



Constitution Brief

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Summary

This **Constitution Brief** provides basic information about the nature and functions of constitutions and is intended for use by constitutions-makers and other democratic actors and stakeholders.

About this series

International IDEA's Constitution Briefs are produced by the Myanmar Constitution Centre's **MyConstitution** project. MyConstitution aims to foster a home-grown, well-informed and inclusive debate through learning, advocacy and advice to stakeholders including political parties, members of parliament, ethnic groups, military, media, civil society organizations and citizens at large.

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About International IDEA

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The Fundamentals of a Constitution

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1. What is a constitution?

A constitution is a body of basic laws and principles that describes the general organization and operation of the state. A constitution most often contains fundamental principles and norms that underlie and guide all government action. As a supreme or higher law, its provisions provide a framework under which all regulations, legislation, institutions, and procedures operate.

Additionally, a constitution usually represents a vision of the state, expressing its basic values national identity. Importantly, it also articulates the rights of citizens that institutions, procedures or legislation must not infringe, and which the state must strive to ensure. Given the fundamental nature of a constitution and its role in laying a groundwork to shape and support the state, a constitution is most often expected to be long-standing and somewhat difficult to change or undo.

Political versus legal constitutions

Categorizations or distinctions about constitutions can be useful tools for examining and understanding them. One way to categorize a constitution is to determine whether it is, or the ways in which it is, a political or legal constitution. This distinction depends on the branch of government tasked with overseeing or constraining executive power. A constitution is said to be political when the legislature is the main body constraining executive action. Many countries with parliamentary systems have political constitutions because under these systems executive power is heavily linked to the parliament. A classic example in this context would be the United Kingdom.

Checks that a political constitution can place on the government include the ability of the legislature to participate in the executive's decision to declare a state of emergency, or the legislature's ability to dismiss the head of government. At the same time, a constitution is said to be legal when the judicial branch is mainly responsible for constraining executive power. A legal constitution often gives the judiciary the power to determine the constitutionality (and therefore legality) of an executive action. Most constitutions provide for both political and judicial checks on the government's exercise of power, which makes it harder to draw a sharp distinction between a political and a legal constitution. However, such distinctions can be useful in thinking about the extent to which each branch is responsible for overseeing or constraining government action.

Rigid versus flexible constitutions

Another potentially useful categorization of constitutions is whether they are rigid or flexible. This categorization refers to how easily a constitution can be amended and how easily the constitutional landscape and framework can change. A constitution is said to be rigid when it is difficult to amend or change. It is said to be flexible when it is more easily amended. The advantages of a rigid constitution include the establishment of a stable and reliable legal landscape, the heightened protection of constitutional rights and values, and perhaps increasingly consistent enforceability of constitutional structures and provisions.

Flexible constitutions, in contrast, allow the constitution and the government to act and react more easily as times change. They prevent future generations from being bound by past commitments when it no longer serves the common good. They provide less protection, however, against actors or parties in power who wish to change the constitution or diminish constitutional protections in order to serve their self-interests. Amendments are further discussed below.

Written versus unwritten constitutions

A third distinction is sometimes drawn: whether a constitution is written or unwritten. This distinction focuses on the nature of a constitution, whether entirely written down and specified in a constitutional document, or whether it is a more nebulous body of laws contained in precedent, tradition, customary laws and practice. Except for the United Kingdom, which is the most often cited example of a polity with an unwritten constitution, many contemporary constitutions are actually written.

Nonetheless, while the distinction between written and unwritten constitutions is an interesting lens through which to compare and contemplate constitutions, in most countries established constitutional law has origins in and consists of both a written constitutional document and unwritten norms, customs, and practices.

2. What is a constitution meant to do?

A constitution serves multiple purposes. It organizes the state and designates state power to actors, bodies, and institutions or branches of government. It authorizes government actions, assigning certain powers and responsibilities to branches (the executive, the legislature or the judiciary), actors (e.g. presidents, ministers, officials and high court justices), or bodies (e.g. electoral management bodies). These constitutionally-assigned powers may include the authority to propose laws, to pass laws, to command a military, or to settle disputes.

Dispersing powers and decentralization

Importantly, a constitution's distribution of powers is most often also a dispersal of powers, intended to create balance and prevent a potentially dangerous amassment of power by any one actor or part of government. A constitution usually attempts to balance power among multiple actors and institutions, creating a system of checks and balances, to ensure no single actor or body accumulates wields too much power independently. Likewise, decentralization of power by assigning it to regional or local authorities provides a way to balance power.

Decentralization also provides recognition and empowerment to regions, as well as marginalized or minority groups. The establishment of a federal system, such as provided for in India's constitution, is a classic version of decentralization. Like most aspects of constitution building, there are as many unique ways to balance or decentralize power as there are constitutions and as always the specific context—the history, tradition, social and political landscape—of any specific country must drive the constitution's design and development.

Expressing identity

A constitution is also an expression of identity, and a manifestation of the coming together of people of diverse ethnic groups, ideologies, regions, cultures, religions,

genders. In order for the constitution to function, to be embraced by diverse groups that make up a state, and to represent the values, principles and identities of the people it represents, the voices of the people must be heard and reflected throughout the constitution's development. The constitution should reflect shared values and agreements that enable diverse groups to come together for the common good: to create wealth, security and health.

A constitution presents a vision of a national identity or enumeration of basic principles, which can be more than merely aspirational. In many cases, basic principles and values can be enforceable. A statement of identity, for instance the recognition of an official language, may prevent a government from later marginalizing an aspect of identity or a particular group, for instance by preventing or deterring the use of a particular language. Likewise, values that are constitutionally enshrined, such as the principle of non-discrimination or non-sexism, may provide a legal basis to prevent legislation, regulation or state action that conflicts with those values.

Limiting state powers

At the same time that the constitution represents a coming together to empower the state, it is also a legal document, placing demands and limitations on state power and operations, as well as on citizens. These limits ensure equality and democratic legitimacy and protect against corruption, oppression, discrimination, and abuse of power. As a body of laws and a document declaring rights, a constitution protects against oppression and constrains the ability of the state to act by guaranteeing rights. This includes what the government cannot do to a person, such as unfounded detentions or cruel punishments, and what the government should do for its citizens, such as provide education and healthcare or responsibly managing natural resources.

Recognizing international law

Constitutional recognition of international law or treaties is another common legal commitment that can guide state action. Almost all constitutions refer to international law, international treaties, or international organizations such as the United Nations. Recognized international law may even be enforceable under the constitution. The 1986 Constitution of Nicaragua, for example, embraced international standards providing support to a policy of decentralization and strengthening of indigenous rights. These rights were later upheld in the country's Supreme Court, relying in part upon the Constitution's commitment to international law. The constitutions of many West African countries also incorporate various international and regional human rights standards, which have been upheld and enforced by national courts in human rights cases.

A constitution is therefore a simultaneously legal, political, and social instrument. It enshrines human rights, limits governmental power, and creates a predictable legal landscape. It also organizes and distributes power, establishing a political landscape. At the same time, it represents the voice of the people who live under it, creating a shared identity and declaring shared values, thereby supporting a harmonious social and cultural landscape.

3. What is a constitution not meant to do?

A constitution is not meant to provide laws and regulations for every aspect of a functioning society. It is usually neither practical nor beneficial for a constitution, when envisioned as a long-term, general framework for operation of the state, to wade too deeply into details. It is impossible to predict how society will look in the future and what its specific circumstances and needs will be.

To take one example, on the issue of health, many constitutions declare a right to health care provided by the state. To the extent a constitution offers further details on the form of the health care system, the responsibility for it and access to it, it usually does so in broad terms. A constitution does not and cannot provide

Box 1. The right to health care in Myanmar's Constitution

Article 367 of Myanmar's Constitution (2008) recognizes every citizen's right to health care:

'Every citizen shall, in accordance with the health policy, laid down by the Union, have the right to health care.'

Article 28 of the Constitution also provides that the Union shall 'enact the necessary law to enable national people to participate in matters of their ... health'.

every detail related to financing, regulation, and operation of a health care system. These are instead left to legislation which will be passed to ensure the envisioned right is protected and fulfilled.

For example, Myanmar's Constitution (2008) recognizes every citizen's right to health care (see Box 1). Likewise, in Afghanistan the Constitution guarantees healthcare 'in accordance with the provisions of the law', and encourages the establishment of private medical services and health centres. However, it does not provide concrete detail about the laws that will enact health care provision, or about how medical services will be encouraged. Given the complexity of health care and the myriad options for promoting health and providing care, as well as the rapid advances and development of health care systems and regulations, a constitution is not an ideal place to specify the details of a health care system. Instead, these are left to legislation and regulation at levels most efficient to delivery.

Similarly, Bolivia's 2009 Constitution enshrines health as a right and prohibits discrimination in access to health. It furthermore sets out a vision, declaring fundamental values for the health system: that it be singular, universal, free, equitable, intracultural, intercultural, and participatory, with kindness, quality and social control, based on the principles of solidarity, efficiency, and co-responsibility. The particulars of the system itself, however, are left to be developed by public policies at all levels of government, in line with the constitution's declared vision.

At the same time, key details of government responsibility may be provided in the constitution and these offer a reinforcement of the requirements placed on the government and a firm ground on which to ensure later implementation of the specific requirement. In an area such as health, specifics can relate to the designation of resources or specific expected coverages, such as maternity care.

The Egyptian Constitution of 2014, for example, specifies a commitment to allocate a minimum of 3 per cent of gross domestic product to health, a percentage which should gradually rise, according to the Constitution. Such details provide a concrete commitment to some level of action, leaving both room for future changes, but setting forth a minimum of dedicated resources under which no government commitment may fall. However, even where key details are included, many others are left for further development at lower levels.

4. How is a constitution drafted?

There are many paths, containing many different phases, to drafting a new constitution. Since each process is different, the first step after deciding on the need for a new constitution is to determine a design for the process. This requires negotiation and agreement among multiple groups, including those in power and opposition groups, as well as both majority, minority and marginalized groups, including representation of historically disadvantaged genders.

The decision to pursue a new constitution and agreements on the process may be made as part of or following a peace or cease-fire agreement. It may also be part of a process aimed at transitioning to or strengthening democratic rule. For example, the Constitution of Myanmar was written as part of long-term process aimed at ending conflict, restoring peace and building a more democratic state.

It may be desirable to involve the international community (in the form of mediation or advice) at an early stage. Experts such as constitutional lawyers or political scientists may also assist during the early stages, but are more often relied on for an advisory or drafting role in later deliberation and debate stages.

Reaching agreement

In designing the process, groups need to build agreement on a number of issues including the form and composition of the constitution-making body. Will it be a broadly representative constituent assembly? Or a parliament? Or a small expert commission? How will its members be selected: by appointment or elections?.

Agreement will also need to be reached on the decision-making process within

the body. Will it be consensus-based or be subject to the decisions ballot? What thresholds—simple or supermajority vote—will determine the validity of a ballot process? Must some decisions be unanimous?

Agreement will also need to be reached on the process for adopting the constitution—will it be by a popular referendum or a parliamentary approval process or both?—as well as the processes for ensuring public participation. At what stage in the process should the public be engaged and how will that be done?

In most cases, these questions will be addressed through a legal framework that also sets out the timeline for the process. In others, especially in countries emerging from conflict, these will be set out in a peace agreement (as in Burundi and Sudan), or an interim constitution (as in South Africa) or both (as in Nepal).

Basic principles

A set of negotiated basic principles with which the new constitution must align may also be negotiated before drafting begins. Such a body of standards, called constitutional principles, was a key aspect of South Africa's Interim Constitution which provided the main framework for drafting the permanent constitution. The draft constitution was even judicially scrutinized to affirm its conformity with the agreed-on principles and a number of provisions were found to be inconsistent with the principles. These provisions were then altered to align with the constitutional principles before ratification of the Constitution. Devices such as basic principles and interim constitutions serve to guide the drafting bodies and ensure adherence to key negotiated elements.

Once initial determinations and agreements have been reached, a constitution-making body is convened to begin its work of deciding on the essential elements of the constitution. Most often such a body is elected—whether specifically for the task of constitutional drafting (such as a constituent assembly), or in the form of elected officials such as legislators who take on the additional task of constitution-building. Other constitution-making bodies are appointed or executive-driven.

Constitution-making bodies

The size and composition of a constitution-making body can vary greatly. A small group such as a committee or subcommittee, an appointed commission, or an expert committee of legal drafters often undertakes the drafting of the text itself. The task of the writing is to set the inputs, agreements, and aims of the stakeholders into a coherent, viable draft to be examined, discussed and debated by both the constitution-making body and the public, including civil society organizations, citizens, the international community, and in the media. Media and social media provide excellent venues for disseminating information about the constitution and for fostering debate as well as for collecting opinions.

Although consideration of public input and participation (e.g. through public hearings) is advisable at early stages, an opportunity for public comments or hearings may also be useful once drafts are on the table before the final work of the constitution-drafting body. There are generally two alternative—although not necessarily exclusive—approaches where public participation is envisaged.

One approach (used by Kenya in 2003) involves the draft being written with the input of the public. The constitution-making body kicks off its work by consulting and collecting public views from which it then produces a draft which then goes through a process of further debates and refinement at various stages before arriving at a final draft. This process allows the public to begin to shape the constitution from the very outset, potentially maximizing the impact of people's expressed needs and desires.

In the second scenario (seen in Kenya 2009), the constitution-making body unilaterally writes the initial draft, after which it is taken to the public for comments. In other words, the public is hardly consulted or its input invited going into the development of the initial draft. One benefit of this model is the ability of the public to debate and comment on concrete proposals.

5. How does a constitution come into force?

Many constitutions are ratified or adopted through a national referendum. This is especially often the case where the constitution-writing body is appointed or indirectly elected. In these cases, the lack of representation in the debating and drafting processes is compensated for by the direct input of the public through a national vote. Referendums are most often held on the question of adoption of the constitution as a whole but they may also be held to resolve a particularly contested provision. Constitutions may also be adopted by the constitution-writing body, such as a constituent assembly.

In addition to ratification of the constitution, much work is usually put into its implementation. Constitutional provisions sometimes need to be enacted in law—legislation must be enacted to fulfil the constitutional promises or changed to reflect the demands of the new constitution. New institutions are sometimes created and elections are usually held sometimes under new laws. New processes and procedures providing judicial access to complain when constitutional rights or the new constitutional order have not been upheld area often needed.

6. How is a constitution amended?

Given the foundational role they play, constitutions are often meant to be long-term, deeply rooted instruments that are more difficult to change than other forms of law. The continuity and legal certainty they provide supports societal stability. At the same time, an unchangeable constitution presents its own difficulties, potentially committing future generations to provisions which no longer serve the greater good or function as they should. Constitutions that lack flexibility present a risk of being violated or failing entirely when unforeseen circumstances arise. Therefore, most constitutions allow for a process of amendment. An amendment is a formal change in the text of a constitution. The change can take the form of a variation to the text, a removal of text, or an addition.

Most constitutions have relatively burdensome amendment procedures, often involving multiple actors, institutions, or other bodies. Others, such as the constitutions of India and Myanmar, have hybrid amendment rules that combine a mix of rigid and flexible procedures for the amendment of different provisions. The involvement of multiple stakeholders protects against self-serving amendments. Some amendment procedures require a referendum to change the constitution, such as Japan's, which allows for public debate and input into the process.

Other constitutions require the support of two legislative sessions (one proposing an amendment and the other ratifying it, such as under Norway's Constitution), with an election in between sessions, which also provides a form of public input into the issues on the table. The greater the number of procedural burdens and actors involved in amendment processes, the more entrenched the constitutional provisions are and the less vulnerable it is to change at the will of powerful individuals or groups.

The Constitution of Myanmar, like that of the United States, is an example of a constitution with rigid amendment procedures at least in so far as some articles are concerned (see Box 2). Certain provisions are so deeply rooted that amending them requires a 75 per cent majority of all members of the Pyithu Hluttaw and a national referendum with the support of over half of all eligible voters in order to be amended. This high burden is placed on provisions related to, among others, basic principles, state structure, and the qualifications of the president and vice president, as well as the formation of the Pyidaungsu and the structures of the Pyithu Hluttaw, the Amyotha Hluttaw, and the Region or State Hluttaw.

Box 2. Amending the Myanmar Constitution

'If it is necessary to amend the provisions of Sections 1 to 48 in Chapter I, Sections 49 to 56 in Chapter II, Sections 59 and 60 in Chapter III, Sections 74, 109, 141 and 161 in Chapter IV, Sections 200, 201, 248 and 276 in Chapter V, Sections 293, 294, 305, 314 and 320 in Chapter VI, Sections 410 to 432 in Chapter XI and Sections 436 in Chapter XII of this Constitution, it shall be amended with the prior approval of more than seventy-five percent of all the representatives of the Pyidaungsu Hluttaw, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote.'

—Article 436(a), Constitution of Myanmar (2008)

7. Are there parts of constitutions which cannot be amended?

Yes, many constitutions contain unamendable provisions. These are provisions that declare an essential aspect of the state, or an essential element of the national identity. Additionally, they may be provisions that protect against specific potential problems such as an undemocratic amassment and entrenchment of power. Tunisia's 2014 Constitution, for example, contains several unamendable provisions. Article 1, which declares Tunisia's freedom, independence, sovereignty, religion, language, and system of government, is unamendable. Similarly, article 2 is unamendable and declares that the state is 'based on citizenship, the will of the people, and the supremacy of law'. Meanwhile, article 75 protects a specific aspect of the design of the state, forbidding amendments that would increase the number or length of presidential terms.

Sometimes a constitution expresses in broad terms that certain principles cannot be breached but the possibility of constitutional change still remains open. Nepal's Constitution (2015) decrees: 'This Constitution shall not be amended in way that contravenes with self-rule of Nepal, sovereignty, territorial integrity and sovereignty vested in people.' Such provisions leave some degree of room for the determination of whether a proposed amendment is possible. Kosovo's Constitution of 2008 provides a process of amendment that requires assessment of the Constitutional Court that certain constitutional rights and freedoms are not diminished. In allowing a court to make the assessment, rather than explicitly stating that a certain provision may not be removed or altered, a degree of flexibility is introduced, while still emphasizing the importance of the cited rights.

Even where unamendable rights are used, it is important to note that, in some cases, revolution or ample political consensus are sufficient to amending or replacing something originally intended to be unamendable. The choice to write a new constitution is one way in which unamendable provisions fail to endure.

8. How is a constitution repealed?

Just as constitutions provide rules for their own amendment, many provide procedures for their total revision or replacement. Spain's 1978 Constitution, for example, contemplates a scenario of its total revision. It distinguishes, however, between total and partial revision, placing higher burdens (two-thirds majorities in both houses and the subsequent dissolution of the parliament) for total revision of the Constitution as well as for revision of some more significant provisions.

A constitution may also provide for its own suspension or the suspension of certain provisions in emergency circumstances. Explicit rules for such suspensions, including limiting their duration and constraining an executive to unilaterally declare them, protect against abuse of emergency powers. For example, Ethiopia's Constitution requires parliament's prior approval for a declaration of a state of emergency. Others, such as Malawi's, require retroactive approval by parliament or approval by other actors or institutions. Emergency powers generally do not represent a repeal of a constitution, but rather a suspension of the constitutional order for a limited duration in order to address distinct, imminent threats.

Some constitutions cease to function or lack legitimacy and are replaced in the process of writing and adopting new constitutions. Some interim constitutions declare their function of replacing an older constitution. Many constitutions are repealed and replaced by the adoption of new ones.

International IDEA in Myanmar

In Myanmar, International IDEA has supported democratic change since 2002. Since the establishment of a country office in 2012, International IDEA has been working together with democratic stakeholders to strengthen the transition to democracy, contributing in particular to credible electoral processes, democratic oversight of parliamentary, and the strengthening of constitutional expertise in the country.

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References and further reading

Web resources

ConstitutionNet, <<http://www.constitutionnet.org>>

The Constitute Project, <<http://www.constituteproject.org>>

International IDEA's Constitution-Building Primer series, <<http://www.constitutionnet.org/primers>>

Research reports

M. Böckenförde, N. Hedling and W. Wahiu (eds), *A Practical Guide to Constitution Building* (Stockholm: International IDEA, 2011), <<http://www.idea.int/publications/pgcb/index.cfm>>

Brandt, M. Cottrell, J., Ghai, Y. and Regan, A., *Constitution-making and Reform: Options for the Process* (Geneva: Interpeace, 2011), <<http://www.constitutionmakingforpeace.org/sites/default/files/Constitution-Making-Handbook.pdf>>

Gluck, J. and Brandt, M., *Participatory and Inclusive Constitution Making: Giving voice to the demands of citizens in the wake of the Arab Spring* (Washington, DC: United States Institute of Peace, 2015), <<http://www.usip.org/publications/participatory-and-inclusive-constitution-making>>

Ladley, A., *Constitution Building after Conflict: External support to a sovereign process*, International IDEA Policy Paper, July 2011, <<http://www.idea.int/publications/constitution-building-after-conflict/index.cfm>>

Van Vliet, M., Wahiu, W. and Magolowondo, A., *Constitutional Reform Processes and Political Parties: Principles for Practice* (Den Haag/Stockholm/Leiden: Netherlands Institute for Multiparty democracy/International IDEA/African Studies centre, 2011), <<http://www.idea.int/publications/constitutional-reform-processes/index.cfm>>

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