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Constitutions

AIMS AND OBJECTIVES

At the end of this chapter you should be able to:

- Define a constitution
- Appreciate the nature and content of constitutions
- Appreciate the purpose of constitutions
- Distinguish between different types of constitution ■ Understand the concept of constitutionalism

1- **Definition**

A constitution can be defined in two ways: either with a **narrow** or a **wide** meaning. In a **narrow** sense they have described a constitution as:

‘ . . . a document having a special legal status which sets out the framework and principal functions of the organs of government within the state and declares the principles or rules by which those organs must operate.’

In a broader sense of the term :

‘ . . . the whole system of government of a country, the collection of rules which establish and regulate or govern the government.’ (2)

In its first report in July 2001, the House of Lords Select Committee on the Constitution recognized the difficulty in defining the term

‘constitution’ and put forward the following definition:

‘Our working definition of a constitution is that it is the set of laws, rules and practices that create the basic institutions of the state and its component and related parts, and stipulate the powers of those institutions and the relationship between the different institutions and between those institutions and the individual.’

For present purposes, therefore, we may conclude that **a constitution is simply a set of rules and principles that govern the organisation and structure of the state which the governing institutions must adhere to**. As will be indicated below, these constitutional rules will almost invariably be found in a single written document entitled ‘The Constitution’, although sometimes – as in the United Kingdom – these rules are located other than in a single specific constitutional document .

ACTIVITY

self-test question

Using the above definitions, how would you define a constitution in your own words?

2-The contents of a constitution

What will a constitution contain? The exact contents of a state constitution will differ from state to state. It must be remembered that constitutions exist in both democratic and non-democratic countries, although by their nature, democratic constitutions should follow the principles of **constitutionalism** .

As an introduction or foreword, a preamble is found in many state constitutions. It tends to be declaratory in nature and identifies the people as the constituent (sovereign) power from which the moral authority and legitimacy of the constitution derives.

For example, in the **Algerian Constitution (2016)** it is stated at the end of preamble that:

The pride of the Algerian people, their sacrifices, sense of responsibility and inveterate adherence to freedom and social justice reflect the optimum guarantees of their respect for the principles of this Constitution which they shall adopt and bequeath to the future generations, the successors of the pioneers of freedom and the founders of the free society.

2.1 The establishment of the institutions of government together with their roles, powers and functions

A constitution will set out the basic ground rules of the state which will include the establishment of its institutions . In short, it will establish and detail the principal institutions of the state together with their roles/functions:

- The executive/government institution which enforces the law and makes policy decisions (Prime Minister/**Cabinet**/President).
- The law-making institution which passes legislation (Parliament/ Congress/ Assembly).
- The judicial institution which interprets and declares the law (the tribunals / courts /**Supreme Court**).

For example, the Constitution of Algeria (2016) states the following:

Title 1

THE GENERAL PRINCIPLES GOVERNING THE ALGERIAN SOCIETY

Title 2 ORGANISATION OF POWERS

CHAPTER I The Executive Power

Art. 84 - The President of the Republic, Head of State, shall embody the unity of the Nation.

He shall be the guarantor of the Constitution.

He shall embody the State within the country and abroad.

He shall reserve the right to address the Nation directly.

CHAPTER II The Legislative Power

Art. 112 - The legislative power shall be exercised by a Parliament, consisting of two Chambers, the People's National Assembly and the Council of the Nation.

Parliament shall draft and vote the laws in a sovereign manner.

CHAPTER III The Judicial Power

Art. 156 - The judicial power shall be independent. It shall be exercised within the framework of the law. The President of the Republic shall be the guarantor of the independence of the judiciary.

2.2 The establishment of the relationship between the different institutions of the state

A constitution will also set out the constitutional relationship between the various institutions established under it. In a democracy this relationship will necessarily involve the principle of the system of checks and balances between the institutions .

For example, the constitution of the United States stipulates that Congress is the body responsible for passing legislation; however, Art I, s 7 states that before a Bill becomes law it must be presented to the President for approval. If the latter rejects the Bill, it can still become law providing that Congress reconsiders it and both congressional chambers pass the Bill with a two-thirds majority. This therefore sets out the constitutional relationship between the President and Congress in the context of the passage of legislation.

In the German Constitution (1949), Art 67 states that the Bundestag (the lower House of the German Parliament) can express a lack of confidence in the Federal Chancellor by electing (with a majority of its members) a successor to replace them. Thus, a major theme of public law is how the state institutions relate to and complement one another and, most importantly, how they check and balance one another.

2.3 The establishment of the relationship between the state

institutions and the individual إقامة العلاقة بين مؤسسات الدولة والفرد

As noted above, constitutional law is partly concerned with how the individual relates to the state (ie what powers can the state exert over the individual?). For example, in what circumstances can the individual be arrested and detained or have their freedom of expression interfered with? A democratic constitution, however, will constitutionally ring-fence and safeguard certain basic rights of the individual with which the state institutions cannot interfere (or can only do so with compelling justification). In other words, this means that the rights of the individual are put beyond the reach of the state. In one sense, this can be seen as part of the social contract which the citizen makes with the state. This in turn confers legitimacy on the state institutions to rule.

One of the most famous declarations of basic and fundamental human rights is ‘the **Bill of Rights**’ containing the first ten amendments of the constitution of the United States. As an example, the Fourth Amendment of the Bill of Rights is set out below:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2.4 The methods and procedures to change the constitution (amendment)

Although constitutions are (generally) documents which embody the framework of the state, they are not necessarily meant to be documents which are incapable of amendment and improvement. Indeed, the contents of a state constitution which could not be altered in any way in order to adapt to changing times would make the

citizens of that state a prisoner of their constitution, as after all, their constitution may have been drafted decades, if not centuries, before. A constitution will typically, therefore, stipulate the method and procedures that must be complied with in order to alter its provisions.

Let see how the process in Algerian constitution : 

Title 4

ON CONSTITUTIONAL AMENDMENT (CONSTITUTION 2016)

Art. 208 - The constitutional amendment shall be decided on the initiative of the **President of the Republic**. It shall be voted in identical terms by the

People's National Assembly and the Council of the Nation in the same conditions as a legislative text.

It shall be submitted by referendum to the approval of the people within fifty (50) days of its adoption.

The constitutional amendment, approved by the people, shall be promulgated by the President of the Republic.

Art. 211 - Three-quarters (3/4) of the members of the two Chambers of Parliament, meeting in joint session, may propose a constitutional amendment and present it to the President of the Republic, who may submit it to a referendum.

If its approval is obtained, it shall be promulgated.

Art. 212 - No constitutional amendment shall undermine:

- 1- the Republican character of the State;
- 2- the democratic order based on a multi-party system;
- 3- Islam as the religion of the State;
- 4- Arabic as the national and official language;
- 5- the fundamental freedoms and the human and citizens' rights;
- 6- the integrity and unity of the national territory;
- 7- the national emblem and the national anthem as symbols of the

Revolution and the Republic;

8- the re-eligibility of the President of the Republic for a second term.

KEY FACTS Key facts on the contents of a constitution

A constitution will detail the principal institutions of the state, their functions and powers.

A constitution will establish the relationship between each of the state institutions together with how these institutions relate to the citizen.

A constitution will also indicate how (or if) it can be altered and the process that must be undertaken in order to do so.

4 The purpose of a constitution

Why do countries have constitutions? There are many reasons for creating a constitution, and these are set out below.

4.1 To ensure stability and order

As noted above, all countries (and organizations) have a constitution of some description because all societies require rules and organisation in order to ensure stability. Without a set of basic rules there would be no structure or organisation and chaos would ensue. Constitutions, therefore, provide a set of basic ground rules and principles which establish and regulate the basic framework of the state. A constitution helps ensure that a state – or indeed even a social club – achieves its primary purpose and objectives.

For example, if one object of a people is to safeguard the basic human rights of the individual in society (particularly vulnerable minorities), this can be achieved with a constitution setting up a mechanism such as a declaration of human rights, together with a Supreme/Constitutional Court to safeguard and protect such rights from infringement.

4.2 To ensure that government operates by consent and has constitutional and moral legitimacy

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Thomas Paine, writing in the eighteenth century, stated that: 'A constitution is not the act of a government, but of a people constituting a government, and a government without a constitution is power without right. . . . A constitution is a thing antecedent to a government; and a government is only the creature of a constitution.'

'Rights of Man' in *The Complete Works of Thomas Paine*, cited in B Thompson, M Gordon and A Tucker, *Cases and Materials on Constitutional and Administrative Law* (13th edition, Oxford University Press, 2022) p 1.

4.3 To represent a constitutional watershed

A state constitution is generally founded to represent a break with the past and so represent a watershed in terms of the history, politics and institutional structure of that particular state. For example, the creation of a constitution may well follow:

- A revolution: the United States (1789)
- Independence following colonial rule: Malawi (1966)
- The removal of a dictatorship: Spain (1978)
- A war: West Germany (1949), Japan (1947).

4.4 To affirm particular values and goals

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All constitutions are drafted with certain underlying principles and goals in mind. These could be, for example, the promotion of democratic values, open government, the welfare and public good of the citizen or the attainment of religious aims.

Key facts on the purpose of a constitution

THE rationale behind a constitution is to ensure the following:

- Order and stability.
- The legitimacy of the governmental institutions.
- To mark a watershed.
- To limit governmental power.
- To affirm specific goals considered important for that society.

5-Different types of constitutions

There are various types of constitutions in existence around the world and set out below are three principal ways in which they can be (very broadly) categorized and classified.

5.1 Written and unwritten constitutions/codified and uncodified constitutions

Historically, one major way of classifying and distinguishing between constitutions was through the labels of written and unwritten constitutions. A written constitution was one in which the rules of the constitution were located in a written document entitled 'The Constitution'. For example, the Constitution of the United States can be found in the document called the 'United States Constitution', which contains seven articles along with their various amendments. Similarly, the Indian constitution can be found in a document which comprises almost 400 articles and nine accompanying schedules. In contrast, an unwritten constitution would be one in which the major constitutional rules of the state could not be found in a single written document – as in the United Kingdom.

5.2 Rigid and flexible constitutions

Historically, constitutions have also been classified according to

whether or not there is a special procedure which must be followed in order to change the constitutional text (and therefore constitutional law). In order to alter the content and provisions of a rigid constitution, a procedure is stipulated which requires specific legal/constitutional obstacles to be overcome. For example, a proposed amendment may require the approval of the people in a national referendum and/or the use of special majorities in the parliament/assembly.

In contrast, a flexible constitution is one in which the content and principles of the constitution can be amended by the ordinary legislative process used to alter non-constitutional laws. Flexible constitutions are much less common than rigid constitutions because constitutional laws, by their very nature, are viewed as being fundamental and so *should* be more difficult to change than non-constitutional laws

It should be noted that, just because a constitution is labelled as rigid (owing to its prescribed method of amendment), it does not necessarily follow that the constitution is never amended or that in practice it is *actually* very difficult to alter. In reality, changes to a constitution are driven by, and dependent on, the political will in that particular state. As indicated above, the constitution of the United States has been altered formally on 27 occasions, even though there are significant obstacles to be overcome in order to change it. In contrast, a flexible constitution may not necessarily be changed frequently in practice, even though it is technically possible to do so.

5.3 Federal and unitary constitutions

A federal constitution (such as in the United States, Australia and Germany) is one where the powers and responsibilities of the institutions of the state are constitutionally divided between the centre (federal institutions) and the regions/states/provinces. For example, in the United States the federal (national) Congress has

specified powers and responsibilities under the constitution (eg in relation to national and international affairs). In contrast, the legislatures of the various states (eg Florida or California) have powers and responsibilities which relate specifically to the regulation and government of that particular state

self-test questions

Explain the main ways in which constitutions can be classified. Are these useful or definitive?

(1) A Bradley and K Ewing, *Constitutional and Administrative Law* (15th edn, Pearson/Longman, 2011), p 4.

(2) K Wheare, *Modern Constitutions* (2nd edn, Oxford University Press, 1966), p 1.

(3) The House of Lords Select Committee on the Constitution, *Reviewing the Constitution: Terms of Reference and Method of Working*, HL Paper 11 (2001), p 16.

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