



Constitution Brief

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Summary

This **Constitution Brief** provides basic information about the nature and functions of constitutions and is intended for use by constitution-makers and other democratic actors and stakeholders in Myanmar.

About MyConstitution

The **MyConstitution** project works towards a home-grown and well-informed constitutional culture as an integral part of democratic transition and sustainable peace in Myanmar. Based on demand, expert advisory services are provided to those involved in constitution-building efforts. This series of Constitution Briefs is produced as part of this effort.

The MyConstitution project also provides opportunities for learning and dialogue on relevant constitutional issues based on the history of Myanmar and comparative experience.

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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.

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The Fundamentals of a Constitution

Nora Hedling

1. What is a constitution?

A constitution is a body of basic laws and principles that describes the general organization and operation of the state and contains fundamental principles and norms that underlie and guide all government action. Given the fundamental nature of a constitution and its role in laying a groundwork to shape and support the state, a constitution is usually expected to be long-standing and somewhat difficult to change or undo.

A constitution is simultaneously a legal, political, and social instrument. Legally, it enshrines human rights and creates a predictable legal landscape. As a supreme or higher law, its provisions provide a framework under which all regulations, legislation, institutions, and procedures operate. It articulates the rights of citizens that institutions, procedures or legislation must not infringe, and which the state must strive to ensure. Politically, it establishes, distributes and limits governmental power and provides mechanisms for deliberating and deciding on public policy. Socially, it may reflect a shared identity or civic vision of the state, expressing commonly-held values or foundational principles.

Forms of constitutions

Written vs unwritten: Although all systems of government rely at least in part on unwritten norms, customs and practices to regulate the exercise of public power, most have at their core a written constitution in the form of a consolidated legal document. Only a small minority of countries—notably the United Kingdom, New Zealand, and Israel—deviate substantially from that pattern.

Legal vs Political: In most countries the judicial branch is mainly responsible for interpreting and enforcing the constitution, most notably through the ability of the courts to determine the constitutionality or unconstitutionality of laws. These constitutions are said to be ‘legal’ constitutions. Some countries, including Switzerland and the Netherlands, have what are sometimes known as ‘political’ constitutions, in which the legislature is primarily responsible for interpreting and upholding the constitution.

2. What is a constitution meant to do?

A constitution serves multiple purposes. Above all, it empowers public institutions and both authorises and regulates the exercise of public power. The constitution provides a legitimate legal and political basis for proposing and enacting laws,

organising public service and settling disputes. To do this, the constitution must distribute powers, duties and responsibilities between various branches of the government (executive, legislature and judiciary) and regulate relationships between them.

Organizing and dispersing powers: The horizontal dimension

Typically, constitutions seek to disperse powers ‘horizontally’ among multiple actors and institutions—for example, between two chambers of a legislature, or between a president and a prime minister. In some cases, it may be appropriate to consider a horizontal distribution of power between civilian and military authorities, or between secular and religious institutions, or between the ‘party-political’ institutions and the independent institutions such as an electoral commission or public service commission. This distribution of powers can be designed to create a system of checks and balances, to ensure no single actor or body accumulates a potentially dangerous concentration of power. At the same time, however, constitutions also need to establish an effective and efficient system of government that can respond to public demands without falling into deadlock.

Organising and dispersing powers: The vertical dimension

Constitutions often establish a ‘vertical’ distribution of power between national or central and subnational authorities. The vertical distribution of power can provide recognition and empowerment to regions, as well as marginalized or minority groups. Taken to excess, however, it might cause inefficiencies, unnecessary duplication of effort, additional expense, or the loss of technical expertise and resources which are available only at a national level.

Federalism, in which the powers and duties of the different levels of government are set out in the constitution, is one way of protecting and promoting this vertical distribution of power, although other more flexible forms of decentralisation, such as devolution and regionalism, are also available. In each case, the balance between decentralisation and centralisation has to be considered according to the history, tradition, social and political landscape, economic resources, and development needs, of each country.

Expressing identity

A constitution can also be an expression of shared values, identity or purpose. In general, for a constitution to be effective, enduring, and widely respected, it should reflect a broad consensus of agreement about these fundamentals. A constitution that represents and embodies only the values and identity of a particular part of society—for example a dominant region, religion, class, ideology or ethnicity—and that seeks to impose this upon the rest of society, is unlikely to achieve the broad consensus needed for it to function properly. It will be seen as an illegitimate instrument and will not provide an overarching framework for stable, legitimate and effective government.

This need for broad-based agreements means that, where possible, a constitution should reflect shared values, identity and purposes of society. To achieve this, the voices of the people, in all their diversity, must be heard and reflected throughout the constitution’s development—either directly through public consultations or indirectly through representatives that they trust to act on their behalf.

The extent to which agreement is possible, however, varies depending on circumstances. Some constitutions are a manifestation of a relatively unified national culture and identity, which can be unproblematically expressed through a nation-state constitution. Others represent the coming together of people of diverse ethnic groups, ideologies, regions, cultures, religions, genders, who are united in their diversity by a shared civic vision. Some constitutions rest only upon ‘thin’, pragmatic and procedural agreements, which are negotiated to provide a

basis of peace and stability in a given territory, with only a weak and conditional sense of shared identity or common purpose.

The statements of vision, purpose or principles in a constitution are often aspirational—they reflect what the constitution makers would like to see in the future, rather than or in addition to what is at present. However, they can also be transformational. Basic values and principles expressed in a constitution can be made legally enforceable in a way that changes policy. The official recognition of a minority language may, for instance, prevent a government from later banning the use of that language and therefore marginalizing an aspect of the particular group's identity. Likewise, constitutionally enshrined values, such as the principle of non-discrimination or non-sexism, may provide a legal basis to prevent legislation, regulation or state action that conflicts with those values.

Limiting and directing state powers

As a legal document, constitutions usually impose substantive and procedural limits on state power.

Substantive limits are those which limit what the state can do. They constrain the ability of the state to act against human rights and dignity—for example by protecting freedom of speech and assembly, or by prohibiting unlawful detention, forced labour or cruel punishments. Many constitutions also prescribe what the government should do for its citizens, such as provide education and healthcare, protect the environment, or responsibly manage natural resources.

Procedural limits limit how the state can act, in order to prevent arbitrariness, corruption, oppression, discrimination, and the misuse of public office for personal gain. Procedural limits may include legal rights that promote procedural equality in the operation of the law and administration, such as 'due process' rights ensuring a fair trial or a right to approach the administration in one's own language. Procedural limits can also include the whole range of constitutional provisions that structure how decisions can be made.

Recognizing international law

Constitutional recognition of international law or treaties is another common legal commitment that can guide state action. Almost all constitutions refer to international law, international treaties, or international organizations such as the United Nations. Recognized international law may even be enforceable under the constitution. The 1986 Constitution of Nicaragua, for example, embraced international standards providing support to a policy of decentralization and strengthening of indigenous rights. These rights were later upheld in the country's Supreme Court, relying in part upon the Constitution's commitment to international law. The constitutions of many West African countries also incorporate various international and regional human rights standards, which have been upheld and enforced by national courts in human rights cases.

3. What is a constitution not meant to do?

A constitution is not meant to provide laws and regulations for every aspect of a functioning society. It is usually neither practical nor beneficial for a constitution, when envisioned as a long-term, general framework for operation of the state, to go into details. It is impossible to predict how society will look in the future and what its specific circumstances and needs will be.

To take one example, on the issue of health, many constitutions declare a right to health care provided by the state. Given the complexity of health care and the myriad options for promoting health and providing care, as well as the rapid advances and development of health care systems and regulations, a constitution is not an ideal place to specify the details of a health care system. Instead, these are left to legislation and regulation at levels most efficient to delivery. To the extent that a constitution does offer further details on the form of the health care system, it usually does so in broad terms. Details relating to financing, regulation, and

Box 1. The right to health care in Myanmar's Constitution

Article 367 of Myanmar's Constitution (2008) recognizes every citizen's right to health care:

'Every citizen shall, in accordance with the health policy, laid down by the Union, have the right to health care.'

Article 28 of the Constitution also provides that the Union shall 'enact the necessary law to enable national people to participate in matters of their ... health'.

operation of a health care system are left to ordinary laws and regulations that will be passed to ensure the envisioned right is protected and fulfilled.

For example, Myanmar's Constitution (2008) recognizes every citizen's right to health care (see Box 1). Likewise, in Afghanistan the Constitution guarantees healthcare 'in accordance with the provisions of the law', and encourages the establishment of private medical services and health centres. However, it leaves concrete details about its operationalisation to ordinary law.

4. How are constitutions made, changed and replaced?

Given their foundational role, and their contribution to continuity, stability and legal certainty, constitutions are often meant to be long-term, deeply rooted instruments that are more difficult to change than other forms of law. At the same time, an unchangeable constitution presents its own difficulties, potentially committing future generations to provisions which no longer serve the greater good or function as they should. Therefore, constitutions should be capable of being changed, but not too easily; they should be changed only on the basis of careful deliberation, with public support and on the basis of broad agreement.

The decision to replace or significantly amend the constitution may result from a peace process or cease-fire agreement. It may also be a consequence of revolutionary regime change (as happened in Tunisia 2011-2014) or as part of a more gradual and negotiated process aimed at transitioning to or strengthening democratic rule (e.g. Myanmar). In countries where there is no previous constitution (for example, in the case of a newly independent states), or the previous constitution will have been totally discredited and abandoned (e.g. Germany after the Second World War), there may be no alternative but to develop a new constitution from scratch. In many cases, however there is an existing (or previous) constitution that can be used as a starting point, and constitutional discussion will be based upon making specific amendments to that text.

Whether a new constitution is adopted or an existing constitution reformed, arriving at a new constitutional settlement requires negotiation and discussions among multiple groups, including those in power and opposition groups, as well as both majority, minority and marginalized groups, including representation of historically disadvantaged genders and classes. Even in countries where there is a clear formal process for constitutional amendment (see below), these negotiations and discussions may take place through additional forums created for the purpose, such as a Constitutional Convention or Constitutional Committee with a mandate to consider reforms and to consult with the people.

Constitutional amendment procedures

A constitutional amendment is a formal change in the text of a constitution. The change can take the form of a variation to the text, a removal of text, or an addition. Most constitutions have relatively burdensome amendment procedures, often involving multiple actors, institutions, or other bodies.

Rigid vs Flexible: Some constitutions are more rigid (difficult to change) and others more flexible (relatively easy to change). The greater the number of procedural burdens and actors involved in amendment processes, the more rigid the constitutional provisions are and the less vulnerable it is to change at the will of powerful individuals or groups. Mechanisms that make constitutions more rigid include: a requirement for approval by a super-majority in the legislature for constitutional changes (e.g. 2/3rds of the members in Bangladesh, 3/4ths in Myanmar), the requirement for a referendum (e.g. Australia, Ireland, Denmark), approval by two sessions of the legislature with an intervening general election (e.g. Netherlands, Sweden, Norway), or approval by state legislatures in a federation (USA, Canada). The involvement of multiple stakeholders in the amendment process, time delays, and opportunities for public input to the process, protects against self-serving amendments, or those that only reflect the preference of a narrow majority and not a broad consensus in society.

Box 2. Amending the Myanmar Constitution

'If it is necessary to amend the provisions of Sections 1 to 48 in Chapter I, Sections 49 to 56 in Chapter II, Sections 59 and 60 in Chapter III, Sections 74, 109, 141 and 161 in Chapter IV, Sections 200, 201, 248 and 276 in Chapter V, Sections 293, 294, 305, 314 and 320 in Chapter VI, Sections 410 to 432 in Chapter XI and Sections 436 in Chapter XII of this Constitution, it shall be amended with the prior approval of more than seventy-five percent of all the representatives of the Pyidaungsu Hluttaw, after which in a nation-wide referendum only with the votes of more than half of those who are eligible to vote.'

—Article 436(a), Constitution of Myanmar (2008)

The advantages of a rigid constitution include the establishment of a stable and reliable legal landscape, the heightened protection of constitutional rights and values, and perhaps increasingly consistent enforceability of constitutional structures and provisions. Flexible constitutions, in contrast, allow the constitution and the government to act and react more easily as times change. They provide less protection, however, against actors or parties who wish to promote self-serving constitutional change or amendments.

There are several constitutions that have mixed amendment rules, with different degrees of rigidity for the amendment of different parts of the constitution. For example, parts of the Constitution of India concerned with the distribution of powers between the Union and the States can only be changed with the approval of the State Legislatures. The Canadian Constitution has several different amendment procedures, with most amendments requiring the consent of 7/10 provinces containing between them at least 50 per cent of the population, some amendments requiring only the consent of the Federal Parliament and others requiring the unanimous consent of all ten Provincial legislatures.

The Constitution of Myanmar is particularly rigid with regard to basic principles, state structure, and the qualifications of the president and vice president, as well as the formation of the Pyidaungsu and the structures of the Pyithu Hluttaw, the Amyotha Hluttaw, and the Region or State Hluttaw. These parts of the Constitution can be changed only by the support of more than 75 per cent majority of all members of the Pyithu Hluttaw and a national referendum with the support of over half of all eligible voters (see Box 2).

Unamendable provisions

Many constitutions contain unamendable provisions. These are provisions that declare an essential aspect of the state, or an essential element of the national identity. Additionally, they may be provisions that protect against specific potential problems such as an undemocratic amassment and entrenchment of power. Tunisia's 2014 Constitution, for example, contains several unamendable provisions. Article 1, which declares Tunisia's freedom, independence, sovereignty, religion, language, and system of government, is unamendable. Similarly, article 2 is unamendable and declares that the state is 'based on citizenship, the will of the people, and the supremacy of law'. Meanwhile, article 75 protects a specific aspect of the design of the state, forbidding amendments that would increase the number or length of presidential terms.

Sometimes a constitution expresses in broad terms that certain principles cannot be breached but the possibility of constitutional change still remains open. Nepal's Constitution (2015) decrees: 'This Constitution shall not be amended in way that contravenes with self-rule of Nepal, sovereignty, territorial integrity and sovereignty vested in people.' Such provisions leave some degree of room for the determination of whether a proposed amendment is possible.

Kosovo's Constitution of 2008 provides a process of amendment that requires assessment of the Constitutional Court that certain constitutional rights and freedoms are not diminished. In allowing a court to make the assessment, rather than explicitly stating that a certain provision may not be removed or altered, a degree of flexibility is introduced, while still emphasizing the importance of the cited rights.

Even where unamendable rights are used, it is important to note that, in some cases, revolution or ample political consensus are sufficient to amending or replacing something originally intended to be unamendable. The choice to write a new constitution is one way in which unamendable provisions fail to endure.

Informal amendment: Judicial review and political conventions

In addition to formal amendments to the constitutional text, constitutions can also evolve over time to meet changing needs and circumstances. The same words in the text of the constitution can come to be understood, interpreted and applied

in different ways. For example, in the 1930s, when faced with a major economic crisis, the Constitution of the United States was re-interpreted, both through executive and legislative action and through subsequent Supreme Court decisions, to allow a vast expansion of federal power over economic, industrial and aspects of social policy.

Perhaps the best example of such constitutional reinterpretation can be seen in the gradual change in some 19th century European constitutions from a constitutional monarchy in which the king or queen held real power to a parliamentary democratic system in which the king or queen's role was merely ceremonial and representative. When these constitutions were first written, in the early 19th century, it was assumed that the monarch would have an active, personal role in government—at least to the extent of selecting ministers, choosing when to dissolve parliament and call elections, and perhaps vetoing legislation. By the end of the 19th century, however, it was generally clear that, although these powers still existed on paper, they were not exercised according to the monarch's own discretion and will. Only much later, once these practices had become normalised and uncontroversial, were they incorporated, for the sake of clarity and certainty, into the actual text of the constitution. This meant that change could come gradually and incrementally, in response to emerging circumstances. Monarchs could make concessions to political demands, but because they still had the formal power on paper, they felt they had some guarantees against losing control of the situation.

5. Processes of major constitutional change

Reaching agreement

Since each constitutional change process is different, the first step after deciding on the need for a new constitution is to determine a design for the process itself. In cases where amendments are being made to an existing constitution, the formal legal requirements that must be undertaken in order to bring amendments into effect will be prescribed by the constitution. However, it is increasingly common for parallel or preliminary political processes to be established in order for agreement about constitutional changes to be reached. For example, in Ireland constitutional amendments must be approved by Parliament and then by a referendum, but recently a broadly representative Constitutional Convention, including members of the public, has been established to discuss and agree upon changes before this formal, legal process is carried out.

These political processes can be designed to fit the circumstances and needs of each country at its particular point in history, and it is first of all beneficial to have agreement about the structure of the process itself. In most cases, a transitional agreement or legal framework will be put in place in order to legitimate and structure the process, and also perhaps to set out a timeline for its completion. This may be set out in a peace agreement in the case of countries emerging from conflict (as in Burundi and Sudan), in an interim constitution (as in South Africa), or in a law regulating the reform process (as in Kenya). Nepal used a combination of a peace agreement and an interim constitution.

Constitution-making body

One of the first things to agree upon is the form and composition of the forum in which these constitutional discussions will take place (this is often referred to as a 'constitution-making body'). Will it be a broadly representative constituent assembly? Or a committee of parliament? Or a small expert commission? How will its members be selected: by appointment or elections?

The size and composition of a constitution-making body can vary greatly. A small group such as a committee or subcommittee, an appointed commission, or an expert committee of legal drafters often undertakes the drafting of the text itself. The task of writing is to transform the various public inputs, political

agreements, and aims of the stakeholders into a coherent, viable draft to be examined and debated by both the constitution-making body and the public, including civil society organizations, citizens, the international community, and in the media.

Agreement will also need to be reached on the decision-making process within the constitution-making body. Will it be consensus-based or be subject to majoritarian decision-making? Must some decisions be unanimous?

Basic principles

Before undertaking constitutional drafting or negotiating specific constitutional changes, preliminary agreement may be sought on the basic principles or standards that the new or revised constitution will adhere to. In cases where an existing constitution is being amended, this preliminary agreement will set out the scope and limits of intended constitutional change, thus giving certain guarantees both to those who seek to protect their existing interests and those who wish to achieve reform.

Such a body of standards, called Constitutional Principles, was a key aspect of South Africa's Interim Constitution, which provided the main framework for drafting the permanent constitution. The draft constitution was even judicially scrutinized to affirm its conformity with the agreed-on principles and a number of provisions were found to be inconsistent with the principles. These provisions were then altered to align with the constitutional principles before ratification of the Constitution. Devices such as basic principles and interim constitutions serve to guide the drafting bodies and ensure adherence to key negotiated elements.

Public participation

Another question to consider is at what stage in the process should the public be engaged and how will that be done? Media and social media provide excellent venues for disseminating information about the constitution and for fostering debate as well as for collecting opinions. Although consideration of public input and participation (e.g. through public hearings) is advisable at early stages, an opportunity for public comments or hearings may also be useful once drafts are on the table before the final work of the constitution-drafting body.

There are generally two alternative—although not necessarily exclusive—approaches where public participation is envisaged. One approach involves the draft being written with the input of the public. The constitution-making body starts its work by consulting and collecting public views from which it then produces a draft which then goes through a process of further debates and refinement at various stages before arriving at a final draft. This process allows the public to begin to shape the constitution from the very outset, potentially maximizing the impact of people's expressed needs and desires. In the second scenario, the constitution-making body unilaterally writes the initial draft, after which it is taken to the public for comments. This approach has the benefit of allowing public to debate and comment on concrete proposals rather than just general ideas.

International community and expert advice

It may be desirable to involve the international community (in the form of mediation or advice) in the constitution building process, since they may be able to advise on the applicability of international norms and standards, and may provide useful comparative experience from the constitutional history and practice of other nations. However, international experts cannot replace national decision-making, and the eventual constitution must always represent an authentic agreement between the relevant elites and populations who will have to work and live under the constitution.

International IDEA in Myanmar

International IDEA works with democratic stakeholders to consolidate the transition to democracy, contributing in particular to electoral processes, democratic oversight of the parliament, and strengthening of constitutional expertise in the country. International IDEA established its country presence in Myanmar in 2012 and now has offices in Yangon and Naypyitaw.

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Formal approval and implementation of changes

When a new constitution is being written, agreement will also need to be reached on the process for adopting or ratifying the constitution (bringing the constitution into legal effect). In cases where an existing constitution is being amended, this process will be set out in the amending formula of the existing constitution.

Many constitutions are adopted by the constitution-making body, such as a Constituent Assembly or by Parliament. To reflect the need for consensus, a special majority may be required. Alternatively, many constitutions are ratified or adopted through a national referendum. This gives people a direct vote on the new constitution and is reflective of the principle of popular sovereignty.

Sometimes, referendums are used as a substitute for public participation earlier in the process. In these cases, the lack of representation in the debating and drafting processes is only partially compensated for by the direct input of the public through a national vote—because referendums only allow voters to choose for or against a set of proposals that have been developed by others, and voting ‘no’ may have unpredictable results. Referendums are most often held on the question of adoption of the constitution as a whole but they may also be held to resolve a particularly contested provision (for example, Iceland in 2012 held six concurrent referendums on specific aspects of the constitution).

In addition to ratification of the constitution, much work is usually put into its implementation. Constitutional provisions sometimes need to be enacted in law—legislation must be enacted to fulfil the constitutional promises or changed to reflect the demands of the new constitution. New institutions are sometimes created and elections are usually held sometimes under new laws. New processes and procedures providing judicial access to complain when constitutional rights or the new constitutional order have not been upheld area often needed.

References and further reading

Web resources

ConstitutionNet, <<http://www.constitutionnet.org>>

The Constitute Project, <<http://www.constituteproject.org>>

International IDEA’s Constitution-Building Primer series, <<http://www.constitutionnet.org/primers>>

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