

# Principles of Constitutional Design

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least not for anything related to size. Perhaps this is the case, but it is unlikely. Invariably, matters of size are subsumed under “diversity” of some sort, which implies, improbably, we can assume that a given set of institutions are appropriate for a Brazil of 20 million or 200 million as long as relative diversity remains constant. The problem here is, given the evidence to be gleaned from human history, it seems highly probable that for a population to increase significantly it requires the introduction of increasing diversity of all sorts, although there are a few continuing exceptions, such as Japan. On the other hand, certain constitutional forms seem tailored for dealing with sensational increases in diversity without significant institutional change – federal systems, for example.

In our recurrence to fundamentals, we will not assume that any variables or aspects of life are immaterial, although initial study may lead us to conclude a greater importance for some than others – and not always the ones we now too easily take for granted. The growing number of constitutional democracies, and the diverse mixture of variables they contain, finally allows us to study constitutional democracy the way Aristotle studied constitutionalism in general. The stage we have recently reached in the history of constitutional democracy not only allows us to study the phenomenon; it requires that we do so. The nation-state is not going away. Every new development cited by those who see a more highly interconnected future world requires the successful functioning of something that resembles the nation-state, and it seems to favor the form of nation-state we term a constitutional democracy. The development of supranational organizations still rests on “local” control by nation-states, whether it be NAFTA or the South American Mercosur. Even the European Union rests on either the continuance of its member nation-states or the creation of one very large nation-state.

## **General Constitutional Developments since World War II**

Although this volume is concerned with the theoretical principles of constitutional design, these principles are not divorced from the actual behavior of constitutional democracies. Later discussion addresses this behavior in a more systematic fashion, but for now a general overview of some trends over the past half century and a look at some of

the lessons they hold provide an efficient entree to the discussion of principles.

*Growth of Democracy.* The growth in the number of constitutional democracies, though definite – from nineteen in 1947 to at least sixty in 2000 – has been episodic. Figure 1.1 creates the impression of a smooth and accelerating increase in numbers, but historically this growth has been characterized by periods of rapid increase followed by long plateaus or declines. The demise of the Soviet Union has produced the most recent upward surge, just as decolonization did in an earlier era. The probability for now is an increase over the next decade to about eighty countries that meet the test of constitutional democracy and then a plateau or perhaps minor decline in the numbers. In general the curve of constitutional democracies has followed the curve for the number of countries with written constitutions, with about a one-century lag, which has recently declined to a half-century lag. Constitutionalism is a difficult if rewarding form of government, and we should not expect significant future diffusion of the form to be rapid or inevitable. Figure 1.1 does imply, however, that if a nondemocracy has a written constitution, there are long-term pressures to democratize the system. A written constitution is a bit like a self-fulfilling prophecy. Still, one lesson to be learned from experience over the past half century is that, even though constitutional democracy is quite secure as we move into the twenty-first century, its spread is neither easy nor certain. The curve of its diffusion looks strong and hopeful, but it has taken more than two centuries of gains and losses to get where we are now.

*Diffusion of Institutions and Principles.* The diffusion or transference of both specific institutions and constitutional principles over the past half century has been significant. For example, the German electoral system has been widely copied, often with variation; indeed, the German constitutional system has served as a major model. Diffusion of socioeconomic rights has also occurred across Europe and into other parts of the world, along with the spread of federalism and the separation of powers as operative constitutional principles. Such transference does not result from simple copying but rather from the adoption of techniques and principles that effectively address problems and needs

found throughout the world. Diffusion of institutions and principles is prima facie evidence that constitutional design makes a difference and that there are connections between institutional design and general political outcomes. In the end, however, the connection is pragmatic and practical, not ideological.

*Parliamentary versus Presidential Systems.* Nearly all new democracies constituted or reconstituted during the 1970s, 1980s, and 1990s have had elected presidents with varying degrees of political authority. Among newer democracies, true parliamentarism remains largely a phenomenon of the former British Empire. Since World War II, no existing “presidential” system has ever changed to a parliamentary system, whereas a number have moved in the opposite direction. This is evidence not of the inferiority of the parliamentary form but rather of the need for more separation of powers than a true parliamentary system provides. In Britain, the rule of law has been sustained primarily through a political culture that prevented the potential abuses of power inherent in the highly centralized and essentially unlimited power structure of the parliamentary form. The high failure rate of parliamentary government, especially in Africa, results from the absence of the unique and particularistic British political culture. So-called presidential systems have at the same time tended to incorporate institutions of a more parliamentary nature so that the distinction between the parliamentary and nonparliamentary form has become blurred. As a result of this blending, we should not only seek new categories and fresh analytic approaches to comparative constitutional study but also be cautious of research that makes such a distinction as if it were not problematic. One conclusion to be drawn is that constitutional design is not so much the science of finding an optimal form, but the art of mixing the old with the new, which results in an array of possibilities, each blending into the other. Institutional mixes will vary as the mixes of population and circumstances vary, and matching the underlying reality must take precedence over the defense of any given constitutional form as optimal.

*Growth of Separation of Powers.* A useful way to describe post-World War II institutional trends is as a general move toward a greater degree

in the separation of powers. Many of the elected presidents have minimal powers, but their presence has been matched by reducing the ability of parliaments to appoint officials or to revise the constitution without the intervention of some other body. Often the regulation of the electoral system is taken out of parliament's hands as well. An important part of the increase in the separation of powers has been a general emergence of more independent supreme or constitutional courts to supplement the trend toward stronger and/or more divided executive powers. This has been supplemented by the strengthening of upper or second branches of the legislature – that is, a strengthening of bicameralism. In sum, those who have lived under constitutional democracy have, by their decisions for change, underscored the need to be realistic about the dangers of power, and the role of constitutionalism in channeling and controlling power.

***Consensual Politics.*** Constitutional democracies have tended to move away from the majoritarian model of decision making toward a consensual model. The purer a parliamentary system is, the closer it approximates the majoritarian model. Consensual politics puts a premium on deliberative processes with multiple entry points, plus multiple decision points that slow the process down enough to produce legislation that takes into account the needs and wishes of more than a simple majority of the population. This trend underlies the previous one involving the separation of powers and is related to the next two trends. Constitutions need to be viewed more as instruments for achieving general fairness and justice than as instruments for efficiently pursuing specific public policies.

***Decline of Unitary Systems.*** A move away from unitary government toward systems that are federal, confederal, or consociational has been slow but persistent. The European Union is a major example. Unitary systems work best with highly homogeneous populations and less well with the populations that are more heterogeneous. Not only are newer constitutional democracies less homogeneous than older ones, but many older ones are coming to recognize aspects of heterogeneity that were submerged or ignored in the past. The trend away from unitary government is another example of the lesson that the fundamental goal is to match the constitution to the people.

***Inclusion of Minorities.*** Underlying the previous three trends has been a significant trend toward the recognition and inclusion of ethnic, religious, ideological, regional, racial, and indigenous minorities. The mix of institutions used has varied according to the nature of the cleavages. Federalism is most useful for territorially based cleavages. Indigenous and racial cleavages have often been addressed by increasingly more activist or more powerful national courts. Bicameralism has been used for regional, ethnic, and religious cleavages. The more cleavages there are, the more complicated the range of institutions brought to bear. The lesson is that constitutions are supposed to aid the moving of conflict from the streets and battlefields to arenas of compromise and persuasion, and not to produce peace per se.

***Rights Consciousness.*** Constitutional democracies have made a general and significant move toward “rights consciousness.” Rights consciousness has involved two more or less equal subtrends, involving group and individual rights. In many countries, as in Canada, both subtrends have been intertwined. Longer and more complex bills of rights, more active national courts, and political mobilization through normal politics have all achieved greater prominence. It is reasonable to conclude, at least provisionally, that constitutions produce long-term pressures for identifying remaining injustices and codifying mutually acceptable solutions for these injustices.

***Political Mobilization.*** In country after country, both social justice and political justice, often defined in terms of growing rights consciousness, have been addressed by supreme or constitutional courts. In country after country the net effect of judicial intervention in this regard has been marginal. Instead, social and political justice have been best served most consistently through political mobilization regardless of the content or even the existence of bills of rights. Bills of rights and rights consciousness have served more often than not as the catalyst and justification for political mobilization, and court activity has tended to legitimate rather than effectuate the demands underlying such mobilization. The openness and effectiveness of political institutions for participation thus loom larger than the reform of legal institutions when it comes to addressing the consequences of heterogeneity. There are several possible lessons here. Constitutions, including bills of rights, are

in the end only pieces of paper absent popular acceptance and support. These pieces of paper do, however, help to instigate and frame popular political activity. In the end, constitutions rest on popular approval and popular activity. They are not self-enforcing through logical or legal exercises.

*Appropriate Electoral Systems.* A key participatory institution is the electoral process. It is of considerable interest, then, that historically once a constitutional democracy has initiated an electoral system, that system is rarely changed in any significant way. This implies that no electoral system (e.g., single-member districts vs. multimember districts) has an inherent advantage over another per se. Rather, constitutional framers seem to have been uniformly proficient in successful constitutional democracies at developing electoral systems appropriate to, and accepted by, the relevant population. Again, the lesson seems to be that matching the institutions to the people is more important than pursuing some theoretically optimal institutional design.

*Need for Popular Consent.* Over the history of modern constitutionalism, the failure rates of parliamentary and presidential systems have been very similar. The situation is even more ambiguous than this statement indicates, because, while commentators frequently are willing to classify a political system as one or the other, most political systems are hybrids of these two polar types so it is difficult to assign blame for failure on specific institutional arrangements. Rather, failure generally has resulted either from sociopolitical factors that made any constitutional arrangement problematic or from a mismatch between institutions and the people they were supposed to serve. One common mistake is to create a presidential system where the executive is the commander in chief of the army that overthrew the old regime. Another is to create a majoritarian parliamentary system for a highly fragmented population. Modern political science has reaffirmed Aristotle's dictum that the constitution must be matched to the people, and a people unready for constitutional democracy will not support any form of it. On the one hand, Aristotle showed us how to abstract general principles from the comparative study of constitutions. On the other hand, his dictum, as well as his abstracted principles, warn us about the limits we face when advising those writing new constitutions. A people will establish

a constitutional democracy when they are ready, and the form it takes should have indigenous roots. Ideas and institutions may be borrowed or adapted, but constitutional democracy rests on popular consent for what is familiar and understood and not on some ideal design. Even in those rare instances where a successful constitution was imposed from the outside, as with post-World War II Japan and Germany, there usually has been prior constitutional experience that could be drawn upon, basic social and cultural patterns have been left relatively undisturbed, and the document has been appropriated over time through gradual but complete amendment, whether formally or through de facto usage, by the people living under it. Aside from repeating the lessons drawn earlier, one could add that experience under constitutional democracy shows constitutionalism to be a process rather than a model – a never-ending process that works out, through experience, the changing hopes and needs of the people living under the constitution.

*National versus Constitutional Cultures.* Experience since World War II has highlighted a persistent, recurring problem with the nature of citizenship in constitutional democracies. Does a common citizenship require a common identity beyond that of citizen? In the old nation-state perspective, where both “nation” and “state” were reified and linked, the answer tended to be yes; however, this links personal identity with the state. Those who refuse to reify the nation or the state think otherwise and say no – citizenship and patriotism do not require nationalism or a strong common identity. Yet citizenship and patriotism do require the passing on of something from generation to generation, and what this “something” is stands at the center of most current constitutional controversies. To what extent does one need to pass on the values of a national culture, and to what extent must one pass on the values of a constitutional culture? In principle, a constitutional culture can encompass several nationalities, or a constitutional culture can be identified with a particular national culture. Or a constitutional culture can be based on the gradual extinction of all national cultures, as some argue happens in the United States. Is it possible to have constitutionalism with no cultural component beyond a constitutional culture, or does this amount to a politics of nonidentity? Concern over the presence of multiple identities in the same political system is not a new phenomenon, but the identification of the political system with



a singular nation is a relatively recent invention grounded in Hegelian statism. It is time to at least think about the nature and extent to which nationality and political nationhood may be decoupled.

*Socioeconomic versus Group Rights.* Finally, it is now respectable to constitutionalize both socioeconomic and group rights, but to what extent is each helpful for the long-term health of constitutional democracies? The former implies that all citizens should be treated the same, and not in a minimal legalistic sense. The latter implies that citizens should be treated differently depending on group or ethnic membership. The theoretical and practical disjunction between the two is too often glossed over. In addition, constitutionalizing socioeconomic and group rights tends to emphasize the role of the state in guaranteeing rights, whereas rights were invented to protect citizens *from* the state. Aside from the possibility that such an emphasis undercuts the actual function of rights, it tends to undercut the ability and motivation of citizens to pursue political outcomes beyond or different from what a constitutionally oriented court might support. Such a tendency short-circuits the role of citizenship per se and seems to view constitutionalism as a set of objectively predetermined outcomes rather than as a process of citizens involved in the working out of mutual hopes and needs through the use of commonly accepted decision-making rules and processes.

### The Three General Elements of Constitutionalism

All of the trends, problems, and considerations just outlined point toward the need for a recurrence to original principles – to a deeper and clearer understanding of what constitutionalism means and implies. For example, it is not helpful to confuse constitutionalism with legalism, although the former leads to the latter. Perhaps the place to begin is with the connection between constitutionalism and prepolitical cultural mores. Although constitutionalism necessarily includes the notion of culture, it also transcends culture. “Culture” has been variously used to refer to what others might term “ideology,” “shared interests, preferences, or perspectives,” “a common set of values,” ethnicity,” “shared mental states,” and so on. The term is here used in a more formal, anthropological sense to refer to a shared set of symbols, used to