a small pamphlet to that of a fairly large book.

The constitution and the constitutional order

Despite the proliferation of nominally democratic constitutions, only a minority of states have so far succeeded in maintaining a lasting democratic constitutional order. There is little benefit in having a constitution that can be ignored with impunity or changed unilaterally by those in power, or one that is so framed that the democratic nature of the constitution can be undermined by ordinary laws or by exclusionary political practices. Likewise, if the rule of law is weak, such that the constitution is selectively applied, this will undermine the achievement of a constitutional order.

A constitutional order, in this sense, represents 'a fundamental commitment to the norms and procedures of the constitution', manifest in 'behaviour, practice, and internalisation of norms' (Ghai 2010). The constitutional order is much broader than just the constitutional text (see Box 2.1). It can include customs, conventions, norms, traditions, administrative structures, party systems and judicial decisions that are integral to the practical workings of the constitution. This deep cultural internalization of a constitutional order is very hard to achieve (Ghai 2010). It is embodied, ultimately, in the political culture and in the 'free and civic way of life' of a people (Viroli 2001).

It is important to recognize at the outset that building a democratic constitutional order is a long-term process. Drafting the constitutional text is only a small part of the challenge; it is also necessary to establish institutions, procedures and rules for constitution-making (preparatory stage); to give legal effect to the constitution (ratification and adoption) and, crucially, to ensure that the spirit and the letter of the constitution are faithfully implemented. Each stage of this process depends for its success on the agreements reached at the preceding stage: a poorly conceived drafting process is unlikely to yield a successful text or to serve as the basis for a viable, stable and legitimate constitutional order.

The Importance of a Democratic Constitution

1. The people have the right to choose their own form of government.

There are many different types of government in the world. Different countries need different forms of government to suit their particular circumstances and traditions. The people of a country therefore must choose the style that they think right for their country. Rulers have no right to impose a form of government different from the one that the people chose. Democracy means not only electing politicians but also choosing the form of government. If the people have not had the opportunity to choose their own form of government, then democracy does not exist. As point 3 will explain, the people generally codify these choices in a *constitution*.

2. The people have the right to put enduring limits on their government.

Once the people have chosen their form of government, then the rulers may not thereafter change it. By choosing the form of government, the people have the right to limit the government officials, who may not depart from the rules laid down by the people. The people typically put several kinds of limits on officials.

- First, they divide power among different parts of the government: they give the president certain powers and the judiciary other powers, and so forth. Once the people have marked out this division, the officials may not shift it. The president may not, for example, try to intrude on the domain of the judiciary by deciding court cases himself, and he may not intrude on the domain of the legislature by making laws. This division of power between different parts of the government has a technical name: *separation of powers*.
- Second, they sometimes divide powers between the central government and more local governments such as provinces. They might, for example, give the central government power over the military, and they might give local governments power over local schools. Once the people have made this division, neither the central government nor the local governments may try to change it. The local government may not, for example, try to take over the military, and the central government may not try to take over local schools. This division of power between center and periphery has technical names: some people call it *federalism*, and others call it *autonomy*.
- Third, they require that the government respect the people's individual rights. Different constitutions protect slightly different collections of individual rights, but the trend of world history has been to protect more and more rights, not fewer. Commonly, constitutions protect the individual right to religious practice, self-expression, criticism of the government and protest, political organization, non-discriminatory treatment, and fair criminal procedures. Once

the people have protected these rights, the government may not invade them except in truly exceptional circumstances spelled out by the people in the constitution itself.

- Fourth, they require that the government shall be accountable to the people through regular and free elections. Frequently, the people detail the rules governing elections in some detail: when and how often elections will occur; who may vote; who may stand for office, and so on. It is especially important to make rules providing that elections be free, fair, and transparent, or else the vote-counters—rather than the voters—will be choosing the representatives. It is also especially important to provide for multi-party democracy, or else the people will not be making a choice between real alternatives. Once the people have made these rules, government officials may not contravene them, as for example, by staying in office longer than their term, or disenfranchising certain people, or intimidating voters, or refusing to register political parties. This set of rules governing elections also has a technical name: *electoral law*.

3. Once the people have chosen a form of government and limits on the government, they have the right to entrench those rules in a constitution.

The people create and limit the government; the government is like the servant or the child of the people. In the constitution, the people give instructions to their servant, the government. A constitution must therefore be as clear and specific as possible, or else the instructions will be vague. For that reason, the constitution is typically a written document. The term *constitution* literally means *creation or foundation*, because in the constitution the people create and found a government, which has no legitimate power apart from the people's will expressed in the constitution. The people must therefore take certain steps to ensure that the constitution functions as a set of instructions to the government from the people.

- First, the people must play a *dominant role* in the process of drafting and adopting the constitution. Ideally, the constitution should be written by a constituent assembly elected by the people, with heavy representation of traditionally under-represented groups such as women and ethnic minorities; the people should have opportunity for input both before and after the draft is written; and the draft should be adopted only if it passes a referendum vote.
- Second, the constitution must be *entrenched*, so that the government may not freely change it. If the government may change the constitution by ordinary legislation, then the constitution will place no effective limit on the government—and the point in the constitution is to allow the people to place enduring limits on their government. Therefore, it should be difficult to amend the constitution, and any amendment should be adopted only if it passes a referendum vote, perhaps with a requirement of super-majority support.
- Third, the people must create a *constitutional enforcement mechanism* to ensure that the government pays heed to its instructions. Unless the constitution is actually enforced, it is only a paper tiger. Therefore, the people must not only create limits on their government; they must also create a mechanism or mechanisms to enforce those limits. One of the most important enforcement mechanisms is the holding of free and fair multiparty *elections*: if the people feel that their government is violating the constitution, hopefully they will vote the government out

of office. But elections are seldom sufficient by themselves. Elections occur only periodically, and in between the government might be committing large scale constitutional violations with impunity. The people might also have a limited understanding of the meaning of the constitution and/or of the facts of government wrongdoing. Therefore, it is generally thought important to create *a full-time professional watchdog* with great constitutional expertise and access to information about the government's behavior. Though technically part of the government, this body must in substance exist outside the government, so that it can scrutinize the behavior of office-holders. Ordinary people must also have access to this body so that they can challenge government wrongdoing experience in their daily lives. Typically, this body is a court, but it could also be an independent council or commission.