HANDBOOK ON DEMOCRATIC CONSTITUTIONS

DEMOCRACY REPORTING INTERNATIONAL

STEP DEMOCRACY ရွေးမြှင့်မာ

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Why this handbook?

This handbook provides an overview on how to build a democratic constitution. It covers a democratic constitutional reform process and identifies those substantive elements of a democratic constitution.

The handbook is aimed at constitution-makers and the interested public everywhere, but especially those in countries emerging from authoritarian regimes or conflict situations, where a democratic constitution is seen as an integral part of building peace and a transition to democracy. This resource intends to provide realistic, accessible and practical information for these constitution builders in their work on reforming or replacing their constitutions.

While drawing on many Democracy Reporting International (DRI) briefing papers on aspects of democratic constitutions to write this handbook, we have tried to avoid duplication with other handbooks, in particular: Interpeace's Constitution-making and Reform: Options for the Process (2011), which provides a far more detailed overview and is not explicitly and only geared towards the democratic elements of a constitution; and International Institute for Democracy and Electoral Assistance (IDEA)'s A Practical Guide to Constitution Building (2011), which goes into more detail on a selected number of issues.

In contrast to most resources, this handbook uses the framework of international law to anchor concepts of a democratic constitution. We have focused on a number of real-life challenges of constitutionalism, such as re-emerging authoritarian rule and the challenge of implementing a democratic constitution. We have tried to keep things as short as possible, preferring to add references for further reading to each of the handbooks' four parts.

The handbook was edited and compiled by Silvia Suteu based on numerous DRI Briefing Papers, written by many authors, to whom we are grateful. Michael Meyer-Resende, Eva Gil, and Thibaut Noel provided the technical lead and additional contributions. Justine Willis proofread the text.

Part I

KEY FEATURES OF DEMOCRATIC CONSTITUTIONS

CHAPTER 1

The various functions of democratic constitutions

Constitutions, at their most basic, set out the rules of the game for the political community that they regulate. They are the supreme law of the land and as such take precedence over other legal norms. For the most part, this handbook will refer to constitutions in this sense: as the written document that constitutes the fundamental, supreme law of a state.

There is a broader sense of the term "constitution": namely all "constitutional norms, theories, interpretive precedents, or any such extra-textual element."[1] Often constitutional reality is far removed from what the text says, for example where authoritarian states' constitutions include democratic guarantees or human rights guarantees which are not respected.[2] This handbook focuses on the narrow sense of the written text.

Constitutions perform various functions, including:

1.1. Laying Out the Social Contract between the People and the State

Constitutions are meant to encapsulate the social contract between citizens and the state as highlighted in the formula "in the name of the people". The starting point is the notion of self-government, which the people entrust to their representatives according to agreed rules. This understanding also implies that when the constitution is no longer seen as fit for purpose for whatever reason (for example, political or economic crises, violent conflicts), the people reserve the right to change the contract. This can result in partial or total constitutional change.

1.2. Designating Political Institutions So That Government Works — Checks and Balances

Another function of constitutions is normative: they designate the key institutions of the state and the relationship between them. These institutions typically include a head of the executive (whether president or prime minister), a cabinet, the parliament (whether made up of one or two chambers), the judiciary, as well as independent institutions such as Audit Offices, Election Management Bodies or Human Rights Commissions. Often, the constitution sets out only the basic principles related to, and elements of, such institutions, leaving it to ordinary legislation to define in more detail the parameters that are to guide their interaction.

1. Zachary Elkins et al., *The Endurance of National Constitutions* (Cambridge University Press, 2009), p. 36.
2. Often called "façade", "fictive" or "paper" constitutions. See John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law* (Oxford University Press, 1991), p. 22.

For a constitution to be democratic it is essential that there are checks and balances. No branch of power should monopolise the exercise of state power. This is called the "separation of powers", but the term should be used with caution. The branches of power have different roles, responsibilities and accountability mechanisms, but they also must cooperate to make government work. If every branch of power merely tries to become the most important or supreme power, government is likely to become dysfunctional. Many experts therefore prefer the notion of a "separation and balance of power".

1.3. Limiting Government

Government must be able to deliver and to wield the monopoly of coercive power, but it should not dominate and control society. The concept of limited government was at the heart of the United States constitution when it was adopted in 1776. That document reflected the origins of the United States of America (USA) as a federation of states coming together and only enshrining the government with a few, explicit powers. More recent constitutions tend to say more on the powers of the government, which reflects the growth of the functions that the state performs. Nevertheless, the idea of enshrining in the constitution safeguards against abuse of state power remains essential to building democratic systems to this day.

1.4. Recognising Individual Rights and Setting Out the Mechanisms for Their Protection

An essential safeguard provided by democratic constitutions is that of recognising individual rights and stipulating effective means for their protection. Constitutions display great variety in how they protect rights but the great majority have some version of a bill of rights. This is the list of fundamental rights the state has a duty to protect, both in its own interactions with individuals and, increasingly, horizontally between private persons. Most constitutions include civil and political rights in this list, although increasingly, social and economic rights also feature. Constitutions tend to guarantee these rights and freedoms to their citizens, although there are also protections that are pledged to all human beings (for example, the freedom from torture and cruel, inhuman or degrading treatment).

1.5. Playing a Symbolic Role

A constitution will often play the role of symbolic document, declaring the defining characteristics of the state and its goals. Such characteristics can include an official language, religion, as well as claims to a common heritage or history. Often these are inscribed in constitutional preambles. For example, the preamble of the 2014 Constitution of Tunisia states:

> *Taking pride in the struggle of our people to gain independence and build the State, to free ourselves from tyranny, to affirm our free will and to achieve the objectives of the revolution for freedom and dignity, the revolution of December 17, 2010 through January 14, 2011, with loyalty to the blood of our virtuous martyrs, to the sacrifices of Tunisian men and women over the course of generations, and breaking with injustice, inequity, and corruption, [...]*

Although preambles do not usually stipulate constitutional rules, their texts can be controversial, as they express the underlying values and beliefs of a constitution, such as a notion of a nation, the role of a language or religion, or interpretations of historical events. The text of a preamble may also influence how constitutional provisions are interpreted. Democratic constitutions often mention the will of the people as the basis of governance.

1.6. Setting Out a Transformative Agenda for Society

Constitutions can determine transformative agendas for their society by promoting social change and the advancement of previously marginalised groups. How this aspirational agenda is translated into constitutional language differs from context to context.

An example of an agenda for social change may be found in those documents that not only protect but actively promote equality. The Canadian Charter of Rights and Freedoms, for instance, states in article 15:

> 1. *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*
>
> 2. *Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

Such affirmative measures are a recognition that provisions guaranteeing formal equality will not suffice in circumstances where segments of the population have been systematically discriminated against. Such provisions are recognised by international law as necessary temporary measures to correct historical injustice[3].

Other constitutions adopt "directive principles", which are statements of policy meant to guide the state in all its law-making activities. While not directly enforceable in court (although courts may interpret other provisions in light of such principles), these principles outline key social and economic policies to which the state is committed. Examples include the constitutions of India, Nepal and Ireland[4], each of which speaks of social justice and economic welfare as guiding principles.

1.7. Overcoming Conflict and Laying the Blueprint for Peace

Many constitutions were written and agreed after times of upheaval. Whether adopted in the aftermath of violent conflict or after the fall of an authoritarian regime, many constitutions emerge in conditions of crisis. In such situations, constitutions may include compromises on divisive issues, such as not making statements on history at all.

Post-conflict and post-authoritarian constitutions may also reflect a new beginning. They can provide a strong focus on safeguarding democracy, for example by: providing for robust civil control of the armed forces to prevent a return to military rule; enshrining the rights of opposition parties to foster multiparty democracy; or significantly limiting executive power with a view to preventing the concentration of power and a slide back into authoritarianism.

These various functions should not be understood as independent of one another but as overlapping. ■

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3. For example, article 4(1) of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) stipulates:

> Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

4. See Part 4 of the Constitution of India, Part 4 of the Constitution of Nepal, and article 45 of the Constitution of Ireland.

CHAPTER 2

Democratic Constitutions, International Law And The Internal Legal Order

2.1. Democratic Constitutions and International Law

International law is the body of legal norms regulating the conduct and relations of states, and increasingly also non-state actors, in the international sphere. The sources of international law are varied, and range from international treaties, customary law, and case law from international courts and tribunals (so-called "hard law") to principles, resolutions and guidelines ("soft law").

States remain at the centre of international law and continue to be responsible for complying with international legal norms applicable to them.

Democracy Reporting International does not promote specific forms of a democratic constitution but favours respect of international human rights law, which provides core principles, rights and obligations that should be reflected in a democratic constitution. The key international instruments are: the United Nations (UN) Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the various other UN rights conventions (dealing with, among others, women's rights, racial discrimination, the rights of the child, disability rights). There is also a robust regional rights protection regime in Europe (centred around the European Convention on Human Rights (ECHR)), America (the American Convention on Human Rights) and Africa (the African Charter on Human and Peoples' Rights).

2.1.1. Monist versus Dualist Countries

The link between international law and national constitutions is multifaceted. First, it is important to be aware of the status that constitutions afford international law within the legal system. Thus, on the one hand, so-called "monist countries" accept a unity between national and international law; in such systems, once the competent authorities have ratified an international treaty there is no need for further legislation for that treaty to be considered part of the domestic legal order. Examples of monist countries include France and The Netherlands.

On the other hand, so-called "dualist countries" are those in which an additional step, typically referred to as "incorporation", is required before international obligations undertaken by the state will be recognised in the internal legal order. The United Kingdom (UK) is an example of a dualist country. Thus, despite the UK being one of the first states to ratify the ECHR, for many years the rights in the Convention could not be relied on directly in proceedings before British courts. This changed with the adoption of the Human Rights Act 1998, a piece of domestic legislation passed by the UK Parliament giving effect to the ECHR in UK law.

2.1.2. International Law as an Interpretive Tool

International law can serve as an aid in the interpretation of national constitutions. For example, the constitution and domestic legislation of a state may contain various provisions protecting children's rights. Through adjudication, national courts will need to interpret these provisions and may also look to the state's international obligations in this area to assist them in their interpretation. Courts may do this for various reasons: to eliminate ambiguity in national legislation, to ensure a progressive interpretation of the law, or to safeguard the state's continued compliance with its international obligations.

Some constitutions even require that courts look to international law as an interpretive aid. Article 16(2) of the Constitution of Portugal says: "The provisions of this Constitution and of laws concerning fundamental rights shall be interpreted and construed in accordance with the Universal Declaration of Human Rights." Similarly, the Constitution of South Africa states that, when interpreting the bill of rights in the constitution, courts "must consider international law" (article 39(1)(b)).

2.1.3. International Law as a Minimum Standard

Another way in which constitutions may refer to international law is as the source of minimum standards of protection of certain rights or principles. Thus, in the area of human rights, many constitutions refer to international legal standards as a baseline below which rights protection cannot fall. Of course constitutions can provide for more protection than international covenants. For example, article 20(2) of the Constitution of Romania stipulates: "In case of an inconsistency between domestic law and the international obligations resulting from the covenants and treaties on fundamental human rights to which Romania is a party, the international obligations shall take precedence, unless the Constitution or the domestic laws contain more favourable provisions."

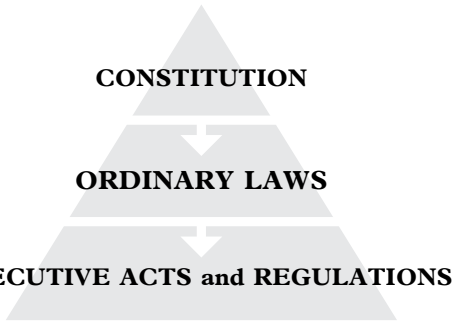
References of this nature are especially common in post-conflict constitutions. The role of these constitutions in ensuring the transition to peace is typically anchored in strong human rights safeguards. For instance, the Constitution of Kosovo explicitly lists a number of international human rights treaties applicable in the country and notes: "Human rights and fundamental freedoms guaranteed by the following international agreements and instruments are guaranteed by this Constitution, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions." (article 22). Similarly, the Constitution of Bosnia and Herzegovina provides that the rights and freedoms in the ECHR are directly applicable and have priority over all other laws (article II(2)). In addition, these rights and freedoms can not be repealed nor restricted through amendment of the constitution (article X(2)).

This handbook refers to international law as both the source of international norms, especially vis-à-vis the protection of human rights, and an interpretive and guiding tool for constitution-makers. The handbook therefore identifies those international obligations that are inherently tied to democracy and explains how they can be given effect in constitutions.

2.2. Democratic Constitutions and the Internal Legal Order

The constitution is the highest legal document of a country, and as such takes precedence over all other domestic legal norms. In practice, the principles of rule of law and constitutional supremacy require that ordinary laws adopted by the legislature, executive acts of the government, and regulations passed by administrative authorities should be compliant with the provisions contained in the constitution. Many constitutions contain a supremacy clause, such as the Constitution of Bolivia, which reads: "The Constitution is the supreme norm of Bolivian law and enjoys supremacy before any other normative disposition." (article 410(II))

The status of the constitution as higher law in the legal order ensures that, once constitutionalised, fundamental rights, but also mechanisms of checks and balances between the three branches of power, enjoy a certain degree of entrenchment: they will generally be more difficult to amend than ordinary legislation, or in parts even unamendable. This ensures an additional layer of protection, such as against a legislative majority that may wish to alter the rights and freedoms of a minority. ■



Further Reading, Key Features of Democratic Constitutions

The Various Functions of Democratic Constitutions

Elliott W. Bulmer, *What Is a Constitution? Principles and Concepts*, International IDEA, Stockholm, 2014 (ENG and BUR)
https://www.idea.int/publications/catalogue/what-is-a-constitution (20 October 2017)

Zachary Elkins et al., "Conceptualizing Constitutions" in *The Endurance of National Constitutions*, eds. Zachary Elkins et al. (Cambridge, New York: Cambridge University Press, 2009), p. 36.

Mark A. Graber, "What Is a Constitution?" in *A New Introduction to American Constitutionalism*, Mark A. Graber (Oxford: Oxford University Press, 2014), p. 14.

International IDEA, *What Is a Constitution?* (video resource)
http://www.constitutionnet.org/video/what-constitution (20 October 2017)

International IDEA, *Why Do Constitutions Matter?* (video resource)
http://www.constitutionnet.org/video/why-do-constitutions-matter (20 October 2017)

Michele Brandt et al., *Constitution-making and Reform: Options for the Process* (Geneva: Interpeace, 2011), Part 1.1 (EN, FR, AR, UKR, RUS, VIET).
http://constitutionmakingforpeace.org/the-constitution-making-handbook/
(20 October 2017)

Constitutions and International Law

Thomas M. Franck and Arun K. Thiruvengadam, "International Law and Constitution-Making", *Chinese Journal of International Law*, Vol. 2, No. 2 (January 2003), 467-518 https://doi.org/10.1093/oxfordjournals.cjilaw.a000486 (20 October 2017)

Anne Peters, "Supremacy Lost: International Law Meets Domestic Constitutional Law", *Vienna Journal of International Constitutional Law*, Vol. 3, No. 3 (2009), 170-198, https://www.degruyter.com/view/j/icl.2009.3.issue-3/icl-2009-0306/icl-2009-0306.xml
(20 October 2017)

Part II

THE CONSTITUTIONAL REFORM PROCESS

CHAPTER 3

Principles Guiding Democratic Reform Processes

3.1. Inclusiveness

A diversity of stakeholders should be involved in constitutional reforms, reflecting the pluralism of society. For a successful reform, different groups within a society need to be included and feel that their interests are considered.

Between 1987 and 2008, 65% of the constitution-drafting processes in post-conflict settings were carried out in an elected constitutional assembly.[5] In the case of directly elected bodies, the electoral framework (number of seats, size and shape of constituencies, the electoral system, special quotas if adopted) has an impact on how inclusive the drafting body is and which segments of society it may represent. The timing of such elections is a sensitive question. On the one hand, early elections might favour established parties to the detriment of emerging opposition or pro-democracy activists, or minorities´ groups. On the other hand, a delay could mean an extended tenure or the entrenchment of the powers-that-be, mistrusted by many.

Where constitution-making bodies are appointed (rather than elected), the appointment procedures should be transparent, and should ensure the inclusion of various ethnic and religious groups and possibly also civil society representatives. Women should also be included in constitution-making bodies in significant numbers, a point recognised by the international community as particularly important in post-conflict situations.[6]

The decision-making mechanisms need to be carefully reflected upon. Simple or absolute majority voting may result in the exclusion of many players. Typically, constitution-making works with higher thresholds for voting such as two-thirds majority requirements for adoption. This ensures that the new or revised constitution enjoys far-reaching (and thus, it is hoped, more stable) support.

3.2. Participation

Broad participation in constitution-making has developed as a norm in international law, tied to notions of democratic self-government of a people and the right to political participation. Moreover, it brings several practical benefits.

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5. Jennifer Widner, "Constitution Writing in Post-conflict Settings: An Overview", *William and Mary Law Review*, Vol. 49, No. 4 (2008), 1522.

6. For example, the United Nations Security Council Resolution 1325 has declared that: "constitutional, institutional, and legislative reform designed to establish or restore rule of law must become the main entry point for redefining the status of women and granting equal rights to men and women." (para. 197)

3.2.1. International Legal Norms Requiring Public Participation in Constitution-Making

International law establishes minimum obligations for participation in public affairs that are also applicable to constitution-making processes. Such obligations are spelled out in the International Covenant on Civil and Political Rights (ICCPR).

The right of self-determination enshrined in article 1(1) of the ICCPR includes the collective right to choose the form of the constitution or government, while article 25 requires that: "every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives..."

3.2.2. Benefits of Public Participation in Constitution-Making

Public participation in constitution-making, if thoughtfully planned and properly carried out, offers substantial benefits. A process of broad public participation is particularly suited to meeting the challenges in states that have lacked the chance to build up a system of representation through long-established, inclusive and democratically representative political parties, religious groups and interest groups, such as trade unions, professional associations or civil society organisations.

- **National unity**: Broad consultation can strengthen national unity and thereby contribute to political stability. An open and inclusive participation process can help reconcile conflicting groups and sensitise people to diverse viewpoints. This is especially important for groups that have been marginalised in a pre-democratic order.

- **Legitimacy and acceptance:** A successful participatory process is a cornerstone of the legitimacy and acceptance — and hence stability — of the new constitutional order. Such a process can not only form the basis for the normative legitimacy of the constitution, but can also increase the social acceptance of the entire legal order. Provided that the result reflects a degree of consensus, which should be the aim of public consultations, it can significantly reduce (a) the demand for renegotiation or (b) the resistance of groups that claim their interests have been neglected and thus refuse to accept the constitution. A constitution passed after a comprehensive consultative procedure can evoke feelings of ownership. People who fought and argued for their constitution often feel more responsible for defending it and advocating for its effective implementation.

- **Inclusiveness:** Even if a parliament or constitutional assembly is directly elected, many groups might not be represented. Depending on the electoral system and the number of parties competing for elections, many votes can go to parties and individual candidates that do not win seats. Consequently, some voters and groups might not feel adequately represented. Such sentiments can be compensated by offering further opportunities to contribute via direct public participation mechanisms.

- **Information and innovation:** Popular participation can provide members of the Constituent Assembly with important information and different viewpoints, infuse new ideas into the process, and help identify divisive issues or blind spots.

- **Constitutional awareness and civic education:** Constitutional awareness-raising and civic education programmes are not only essential requirements for informed participation, but also provide long-term benefits for the acceptance and implementation of the political order. A good constitution requires much more than a balanced text produced through a participatory process; it must be made known and understood, applied and protected, and challenged and defended over time. Civic education also helps inform people about the scope and limitations

of their constitutional rights, thereby preventing exaggerated expectations. Social or economic rights, for example, such as the right to health or to adequate housing, partly depend on public financial resources.

How Can Constitutional Reform Processes Be Made More Participatory?
• Devote one of the first sessions of the constitutional reform body to discussing direct public participation in the drafting process.
• Pass legislation that establishes an obligation to consult the public and enact suitable mechanisms, including rules and procedures for public participation.
• Hold public consultations in all parts of the country.
• Establish a formal and transparent procedure on how to receive, analyse and process written submissions and petitions.
• Establish a procedure to integrate the submissions and meeting results effectively into the deliberations.
• Ensure transparency and inclusiveness by publishing records on how public input was addressed, for example, by publishing parts of the draft as soon as possible, preferably according to a pre-determined schedule.
• Plan civic education and outreach programmes, such as public hearings, especially with potentially disenfranchised and marginalised groups. It is important to make sure that all people in all areas of the country can adequately participate.
• Run a comprehensive public information campaign using the entire spectrum of the media. The campaign should focus on the constitution in general, the work of the constitutional reform body, and the opportunities for the public and individual citizens to participate directly in the process. The campaign should also present the limitations of public participation in order to avoid disappointment and frustration.

3.3. Transparency

Transparency is another important principle that should guide constitution builders in their endeavour. Chapter 6 details the rise of transparency as an international legal norm applicable to the operation of public authorities in general. Transparency requires that the process of constitutional reform be clear and known to all — this will include the reasons for resorting to reform, the rules for effecting change, and the unfolding and outcome of the process. In difficult processes it may nevertheless be necessary for constitution-makers to try to find common ground in deliberations behind closed doors, but this should be an exception.

Increasingly, the principle of transparency in constitution-making has meant that constitution builders have used the internet and social media especially to engage citizens in the process. On the one hand, the internet has facilitated the distribution of vast amounts of information at little cost; on the other hand, it has also aided citizen engagement by facilitating the collection of reform proposals and comments on constitutional drafts, online debates and even draft suggestions. The recent constitutional conventions in Iceland (2011-2012) and Ireland (2012-2014) both made use of online platforms.[7] A pro-active outreach will also make it harder for detractors of the process to undermine it through public campaigns. ■

7. For more on the use of social media technologies in these two conventions, see Silvia Suteu, "Constitutional Conventions in the Digital Era: Lessons from Iceland and Ireland", *Boston College International & Comparative Law Review*, Vol. XXXVIII, No. 2 (2015), 251-276. http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1748&context=iclr (20 October 2017)

CHAPTER 4

Designing The Constitutional Reform Process

4.1. Preparing the Process

4.1.1. Deciding on Whether to Amend the Existing Constitution or Draft a New One

The first choice that constitutional reformers must make is whether to pursue partial constitutional change or produce a new constitutional text. When the required changes are limited, amending an existing constitution is preferable, because large-scale constitutional overhaul is a costly process, which tends to take years. Another advantage of choosing the amendment route may be that it is, by definition, a process that follows prescribed rules.

However, there may be several reasons why only a new constitution can satisfy the need for change. For example, the amendment procedure may be unduly onerous, possibly especially designed to prevent any change. It may be that the reforms sought are so extensive that nothing short of a new drafting process will do. Or it may be that the context is one of regime change or post-conflict constitution-building: the "classic" instances when new constitution drafting takes place. In these latter cases, a new constitution signals a break with the past. There have been exceptions to this rule, however, as in the case of several Eastern European post-communist countries, which proceeded with their democratic transitions by amending their old, Soviet-era constitutions.[8]

4.1.2. Planning and Preparations

Constitution-making begins long before the actual drafting of amendments or a new constitution starts. Adequate planning of and preparations for the process are essential. These should include setting a realistic timeline for the process. It should indicate all the milestones of the process and should strike the right balance between rigidity (to ensure that constitution-makers stick to the agreed plan) and flexibility (leaving some room for adjustments along the way if needed). The same is true for the budget and overall resources allocated for the constitutional reform process: these need to be adequate and agreed upon from the onset, but there should be room for some contingency adjustments given the unpredictable nature of constitution-building in general.[9]

Because constitution-making involves much compromise, all participants in the process should, from the outset, understand that they should adapt and manage their expectations. For example, there is a need to manage expectations regarding timing. An inclusive, highly participatory constitution-building process will be lengthy. Stakeholders should also be prepared to give in on certain

8. For more on these experiences, see Ruti Teitel, "Post-Communist Constitutionalism: A Transitional Perspective", *Columbia Human Rights Law Review*, Vol. 26 (1994), 167-190. http://digitalcommons.nyls.edu/cgi/viewcontent.cgi?article=1319&context=fac_articles_chapters (20 October 2017)

9. See, for example, Michele Brandt et al., *Constitution-making and Reform: Options for the Process,* (Geneva: Interpeace, 2011), pp. 149-185. http://constitutionmakingforpeace.org/the-constitution-making-handbook/ (20 October 2017).

issues and aspirations, particularly when this is required to break deadlocks and accommodate other stakeholders.

Some aspects to be considered for preparing public participation are as follows:

- The public should be informed about the constitutional process in general and ways to participate in particular.

- Special attention should be paid to citizens with little education, illiterate people, linguistic minorities and to people living in geographically marginalised regions, in order to ensure a fully inclusive process. This requires forms of information and outreach adapted to the needs of marginalised groups; for instance, South Africa successfully used images and cartoons.

- Depending on the consultative mechanisms that are chosen, further decisions must be taken. For example, the number and locations of public meetings, who will conduct meetings (ideally members of the constitution-making body) and the way they are trained for this task, are issues that need to be addressed.

- In order to avoid disappointment or mistrust in the process, it needs to be clear from the outset how public submissions will be handled. A way to increase transparency and trust is by using a tracking mechanism that allows the public to monitor the impact of their submission. Those who engage with the body should receive feedback on their submissions. Public participation is not a one-way street. At the same time it should be made clear that, ultimately, it is the constitution-making body that has the responsibility for decision-making and is accountable for the resulting text.

4.1.3. Deciding on the Type of Constitutional Reform Process and Body to Set Up

There are different schools of thought on how to structure a constitutional reform process. They range from a mainly expert-based process to a high degree of direct public participation by ordinary citizens at all stages in the constitution-making process. These approaches and bodies are not necessarily mutually exclusive, but can be combined to complement each other and remedy respective weaknesses.[10]

On the least inclusive end of this spectrum are largely **expert-dominated procedures**, with no direct involvement of citizens or civil society groups. This approach is a more traditional model in which constitution-making is entrusted to a committee composed of appointed legal experts. This type of process emphasises technical expertise in finding good drafting solutions. While such a process may be chosen in the interest of speed, it risks becoming overly legalistic and exclusive.

Another option with limited inclusiveness is a procedure largely **dominated by key political leaders**, with narrow involvement of the public. This approach was, for example, employed in numerous Eastern European countries after the fall of communism. Roundtables composed of key political leaders negotiated amendments or new constitutions.

An alternative is to have **elected representatives form a drafting committee**. Often, a dedicated committee within the legislature is tasked with preparing a report or an amendment bill, which is then discussed and tabled in the plenary session. The review of the constitution by a parliamentary committee would typically follow the amendment procedure stipulated in the existing constitution.

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10. Brandt et al., *Constitution-making and Reform*, pp. 229-74; and Jennifer Widner, "Reform Models", *Constitution Writing and Conflict Resolution Project*, Princeton University, 2005. http://pcwcr.princeton.edu/drafting/models.html (20 October 2017)

Such an approach can achieve inclusiveness through political representation. It tends to give more influence to political parties and is therefore more promising if these parties genuinely represent the whole population, are responsive to individuals' concerns and enable serious dialogue with the public.

Finally, a more inclusive process may be achieved if **a dedicated body — a constituent assembly — is directly elected by the people**. This was the option adopted in, for example, recent constitution-making efforts in Tunisia, Libya and Nepal.[11] An elected constituent assembly coupled with channels for direct participation is often perceived as the most democratic way to craft a new constitution. However, which solution may be most appropriate depends on the context.

4.2. The Stages of a Constitutional Reform Process

There are several stages in any constitutional reform process. Below we discuss those relevant to a process of constitutional renewal, but many of these remarks will also be relevant to less far-reaching processes of constitutional amendment.

4.2.1. The Pre-Drafting Stage

In the public mind, constitution-building is often understood to only mean the drafting stage. However, that understanding misses key steps that can lead to the success or failure of the entire endeavour. The pre-drafting stage includes more than decisions about whether to engage in constitutional change and planning measures. This stage can contain several other elements with a direct impact on the negotiations towards a new constitution or constitutional amendments. These elements include:

- **Peace Negotiations/Peace Agreements**

  Often, the constitution-making process happens in the immediate aftermath of, or in parallel to, or even within peace negotiations. They feed off each other or, conversely, may undermine each other if one breaks down.

  Peace agreements are likely to have a significant impact on the constitution-making process. For example, they may include amnesties and immunities for wartime conduct, which will also need to be constitutionalised. Furthermore, constitutions typically translate political arrangements that were agreed in peace negotiations into the legal order. Examples include agreements on decentralisation of power, specific electoral systems or systems of government. Often a new constitution is the 'next step' in rebuilding a state and democracy after the conclusion of a peace agreement.

- **Interim Legal Regimes**

  A related point concerns interim legal regimes, whether in the form of pre-agreed principles intended to guide and constrain constitutional negotiations, or in the form of full-fledged interim constitutions. They are not a necessary part of a constitutional process, but have been used in some contexts: since South Africa's 1993 interim constitution, recent examples include Somalia (2004), Sudan (2005), Nepal (2007), South Sudan (2011) and Tunisia (2011).[12]

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11. In Tunisia and Nepal, the elected body served as a constituent assembly and as parliament at the same time. In Sri Lanka the elected parliament declared itself to be a constituent assembly.

12. See also Kimana Zulueta-Fülscher, *Interim Constitutions: Peacekeeping and Democracy-Building Tools* (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 2015). https://www.idea.int/publications/catalogue/interim-constitutions-peacekeeping-and-democracy-building-tools?lang=en (20 October 2017)

The more extensive these temporary arrangements, the more important it is that they reflect the principles highlighted in this handbook. This is even more relevant given that initial assumptions about the length of the interim period (the period between the adoption of a temporary legal regime and ratification of a new constitution) may be proven wrong. For example, Nepal started its process of constitutional renewal in 2006 and adopted an interim constitution in 2007, yet only managed to conclude this process (and ratify a new permanent constitution) in 2015. Interim agreements may not be as short-lived as initially hoped and should ensure that basic rights and institutional safeguards are in place.

4.2.2. The Drafting Stage

The choice of the type of constitutional reform process and body entrusted with conducting that process will depend on the constitutional culture of a given country and on the objectives it pursues. The composition of the constitutional reform body will be crucial to the result. Methods of selection for such bodies are varied. Where members of the entity are directly elected, the electoral system may play a significant role in facilitating or hindering the creation of an inclusive body (for example, proportional representation systems are more likely to result in smaller parties being represented). In the case of an appointed body, inclusiveness, transparency of the process and national ownership should be considered in any selection process. This may mean introducing supplementary conditions in the selection method, for instance by including quotas for women or certain minority groups, to ensure the drafting body is representative of the society.[13]

Other considerations that should inform constitution-makers' choices include: the rules of procedure of the constitution-drafting body and whether they facilitate inclusive dialogue; the expertise available to the body and whether it is objective, impartial and accessible to all members; and indeed the facilities available during drafting and whether they might inadvertently be exclusionary (such as security, accommodation, transportation or baby-care facilities).[14]

The 'drafting stage' should not be narrowly understood as drafting of constitutional articles. It rather denominates the process of negotiation and consultation aimed at agreement on principles and rules that can then be translated by expert lawyers into legal text. In other words the process is as much about policy as it is about law. Focusing only on legal writing risks leaving many people out of the process because it is too specialised.

Outside the drafting body itself, education and awareness-raising campaigns and public consultations should feed into the process of constitutional negotiations. They should not only be geared towards disseminating information from the drafters to the public, but should actively seek the latter's input on the substance of negotiations and show a real commitment to integrating this input into the constitutional document.

4.2.3. The Adoption Stage

Draft constitutions or constitutional amendments are usually adopted by the drafting body by way of a qualified majority, meaning a bigger majority than 50% +1 (for discussion of supermajorities as a means of building consensus, see Chapter 5 (section 5.2 below). They are sometimes also subjected to a popular vote through a referendum. This may be done to increase publicity for the draft, to make it the object of broad public discussion, and to enhance public legitimacy of the constitution. The risk, of course, is that the draft does not gain majority approval, or that the majority is

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13. Brandt et al., *Constitution-making and Reform*, p. 42.

14. For a discussion of these elements from a gender-sensitive perspective, see Silvia Suteu and Ibrahim Draji, *ABC for a Gender Sensitive Constitution* (Paris: Euromed Feminist Initiative IFE-EFI, 2015) pp. 111-113. http://www.efi-ife.org/sites/default/files/ABC%20for%20a%20Gender%20Sensitive%20Constitution.pdf (20 October 2017)

slim and divisive. Hard-fought political agreements may be difficult to explain to the broader public; years of negotiations may be undone by a negative vote on a final draft.

Constitution-makers should also be aware that referendums are not the only means of attaining legitimacy for the new constitution. As the cases of the post-war constitutions of Germany and Japan attest, fundamental laws can become accepted by subsequent practice even in the absence of popular ratification. Tunisia presents a more recent example of a process that was concluded only by a vote by the Constituent Assembly. As the process had been relatively participatory and the Assembly voted in favor of the constitution overwhelmingly, the absence of a referendum was not controversial.

Although negotiating a constitution and getting it adopted is important, it will not be worth the paper it is written on if it is never implemented. Constitutional protections must be guaranteed in practice, institutions listed in the constitution must be established, and the system should function according to the principles laid out in the fundamental law. Chapter 9 details the measures that a democratic constitution can mandate in order to maximise the chances of implementation. ■

CHAPTER 5

Decision-Making And Consensus-Building Mechanisms

5.1. Preventing and Solving Deadlocks

Sometimes negotiations break down. Such deadlocks can happen at any stage in the process and may involve divergence over procedural aspects or over issues of principle and substance.[15]

In order to prevent procedural deadlocks, constitution-makers should ensure that the rules guiding the negotiations are clear and transparent and have been properly communicated to all parties. If there is a procedural deadlock, in some cases **courts** solved them. For instance, the Kenyan Constitutional Court in 2015 upheld challengers' request for a more participatory process and ratification by referendum (the referendum eventually rejected the draft constitution). Deadlocks over substantive matters may be more difficult to prevent or to overcome. When they happen, constitution-makers may find inspiration in past practice. Solutions have included: "referring the disagreement to **party leaders** (as in Nepal); **postponing** the contentious issue for future resolution (as in Uganda and Iraq); coming to a resolution by **a subsequent vote with a smaller majority**; and engaging in **mediation** by a group of 'elders.'"[16] **External actors**, be they an international organisation or a foreign state, may also help break deadlock provided they enjoy legitimacy on all sides.

In some instances, a certain closing in of the process, such as by resorting to **direct negotiations between political party leaders**, may help overcome deadlock. **Informal talks** between the deadlocked stakeholders, away from the constraints of the formal process, may facilitate an agreement, usually with the drawback of reduced transparency and participation.

In other instances, and depending on the type of issue at the heart of the disagreement, deadlock has been overcome by opening up the process. Thus, **referendums** have been successfully used to decide certain matters of constitutional reform that political actors could not. Questions put to a referendum have included: secession/independence (Quebec in 1980 and 1995, and Scotland in 2014), the choice between a parliamentary and presidential system of government (the Maldives in 2007) or the choice between a monarchical system and a republic (Italy in 1946 and Greece in 1974).

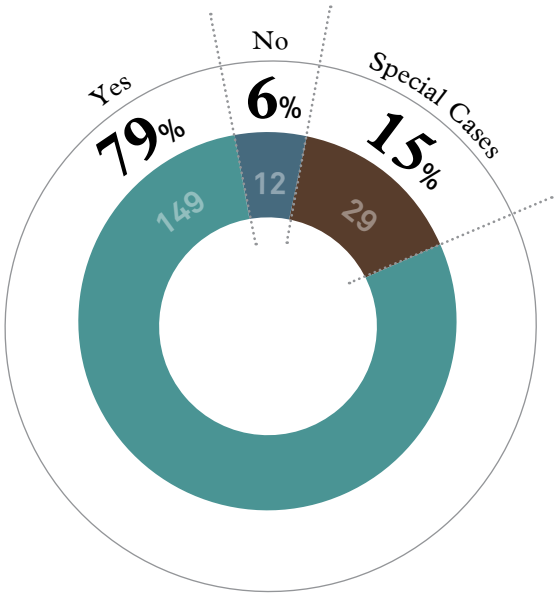
15. Brandt et al., *Constitution-making and Reform*, p. 27.
16. Brandt et al., *Constitution-making and Reform*, p. 28.

5.2. Building Consensus

Building consensus around the process of constitutional reform is essential if the final result is to enjoy legitimacy and widespread acceptance. Consensus must primarily be achieved among the actors involved directly in the negotiations, though it is equally important that there is general agreement around the tenets of a new or reformed constitution in the broader society. There are procedural techniques that can be built into the reform negotiations to facilitate consensus.

Supermajorities are an important procedural tool in building consensus. They oblige political groups to reach across their divisions to muster the majorities necessary to elect a constitutional assembly or adopt a constitution, for example. This process strengthens moderate forces in all parties and discourages the adoption of more extreme, divisive political positions. The rule that a constitution must be adopted by a supermajority helps avoid the writing of partisan constitutions that can tear societies apart. It also reassures "electoral minorities" that they may have a voice in the process of drawing up the constitution.

Percentage of Countries Requiring Supermajorities (Mostly 2/3) for Constitutional Amendments Based on 190 Cases



Indeed, in countries where the process of building a constitution has required a vote by the responsible body, two-thirds majorities have been the norm. In recent decades many countries have required majorities of two-thirds or three-quarters to enable adoption by the constitution-making body, including: Albania, Armenia, Azerbaijan, Croatia, Czech Republic, East Timor, Georgia, Hungary, Latvia, Moldova, Montenegro, Namibia, Poland, Romania, Rwanda, Serbia, Slovenia, South Africa and Uganda.

It is no coincidence that most countries also protect their constitutions from the whim of majorities of the day by requiring a supermajority (usually two-thirds) for constitutional amendments.

Supermajority rules may be accompanied by **other procedural hurdles**, designed to make the process of adopting or reforming the constitution more onerous. For example, a **double majority** may be required for certain constitutional changes. This typically takes the form of a quorum requirement and can thus only be met when 50%+1 of a certain proportion of members of the legislature (in the case of a legislative procedure) or of the voting population (in the case of a referendum) are participating in voting. Variations can include a requirement that two subsequent legislatures vote on the same measures (as is required to amend the Finnish Constitution, for instance), or that a majority of voters and federal units approve of the change in some federations (as is the case in Switzerland vis-à-vis constitutional amendments).

Another critical consideration in establishing the rules for drawing up a constitution is **timing**. Such rules should be in place before the first elections are held and thus before parties know their relative strengths. Parties will be assured that losing elections does not mean losing any ability to play a role in the subsequent process.

The objective of all such measures is to force the political actors involved in the process of constitutional reform to seek the approval of a broader base of supporters, both inside the legislature and amid the wider public. Requiring a supermajority in parliament, for instance, is more likely to result in coalition-building and compromise and to reduce the salience of more extremist views. ■

Further Reading, The Constitutional Reform Process

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Kimana Zulueta-Fülscher, *Interim Constitutions: Peacekeeping and Democracy-Building Tools* (Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 2015). https://www.idea.int/publications/catalogue/interim-constitutions-peacekeeping-and-democracy-building-tools?lang=en (20 October 2017)

Part III

THE CONTENT OF A DEMOCRATIC CONSTITUTION

CHAPTER 6

Principles Of A Democratic Constitution

In 2004, the UN General Assembly adopted Resolution 59/201, citing a number of "essential elements of democracy," among them "transparency and accountability in public administration."[17] Both principles have strong roots in international law and are necessary components of a democratic constitution.

6.1. Transparency

The core idea behind transparency is that state actors should act in an open manner. This includes being transparent about how they operate, about the rules that govern them, about their activities and expenditure, about their operations and about the decisions they take.

This idea is founded, among other things, on the right of everyone to "seek" and "receive" information and ideas, guaranteed under international law as part of the wider right to freedom of expression. It is also grounded in the foundational democratic idea that the "will of the people shall be the basis of the authority of government" for, without transparency, this goal cannot be achieved (see article 21 of the Universal Declaration of Human Rights (UDHR)).

There are a number of ways in which transparency is achieved in practice. A constitution can include a general principle of transparency that should guide public bodies. For example, the Colombian constitution refers to transparency as a guiding principle applicable to political parties (article 107), to the election of civil servants (article 126), to the introduction of electronic voting (article 258(2)), and to various monitoring bodies (articles 272 and 361(3)). The Austrian constitution lists transparency as one of the principles guiding the management of federal budgets (article 51(8)). Even where legislation is silent or open to interpretation, state bodies should act in a way that favours transparency. For example, if an election law is silent on whether an election commission should publish detailed election data, a general constitutional principle of transparency would suggest that it should.

A central element is what has come to be known as the "right to information" or "freedom of information," which is the right of everyone to access information held by public bodies. This right is constitutionally protected in some 60 countries globally.[18] A good example of constitutional protection for the right to information is found in article 51 of the 1997 Constitution of Montenegro, which

17. United Nations, General Assembly, *Enhancing the Role of Regional, Subregional and Other Organizations and Arrangements in Promoting and Consolidating Democracy*, A/RES/59/201, 20 December 2004.
18. See Right2Info.org, "Constitutional Protections of the Right to Information". http://www.right2info.org/constitutional-protections (20 October 2017)

states: "Everyone shall have the right to access information held by the state authorities and organizations exercising public authority." Another example is found in article 32 of the 1996 Constitution of the Republic of South Africa, which states:

> *1. Everyone has the right of access to-*
> *(a) any information held by the state; and*
> *(b) any information that is held by another person and that is required for the exercise or protection of any rights.*
> *2. National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*

Even where constitutionalised, legislation is required to give shape to this right.Dedicated right-to-information laws have been adopted in some 100 countries around the world.[19] Typically, these laws establish systems for the processing of requests for information and oblige public bodies to publish information on a proactive basis. Beyond the right to information, many countries have laws and/or systems to ensure that sessions of certain key public bodies — most importantly the legislature and the courts but ideally a much wider range of decision-making bodies — are open to the public. A more recent development is the open data movement, whereby public bodies publish datasets not only for free, but licensed for free reuse and provided in formats that can be processed electronically.

6.2. Accountability

The core idea behind accountability is that state actors need to be able to be held responsible for their decisions and actions. Accountability is central to democratic governance and is implicit in the right to political participation, which rests, among other things, on the idea that the government is answerable to the people. Public power thus needs to be organised in a way that the people can demand answers from the government and vote it out of office.

As a concept, accountability can be found in constitutions in varying degrees. For example, South Africa's 1996 constitution establishes: "All spheres of government and all organs of state within each sphere must... provide effective, transparent, accountable and coherent government for the Republic as a whole" (article 41(1c)). Finland's 1999 constitution has an entire section devoted to "Official Accountability". In Finland, a civil servant is "responsible for the lawfulness of his or her official actions" and the decisions "made by an official multi-member body that he or she has supported as one of its members". Section 118 of the Constitution provides for individual responsibility and punishment of officials who act unlawfully in a way which violates the rights of others, or results in a loss to them. Thus, civil servants are responsible (accountable) for their actions and must answer for them.

Accountability has two dimensions:

- **Answerability:** State institutions and representatives must inform citizens about their actions and explain the rationale for their decisions.

- **Enforcement:** Citizens have opportunities to hold these bodies and officials accountable for their actions through elections or in the courts.

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19. See Access Info Europe and Centre for Law and Democracy, "Global Right to Information Rating". http://www.rti-rating.org/ (20 October 2017)

Both principles have roots in international law and have been endorsed and promoted by **international organisations**. Examples of organisations having adopted international treaties and other documents imposing standards of accountability and transparency in public life include the UN General Assembly, the UN Human Rights Council, the Organization of American States, the Commonwealth, the Economic Community of West African States (ECOWAS) and the Organization for Security and Co-operation in Europe (OSCE).[20]

6.3. Free and Periodic Elections

Almost all constitutions in the world protect the right to vote and to be elected. Many modern democratic constitutions include detailed articles on how to ensure voting rights, particularly in states emerging from flawed electoral practices by undemocratic governments. Furthermore, as seen in Chapter 3, obligations under international law, especially article 25 of the ICCPR, include significant electoral guarantees, many of which are reflected in democratic constitutions.

The rights to vote and to be elected are usually part of the constitution's human rights catalogue. Important elements in article 25 of the ICCPR, which are also found in constitutional language, include:

- guaranteeing universal and equal suffrage, the secrecy of the vote, as well as "periodic" elections;
- an obligation to provide an "opportunity" to vote, and to stand as a candidate; and
- that states must guarantee the "free expression of the will of the electors".

Other protections entail additional obligations, such as ensuring equal opportunity to vote for vulnerable groups like ethnic minorities or persons with disabilities, or a quota for representation of disadvantaged groups. To these obligations, general principles such as transparency, accuracy, accountability, security, verifiability, and honesty are added as voting safeguards and as guidance to lawmakers and election administrators. Many constitutions include institutional arrangements to guarantee genuine elections, such as independent election management bodies, election dispute-resolution mechanisms, or the right to transparent election observation.

Voting as a human right in constitutions: Constitutions around the world deal with elections differently. Giving expression to electoral rights and guarantees in constitutions is useful for a number of reasons:

- Constitutions guide lawmakers and election administrators in the process of drafting electoral laws and regulations, and ensure that the legal framework for elections adheres to a comprehensive set of electoral rights.
- Constitutions can support a rights-based interpretation of electoral laws. Where various interpretations of a norm may be possible, constitutional guarantees will suggest using the most rights-friendly interpretation.
- Constitutions can fill the gap when electoral legislation leaves out important rights protection.

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20. For a full list of international legal norms on accountability and transparency, see Democracy Reporting International (DRI) and Centre for Law and Democracy, "Briefing Paper 47: International Standards on Accountability and Transparency," written by Toby Mendel of the Centre for Law and Democracy, with Michael Meyer-Resende, Evelyn Maib-Chatré, Raymond Serrato, and Irina Stark of Democracy Reporting International, Berlin, March 2014, http://democracy-reporting.org/?dri_publications=briefing-paper-47-international-standards-on-transparency-and-accountability (20 October 2017)

In enumerating electoral rights, constitutions should both establish the right and, where appropriate, indicate which state body is responsible for protecting that right. For more detailed examples, see Chapter 7 below.

Periodic elections: International law does not provide a requirement for how regularly elections must take place, but the ICCPR does require that they be periodic. This is understood as requiring that: "Elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors."[21] Constitutions usually regulate the intervals between parliamentary and executive elections, as well as presidential term lengths.

Directly elected lower houses		Directly elected upper houses		Directly elected heads of state	
Term length	Number of constitutions with this term length	Term length	Number of constitutions with this term length	Term length	Number of constitutions with this term length
2 years	1 (USA)	4 years	9	4 years	17
3 years	5	5 years	7	5 years	60
4 years	64	6 years	10	6 years	11
5 years	77	8 years	2 (Brazil, Chile)	7 years	10
6 years	2	9 years	1 (Liberia)		
7 years	1 (Ireland)				
Determined by an organic law	2 (France, Greece)				

In instances where legislatures or individual chambers have longer terms, **elections are often staggered** to provide regular renewal, so that only a proportion of the seats are contested at any given election. In the USA, for instance, the entire House of Representatives is elected every two years, while in the Senate (where terms last six years) only one-third of the seats are contested every two years. Similar staggered elections take place in the senates of Brazil, Pakistan and the Philippines, among others.

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21. UN Human Rights Committee, "Covenant on Civil and Political Rights (CCPR) General Comment No. 25: article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service," 12 July 1996, CCPR/C/21/Rev.1/Add.7, para. 9. http://www.refworld.org/docid/453883fc22.html (24 October 2017)

22. UN Human Rights Committee, "CCPR General Comment 25 (article 25)," para. 21

23. See UN Department of Political Affairs, "Elections". http://www.un.org/undpa/en/elections (20 October 2017); Office for Democratic Institutions and Human Rights, *Election Observation Handbook: Sixth Edition* (Vienna: Organization for Security and Co-operation in Europe (OSCE), 2010).
http://www.osce.org/odihr/elections/68439 (20 October 2017); European Commission, *Handbook for European Union Election Observation Missions* (2008).
http://eeas.europa.eu/archives/docs/eueom/pdf/handbook-eueom-en-2nd-edition_en.pdf (20 October 2017); European Commission for Democracy Through Law (Venice Commission), *Draft Guidelines for an Internationally Recognised Status of Election Observers* (2009).
http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-EL(2009)022-e (20 October 2017); African Commission on Human and Peoples' Rights, *Guidelines for African Union Electoral Observations and Monitoring Mission*.
http://www.achpr.org/instruments/guide-elections/ (20 October 2017)

Electoral systems: States are free to choose their electoral system, but the system "must guarantee and give effect to the free expression of the will of the electors". [22] Small changes to an electoral system can have a dramatic effect on the outcome of an election. For this reason, the legal framework for establishing a particular system is politically sensitive. Some constitutions include a reference to the type of electoral system to be used, but many do not. In all cases, these constitutional provisions are further detailed by an electoral law.

Independent scrutiny of elections: ICCPR General Comment 25 includes the standard of "independent scrutiny of the voting and counting process". The standard of independent scrutiny is a reflection of a wider obligation towards transparency. **Election observation** is an effective way of ensuring the transparency of elections and can be done both by domestic and international actors. A variety of international organisations have been involved in election observation worldwide, including the UN, the OSCE, the European Union, the Council of Europe, and the African Union. They have all developed detailed guidelines for their monitors,[23] and also adhere to a set of commonly agreed principles. [24]

Example

Independent Scrutiny of Elections Guaranteed by the Moroccan Constitution

Article 11 of the Moroccan constitution states:

Free, honest and transparent elections constitute the foundation of the legitimacy of democratic representation.... The law defines the conditions and the modalities of independent observation and neutrality of the elections in accordance with the recognised international norms.

Example

Electoral Process Guarantees in the Kenyan Constitution

Article 81 of the Kenyan Constitution outlines "general principles for the electoral system", including elections which are "free from violence, intimidation, improper influence or corruption; transparent; and administered in an impartial, neutral, efficient, accurate and accountable manner".

The Kenyan Constitution also includes particularly detailed provisions on vote counting and aggregation as a means of preventing voter fraud. Article 86 compels the Independent Electoral and Boundaries Commission to ensure that:

- whatever voting method is used, the system is simple, accurate, verifiable, secure, accountable and transparent;
- the votes cast are counted, tabulated and the results announced promptly by the presiding officer at each polling station;
- the results from the polling stations are openly and accurately collated and promptly announced by the returning officer; and
- appropriate structures and mechanisms to eliminate electoral malpractice are put in place, including the safekeeping of election materials. ■

24. The Carter Center, the National Democratic Institute (NDI), United Nations Electoral Assistance Division (UNEAD) *Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers* (2005). https://www.ndi.org/sites/default/files/1923_declaration_102705_0.pdf (20 October 2017)

CHAPTER 7

Protection Of Fundamental Rights And Freedoms

Individual rights are protected in both international human rights treaties and in most constitutions around the world. The list of rights thus protected is vast and has tended to include:

- the right to life;
- the freedom from torture and cruel, inhuman or degrading treatment;
- the right to liberty and security of person; freedom of movement;
- the right to a fair trial;
- the right to privacy;
- the freedoms of thought, conscience and religion, of opinion and expression, and of peaceful assembly and association;
- the right to participate in the conduct of public affairs;
- the freedom from discrimination; and
- rights to health, education and work.

International human rights treaties place an obligation on states to implement these rights protections through national laws (see article 2(2) of the ICCPR), as well as to provide access to justice and effective remedies for rights violations (article 2(3) ICCPR).

In the past, rights tended to be divided into two categories: **civil and political rights**, as enshrined in the ICCPR, and **economic, social and cultural rights**, as enshrined in the International Covenant on Economic, Social and Cultural Rights (IESCR). It has been said that social, cultural and economic rights require high levels of state investment, whereas civil and political rights only require the state to refrain from interfering with individual freedoms. However, the protection of the former may also involve the state refraining from interference, such as with the activity of trade unions or the right to work. Conversely, the state may also need to invest in order to ensure certain civil and political rights are adequately protected — for example, in a functioning court system, legal aid to protect rights of access to justice, or in electoral infrastructure. Finally, the enjoyment of various rights is linked and this should be reflected in states' systems as well. For instance, lack of access to education will diminish the possibilities of individuals pursuing their right to participate in public affairs.[25]

There is also an important distinction between **derogable and non-derogable rights**. This refers to the possibility for states to be exempted from their international obligation to protect rights in

25. For more on this discussion, see Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights, Fact Sheet No. 33, 2008.* http://www.ohchr.org/Documents/Issues/ESCR/FAQ%20on%20ESCR-en.pdf (21 October 2017)

times of public emergency. Article 4 of the ICCPR states the strict conditions under which a state may invoke derogation of rights, as well as the rights that may not be derogated from under any circumstance, including emergencies. Restrictions on rights during emergencies are discussed further in section 7.2.

The next subsection focuses on outlining those rights and freedoms that are generally seen as constitutive to a democracy, from the right to vote to the freedoms of opinion, expression, association and assembly. This focus does not mean that other rights are not equally important, or that they should be afforded a lower priority in a state's constitution. The aim here is merely to highlight the rights that directly enable the functioning of a democratic system.

7.1. Democratic Rights and Freedoms

7.1.1. The Freedom of Thought, Conscience and Religion

Protected by article 18 of the ICCPR, it "encompasses the freedom of thoughts on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others".[26] In this context it is problematic that some constitutions reserve certain elected offices to people of a particular religion, such as the need for the president in some Muslim-majority countries to be a Muslim.

7.1.2. The Freedom of Opinion and Expression

Protected by article 19 of the ICCPR, as well as by article 19 of the UDHR, these two freedoms are seen as "indispensable conditions for the full development of the person", as "constitut[ing] the foundation stone for every free and democratic society" and as being "closely related, with freedom of expression providing the vehicle for the exchange and development of opinions".[27]

The freedom of opinion must preclude the "harassment, intimidation or stigmatization of a person, including arrest, detention, trial or imprisonment for reasons of the opinions they may hold",[28] as well as coercing someone to hold or not hold an opinion.[29] The UN Human Rights Committee has explained that the freedom of opinion should be viewed as non-derogable, as there are no circumstances in which it would be necessary to restrict it during a state of emergency.[30]

Freedom of expression is integral to the enjoyment of the rights to freedom of assembly and association, and to the exercise of the right to vote.[31] The freedom of expression is taken to include "political discourse, commentary on one's own and on public affairs, canvassing, discussion of human rights, journalism, cultural and artistic expression, teaching, and religious discourse".[32] Protected expression may be written, oral or in sign language and also covers the freedom of the media. The freedom of expression as enshrined in article 19 of the ICCPR also encompasses a right to information held by public bodies — this has been interpreted as encompassing the right of access to public records of the media and individuals as well as the right to access personal data. Constitutions around the world adopt a variety of approaches to enshrining the freedom of opinion and of expression. A famous example is that of the United States constitution, whose First Amendment declares: "Con-

26. UN Human Rights Committee, "CCPR General Comment No. 22: article 18 (Freedom of Thought, Conscience or Religion)," 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 1. http://www.refworld.org/docid/453883fb22.html (24 October 2017)
27. UN Human Rights Committee, "CCPR General Comment No. 34: article 19 (Freedoms of Opinion and Expression)," 12 September 2011, CCPR/C/GC/34, para. 1. http://www.refworld.org/docid/4ed34b562.html (24 October 2017)
28. UN Human Rights Committee, "CCPR General Comment No. 34 (article 19)," para. 9.
29. UN Human Rights Committee, "CCPR General Comment No. 34 (article 19)," para. 10.
30. UN Human Rights Committee, "CCPR General Comment No. 34 (article 19)," para. 5.
31. UN Human Rights Committee, "CCPR General Comment No. 34 (article 19)," para. 4.
32. UN Human Rights Committee. (2011). *General Comment No. 34, Article 19, Freedoms of opinion and expression. UN Doc. CCPR/C/GC/34.* http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf.

gress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

More recently adopted constitutions reflect the accumulation of experience with regard to the restriction of these freedoms, and explicitly list the acceptable grounds for the limitation of expressive rights. The Ukrainian constitution is an example, stating in article 34 that:

> *Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.*
>
> *Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice.*
>
> *The exercise of these rights may be restricted by law in the interests of national security, territorial indivisibility or public order, with the purpose of preventing disturbances or crimes, protecting the health of the population, the reputation or rights of other persons, preventing the publication of information received confidentially, or supporting the authority and impartiality of justice.*

It will be noted that this is an exhaustive list of potential grounds for limiting the right, in other words, no other grounds may be added to those already stated. There are also those constitutions that have incorporated a right to information. This is the case of the Bulgarian constitution, which in article 41(2) states: "Everyone shall be entitled to obtain information from state bodies and agencies on any matter of legitimate interest to them which is not a state or official secret and does not affect the rights of others."

7.1.3. The Freedom of Assembly and Association

Enshrined in articles 21 and 22 of the ICCPR, as well as in article 20(1) of the UDHR, these freedoms are to be read in conjunction with the freedom of opinion and expression as "expressive democratic rights".

The freedom of assembly refers to the rights of individuals to come together and protest peacefully, including to express unpopular opinions. All forms of non-violent demonstrations are in principle protected, although reasonable restrictions may be imposed within the limits prescribed by law (such as requirements for prior notification or authorisation).[33]

The freedom of association refers to the right of individuals to voluntarily form and join associations, including political parties, trade unions,[34] professional and sporting clubs, and other non-governmental organisations. While the ICCPR recognises there may be groups of individuals whose right of association may be restricted, such as members of the armed forces and the police, these and any other limitations placed on the freedom of association must comply with requirements of legality, necessity and proportionality as discussed in the following subsection.

Different constitutions adopt different mechanisms for protecting the freedom of assembly and association. For example, article 13 in the Finnish constitution starts from a presumption that

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33. For a more in-depth discussion, see OSCE Office for Democratic Institutions and Human Rights (ODIHR), *Guidelines on Freedom of Peaceful Assembly*, 2nd ed., 2010. http://www.osce.org/odihr/73405. (24 October 2017)

34. Rights related to trade unions are also enshrined in article 8 of the International Covenant on Economic, Social and Cultural Rights (IESCR).

assemblies and associations are lawful and leaves it to ordinary legislation to further define the contours of these rights in Finland:

> *Everyone has the right to arrange meetings and demonstrations without a permit, as well as the right to participate in them.*
>
> *Everyone has the freedom of association. Freedom of association entails the right to form an association without a permit, to be a member or not to be a member of an association and to participate in the activities of an association. The freedom to form trade unions and to organise in order to look after other interests is likewise guaranteed.*
>
> *More detailed provisions on the exercise of the freedom of assembly and the freedom of association are laid down by an Act.*

7.1.4. The Right to Participate in the Conduct of Public Affairs, to Vote and to be Elected

Enshrined in article 25 of the ICCPR, as well as article 22 of the UDHR, this right is seen as lying "at the core of democratic government based on the consent of the people". It is regarded as ensuring to individuals the opportunity "to participate in those processes which constitute the conduct of public affairs".[35] While this is a right that is attached to citizenship of a state, discriminatory distinctions among citizens are not permitted, and any restrictions of the right will still need to be justified on "objective and reasonable criteria"[36] (for more on legitimate grounds for rights restriction, see the next subsection).

The UN Human Rights Committee has defined the concept of "public affairs" as a broad one, encompassing the exercise of all power (legislative, executive and administrative), at all levels (international, national, regional and local).[37] Citizens' right to participation may refer to three distinct activities: (1) indirect participation, via their representatives freely chosen during elections; (2) direct participation, which includes the holding of public office, voting in elections or referendums, and any other mode of direct participation established by law; and (3) influence as exercised through public debate and dialogue.

The state must take effective measures to ensure the right to vote to all citizens entitled and able to exercise this right. Any restrictions on this right (such as age, registration or residency requirements) must be reasonable and clearly set out in law. The state must also take steps to prevent interference with the right to vote by criminalising intimidation, coercion or other actions that preclude the free exercise of the right. Elections must be conducted fairly and freely and be held periodically, at intervals that are not too long.

The right to be elected ensures that citizens have a free choice of candidates for whom to vote. The UN Human Rights Committee has made clear that "[p]ersons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation."[38]

There is great variety in how constitutions around the world enshrine the protection of these rights. Some constitutions simply declare a universal right to vote, leaving it to ordinary legislation to clarify the details of implementation. An example is the French constitution, whose article 3 declares:

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35. UN Human Rights Committee, "CCPR General Comment No. 25 (article 57)," paras. 1, 2.
36. UN Human Rights Committee, "CCPR General Comment No. 25 (article 57)," para. 4.
37. UN Human Rights Committee, "CCPR General Comment No. 25 (article 57)," para. 5.
38. Human Rights Committee, "CCPR General Comment No. 25 (article 57)," para. 15.

"Suffrage may be direct or indirect as provided for by the Constitution. It shall always be universal, equal and secret." Other constitutions list in detail the components of universal suffrage, including the types of elections in which voting is guaranteed, requirements for voter registration and eligibility, and restrictions on standing for election.[39] Most constitutions fall somewhere in between.

All democratic constitutions protect the right to vote in genuine periodic elections either through one article on the general right to vote, or through a guarantee of the right in every reference to a particular electoral event (parliamentary, presidential, local, referendum and so on). UN Human Rights Committee General Comment 25 states that only "reasonable restrictions" may be placed on the right to vote, such as minimum age requirements. These restrictions must be based on "objective and reasonable criteria". The General Comment further states that "literacy, educational or property requirements" are not reasonable, nor can the right to vote be limited on the basis of residence or descent, physical disability or political-party affiliation. Examples of reasonable restrictions include: residence requirements (so long as they do not disenfranchise the homeless), the deprivation of the vote on grounds of commission of an offence (but only for a duration proportionate to the offence), and mental incapacity.

Over 125 constitutions guarantee universal suffrage. Fifteen constitutions in the world oblige eligible citizens to vote (called compulsory or mandatory voting). An example is Australia, which has had mandatory voting for over a century.[40] The most common restriction on the right to vote, as allowed under international law, is the age of the voter. The vast majority of constitutions do not allow voting to persons under 18 years of age. Constitutions generally also make restrictions on the right to be elected, with age the most common restriction.

7.1.5. Equal Suffrage and Special Measures

While universal suffrage relates to who is allowed to vote, equal suffrage means equal voting power. Each seat should represent a similar number of voters or population. This has implications for the delimitation of electoral districts and the method of allocating votes, which "should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely".[41]

The **delimitation of electoral boundaries and allocation of seats** is generally determined by subsequent legislation, but constitutions often determine the criteria or procedures used to determine the boundaries and seats of electoral districts. For example, the Finnish constitution (section 25) requires that seats in parliament be distributed equally among electoral constituencies "on the basis of the number of Finnish citizens, into at least twelve and at most eighteen constituencies". Article 161 of the Zimbabwean constitution also assigns seats to constituencies "so far as possible" on an equal basis. The electoral commission is empowered to increase the number of seats by up to 20% beyond what would be granted according to population, after taking into account specific characteristics of a constituency, such as geographic isolation.

The European Commission for Democracy Through Law (Venice Commission)'s Code of Good Practice in Electoral Matters states that a **variation** of 10% in terms of voting power is acceptable, but that it should not exceed 15% except for special circumstances, such as thinly populated areas or the protection of a concentrated minority. Concretely, this means that a seat should represent the same number of voters or population within a 10% margin.[42]

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39. See, in this regard, article 14 of the Brazilian Constitution.

40. Mandatory voting is not always enforced, however, and when it is, it comes associated with various sanctions, both monetary and non-monetary. Critics of compulsory voting argue that the right to vote should also include the right not to vote (to abstain).

41. UN Human Rights Committee, "CCPR General Comment 25 (article 25), "para. 21.

There are 47 constitutions that require a **census** to calculate the population of constituencies. Article 82 of the Indian constitution requires a readjustment of the seats assigned per constituency after each census.

International law empowers states to adopt **special measures to enhance the representation** of women, minorities and historically marginalised groups.[43] Specifically, international law empowers states to employ quotas to ensure greater equality for women and provides that these measures should not be considered in contravention of the equality principle.[44] There are a variety of techniques used to promote women's representation, such as mixed electoral lists or gender-neutral legislative quotas.[45] Quotas for national minorities have also been used to ensure a minimum degree of legislative representation to their representatives (see for example, article 62(2) of the Romanian constitution, or article 80 of the Slovenian one). At the very least, the constitution can indicate that legislation should seek to ensure equal representation, such as was done via article 46 of the 2014 Tunisian constitution, which commits the state to seeking "parity between men and women in all elected assemblies".

Separate electoral rolls for particular sociological groups are not seen as a positive contribution to equality because they carry the risk of polarisation or discrimination through the separate classification of citizens. The Constitution of Bangladesh addresses this threat in article 121: "No special electoral roll shall be prepared so as to classify electors according to religion, race caste or sex."

States have an obligation to ensure full access to the voter register, to election information, to voting booths and to public office. International law, including the ICCPR and the Convention on Rights of Persons with Disabilities (CRPD), requires that persons with disabilities have equal access to the enjoyment of political rights.[46] Fifty-eight constitutions protect the equality of persons with disabilities under the law, and the constitutions of Brazil and Paraguay extend the same protections to illiterate persons. These protections indicate a need to make special efforts for accommodating illiterate voters or those with disabilities.

7.1.6. Secrecy of the Vote

The secrecy of the vote is required under article 25 ICCPR as a means to protect voters "from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process".[47] The secrecy of the vote is explicitly protected in over 150 constitutions. For example, article 15 of the Japanese constitution states: "In all elections, secrecy of the ballot shall not be violated. A voter shall not be answerable, publicly or privately, for the choice he has made." Secrecy also serves as a protection to vulnerable groups. For example, where couples are allowed to go together into the polling booth ("family voting"), it often means that husbands tell their wives whom to vote for.

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42. European Commission for Democracy Through Law (Venice Commission), *Code of Good Practice in Electoral Matters* (2003), p. 7. http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023rev-e (21 October 2017)

43. Article 1, International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Article 4, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 5, Convention on the Rights of Persons with Disabilities.

44. CEDAW Committee, General Recommendation 23 (16th Session, 1997), para. 15. http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm (24 October 2017)

45. For explanations and more examples, see Suteu and Draji, *ABC for a Gender Sensitive Constitution*, pp. 62-65.

46. Article 29 of the CRPD requires that states ensure that "voting procedures, facilities and materials are appropriate, accessible and easy to understand and use" and that persons with disabilities be free to "vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government", including by "allowing assistance in voting by a person of their own choice".

47. UN Human Rights Committee, "CCPR General Comment 25 (article 25)," para. 20.

7.1.7. Freedom from Discrimination

Protected by articles 2(1) and 26 of the ICCPR, and by articles 2 and 7 of the UDHR, the freedom from discrimination, together with equality before the law and equal protection of the law without any discrimination, form an all-encompassing principle.[48] It is meant to ensure that rights protection is extended to all individuals irrespective of class, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or (dis-)ability. What constitutes discrimination can be discerned with the aid of international human rights treaties[49] but affirmative action measures are general accepted. Such positive measures are taken to redress historical injustice and correct structural discrimination, and are understood to be temporary until full equality can be achieved.[50]

Constitutional bills of rights around the world have adopted different drafting techniques for giving effect to the freedom from discrimination. A good example is that of the Canadian Charter of Rights and Freedoms, which in article 15 both prohibits discrimination and protects affirmative action measures:

1. *Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

2. *Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.*

7.2. Lawful Restrictions on Rights

While constitutions of authoritarian regimes have often included human rights protections, they suffered from two flaws: these constitutions were either not respected or they included far-reaching limitation clauses that rendered the promised rights protection meaningless. For example, in the Middle East many human rights provisions included the provision "as determined by law", which effectively meant that legislators could restrict their content as they pleased.

International human rights law includes a number of key elements that ensure that limitations of rights do not undermine these rights altogether. They need to be considered when drafting human rights catalogues in constitutions. These key elements are:

- Rights limitations generally must have a legal basis;
- The grounds for rights limitations must be clearly defined;
- Limitations must be necessary in a democratic society, proportional to the objective they pursue and must not affect the essence of a right; and
- There should be an effective legal remedy against potential human rights violations.

Democracy activists often think that a constitution should not say anything about limiting human rights. They think that any limitation would diminish these rights.

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48. UN Human Rights Committee, "CCPR General Comment 18: Non-discrimination," 10 November 2989, para 1, http://refworld.org/docid/453883fa8.html (24 October 2017)
49. For example, the CERD defines "racial discrimination" (article 1); CEDAW defines "discrimination against women" (article 1); the Convention on the Rights of Persons with Disabilities defines "discrimination on the basis of disability" (article 2), and so on.
50. Article 4(1) of CEDAW, for example, expressly states that "temporary special measures aimed at accelerating de facto equality between men and women" shall not be considered discriminatory according to that Convention.

This would be a mistake, however. By not defining the circumstances under which certain rights can be curtailed, the constitution would create uncertainty about their scope and also leave open the door to executive abuse. This is a practical concern. Most political and civil rights must be limited in some way in order to ensure social order and justice. In the words of US Supreme Court justice Oliver Wendell Holmes Jr., "The right to swing my fist ends where the other man's nose begins."[51] International treaties on democracy and human rights therefore recognise the need to limit certain rights protections.

7.2.1. Rights Limitations in International Law

International human rights can be divided into two big groups:

- On the one hand, there are so-called **"absolute rights"**, which cannot be qualified or interfered with on any grounds. The classic example of such an absolute right is the freedom from torture and inhuman or degrading treatment, which cannot be curtailed under any circumstances.

- On the other hand, most rights are **not absolute**. For example, the freedom of assembly usually does not extend to citizens demonstrating on a highway or an airfield; the freedom of expression does not generally protect speech meant to incite violence; a criminal gang does not enjoy the freedom of association. The question therefore is not whether these human rights can be limited but rather how and to what degree.

With the exception of absolute rights, international human rights law accepts **limits on political rights**. Article 29(2) of the UDHR states:

> *In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

International human rights law limits rights in two ways:

- Some documents include a **general limitation clause** that applies to all rights protections in the document. An example is the above-mentioned article 29(2) of the UDHR, as well as article 27(2) of the African Charter on Human and Peoples' Rights, which states: "The rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest." These clauses make it easier for those who apply the norms — a legislature, the executive and judges — and for the public to grasp the limitation concept being used. On the other hand, they do not allow differentiation between rights.

- Other international human rights instruments do not include a general clause, but rather have **specific limitation clauses** attached to specific articles. This is the solution of the ICCPR, which contains no general limitation clause that would apply to all rights equally.[52] This is also the choice made by drafters of the European Convention on Human Rights and the American Convention on Human Rights, which list the acceptable grounds for limiting each right in individual provisions. This drafting choice results in a lengthier bill of rights but has the advantage of allowing for differentiation among the acceptable grounds for limiting specific rights. Some

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51. Holmes's quote could suggest that persons enjoy human rights in relation to other persons. Such an assumption is known as the horizontal effect of human rights. This handbook only addresses the classical assumption of human rights, i.e. that they represent rights of individuals vis-à-vis the state.

52. Nevertheless, in practice the various formulations of limitations in the ICCPR have become less relevant. The UN's Human Rights Committee tends to use these formulations interchangeably.

articles of the ICCPR do not include specific text on limitations. Article 25 on participation in public life, for example, only states that there should be "no unreasonable" restrictions. In these situations the UN Human Rights Committee has developed case law to explore the meaning of "unreasonable restrictions".

7.2.2. The Legal Basis for Limiting Rights

When allowing for limitations, constitutions and international law often require that these restrictions be based in law. For example, article 19 of the ICCPR states that the freedom of expression and information might be open to certain restrictions "provided by law".

Clauses like these are sometimes seen as weakening the force of the rights protection by those who fear that ordinary legislation can be used to abrogate or restrict a constitutional right, rendering the constitution impotent against rights violations. However, requiring that any rights restrictions be grounded in law protects against arbitrary acts of the executive and ensures legal certainty. It thus demands that the legislature — or judge-made law (precedent) in common-law systems — must make clear the basis on which it limits rights.[53]

The "provided by law" clause in article 19 of the ICCPR, therefore, should be understood as prohibiting "interference based solely on an administrative provision or a vague statutory authorization".[54] It is important to remember, however, that a "prescribed by law" clause alone is not a sufficient guarantee against violation of rights. A constitution should clearly limit the lawmaker's scope for restricting rights, as outlined in the next two sections.

7.2.3. Grounds for Rights Limitations

Before discussing acceptable grounds for restricting non-absolute rights, it is important to highlight that the content of a right must itself be clarified. What may appear to be a limitation may not have been covered by the right in the first place. For example, typically it is only citizens of a state who have the right to vote in national elections (see article 25, ICCPR); the fact that foreigners cannot vote is therefore not a matter of a human rights limitation.

Moreover, rights limitations result from the need for a systematic interpretation of a human rights catalogue. Rights cannot be seen in isolation. For example, female genital mutilation is not protected by the freedom of religion of the parents because the right to physical integrity and other rights of the child outweigh religious freedom on this point.[55]

Acceptable grounds for limiting individual rights may include:

- **The rights of others:** These may include the fundamental rights of other persons and may also include rights that are not protected in fundamental rights catalogues. For example, private property is not always protected in bills of rights, but it is generally accepted that private property rights may restrict the freedom of movement (for example, by way of rules against trespassing).

- **Public order:** Public order is a ground for rights limitation found in numerous ICCPR articles and also in many constitutions. On the one hand, public order seems to be an obvious limitation, referring to states' role of preventing disorder, combatting crime and safeguarding the rule of

53. This guarantee goes as far back as the English Magna Carta of 1215, which states in article 39: "No freemen shall be taken or imprisoned or diseased or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." (emphasis added)

54. Manfred Nowak, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed. (Kehl am Rhein, Germany; Arlington, VA: N.P. Engel Publishers, 2005), p. 460, fn. 46.

55. See for example article 5 (b) of the African Commission on Human and Peoples' Rights' "Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa," prohibiting female genital mutilation with a view to eradicating the practice.

law. On the other hand, this ground for limitation is often abused. It is important therefore that legislation and courts develop a detailed notion of legitimate public order restrictions, informed by international standards, and that this limitation is itself limited by the principles of necessity and proportionality (see section 7.2.4).

- **National security:** In international human rights instruments, national security is an accepted ground on which to limit certain human rights, for example the freedom of movement (article 12 ICCPR) and the freedom of expression (article 19 ICCPR). As in the case of public order considerations, invoking national security should not be a cloak for permitting abuses of power. An example of such abuses would be the restrictions placed on the right to fair trial of detainees in the "war on terror", when suspects in several countries were imprisoned indefinitely and without charge.

- **Public health:** This ground for rights limitation is also widespread. It can be invoked, for example, in situations in which the state limits the freedom of movement of its citizens in order to stem an epidemic (quarantine) or to protect public water drinking supplies.

- **Public morals:** The protection of public morals is a limitation that is recognised in relation to many human rights. It may be invoked, for example, when prohibiting demonstrations in a mosque, a church or a cemetery. The extent of this limitation is often controversial in relation to the freedom of expression, for example regarding blasphemy.

7.2.4. Restricting Rights Limitations: Proportionality and Protecting the Essence of a Right

Limitations of human rights cannot be without limits themselves. Otherwise nothing may be left of a given human right once public authorities place restrictions on its exercise.

The legal **principle of proportionality** is important in narrowing rights limitations and helps determine the extent to which a measure represents the least restrictive means towards achieving an otherwise acceptable aim. The principle of proportionality states that the government should not limit a right beyond the necessary to attain the objective of the measure.

The OSCE, in describing limits on restrictions on the freedom of assembly, writes:

> *Any restrictions should closely relate to the particular concerns raised, and should be narrowly tailored to meet the specific aim(s) pursued by the authorities. The state must show that any restrictions promote a substantial interest that would not be served absent the restriction. The principle of proportionality thus requires that authorities not routinely impose restrictions that would fundamentally alter the character of an event, such as routing marches through outlying areas of a city.*[56]

Proportionality is expressed in different ways in international law. For example, article 19 of the ICCPR indicates that restrictions shall only be permissible if they are "necessary" to achieve the objective of the limitation. Judges have often broken down the proportionality test into two components: whether it is necessary at all to achieve a legitimate objective (or if it could be achieved otherwise), and whether the restriction is proportional to the objective. The latter criterion tries to prevent that a "nut is cracked with a sledgehammer".[57]

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56. OSCE ODIHR, *Guidelines on Freedom of Peaceful Assembly*, p. 39.

57. The UN Human Rights Committee has explained its understanding of the protection of the essence of a right and the principle of proportionality in various General Comments. See for example "CCPR General Comment No. 27: article 12 (Freedom of Movement)," 2 November 1999, CCPR/C/21/Rev.1/Add.9, paras 11-18.
http://www.refworld.org/docid/45139c394.html (accessed 21 October 2017)

Necessity refers to the requirement for public authorities to show that any measures taken to restrict rights are necessary in a democratic society. No more than strictly necessary steps are to be taken, even in the pursuit of one of the otherwise acceptable aims discussed in the previous section. Examples include the democratic necessity of restrictions placed on the freedoms of assembly and association in the ICCPR. These two rights have an essential democratic function in the process of forming and expressing political opinions, and limits to these rights must remain true to that function. The ICCPR requires that restrictions against these rights must be necessary to maintaining a "democratic standard oriented along the basic democratic values of pluralism, tolerance, broad-mindedness, and peoples' sovereignty".[58] In other words, in order to restrict assembly or association, the state must show that such a restriction is required to address a pressing social need. For example, the state can outlaw a racist group that seeks to systematically intimidate racial minorities as they prepare to vote. A restriction on the supremacist group is justified not only because it limits the rights of others, but also because it threatens the basic values of a pluralistic society.

Proportionality to the objective pursued is assessed by looking at whether the measure was the least restrictive available. If alternative measures existed that would have impaired the right in question to a lesser extent, the government will be found to have violated the principle of proportionality. Keeping with the example of the freedom of assembly, if on the grounds of protecting public order a peaceful protest is banned, public authorities will be required to justify not resorting to other, less restrictive measures in preventing disorder. For example, if the government could have prevented disorder by allocating more police protection to protesters or by limiting the protest to certain areas instead of banning the protest entirely, it will likely be found to have violated the protesters' freedom of assembly.

Finally, international human rights law embraces the principle that the **"essence of a human right"** may not be affected by limitations on that right. This constitutes an absolute limitation. For example, if government only permitted opposition parties to hold a protest in a stadium and not in the city centre, the essence of the right to freedom of assembly may be affected, because the purpose of demonstrations is to reach and engage the public in the streets, which is not possible in a stadium.

7.2.5. Limitation Clauses in Constitutions

Many legal systems around the world place lawful limits on political rights that are consistent with international obligations. As in international human rights treaties, constitutions either list grounds for rights limitations in a general limitation clause or incorporate them into individual rights provisions. These limits come in various forms.

South Africa's constitution provides a sophisticated human rights architecture and lays out human rights limitations in detail. Article 3 notes: "The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill." Thus the constitution contains both a general limitation and specific limitations. Article 36 reads:

1. *The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including*
   - *a) the nature of the right;*
   - *b) the importance of the purpose of the limitation;*
   - *c) the nature and extent of the limitation;*
   - *d) the relation between the limitation and its purpose; and*
   - *e) less restrictive means to achieve the purpose.*
2. *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

The South African text thus includes explicitly all the guarantees against excessive limitations that have been highlighted in this handbook.

The Swiss constitution also provides a general provision relating to human rights limitations (article 36):

> 1. *Restrictions on fundamental rights must have a legal basis. Significant restrictions must have their basis in a federal act. The foregoing does not apply in cases of serious and immediate danger where no other course of action is possible.*
> 2. *Restrictions on fundamental rights must be justified in the public interest or for the protection of the fundamental rights of others.*
> 3. *Any restrictions on fundamental rights must be proportionate.*
> 4. *The essence of fundamental rights is sacrosanct.*

The German constitution takes a similar approach in article 19:

> 1. *Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.*
> 2. *In no case may the essence of a basic right be affected.*
> 3. *The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.*
> 4. *Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts.*

The German constitution also guarantees recourse for alleged rights violations in the courts, including by way of an individual right to petition the Constitutional Court.

The Tunisian constitution adopted in 2014 also contains a rights limitation clause, in article 49:

> *The limitations that can be imposed on the exercise of the rights and freedoms guaranteed in this Constitution will be established by law, without compromising their essence. Any such limitations can only be put in place for reasons necessary to a civil and democratic state and with the aim of protecting the rights of others, or based on the requirements of public order, national defence, public health or public morals, and provided there is proportionality between these restrictions and the objective sought.*

Judicial authorities ensure that rights and freedoms are protected from all violations.

No amendment may undermine the human rights and freedoms guaranteed in this Constitution.

7.3. Effective Remedies for Rights Violations

International law requires that rights protections be accompanied by access to effective remedies. Article 2 of the ICCPR notes:

> 3. *Each State Party to the present Covenant undertakes:*
> *(a) To ensure that any person whose rights or freedoms as herein recognized are violated*

58. Nowak, *U.N. Covenant on Civil and Political Rights*, pp. 491, 505.

shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Effective remedies can take the form of guaranteeing judicial recourse, which gives legal force to rights protections and can defend against state violations of particular rights, or non-judicial means. For example, in the case of the right to vote, an effective remedy amounts to a requirement to provide "access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes".[59] ■

59. UN Human Rights Committee, "CCPR General Comment 25 (article 25)," para. 20.

CHAPTER 8

State Structures And Institutions

State structures and institutions vary greatly across different systems, and one model is not necessarily better than the other. What matters most, however, is ensuring that power is not concentrated in the hands of a single actor or institution. There must instead be a balance of powers, both horizontally between the different branches of government (the executive, the legislative and the judiciary) and vertically between different levels of government (local, regional and central). Also known as the principle of separation of power, these considerations underpin the following observations.

8.1. The System of Government

The system of government is usually a major question when constitutions are drafted or significantly amended. Their structure and shape have a significant impact on how democratic a constitution is. In the early 20th century, democracies were primarily built on two systems of government: either presidential or parliamentary. During the course of that century, these systems were adapted to such a significant degree that scholars identified the emergence of a third system of government called "semi-presidentialism". While the first two systems are centred on two political powers (parliament and president, or parliament and government), the semi-presidential system gives a central role to three bodies: parliament, president and a government headed by a prime minister, with each of the three enjoying comparable democratic legitimacy and significant powers.

8.1.1. Presidential Systems

The presidential system of government creates a clear separation of power between the executive (president) and the legislature, with both enjoying direct electoral legitimacy. The most famous example of a presidential system is the USA, but countries in Latin America (such as Brazil and Argentina), Africa (such as Nigeria, Sudan or Kenya) and Central Asia (such as Kazakhstan or Turkmenistan) have also adopted presidential systems of government.

Distribution of powers in a presidential system: In a presidential system, parliament has the legislative power and limits the president through political control. In turn, the president generally has no legislative power, although s/he may have a power of veto over legislation and may also be empowered to issue decrees. The president holds executive power, which means that s/he determines day-to-day policy and controls the executive branch of government. Both the parliament/legislature and the president serve for fixed terms in office and neither has the power to dismiss the other, with the narrow exception of impeachment for misconduct of a president.

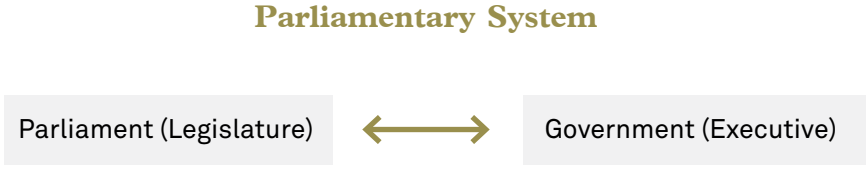
Presidential System:

Pros and Cons of Presidential Systems:	
Pros	**Cons**
The president is often directly elected by the people and accountable to them. A system of checks and balances between the various branches of powers can work more straightforwardly given the clear demarcation between the executive and the legislative. The office of the presidency has a national constituency and as such can act as a centralising force in federal states or in an otherwise fragmented system (for example, in times of volatility). In times of crisis a president may offer decisive leadership.	Presidentialism may reduce the number of political parties over time, as they must strive to put forward viable candidates to the presidency. There is a risk of gridlock in government, given that the executive and legislative powers are parallel structures. This is compounded when politics is polarised between two major parties (as currently in the USA). There is the potential for instability of the system and a slide into authoritarianism, given the concentration of executive power in the presidency (authoritarian regimes typically pretend to be presidential systems, but in reality parliament tends to be very weak).

8.1.2. Parliamentary Systems

Over the centuries the UK built the quintessential parliamentary system of government, which has been adopted with significant variations by other, such as Belgium, Canada, Germany, India, Jamaica, Japan, Mauritius, Nepal, New Zealand and Norway. In the UK, this system of government has been largely stable, relying on a majoritarian electoral system that usually produces clear parliamentary majorities. In other countries, the parliamentary system has sometimes been seen as a source of instability, typically in circumstances with unclear majorities shifting party alliances and fragmentation, making it difficult to build a stable government and resulting in frequent changes of government.

Distribution of powers in a parliamentary system: In a parliamentary cabinet system, parliament has legislative power and controls the government, which is headed by a prime minister. The government has neither legislative power nor power of veto. It is responsible for the day-to-day running of the country and relies on enjoying the confidence of a majority in parliament. As the prime minister is usually the leader of the majority party in parliament, s/he may have significant de facto influence in parliament. The head of state — either a president or a monarch — only enjoys ceremonial or very limited powers.

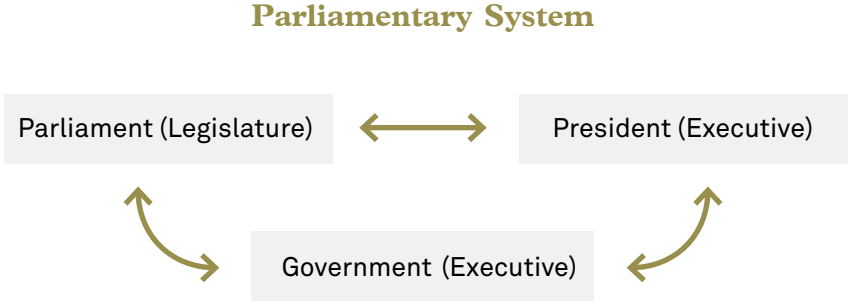


Pros and Cons of Parliamentary Systems:	
Pros	**Cons**
Legislation can be adopted relatively easily, as the executive (often the initiator) and legislature (generally dominated by the same political party/ies having formed the government) work together. Splits between executive and legislature are less likely, as the executive needs to maintain the confidence of the legislature.	The separation of executive and legislature is not as clear as in a presidential system. The head of the executive is elected by the legislature and as such less directly accountable to the electorate than a president. The system can become unstable, for instance when coalition government breaks down or a vocal minority blocks the process.

8.1.3. Semi-Presidential Systems

Semi-presidential systems have been much discussed in the context of recent constitution-making, because of the risks associated with the other two systems of government: presidentialism can deteriorate into authoritarian rule, while a parliamentary system may be unwieldy and result in a lack of leadership. Semi-presidentialism is often seen as a system that allows presidential leadership, while creating more checks and balances of executive power through a government with a prime minister. As shown below, this system has its own complexities and risks. Systems often referred to as semi-presidential are those of Austria, Bulgaria, Cape Verde, East Timor, Finland, France, Georgia, Poland, Portugal, Romania, Senegal, Taiwan and Ukraine.

Semi-presidentialism is characterised by a balance of power between **three** political bodies: the president, the government (headed by a prime minister) and parliament, as illustrated below.



The main challenge of semi-presidentialism is to achieve a balance between these three bodies. Both the constitutional framework and the political context must ensure that the three bodies interact on the basis of a dynamic relationship and, in particular, that the split executive (president/government) work cooperatively.

A semi-presidential system is based on the equivalent democratic legitimacy of the three bodies and on a distribution of powers (either positive or negative) that creates a dynamic balance between the three. The parameters of power allocation include:

- administration of day-to-day policy (only in the hands of the government or also in the hands of the president? Linked to this, who chairs the cabinet meetings?);
- dependence of the government (on the two other bodies or only on parliament?);
- the ability of the president to dissolve the legislature (freely or only in specific situations of deadlock?);
- the right to issue decrees (only the president? Only the prime minister? Only if signed by both? What role for parliament?);
- the right to appoint cabinet members and officials; and
- presidential powers to veto legislation.

Often the decisive aspect defining a semi-presidential system is the power attributed to the president. Too many powers for the president can make the system shift towards presidentialism; too few and it becomes a parliamentary system of government.[60]

Pros and Cons of Semi-Presidential Systems:	
Pros	**Cons**
A president may provide stability in the context of a political crisis or political conflict. A prime minister responsible to parliament can provide political flexibility and a balance to presidential power. The presence of a dual executive with both a president and a prime minister allows some degree of power-sharing between competing parties and avoids winner-takes-all scenarios.	The responsibility of the prime minister and the government to the legislature can lead to governmental instability in the face of a fragmented legislature. The presence of a dual executive could result in institutional conflict within government, especially during periods of "cohabitation" when the president and the parliamentary majority are not from the same party.

Either of these three systems of government can be designed in such a way as to render them compatible with democratic requirements, provided that adequate balance-of-power mechanisms are at their heart. The constitution should clearly indicate the red lines that cannot be crossed if the system, be it presidential, parliamentary or semi-presidential, is to remain democratic. As the Turkish example below shows, these red lines revolve around separation-of-powers guarantees, in particular checks and balances on executive power and the independence of the judiciary.

60. For a numeric scale of presidential powers, see Alan Siaroff, "Comparative Presidencies: The Inadequacy of the Presidential, Semi-presidential and Parliamentary Distinction," *European Journal of Political Research*, Vol. 42 (2003), 287.

Example

Turkey's Move to a Presidential System of Government

In 2017, Turkey adopted a controversial set of constitutional amendments that effectively transformed it into a presidential system with weak checks and balances. New powers granted included:

- **increasing the powers of the President** (by abolishing the office of the Prime Minister and subsuming its powers to those of the President; granting the President the power to appoint ministers, prepare the state budget and issue wide-ranging executive decrees with the force of law; allowing the President to retain ties to their political party; and giving the President the power to declare a state of emergency and/or abolish the Parliament and thereby trigger new elections);
- **decreasing the powers of the Parliament** (by reducing its scrutiny role vis-à-vis the executive, its capacity to pass legislation not approved by the President, and its ability to impeach the President); and
- **jeopardising judicial independence** (by having the President appoint more than half of top-ranking members of the judiciary).

The Venice Commission warned against the dangers of this "Turkish-style" presidential regime".[61] The Commission explained that, while all systems of government could in principle be made compatible with democratic standards, presidential systems were especially required to adopt strong checks and balances and "[i]n particular, a strong, independent judiciary is essential because the controversies which in a parliamentary regime are normally settled through political debate and negotiations, in a presidential regime often end up before the courts". Upon evaluating the proposed amendments to the Turkish Constitution, the Venice Commission concluded that they "would introduce in Turkey a presidential regime which lacks the necessary checks and balances required to safeguard against becoming an authoritarian one". Turkey's example therefore provides a cautionary tale against adopting a system of government without the necessary institutional safeguards to prevent it from sliding into authoritarianism.

8.2. Decentralisation of Power

All states have a degree of decentralisation. Defined as the transfer of some degree of power and authority away from the centre towards sub-units, decentralisation is understood here as a territorial concept.

Expectations from decentralisation: A range of expectations are placed on a new decentralised system, such as: improvement of infrastructure, more efficient local service delivery, the end of marginalisation and discrimination, more equal wealth distribution, prevention of resurgence of dictatorship, and autonomous rights for specific groups. Although designs of decentralisation may help in many instances to achieve those objectives, it is not an all-in-one device suitable for every situation. Some failures of the past might be addressed more efficiently by other or at least additional means, such as ensuring equal treatment for minorities.

61. European Commission for Democracy Through Law (Venice Commission), *Turkey: Opinion on the Amendments to the Constitution Adopted by the Grand National Assembly on 21 January 2017 and to Be Submitted to a National Referendum on 16 April 2017*, 13 March 2017. http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=cdl-ad(2017)005-e (21 October 2017)

When designing a decentralised state system, it is useful to distinguish between formal and substantive aspects:[62]

- At the **formal level**, the questions are how many levels of government there should be (central, regions, municipalities), and how many and what size units there should be at each level. This formal aspect answers the question of geographic allocation of units and sub-units. Some countries deploy asymmetry, for example when some territories are administered directly by the central government, while others also have regional or state governments. Two sets of criteria influence formal decentralisation:

    - Efficiency and economy: These affect the choice between setting up new units or formalising historic ones, or deciding whether units are economically viable with respect to resources or infrastructure.

    - Identity (ethnic, linguistic, religious, historical): This is deciding whether identity-based sub-units are to be set up (sometimes preferred in post-conflict situations such as those of Bosnia Herzegovina or South Sudan). Such identity-based decentralisation may create new problems, because sub-units are not homogenous either and often result in the creation of new minorities in their area. Nevertheless, when identity is necessary for the acceptance of a decentralised structure, a mixed approach between these two types of criteria is preferable. The continuing discussions in Nepal concerning the criteria for delimiting internal boundaries illustrate the challenges associated with resolving such issues.[63]

- At a **substantial (functional) level**, three areas of decentralisation can be distinguished:

    - Political decentralisation occurs when voters in sub-units have the right to elect their own representatives for representational bodies (state or provincial legislatures or executive posts, for example) and also when sub-units have the right to regulate a policy area (such as the school system).

    - Administrative decentralisation can be a mere matter of making services of the central state directly available across the territory (such as issuing passports), but it can also take more intensive forms, such as giving the sub-units the right to implement national policies or to make policy decisions within a legal framework determined at the national level.

    - Fiscal decentralisation determines the degree of financial autonomy of regional and local government. Here three questions can be distinguished: Which level raises revenue? Which level pays for expenditure? How are transfers made between the levels, often to compensate for imbalances? Fiscal decentralisation is often controversial, especially in countries where one region has disproportionate economic resources. Yet fiscal questions can be the real test of genuine decentralisation; if sub-units have no funds to work with, other aspects of decentralisation can become meaningless.

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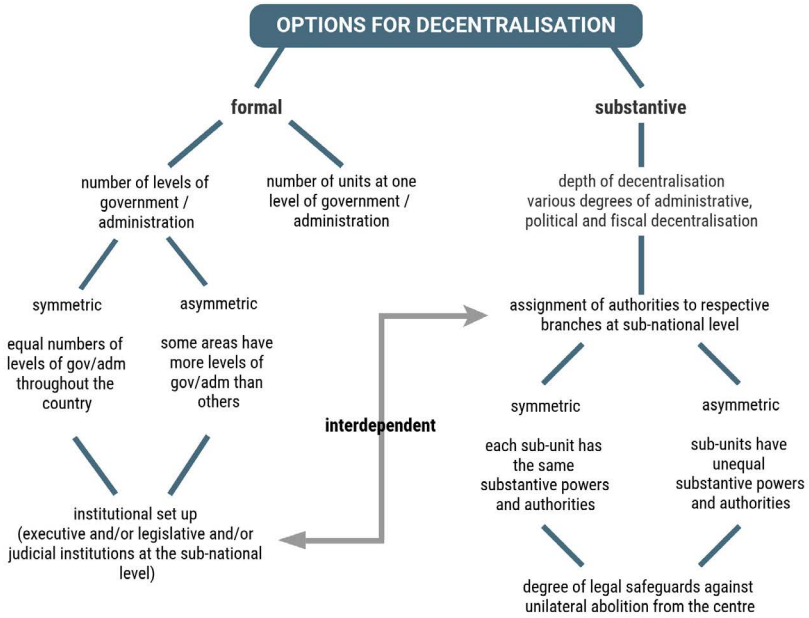
62. For further details on design options in decentralised systems, see DRI, "Briefing Paper 87: Decentralising Government. What You Need to Know," written by Ezra Karmel, Berlin, August 2017. http://democracy-reporting.org/dri_publications/bp-87-decentralising-government-what-you-need-to-know/ (21 October 2017)

63. See Magnus Hatlebakk and Charlotte Ringdal, *"The Economic and Social Basis for State-restructuring in Nepal* (Bergen: Chr. Michelsen Institute, 2013). http://www.cmi.no/publications/file/4711-the-economic-and-social-basis-for-state.pdf (21 October 2017)



Given these many parameters, it is clear there is not one model of decentralisation. Many combinations of decentralised power arrangements are possible.

Federalism: Federalism is one specific form of decentralisation. In a federal state, legal guarantees exist to provide that neither of the levels of government can unilaterally change the responsibilities and authority of the other level. Thus, California cannot unilaterally expand its powers, and the federal government of the USA cannot unilaterally take away powers from California. But the mere existence of a federal relationship between levels of government says little about the actual depth of decentralisation, the amount of power and resources constitutionally assigned to the sub-units.[64] Furthermore, designing a strong local government in a constitution has nothing to do with opting for or against a federal structure.

Why talking of federalism is not always helpful.

In the process of drafting a constitution, federalism is often captured by political rhetoric, loaded with historical experiences and power agendas, turning federalism from a technical notion with a rather distinct legal definition into a controversial concept. This is why in South Africa, Sudan and Spain, the term federalism was avoided during constitutional negotiations without denying the merits of federal arrangements. In the words of John Garang, former Vice President of Sudan:

> *We have not used any formal word in the entire Comprehensive Peace Agreement to describe the type of governance that we have negotiated and agreed on. Perhaps we were guided by the African sign not to name a child before it is born. In the peace process..., we sat down to...negotiate and solve the serious problem of war and peace, instead of being bogged down in whether we should have a federation, a confederation or true federalism. Now that the child has been born researchers can give the name that they believe best depicts the arrangements the Sudanese have agreed in the Sudan Comprehensive Peace Agreement.*

64. For example, Zanzibar (part of Tanzania) and Åhland (part of Finland), which are among the most autonomous sub-units around the world, are not accommodated in a federal system.

Specific decentralisation arrangements will vary greatly from one state to another and will be moulded on that country's distinct context. However, what is important to retain is that, as in the case of the choice of a system of government, constitutional arrangements should aim to ensure there is a balance of power between the various levels of government. Wherever power is located, its exercise must be accompanied by appropriate checks and balances, including accountability mechanisms.

8.3. Independent Judiciary and Constitutional Review

8.3.1. Independence of the Judiciary

The independence of the judiciary is as much an essential element of constitutional democracy as human rights. At the heart of a system of the rule of law, independent courts and tribunals ensure that the conduct of all public authority is consistent with the law, with rights and with the constitution.

8.3.1.1. Judicial Independence in International Law

The UN General Assembly recognised the link between judicial independence and democracy in the 2004 declaration on the "essential elements of democracy".[65] Moreover, article 14 of the ICCPR states that all persons are equal before courts and tribunals, and that all persons are entitled to a fair and public hearing before a competent, independent and impartial tribunal.

The UN has also adopted several sets of basic principles and guidelines as framework models for how a country's domestic laws and institutional structures can protect the independence of the judiciary. These documents include:

- Basic Principles on the Independence of the Judiciary;[66]
- Basic Principles on the Role of Lawyers;[67]
- Guidelines on the Role of Prosecutors;[68]
- Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary;[69] and
- Draft Universal Declaration on the Independence of Justice (the "Singhvi Declaration").[70]

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65. UN, "Enhancing the role of regional, subregional and other organizations and arrangements in promoting and consolidating democracy," Resolution A/Res/59/201 adopted by the General Assembly on 20 December 2004 (published 2005). http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/59/201&Lang=E (21 October 2017); see also Michael Meyer-Resende, *International Consensus: Essential Elements of Democracy* (Berlin: DRI, 2011). http://democracy-reporting.org/dri_publications/international-consensus-essential-elements-of-democracy/ (21 October 2017)

66. UN, "Basic Principles on the Independence of the Judiciary," adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985, endorsed by General Assembly resolutions 40/32, 29 November 1985 and 40/146, 13 December 1985. http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx (24 October 2017)

67. UN, "Basic Principles on the Role of Lawyers," adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990.

68. UN, "Guidelines on the Role of Prosecutors," adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August-7 September 1990.

69. UN, "Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary,", Economic and Social Council resolution 1989/60, endorsed by General Assembly resolution 44/162, 15 December 1989.

70. UN, "Draft Universal Declaration on the Independence of Justice (the 'Singhvi Declaration')," Economic and Social Council, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur on the Study on the Independence and Impartiality of the Judiciary, Jurors and Assessors and the Independence of Lawyers, endorsed by Commission on Human Rights resolution 1989/32 (the "Singhvi Declaration").

The UN Human Rights Committee provides an authoritative interpretation of the article in General Comment No. 32, which yields the following working definition of judicial independence:

1. *Courts must treat all parties impartially without discrimination.*
2. *Courts must display no bias or favour towards particular parties.*
3. *Courts must not pre-judge cases (i.e., there is no prejudice).*
4. *Courts must be politically independent; they must not be beholden to, or subject to manipulation or influence from the executive, administrative or legislative branches of government, which will often be parties before the courts.*
5. *Courts must be able to fulfil their functions without fear: courts cannot act independently if they face retribution for judgments unfavourable to private parties or government.*

As the ICCPR, regional multilateral treaties include a requirement of judicial independence (articles 2, 26, African Charter on Human and Peoples' Rights; article 6, European Convention on Human Rights; Article 8, American Convention on Human Rights: Articles 8, 20, Association of South East Asian Nations Human Rights Declaration).

8.3.1.2. Judicial Independence in Constitutions around the World

Constitutional democracies around the world have encoded versions of this working definition in domestic constitutions. One example is the South African constitution, which provides (article 165(2)):

> *The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*

The Kenyan constitution emphasises fidelity to the Constitution and the law and prohibits interference in the work of the courts (article 160):

> *In the exercise of judicial authority, the Judiciary ... shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.*

The 2014 Tunisian constitution, in its article 102, states:

> *The judiciary is independent. It ensures the administration of justice, the supremacy of the Constitution, the sovereignty of the law, and the protection of rights and freedoms.*
>
> *Judges are independent with the law being the sole authority over them in discharging their functions.*

8.3.1.3. Key Elements of Judicial Independence

Based on the above international legal norms as well as comparative practice, there are several key elements to judicial independence, which all constitution-makers should consider.

Key element of judicial independence	Issues to consider
The need to balance judicial independence and accountability	• Judicial appointments • Security of tenure • Terms of service • Dismissals, discipline and sanctions • Transfers and promotions • Court structure
The institutional independence of the judiciary	• Constitutionalising judicial independence • Judicial versus administrative remedies • Budget • Case assignment • Special courts and military tribunals
The network of institutions supporting judicial independence	• Prosecuting authorities • Judicial councils • Professional law associations

- **The Need to Balance Judicial Independence and Accountability**
  The personal independence of judges is protected, in large part, by the mechanisms and procedures for their appointment and the extent to which politicians or private parties are able to influence judicial behaviour after judges are appointed. However, judges who fail to perform their tasks competently, independently or impartially must be accountable for their actions. The rules for the appointment, terms of service, dismissal, discipline and sanction of judges must strike a delicate balance between the need for protecting judges from undue external influence, and the need for judicial accountability.

  - **Judicial Appointments**
    The UN Basic Principles on the Independence of the Judiciary note that the mechanisms for judicial appointment must make appointment dependent on integrity and ability, and include safeguards against appointment for improper motives (including discrimination) (para. 10). Countries differ in their criteria for judicial appointments. There is a divide between civil law countries, which follow the so-called "career model" (judges appointed as civil servants soon after a basic legal qualification), and common law countries, which follow the "recognition model" (appointments based on achievements during a long career as a legal professional). Whatever the model followed, judicial appointments procedures should be in the hands of the legislature and executive together, and should not be dominated by either branch. Furthermore, with a view to preventing abuse, Chief Justices should be selected within their respective court.

  - **Security of Tenure**
    Security of tenure ensures that judges cannot be dismissed, except in specific circumstances, until the expiry of their term of office. Whether judges are appointed until a mandatory retirement age, or for set terms of office, however, is a matter for the determination of each legal system. The Commonwealth Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence recognise this point, even while they indicate a preference for permanent appointments (para. II(1)). The African Union guidelines are clear that security of tenure must be guaranteed for the duration of the term of office, whether this is until a mandatory

retirement age or until the expiry of a set term, although appointment under fixed-term contracts is prohibited.[71]

- **Terms of Service**
  Guaranteeing judges' remuneration, and otherwise guaranteeing that the conditions and terms of their service will not be reduced unfavourably, is an important element of judicial independence. Threats of reductions in pay or less favourable terms of service can be used to influence judges' decisions. Details can be left for determination by ordinary legislation or government regulation, which will preserve a degree of flexibility.

- **Dismissals, Discipline and Sanctions**
  The UN Basic Principles on the Independence of the Judiciary provide that judges should not be removed or suspended from office except for reasons of incapacity, inability to discharge their duties or a lack of fitness for the position. Further, all disciplinary proceedings must adhere to standards of procedural fairness, with judges subject to discipline, removal or sanction only for violation or non-fulfilment of established standards of judicial conduct; all such proceedings must be subject to independent review.[72] An exception may be transitional periods, when judges associated with previously authoritarian regimes may be exchanged.

- **Transfers and Promotions**
  Transfer of judges to less favourable postings can be used as a threat to influence judicial behaviour. Rules for transfer must be carefully constituted to eliminate this threat, but allow for reasonable and necessary administrative re-assignment and transfer of judges.[73] Conversely, any system of promotion must eliminate judicial advancement as a reward for political bias. One way to ensure objectivity is to leave decisions on judges' promotions to an independent body composed of at least a majority of judges.

- **Court Structure**
  The status of courts and the organisation of the judicial system are sometimes embedded in constitutions, albeit to different degrees. The US constitution, for example, establishes only the US Supreme Court and leaves the establishment and functioning of all the other courts to ordinary legislation (Article III, s 1). The South African constitution, on the other hand, establishes all courts, sets out the judicial hierarchy, and outlines the jurisdiction of each court in that hierarchy (article 166). Where the constitution does not establish courts, it may be open to the legislative and the executive to establish special or ad hoc courts, at their discretion, such as special courts to try those accused of acts of terrorism. The power to create special courts could be abused to allow special courts to circumvent ordinary (and perhaps often onerous) fair trial procedures, in so doing undermining judicial independence or at least the perception of judicial independence.

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71. African Commission on Human and Peoples' Rights, African Union, "Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa," principles A(4)(l), (m), and (n)(3), 2003, http://www.achpr.org/files/instruments/principles-guidelines-right-fair-trial/achpr33_guide_fair_trial_legal_assistance_2003_eng.pdf (21 October 2017)

72. UN, "UN Basic Principles on the Independence of the Judiciary," paras. 17-20.

73. UN, "Draft Universal Declaration on the Independence of Justice (the 'Singhvi Declaration')," para. 15.

- **The Institutional Independence of the Judiciary**
  Ensuring that judges decide cases fairly and independently is only one element of judicial independence. Just as individual judges themselves must be independent, the judiciary as an institution must remain impervious to manipulation and outside influence. As an institution it must function autonomously, without interference from the other branches of government in regulating its own administrative and internal arrangements. The institutional independence of the judiciary can be protected by:

  - **Constitutionalising Judicial Independence**
    Entrenching this principle will provide some protection against political manipulation, though operational details of the judiciary's functioning are often left to the judiciary itself to regulate. Accordingly, some constitutions allow that the "internal" functioning of the courts shall be determined by the courts themselves, usually within a framework of legislation or the constitution.[74]

  - **Judicial versus Administrative Remedies**
    While international law endorses the principle of access to justice, it does not require that the remedy for a rights violation necessarily be provided by a court (as opposed to other administrative bodies). In principle, alternative forums for the resolution of legal disputes provide benefits of cost and speed,[75] but such alternative forums should (a) not close off routes of access to courts, especially to protect rights, and (b) operate with similar safeguards for independence and impartiality as ordinary courts.

  - **Budget**
    The judiciary must have adequate resources if it is to be able to discharge its function properly. Its budget should be of high priority and the judiciary or another independent institution must be responsible for its spending. Sometimes constitutions will entrench the judiciary's budget, for instance as a percentage of the national budget, as a measure to prevent executive abuse (examples include article 177 of the Costa Rican constitution and article 172 of the Constitution of El Salvador).

  - **Case Assignment**
    Case allocation should be determined within the walls of the judiciary without any room for interference or intervention from the other branches of government. In cases where abuse through the manipulation of case assignment may come from within the judiciary itself (such as from senior judges), it can help to introduce measures such as some form of randomised allocation procedure, or allocation according to a highly detailed management plan based on objective criteria.[76]

  - **Special Courts and Military Tribunals**
    While international law does not adopt a unitary position on the legitimacy of such courts and tribunals, nor on whether civilians should ever come before them,[77] there is no question that standards of judicial independence and fairness must also apply in this context. Constitutions are equally divided on this issue.

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74. See DRI and The Carter Center, *Strengthening International Law to Support Democratic Government and Genuine Elections*, written by Dr. Nils Meyer-Ohlendorf and Avery Davis-Roberts (Berlin, Germany; Atlanta, GA; 2012), p. 17. https://democracy-reporting.org/dri_publications/report-strengthening-international-law-to-support-democratic-governance-and-genuine-elections/ (21 October 2017)

75. Leandro Despouy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers* (Geneva: UN, 2008), para. 35.

76. Despouy, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, para. 47.

- **The Network of Institutions Supporting Judicial Independence**
  The legal representatives who appear in court, as well as institutions and individuals responsible for prosecutions, investigations and the collection of evidence, must act impartially if judicial decisions are to uphold principles of the rule of law and respect and protect human rights.[78] Among the most important of these supporting institutions are:

  - **Prosecuting Authorities**
    International law is clear about the need for domestic arrangements to ensure the impartiality of the prosecuting authority. The UN Guidelines on the Role of Prosecutors are intended to assist states in ensuring the effectiveness, impartiality and fairness of prosecutors, and should be taken into account and reflected in national legislation and practice.[79] It is important to note, however, that international law does not require that prosecuting authorities be independent, since in many cases the institutions responsible for prosecution are under the control of, or form part of, the executive or judiciary.

  - **Judicial Councils**
    A judicial council is an independent, corporatist body variously comprising members of the judiciary, the executive and legislative branches of government, the legal profession and/or civil society (composition models differ across jurisdictions). It is mandated with the performance of specific tasks related to constituting the judiciary and the functions of the judiciary. These tasks vary, but they are usually taken to include: the nomination or appointment of judges; decisions on discipline, dismissal and promotion of judges; and administrative matters related to the internal functions of the courts. International guidance in this area indicates the need for such a body to be independent, and for its membership to include (or even have as a majority) members of the judiciary. Roughly 60% of countries have established a judiciary council.[80]

    Judicial independence is a principle clearly established and defined in international law and given weight in constitutions around the world. While certain operational details will vary, there is no doubt that a democratic constitution will have to protect the key tenets of the principle. The following operational guidelines can be distilled.

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77. See further discussion in: DRI and The Center for Constitutional Transitions at NYU Law, "Briefing Paper 41: International Standards for the Independence of the Judiciary," written by Richard Stacey and Sujit Choudhry, Berlin, September 2013, p. 11. http://democracy-reporting.org/dri_publications/briefing-paper-41-international-standards-for-the-independence-of-the-judiciary-2/ (21 October 2017)

78. UN, "Guidelines on the Role of Prosecutors".

79. UN, "Guidelines on the Role of Prosecutors".

80. Nuno Garoupa and Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, John M. Olin Program in Law and Economics Working Paper No. 444, 2008, p. 4. http://chicagounbound.uchicago.edu/law_and_economics/222/ (21 October 2017)

Operational Guidelines on Judicial Independence

Under international law the following working definition of judicial independence can be discerned: an independent judiciary must (a) be impartial; (b) approach cases in an unbiased manner; (c) display no prejudice; (d) be politically independent; and (e) operate without fear.

On the basis of international law these principles can be translated into the following operational guidelines:

a) The power to make judicial appointments should not lie in the hands of a single political actor, especially the executive, with the ability to exercise wide discretion in the selection and appointment of judges. It is preferable for judicial appointments to be made through a process that provides for the participation of other sectors of government and society, for example judges, the legal profession, opposition political parties, civil society, the legislature, or members of government responsible for judicial administration.
b) Security of tenure requires that judicial appointments be for life, until mandatory retirement or for a set term of office.
c) Terms of service and remuneration cannot be reduced unfavourably, and must be secured by law.
d) Judges must remain accountable for their conduct: judges may only be dismissed or disciplined for serious misconduct, incompetence or incapacity, on the basis of objective standards and criteria that are set out beforehand, and through fair procedures with a right of judicial review.
e) Transfer and re-assignment of judges within the judiciary must be determined by the judiciary internally and lie beyond the sole control of the legislature or executive.
f) All courts must be established by law: the court structure must not be subject to summary modification by the executive, and ad hoc courts must be prohibited.
g) The judiciary, or an independent judiciary council, must be responsible for the administrative management of the judiciary.
h) Tribunals other than traditional courts are subject to the same principles of judicial independence as the ordinary courts.
i) Courts must be provided adequate financial resources to fulfil their functions. The judiciary itself or a judiciary council must be solely responsible for managing the judiciary's budget.
j) The allocation of cases to judges is a matter of internal judicial administration. Ideally, case allocation should be randomised or routinised.
k) Military tribunals must have no jurisdiction to try civilians.
l) Prosecuting authorities must be impartial, and operate fairly.
m) A judiciary council, if established, should be composed primarily of judges, and its powers and functions set out clearly in law.

8.3.2. Constitutional Review

The establishment of a judiciary with the power of constitutional review — determining whether government actions comply with the constitution's provisions — is widely considered a standard component of a democracy.[81] It is increasingly common to entrust the power of constitutional review to a specialised constitutional review institution (CRI), typically a court. This body can issue authoritative decisions on the constitutionality of laws and government actions and can interpret the

81. This section is based on DRI and The Center for Constitutional Transitions at NYU Law, "Briefing Paper 40: Constitutional Review in New Democracies," written by Katherine Glenn Bass and Sujit Choudhry, Berlin, September 2013. http://democracy-reporting.org/dri_publications/briefing-paper-40-constitutional-review-in-new-democracies/ (21 October 2017)

constitution's provisions. Establishing a CRI with the power to review the constitutionality of laws and government actions provides political parties and groups with a form of "insurance" for future scenarios, when they may not be in government and want to make sure that a government formed by their opponents acts within the limits of the constitution.

The roles of a CRI: A constitutional review institution can play many important roles, including reviewing the constitutionality of legislation, protecting individual rights, providing a forum for the resolution of disputes in a federal system, enforcing the separation of powers, certifying election results, and assessing the legality of political parties.

Relationship between ordinary courts and constitutional court: Ordinary courts should be allowed to engage in limited review of constitutional questions that arise in the course of cases before them. This review may be limited to ensuring that statutes are applied in a constitutional manner. Alternatively, if ordinary courts can consider challenges to statutes, they may be subject to later review of their decisions by the constitutional court. Either option promotes judicial efficiency by eliminating the need for ordinary courts to halt proceedings while they consider constitutional issues.

Court membership and the judicial independence of CRIs: Judges should be protected from undue political pressure. An appointment procedure that involves many different political actors, rules that strictly define the causes for which a judge may be removed and the procedure for removal, judicial qualifications based on merit and expertise, and non-renewable terms for judges, can all help to foster judicial independence specific to CRIs.

The procedure of appointing/selecting judges to a constitutional review institution differs in most countries from the procedure that is applied for other judges. Owing to the political impact of their decisions it is widely accepted that political actors from other branches of government should be involved in the selection process, since those involved might be more inclined to accept judgments. Basically, there are three different models available for the selection method of constitutional review court judges: (1) by one institution (often by the legislature or occasionally by the Head of State); (2) by different actors on a sequential basis (the decision is made by different actors together, often referred to as cooperative mechanism); (3) by different actors on a proportional basis (each actor makes its appointments to the court separately, often referred to as representative mechanism).[82] There is no best model to choose. Often the model countries have opted for has been predetermined by legal culture/constitutional history (for example, model (3) is predominately used by francophone countries).

Jurisdiction: A CRI should have jurisdiction over all matters that involve a constitutional question. While granting a constitutional court broad jurisdiction allows the court to exert substantial influence over a country's politics, restricting the court's jurisdiction in a way that declares any area of constitutional law "off-limits" is incompatible with the court's role as the final arbiter of the law.

Access to constitutional review: However broad the CRI's jurisdiction is, its effect remains limited if there is only very restricted access to the CRI. Generally, if the CRI is not accessed actively by someone, be it institutionally or individually, it remains inactive (no plaintiff, no judge). Some constitutions have included exceptions to this rule by stipulating that, in certain cases, a bill is to be mandatorily referred to the CRI before promulgation:

- France and many other francophone countries require the CRI to review all organic laws (laws that implement or give greater detail to constitutional provisions) with respect to their constitutionality before enactment.

82. Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003).

- Similarly, before the ratification of an international treaty, some CRIs have to scrutinise whether and to what extent the international agreements conform to the constitution.
- Exceptionally, some constitutions require the CRI to approve explicitly the constitutionality of constitutional amendments, both from a procedural and substantive perspective (as in Tunisia): Have the amendment procedures as stipulated in the constitution been adhered to and has the constitutional hierarchy been respected? The latter question becomes relevant if the constitution contains immutable clauses (provisions that must not be amended at all, nor infringed upon).
- Very rarely a CRI is also empowered to decide on constitutional issues by its own initiative (ex officio). In Benin, the Constitutional Court may act on its own motion to determine the constitutionality of presidential elections (article 117). It has expanded this "procedure de saisine d'office" to laws and regulations presumed to infringe on fundamental human rights.[83]

Alongside these exceptions, there are different ways of accessing the CRI:

- By referral from other courts (if a matter before an ordinary court involves a question of constitutionality, lower courts may halt the process and refer the question to the CRI);
- By referral from members of the legislature, the prime minister or the president; or, especially with regard to the enforcement of the bill of rights, by the initiative of citizens (the Constitution of Colombia stands out by granting every citizen the right to challenge the constitutionality of laws, executive decrees, and constitutional amendments), civil society organisations (public interest litigation), or specific governmental officials/institutions (such as an ombudsperson or the head of a specialised commission).

An individual complaint procedure provides CRIs with case load to effectively monitor the government's compliance of human rights ("monitoring theory"[84]), but access to the CRI is not determined by standing rules alone (who has the right to make a case), but also by the financial resources required to bring a case. A legal aid system supporting those that cannot otherwise afford going to the court might be important, in particular in relation to some socio-economic rights. In this context, independent commissions might serve as an effective tool to bridge factual gaps between the people's right and the capability to make that right heard and observed (see below).

Expectation management is important here too: Allowing any citizen to bring a complaint may increase the number of cases on a CRI's docket in a manner that is no longer manageable. Certain limitations, or the involvement of intermediate actors (such as a Human Rights Commission), may prove necessary for the sustainability of the CRI.

Remedies for violations of constitutionality: A constitutional court must have the power to grant remedies for constitutional violations that can address a wide range of situations, and that have a real impact. Options for remedies typically include:

- Declarations of unconstitutionality: These can involve declaring a law unconstitutional either wholly or in part, with immediate or delayed effect. Of course, the legislature could always choose to amend the laws in question to remove such conflicts of constitutionality.
- Finality of the judgment: Making CRI judgments final means they are binding and irrevocable; this in turn ensures compliance and offers legal certainty and predictability across the legal system.

83. Kangnikoe Bado, *Verfassungsgerichtsbarkeit und Demokratisierung im frankophonen Westafrika — Länderstudie Benin* ("Judicial Review and Democratization in Francophone West Africa: Country Study Benin"), Franz von Liszt Institute Working Paper 2014/05, p. 12. http://intlaw-giessen.de/fileadmin/user_upload/bilder_und_dokumente/forschung/westafrikaprojekt/workingpapers/Draft_WP_2014_benin.pdf (21 October 2017)

84. Widner, "Constitution Writing in Post-Conflict Settings", p. 1520.

- Annulment of electoral results: Where a constitutional court has jurisdiction to certify a country's elections, it may have the power to annul the results of the election if it finds that constitutional rights were violated during the electoral process.
- Injunctions and interim orders: Like ordinary courts, constitutional courts may also have the power to issue injunctions, which are orders that command someone to take a certain action, or forbid them from doing so.

8.4. Independent Constitutional Bodies Supporting Democracy

8.4.1. Election Management Bodies

The fulfilment of other election obligations requires competent and independent electoral administration. ICCPR General Comment 25 assigns the responsibility of ensuring that elections are "conducted fairly, impartially and in accordance with established laws" to an "independent electoral authority", which should be established "to supervise the electoral process."[85] Principles of ensuring institutional independence are outlined in a number of international documents. The UN, drawing on comparative experience, recommends that electoral management bodies be permanent and guided by principles of independence, impartiality, transparency, professionalism and sustainability. [86] The Venice Commission also recommends that impartial electoral commissions be made permanent, protected from arbitrary dismissal, and set up at all levels (from the national to the polling station levels).[87]

Various models exist for independent electoral authorities. The most common, found in over 80 constitutions, is **a national election commission**. Two general models exist for the governance of an election commission:

- The cross-party model, in which members of all major political parties have a seat on the commission. For example, article 264 of the Colombian constitution states that the National Electoral Council consists of seven members from "lists drawn up by the parties and political movements…reflecting the political makeup of the Congress", but also that members "must possess the qualifications mandated by the Constitution for judges of the Supreme Court of Justice".
- The independent model, in which commissioners are politically independent. For instance, article 126 of the Tunisian constitution states: "The Commission shall be composed of nine independent, impartial and competent members, with integrity, who undertake their work for a single six-year term." Another article guarantees the Commission's "legal personality and financial and administrative independence".

Another model is **an electoral court**, found in many constitutions of Central and South America. Staffed by judges, they tend to have similar functions to electoral commissioners. In some older democracies, where there is trust in the impartiality of the civil service and no history of electoral fraud, the Ministry of Interior (France) or other government agencies (Germany) manage elections.

8.4.2. National Human Rights Institutions

Apart from the CRI there are other and often complementary institutions required by the constitution that support constitutional compliance. Often these take the form of independent commissions (for example: anti-corruption commission (in more than 25 countries); electoral commission (in more

85. UN Human Rights Committee, "CCPR General Comment 25 (article 25)," para. 20.
86. United Nations Development Program (UNDP), *Principles for Independent and Sustainable Electoral Management: International Standards for Electoral Management Bodies*, (2012). https://www.ec-undp-electoralassistance.org/wp-content/uploads/2018/08/undp-contents-publications-principles-for-independent-and-sustainable-electoral-management-English.pdf (24 October 2017)
87. Venice Commission, *Code of Good Practice in Electoral Matters* (2003), p. 10.

than 90 countries), human rights commission (in more than 40 countries); media commission (in more than 30 countries)).[88] With regard to respect for fundamental rights, a human rights commission or a human rights ombudsperson might prove to be helpful, both in terms of awareness-raising among citizens and in terms of investigating relevant violations. As with CRIs, the selection process and the authorities of a human rights commission are key to its performance.

In both aspects, the Human Rights Commission of India is worth considering, though its establishment was not demanded by the constitution but solely based on the Protection of Human Rights Act of 1993. The composition of the human rights commission in India is to a certain extent predetermined by the high qualification criteria required for three of the five members. The commission must be chaired by a retired chief justice of the Supreme Court, and must include a sitting or retired chief justice from a High Court and a sitting or retired judge from the Supreme Court (the two remaining candidates are to be "persons having knowledge of, or practical experience in, matters relating to human rights").[89] The portfolio of the commission is broad, and includes investigation of alleged human rights violations, inspection of prisons and spreading of human rights literacy among all levels of society.

8.5. Specific Guarantees Against Authoritarianism

A democratic constitution is by nature a bulwark against authoritarianism, but there are a number of specific provisions that should be considered to prevent autocratic rule.

8.5.1. Checks on Executive Authority

Presidential term limits: Authoritarian rule often consolidates power in one person, mostly a long-ruling president. To prevent autocratic, personalised and unaccountable rule, many constitutions limit the length and number of terms that a national executive can hold. Constitutional term lengths around the world typically range from four to six years; some constitutions allow for only one term, many for only two terms total, and some for a maximum of two consecutive terms but with no restriction on the total number.

Some presidents seek to extend or abolish presidential term limits in order to strengthen their power. Recent attempts to change term limits have triggered political crises around the world, especially in sub-Saharan Africa. Since 1990, seven sub-Saharan African presidents extended their constitutional two-term limit by referendum and won a subsequent third term. In addition to referendums, presidents around the world have tried to circumvent term restrictions in several ways, including by:

- abolishing relevant provisions through constitutional amendment in the legislature (Tunisia 1975);
- abolishing relevant provisions through the decision of a partisan court (Nicaragua 2009);
- arguing that a constitutional amendment intended for the next president applies to the sitting president (Senegal 2012);
- enlisting a surrogate, such as a political ally, to run for president to avoid restrictions on subsequent terms while wielding significant power over the surrogate, possibly occupying the position of Prime Minister (Russia 2012).

In order to prevent manipulation, the Honduran constitution provides that any leader who proposes the abolition or amendment of term limits is subject to immediate removal from office. This was the

88. Source for the numbers: Constitute Project. www.constituteproject.org (21 October 2017)
89. National Human Rights Commission, "The Protection of Human Rights Act, 1993 (No. 10 of 1994)," Gazette of India, Extraordinary, Part II, 1994-01-10, No. 10, pp. 1-16.
http://nhrc.nic.in/documents/Publications/TheProtectionofHumanRightsAct1993_Eng.pdf.

fate in 2009 of former president Manuel Zelaya, who proposed a constitutional amendment that would allow him to stand for a third term.[90]

A number of legal barriers can be erected to make it harder to change term limits. Drafters should consider provisions that would:

- clarify in the text that a term limit continues to apply even if other parts of a constitution have been amended;
- clarify in the text whether a person who serves as president at the time of adoption of a constitution already falls under the term limit, or whether only his or her future terms will be counted;
- declare term limits unchangeable by any means, including by ordinary constitutional amendment, court decision, or referendum.

Clear and restrictive provisions for declaring a state of emergency: A state of emergency weakens the constitutional balance of powers in a democracy by shifting more power to the executive branch. Without placing restrictions on how they can be used and under what circumstances, states of emergency can also be abused to consolidate power for long periods of time.

Decades-long states of emergency were a common tool of undemocratic consolidation of power in several countries in North Africa and the Middle East. Among the constitutions that authorise a national executive to declare a state of emergency, 80% call for approval from a second state organ: the head of state or head of government (in systems with two executives); the legislature; or the cabinet. Of constitutions with emergency provisions, 84% stipulate explicit conditions under which a state of emergency can be called, such as war, invasion, natural disaster, economic emergency or a threat to the constitutional system.

Indeed, article 4 of the ICCPR introduces strict limitations on applications of the state of emergency. It allows derogations "to the extent strictly required by the exigencies of the situation" and includes rights that cannot be derogated from. The Human Rights Committee's General Comment on article 4 states that states of emergency are of an "exceptional and temporary nature and may only last as long as the life of the nation concerned is threatened".

The UN's Siracusa Principles[91] provide an orientation on how to limit a state of emergency, including:

- specific conditions under which a state of emergency can be called;
- protection of specific rights or freedoms even during a state of emergency, in line with article 4 of the ICCPR;
- explicit limitations of the executive's powers during a state of emergency, restricting them to a narrow list.

In addition to the above safeguards, constitution makers could also consider requiring:

- approval of a state of emergency from some supermajority of legislators or other government organ;
- renewed approval from an authorising body over regular periods of time;
- endorsement from an independent body that can determine whether or not the conditions authorising a state of emergency have been met;

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90. Tom Ginsburg, "The Puzzle of Unamendable Provisions: Debate-Impairing Rules vs. Substantive Entrenchment," *Comparative Constitutions Project*, 13 August 2009. http://www.iconnectblog.com/2009/08/the-puzzle-of-unamendable-provisions-debate-impairing-rules-vs-substantive-entrenchment/ (23 October 2017)

91. UN Economic and Social Council, UN Commission on Human Rights, "The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights," Annex, UN Doc E/CN.4/1984/4, 28 September 1984. http://www.uio.no/studier/emner/jus/humanrights/HUMR5503/h09/undervisningsmateriale/SiracusaPrinciples.pdf (23 October 2017)

- a limit to the length of time for which a state of emergency can be in effect;
- safeguards to protect the rest of the government from executive interference, such as by explicitly preventing the executive from dissolving or extending the term of parliament, amending the constitution or ruling by decree.

8.5.2. Limitations on Constitutional Amendment

Entrenched or unamendable constitutional provisions or principles: Constitutions can entrench certain fundamental provisions, a practice that makes such provisions more difficult to amend than others. Some constitutions even make specific provisions or principles unamendable; 35% of the world's constitutions include such so-called eternity clauses.

Examples include:

- "The republican form of government shall not be amended" (France, article 89);
- "Changes in the essential requirements for a democratic state governed by the rule of law are not permissible" (Czech Republic, article 9.2);
- "Amendments of this fundamental law affecting the division of the federation into states, their participation in the legislative process, or the principles laid down in articles 1 and 20 shall be inadmissible" (Germany, article 79.3); article 1 of the German constitution also states that human dignity shall be unviolable, and article 20 enshrines the principles of a democratic and social federal state as well as the rule of law.

The entrenchment of specific constitutional articles — rather than principles — is much less common. Turkey's article 4 declares articles 1, 2 and 3 of the constitution to be unamendable. Article 2 states: "The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble."

In its evaluation of unamendable provisions, the Venice Commission considers that such entrenchment is a complex and potentially controversial constitutional instrument, which should be applied with care, and reserved only for the basic principles of the democratic order. A constitutional democracy should in principle allow for open discussion on reform of even its most basic principles and structures of government.[92]

Some constitutions allow for "anti-entrenchment", or provisions that are easier to amend than others. Article 62 of Iceland's 1944 constitution states: "The Evangelical Lutheran Church shall be the State Church in Iceland and, as such, it shall be supported and protected by the State. This may be amended by law."

Legislative supermajorities to approve constitutional amendments: When it comes to amending the constitution, drafters must strike a balance between stability and flexibility. A constitution, as the fundamental law of the land, should not be subject to the whim of the parliamentary majority of the day. At the same time, however, a constitution must be able to adapt to significant changes in public opinion or institutional development over time. In this way, a constitution could be either too easy or too difficult to amend.

Over 90% of constitutions worldwide require amendment approval by some supermajority, between an absolute majority (50% + 1 of the members of the assembly, not members present) and three-quar-

92. Venice Commission, *Report on Constitutional Amendment*, adopted by the Commission at its 81st Plenary Session, Venice, 11-12 December 2009 (2010), para. 218. http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)001-e (23 October 2017)

ters of the legislature. The type of electoral system is an important consideration in determining the appropriate supermajority for amendment. In majoritarian electoral systems, for example, one party can gain significant majorities that could easily translate into a constitution-changing majority.[93]

One danger of a very high threshold for a supermajority is that it can strengthen disproportionately the bargaining position of minority or fringe groups.

Some constitutions require an additional vote by the next legislature. In Sweden, for instance, there must be new legislative elections and the same text of the amendment must be adopted by the two successive parliaments, with a minimum of nine months' delay between the vote. Such time delays reduce the likelihood of political engineering of a constitution, but they do not allow for swift changes in exceptional situations. Other constitutions (Italy, Guyana, Burkina Faso, Latvia) require a referendum to approve amendments that have passed the legislature, unless the vote in the assembly garners a certain supermajority. Still others (Chile, Malta, Iceland) call for different majorities depending on the type of provision being amended. Some constitutions with bicameral legislatures (Korea, Swaziland) require different thresholds in each house.

Clear and detailed provisions for constitutional referendums: Some constitutions require public referendums to ratify constitutional amendments. The Lithuanian constitution reserves the amendment of certain provisions for referendum only. Article 148 states that "the provisions of the First Chapter ('The State of Lithuania') and the Fourteenth Chapter ('Alteration of the Constitution') may be altered only by referendum".

A referendum can serve as a useful additional safeguard against partisan amendments. But provisions for constitutional referendums can also open the door to authoritarian rulers who try to override constitutional texts. Suggesting that the people's verdict must weigh more than any constitutional text, referendums have been used across the former Soviet Union to ride roughshod over constitutional limitations.

For example, Ukraine suffered from a prolonged political conflict in the late 1990s culminating in a controversial constitutional referendum in 2000. Amid a bitter dispute with parliament, then-President Leonid Kuchma called for a constitutional referendum that greatly reduced the legislature's power by extending the president's authority to dissolve parliament, establishing a second chamber, and weakening the immunity of deputies. Ten years after the referendum, the Venice Commission concluded that the All-Ukraine referendum was at the root of the country's chronic political instability. The Commission indicated that the Ukrainian constitution was not sufficiently clear in safeguarding referendums from populist tampering with constitutional provisions.[94]

Constitution drafters can reduce the risk of referendums being used to undermine the constitution by clearly stipulating:

- the process for referendums, including their timing (before or after an amendment has been approved by a parliamentary majority);
- the types of articles that can be amended through referendum;

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93. For example, in the Hungarian elections of 2010 the centre-right FIDESZ party won approximately 53% of the votes, resulting in it holding more than two-thirds of the seats. The party then enacted far-reaching and highly controversial constitutional reforms.

94. Venice Commission, "Constitutional Referendum in Ukraine", Opinion adopted by the Commission at its 42nd Plenary Session, Venice, 31 March 2000. http://www.venice.coe.int/webforms/documents/?pdf=CDL-INF(2000)011-e (23 October 2017); Venice Commission, "Constitutional Situation in Ukraine", Opinion adopted by the Commission at its 85th Plenary Session, Venice, 17-18 December 2010. http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2010)044-e (23 October 2017); see also DRI, *Democracy Delayed: Obstacles in Political Transition* (Berlin, 2011). http://democracy-reporting.org/dri_publications/report-democracy-delayed-obstacles-in-political-transition/ (23 October 2017)

- that all referendums must be held according to the procedures outlined in the constitution, and by entrenching those procedures;
- that a referendum followed by a supermajority vote in parliament is the only way to amend the constitution.

8.5.3. Democratic Governance of Armed and Security Forces*

Over the past decades, several new constitutions included detailed provisions on the governance of armed and security forces. This has been particularly the case with post-conflict countries and countries transitioning from (military) dictatorship towards more democratic systems of government. Examples include post-1989 transitions in Eastern Europe, the post-dictatorship constitutions in Latin America and the democratic constitutions adopted in several African countries in the 1990s. Constitutions are important to establish democratic governance of armed and security forces.

The monopoly on the use of force is the fundamental feature of the modern state and, in a democracy, every aspect of state power should be controlled by the democratically legitimised institutions. The balance of power, transparency and public accountability, strong and independent judiciaries, the rule of law, respect for political rights and freedoms, and other essential elements of democracy, are central parts of democratic governance of armed and security forces.

In designing the architecture of armed and security forces' governance, constitutions should adhere to obligations in international law and take inspiration from comparative constitutional practice, including democratic oversight over armed and security forces and their organisation. This is particularly relevant to countries where, historically, armies played a major role in establishing and maintaining authoritarianism.

International obligations on the democratic governance of armed and security forces can be derived from international and regional instruments. These include general instruments on human rights and democracy such as the UDHR (1948) and the ICCPR (1966). They also include more specific documents, often soft law sources, such as the Code of Conduct for Law Enforcement Officials,[95] the UN Human Rights Commission Draft Principles Governing the Administration of Justice through Military Tribunals[96] and several UN General Assembly resolutions. There are also several instruments by regional organisations: the OSCE Code of Conduct on Politico-Military Aspects of Security;[97] the Code of Conduct for Armed Forces and Security Services in West Africa;[98] the Inter-American Democratic Charter;[99] and the Quebec City Plan of Action adopted by the Third Summit of the Americas of 2001.[100]

Constitution-making bodies are expected to set out the main principles and most important rules governing armed and security forces. These are: the subordination of armed and security forces to

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* This section is based on DRI, "Briefing Paper 50: Constitutional Provisions for Democratic Governance of Armed and Security Forces", written by Omar Hammady, Matthias Hartwig, and Duncan Pickard, Berlin, September 2014. https://democracy-reporting.org/wp-content/uploads/2016/03/dri-bp-50_en_constitutional_provisions_for_democratic_governance_of_armed_and_security_forces_v1_2015-04-171.pdf (24 October 2017)

95. UN, "Code of Conduct for Law Enforcement Officials," Resolution 34/169 adopted by General Assembly of 17 December 1979.

96. UN Commission on Human Rights, "Draft Principles Governing the Administration of Justice through Military Tribunals," UN Doc. E/CN.4/2006/58, 13 January 2006.

97. OSCE, "Code of Conduct on Politico-Military Aspects of Security," adopted at the 91st Plenary Meeting of the Special Committee of the CSCE Forum for Security Co-operation, Budapest, 3 December 1994.

98. Economic Community of West African States (ECOWAS), "Code of Conduct for Armed Forces and Security Services in West Africa," adopted by the ECOWAS Council of Ministers, Abuja, 17-18 August 2011.

99. Organization of American States (OAS), "Inter-American Democratic Charter," adopted by the General Assembly at its session in Lima, 11 September 2001.

100. Organization of American States (OAS), "Quebec City Plan of Action," Declaration of the Third Summit of the Americas adopted in Quebec, 22 April 2001. https://www.state.gov/p/wha/rls/59664.htm (23 October 2017)

democratically elected institutions; political neutrality and non-interference in politics; and abiding by the rule of law and by human rights. These have direct implications to be taken into account while drafting the relevant constitutional provisions, most notably regarding the establishment and organisation of armed and security forces, their command, oversight, control and use.

Subordination of armed forces to democratically elected institutions: This is one of the best-established principles on armed and security forces' governance. The UN General Assembly and the Human Rights Commission highlighted this principle in a resolution on "promoting and consolidating democracy",[101] stating that militaries must be "accountable to democratically elected civilian government". [102]

Non-interference in politics and ideological neutrality: Political and ideological neutrality of armed and security forces is a key element in enabling civilian institutions to fulfil their role and in particular to allow elected institutions to implement political programmes for which they were elected. This does not mean individual members of the security sector should only enjoy limited civil and political rights, but rather that the institutions as such should observe strict political neutrality.

Adherence to the rule of law and human rights: Armed and security forces must at all times be subject to the rule of law and exercise their power within its limits. The UN "Approach to Rule of Law Assistance", including assistance to constitutional reforms, also identifies, as part of the framework for strengthening the rule of law: "Police and other law enforcement agencies that protect individuals and communities, enforce the law without discrimination and take appropriate action against alleged violations of the law (...)" as well as a "military and civil defence force that has allegiance to the Constitution (...) and to the democratic government, and follows international humanitarian law".[103]

Further principles important for the conduct of armed and security forces, such as the principle of proportionality, are generally provided for. Article 3 of the Code of Conduct for Law Enforcement Officials states that officials "may use force only when strictly necessary and to the extent required for the performance of their duty".[104]

Part and parcel of human rights guarantees is access to justice and effective remedies. Traditionally, the specific nature of military life was used to justify the establishment of military tribunals on the ground that civilian judges lack the expertise in military matters.[105] However, the independence of the judiciary must be preserved and safeguards must be established to prevent military courts from being fora of justice with lower standards.[106] The UN Commission on Human Rights developed a set of draft Principles Governing the Administration of Justice through Military Tribunals.[107]

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101. UN, "Promoting and Consolidating Democracy," Resolution A/RES/ 55/96 adopted by the General Assembly of 28 February 2001.

102. UN, "Promoting and Consolidating Democracy," para. 1-c (ix); see also UN Commission on Human Rights, "Democracy and the Rule of Law," Resolution E/CN.4/RES/2005/32, 19 April 2005. http://www.refworld.org/docid/45377c4c0.html 2005/32, para. 14 (b)(vii) (23 October 2017)

103. UN, *Guidance Note of the Secretary General, UN Approach to Rule of Law Assistance* (2008), p. 6. https://www.un.org/ruleoflaw/files/RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf (23 October 2017)

104. UN, "Code of Conduct for Law Enforcement Officials". http://www.ohchr.org/Documents/ProfessionalInterest/codeofconduct.pdf (23 October 2017)

105. Mindia Vashakmadze, *Understanding Military Justice*, (Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2009), p. 10. http://www.dcaf.ch/sites/default/files/publications/documents/Milit.Justice_Guidebook_ENG.pdf (23 October 2017)

106. UN, "Basic Principles on the Independence of the Judiciary".

107. UN Commission on Human Rights, *Draft Principles Governing the Administration of Justice Through Military Tribunals*, Report submitted by the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Emmanuel Decaux, UN Doc. E/CN.4/2006/58, 13 January 2006.

8.5.4. Constitutional Rights of the Opposition

A functioning and effective opposition — e.g. individual Members of Parliament (MPs) or a parliamentary group that does not support the government — is an essential element of any democracy. The opposition offers people an alternative to the incumbent government. Without such an alternative, people cannot effectively choose their government. A functioning opposition is also indispensable for pluralism because it offers views and policies different from those of the government; it provides a wider range of voices, which are essential for the "competition of ideas".

The principle of **democratic pluralism** has been given constitutional status in several constitutions. Portugal's constitution, for example, requires that every constitutional amendment respect plural expression and the right to democratic opposition (article 289). In Portugal, pluralism and opposition rights are part of a constitutional eternity clause.

The importance of a functioning opposition and pluralism is widely recognised around the world. NGOs, governments, and international organisations have stressed, on various occasions, the importance of a functioning opposition for pluralism. Delegations from Arab, African and Asian countries have all agreed to strengthen pluralism so that their parliamentary bodies "represent popular will", "ensuring the fair representation of all sectors of society".[108] In April 2012, the UN Human Rights Council adopted a resolution that emphasised "the crucial role played by the political opposition and civil society in the proper functioning of a democracy".[109]

However, recognition of the opposition alone is not sufficient. According to the Parliamentary Assembly of the Council of Europe, the quality of that democracy must be "measured by the means available to the opposition or the parliamentary minority to accomplish its tasks".[110] An opposition must enjoy a number of concrete rights to function effectively and offer an alternative to the majority. In general, these rights include the equal treatment of parliamentarians and freedom of expression. More specifically, opposition rights include the right to supervise government, the right to speak in parliament and the right to participate fully in the legislative processes.

With a few exceptions, constitutions and laws of States do not define the role of the opposition, but acknowledge their rights. In one way or another, the constitutions of many states acknowledge opposition rights either by granting specific rights to all parliamentarians **(implicit rights)** or by explicit reference to the "opposition" **(explicit rights)**. Even if not always constitutionally protected, the Member States of the Council of Europe grant rights to the parliamentary minority, whether organised around political groups or individual parliamentarians.[111] Similarly, the constitutions of several Member States of the Arab League and the African Union guarantee a number of rights to parliamentarians.

- **Implicit Rights**
  Granting rights to all MPs, thus providing implicit opposition rights, has been more common than granting explicit rights to the opposition. A right commonly found throughout constitutions is parliamentary immunity, which is a right that applies to all MPs of a given parliament, and also benefits the opposition. Supermajorities, such as two-third majorities required for consti-

108. Inter-Governmental Regional Conference on Democracy, Human Rights and the Role of the International Criminal Court, "Sana'a Declaration on Democracy, Human Rights, and the Role of the International Criminal Court," Sana'a, 10-12 January 2004.
109. UN Human Rights Council, "Human rights, democracy and the rule of law," Resolution A/HRC/RES/19/36 adopted at the Council's 19th Session, Geneva, 23 March 2012.
110. Parliamentary Assembly of the Council of Europe (PACE), "Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament," Resolution 1601 adopted at the Assembly's 6th Seating, 23 January 2008, para. 2.
111. PACE, "Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament," para. 8.

tutional amendments, or low thresholds required to conduct constitutional review of legislative acts, are examples of implicit rights that are particularly geared toward the opposition. In the former case, in effect the parliamentary opposition often has a veto (provided that the parliamentary majority does not have a two-third majority); in the latter, it has the power to initiate judicial review or delay legislation. While these rights are available to all MPs, the qualified majority-minority provisions make them useful in preventing misuse by the majority.

- **Explicit Rights**
  Explicit rights are rarer, but there are some countries that protect opposition rights by explicitly referring to the term "opposition" in the constitution. In Europe, Portugal and France, for example, lay down specific opposition rights. Portugal's constitution determines that "minorities have the right to democratic opposition, as laid down by this Constitution and the law" (article 114(2)). Political parties that hold seats in the parliament, but are not part of the government, are "particularly" entitled "to be regularly and directly informed by the Government as to the situation and progress of the main matters of public interest" (article 114(3)).

Examples of Constitutional Rights of the Opposition:

- **Equal Treatment and Proportionality**
  The principle of **equal treatment**, usually provided for in parliamentary Rules of Procedure, requires that opposition members be able to exercise their mandate under the same conditions granted to those MPs in the majority. Furthermore, all MPs should have a number of equal rights whether they are part of a big group, a small group or not aligned with any group. Equal treatment of MPs must be ensured in all their activities and privileges. The principle of equal treatment is usually balanced by that of **proportionality**, which holds that differentiation between parliamentarian groups is justified to reflect their size. Examples of differentiated rules to account for such differences include:

  - **speaking time;**
  - **question time;**
  - **parliamentary committee membership and leadership;**
  - **participation in the administration of parliament** (such as rules that the leadership of the legislature go to the majority party).

  However, electoral size differences do not justify measures that would hinder the parliamentary work of opposition groups, such as allocation of fewer individual resources or staff.

- **Access to and Coverage in the Media**
  Many constitutions grant the opposition the right of access to the media and the right of coverage in the media. Constitutions generally include different rules for public and private media: while private media is rarely the subject of constitutional provisions, state media usually is. Constitutions often contain different rules for election campaigns. For example, according to article 35 of Peru's constitution, political parties have — under the conditions of the law — "free access to the state-owned social media in a proportional manner to the last general election results".

- **Effective Government Scrutiny and Control**
  There are many different ways to conduct oversight and they include the right to debate government programmes and pose questions to the government, which is required to answer within certain time limits. They also include the right to investigate government activities and table a motion of no confidence, which leaves the government dependent on support of parliament

to a large degree. For example, Indonesia's constitution stipulates that parliament has "the right of interpellation (interpelasi), the right of investigation (angket), and the right to declare an opinion" (article 20(A)(2)). In order to prevent opposition rights being blocked by majority groups, some constitutions grant the minority in parliament or single MPs a number of rights that cannot be blocked by the majority. This is done either by explicitly granting the right to individual MPs or through constitutional provisions for qualified minority rights. This means that a certain minority percentage of MPs may call for inquiries or adopt other initiatives. Examples of such rights include:

- **asking questions and sending interpellations to the government** (this right can be granted to individual MPs, as in Indonesia, or to groups of MPs: one-fifth in Lithuania and a minimum of 20 in the Czech Republic);
- **calling parliamentary sessions** (constitutions differ on the percentage of MPs required: the South Korean constitution requires one quarter, for instance, while the Armenian one requires one-third);
- **setting the agenda** (for example, the French constitution grants the opposition the right to set the agenda once per month);
- **establishing committees of inquiry** (the German constitution allowed one quarter of opposition MPs the right to establish a committee of inquiry, but when a coalition of the two major parties controlled more than 75% of the seats in parliament, they lowered the threshold to 20% in order to maintain effective opposition rights).

- **Appeal to the Constitutional Court**
  Where strong constitutional courts exist and parliament is entitled to appeal to the court, opposition members should have the right to request a constitutional review of laws. In Germany, one quarter of the members of the Bundestag (the lower house) can lodge a case with the Federal Constitutional Court to rule on the constitutionality of federal and regional (Länder) laws. Germany's Constitutional Court also rules on appeals by individual MPs who allege that their constitutional rights as parliamentarians have been violated (article 93). These opposition rights have played an important role in German politics, and a number of laws have been annulled by the Constitutional Court following an appeal by the opposition.

- **Legislative Initiative**
  One of parliament's primary functions is to legislate. Constitutions usually give MPs or parliamentary groups the right to table legislative proposals and the right to comment on proposals by the government. While some constitutions require the support of a specific number of MPs to table draft legislation, others give individual MPs such rights. Jordan is an example of the former, where ten or more MPs are required to propose draft laws (article 95). Turkey, Indonesia, Albania and Portugal are examples of the latter.

- **Participation in Committee Work**
  Committees discuss and prepare legislation, the budget and other acts and are an essential part of a functioning parliament. For this reason, the effective participation of the opposition in committees is indispensable. At the same time, the composition of committees must reflect the strengths of political parties. Various constitutions stipulate explicitly that committee membership be proportional to the composition of parliament as a whole (examples include Portugal (article 178(2)) and Greece (article 68(3))). However, the general principle of proportional representation should not prevent the opposition from participating effectively in the parliament's committee work. Looking to strike a balance, some constitutions stipulate that a certain number of committees should be chaired by a member of the opposition.

- **Participation in the Election/Appointment of Senior Officials**
  The election or appointment of senior officials is politically sensitive. These can include media commissioners, ombudspersons, head of court of auditors, central bankers, high-ranking judges and high-ranking military officers. There are many different arrangements to elect or appoint such officials. Often, the president, government, prime minister or MPs have the right to select these officials. However, it is also common for the opposition to be consulted and/or approve the appointment. For example, South Africa's constitution requires that three members of the Judicial Service Commission be MPs from opposition parties (article 178(1)(h)). In Argentina, the chair of the General Auditing Office is "appointed under the proposal of the Opposition with the largest number of legislators in Congress" (article 85).

- **Validity of Term**
  It is of particular importance for opposition members that parliament cannot remove individual MPs by simple majority and/or on vague grounds. If the term of an MP simply depends on a decision by a majority of Parliament, the opposition members work under the constant threat of losing their seats. It is equally problematic if MPs can be removed on vague grounds, such as moral conduct. The Constitution of Pakistan, for example, contains an extensive list of grounds for removing MPs, some of which are vague and lend themselves to unpredictable and inconsistent application.

The decision to include opposition rights as constitutional provisions requires careful consideration and is a unique process for every state. However, explicit constitutional protection of opposition rights makes particular sense in new democracies with a history of oppressing opposing voices, and where constitutional recognition of the opposition's status can be a safeguard against the re-emergence of a one-party system. In addition, such constitutional protection can institutionalise political majority-minority relations and give a strong signal that losing elections does not necessarily mean exclusion from the political scene.

Example

Opposition Rights in Morocco's 2011 Constitution

While most Arab countries' constitutions do not contain explicit rights of the opposition, Morocco's revised 2011 Constitution does. Article 10 contains a detailed catalogue of explicit opposition rights, which exceed the rights of the opposition in many other parliaments:

The Constitution guarantees to the parliamentary opposition a status conferring on it the rights that will permit it to appropriately accomplish the missions that accrue to it in parliamentary work and political life.

It guarantees, notably, to the opposition the following rights:
- the freedom of opinion, of expression, and of assembly;
- air time at the level of the official media, proportional to its representation;
- the benefit of public finance, conforming to the provisions of the law;
- the effective participation in the legislative procedure, notably by inclusion of proposals of law in the agenda of both Chambers of the Parliament;
- the effective participation in the control of the governmental work, notably by way of [a travers] the motions of censure and the interpellation of the Government, [and] the oral questions addressed to the Government and the parliamentary commissions of inquiry;

- the contribution to the proposing of candidates and to the election of members of the Constitutional Court;
- an appropriate representation in the internal activities of both Chambers of the Parliament;
- the presidency of the commission in charge of the legislation in the Chamber of Representatives;
- disposal of means appropriate to assume its institutional functions;
- the active participation in parliamentary diplomacy with a view to the defence of just causes of the Nation and of its vital interests;
- the contribution to the structuring and the representation of the citizens [feminine] and citizens [masculine] in the work of the political parties which it forms and this, in accordance with the provisions of Article 7 of this Constitution;
- the exercise of power in the local, regional and national plans, by way of democratic alternation, and within the framework of the provisions of this Constitution.
- The groups of the opposition are held to provide an active and constructive contribution to the parliamentary work.

The modalities of exercise, by the groups of the opposition, of the rights provided for above are established, as is the case, by the organic laws, by the laws or additionally, by the internal regulations of each Chamber of the Parliament.

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Part IV

MAKING CONSTITUTIONS WORK

CHAPTER 9

The Implementation of Constitutions*

A constitution must be translated into realities, but often, new constitutions do not meet these promises. Lack of implementation remains a constant challenge.

It is worth distinguishing **two different phases of "implementation"**. Constitutions are hardly ever "complete". They do not and cannot address all contingencies and spell out how they are resolved.[112] They rely on further measures to be taken either by the legislature or the executive in order to become fully operational. Metaphorically, one might think of a constitution as a carcass or skeleton of a building where the bricking is completed, but the installation and fittings still need to be done. Often, constitutions include specific chapters regulating the **transitional period** in which the old is phasing out and the new is coming in, be it with regard to laws, institutions or personnel. The second type of implementation, once the constitutional building is fully established, refers to the operation of the constitution: the day-to-day process of fidelity to the text and the principles that are legitimately derivable from the constitution by all organs of government. Implementation is strengthened through **compliance** and **enforcement** procedures[113] by courts and commissions, reporting requirements or other safeguards.[114]

9.1. Expectation Management: What Can Constitutions Do?

Constitutions — especially if drafted after violent conflict or after the fall of an authoritarian regime — often mirror the people's aspirations and hopes for a better future. But as such, they remain words on paper that need to be implemented. Setting expectations too high might soon lead to disappointment. Or, as James Madison as one of the fathers of the US Constitution stressed: constitutional texts are only fragile "parchment barriers" (barriers on paper) against internal political resistance and external economic or strategic shocks. The effectiveness of institutions even with formal sanctioning power depends to a considerable degree on their standing and support from other institutions and the society at large.

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* This chapter is based on DRI, "Briefing Paper 81: From Words to Deeds. Implementation of Constitutions," written by Markus Böckenförde, Berlin, May 2017, https://democracy-reporting.org/de/dri_publications/from-words-to-deeds-implementing-constitutions/ (24 October 2017)

112. Rosalind Dixon and Tom Ginsburg, "Deciding Not to Decide: Deferral in Constitutional Design", *International Journal of Constitutional Law*, Vol. 9, No. 3-4 (2011), 636-672.

113. Although in this period transitional arrangements are dominant, compliance to and enforcement of the new constitution operates in parallel.

114. There is a caveat to this distinction of two types of implementation. Occasionally, negotiating parties deliberately agree on an ambiguously worded text that allows each of them to read their different understandings into the text. Such an ambiguity is often labelled "constructive" since it articulates compromise insofar as the sides agree to not agree on a precise wording with regard to a specific issue, which they are interpreting differently. Here, an issue that is not yet resolved is not deferred to the legislature for implementation in the transitional phase, rather it is the task of the judiciary to flesh out one distinct meaning of the text in the operational phase.

Since the degree to which constitutional choices are implemented will bear some relationship to how and in which context they were made, three issues should be considered:

- Ownership related to participation;
- Ownership related to familiarity and/or the context of design options;
- A constitutional design that corresponds to the capacities available for implementation.

9.1.1. Ownership Related to Participation

Next to the normative claim of participation (see discussion in Chapter 3 of this handbook) and its psychological benefits (inclusion and trust), the monitoring aspect of a participatory process is key to fostering the constitution's implementation. When citizens actively take part in forming the constitution through public consultation and civic education, they learn its content more fully, including the rough parameters of accepted behaviour under the new constitution. Disrespect of the constitution by governmental officials may be identified and challenged by relevant institutions. Where leaders are aware that citizens are better able to monitor, they may be more likely to observe constitutional limitations on exercising power, anticipating that they will meet resistance.[115]

9.1.2. Ownership Related to Familiarity and/or the Context of Design Options

Constitutions literally "constitute" the legal parameters within which a society is to operate. Drafting a constitution that works requires a balance between the need for reforming or replacing existing structures at the one end (that may have caused violent conflict or allowed for authoritarian ruling over decades), and accommodating existing customs at the other end. Reconstructing a society through constitutional design where laws neither reflect nor are derived from the cultural norms in which they must endure, might render the constitution irrelevant and destined to fail. Or, as Ruth Gordon metaphorical stated: "constitutions can flourish and succeed only if they are firmly planted in the cultural soil from which they gain legitimacy".[116] Culture in this context should not be understood as a romantic preconception often referred to as "tradition", but as a "collective prism through which the constitutional and political order are understood".[117]

Examples of Relevant Context and Familiarity:

- After declaring unilaterally its independence from Somalia, Somaliland's new constitution included institutions and structures that reflect **forms of traditional social organisation**. The creation of the 82-member Guurti formalised a centuries' old and effective mediation system among clans and sub-clans as a parliamentary body (upper house). The Guurti is regarded as the "centre of gravity" for the successful process of rebuilding Somaliland peacefully. Discussions within Somaliland to reform this institution 25 years later underscore that institutional choices based on traditional experiences are not isolated from consecutive reforms.

- Most countries' formal legal systems are — at least in part — informed by one of two legal families: **the common law** or **the civil law**. They have distinct features that affect the work of judicial institutions and reflect their specific design. This becomes partic-

115. Widner, "Constitution Writing in Post-Conflict Settings," p. 1520.
116. Ruth Gordon, "Growing Constitutions," *Journal of Constitutional Law*, Vol. 1, No. 3 (1999), 530. https://www.law.upenn.edu/journals/conlaw/articles/volume1/issue3/Gordon1U.Pa.J.Const.L.528(1999).pdf (23 October 2017)
117. Sumit Bisarya, "Unpacking Context: What exactly do we mean by context-driven constitutional assistance?", *The UN Constitutional*, No. 5 (2016), p. 5. http://peacemaker.un.org/sites/peacemaker.un.org/files/TheUNConstitutional_Edition5_Summer2016.pdf (23 October 2017)

ularly evident with regard to constitutional review of laws. Specialised constitutional courts are high on the agenda of constitutional drafters and international advisors. But since they are fitted well into the judicial architecture of civil law countries with their detailed codes and different court systems, they might turn out alien in a common law context. One might therefore consider including some preferable aspects of constitutional courts into a common law context instead of importing a new institution. Some countries have followed this path: many anglophone countries in West Africa have opted for a concentrated constitutional review through a "referral procedure", while maintaining the Supreme Court structure.

- **"Federalism"** is another design option that is often debated on an abstract, political level, but rarely contextualised and therefore poorly implemented. Borrowing federal models from countries whose constitutional design aimed at bringing several independent states together (USA, Switzerland, Germany) might create confusion when searching for models to keep a diverging country together. Similarly, demographics of the natural topography in some countries may suggest considerations along federal lines (Nepal), but should not be transferred to different landscapes literally.

- Keeping in mind that constitutions are implemented by and through the actions of the institutions they created, the extent of successful implementation also depends on the **appropriate allocation of tasks to respective institutions**. If a constitution aims to transform a centralised structure into a decentralised one, relevant mechanisms should not be left in the hands of the national legislature from which powers are to be transferred to other layers of government.

9.1.3. A Constitutional Design That Corresponds to the Capacities Available for Implementation

Drafting a new constitution is often aspirational and visionary. It represents a hope for a better future. Thus, constitutions are written based on views of what should go into the text because of the society that is to be established rather than what is required to implement it. At the same time, constitutions are negotiated compromises between different political stakeholders and interest groups. The accommodation of their different preferences and demands often results in bigger government that requires larger numbers of people and greater budgets. Obviously, such dynamics bear a risk on the implementation end. If the human and financial resources are not available to run the institutions envisaged in the constitution, frustration and disappointment among the people increases and the constitution's credibility is at stake. Or, to put it in the words of a constitutional expert from South Africa: "We have built a Rolls Royce Constitution and forgot about the high consumption. Now we are looking for petrol to drive it."

9.2. The Transitional Period

A new constitution may create new institutions, additional rights for citizens, more constraints to foster government accountability and, in the case of substantive decentralisation, additional layers of government. Yet although these tasks are manifested in the constitution, the constitution regulates only a few of them directly and exclusively.

Most constitutions do not become immediately operational following their promulgation but still need to be established by law, decree or otherwise. Generally, the margin of discretion that is given to the legislature differs from case to case: sometimes the constitution provides a narrow and predetermined frame; sometimes the legislature is tasked to set up institutions without any further directions by the constitution.

This period of phasing out the old and introducing the new is a transformative one. It marks the difference between constitution-making (writing and ratifying the constitutional document) and constitution-building (completing the constitutional setting in a way that makes it fully operational), and is the first litmus test of the degree of commitment towards the new document. At the same time, the mechanisms described below allow the drafters of a constitution to ensure that future governments will do what is necessary to implement the new constitution, and prevents this process being entirely at their will.

9.2.1. Implementation Schedule

Many constitutional provisions defer the establishment of new institutions, additional rights and so forth to the legislature or the executive. Without any further guidance it might be difficult to identify which action is best taken at which time by the relevant institution. In different countries, implementation schedules have been introduced to encourage and support implementation by indicating which laws/decrees need to be passed in what sequence, until which date, by which institution. The form of those schedules ranges from a separate chapter in the constitution (Tunisia, Afghanistan) to annexed tables (Sudan, Kenya).

> The Kenyan example (adoption of a new constitution in 2010) stands out with its specific, elaborate and limited timetable for constitutional implementation. It also considers that the discussion and elaboration of some laws might be particularly controversial, demanding more time than planned. It thus permits the legislature to extend the deadline once, if two-thirds of its members consent.

9.2.2. Oversight Institutions for Implementation

Beyond merely setting a schedule, the commitment to implementation might be increased through the creation of institutions specifically designed to support and monitor the implementation process. Afghanistan, Sudan and Kenya have provided for such an institution. The degree of independence of these institutions differs, as does their authority.

The creation of the Afghan "Independent Commission for the Supervision of the Implementation of the Constitution" was delayed by six years. In 2010, the task assigned to the commission was no longer the supervision of the implementation process, but rather the interpretation of the Constitution at the request of the government, the National Assembly and the Supreme Court.[118]

Kenya's "Commission for the Implementation of the Constitution" is probably the most far reaching institution of that kind, vested with the power to "monitor, facilitate, and oversee the development of legislation and administrative procedures as required to implement the constitution" (sec. 5, para. 6 of schedule 5). In addition, it is tasked with preparing legislation required to implement the constitution for tabling in Parliament (in coordination with the Attorney-General and the Kenya Law Reform Commission), and with cooperating with each of the other commissions to ensure that the letter and spirit of the constitution is respected.

9.2.3. Compliance and Sanctions Mechanisms

Many constitutional provisions remain dormant if the legislature fails to enact the implementing law. Implementation commissions do not have enforcement mechanisms; they have to rely on the effectiveness of their support and the soft power of their reports. But a few constitutions provide additional compliance mechanisms:

118. The law establishing the Commission was vetoed by the President; the veto was overruled by a two-thirds majority in Parliament. The President argued that the authority of the Commission would create an overlap with the Supreme Court's jurisdiction. See Shamshad Pasarlay, *Making the 2004 Constitution of Afghanistan: A History and Analysis Through the Lens of Coordination and Deferral Theory*, PhD Thesis (University of Washington, 2016). https://digital.lib.washington.edu/researchworks/handle/1773/36735 (23 October 2017)

- In South Africa, important rights provisions of the constitution (right to information; just administration) are "doubled" with **fall back clauses** in case of relevant implementation law not being enacted. A deadline of three years for the enactment of the implementing laws is provided and section 23 of schedule 6 indicates how the respective articles should be interpreted during the interim period. If the legislature failed to enact the laws during this period, the transitional reading was to become permanent.
- In Papua New Guinea **courts** are entrusted in a case before them to make such orders as may be necessary to fill the gap left by the absence of an implementation law. Furthermore, **independent commissions** that are waiting for the enabling law can become operational and are entitled to staff and facilities needed to carry out their function.[119]
- Kenya opted for a different path and introduced **an escalating sanction system:** if the legislature fails to enact legislation in the specified time, any person may file a petition to the High Court. The High Court, in turn, transmits an order directing Parliament and the Attorney-General to take steps to ensure that the required legislation is enacted, within the period specified in the order, and to report the progress to the Chief Justice. If the legislature fails to comply with the order, the Chief Justice may ask the President to dissolve the legislature.

9.2.4. Reviewing Old Laws

A new constitution, especially if it introduces a radical change from the past, has to decide on the status of existing laws. Often, the most repressive laws on which a former regime was based are repealed by the constitution (see, for example, schedule 7 of the Constitution of South Africa 1993).[120]

Beyond this, a decision needs to be made as to whether the "constitutionality check" of old laws shall be part of the transitional period or shall rather be left to life under the new constitution.

- The first option considers old laws as part of the past that is to be left behind. In order to qualify for the new era, these must pass a screening of constitutionality in the interim phase. Following this path, the challenge remains to identify/create the proper institution to fulfil this task. Depending on the situation before the constitutional change, there might be resistance to entrusting the "old judiciary" with this task. In Sudan, the authority was given to the National Constitutional Review Commission (which also had to "translate" the relevant provisions from the six peace protocols into a constitutional text). However there is also a further challenge: Which law is to be considered "old"? The entire corpus of existing law or only those laws passed under a certain regime, during a specific period of time?
- In light of these challenges, most constitutions abstain from regarding the review of all existing laws against the new constitution as a part of a transitional period. Old laws that are not repealed continue to exist as long as no court finds them inconsistent with the new constitution.

9.2.5. Vetting

Constitutions, especially when drafted in a post-conflict or a post-authoritarian setting, express commitments for a better and more peaceful future. Building new trust and a common vision for the time to come cannot be achieved by the constitutional text alone. It also requires coming to terms with the recent past, including the question of continuity or change with regard to personnel. To what extent can/must one rely on the old bureaucracy/justice system for a new start? And how much do they support the change towards a new era? Should there be a vetting process for officers

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119. Interpeace, *Constitution-making and Reform*, p. 225.

120. Further examples include Cambodia and Poland. In the Constitution of Cambodia certain laws (property-related) "continue to remain in force until amended or repealed by new laws and regulations, except those provisions that are contrary to the spirit of this Constitution" (article 158). The Constitution of Poland provided (article 239) that with the entering into force of the constitution, "resolutions of the Constitutional Tribunal on interpretation of statutes shall lose their universally binding force" (with an ex-tunc effect, leaving existing judgments based on that interpretation intact).

and judges in a transitional period, investigating to what extent they were involved in the previous regime? Obviously, these questions are relevant for the success of implementation and touch on the delicate and broader issue of transitional justice.

In Kenya, the judicial system was perceived as overly corrupt ("why pay for a lawyer if you can buy a judge"?). To address this issue, and to strengthen the rule of law beyond institutional reforms as part of the drafting process, the constitution required the establishment of a "Judges and Magistrates Vetting Board" that scrutinised past performances of judges, and on which their further employment was based.

9.3. Compliance with and Safeguarding of the Constitution

Once full effect is given to the constitution by setting up the new institutions (including personnel, resources etc.) and by adopting the required laws, the constitution needs to take root. The respect for the constitutional framework and the commitment of relevant stakeholders to govern within this framework are the foremost preconditions for making the constitution work and enabling the rule of law and constitutionalism to prosper. Two aspects are key in this regard: a viable institutional design of "checks and balances" with independent and competent institutions and an educated and vigilant professional community and wider public who knows about its constitutional rights, and is given the opportunity to enforce them.

9.3.1. Institutions as Guardians of the Constitution

A diligently designed constitution creates a network of prevention and control mechanisms between the different institutions that are exercising state authority.[121] Such a system of checks and balances, be it on a horizontal level between the different branches of government or on a vertical level between different levels of government, avoids a single institution usurping too much control and power and thus contributes to the constitution's implementation.[122] Often judicial constitutional review institutions are at the apex of such a network, operating as the guardian of the constitution and its final arbiter (supreme court, constitutional court, constitutional council). They are frequently supported by (sector-related) independent commissions (e.g. human rights commission).[123]

Such institutions are especially important in the immediate aftermath of the new constitution's adoption, when its implementation may be particularly sensitive. As such it is important, first of all, that the institutions mandated by the constitution with this task actually be implemented. They also need to be guaranteed all necessary resources for their operation (such as for staff, budget, logistics). For example, the Tunisian constitution created a new Constitutional Court, but it took nearly two years for the legislature to pass the required legislation to bring it into being, and staffing and other problems continue to prevent it from operating. If adequately set up and supported, such institutions can emerge as staunch defenders of democracy and individual rights. The South African Constitutional Court, set up by the 1993 Interim Constitution and retained under the 1996 permanent Constitution, is an example of a highly respected court emerging as the guardian of a post-conflict constitution. It has been praised for handing down important judgments from its earliest days (such as on the abolition of the death penalty and on socio-economic rights) and effectively playing the veto role assigned to it by the Constitution throughout its existence.[124]

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121. Juliane Kokott and Martin Kaspar, "Ensuring Constitutional Efficacy", in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel Rosenfeld and Andras Sajo (Oxford: Oxford University Press, 2012), p. 796.

122. For further detail, see Böckenförde et al., *A Practical Guide to Constitution Building.*

123. For a more detailed analysis see DRI and The Center for Constitutional Transitions, "Briefing Paper 40: Constitutional Review in New Democracies."

124. Theunis Roux, *The Politics of Principle: The First South African Constitutional Court* (Cambridge: Cambridge University Press, 2013), pp. 2 and 4.

9.3.2. International Support for National Implementation

Indirectly, the UN Human Rights Council and other monitoring bodies of international treaties may also support the implementation of a national bill of rights. If a country has ratified the relevant international agreements and designed the national bill of rights accordingly, the universal periodic review and the complaint mechanism under the Council support the implementation of the respective standards.

9.3.3. Creating a Culture of Constitutionalism

As well as depending on the institutional design of the constitution and the way it is drafted, the success rate of constitutional implementation relies heavily on the courage and enthusiasm of the citizens to ensure that the promises of the constitution are kept. The often-told example from South Africa reflects this vision of establishing a culture of constitutionalism: there people used to travel with a pocket-sized version of the constitution, which they would bring out when confronted by overbearing officials. Such commitment can be constitutionally supported. First and foremost, public participation and constitutional education need to be constantly reinforced beyond the phase of drafting the constitution. Ongoing constitutional awareness may be strengthened by the translation of the constitution into local languages, by its wide distribution and by its inclusion in school and higher education curricula.

Some constitutions include a dissemination provision (Uganda). In India, a booklet series entitled "Know your Rights" was published by a local non-governmental organisation in 15 local languages in accessible language, complemented by cartoons. Other constitutions provide for a national commission for civic education to create and sustain awareness of the constitution (Ghana). The task of the commission is to educate and encourage citizens to defend the constitution and to formulate programmes for awareness of civil responsibilities.[125] If equipped with sufficient resources, such a commission may make a difference.

Creating a culture of constitutionalism also includes an open discussion about judicial decisions within academia and the interested public. Once judgments are part of the general discourse and open to scrutiny, it may compel judges to give adequate reasons to provide adequate justification. This transparency can be supported through a constitutional framework that requires public hearings as part of a due process canon, timely decisions and the publication of judicial opinions.[126] One might also discuss in this context whether courts should be permitted to release dissenting opinions or whether only one opinion is to be published, reflecting the unified judgment of the court.[127]

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125. See Act 452 (1993), Section 2 of the Ghanaian National Commission for Civic Education Act:
(a) to create and sustain within the society the awareness of the principles and objectives of the Constitution as the fundamental law of the people of Ghana; (b) to educate and encourage the public to defend the Constitution at all times, against all forms of abuse and violation; (c) to formulate for the consideration of Government, from time to time, programs at the national, regional and district levels aimed at realizing the objectives of the Constitution; (d) to formulate, implement and oversee programs intended to inculcate in the citizens of Ghana awareness of their civic responsibilities and an appreciation of their rights and obligations as free people; and (e) to assess for the information of Government, the limitations to the achievement of true democracy arising from the existing inequalities between different strata of the population and make recommendations for re-dressing these inequalities.

126. Markus Böckenförde, *Judicial Review Systems in West Africa: A Comparative Analysis* (Stockholm: International IDEA, 2016), p. 138. http://www.idea.int/publications/catalogue/judicial-review-systems-west-africa-comparative-analysis (23 October 2017)

127. Especially after the breakdown of an authoritarian regime, constitutional review institutions (CRIs) cannot rely on existing constitutional jurisprudence, but often have to build a new and coherent system. Where the court's authority and legitimacy are still weak, and before a legal culture of articulating dissent on the bench has been established, there may be a reluctance to permit members of a nascent institution to issue dissenting opinions. See Nuno Garoupa and Tom Ginsburg, *Judicial Reputation: A Comparative Theory* (Chicago, IL: University of Chicago Press, 2015), p. 148. Dissenting opinions may challenge the drafters of the majority opinion to write their judgment diligently and provide comprehensive legal arguments to support their view. The process may encourage a wider debate on the majority decision and stimulate an open discourse about the judgment. See Böckenförde, *Judicial Review Systems in West Africa*, p. 139.

The public communications of courts are important in this regard. They may for example provide explanation of important judgments in simpler, non-legal terms.This chapter has emphasised that implementation of the constitution should not be approached as an afterthought following its promulgation, but as a challenge that needs to be central from the very beginning. Understanding and taking this challenge seriously almost inevitably results in a more extensive constitution-building process.

Further Reading, Making Constitutions Work

DRI, "Briefing Paper 81: From Words to Deeds. Implementation of Constitutions," written by Markus Böckenförde, Berlin, May 2017, http://democracy-reporting.org/dri_publications/from-words-to-deeds-implementing-constitutions/ (24 October 2017)

DRI and The Center for Constitutional Transitions, "Briefing Paper 40: Constitutional Review in New Democracies", written by Katherine Glenn Bass and Sujit Choudhry, Berlin, September 2013, http://constitutionaltransitions.org/publications/constitutional-review-in-new-democracies/ (24 October 2017)

Ruth Gordon, "Growing Constitutions", *Journal of Constitutional Law* (1999) 1:3, pp. 528-582, https://www.law.upenn.edu/journals/conlaw/articles/volume1/issue3/Gordon1U.Pa.J.Const.L.528(1999).pdf.

Juliane Kokott and Martin Kaspar, "Ensuring Constitutional Efficacy",, in Michel Rosenfeld and Andras Sajo, *The Oxford Handbook of Comparative Constitutional Law,* Oxford University Press, 2012, pp. 795-815.

This handbook provides an overview on how to build a democratic constitution. It uses the framework of international law to anchor concepts of a democratic constitution, and focuses on a number of real-life challenges of constitutionalism, such as re-emerging authoritarian rule, rights of the opposition, and the challenge of implementing a democratic constitution.

This resource is aimed at constitution-makers and the interested public everywhere. It intends to provide realistic, accessible and practical information for these constitution builders in their work on reforming or replacing their constitutions.

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