Constitutional Law

Introduction

1.1. What's a constitution?

A constitution is an aggregate of fundamental principles and rules that constitute the legal basis of a polity and commonly determine how that entity is to be governed.

Constitution is that higher law by the instrumentality of which the following are determined:

- The basic principles of a state
- The structures and processes of government and
- The fundamental rights of citizens

The making and amendment of such higher law is usually the result of an extra-ordinary process unlike the case in other ordinary laws.

A constitution is a set of fundamental legal-political rules that:

- Are binding on everyone in the state, including ordinary lawmaking institutions;
- Concern the structure and operation of the institutions of government, political principles and the rights of citizens;
- Are based on widespread public legitimacy;
- Are harder to change than ordinary laws (e.g. a two-thirds majority vote or a referendum is needed);
- As a minimum, meet the internationally recognized criteria for a democratic system in terms of representation and human rights.

1.2. The Functions of a Constitution

Defining Boundaries: Constitutions can declare and define the boundaries of the political community. These boundaries can be:

- Territorial (the geographical borders of a state, as well as its claims to any other territory or extra-territorial rights) and
- personal (the definition of citizenship).

Thus, a country's constitution often distinguishes between those who are inside and those who are outside the polity.

Defining the nature and authority of a state:

Constitutions can declare and define the nature and authority of the political community. They often declare:

- the state's fundamental principles and assumptions,
- Where its sovereignty lies.

E.g. the French Constitution declares that 'France is an indivisible, secular, democratic and social Republic' and that 'National sovereignty belongs to the people, who exercise it through their representatives and by means of referendums' (Constitution of the Fifth French Republic). The Constitution of Ghana (1992) states that, 'The Sovereignty of Ghana resides in the people of Ghana in whose name and for whose welfare the powers of government are to be exercised'.

Defining common identity and values: Constitutions can express the identity and values of a national community. As nation building instruments, Constitutions may define:

- the national flag,
- anthem
- other symbols, and
- may make proclamations about the values, history and identity of the nation.

Setting out rights and duties: Constitutions can declare and define the rights and duties of citizens. Most constitutions include a declaration of fundamental rights applicable to citizens. These rights include:

- Civil Rights
- Political Rights
- Social Rights
- Economic Rights
- Cultural Rights

- Many constitutions go beyond laying down the basic civil and political rights to include social, economic and cultural rights or the specific collective rights of minority communities; While some rights may be left to citizens (e.g. right to vote), others apply to both citizens and noncitizens (e.g. protection from torture and degrading treatment)

Establishment and Regulation of Political Institutions: Constitutions can establish and regulate the political institutions of the community. This includes:

- defining the various institutions of government;
- prescribing their composition, powers and functions; and
- regulating the relations between them.

It is almost universal for constitutions to establish legislative, executive and judicial branches of government. In addition, there may be a symbolic head of state, institutions to ensure the integrity of the political process (such as an electoral commission), and institutions to ensure the accountability and transparency of those in power (such as auditors, a court of accounts, a human rights commission or an ombudsman).

- The institutional provisions typically provide mechanisms for the democratic allocation and peaceful transfer of power (e.g. elections) and mechanisms for the restraint and removal of those who abuse power or who have lost the confidence of the people (e.g. impeachment procedures).

Division of Power: Constitutions can divide or share power between different layers of government or sub-state communities.

Many constitutions establish federal, quasi-federal or decentralized processes for the sharing of power between provinces, regions or other sub-state communities.

These may be geographically defined (as in most federations, such as Argentina, Canada or India), or they may be defined by cultural or linguistic communities (e.g. the 1994 Constitution of Belgium, which establishes autonomous linguistic communities in addition to geographical regions).

Declaring the secularity or otherwise of the state and its system: Constitutions can declare the official religious identity of the state and demarcate relationships between sacred and secular authorities. This is particularly important in societies where religious and national identities are interrelated, or where religious law has traditionally determined matters of personal status or the arbitration of disputes between citizens.

Statement of common aspirations and goals:

Constitutions can commit states to particular social, economic or developmental goals. This may take the form of judicially enforceable socio-economic rights, directive principles that are politically binding on the government, or other expressions of commitment or intent.

The Constitution at the Intersection of Legal, Social and Political Life

The constitution isn't a mere legal document. It's a legal, political and social document, which lies at the intersection of the legal system, the political system and society.

A. Constitutions as legal instruments: It is the supreme law of the land, and it provides the standards that ordinary statutes have to comply with.

A constitution 'marries power with justice'. It:

- makes the operation of power procedurally predictable;
- lays down foundational legal principles and rules
- upholds the rule of law; and
- places limits on the arbitrariness of power.

B. Constitutions as social declarations

Constitutions often attempt, to varying degrees, to reflect and shape society—for example, by expressing the (existing or intended) common identity and aspirations of the people, or by proclaiming shared values and ideals.

These provisions are generally found in:

- ✓ preambles and opening declarations,
- ✓ oaths and mottos or
- ✓ on flags and other symbols that are defined by the Constitution.

Other substantive provisions of the constitution, particularly those defining socio-economic rights, cultural or linguistic policy, or education, might also belong to this category.

- Compare and contrast the preambles of the constitutions that Ethiopia went through. And, try to understand what social and political community they have aspired to create and how!

C. Constitutions as political instruments

Constitution is a power map; it defines the source, division and limits of political power.

The constitution prescribes a country's decision making institutions; they

- Identify the sovereign power,
- Distribute power in a way that leads to effective decision making and
- Provide a framework for continuing political struggle

The political provisions show how state institutions (parliament, executive, courts, head of state, local authorities, independent bodies, etc.) are constituted, what powers they have and how they relate to one another.

Constitution vis-à-vis constitutionalism

- The fact that a country has come up with a constitution does not mean that it governs itself up to the standards that constitutionalism expects.
- Constitutionalism can be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules.
- Having a constitution alone does not bring about constitutionalism.

- Constitutionalism is related with the prevalence of rule of law where government and public officials shall be held accountable and responsible to their people. It implies having constitutionally limited government on one hand and commitment to the norms and procedures of the constitution on the other.
- Constitutionalism is a set of political values and aspirations that reflect the desire to protect liberty through the establishment of internal and external checks on government power.
- Constitutionalism empowers legitimate authorities to act for the public good in the management of common concerns while protecting people against the arbitrary power of rulers whose powers would otherwise be used for their own benefit and not for the public good.

Features of constitutionalism include:

- Popular sovereignty
- Separation of Powers (checks and balances)
- Responsible and accountable government
- Rule of law
- An independent judiciary
- Respect for individual rights
- Respect to self-determination, among others.

- Having a constitution may not, therefore, lead us to conclude that there exists a constitutional government unless the constitution has the character of limiting the government power through the above principles and mechanisms.
  - *Reading: Maru Bazezew, Notes on Constitutionalism, Mizan Law Review,* Vol. 3 No.2, September 2009

Classification of constitutions

- Constitutions can be classified in varying kinds of categories depending on the parameters/ criteria employed.

Codified v. Uncodified

Rigid vs. Flexible

Presidential vs. Parliamentary

Unitary vs. Federal

Monarchial vs. Republic

Unicameral vs. Bicameral

Codified and Uncodified Constitutions

The first way to classify constitutions is based on whether they are written on a document.

- A codified (or documentary) constitution encompasses the fundamental laws of a state into a single document or a set of documents.
- A codified constitution is the product of an historical break with the past and a fresh start. For instance, the first French constitution (1791), as the outcome of the French Revolution (1789), signaled the transition from feudalism and absolute monarchy to capitalism and democracy, while the US constitution (1787) has its origins in the War of Independence from the British rule (1775-1783).

A codified constitution is accessible to all; certain, insofar as rules are intelligible and adequately described; and transparent, since all constitutional rules are demarked out and concentrated into a single document and are distinguished from ordinary law. Its amendment is often rigid, however, compared to the uncodified ones.

- Does the FDRE Constitution, as most of codified constitutions across the world do, signify a historical break with the past?

Uncodified Constitution: A constitution is described as uncodified, when there is a lack of an overarching document to include the fundamental rules. Only a few countries belong to this category. E.g. The UK, Israel and New Zealand

- The UK constitution, for instance, draws on several written and unwritten sources, as the product of an unusual centuries-long continuity reflected in the smooth evolution of laws and conventions. There have been evolutionary changes; but has never been razed to the ground and rebuilt on new foundations.

- The sources of an uncodified constitution are scattered throughout the centuries and rather difficult to be accessed and read by ordinary people; moreover, areas covered by constitutional law are disjointed and unwritten in a legal source. This makes it difficult for an ordinary citizen to gain a full and coherent image of an uncodified constitution. On the other hand, its uncodified nature endows it with useful flexibility.

Rigid Vs. Flexible Constitutions

- Another way to classify constitutions is based on the degree of ease or difficulty in amendment.

A rigid constitution is one that is difficult to be amended. Its amendment requires stringent procedures, such as a referendum or a prescribed high majority in Parliament. E.g. the US constitution (high majority vote), the Irish Constitution (referendum), and the FDRE Constitution

- The US Constitution: a proposal of constitutional amendment requires a two-thirds majority vote in both Houses of the Congress: the House of Representatives (435 members) and the Senate (100 Senators). Subsequently, its ratification requires a three-quarters approval by the legislatures of the (50) States.
- Discuss the amendment procedures set forth under the FDRE Constitution. See Arts. 104 and 105 (the Constitution) Vs. 59 (1) (other laws)

- Special procedures set in a rigid constitution prevent the transient government of the day to amend it at will and hamper an authoritarian ruling party from repealing pivotal constitutional arrangements. In addition, human rights and civil liberties are sufficiently entrenched and, therefore, protected against the vagaries of partisan competition and political majorities.
- Nevertheless, rigidity does not render a constitution durable: there are many examples of rigid constitutions with frequent amendments. For instance, in spite of the requirement of a high majority of three-fifths in both houses of Parliament, the constitution of Brazil was amended 92 times within 28 years.

A flexible constitution: is one that can be easily amended by a simple majority in Parliament as any ordinary law. An example is the UK constitution, whose amendment requires nothing but passing an Act of Parliament by a simple majority vote, that is, half of the votes of the Members of Parliament plus one. Another country with a flexible constitution is New Zealand. A flexible constitution is adjustable so as it can meet social and political developments: if the government of the day faces an emergency situation that requires an urgent response, it can amend constitutional rules and surmount political impasses.