

## The Constitution and its Relationship to the Legislature

### What is a Constitution?

The existence of a legislature usually derives from a country's constitution, which stipulates its basic powers and its relationship to other state organs and political institutions. The constitution refers to fundamental principles of government of a nation implied in laws, customs or contained in a document or collection of documents (which may be referred to collectively as a 'constitution', as 'basic laws' or 'organic laws'). A constitution delineates the basic organization and operations of government, describing both its powers and limitations. Essentially, a constitution outlines the rules of the political game.

Elements of a country's constitution that directly impact the work of a legislature include: the type of political party or alternative system it encourages through electoral design or establishes by law, whether it is unitary or federal; the role of the chief executive in relation to the legislature (parliamentary or presidential); and the electoral process and the structure of parliament (for example, unicameral or bicameral chambers, the official powers of a legislative presiding officer, etc.).

Whether written or unwritten and whether it provides formally for limitations on governments powers and the rights and freedoms of individuals, constitutions have taken on many different forms in practice based on other political factors. For example, in some countries the constitution afforded the legislature broad formal powers, but in reality the legislature only met a few times a year and/or routinely rubberstamped decisions made by the executive branch or central party leadership. However, in countries seeking to become more democratic, or which are emerging from political or social conflict, constitutional reform is often the first activity embarked upon in an effort to revise the electoral process, re-establish the parameters of government power and redefine relations between the various branches of government.

One should be aware, however, that while important, constitutional design does not by itself determine how a system operates in practice, and Mexico's recent history provides a good illustration. For many years the Mexican Constitution has granted the Congress significant lawmaking, budget and oversight authority. With seven decades of strong PRI control, and with a prohibition on consecutive re-election to political office, however, the Congress had little incentive to utilize its constitutional powers. When the PRI lost control of the lower house of the Mexican Congress in 1997, and a coalition of opposition parties took control, the Congress began making serious attempts to utilize its constitutional powers it had held for most of this century.

In some countries, constitutions include things that the framers hope for rather than expect in the short run. So Indians and Ethiopians have, in addition to usual political rights, a right to a clean environment. Finally, in some established constitutional systems, the constitution itself performs a symbolic function beyond its design features as, for example, an object of loyalty as in the United States.

### Written Constitutions

Most modern constitutions are written, with principles that take precedence over ordinary laws. While constitutions vary in age and detail from one country to another, the following are some common elements of written constitutions.

- A *preamble*, or introduction to the country's governing principles.
- A statement of fundamental *rights and freedoms* held by individuals. These may include social rights as well as political ones.
- A description of the *division of powers* or *system of checks and balances* within a nation's governing institutions, and between the central government and its states or provinces.
- A description of *the structure of governing institutions*, including constitutional obligations of the executive, legislative and judicial branches (and in some cases the role of other political actors, such as the monarchy and the military).
- A commitment to a *political party system* or *alternative system* and outline for selecting government officials.
- An outline of procedures and circumstances for *amending, revising or suspending* the constitution.

## "Unwritten" Constitutions

The **British**, **Israeli** and **New Zealand** constitutions are referred to as unwritten, and the term constitution concerns a whole body of common and statutory laws and practices that have evolved over time. It is the legislature that acts as the ultimate arbiter of decisions made under an unwritten constitution. The laws that make up these constitutions can be changed simply through an act of parliament. Recently, for example, Israel made its prime minister a directly elected figure selected separately from party candidates for parliaments. They take no precedence over other laws. An advantage of this type of constitutional system is that it is flexible in the event of a constitutional crisis.

## Alternative Constitution Structures

Interesting alternative constitutional structures are found in countries not primarily based on political competition. For example, in some countries in the Arab World, the Islamic code of law (the Shari'ah) is often the foundation of the legal system. In the monarchy of **Saudi Arabia**, the Koran itself is considered the constitution of the country, and the authority of the royal family is derived from this religious structure. In 1992, however, King Fahd decreed a series of laws collectively entitled "A Basic System of Government," creating a quasi-constitution within this system. The new laws changed the process used to select the heir to the throne, established a right to privacy, prohibited infringements of human rights without cause, and set a framework for a national consultative council (a quasi-legislature) that is appointed by the King. The King still retains ultimate authority.

## Amending the Constitution

Legal requirements for amending the constitution in many countries require a vote of the legislature, often a super-majority of one or both houses. Amending the **U.S. Constitution** requires a two-thirds majority vote by both chambers of the legislature, followed by ratification of two-thirds of the states. In many countries, an initial vote in the legislature must be followed by a public referendum. In some countries, certain sections of the constitution may require different standards for amendment. In the **South African bicameral** system, for example, amending the Bill of Rights requires a vote of two-thirds of the membership of the National Assembly (lower house) and the support of six provinces in National Council of Provinces (upper house). All constitutional amendments that affect the provinces must be passed by a simple majority in both houses.

## Constitutional Engineering

It is argued key interventions in the creation or amendment of constitutions, or *constitutional engineering*, can help to determine the future success of a governing system. For example, constitutional reforms can redefine the electoral process or the responsibilities of governing institutions in such a way that regional and/or ethnic concerns are represented in divided societies.

These efforts may include the following:

- designing the electoral systems to encourage or discourage smaller parties with an ethnic base or provide for quotas of certain minorities;
- creating a federal system that allows for some local or regional autonomy;
- creating a second chamber of the legislature to allow for greater representation of certain constituencies;
- and/or designing political systems in such a way as to limit instability or deadlock between the executive and legislature. (The **French** government, for example, has operated under 15 constitutions, reflecting in modern times a power struggle between the president and legislature due to a lack of clarity in the division of power in the former parliamentary system. The current constitution, adopted in 1958, provided for the direct election of the President, which fundamentally changed the relationship between the legislature and executive.)

## The Constitutional Reform Process

Many countries that have transitioned to a democratic system during the past decade have found themselves in a paradox: how can a constitution be engineered to reflect and encourage democratic principles when a representative legal body (such as an elected legislature) does not exist to draft it? How are competing political interests mediated when formulating a constitution? Countries in transition have addressed this difficulty through several mechanisms, including: *roundtable meetings* of government and opposition, appointed or elected *constitutional commissions*, a *constitutional committee* within the newly elected or existing legislature and/or through *public referenda*. In some cases, constitutional reform was not immediately addressed but undertaken later in a piecemeal or ad hoc fashion. (See Case Study I: Poland's Constitution and Executive-Legislative Relations)

*Roundtable meetings* have provided a forum in some cases for ruling officials and opposition to draft and agree to changes in the constitution prior to the collapse of the old regime. Ruling officials are apt to participate in the face of public protests and general loss of support. Sometimes these forums involve other social actors, such as labor representatives and civic leaders. Proposed changes are typically then referred for approval by the existing parliament and/or by public referendum (a vote by the entire eligible population on reforms, amendments or on a new constitution). This type of constitutional negotiation process was typical during the democratic political transition in the former communist countries of Eastern Europe.

*Constitutional commissions* or *assemblies* generally refer to bodies established (appointed or elected) expressly for the purpose of drafting or amending a constitution. Assemblies sometimes act as quasi legislatures during a transition period. In Uganda, a constitutional commission made up of leading jurists,

academics and civic activists was appointed in 1988 to redesign the constitution after the National Resistance Movement came to power. The content of the constitution remained a contentious issue, and the country chose to take a more grassroots approach to legitimize the process. Subsequently, the existing legislature passed a law that allowed for national elections of a 283-member Constituent Assembly to promulgate the new constitution and to act as the electoral commission for subsequent parliamentary elections. The Constituent Assembly used the draft Constitution as their working document and enacted a new constitution after 16 months of debate.

*Constitutional Committees* are internal legislative committees, consisting of select members of parliament, established for the purpose of drafting, reviewing and/or approving a new or amended constitution. They may act like other types of constitutional commissions in times of reform processes, or they may be permanent legislative mechanisms for debating and reviewing constitutional issues.

### **Poland's Constitution and Executive- Legislative Relations**

A new Polish Constitution was adopted by national referendum in 1997, ending a long, ad hoc and piecemeal reform process that began in early 1989, before the collapse of the communist regime. Some scholars have pointed to a lack of commitment to a comprehensive constitutional reform process during this crucial period in the early transition period as both a factor in and result of continued political instability. The constitutional reform process became embroiled in day-to-day political battles and constitutional amendments reflected the compromises of an on-going struggle between those interested in a presidential versus those interested in a parliamentary system.

In 1989, roundtable meetings between the ruling communist regime and opposition leaders resulted in some ad hoc amendments to the existing constitution. A hybrid system was adopted, with a President and Prime Minister sharing executive power. A President, Wojciech Jaruzelski, was elected by both houses of the legislature. He had powers to dissolve parliament, nominate the Prime Minister and veto legislation. However, Jaruzelski lacked a strong political base, and his diminishing authority resulted in a system that behaved in a more parliamentary (with executive power concentrated in the Prime Minister) than presidential fashion.

Political pressure in 1990 led to President Jaruzelski's initiative to add an amendment to the existing constitution that allowed for election of the president by popular vote, making the system appear to be closer to the French hybrid, semi-presidential model. Newly elected President Lech Walesa's initial popularity allowed him to maximize his constitutional powers as president.

Responsibility for the promulgation of a new constitution was shifted to the new democratically elected legislature in 1991. Two constitutional committees were established, one in the Sejm (lower house of parliament) and another in the Senate. These bodies proceeded to prepare separate drafts of the constitution. The process was complicated by the fact that 29 political parties won seats in parliament, making it very difficult to obtain a two-thirds majority necessary for adopting a new constitution.

In 1992 a broad opposition coalition was able to enact what was termed as a "Little" Constitution and enacted legislation establishing a methodology for preparing a final constitution at some undetermined future point. According to Jerzy J. Wiatr, under the terms of the Little Constitution, the existing 1952 version of the constitution lost most of its validity. Further changes in the powers of the legislature and

executive resulted in a strong Prime Minister and Cabinet of Ministers vis a vis the president. The Sejm gained the ability to elect its own candidate for Prime Minister in the event of the rejection of the President's candidate. The President's power to dissolve Parliament was more narrowly defined. By 1994, the legislature had prepared the initial draft of the first several articles of a new constitution.

A new Polish Constitution was eventually adopted by referendum in 1997. The new constitution further clarified the powers of the president and the legislature. Some presidential powers were weakened. For example, the president's power was again reduced in an attempt to prevent the executive from paralyzing the legislature. Parliamentary elections in 1997 resulted in a solid majority coalition in the Sejm of parties in opposition to that of the President. One of the first political by the majority coalition was to propose changes in the Standing Rules of the Sejm, which give the government actions more control of parliamentary business and less responsibility to explain its decisions to opposition members of parliament.

The above article is based on a review of the following articles:

Wiatr, Jerzy J., "Executive-Legislative Relations in Crisis: Poland's Experience, 1989-1993",

Osiatynski, Wiktor, "A Brief History of the [Polish] Constitution", *East European Constitutional Review*, Vol. 6, No. 2 & 3, Spring 1997. ([www.law.nyu.edu/eecr/vol6num2/feature/history](http://www.law.nyu.edu/eecr/vol6num2/feature/history))

## Further Reading

1. Baaklini, Abdo & Helen Desfosses, eds., Designs for Democratic Stability: Studies in Viable Constitutionalism, M.E. Sharpe, Armonk, NY, 1997.
2. Holger, Bernt Hansen & Michael Twaddle, eds., From Order to Chaos: The Politics of Constitution-Making In Uganda, James Currey, London, 1995.
3. Lijphart, Arend & Carlos H. Waisman, eds., Institutional Design in New Democracies: Eastern Europe and Latin America, Boulder, Colo., Westview Press, 1996.
4. Maddex, Robert L., Illustrated Dictionary of Constitutional Concepts, Congressional Quarterly, Washington, D.C., 1996.
5. Maddex, Robert L., Constitutions of the World, Congressional Quarterly, Washington, D.C., 1995.
6. Osiatynski, Wiktor, "A Brief History of the [Polish] Constitution", *East European Constitutional Review*, Vol. 6, No. 2 & 3, Spring 1997. ([www.law.nyu.edu/eecr/vol6num2/feature/history](http://www.law.nyu.edu/eecr/vol6num2/feature/history))
7. Sartori, Giovanni, Comparative Constitutional Engineering: an Inquiry into Structures, Incentives and Outcomes, Washington Square, N.Y., New York University Press, 1997.
8. Wiatr, Jerzy J., "Executive-Legislative Relations in Crisis: Poland's Experience, 1989-1993",

## Web Sites

[www.uni-wuerzburg.de/law](http://www.uni-wuerzburg.de/law) (links to constitutions of the world)

[www.urich.edu/~jpjones/confinder](http://www.urich.edu/~jpjones/confinder) (links to constitutions of the world)

[www.law.nyu.edu/eecr](http://www.law.nyu.edu/eecr) (Review of Constitutional Reform in Eastern Europe)

## UNDP Constitutional Reform Activities

Columbia – info n/a

Ecuador – supporting Commission on Constitutional Reform

Eritrea – constitutional drafting

Guyana – public opinion research on constitutional reform

Tokalo – constitutional drafting

## Individuals or Firms Specialized in this Field

1. *European Commission for Democracy through Law* (aka Venice Commission) – membership comprises independent experts on constitutional law, constitutional court judges, parliamentarians and senior government officials. They conduct research and give opinions on constitutional law and reform in developing democracies.

Website: [www.coe.fr/venice](http://www.coe.fr/venice), e-mail contact: [venice@coe.int](mailto:venice@coe.int)

2. *Open Society Foundation, Constitutional and Legal Policy Institute* (COLPI) – works in central/eastern Europe for legal and constitutional reform. Website: [www.soi.hu/colpi](http://www.soi.hu/colpi)
3. *Association of Western European Parliamentarians for Africa* (AWEPA) – [www.awepa.org](http://www.awepa.org).

