

2. What is a Constitution?

READING ITEM 1

The Concept, Types, Functions and Content of a Constitution

This Reading Item has been prepared by relying on the IDEA Constitution-Building Primer published by the International Institute for Democracy and Electoral Assistance in 2014, edited by Elliot Bulmer under a Creative Commons license. (Edited by Márton Sulyok)

INTRODUCTION AND LEARNING OUTCOMES

*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 describe it as **a set of fundamental legal-political rules** that:*

- 1. are **binding on everyone in the state, including ordinary law-making 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); and*
- 5. as a minimum, **meet the internationally recognized criteria for a democratic system in terms of representation and human rights.***

Learning outcomes

- 1. Understanding key principles of constitutions and constitution-making*
- 2. Understanding the concept of the constitution (functions, content, stability)*

Keywords:

Necessary time for Independent Study: 1-2 hours

Recommended Reading

- 1. [L. Orgad: The Preamble in Constitutional Interpretation](#) [ICON, 8(4)2010:714-738]*
- 2. [A. Kavanagh: The Constitutional Separation of Powers](#) (University of Oxford)*
- 3. M. Tushnet: *Advanced Introduction into Comparative Constitutional Law*, Elgar, 2014, Cheltenham, 10-19, 94-112*
- 4. N. Blokker – R. Wessel: [Updating International Organizations](#). Intl. Org. L.R. (2)2005:1-8.*

The Oxford Handbook of Comparative Constitutional Law: edited by Michell Rosenfeld - András Sajó, 2012, Oxford University Press, Chapter 4 Dieter Grimm: Types of Constitutions 98-132.

2.1. The Concept and Functions of a Constitution

If we needed to define constitutions not from an institutional, procedural approach, the best possible way **to grasp the essence of the concept** is based on a functional understanding of the notion.

*Different from the concept of sovereignty, constitutions do not (only) define the **boundaries** of the territory of a state, but also can the boundaries of the political community (generally, the population).*

- **In geographical terms**, a definition of boundaries does not only extend to the definition of actual borders, but can also include territorial claims (if any) or references extra-territorial rights (i.e. rights conferred to members of the political community outside the geographical borders of a country).
- **In personal terms**, the boundaries of the political community generally extend to the citizens, but other groups living in or outside of the territory of the given state can be the – to a varying degree – subjects of rights and obligations under the constitutions, such as minorities (whether constituents of the state or not), immigrants or refugees. (E.g. some rights contained in the constitution may apply to both citizens and non-citizens, such as the right to be free from torture or physical abuse.) A constitution often distinguishes between those inside and outside the polity (i.e. the political space in which the entity having authorization to create the constitution exercises its power).

*Regarding the political community, constitutions can also declare and define its nature and **authority** (the source of sovereignty). They often declare the state's fundamental principles and assumptions, as well as where its sovereignty lies.*

EXAMPLES

- The Constitution of **France** (2008) 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”*.
- 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”*.

- The Fundamental Law of **Hungary** (2011) declares that “*Hungary shall be an independent, democratic rule-of-law State. The form of government of Hungary shall be a republic. The source of public power shall be the people. The power shall be exercised by the people through elected representatives or, in exceptional cases, directly.*”

In addition, constitutions can express the identity and values of a national community. As nation-building instruments, constitutions may define the symbols of sovereignty (national flag, anthem and other symbols), and may make proclamations about the values, history and identity of the nation. A most recent reference to some of these elements pertains to debates on constitutional identity and the identity of the constitution in the United States and also as part of European integration.

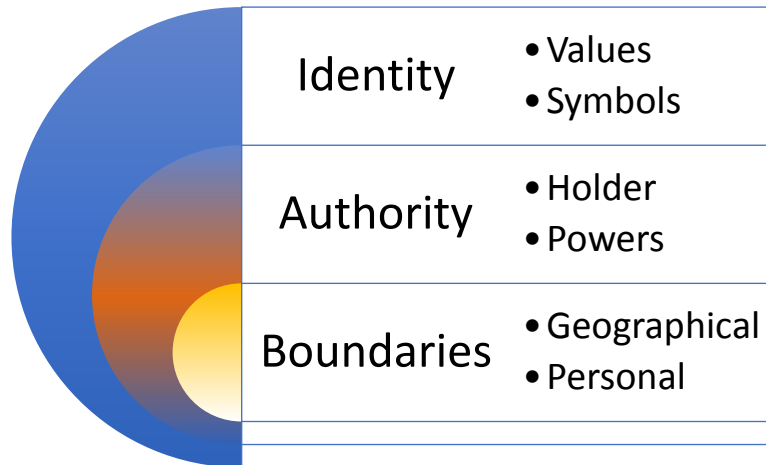
- **There are different models of constitutionally regulating or protecting national insignia.** Some jurisdictions even criminalize certain conducts against symbols of national sovereignty, such as the national flag, while others are constitutionally prohibited from protecting symbolic speech desecrating national symbols due to historical or constitutional constraints.
- *Argentina, Algeria, Australia* – **A for Criminalization** (e.g. national flag) – “desecration” (the alphabet goes on – about 50 countries criminalize such or similar conduct)
 - *United States* – **F for Speech**. Flag burning protected under the First Amendment of the US Constitution as “symbolic speech”. (Historically, there have been about 20 attempts at amending the constitution between 1900 and the present day, but all failed due to procedural constraints.)

*Oral arguments
in the case*

Landmark Case: United States v. Eichman

*“The Government concedes, as it must, that appellees’ flag-burning constituted **expressive conduct**, and this Court declines to reconsider its rejection in Johnson of the claim that flag-burning as a mode of expression does not enjoy the First Amendment’s full protection. It is true that this Act, unlike the Texas law, contains no explicit content-based limitation on the scope of prohibited conduct. Nevertheless, it is clear that the Government’s asserted interest in protecting the “physical integrity” of a privately owned flag in order to preserve the flag’s status as a symbol of the Nation and certain national ideals is related to the suppression, and concerned with the content, of free expression. The mere destruction or disfigurement of a symbol’s physical manifestation does not diminish or otherwise affect the symbol itself.” (496 U.S. 310 – 1990)*

The Core Elements of the Constitution-Concept



Once the identity and the boundaries (i.e. the personal scope) of the constitution was clarified, along with the underlying values constituting and forging the political community, constitutions can also declare and define the rights and duties of citizens.

- ✓ **Most constitutions** use “emotions in constitutional design” in their **preambles**, where the *cultural, historical, linguistic, etc. contexts* of their national as well as constitutional development can be outlined. (For more details, see *Orgad in Recommended Reading*.) Constitutional values are sometimes included here like the well-being of posterity, or the pursuit of happiness as in the US Constitution. (This part, outside of any references to the symbols of national sovereignty and identity, can be considered the *identitarian core* of any constitution.)
- ✓ **Most constitutions** include a **declaration of fundamental rights** applicable to citizens.
- ✓ **Liberty! 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**
 - **Equality! In the form of social, economic and cultural rights AND/OR**
 - **Fraternity! In the form of specific collective rights of minority communities.**

The Rights Contained in the Constitution



*Constitutions can establish and regulate the **political institutions** of the community. The **institutional provisions** typically provide **mechanisms** for the democratic allocation and peaceful transfer of power (e.g. elections) and for the **restraint and removal** of those who abuse power or who have lost the confidence of the people (e.g. impeachment procedures).*

✓ Constitutions define the various **institutions** of government; prescribe their **composition, powers and functions**; and regulate **relations** between them.

○ Almost all constitutions 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** (e.g. an electoral commission), and **institutions to ensure the accountability and transparency** of those in power (e.g. an ombudsman, constitutional court – “protectors of the constitution and fundamental rights”).

✓ **Checks and Balances:** Constitutions can **divide or share power** between different layers of government or sub-state communities. (*For more details, see Kavanagh in Recommended Reading.*)

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

• **Geographically defined** (as in most federations, such as Argentina, Canada or India), or

• **Culturally or linguistically defined** (e.g. the 1994 Constitution of Belgium, which establishes autonomous linguistic communities in addition to geographical regions).

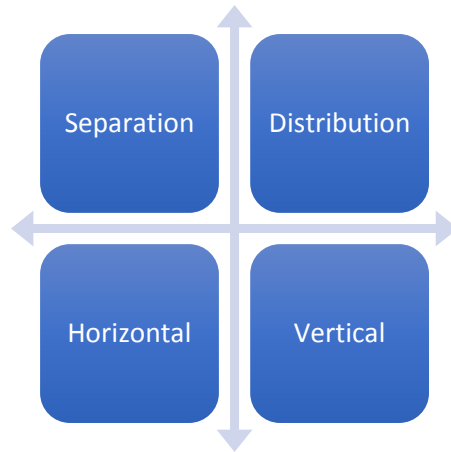
✓ **Church and State:** Constitutions can declare the **official religious identity of the state and demarcate relationships between sacred and secular authorities**. This is particularly important in societies where religious and national identities are interrelated, or where religious law has traditionally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

✓ **State Objectives and Commitments:** 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 Separation and Distribution of Powers

(clearest model in the US)



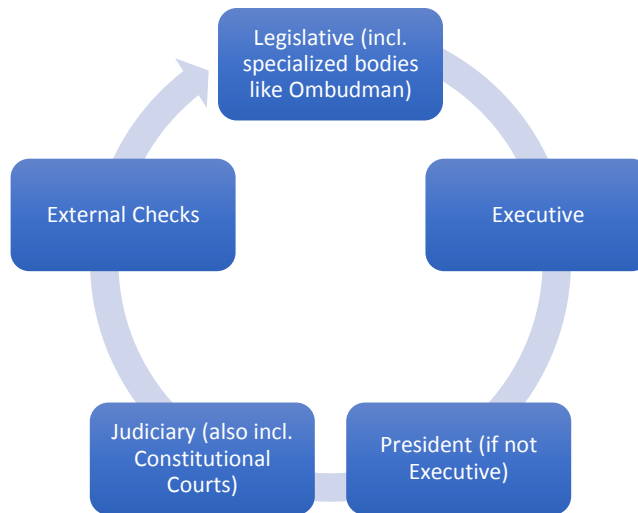
The Fusion of Powers

(when horizontal separation breaks up – most models in Europe)

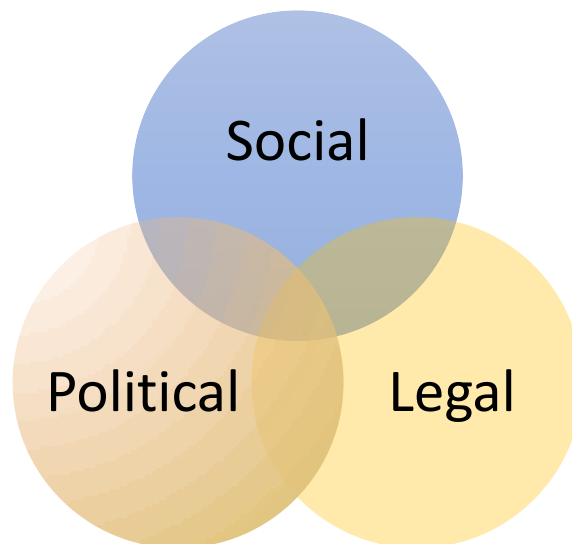


Checks and Balances

(Institutional and procedural assurances for the mutual control of the different branches of power – and other external factors – over each other)

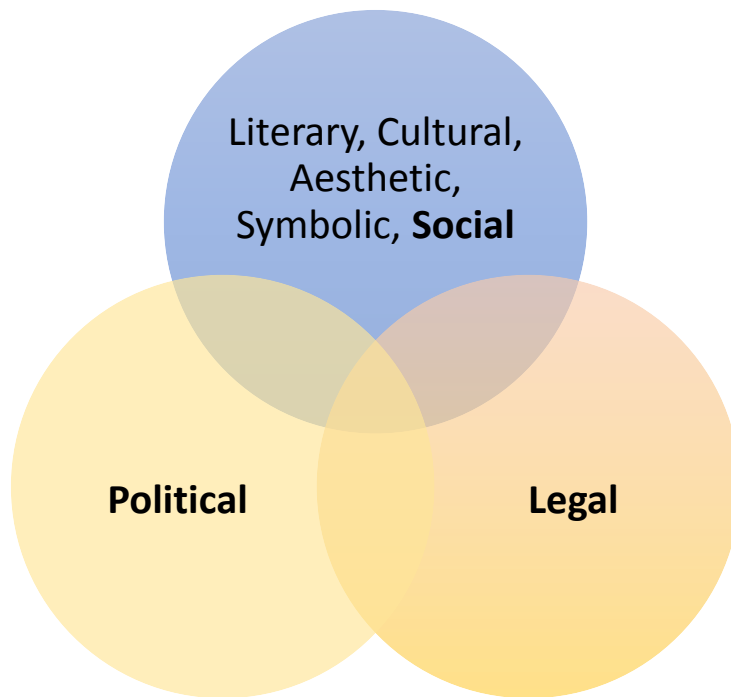


The Cross-Section of Constitutional Functions



The above cross-section could also have been described by the indicators Culture (Social) – Justice (Legal) – Power (Political). Constitutions are maps of culture, justice and power, but also of society, the political and the legal system.

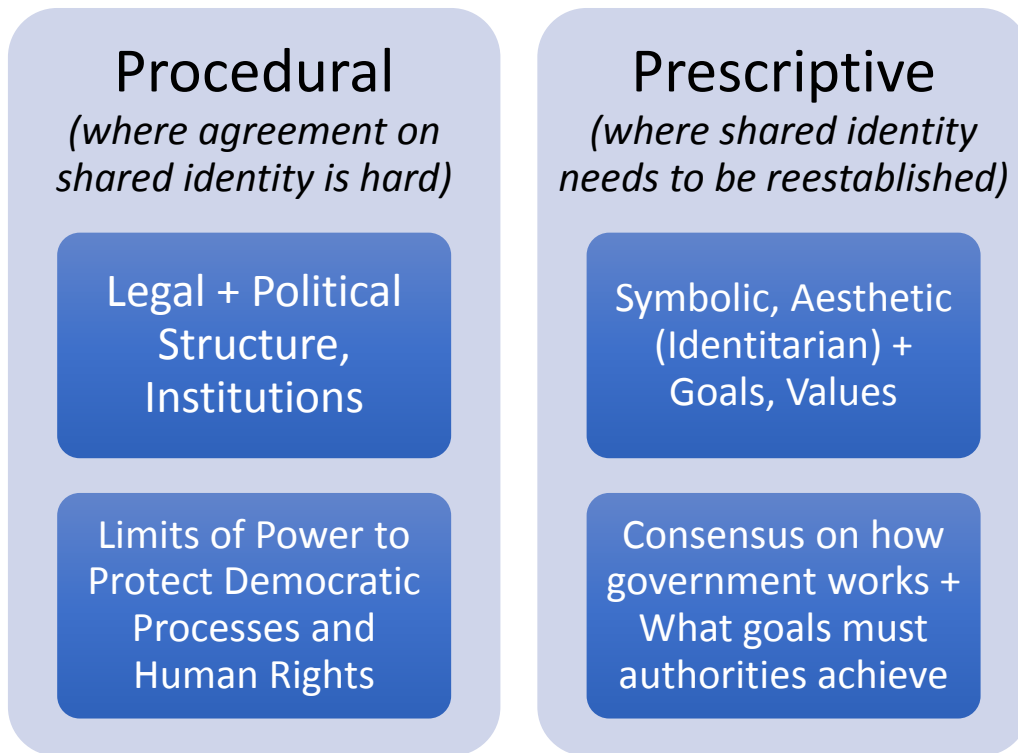
The Constitution as a Document



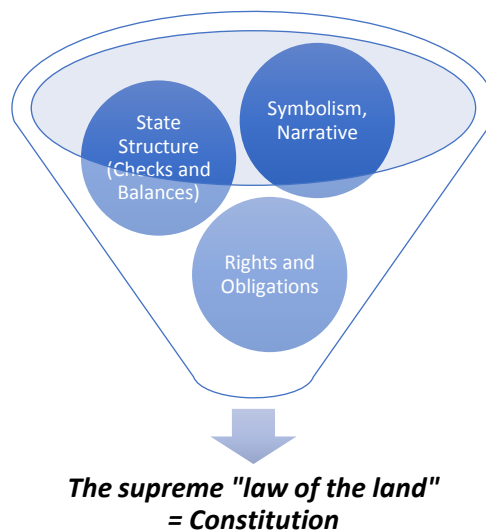
- **Legal:** *As legal documents, constitutions are instruments of guarantees of justice against injustice as a result of any abuse of power. As the supreme sources of law in the given legal system, they provide authorization to enact laws for different aspects of social life and culture.*
- **Social:** *Therefore, constitutions can also be built upon social functions (declarations) – do forge a community and to reflect upon them identitarian values, which they will identify with. (Some call this, the theory of ‘**constitutional patriotism**’.) These pertain to the area of the above mentioned “emotions in constitutional design”, to the realm of preambles (often forging **constitutional identity**), but emphatic references to socio-economic rights or similar commitments as objectives of the state (e.g. the assurance of humane living conditions to everyone)*
- **Political:** *As political documents, constitutions are instruments of identifying supreme power and those institutions in charge of making high political decisions. In this dynamic relationship, these institutions discuss along the lines of legal and social issues central to the attention of public opinion and might make compromises regarding them. (Some call this the plane of ‘**constitutional politics**’.)*

These above functions need to be reconciled within the actual text, according to two basic types, both of which (and a mixture of those) are typical to most constitutions.

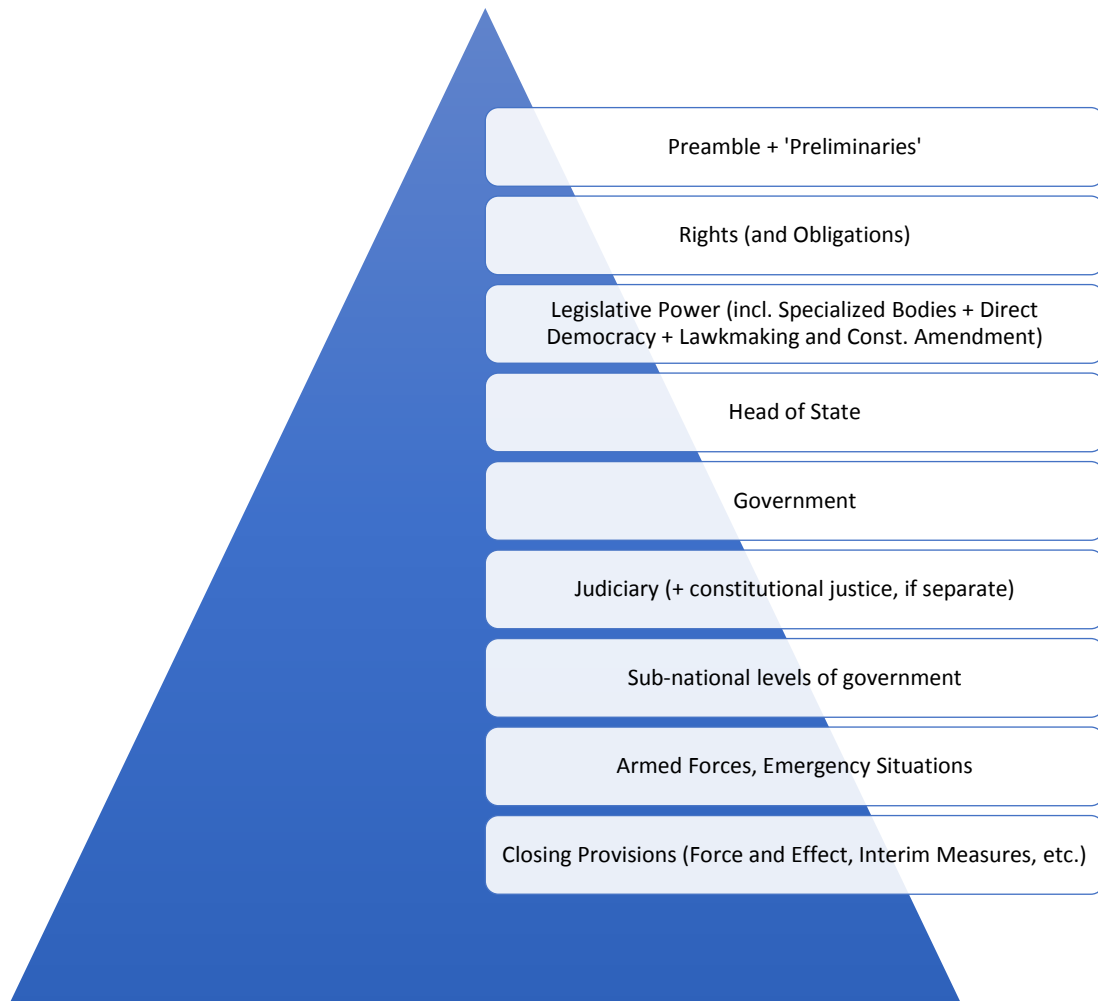
Basic Types of Constitutions (based on basic functions)



What Elements Constitute a Constitution? An Analysis of Content



Typically, constitutions contain the above three components, in varying order or a mixture of those. In the following, a “sample constitution” will be elaborated:



Sidebar: Do International Organizations Have Constitutions?

First of all, the seemingly complicated answer to this question revolves around a dilemma of form and/or content. Formally, many national constitutions are called Basic Law (like in Germany) or Fundamental Law (like in Hungary), but on the level of content, these are all constitutions, with all the functions and elements that we have discussed above.

Secondly, the simpler answer to this question is: yes and no.

Yes, as in a functional approach, all documents that besides creating **institutions that have powers to change, protect and enforce** their constitution, they also establish **rights and obligations** to these institutions.

No, as in a material approach, constitutions of international organizations do not encompass the citizens of the member states of the organizations (as direct subject of a sovereign entity) and do not prescribe them specific rights (and obligations) in such detail as national constitutions do. **The institutional and procedural aspects of such constitutions** (also called by other names such as Charter, Founding Document, Statutes, etc.) **are much more emphatic**.

For example, the ECHR sets forth about a dozen of human rights that are protected all over under the aegis of the Council of Europe, and it also establishes one specific right of remedy available to citizens of all CoE member states, i.e. the right to file an application to the ECtHR in case a CoE member state violates their rights protected under the ECHR. In addition to these, the majority of ECHR articles (Arts. 19 through 59) deals with how the ECtHR will proceed with the case when such individual applications will be filed. Among the Additional Protocols evolving the text of the ECHR, we also find a significant number of procedural amendments, on top of those adding new rights to the ECHR.

Questions for Self-Check
1. How does the constitution describe the boundaries of the political community?
2. What is the connection between the concept of sovereignty and the notion of a constitution?
3. Based on what two basic approaches can a constitution protect national symbols?
4. What does it mean that constitutions normally include rights of Liberty, Equality and Fraternity?
5. What are the core elements of the constitution-concept?
6. How can you distinguish between separation of powers and distribution of powers?
7. What is checks and balances?
8. How would you characterize a fusion of powers?

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