2 The basics of constitutions: An overview

This chapter provides an overview of a number of basic aspects of the constitution that will need to be taken into consideration by constitutional drafters regardless of the institutional choices they make. It begins by outlining the key elements usually regulated in constitutions, and how they are often an instrument of national self-expression. It goes on to discuss key elements of the frame of government, including its territorial structure (which is further elaborated in Chapter 4) and the three powers (the executive, legislative and judiciary). It concludes by providing an overview of the most common mechanisms included in OECD member countries' constitutions for constitutional amendment and stability.

Introduction

As noted in the previous chapter, the vast majority of contemporary constitutions establish at a minimum the basic principles of the state, including as a form of national self-expression; the structures and processes of the chosen form of government; and the fundamental rights of citizens that are protected. They also enshrine these arrangements in a foundational law that cannot be amended by way of ordinary legislation and that entrench some sort of constitutional review to ensure constitutionality. Different options for the configuration of these essential elements will be analysed throughout the report. This chapter outlines the basic aspects that are usually regulated in constitutions, regardless of the specific institutional choices that are made. It starts by analysing what elements are normally part of the constitution, including the three branches of government, the territorial structure and its function as a form of national self-expression. It considers key mechanisms contained in the majority of constitutions to protect their continuity and stability, such as provisions for amendment, emergency power regulation, and independent electoral and audit institutions.

What do constitutions usually do?

- They provide a *frame of government*. Choosing one type of government over another in democratic constitution-making instances means deciding which patterns of political decision making would better serve the rights, needs and expectations of the higher number of citizens, while protecting fundamental rights and minorities. Different institutional arrangements to regulate relations between the legislative and the executive powers in particular give rise to several types of government (widely categorised as parliamentarism, presidentialism, and semi-presidentialism).
- Most constitutions are expressly forms of *national self-expression*. They often describe the nation, its history, and the reasons for adopting the constitution in a preamble. The list of rights in the constitution will refer to what the constitution's adopters think is most important for their nation. And sometimes even particular structures of government – elements of the frame of government – will similarly communicate how the nation understands itself.
- Nearly all contemporary constitutions *regulate the relation between the government and the nation's residents* (the latter usually described as its citizens, though the relevant population often includes many non-citizens). This occurs most obviously in the rights the constitution identifies, because those rights typically insulate residents from actions the government would otherwise be empowered to take. But the relation between the government and citizens can be found as well in the affirmative powers held by the government – the things the constitution authorises the government to do. Closely associated with the constitution's role in regulating relations between the government and citizens is its role in regulating relations among the citizens themselves (known as the constitution's "*horizontal effect*").
- Even if the government's powers are plenary – in the sense that it can act on any issue (as long as it does not violate constitutional rights), constitutions sometimes can single out some *areas for special attention*. At the most abstract level, they can provide that the government must act to promote general welfare; at a more concrete level, they can charge the government with ensuring that its policies preserve the economy and the environment for future generations. Such crucial provisions deserve a careful approach, as they would need to be specific enough not to put the constitutional court and other institutions interpreting the constitution in the field of arbitrariness (instead of allowing only a margin of appreciation, which is inevitable).
- Constitutions almost always tend to provide *mechanisms for their own amendment*. Constitution drafters recognise this need because they acknowledge the uncertainty of future challenges, as well as how constitutional provisions will work in practice. Unanticipated developments in the

national and world economies, as well as technological innovations, might generate challenges that can best be handled at the level of the constitution rather than by ordinary legislation.

- Well-designed constitutions are also *self-stabilising*. The systems of government they create should be able to preserve themselves when ordinary or moderate disruptions occur. Amendment mechanisms are one form of self-stabilising; well-designed provisions for choosing legislatures and executives can also promote constitutional stability. Contemporary constitution drafters have increasingly recognised what are sometimes called additional "institutions for protecting constitutional democracy" as desirable. The most widely adopted of these institutions are a specialised constitutional court, an electoral management body, and a supreme audit authority, each with constitutional guarantees of independence.

What do constitutions usually not include?

As outlined above, there are a number of basic choices that the constitution must make. Among these there is the possibility of leaving some matters to the regular legislative process. That would involve adoption of either ordinary laws or "organic" laws requiring special procedures (typically a special quorum requirement, less commonly a requirement that the law receive more than mere majority support and mandatory review by the constitutional court). Conversely, the constitution's drafters could decide to establish how the legislature, the executive and the judiciary should be chosen, and leave everything else to later determination by ordinary laws. Existing constitutions usually go beyond that scope. Still, all existing constitutions do leave some of the matters discussed above to be resolved by adopting ordinary or organic laws, such as for example regulation of basic rights and the composition and powers of specific institutions. Which choices are made and entrenched, and which are left to later determination, usually depends on the circumstances facing the constitution's drafters. Yet as noted, entrenching larger numbers of the drafters' choices has the effect of narrowing the range of policy making through ordinary legislation.

Constitution drafters might be guided by very general principles in determining what to include (other than the most basic provisions) and exclude. Constitutional issues make up the fundamental legal and political order of a community. The delimitation should therefore be determined by what society considers being fundamental to the community. In this way, it is preserved from the play of majorities and political conjuncture and is therefore the expression of the constituent consensus. In particular, the composition choice and functions of the constitutional institutions or bodies and the relationship among them, as well as the definition of the form of government and its basic principles, should likely be defined at the level of the constitution in order to ensure protection of minorities. If everything included is considered fundamental, and many aspects are covered in the constitution, very little is left to the democratic principle in the hands of successive majorities, binding them and preventing them from taking decisions in accordance with the will of the electors at each moment. To the contrary, if nothing is fundamental, everything is at the mercy of the majority of the day, and nothing is preserved against it. A balance between a position of hyper-constitutionalisation and de-constitutionalisation would be optimal.

When deciding on the inclusion of particular issues and the level of detail required, drafters could ask themselves, Are we ourselves better positioned than legislators will be to devise good policies on the issues we have identified? Legislators would typically have more time and better access to resources dealing with policy specifics than constitution drafters usually would. Those considerations counsel against attempting to address complex issues where good policy will have to contain many details. Yet, a constitution's drafters may believe – typically based on their nation's recent experiences – that the regular legislative process is unlikely to produce good policy on the issue. That might occur because (in the drafters' view) legislators, acting with an eye to elections, would be unable to develop appropriate policies. Or it might occur because (again in the drafters' view) the issue creates widespread conflicts of interest among legislators (as, for example, rules for ethical legislative behaviour might).

Even if the constitution drafters believe that ordinary legislation is not likely to produce good policy on some issue, they also have to conclude that they themselves can do so. And once again, the more detailed or complex the policy issue is, the less likely it is that constitution drafters – constrained by time and the availability of resources to investigate the issue – would be better positioned than even an imperfect legislative process.

In addition, constituent political consensus is sometimes difficult to achieve because of conflicting political positions on fundamental issues. In order to avoid deadlock, several avenues can be taken: a) include in the constitution only a few principles that empower the legislature to consider them and make the final decision, regulating the details; and in case of controversy empowering the constitutional judges or reviewers to adjudge on the matter; b) defer to the law, organic and ordinary, depending on the subject, to specify the constitutional mandates – in the case of matters of high relevance, defer to laws requiring a qualified majority; c) in the case of rights, introduce a clause referring to international human rights law. In this way, the need for consensus could be avoided: it is noted that there is no agreement, but a wording is sought that does not imply a specific position. A common pitfall when attempting to accommodate many views could be the inclusion of a list of potentially contradictory rights, which could lead to significant deadlocks in the medium term. The criterion for the fundamentality of rights may be given by the rights recognised in international instruments, as well as by other comparative law experiences.

National self-expression

A constitution traditionally aims at defining the polity's identity. It becomes the embodiment of the country's values and its project as an historical actor. As a consequence, this proclamation is often specifically protected through the constitutional rigidity mentioned above and constitutional review. The majority of modern constitutions contain preambles that describe the constituent nation. Preambles vary in length, tone and content, all of which are determined by local circumstances. Topics dealt with in preambles include the constitution's general purposes (including what it commits the nation to do in the future), the historical conditions leading up to the constitution's adoption, and the nation's place in the international community. In addition, some constitutions have specific provisions that reflect judgements about the nation's self-identity. These provisions can include the definition of the nation's territory; a description of the national flag and other symbols of the nation; the official language(s); and whether the state is to be considered secular or considered to have official religion(s). A few constitutions create specific institutions – such as ones dealing with Indigenous populations – and specific rights that also communicate to the nation's people and to the world the drafters' understanding of what the nation is. Whether a constitution's preamble has independent legal force varies. In some nations the preamble can support legal conclusions that a piece of legislation is constitutionally permissible or is unconstitutional; in others, the preamble has no independent legal force, though it might serve as background to explain why or how other provisions should be interpreted.

Frame of government

Unitary or federal

Constitutions usually specify the overall form of government (see Chapter 4), and whether the national government has power over all matters in a single "unitary" system, or whether subnational governments have constitutionally defined ranges of power to determine policy on some subjects. They can also define which policies the national government may not displace (in a federal system). Federal systems generally contain lists of powers held exclusively by the national government, of powers held exclusively by the subnational governments, and of powers that are shared between the two levels of government (Canada

§§91-92 1867 Constitution Act; India Seventh Schedule [Union List]).[1] Experience has proved that determining whether a given policy falls within either of the two exclusive domains or is shared can be difficult; the resolution is usually worked out in an ad hoc manner by political bargaining between the two levels, or decided by the constitutional court.

The three classical branches of government

A long tradition lies behind the creation of three "branches" of government (and some constitutions create a fourth or even a fifth). For each branch, the constitution describes the associated powers, the ways people become members of the branch (including the qualifications for membership), and the length of tenure within it. Many of the relevant issues are dealt with later in this report, including a discussion on the system of government in Chapter 4.

The legislature/parliament

The majority of constitutions have created legislatures that either have two chambers or are unicameral. Typically the "lower" chamber (or house or congress) is designed to be "closer" to the people – an arrangement ordinarily defended on the grounds that the lower chamber will be more responsive to popular needs and demands. Upper chambers (or senates) usually represent the subnational territories and regions. However, large degrees of subnational devolution or decentralisation usually require an upper chamber able to adequately represent the interests of subnational governments.

Inclusiveness in the legislature

Some constitutions provide that a proportion of seats in either or both chambers be reserved for specific groups, including women and Indigenous populations (New Zealand Constitution Act 1986 §45 [Indigenous], Tunisia §46 [women]). Determining district boundaries requires a reasonably accurate census of both the general population and, where relevant, the population of Indigenous communities. Some constitutions provide for a periodic census (Canada §51.1.1). Boundary drawing also requires action by an institution, a task that in almost all constitutions is allocated to an electoral management body. A question to be considered is whether the basic elements of the electoral system are addressed at the level of the constitution. If not, a law enacted with qualified majority could be recommended, as the electoral system is a substantial part of the rules of the political and democratic system.

Lawmaking

Ordinarily, both chambers must concur before a bill can become binding law. Some constitutions, however, give the upper chamber only suspensory power on all or some matters (United Kingdom Parliament Act 1911). Under such arrangements, the upper chamber returns proposed legislation sent to it by the lower one with a statement of its objections. The lower chamber then must address those objections by adopting them, modifying the proposal in light of the objections, or expressly rejecting them. Once the lower chamber acts, the upper chamber typically has no additional role (the most common form of the upper chamber's power to suspend but not absolutely veto proposals involves the national budget). Usually in presidential systems of government the president can take the legislative initiative, but parliaments (lower chambers) may reject presidential proposals and if the president insists on their proposal an increased majority vote may be required at the lower chamber. In some countries, there is also a popular legislative initiative awarded to the electorate. In other countries the electorate customarily votes on referendums (e.g. in Switzerland).

Parliaments are responsible for crafting binding statutes. Constitutions sometimes contain provisions allowing for "direct" legislation as well. These provisions allow for law to be made by the people directly, bypassing the legislature and executive – or at least supplementing them (e.g. in Switzerland). The

rationale is that elected representatives may find themselves locked in disagreement and unable to act on some matter that the nation's people would like to see resolved.

The forms of direct legislation vary: in some versions, a referendum will itself enact binding law; in others the referendum directs the legislature to adopt a law dealing with a specific topic. Sometimes only the legislature can authorise holding a referendum; other times referendums are allowed upon receipt of petitions with a specified number of signatures. Some constitutions that allow direct legislation limit the topics (for example they exclude budgetary matters or bar referendums on the constitution's guarantees of rights) (Italy, art. 75). The details of the procedures used for referendums are typically left in the hands of the nation's electoral management body or the courts.

The executive

The fundamental choice of form of government (presidential, parliamentary, or other) is dealt with in Chapter 4. The section on amending the constitution below highlights one aspect that arises regardless of the form of government chosen – regulation of emergency powers.

The judiciary

Constitutions in democracies assign to the judicial branch responsibility for interpreting the law and settling disputes by applying the law in the cases that come before it (International IDEA, 2014[1]). With these powers, courts uphold the rule of law. In several constitutions, courts are also given the power to carry out constitutional review. The most fundamental requirements for courts are that they be independent, accessible and accountable. Many constitutions make an express commitment to the principle of judicial independence,[2] which is an essential cornerstone for a functioning constitution. Courts authorised to decide constitutional questions should also be accountable politically to some degree, but not so much as to compromise accountability to law.

Judicial tenure

One of the most important choices about courts concerns the length of time judges can serve, particularly the tenure of judges on the highest court authorised to decide constitutional questions. While long tenures insulate judges from political influence and reprisals due to their decisions while on the bench, and limit any personal interests when handing down particular rulings, they may also weaken any accountability of judges to other powers and to the public, as well as to progress and innovation in legal interpretation (Böckenförde, Hedling and Wahiu, 2011[2]). The tenure and terms of service of judges deciding on constitutional questions, which are of particular importance to the issue of judicial constitutional review, are analysed in Chapter 6.

Judicial management and removal

The circumstances under which judges are removed can have a significant impact on their independence. Judges should not fear dismissal or reprisals in case they make particular decisions. Appropriate mechanisms to ensure independence through autonomous management and limited removal differ for ordinary and constitutional courts. In civil law systems, judicial management and removal is ordinarily performed by a council of judges (given varying names). In these courts, judicial independence and accountability to law usually strongly dominate the need for political accountability, even when the courts have some responsibility for constitutional interpretation. Here again constitutional courts, and especially the apex constitutional court, tend to be different, as analysed in Chapter 6.

The Government and the citizens: Rights provisions

While Chapter 3 focuses primarily on social and economic rights as well as other emerging rights, contemporary constitutions contain – indeed, often begin with – a list of fundamental human rights, which are outside of the scope of this report. Templates are available in a number of international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities.

In particular, these rights can include provisions for minority groups, women and groups that can be considered vulnerable due to their age (particularly children, youth and the elderly). Defining who constitutes a minority can be challenging given the implications of the term and the difficulty to identify a firm "boundary". The vast majority of constitutions contain provisions that prohibit discrimination on the grounds of origin, language, ethnicity, race and so on, thus entitling minorities to enjoying the same rights as the rest of the citizens. A further step that constitutions sometimes take is to include what is known as "affirmative action", or special rights that can only be claimed by the particular minority. Such provisions can take many forms, including recognition of particular characteristics such as the minority group's language, tradition and symbols, preferential treatment in particular ways, and state-funded support for the group.

Moreover, a commitment to gender equality, along with the prohibition of discrimination on the grounds of gender and age, is almost universally proclaimed in constitutions. Some constitutions go one step further in their commitments by enshrining affirmative action initiatives to support the inclusion and participation of women, youth and the elderly in different aspects of politics and the economy. The use of inclusive language throughout the constitution can also serve as a tool to further integrate gender equality (see Chapter 3).

Ensuring the inclusion of these rights from a representative perspective often calls for the integration of a diverse group in the constitution-drafting process from the standpoint of gender, age and ethnicity.

Amending the constitution

As each country and its social, economic and cultural contexts evolve, constitutions drafted in the past may stop responding to societal priorities. Provisions and institutions can interact in problematic ways that drafters could not have anticipated. Technological development can generate novel problems, most of which are best handled by ordinary legislation. Emergencies can require immediate and unprecedented action to safeguard the national territory or citizens' security.

For all these reasons, constitutions contain provisions for their own amendment. Many different amendment procedures are found in constitutions around the world. One general principle is that an amendment should only be allowed when there is reason to think that the proposed change has support from a significant majority of the nation's people, sustained over a reasonable period. That principle can be implemented by requiring that an amendment receive support by more than a simple majority (France, art. 89), or that it receive support at least twice (often with an election intervening between the two times the amendment is put to a vote) (Netherlands, art. 137). Local circumstances determine the precise form the constitution gives to this principle.

Some modern constitutions provide two different amendment rules, one stronger than the other (though both conform to the general principle of sustained support by more than a simple majority) (Canada Act Part V, with several different amendment rules). The stronger rule – for example, that an amendment receive 75% approval rather than two-thirds approval – applies to topics the constitution's drafters regard

as particularly important. A common, although not universal, practice is to use a stronger rule for constitutional "replacements" than for ordinary or discrete constitutional amendments.

Such "tiered" amendment rules, if they are adopted, come with additional requirements, necessary to make the system effective. One that is minor though sometimes overlooked is that the provision identifying the topics subject to the stronger amendment rule should itself be protected from amendment by use of the weaker rule. A more important requirement is that constitutions that use tiered amendment rules should have an institution that is authorised to say that a proposed amendment may be adopted according to the weaker rule or may only be adopted according to the stronger one, and that a proposed amendment or group of amendments is or is not a constitutional replacement. This institution can be a court or an electoral management body.

A significant number of constitutions identify provisions that may not be amended at all; such provisions are protected by what have come to be called "eternity" clauses (Germany, art. 79 (3)). Such clauses typically protect provisions that the constitution's drafters regard as truly fundamental to the operation of the constitutional system or to the nation's self-identity. A common shorthand for this is that eternity clauses protect the constitution's "basic structure" or general principles from amendment: they often refer to the form of government (democracy, monarchy or republic), the rule of law and judicial independence, fundamental rights, human dignity and/or territorial integrity. The content of the basic structure varies from nation to nation.

Over the past several decades an increasing number of constitutional courts have developed a doctrine, usually not rooted in specific eternity clauses, that constitutional amendments inconsistent with what the courts deem to be the constitution's basic structure are unconstitutional. Review by the courts of questions regarding whether an amendment was adopted in a procedurally regular way is usually seen as uncontroversial. Review of the substance of constitutional amendments was initially seen as controversial, though the basic-structure doctrine now appears to be part of the general armamentarium of constitutional courts. A few constitutions have addressed this doctrine by limiting the courts' power to determine that the substance of a constitutional amendment is inconsistent with the pre-existing constitution (Hungary, art. S).

Besides the formal mechanisms to amend a constitution, some countries integrated the possibility for citizens to initiate or be involved in a constitutional change, through citizen-initiated or traditional referendums, or Citizens' Assemblies (OECD, 2020[3]). This is the case for example in Ireland: the Constitutional Convention and the Citizens' Assembly recommended to the relevant special parliamentary committees that there should be referendums concerning numerous constitutional issues; this prompted the government to hold several referendums (in 2015, 2018 and 2019) on amendments to the Irish Constitution. The Irish (Citizens' Assembly on Gender Equality, 2021[4]) also treated issues that could lead to potential constitutional amendments (this was ongoing at the time of publication). In 2008, Iceland established an innovative framework using deliberation and co-creation mechanisms to include citizens and stakeholders in a participatory constitution-making process. Another example, albeit at a subnational level, is the constitution of Mexico City, which was crowdsourced with citizens and civil society in a process that involved online/offline consultations, working groups, and a petition platform. Citizen participation can promote the creation of future-looking constitutions.

The majority of constitutions also include provisions awarding the executive particular powers that they may exercise only in extreme circumstances; these are known as emergency powers. These powers, unlike constitutional amendments that are entrenched following their adoption, are always limited in time and scope, and their application is restricted to the duration of the state of emergency. Nevertheless, they can significantly alter the scope of powers of the executive and the governance system throughout the emergency, and so appropriate safeguards must be included. These are discussed in more detail below.

Constitutionalising emergency powers

How constitutions deal with the government's power to act when an emergency arises is one of the most contentious and difficult questions in constitutional design. Once an emergency is declared, ordinary rules about the allocation of power within the government change, as do some of the limits on the government's power to regulate the daily lives of the nation's citizens. In particular, emergency powers can alter the ordinary separation of powers on the one hand, and limit the fundamental rights of citizens on the other.

The difficulties can arise because emergencies tend by nature to require quick action, far more readily taken by the executive branch than by the legislature. This in broad terms implies that the executive should have the power to declare an emergency. The changes in constitutional arrangements that follow upon a declaration of emergency, though, can make such declarations attractive to chief executives who want to consolidate personal power.

Guarding against abuse of the power to declare an emergency usually can take two forms:

- *Substantive*: Constitutions attempt to identify the circumstances under which emergencies can be declared. These include natural disasters, invasions, and economic collapse. However, the forms that emergency takes are indeed varied, and some constitutions use a general formulation such as "where the proper functioning of the constitutional public authorities is interrupted" (France, art. 16). The majority of constitutions attempt to establish clear constitutional criteria for declaring an emergency. The degree to which those limitations have been effective has also varied. An approach adopted by many countries is to specify that some aspects of the constitution cannot be suspended during an emergency. Rights to personal security, for example, are often insulated from change during an emergency. So are the right of the legislature to convene without approval from the executive (France, art. 16) and the right of ordinary courts to continue to function, physically insofar as possible. In addition, a safeguard often included is the fully fledged scrutiny of all actions of the executive by the courts.
- *Procedural*: The constitution can specify that while the executive has the power to declare an emergency, the legislature must ratify or reject the declaration within a relatively short period (ranging from weeks to a few months) (Spain, art. 116.1, referring to the state of alarm). Constitutions often limit the time that an emergency can be declared for, although they also allow emergency declarations to be renewed periodically – again with legislative ratification. On the other hand, the state of emergency can sometimes only be declared following approval by legislature, for example in Spain (art. 116). The success of this control method appears to have been mixed. In parliamentary systems, where the executive commands a legislative majority at the outset, ratification could be relatively easy. That might not occur where the executive government is a coalition, or where the chief executive's support within the majority weakens as the emergency period lengthens. In presidential systems, political scientists observe a trend of increased short-run popular support of the country's political leaders during periods of crisis, leading to straightforward ratification of initial declarations of emergency.

As such, there are various challenges associated with effective control of the power to declare an emergency. Constitutions could employ a number of techniques of substantive and procedural control, yet constitutional drafters need to be aware of the inherent difficulties in enforcing that control effectively.

Promoting constitutional stability

Some older constitutions and many newer ones give constitutional status to several institutions other than the classical three branches. The institutions singled out for such treatment are varied, but many can be understood as institutions for the protection of constitutional democracy. These institutions serve to stabilise the democratic system from internal forces that might lead to instability.

Historically, constitution drafters relied upon competition between and within the executive and legislative branches to protect against constitutional instability, with courts providing some guarantees that majorities would not oppress minorities. The rise of nationally organised political parties introduced uncertainty about competition between the branches as a mechanism for preserving constitutional democracy. The most obvious case involves a president whose party has a majority in the parliament; the branches will then co-operate rather than compete. Other configurations of party control of legislatures and the executive can lead to different but predictable situations in which competition will fail. Nationally organised parties have also led to difficulties in sustaining the division of authority between the national and subnational governments.

These problems associated with governance through political parties led initially to the creation of constitutional courts with the power to determine the proper allocation of power. Acting upon application from the legislative minority, for example, the constitutional court could declare unconstitutional actions by the president's supporters in the legislature that gave the president too much power. Experience suggested to constitution drafters that constitutional courts should sometimes be backed up by other institutions. The most common are electoral management bodies – sometimes defined as electoral courts, sometimes as election commissions – and supreme audit agencies, also sometimes designated as courts of audit (see Chapter 7).

Many of the design issues associated with constitutional courts arise afterward, and the design after all do play a similar role in seeking to guarantee constitutional stability. In particular, design must achieve an appropriate balance between independence and accountability, usually through qualifications for membership, mechanisms for appointment, and clearly defined term lengths for the members of these bodies (see Chapter 6).

Electoral management bodies

Several constitutions provide electoral management bodies with constitutional status. In order to ensure that elections are free and fair, election management is placed in the hands of a neutral body that is above partisanship. This helps avoid undue influence from politicians who control the executive and legislature and who may have an interest in tilting the electoral playing field to favour their own parties.

Electoral management bodies are often given tasks such as defining election rolls and constituency boundaries, operating polling places and counting ballots. An important issue is also to define . 1) The body can be bi-partisan or multi-partisan, with representation from the major parties. Many variants of this model exist, and most often the choice is determined primarily by local political conditions. 2) The body can be non-partisan. Some members might be career civil servants, others chosen by and from non-governmental organisations, including universities. In this model commission members usually cannot have or have had significant recent roles in political parties (although mere membership in a party is rarely disqualifying). Achieving full non-partisanship in this model has in practice proved to be difficult.

A significant number of constitutions assign some of these tasks, especially the resolution of controversies over ballot counting, to the constitutional court instead. Doing so raises the possibility, which has often been realised, that those courts become embroiled in extremely high-stakes political controversies, and whatever they do might weaken their credibility according to the side they rule against. This in turn might

undermine their credibility when they resolve other contentious constitutional issues, particularly those involving individual rights.

Audit institutions and other independent bodies

Supreme audit agencies, sometimes designated as audit courts, have a long history. Initially designed to ensure that public money is spent solely for its intended purposes, audit agencies have evolved into important anti-corruption bodies. Typically they have the power to issue public reports but not initiate criminal prosecutions, which are left to other agencies (Austria, art. 126D). The heads of supreme audit bodies are normally expected to have significant experience in managing and auditing public budgets, but specifying such a qualification in the constitution is rather unusual.

Contemporary constitutions sometimes place other institutions within the category of those protecting constitutional democracy. These include human rights agencies and ombudsman offices. The case for giving such institutions constitutional status rests in large part on the proposition that they can exercise functions similar to courts, including investigating individual complaints about government misconduct, but also can have the power to engage in public education campaigns and, importantly, issue reports based on general investigations that courts cannot do, or cannot do as easily. No standards have yet been developed regarding *which* institutions – even electoral management bodies – should be included in contemporary constitutions, and each nation's constitution reflects local conditions and choices.

Empirical studies show that a stable and growing economy contributes to constitutional stability as well. Sometimes short-term political considerations can dominate the ordinary processes of developing a budget (and other policies) in ways that overlook the longer-term economic and environmental consequences of today's decisions.

These considerations have led some constitution drafters to give central banks and environmental protection agencies constitutional status, usually independent of direct political control (though with some degree of accountability, akin to that associated with constitutional courts). Doing so for central banks is relatively uncommon though not unknown (see Chapter 8). When constitutions do give central banks constitutional status, they do not specify much about the bank – occasionally the terms of service on the board or as chair, almost never the goals the bank is to pursue).

With respect to fiscal policy, as noted in Chapter 7 some national constitutions include "balanced budget" requirements (Peru, art. 78, Constitution of 1993) or limitations on the rate of growth of the national budget (Brazil, Amendment 95, 2016). These limitations are controversial, in part because economists disagree about the importance of balanced budgets and limiting the rate of growth of the national budget, and in part because they acknowledge that sometimes breaching such limits is sound economic policy yet capturing in constitutional language those circumstances is quite difficult.[3]

Some constitutions adopted in the 21st century also include environmental protection. These constitutions establish a national environmental protection agency (Tunisia, art. 129), although experience with constitutional provisions for such institutions is still limited.

References

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OECD (2020), *Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave*, OECD Publishing, Paris, https://dx.doi.org/10.1787/339306da-en. [3]

Notes

[1] References are to the pertinent sections of national constitutions, and are included to illustrate possibilities without identifying all the constitutions that include relevant provisions.

[2] Over 90% of constitutions introduced since the Second World War contain this provision. *Source*: Comparative Constitutions Project, Report on judicial independence (2008).

[3] Balanced budget requirements exist in many subnational constitutions in the United States, but efforts to insert such a requirement in the national constitution have regularly failed.