

# About Constitutions

- **What is a constitution?**
- **What sorts of things appear in constitutions?**
- **How are changes made to the constitution?**
- **What happens when the constitution is broken?**

## WHAT IS A CONSTITUTION?

A constitution provides the main rules for government. Some of the rules deal with relations between people and the government. Because these rules are so important, a constitution is usually more difficult to change than other laws.

Almost every country has a written constitution. The United Kingdom is a well-known exception. In that country, instead, all constitutional rules are found in other places: Acts of Parliament, the common law or judge-made law, and well-established practices or 'conventions' of government.

These sources are important in Australia as well. But in addition, in Australia there are written constitutions: one for the whole of Australia, and one for each State. The Australian Constitution originally was necessary to bring all parts of Australia together in a single federation, in 1901. Earlier each State had drawn up its own constitution, for its own system of government, when it achieved self-government from Britain.

## WHAT SORTS OF THINGS APPEAR IN CONSTITUTIONS?

Most constitutions provide a basic framework for government. They say who has power to govern and outline the limits of that authority. The Australian Constitution, for example, describes the composition and powers of each of three branches of government: the legislature, the executive and the judiciary. Other terms sometimes used for these are parliament, government and courts.

Most modern constitutions also include guarantees of particular rights and freedoms of individuals or groups. Federal constitutions, which provide for decentralized government, specify relations between levels of government, as well. The way in which the constitution can be changed is usually described also.

Frequently, a constitution will include other matters considered particularly important at the time it was framed. For example:

- the Constitution of *Canada* protects language rights;
- the Constitution of *Japan* bans the use of armed force; and,
- the Constitution of *Fiji* makes provision for the position of traditional chiefs.
- Constitutions vary a lot in length. The constitutions of the United States and Australia are quite short by world standards. In India and Germany, to take just two examples, the constitution is much longer and more detailed. No constitution attempts to set out all the rules, however. Different countries have different ideas about what can be left out of the constitution, to be dealt with by parliament, government or the courts.

## HOW ARE CHANGES MADE TO A CONSTITUTION?

Different countries use different procedures for changing, or amending, their constitutions. Most are more difficult than procedures for changing ordinary laws. Usually, they have some connection with the way in which the Constitution came into effect in the first place. The Australian Constitution, for example, was drafted by an elected Convention and approved by the electorate. It can now be changed only by referendum, or popular vote.

Another common procedure for constitutional amendment, which is used in some Australian States, is a requirement for special majorities in the parliament. Federal constitutions may require the various parts of the federation to agree to amendments as well. In Australia, for example, a proposal to amend the Constitution must be accepted by a majority of voters in at least four States, as well as a national majority. Similarly, in the United States, amendments initiated by special majorities in Congress must be approved by two-thirds of the State legislatures as well.

## WHAT HAPPENS WHEN A CONSTITUTION IS BROKEN?

The answer varies greatly between different constitutions. In Australia, an action or a law usually will have no effect at all, if it is inconsistent with the Constitution. In these cases, the decision about whether something is "unconstitutional" is made by a court, exercising the function of 'judicial review'.

Judicial review is not used everywhere for interpreting and enforcing constitutions. Some countries are unwilling to accept that decisions of courts can override laws passed by elected legislatures. The United Kingdom is one of these. So are some countries in continental Europe and, for different reasons, countries with communist or socialist regimes.

These countries deal with questions raised about whether laws are inconsistent with the constitution in other ways.

- *New Zealand*, for example, gives Parliament itself the responsibility to enforce its bill of rights.
- *Switzerland* requires a vote by the people to challenge the constitutional validity of federal laws.
- In *France* the validity of a law can only be challenged before it is passed by the legislature.

Many countries accept judicial review of the constitutional validity of laws, however. They include the United States, Canada, Australia, Germany, India, Japan and South Africa. Even in these countries, however, the courts will not necessarily deal with all constitutional disputes. The Australian High Court, for example, usually will not interfere while a bill is passing through Parliament, even if there is a very good argument that it is unconstitutional. And parts of some constitutions are deliberately written as a "direction" to governments or parliaments, which is not intended to be enforced through the courts.

In common law countries such as Australia, Canada and the United States, constitutional disputes usually are handled by the ordinary courts. The highest court of appeal (in Australia, the High Court) has an important constitutional jurisdiction but deals with other cases as well. Countries from other legal traditions often use a special Constitutional Court. South Africa, Germany and Taiwan are examples.

## SUMMARY

- The constitution of a country provides its framework for government.
- Typically, constitutions describe the composition and powers of the main institutions of government: in Australia, parliaments, governments and courts. Most also provide guarantees of particular individual rights.
- Most constitutions have a special status and are more difficult to change than ordinary laws.
- Many constitutions are interpreted and enforced by courts. In these cases, laws or government actions inconsistent with the Constitution are likely to be ineffective or invalid.

## FURTHER READING

Lawrence Beer (ed), *Constitutional Systems of Late Twentieth Century Asia*, University of Washington Press, 1992.

Vernon Bogdanor (ed), *Constitutions in Democratic Politics*, Gower, 1988.

S E Finer (ed), *Five Constitutions*, Penguin, 1979.

K C Whare, *Modern Constitutions*, Oxford University Press, 1966.

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The Constitutional Centenary Foundation is an independent organisation which was established to encourage and assist public debate on the Australian system of government during the lead-up to the centenary of the Constitution in 2001.

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