



# What Is a Constitution? Principles and Concepts

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## About this series

These constitution-building primers are intended to assist in-country constitution-building or constitutional-reform processes by: (i) helping citizens, political parties, civil society organisations, public officials, and members of constituent assemblies, to make wise constitutional choices; and (ii) helping staff of intergovernmental organizations and other external actors to give good, well-informed, context-relevant support to local decision-makers. The primers are designed as an introduction for non-specialist readers, and as a convenient aide-memoire for those with prior knowledge or experience of constitution-building. Arranged thematically around the practical choices faced by constitution-builders, the primers aim to explain complex issues in a quick and easy way.

## About International IDEA

The International Institute for Democracy and Electoral Assistance (International IDEA) is an intergovernmental organization with a mission to support sustainable democracy worldwide.

## Overview

### *What Is a Constitution?*

The vast majority of contemporary constitutions describe the basic principles of the state, the structures and processes of government and the fundamental rights of citizens in a *higher law* that cannot be unilaterally changed by an ordinary legislative act. This higher law is usually referred to as a **constitution**.

The content and nature of a particular constitution, as well as how it relates to the rest of the legal and political order, varies considerably between countries, and there is no universal and uncontested definition of a constitution. Nevertheless, any broadly accepted working definition of a constitution would likely include the following characteristics:

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

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

## *The Functions of a Constitution*

- 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.
- Constitutions can declare and define the nature and authority of the political community. They often declare the state's fundamental principles and assumptions, as well as where its sovereignty lies. For example, 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'.
- Constitutions can express the identity and values of a national community. As nation-building instruments, Constitutions may define the national flag, anthem and other symbols, and may make proclamations about the values, history and identity of the nation.
- Constitutions can declare and define the rights and duties of citizens. Most constitutions include a declaration of fundamental rights applicable to citizens. At a minimum, these will include the basic civil liberties that are necessary for an open and democratic society (e.g. the freedoms of thought, speech, association and assembly; due process of law and freedom from arbitrary arrest or unlawful punishment). Many constitutions go beyond this minimum to include social, economic and cultural rights or the specific collective rights of minority communities. And some rights may apply to both citizens and non-citizens, such as the right to be free from torture or physical abuse.
- Constitutions can establish and regulate the political institutions of the community—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, motions of censure).
- 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).
- 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.

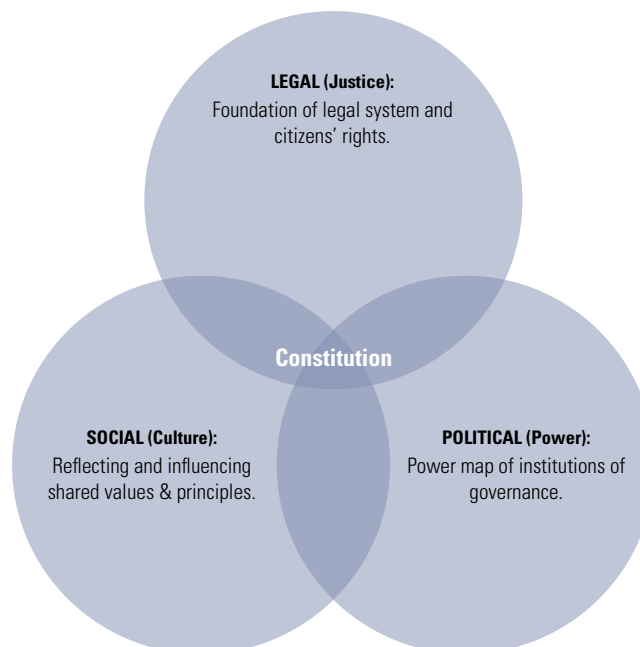
- Constitutions can commit states to particular social, economic or developmental goals. This may take the form of judicially enforceable socio-economic rights, directive principles that are politically binding on the government, or other expressions of commitment or intent.

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

As legal, political and social documents, constitutions are at the intersection of the legal system, the political system and society.

- *Constitutions as legal instruments:* A constitution ‘marries power with justice’ (Lutz 2006: 17)—it makes the operation of power procedurally predictable, upholds the rule of law, and places limits on the arbitrariness of power. It is the supreme law of the land, and it provides the standards that ordinary statutes have to comply with.
- *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, but can also be found in 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 (Lutz 2006: 16–7).
- *Constitutions as political instruments:* The constitution prescribes a country’s decision-making institutions: constitutions ‘identify the supreme power’, ‘distribute power in a way that leads to effective decision making’ and ‘provide a framework for continuing political struggle’ (Lutz 2006: 17). 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.

**Fig. 1: A Constitution as a Legal, Social and Political Document**



## Two Constitutional Archetypes

Constitutions balance and reconcile these legal, political and social functions in different ways. Two broad constitutional archetypes can be identified: the procedural and the prescriptive. The differences between these two types of constitutions relate to the nature and purposes of the document itself:

- *A procedural constitution* defines the legal and political structures of public institutions and sets out the legal limits of government power in order to protect democratic processes and fundamental human rights.
- *A prescriptive constitution* emphasizes the foundational function of the constitution as a ‘basic charter of the state’s identity’, which plays ‘a key role in representing the ultimate goals and shared values that underpin the state’ (Lerner 2011: 18). It provides a collective vision of what might be considered a good society based on the common values and aspirations of a homogeneous community. In addition to describing how the government functions, the constitution assumes (or attempts to impose) a broad consensus on common societal goals that public authorities must strive to achieve. This is reflected in the emphasis placed on the constitution’s social content and in the ideological shape of its legal and political content.

A procedural constitution may be appropriate in cases where it is difficult to arrive at a common agreement over issues of values or identity, but where it is possible to reach a more limited and pragmatic consensus on using democratic procedures to resolve these differences. The Canadian (1867/1982) and Dutch (1848/1983) Constitutions closely reflect the procedural archetype. They proclaim no single vision of a good society but rest only on the minimal commitment to live together, to solve common problems through political institutions and to respect the rights of those who differ or disagree. They make little or no explicit mention of nation-building or of fundamental philosophical or ideological principles. They contain few substantive provisions (provisions settling particular policy issues) except where such provisions reflect pragmatic attempts to settle practical problems of co-operation in a pluralist society (e.g. language rights and ownership of resources in Canada, education in the Netherlands).

A prescriptive constitution may be appropriate in cases where a society wishes to re-establish itself on a shared ethical basis that is both symbolically proclaimed by, and practically embedded in, its supreme law. South Africa (1996) and Ecuador (2008) provide examples of prescriptive constitutions.

It should be remembered that these archetypes are not firm categorizations. Most constitutions contain, to varying degrees, both features. According to South African Constitutional Court Justice Albie Sachs, constitutions can be regarded as ‘autobiographies of nations’ (Austin 2009). Even a relatively thin procedural constitution will say something about how a society sees itself and about who is included in and who is excluded from the nation’s self-narrative. Moreover, in some countries, this autobiographical function is not confined to the constitution as such. It may also be performed by a separate pre-constitutional or extra-constitutional text, such as a declaration of independence or a republic proclamation, that is not part of the legal order of the state but has an important role in maintaining social and political norms.

### What Does a Constitution Typically Contain?

*Divisions:* Most constitutions are divided and sub-divided into parts that may variously be known as titles, chapters, articles, sections, paragraphs or clauses.

*Arrangement:* Constitutions vary in the arrangement of their provisions, although it is now usual for principles and rights provisions to be placed in a separate section near the beginning of the text, for the main institutional provisions to be grouped in the middle of the text, and for independent

institutions, miscellaneous provisions and amendments to be placed near the end of the text. The layout of a typical constitution might resemble the following:

- (1) Preamble: a statement of the overarching motives and goals of the constitution-making exercise, sometimes referring to important historical events, national identity or values.
- (2) Preliminaries: a declaration of sovereignty or of basic principles of government; the name and territory of the state; citizenship and franchise; state ideology, values or objectives.
- (3) Fundamental rights: a list of rights, including their applicability, enforcement, limitations, suspension or restriction during a state of emergency.
- (4) Social and economic rights or policy directives.
- (5) Parliament or legislature: its structure, composition, terms of office, privileges, procedures, etc.
- (6) Head of state: the method of selection, powers, terms of office.
- (7) Government (in a parliamentary or semi-presidential system): government formation rules, responsibility, powers.
- (8) Judiciary: Court system, judicial appointments, judicial independence, public prosecutors.
- (9) Sub-national government: federal or devolved powers, local government.
- (10) Provisions for referendums.
- (11) Institutions of the so-called integrity branch (electoral commission, ombudsman, audit institution, etc).
- (12) Security sector: commander-in-chief, any restrictions on military power.
- (13) Other miscellaneous provisions: special provisions for particular groups, language laws, particular institution, etc.
- (14) Amendment procedures, implementation timetable and transitional provisions.

### **Reading Between the Lines**

The constitutional order can include, in addition to the constitutional text itself, other written legal or quasi-legal instruments with constitutional significance. These may typically include electoral laws, laws on party financing, laws on judicial appointments and on the organization of the courts, international treaties, the standing orders of parliament and judicial decisions (Palmer 2006).

The constitutional order may also include unwritten—and legally unenforceable—rules that are nevertheless regarded by all constitutional actors as politically binding (King 2001). In Canada, for example, ‘the conventions of Cabinet government’ and the ‘firm, though unwritten rule that the government must hold the support of a majority in the House of Commons’ are not mentioned in the constitutional text but are well established in the conventional practice of the Canadian constitutional order (Van Loon & Whittington 1987: 172).

*Size and length:* Constitutions vary in length from a few thousand words (Iceland, Latvia) to more than 50,000 words (India). Newer constitutions tend to be longer than older ones, and federal constitutions longer than unitary ones. A national constitution in printed form may vary from the size of a small pamphlet to that of a fairly large book.

## ***The Constitution and the Constitutional Order***

Despite the proliferation of nominally democratic constitutions, only a minority of states have so far succeeded in maintaining a lasting democratic constitutional order. There is little benefit in having a constitution that can be ignored with impunity or changed unilaterally by those in power, or one that is so framed that the democratic nature of the constitution can be undermined by ordinary laws or by exclusionary political practices. Likewise, if the rule of law is weak, such that the constitution is selectively applied, this will undermine the achievement of a constitutional order.

A constitutional order, in this sense, represents ‘a fundamental commitment to the norms and procedures of the constitution’, manifest in ‘behaviour, practice, and internalisation of norms’ (Ghai 2010). The constitutional order is much broader than just the constitutional text. It can include customs, conventions, norms, traditions, administrative structures, party systems and judicial decisions that are integral to the practical workings of the constitution. This deep cultural internalization of a constitutional order is very hard to achieve (Ghai 2010). It is embodied, ultimately, in the political culture and in the ‘free and civic way of life’ of a people (Viroli 2001).

It is important to recognize at the outset that building a democratic constitutional order is a long-term process. Drafting the constitutional text is only a small part of the challenge; it is also necessary to establish institutions, procedures and rules for constitution-making (preparatory stage); to give legal effect to the constitution (ratification and adoption) and, crucially, to ensure that the spirit and the letter of the constitution are faithfully implemented. Each stage of this process depends for its success on the agreements reached at the preceding stage: a poorly conceived drafting process is unlikely to yield a successful text or to serve as the basis for a viable, stable and legitimate constitutional order.

# Constitutions and Democracy

## ***Why Have a Constitution?***

Even the best constitution cannot pave a road or build a sewer; it cannot manage a clinic or administer a vaccine; it cannot educate a child or take care of an elderly person. Despite these obvious limitations, constitutionalism is one of the crowning achievements of human civilization. Countries that have succeeded in establishing and maintaining constitutional government have usually been at the forefront of scientific and technological progress, economic power, cultural development and human well-being. In contrast, those states that have consistently failed to maintain constitutional government have often fallen short of their development potential.

### **An Analogy: The Constitution as Rules of the Game**

Imagine two teams playing a game of football. If the team in possession of the ball could change the rules of the game and appoint its own referee, then the game would hardly be fair. One team would always win, and the other would lose—or simply stop playing. This is like political life without a democratic constitutional order. The party, faction or group in power makes up the rules, and those in opposition are excluded from a game that is rigged against them. A democratic constitutional order acts like the rules of the game, and its guardians—for example, a constitutional court—are like the referee. They make sure that everyone can play the ‘political game’ fairly.

This is because constitutional government ensures ‘the fair and impartial exercise of power’; it ‘enables an orderly and peaceful society, protects the rights of individuals and communities, and promotes the proper management of resources and the development of the economy’ (Ghai 2010: 3). In other words, 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.

In providing fundamental rules about the source, transfer, accountability and use of political power in a society, a constitution introduces a separation between the permanent, enduring institutions of the state, on the one hand, and the incumbent government, on the other. The constitution ensures that the government does not own the state: it simply manages the state, under the authority of higher laws, on behalf of citizens.

In this sense, constitutionalism is the opposite of despotism. Despotism is a system of government in which the governing authorities are a law unto themselves. Many states around the world have historically been despotic. They are not bound by any higher law that restricts how they rule, for example, by protecting the fundamental rights of the citizens or by ensuring their accountability to the people. As a result, despots govern only for their own good, or for that of a privileged minority who support the ruling class, and not for the common good of all citizens.

Not all despotic governments are intolerably oppressive. In practice, despotism may be self-restraining, and outright oppression may be restricted to those who visibly oppose or threaten the rulers or their interests. Nevertheless, the defining characteristic of despotism is that it is arbitrary. Despotic rulers—whether an all-powerful monarch, a sovereign parliament, a military junta or an authoritarian president—can make laws, and can determine right and wrong, through their own unilateral decisions, without requiring broader consent or public approval, without being restrained by balancing institutions and without being held to account by the people.

In choosing to adopt constitutional government, people are choosing to say no to despotism and to the precariousness of living under rulers who can act arbitrarily. They are choosing to acknowledge that certain rights, principles, values, institutions and processes are too important to depend on the arbitrary will of those in power: they should be entrenched in a way that makes them binding on the government itself. In such a system, the people live under a government of universal rules that are based on broad public consent, and they have freedom from the arbitrary acts of the rulers.

### ***Democratic Constitutionalism as a Global Norm***

Modern democratic constitutionalism is based on two principles: (i) *representative government*, enabling citizens to participate in public affairs and hold their government to account; and (ii) the *protection of rights* (especially the due process of law, freedom of speech and religious tolerance), through which citizens are insulated from abuses of power.

These principles of representative government and the protection of rights can be expressed in terms of *inclusivity* and *contestation* (Dahl 1973), notions that have gradually broadened and deepened over time. During the 19<sup>th</sup> and early 20<sup>th</sup> centuries, the right to participate in public affairs was extended, usually after long and sometimes violent struggles, to all men, and finally to women as well. New forms of public participation were also developed or popularized during the 20<sup>th</sup> century, such as proportional electoral systems and mechanisms of direct democracy. Similarly, during the 20<sup>th</sup> century, the rights provisions of new constitutions typically became: (i) *more expansive*, with economic, social, cultural and environmental rights being increasingly recognized in addition to the basic civil and legal rights of earlier texts; and (ii) *more directly enforceable*, with an expanded role for independent judiciaries in upholding them.

Modern democratic constitutionalism has spread around the world in subsequent waves of democratization. During the second half of the 20<sup>th</sup> century, it successfully took root in many parts of the world beyond its old North Atlantic and Western European core. Democratic constitutionalism is now embedded in the most widely recognized international declarations and conventions, including the UN Universal Declaration of Human Rights (1948) and the International Covenant on Civil and Political Rights (1966). The list of states with credible claims to having a stable and sustainable democratic constitutional order now includes countries on all continents and in all regions of the world.

Whatever it once was, democratic constitutionalism is now a universal value, the benefits of which can, at least potentially, be shared by all of humanity (Sen 1999).

### ***A Constitution for Everyone: Elite Accommodation, Inclusive Bargains and Pre-commitment***

Establishing a democratic constitutional order is not easy. Throughout history, only a minority of states have succeeded. Those who set themselves the task of establishing such a constitutional order must be mindful of the social and political, as well as the technical and legal, challenges they face.

In almost every human society, there are distinctions of wealth and power. In most societies, two broad groups can be identified. First, there is a relatively small number of people who possess both wealth and power in abundance. Second, there will be a much larger number of people who do not possess wealth or power in abundance. These are the non-elites. What distinguishes the elite from the non-elite, in constitution-building terms, is access to economic and political power: elites rule, non-elites are ruled.

By establishing a democratic constitutional order, a society is attempting to do something that can be considered remarkable—to impose rules on rulers. This means, at a minimum, that the ruling elites are limited by rules that the non-elites have approved, and are accountable to non-elites for their conduct. The people's right to exercise a periodic choice between competing parties ensures that ruling elites are at least minimally responsible, and responsive, to the governed. Leaders who consistently fail to satisfy the demands of the majority will be replaced by competitors at the next election. Elites are trustees of the people. More radical visions of a democratic constitutional order go further, seeking to place power under rules that erode distinctions between elites and non-elites, making office-holders mere delegates of the people.

In posing such a challenge to elite rule, a democratic constitutional order can expect to encounter resistance from those elites who are jealously protective of their power, privileges and wealth, and who resent the fact that democratic constitutionalism, as a minimum, places limits on their greed and lust for power. The rich, powerful and well-connected, those who control resources, and those who have high social status in their communities are often those who have gained or kept most under despotic rule, and who could see their advantageous position eroded by a move to a more democratic constitutional order. These people, if unchecked, might support a return to a despotic form of government or might seek to corrupt the democratic constitutional order to the extent that it becomes ineffective at restraining the behaviour of the elites (i.e. it is undermined).

To achieve such inclusive bargains, elites and other traditionally dominant groups (if they are to be persuaded not to veto or undermine the transition to a democratic constitution) might have to be appeased in specific areas that concern their most vital interests. One way of achieving this appeasement is for the constitution to enshrine—or at least not to destroy—some of their existing privileges. In contemporary contexts, vested interests that might need to be accommodated typically include members of the old regime, economic oligarchs and those with links to the security sector. They might also include foreign actors such as powerful donor nations or large foreign investors. In such cases, the constitution can be regarded as an attempt to embed these compromises in the foundation of the new democratic constitutional order—enabling change to take place in relative safety, without fear of a counter-revolution. Such compromises can vary from immunity from prosecution for past crimes to, in some cases, a share of future policymaking. In Chile, for example, the former authoritarian president, Augusto Pinochet, was made a member of the Senate for life after the restoration of democracy—a position that gave him continued influence and immunity from prosecution. In Portugal, the Constitution of 1976 gave military officers extensive veto powers over the transition to democracy—powers that were not removed from the Constitution until 1982.

However, if these compromises are too generous to vested interests, they can undermine the effectiveness and quality of the democratic constitutional order. For example, the US Constitution



preserved the privileges of the Southern slaveholding aristocracy in 1787 despite the recognition by many of the moral abhorrence of this arrangement. Excessive appeasement to vested interests can prevent the state from achieving a democratic constitutional order; instead, an oligarchic system is produced (meaning that the few rule, that they are neither properly limited by, nor held accountable to, the people).

The resistance of elites to a democratic constitutional order is one of the greatest challenges facing constitution-builders. In some cases, competing elites will tire of self-destructive conflict among themselves, and will embrace democratic mechanisms as a way of moderating and containing that conflict. In others, elites may be fatally weakened by the transfer of land, wealth and organizational capacity to non-elites, and may in such circumstances decide that sharing power with non-elites offers the best way of preserving their most important interests. Sometimes, these processes occur in a complex and overlapping way: the constitution, in such cases, can be regarded both as an inter-elite bargain and as a bargain between elites and non-elites. Through these bargains, power is shared across society.

### **South Africa: A Constitution Emerging from Society**

'[South Africa's Constitution] belongs to all of us, not just the ruling party, or one section of South Africa. We all wrote this collectively with our blood, some with their lives, with our tears and with our sweat. We claim it as ours, it enshrines the rights that make us live as South Africans, and we will protect it because it belongs to us.'

*Cyril Ramaphosa, Secretary-General of the African National Congress (1991–1997)*

In principle, constitutionalism, by making all citizens parties to a great bargain (an agreement of the people or a social contract), makes the state into a public entity (*res publica*)—a common possession of all the citizens, and not the possession of one person, party or section of society. Many historical constitutions, however, have failed to establish a democratic constitutional order because they did not truly belong to the whole community and were not based on broad and inclusive agreements. Instead, they represented an imposition of values by one side, section or faction of the community that wanted to exercise control over the state in order to dominate the whole. Such narrowly based, one-sided constitutions exclude those citizens who do not belong to that section or faction of society, or those who disagree with its vision, from full and equal participation in the state. As such, these partisan constitutions, resting on insufficiently widespread agreement, are often perceived as illegitimate by opponents of the ruling party; they seldom outlive the particular individuals or governments that establish them, and they generally fail in the task of constitutionalizing rather than personalizing power.

Sometimes, a one-sided constitution emerges from a cynical and selfish attempt by one person or party to maintain power so that they alone can enjoy the spoils of office and can control the resources of the state for personal gain. One-sided constitutions have also been promoted—often with disappointing outcomes—by good, sincere and well-intentioned people who wish, through a new constitution, to give effect to their vision of a better society. The problem with this approach is that it makes insufficient allowance for pluralism: different people have different visions of a better society, and arguments arising from such differences are often highly polarized and very difficult to resolve. Indeed, it is often difficult for those who are highly motivated by a philosophy, ideology or religious conviction to remember, first, that the things that are self-evidently true and right to them may be difficult and doubtful to others, and, second, that those who hold different views and live by different values are also, in a democratic society, fellow citizens with rights to co-existence, inclusion and expression.

This is not to say that a constitution should avoid all discussion of values or that it should exclude all substantive content: both procedural and prescriptive approaches have their place, and where a broad public consensus exists as the basis for agreement, there can be a case for the inclusion of substantive and even transformational material. It does mean, however, that constitution-builders

would be wise to allow for pluralism of values and interests, to concentrate on those areas where consensus can be achieved and to strive to make the constitutional bargain as inclusive as possible.

### **Self-preservation through Pre-commitments**

The Greek hero Odysseus ordered that he be tied to the mast of his ship while passing between whirlpools and sea monsters; by pre-committing himself, he prevented the ship from being wrecked by any rash orders he might give under the influence of the Sirens.

Because it depends upon reaching an inclusive and relatively enduring set of higher laws through which ordinary political disputes will be channelled, constitution-building can be seen as a process that differs, in both purpose and nature, from ordinary lawmaking. Constitution-building requires both a broader consensus and a greater willingness to set aside immediate self-interests for the sake of enduring public values (Ackerman 1993). This sometimes takes place in a so-called constitutional moment, a particular time when a country, usually upon achieving independence or after the collapse of a failed or undemocratic regime, decides to reconstitute itself along inclusive lines. Such profound founding moments have occurred in the constitutional history of the United States (1787–1791), India (1946–1950) and South Africa (1991–1996).

Some scholars are sceptical of the principle of government by higher rules. They argue that the rules embodied in a constitution bind elected representatives to bargains made at the time of constitutional founding while excluding other viewpoints from political discourse. Since these rules are typically upheld by judges and other specialists, rather than by elected representatives of the people, the effect is to create tension between the pre-commitments of constitutionalism and the principles of democracy.

In practical terms, however, the pre-commitments of constitutionalism can be seen as a form of collective self-binding, by which the participants in a political system bind themselves to fundamental rules so that incumbent holders of government office cannot dominate or manipulate the state. Adherence to the pre-commitments of the constitution is a self-defence mechanism for democracy, preventing people from easily voting democracy away.

Another approach is to regard the constitutional documents that emerge from the constitutional bargains achieved during founding moments as expressions of the sovereign constituent power of the people. According to this view, constitutional ground rules are contrasted with ordinary laws, which are produced by ordinary parliamentary majorities under conditions of normal politics. When the decisions of the legislative majority, expressed through ordinary law, differ from the decisions of the people, expressed in the constitution, the latter ought naturally to prevail. The nullification by the judiciary of a law enacted by the legislative majority is not, therefore, a restriction on popular sovereignty but a defence of constitutional popular sovereignty against legislative encroachment. The people are bound by founding decisions, but these decisions are not fixed in time. They can be revised and revisited but only by more inclusive constitution-making processes structured through more demanding decision-making rules, such as the need for a two-thirds majority or a referendum.

Interpretations of a constitution also evolve organically, between moments of foundation or refoundation, through the legislative acts, political conventions and judicial decisions that complete the constitutional framework. Sometimes, to lower the stakes and facilitate more inclusive bargaining, constitution-makers deliberately include time-limited articles that invite subsequent revision.

### ***Constitutions, Corruption and Good Citizenship***

Corruption is a much broader concept than the mere taking or payment of bribes; it covers all actions that put private interests above public interests in relation to legislation, policy and administration. The threat that corruption poses to a democratic order has long been well understood. In the words

of Benjamin Franklin (1706–1790, a statesman active in the founding of the United States), ‘Avarice and ambition are strong passions and, separately, act with great force on the human mind; but when both are united, and may be gratified in the same object, their violence is almost irresistible, and they hurry men headlong into factions and contentions, destructive of all good government’ (Vidal 2004: 46).

That is to say that when rulers forget about the common good and concern themselves only with their private gain and profit, politics ceases to be a public vocation and becomes a ‘trade’ (the selling of promises for votes in order to obtain influence that can, in turn, be sold to private interests for personal gain).

‘I feel that the constitution [of India] is workable, it is flexible and it is strong enough to hold the country together both in peacetime and in wartime. Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is that Man was vile.’  
*B. R. Ambedkar, Indian jurist and constitution-builder*

In such conditions, good legislation and good policymaking become impossible, faith in political leadership and in democratic institutions is undermined and the constitutional order weakened—often to the point of collapse.

For this reason, those who have thought most deeply about the establishment and maintenance of a democratic constitutional order have often considered that only communities with a strong sense of public spirit—that is, a willingness to set aside immediate personal gain for the wider and longer-lasting public good—are able to sustain it. This means that constitution-makers must pay attention to the nurturing of social, economic and cultural institutions that disperse power in society and that equip citizens morally, intellectually and practically for citizenship. Others have considered the need for good and principled leadership in a democratic constitutional order, and have sometimes attempted to embody a commitment to such principles in a particular constitution through leadership codes or standards for public life. Constitution-building, according to this view, must be sustained, through the implementation phase and far beyond, by a commitment to a free and civic way of life and to a culture of democracy that includes democratic relations in social, familial and economic life, as well as in the explicitly public sphere.

In summary, the constitutional text, if it is to be the basis of a democratic constitutional order, must reflect and embody democratic values, but these values must themselves exist among the people. If they are absent, it is unlikely that the constitutional text will be able to inculcate them. Nations wishing to embrace a democratic constitutional order might have to begin with soul-searching. In such circumstances, one way of proceeding might be to embark on a pre-constitutional phase of national dialogue. This would bring together the political forces in society in an attempt to reach agreement on the basic principles of a democratic constitutional order and on the process of constitution-building. In South Africa, for example, a multiparty negotiating forum was convened to lay out the principles and procedural foundations on which the constitution-building process was to take place.

## References, Resources and Further Reading

Ackerman, Bruce, *We the People, Volume 1: Foundations* (Cambridge, MA: Harvard University Press, 1993)

Austin, Reginald, ‘Constitutional Reform Processes’, in *Writing Autobiographies of Nations: A Comparative Analysis of Constitutional Reform Processes* (The Hague: Netherlands Institute for Multiparty Democracy, 2009)

- Dahl, Robert, *Polyarchy: Participation and Opposition* (New Haven, CT: Yale University Press, 1973)
- Ghai, Yash, 'Chimera of constitutionalism: State, economy and society in Africa', lecture, 2010, available at <[https://web.up.ac.za/sitefiles/file/47/15338/Chimera\\_of\\_constitutionalism\\_yg1.pdf](https://web.up.ac.za/sitefiles/file/47/15338/Chimera_of_constitutionalism_yg1.pdf)>
- International IDEA, *A Practical Guide to Constitution Building* (Stockholm: International IDEA, 2011), available at <<http://www.idea.int/publications/pgcb/index.cfm>>
- Lerner, Hanna, *Making Constitutions in Deeply Divided Societies* (Cambridge: Cambridge University Press, 2011)
- Lutz, Donald S., *Principles of Constitutional Design* (Cambridge: Cambridge University Press, 2006)
- Paul, Ellen Frankel, Miller, Fred D. Jr. and Paul, Jeffrey (eds.), *What Should Constitutions Do?* (Cambridge: Cambridge University Press, 2011)
- Sen, Amartya, 'Democracy as a Universal Value' *Journal of Democracy*, 10/3 (1999), pp 3–17
- Vidal, Gore, *Inventing a Nation: Washington, Adams, Jefferson* (New Haven, CT: Yale University Press, 2004)
- Viroli, Maurizio, *Republicanism* (New York: Hill and Wang, 2001)