MAX PLANCK INSTITUTE
FOR COMPARATIVE PUBLIC LAW
AND INTERNATIONAL LAW

Directors: Professor Dr. Armin von Bogdandy · Professor Dr. Dr. h.c. Rüdiger Wolfrum

MAX PLANCK MANUALS ON CONSTITUTION BUILDING:
STRUCTURES AND PRINCIPLES OF A CONSTITUTION

2nd Edition
August 2009

Katharina Diehl
Johanna Mantel
Matthias Reuss
Jan Schmidt
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A. **Introduction**

Following the requests of Somali stakeholders in the ongoing peace and constitution-building processes in Somalia, the Max Planck Institute for Comparative Public Law and International Law (MPIL) has been supporting the drafting of the country’s constitution since 2007. This support consisted mainly of providing capacity-building workshops to the Independent Federal Constitutional Commission (IFCC). For these workshops, members of the MPIL drafted a set of manuals as training materials for the IFCC. The present manual is the first in this series.¹

This introductory manual provides an overview of the state structures and principles of modern democratic constitutions, while the following manuals elaborate specific issues of constitutional law in detail. To introduce readers to principles of constitutional law, this manual begins with the history of constitutionalism both in the western hemisphere and the Islamic world and examines several constitution-making processes (sections A and B). It continues with an analysis of the interrelation of constitutional law with international law and, most relevant for the Somali context, Sharia law (sections C and D). After presenting the possibilities of structuring a constitution (section E) the manual summarizes some fundamental issues that can be regulated therein (section F). This is followed by an examination of the horizontal and vertical separation of powers (section G). The manual further presents different models of democracy (section H) and concludes with a section on how to amend and protect the constitutional order (section I).

In each part, examples from existing constitutions illustrate the constitutional principles discussed. By presenting these examples the manual indicates the options for the constitutional drafters in Somalia. However, it goes without saying that any decision on the content of the future Somali constitution lies exclusively in the hands of the Somali people. Hence, the manual does not offer particular solutions, but rather intends to show legal options for political discussion in Somalia. It seeks to support a fully participatory constitution-making process and merely introduces the readers to the concept of constitutionalism, to constitutional principles and to constitutional options for the structure of a country.

I. **What is a Constitution?**

A constitution is a set of legal norms that define the fundamental political principles and establish the structure, procedures, powers and functions of all organs of a state. Most national constitutions also guarantee certain rights to the citizens and other human beings present in a country. Usually, constitutions are codified in a written document. However, for historical or other reasons, some states do not have a formal written constitution. When these states were established, their institutions and procedures often continued relying on unwritten customs.

Other states have adopted a written constitution only recently after many years of its factual validity and general acceptance. The United Kingdom and Israel, for instance, have no single constitutional document comparable to those of other nations. The un-codified or de facto

¹ The manuals are prepared by the members of the Somalia team, which currently includes: Katharina Diehl, Johanna Mantel, Matthias Reuss and Jan Schmidt. Former team members Markus Böckenförde and Verena Wiesner were involved in drafting the first edition.
constitution of the United Kingdom exists in form of written statutes, court judgments and treaties and stems from sources such as parliamentary constitutional conventions and royal prerogatives. Similarly, Sweden’s constitution consists of four fundamental laws instead of one single document. Saudi Arabia’s constitutional order essentially consists of its Basic Law (Basic System of Governance) which is accompanied by four decrees of the same rank, governing specific state organs. Libya has at least 20 texts in the form of laws, decrees, decisions and resolutions which together constitute its constitutional order.

Not all constitutions are named as such. For instance, the Palestinian and German constitutions are both labeled “Basic Law”. The Palestinian Basic Law is a temporary constitution for the Palestinian Authority until the establishment of an independent state and a permanent constitution for Palestine. In Germany, the drafters of the Basic Law avoided the term “constitution” because they regarded the Basic Law as a merely provisional document that was to be superseded by the constitution of a future united Germany. After reunification, the Basic Law remained in force and the name was kept (although major amendments were made). In contrast, Saudi Arabia’s avoidance of the term “constitution” is based on religious considerations. While the late King issued the “Basic System of Governance” per decree in 1992, Saudi cultural and religious views stigmatize any reference to “constitution” other than the Quran itself and the practice of the Islamic prophet Muhammad. Likewise, some Israeli Jews had opposed the idea of their nation having a document which the government would regard as a nominally “higher” authority than religious texts. The constitutional order in Oman is regulated by the “Basic Statute of the State” and Qatar was governed by a Basic Law until a constitution was promulgated in 2003. It should be noted, however, that also in Islamic countries many drafters of constitutions do not share the religious reservations about the terminology, as can be seen from the use of the term “constitution” in Afghanistan, Iran or Iraq.

II. Development of Constitutionalism

In order to make adequate choices when drafting a constitution it is important to understand the modern concept of a constitution and the implications that the concept of constitutionalism has for the legal system of a country. An overview of the history of constitutionalism in the West as well as Islamic countries may help in furthering this understanding.

When deciding for a constitution, a population always transforms policy choices into law. These choices usually reflect the country’s distinctive history and its specific social, economic and cultural conditions. For instance, a seafaring nation might want to address maritime issues in its national constitution; or a people that have just freed themselves from the yoke of tyranny might opt for particularly flat hierarchies.

Additionally, the constitutional choices of a country may also be influenced by its earlier constitutions, or by the political thinking of its founders. A good example for the latter is the U.S. American Constitution (Madison, Hamilton, Adams and others).

In many countries, in particular on the African continent, constitutionalism has come along with decolonization. On the one hand, the people’s exercise of their right to self-determination aimed at gaining independence and discarding the colonial powers. On the other hand, this
exercise of the people's right to self-determination can be seen as a step towards constitutionalism.

Contemporary western scholars who embrace liberal values see it as the primary function of constitutions to limit the scope of governmental power and to describe the method for its exercise, thereby preserving the citizens' rights to the largest possible extent. Constitutions typically perform these functions through the separation of powers (see Montesquieu), the incorporation of democratic principles and some form of judicial review.

Certain scholars construe constitutions as a "social contract" between the individuals of a given society: In order to better pursue their common goals, the individuals voluntarily agree to establish an order, thereby founding a state. This order creates obligations between the individuals and the representatives of the common power structures. These obligations derive their legitimacy from the agreement of the people. The legal homologue of these obligations is, in the terminology of legal scholars, the constitution. Early scholars following this theoretical approach emphasize the aspect that the individuals have to submit to a strong power in order to receive protection against (external) enemies and (internal) crime (e.g. Hobbes, Locke). Later scholars stressed rather the voluntary aspect: Individuals organize themselves in a certain way, because they realize that they benefit from the order created by the social contract (e.g. Rousseau, Rawls). It should be added, that at any rate the social contract is purely hypothetical and not meant to reflect actual historical development.

Some traditional scholars of constitutional law saw constitutions mainly as a manifestation of the antagonism between the individual and the state. For them, the distinction between the state—as the apparatus of government—and the individual was primordial (e.g. Carl Schmitt). Today, the complex relationship between the state, the society and the individual is articulated in a more differentiated way. Hence, constitutions are depicted rather as a tool to organize the multifaceted relationships between state power, the society as a whole and the individual: As citizens, individuals constitute the people of a state. Through the exercise of their civil and political rights they take part in the state apparatus. If they make use of their right to be elected to state offices, they may become representatives of the power they are subject to. Additionally, the same individuals figure as parts of the civil society which represents social and economic institutions and processes that are distinguishable from the state structures.

In contemporary legal thinking, constitutionalism can hardly be understood unless by taking into account its close link to democracy and the sovereignty of the people. Democratic legitimacy has become virtually the only form of legitimacy that scholars accept as a justification for the exercise of state power. Thus today, a constitution only finds approval if it reflects the idea of the sovereignty of the people. Art. 2 of the Interim National Constitution of Sudan illustrates this point by stating that "sovereignty is vested in the people and shall be exercised by the State." This provision clarifies that the legitimate state is (only) a tool that the people use in order to exercise their original power. It is remarkable that even the Constitution of Afghanistan, otherwise heavily relying on religious legitimization, cannot overcome the contemporary requirement of democratic legitimacy and thus provides that the national sovereignty in Afghanistan belongs to all individuals who are citizens of Afghanistan (Art. 4 Afghan Constitution). The scholarly discourse around the idea of democratic legitimacy has also long affected the procedural aspects of constitution building. The participation of the people in
constitution building processes and the people's ownership of such processes are undisputed requirements for ensuring the legitimacy of any constitution resulting form such a process.

However, the modern concept of constitutionalism, in which powers of the state are legally delimited and fundamental rights and freedoms guaranteed, did not evolve only in European countries. Islamic states also developed constitutions, even if they did not necessarily use the term "constitution". Among scholars who study the history of Islamic legal thinking it is controversial whether such fundamental principles as the separation of powers form part of Islamic law. Historically, Islamic legal thinking was based on the Qur'an's depiction of Islamic life as an integrated unity. It did not rely upon the assumption that religion and the state are separate spheres.

From a comparative perspective, it was also the case in Europe and the Americas, both ancient and modern—until the advent of secularization—that no distinction, or only a weak one, was made between the religious and the political spheres. Both religious practice and political activity were considered part of the public sphere and as such subject to the control of the ruler or ruling bodies whose authority was seen as deriving from the divine order.

The philosophical basis of Islam, which did not differentiate between the affairs of the state and the realm of the religion, was decisive for the formation of Islamic constitutional theory. Nevertheless, today most states with a Muslim majority have a constitution that integrates the Sharia into the constitutional legal order to varying degrees.

One of the first Muslim states to promulgate a formal constitutional document was the Ottoman Empire in 1876. During the reign of the Ottoman Sultan, constitutionalism in the modern sense developed in the empire. In Iran (then Persia) the first constitution was promulgated in 1906. It was the outcome of a large coalition of intellectuals, religious scholars and merchants in which scholars played a significant role. In 1979 this constitution was replaced by the constitution of the newly established Islamic Republic, which refers to the God given order. Afghanistan, a state with one of the youngest modern constitutions underwent a long constitutional history beginning in 1923 when it became a constitutional monarchy after independence from British rule. Likewise Nigeria, consisting of diverse regions was united under British rule and is now based on a constitution that accounts for the Muslim North, as well as the Christian South.

Recent constitution building processes are often undertaken in order to facilitate democratic transitions, and to serve peace and (post-conflict) state building. The design of a constitution can play an important role in political transitions. It can reconcile a people and/or stabilize a country. The constitutions of Afghanistan, South Africa, Cambodia and Bosnia and Herzegovina can be cited as examples where establishing a constitutional order played a role in overcoming long lasting conflicts. It should be emphasized, however, that any constitution building process must and should be participatory in nature. In other words, it should strive to involve as many citizens as possible. For ultimately, the legitimacy of a constitutional process rests on the extent to which the process was participatory, open, democratic, inclusive, transparent, accommodating different interests and respecting the will of the majority as well as minorities.

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III. **Regulations in a Constitution**

As illustrated above, the term constitution refers to a set of rules and principles that define the nature and extent of government. Most constitutions seek to regulate the relationship between institutions of the state, in a basic sense the relationship between the executive, legislature and the judiciary, but also the relationship of institutions within those branches. Most constitutions also attempt to define the relationship between individuals and the state, and to establish the broad rights of individual citizens. A constitution is thus the most basic law of a territory upon which all of its other laws and rules are based. It creates the government and lays down the main rules for the operation of that government. In very simple terms, the constitution is sometimes referred to as “the instruction book for how things work”. In addition, the constitution contains guiding principles, i.e. it states the values and goals the legal order of the country shall be based upon, such as democracy, the rule of law or the commitment to human rights. For example, Section 1 of the South African Constitution stipulates that the Republic of South Africa is founded on the values of “human dignity, the achievement of equality and the advancement of human rights and freedoms; non-racialism and non-sexism; supremacy of the constitution and the rule of law; universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.”

Moreover, a constitution usually does not only contain rules which organize the exercise of political power but also restrains this exercise. Most constitutions thus provide for the protection of the individual rights of the citizens and for independent institutions designed to ensure that government is effective and does not act arbitrarily and within the limits set out by the constitution.

In other words, a constitution’s main functions are

- To provide for the structure, institutions and governmental processes of the country.
- To assert the values and goals which are the basis of the country’s legal order.

In addition, most constitutions also

- Provide for institutional arrangements which limit the exercise of power by state institutions, in particular preventing their arbitrary exercise of power;
- Define and protect the rights of the individuals who either constitute the people of the country or are present in the country;
- Stipulate duties for individuals within the country;
- Establish an economic order.
- In recent years, there has been a trend to acknowledge obligations of the state in the fields of social justice, basic needs and the environment.
IV. **The Difference between a Constitution and Other Laws: The Hierarchy of Norms**

A constitution is not like ordinary laws. The main difference is that the constitution generally is the highest law in the country and is therefore at the top of the hierarchy of norms. All other laws have to comply with it and all governmental institutions have to respect it because it is the supreme law of the country.

To visualize this special importance of a constitution, one may compare it to a roof under which all laws and public policies have to fit. As far as they are not consistent with the constitution and regulate issues that contradict it, they are unconstitutional and cannot be enforced. In some constitutions such laws, that are inconsistent with the constitution, are even considered void, such as stated in Art. 1 of the Ghanaian constitution.

This supremacy of the constitution as the highest law of the land is usually implied, but in some countries it is stated explicitly. For example in Art. 9 of the Ethiopian Constitution, which also states that all laws and official acts, which contradict the constitution are to have no effect.

On the other hand, the constitution does not have to be the only basis for legislation, but may identify other sources of legislation on which the legislative body of the country shall base its work. Such sources could be the customs of the people or religious principles. Especially in Muslim countries the constitutions often contain provisions which define Sharia as one or even the main source of legislation. This has been done for example in the United Arab Emirates (Art. 7 of the constitution), in Sudan (Art. 5 of the constitution) or in Iraq (Art. 2 of the constitution).

However, such sources of legislation cannot authorize the legislative body otherwise to violate the supreme law in the country, namely the constitution. According to the respective constitutional provisions, legislative acts that violate the constitution either cannot be enforced, or are automatically void, or may be declared as such by a constitutional court. Therefore the legislative body is compelled to draft only laws which are still covered by the “constitutional roof”. Should a law run contrary to certain constitutional provisions it would graphically fall outside of the “constitutional roof”.

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This can best been shown by an example: The following provisions are part of a constitution in country X:

**Sources of Legislation**

*Nationally enacted legislation shall have as its sources of legislation the values and the customs of the people as well as the consensus of the people.*

**Right to Live**

*Every human being has the inherent right to life, dignity and the integrity of his/her person, which shall be protected by law; no one shall arbitrarily be deprived of his/her life.*

The legislature of country X wants to enact the following law:

*In the case of the death of her husband, a widow is part of the cremation and shall be burned together with his corpse.*

The mandatory burning of the widow together with her deceased husband violates the widow’s right to life, which is protected by the constitution. Thus the law is – even if it reflects the tradition of the country X – not in line with the constitution of the country X. It is therefore either void or at least not enforceable.

**B. Constitution-Making Process**

To enact a constitution is a special and rare political activity in the course of a state. Its success or failure has profound and lasting consequences for the state and its people. Consequently, the process of drafting a constitution and the manner of organizing such a process are very important and sensitive issues. Traditionally, the drafting-process of a new constitution was placed into the hands of national elites, requiring the people’s consent only at the stage of final ratification. But over the past twenty years, an approach of “new constitutionalism” has emerged, which is focused on “participatory constitution-making”. This new approach is characterized by more transparency and by broad-based public participation. As a result, today, the legitimacy of a constitutional process and the constitution itself is measured by the degree to which the process is participatory, open, democratic, socially inclusive, and transparent, and where those drafting the constitution are democratically legitimized and accountable. This approach makes the constitution the fundamental decision of the people to be governed and provides for the necessary democratic legitimacy.
I. Basic Elements of a Constitutional Process

There are many different ways of organizing a constitution-making process. And each state or nation has applied its own special and unique way. But generally, a constitutional process may be characterized by four phases:

(1) The preparatory phase;
(2) The constitutional drafting phase;
(3) The public consultation phase; and
(4) The final review and adoption phase.

In the ideal case these four phases may run as follows: ³

First Phase: Preparatory Phase

- Initial negotiations concerning procedure, an outline of the process, and the establishment of realistic timetables.
- Agreement on a set of basic principles that will guide the constitutional process.
- Initial public education and consultation, national dialogue of the constitutional changes or potential revisions.
- The possible adoption of an interim or transitional constitutional document.
- The establishment of a constitutional commission.

Second Phase: Constitutional Drafting Phase

- The establishment of an elected constitutional commission or assembly that will oversee the drafting of the final document.
- Extensive consultation with legal experts and advisors, the international community, a broad array of stakeholders, all political parties concerned, and the public at large.
- The preparation of an initial draft of the constitution, via transparent drafting committees, and regular input from the public, and select international advisors, as well as domestic and international legal advisors.

Third Phase: Public Consultations Period

- Nation-wide public and civil education, media campaigning, reception of public comments and suggestions.

• The use of traditional and innovative modes of mediation and public dialogue, before or during the initial drafting of the new constitution.

• Structured participation by all groups, especially women, minorities, all political and opposition parties, and the civil society.

Fourth Phase: Final Review and Adoption Phase

• A review by the constitutional commission, parliament or the courts, as well as the public, for necessary revisions, amendments, or greater public input.

• The broad approval and adoption of the final text via the constitutional commission, elected representatives, or a national referendum process.

• A post-adoptions process of public education, national ratification, and conference of legitimacy on the final product.

II. Interim Arrangements

The constitutional process is often facilitated by the establishment of interim arrangements. While this has taken a variety of forms, the essential features of such interim arrangements may be characterized as follows: (1) the clarification of basic legal rules and governmental structures during the interim period; (2) a clear demarcation from the past and the removal of elements that are clearly objectionable or repressive.

In some cases, (Rwanda and Cambodia for example), basic stability was provided through a peace agreement. In other cases (i.e. Ethiopia and Eritrea), stability was established through a national charter which provided for a basic structure of government and the guarantee of human rights which would govern the interim period while the constitution was being drafted.

South Africa enacted a formal interim constitution which served these purposes and set out a series of constitutional principles to guide the process. At the beginning of the process, private negotiations amongst the various political factions in South Africa took place. By 1993, the parties had negotiated an interim constitution which set out the basic rules for the process of adopting a permanent constitution and provided for the basic functioning of a “Government of National Unity” throughout the constitution making period. Under the interim constitution, the final constitution was to be adopted by a constituent assembly on the basis of a two-thirds vote and no constitutional commission was created. The election to the assembly was based on a proportional representation list system and supervised by an independent electoral commission. The constituent assembly, in addition to drafting a permanent constitution for the country, would also function as a parliament in the interim period. In addition, the interim constitution in South Africa set out 32 substantive principles which had to be implemented in the drafting of the permanent constitution. Furthermore, the South African Interim Constitution provided for some basic measures for the exercise of executive, legislative and judicial functions. Thus, a constitutional court was created to play a kind of oversight role in connection
with the constitution-making process and to determine whether the final draft of the permanent constitution complied with the principles set out in the interim agreement.  

In Sudan, after long years of civil war, a peace agreement was negotiated between the Sudanese government and the Sudan People’s Liberation Movement /Sudan People’s Liberation Army. This Comprehensive Peace Agreement (CPA) established a six month pre-interim period and a six years interim period starting in January 2005. During the six months of the pre-interim period a constitutional framework was to be established in form of an Interim Constitution for Sudan which was foreseen to be the fundamental law of the interim period for all parts of the Sudan. While the ‘Interim National Constitution of the Republic of the Sudan 2005’ (INC) was adopted in July 2005 the CPA had already defined the fundamental guidelines for the INC and continues to be the supreme law of the country. This follows from Art. 226 of the INC, which states that “this Constitution is based on the Comprehensive Peace Agreement and the Constitution of the Republic of the Sudan 1998” and is further supported by Art. 225 of the Interim National Constitution of the Sudan, which states that “the Comprehensive Peace Agreement is deemed to have been duly incorporated in this Constitution; any provisions of the Comprehensive Peace Agreement which are not expressly incorporated herein shall be considered as part of this Constitution”.

III. Public Participation and Ownership

There is a clearly emerging trend today for providing for more direct participation by the population in the constitution-making process, in the form of civic education and popular consultation. Rather than being crafted behind closed doors by a small number of professionals, this model enables the broader public to be engaged in the process. It can serve to include a broader range of civil society groups by providing an opportunity for them to impact on the constitutional process as well as on the political process. Thus, the constitutional process can provide a forum for national dialogue and education regarding issues and decisions that are vital to the future direction of the country.

South Africa, Eritrea, and Rwanda are successful examples to this extent. In these processes, a carefully planned program of civic education was conducted so as to educate the population on the role of a constitution and their role in the process of making a constitution. During this program of civic education it was established which issues were the most important for the population at large.  

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4 One draft was actually rejected by the Constitutional Court as inconsistent with the constitutional principles which had been established.

5 In this context it is worth mentioning, that the term interim refers the special status of the Southern Sudan States, which have the right to secede from the newly established federation of the Sudanese States after this period, while the Interim National Constitution of the Sudan will continue to be the supreme law of the Northern Sudanese States in this case.

6 Over the course of the Rwandan constitutional process, it is worth noting, that the opinions of the constitutional commission were actually revised in light of the popular consultations.
Uganda’s constitution-making process was a very unique exercise to increase civic involvement during the early period of the democratic transition. The eight year long process was carried out by local leaders, funded and supported by external donors, and enriched by local civil society organizations. In 1988, the National Resistance Movement (NRM) government established a 21-member Ugandan Constitutional Commission (UCC) and instructed it to “seek the views of the general public through the holding of public meetings and debates, seminars, workshops and any other form of collecting views” and to “stimulate public discussion and awareness of constitutional issues”. From March 1989 until December 1992, members of the Constitutional Commission held 86 district and institutional seminars designed to sensitize the public to, and exchange views on, the agenda and methodology of the process. Additionally, the UCC prepared educational materials teaching and encouraging citizens to get involved in future constitution-building processes. The UCC broadcasted over 75 radio programs, participated in 20 television programs and held over 15 press conferences. The UCC attended seminars in all of the country’s 813 sub-counties where they called upon citizens to organize local meetings and discuss constitutional issues and later on returned to all 813 sub-counties at least once to meet with citizens and collect views in oral and written form. Furthermore, the UCC analyzed and publicized 25,547 memoranda submitted by individuals and groups, as well as student essays and conducted a comparative study of selected foreign constitutions. Only thereafter did the UCC prepare the draft constitution. In addition to the meetings attended by commissioners, thousands of local government meetings took place to discuss constitutional issues and prepare submissions to the UCC. Local government leaders and traditional elders were called upon to organize activities in their area to include every citizen. Numerous public gatherings throughout the country were held working through local institutions so that poor, rural, and illiterate citizens could participate along with the elites concentrated in the capital city.

IV. **Constitutional Commissions**

Many constitution-making processes recently involved the establishment of a constitutional commission, as in Eritrea, Ethiopia, Uganda, Kenya or Rwanda. In most of these cases, commissions have been called upon to also conduct civic education in connection with the constitution-making processes. Moreover, the commissions consulted the respective populations as to which issues the citizens deemed to be crucial for the processes. Ultimately, the commissions compiled drafts of the constitution which took into account these consultations as well as other drafts and submissions from political parties, individuals, and non-governmental organizations.

These constitutional commissions were usually appointed by the executive or elected or appointed by a Constituent Assembly. In the ideal case these commissions should be relatively small in size, but still fairly representative in order to include the various political parties and religious, racial, and ethnic groups within the society. Where the constitution-making process has been sufficiently deliberative and has entailed broad public consultation, an intriguing result has repeatedly been the transformation of the members of a constitutional commission from
serving primarily as advocates for their respective interest group into a more cohesive group with a greater focus on the needs of the whole society.\footnote{United States Institute of Peace \textit{Special Report 107 Democratic Constitution Making} (July 2003), p.7.}

V. \textit{Adoption of the Constitution}

In addition to public participation, an important factor for the ultimate legitimacy of the constitution and the stability of the system it establishes is democratic representation in the body that receives the commission draft. This is often a constituent assembly that debates and revises the commission draft and adopts the constitution.

A broadly representative constituent assembly is more likely to adopt a constitution which is perceived as legitimate, and to establish a political system which will prove to be stable. When there is broad democratic representation, there is a greater likelihood that all stakeholders will have an opportunity to express their views on constitutional issues of importance to them. More importantly, there is a greater likelihood that their views will be taken into consideration in the drafting of the final document. Where this is the case, the constitution can serve to resolve conflict and provide mechanisms and reliable institutions for peaceful resolution of conflicts in the future.

In many cases, the constitution was adopted by a constituent assembly elected for that purpose only, and in several cases the constitution had to be adopted by a two-thirds vote of that body. South Africa, Cambodia, and East Timor are examples. In other cases, the constitution was adopted simply by the existing parliament (Fiji, for example). In Columbia, the constitution was adopted by presidential decree, and in Rwanda, the constitution was adopted by popular referendum.

The adoption by a popular referendum suggests the highest form of democratic legitimacy. But this only holds true if broad public participation also took place during the drafting period. Only if the people know what they are voting on and if they had previously had the opportunity to influence the content of the future constitution, would the objectives of a participatory constitutional process be achieved. In this case, the popular referendum would provide full legitimacy.

As the examples in South Africa and Uganda demonstrate, the adoption by a freely elected and broadly representative convention provides the necessary democratic legitimacy, because the people were directly involved in the constitution-making process itself.

VI. \textit{Comprehensive Overview on the Constitution-making Processes in South Africa, Rwanda and Afghanistan}

1. \textit{South Africa}

1990: Agreement to negotiate about constitution.
April 1993: Agreement on the procedures.
December 1993: Agreement on an interim constitution, including principles binding on the final constitution-making process.
1994: General elections under the interim constitution.
October 1996: Scrutiny by Constitutional Court: amendments required.
December 1996: Constitution was signed into law.

2. Rwanda

10 July 2000: Constitutional Commission elected by National Assembly.
November 2000: Board and Executive Secretary set up (also elected by the National Assembly).
Beginning 2001: Constitution-building seminar.
Middle 2001: Country visits of Commission.
2002: Commission for six months in the different provinces for constitutional education and discussions; database for submissions developed.
Middle 2002: 2 months for drafting – draft then submitted to public seminar.
End of 2002: Amendments made, presented to public.
Dec 02- May 03: Preparations for referendum by Electoral Commission.
26 May 2003: National referendum resulted in 93% support.
4 June 2003: Constitution promulgated into law.

3. Afghanistan

October 2002: Constitutional Drafting Commission appointed.
March 2003: Commission presents its recommendations.
April 2003: Constitutional Review Commission appointed by President.
June/July 2003: Public consultations.
September 2003: First criticism by public; President revised timeline for constitutional process.
September 2003: Draft presented to President only; changes requested.
November 2003: Draft released by President to public.
December 2003: Convening of Loya Jirga (Constitutional Convention).
C. The Constitution and International Law

Today it is acknowledged that several central elements of constitutions are influenced by international law. For example, international human rights standards are binding upon those states which have ratified the pertinent international agreements. Principles which have to be taken into account in national constitutions are defined by reference to international norms concerning democracy, human rights, social justice, and gender equality. Despite the international doctrine of state sovereignty it is well established that international law influences national constitutions. This holds also true for constitutions of Muslim states. Most constitutions contain provisions concerning international law. Most commonly, these provisions cover the power to negotiate and conclude international treaties, the relationship between international law and domestic law, and references to international human rights.

I. International Treaties

Nearly all states have adhered to international treaties, governing a variety of areas such as

- Trade, see e.g. the Agreement Establishing the World Trade Organization (WTO Agreement) and its Annexes;
- Environment, see e.g. the Kyoto-Protocol;
- Armed conflict, see e.g. the Hague Conventions of 1907 or the four Geneva Conventions of 1949; or
- Foreign relations, see e.g. the Vienna Convention on Diplomatic Relations.

Some treaties establish international organizations, be they global such as the United Nations or the International Monetary Fund, or regional such as the African Union, the European Union or the Organization of American States. Some international treaties create specialized organizations such as the Organization of the Islamic Conference, the North Atlantic Treaty Organization or the Organization of Petroleum-Exporting Countries. In the area of human rights and the protection of minorities a series of international treaties has been concluded such as the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. 8

For the most part, the international legal rules with respect to international treaties are contained in the Vienna Convention on the Law of Treaties (VCLT). Part II of this Convention concerns the conclusion and entry into force of treaties. Art. 11 VCLT names ratification as a means of expressing the consent of a state to be bound by an international treaty. National

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8 There are other, more specialized treaties for the protection against racial discrimination or torture, or for the protection of the rights of women, children, refugees, and indigenous peoples. In addition regional human rights treaties have been concluded in Europe, Latin America, and Africa.
constitutions usually contain provisions regulating the procedure for the ratification of international treaties and the relationship between national law and international treaties.

1. **The Power to Deliberate and to Ratify International Treaties**

Most constitutions contain detailed provisions on the exercise of treaty-making powers and their application. The ratification of international treaties usually follows the same rules as the passing of laws in most constitutions. However, different bodies or branches of government can be vested with the power of treaty-making.

- **The Executive**

In most countries, the Head of State is authorized to ratify international treaties with the consequence that the state in question is bound by that treaty internationally. This is the case, for example, in Namibia where the President has the power to “negotiate and sign international agreements” (Art. 32 of the Namibian Constitution). In Turkey, the President is authorized “to ratify and promulgate international treaties” (Art. 104 of the Turkish Constitution).

In some countries, however, the power to negotiate and ratify international treaties is vested in the government: for example, under the Ethiopian Constitution, the Federal Government has the power to “negotiate and ratify international agreements” (Art. 51 of the Ethiopian Constitution). In the United Arab Emirates the Supreme Council of the Union has the power to ratify international treaties and agreements by decree (Art. 47 of the Constitution of the United Arab Emirates).

Nonetheless, the Head of State quite often concludes only the most important international treaties whereas other treaties can be concluded by the government, usually by one of the ministers acting on behalf of the state, most often the minister for foreign affairs. For example, the Constitution of Mozambique distinguishes between international treaties, which have to be concluded by the President (Art. 123 of the Constitution of Mozambique) and international agreements, which can be concluded by the Council of Ministers (Art. 153 of the Constitution of Mozambique).

- **Involvement of the Legislature**

While it is usually the prerogative of the executive to negotiate and ratify international treaties, many constitutions require the involvement of the legislature to give them legal force within the respective country. Roughly two types of such involvement can be distinguished:

First, negotiation and conclusion of an international treaty may be reserved to the executive and the legislature is responsible only for implementation. The international treaty is normally concluded without the participation of parliament. This conclusion makes the international treaty binding under international law but its provisions do not become part of domestic law until they are incorporated by parliament through specific legislation. Parliament is free, at least according to constitutional law, to pass such legislation or to reject it. Consequently, it is this legislative act and not the international treaty itself that becomes part of the applicable
domestic law. Under these rules, parliament may also amend such legislation at any time. If it
rejects the international treaty from the outset or if it overrides the international treaty at a
later time, a conflict arises between domestic and international law. It is a matter of the
executive then to resolve this conflict in some way or other, e.g. by renewed negotiations with
the international treaty partner.

According to a second type of constitutional provisions, previous approval by the legislature is
required either in the form of a formal law or in some other way, for example, by a
parliamentary resolution. In these cases, the preceding consent to the international treaty by
the national legislature makes an additional legislative implementation after the treaty’s
conclusion redundant. Being approved by the legislature beforehand, the international treaty
becomes domestically applicable as soon as it becomes effective under international law.

For example, in Sudan the President has the power to ratify treaties and international
agreements with the approval of the National Legislature (Art. 58 of the Sudanese Constitution).
In countries with a bicameral legislature only one chamber may be required to approve the
treaty. For example, in Namibia only the first chamber, the National Assembly, has “to agree to
the ratification of or accession to international agreements” signed by the President (Art. 63 of
the Namibian Constitution). In the United States of America only the second chamber is
involved: International treaties concluded by the President require the approval of a two-thirds
majority in the Senate (Art. II Sect. 2 of the US American Constitution).

In South Africa an exception is made in case of purely technical or executive agreements, which
do not require approval by Parliament but are binding upon the state directly.

In Egypt the approval of the People’s Assembly is only required for “peace treaties, alliance
pacts, commercial and maritime and all the treaties involving modifications in the national
territory or affecting the rights of sovereignty, or imposing charges on the state treasury which
are not provided for in the budget” (Art. 151 of the Egyptian Constitution).

It should be emphasized that even international treaties which are concluded by simple
signature, and do not therefore need legislative approval, are usually approved by the
government by means of a decree or ministerial decision (administrative approval) and are then
published in the Official Gazette for subsequent application within the country concerned.

2. The Status of International Treaties in Domestic Law

Most countries follow a dualist approach as regards the status of international norms in
domestic law. This means that international and national law are perceived to be two different
sets of norms, and international law may only be applied at the domestic level once it has been
incorporated into national law. Other countries follow a so-called monistic approach. This
means that international treaties, once concluded, are directly applicable within the domestic
legal system. Usually the monistic approach comes together with a constitutional provision that
requires that the legislature has to approve the international treaty beforehand (see above).

No matter which of the two approaches a constitution follows, even if the applicability of
international treaties is agreed upon, their status in the domestic legal system may still differ.
To which extent international treaties are considered as being binding largely depends on their status in the hierarchy of norms of the respective country.

In most states, duly incorporated or previously approved (as the respective national legal order requires) international treaties simply have the force of law. In these cases usually the principle *lex posterior derogat legi priori* (i.e. the more recent law takes precedence over the earlier law) is applied, so that recent international treaties prevail over earlier legislation. On the other hand, it is possible that subsequent legislation may supersede international treaties that have been concluded earlier. However, countries where this approach is followed (e.g. the United States, the United Kingdom, Turkey or Egypt) usually try to take steps to prevent any conflict between domestic law and any international treaty they have concluded earlier.

Some countries regard international treaties which have been duly ratified as superior to domestic law, some even including the respective national constitution. However, this is only the case in very few countries, for example in the Netherlands and in Belgium.

Other states recognize the international treaty's status as superior or equal to the constitution in the relatively exceptional cases where an international treaty has a direct impact on the constitution (for example, if it amends the constitution or provides for derogations from it). However, they only do so if the respective international treaty has been approved by parliament by a qualified majority (e.g. Finland or Austria).

Finally, in some countries the constitutions provide that particularly important international treaties occupy a position within the domestic legal order which is superior to that of certain provisions of the constitution. This is for instance the case in Italy with respect to the treaty establishing the European Union.

Other states consider international treaties only as superior to national legislation, but not to their constitution. These countries give precedence to international treaties over both previous and subsequent legislation, but usually only under certain conditions: the international treaty has to be approved by the national legislature and it has to have entered into force. In addition, many countries require the condition of reciprocity, i.e. that the other party has to apply the treaty as well. This is the case, for example, in France, Senegal or Cameroon.

In other states, international treaties generally do not take precedence over domestic law, but certain international treaties are regarded as superior to national legislation. For example, in Russia international treaties for the protection of human rights prevail over any contradicting statutory law.

Lastly, in some countries international treaties are considered inferior to domestic statutory law. However, this rather exceptional case usually concerns only international treaties of lesser importance. These are mostly international treaties which are concluded by the administration (alone or on the basis of authorization by parliament). In such cases, the international treaty has
the force of the executive act (decree, ministerial decision, etc) through which it becomes applicable within the domestic legal system.9

II. International Customary Law and General Principles of International Law

Regarding international customary law and general principles of international law, many constitutions follow a monistic approach. This means that such customary law and general principles are seen to be part of the domestically directly applicable law without any further act of incorporation by the national legislature. In most cases, national courts can rely on international customary law and general principles of international law and apply them directly.10 Some constitutions, however, contain explicit provisions concerning international customary law and general principles of international law. For example, in South Africa customary international law is considered to be part of the national law unless it is inconsistent with the constitution or an act of Parliament (Section 232 of the South African Constitution). In Russia, Art. 15 of the Constitution states that “generally recognized principles and norms of international law [...] shall be a constituent part of its legal system.” At the present time, the core principles of the most fundamental human rights, as laid down in the Universal Declaration on Human Rights, are considered to be part of international customary law.11

III. Decisions of International Bodies

1. Decisions of International Organisations

National constitutions usually do not contain any provisions regarding the legal significance of decisions or any other secondary law issued by international organizations. An exception is the Portuguese constitution which states that rules issued by international organizations are directly applicable in domestic law to the extent that the international treaties setting up the organization provide for this (Art. 8 of the Portuguese Constitution).12 For most other countries the binding effect of rules and decisions issued by international organizations is usually determined solely by the international treaty which creates the organization. Art. 25 of the United Nations Charter, for instance, lays down the binding effect of decisions of the Security Council.

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9 See CP Economidès The relationship between international and domestic law (Council of Europe / European Commission for Democracy through Law Strasbourg 1994).
10 See CP Economidès The relationship between international and domestic law (Council of Europe / European Commission for Democracy through Law Strasbourg 1994).
12 However, an exception thereto can be found in some European constitutions regarding the European Union: many constitutions contain special provisions relating to the transfer of national responsibilities to international organizations, that means the European Union. Decisions of the European Union thus usually can be directly and automatically applicable in the domestic legal systems of the member states.
Art. 25 of the United Nations Charter

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

However, even if an international treaty stipulates the binding effect of decisions taken by an international body established within its ambit, it usually does not provide for immediate enforceability of the international organization’s secondary law within the national legal systems of its member states. Instead, the states adhering to the international treaty have to take action to enforce the decisions/secondary law on the domestic level by means of domestic legal instruments (legislative or administrative measures, see above).\(^\text{13}\)

2. **Judgments of International Courts**

Most constitutions also remain silent on the question of incorporation and enforcement of judgments and rulings of international courts in domestic law. Generally the international treaty establishing the respective court or tribunal stipulates the binding effect of its decisions and judgments. For example, Art. 94 of the United Nations Charter stipulates:

Art. 94 of the United Nations Charter

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

However, the decisions still have to be enforced in domestic law. While the procedure for the enforcement may vary, customarily the state adopts the necessary administrative or legislative instruments of enforcement in order to comply with the judgment or ruling.\(^\text{14}\)

IV. **Prevention of Contradictions**

Apart from incorporating the guidelines and rules set by international law into the national constitutions, states may take additional measures to prevent contradictions between international and domestic law:

- Before signing an international treaty, every state has to make sure that the international treaty is compatible with its domestic laws as well as its constitution. If there are any

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\(^{13}\) CP Economidès *The relationship between international and domestic law* (Council of Europe / European Commission for Democracy through Law Strasbourg 1994).

contradictions but the state nonetheless intends to become a party to the treaty, the state needs to amend its domestic laws or even its constitution before signing the treaty.

- **Reservations:** States may also, instead of amending their constitutional norms, limit the impact of an international treaty by entering a reservation to certain provisions of this treaty. In the interest of allowing the largest number of states to join international treaties, reservations are regarded as permissible in international law\(^\text{15}\). According to Art. 2 (Use of Terms) of the Vienna Convention on the Law of Treaties (VCLT) a “reservation means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”\(^\text{16}\)

Art. 19 to 23 of the VCLT lay out the rules and procedures relating to reservations. A reservation by one state changes the legal effect of the specific treaty provision it was entered upon only in relation to those other contracting states that accept the reservation. If another contracting state objects to a reservation, the treaty remains in effect without the reservation between the state with the reservation and the objecting state.\(^\text{17}\) A reservation is only valid if it is not expressly prohibited by the specific international treaty and if it is included at the time of signing or ratification.\(^\text{18}\)

Furthermore, reservations are impermissible if they run counter to the object and purpose of the agreement they were entered upon.\(^\text{19}\) The broad reservation Iran, for instance, asserted in its accession to the Convention on the Rights of the Child, that it “reserves the right not to comply with any provision or articles of the Convention that are incompatible with Islamic laws and the internal legislation in effect” is problematic under international law. Several Muslim countries have made similarly broad reservations to the Convention on the Elimination of Discrimination against Women. Likewise, reservations entered by the United States concerning the International Covenant on Civil and Political Rights are broad in scope and may run counter to the object and purpose of the treaty. Reservations concerning specific articles, on the other hand are reasonable and helpful in preventing contradictions between domestic and international law. For example, Egypt and Jordan entered reservations on Art. 20 of the Convention on the Rights of the Child. These specific reservations of Egypt and Jordan only deal with the provisions concerning adoption. They do not question the application of the Convention or most of it but rather a particular and perhaps not even central aspect.\(^\text{20}\)

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\(^{15}\) The rules regarding reservations were developed as customary international law and then codified in the Vienna Convention on the Law of Treaties.


\(^{17}\) The legal consequences of objections to reservations are complex and therefore cannot be covered in more detail in this manual. However, it is important to note that the binding effect of a multilateral treaty can differ greatly between the various signatory states.

\(^{18}\) Art. 19 VCLT.

\(^{19}\) Art. 19 (c) VCLT.

\(^{20}\) R Wolfrum “Constitutionalism in Islamic States: An International Law Perspective” in *Constitutionalism in Islamic Countries: Between Change and Continuity* (expected to be published by Oxford University Press, New York, in 2009).
• **Declarations:** A state may also enter an interpretative declaration to a specific provision upon its accession to an international treaty. Unlike a reservation, such a declaration does not affect the legal obligations that the state has entered. Rather, it is meant to explain how that state interprets a certain provision. These declarations are important for the interpretation of an international treaty, which is regulated in Art. 31 through 33 of the VCLT. Since declarations are not defined under the VCLT, it is sometimes difficult to distinguish them from reservations. The general rule is that a statement entered by a state to a treaty provision constitutes a mere interpretative declaration as long as it does not contain a specific condition dependent on acceptance by other states.\(^{21}\)

• **Memoranda of Understanding (MOU):** Concluding MOU gives states yet another means of modifying existing international treaties. MOU express a convergence of will between parties and factually constitute an agreement between them, but do not necessarily imply a legal commitment. Because MOU avoid obligations under international law and can be put into effect without requiring parliamentary approval, states commonly prefer them to more formal instruments for adapting international treaties. Nonetheless, MOU may have legally binding effect. Examining the intent and position of the parties and carefully analyzing the wording of the document may determine this.\(^{22}\)

• **Interpretation:** Another way to prevent contradictions is to require the courts to favour interpretations of domestic laws, which are consistent with international law. This has been done, for example, in South Africa. Section 39 of the South African Constitution stipulates that the courts “must consider international law and may consider foreign case law” when interpreting the bill of rights. In addition, Section 233 of the South African Constitution stipulates that every court must prefer any reasonable interpretation of domestic statutory law that is consistent with international law over any alternative interpretation that is inconsistent with international law. In practice the South African Constitutional Court extensively refers to international law. In the “Mohamed” case, for instance, the court made references to various international instruments as well as foreign case law when deciding about the constitutionality of extraditing an accused person to a country that imposes the death penalty.\(^{23}\)

The Indian Supreme Court also refers to international law when interpreting the Indian Constitution. For example, the Indian Supreme Court referred to the Universal Declaration of Human Rights and the International Convention on Economic, Social and Cultural Rights in several cases when interpreting the meaning of the right to life as laid down in Art. 21 of the Indian Constitution.\(^{24}\)

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23 South African Constitutional Court: Mohamed and Another v President of the Republic of South Africa and Others (CCT17-01), 28 May 2001, referring to S v Makwanyane and Another (CCT3-94), 6 June 1995.
• **Membership requirements of international organizations:** Many international organizations stipulate requirements for their members. The existence of democratic structures within the member countries is one of the most common requirements (e.g. Art. 3 of the Charter of the Organization of American States). Depending on the international organizations a country intends to join, such requirements should also be kept in mind.

V. **Further International Law Issues**
In addition, national constitutions often contain provisions referring to international law, most notably with regard to the protection of human rights, but also insofar as they contain principles for international relations such as the prohibition of the use of force:

1. **Human Rights**
With respect to international human rights, some national constitutions nowadays acknowledge an increased influence of international law. For example, the Sudanese Constitution states that “all rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of the Sudan shall be an integral part of this Bill [of rights]” (Art. 27 of the Sudanese Constitution). The Constitution of Bosnia and Herzegovina stipulates “the rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law” (Art. II 2 of the Bosnian Constitution).

The Constitution of the Republic of Senegal refers to international human rights in its Preamble, which is an integral part of the constitution. It reaffirms the commitment to the French Declaration of Human Rights of 1789 as well as “international instruments adopted by the United Nations and the Organization of African Unity, in particular the Universal Declaration of Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the African Charter on Human and Peoples’ Rights”. Title II of the Constitution contains a catalogue of human rights ("public liberties") containing the traditional civil and political rights as well as most of the economic, social and cultural rights as enshrined in the two international human rights covenants.

2. **Prohibition of the Use of Force**
Art. 2 para. 4 of the United Nations Charter prohibits not only war but also the recourse to the threat or use of force in international relations. Many constitutions thus explicitly prohibit aggression or provide that the use of force is only allowed for defence (e.g. Art. 5 of the South Korean Constitution, Art. 9 of the Japanese Constitution, Art. 147 of the Tanzanian Constitution). In Germany, Art. 26 of the Basic Law prohibits any preparation for a war of aggression.

Other constitutions refer explicitly to international law. In Algeria, for example, the President “declares war in case of effective or imminent aggression in conformity with the pertinent provisions of the Charter of the United Nations” (Art. 95 of the Algerian Constitution). Similarly,
the South African Constitution allows the defense of the country only “in accordance with the Constitution and the principles of international law regulating the use of force” (Section 200 of the South African Constitution).

Other constitutions contain principles for external relations of the country, often including the obligation to resolve conflicts non-violently and promoting friendly relations between states. For example, Art. 86 of the Ethiopian Constitution requires the state “to seek and support peaceful solutions to international disputes”. Art. 8 of the Afghan Constitution states that “the State regulates the foreign policy of the country on the basis of preserving independence, national interest, territorial integrity, non-aggression, good neighborliness, mutual respect, and equal rights”.

D. Sharia and the Constitution

In secular states, religion and the state are separated. Thus religion does not play a role in the governance of these countries. In other states, where the separation of religion and state is less pronounced, religious law may exist concurrently, or the religious law may be integrated as part of the country’s legal system. Since the integration of Sharia in the future Somali constitution is most pertinent in the given context, the following section will analyze the references to the Sharia contained in constitutions of countries with a (mostly) Islamic population. Hence, the section scrutinizes the different models these countries have opted for respectively for integrating Sharia in their systems of government.

The relationship of Sharia law to constitutional law will be covered in greater detail in a separate manual. Therefore, the following section only provides an overview of the issue. At the same time, it is intended to raise awareness for certain legal conflicts that may arise from the integration of these legal systems.

There is a broad variety in the interpretation and implementation of Sharia law in Muslim societies, partly due to the fact that the concepts of Sharia differ substantially among the various Islamic schools of law. Today, only a few constitutions are based solely (or almost exclusively) on religious law, such as in Iran and Saudi Arabia. In most other Islamic countries, Sharia law coexists with either common or civil law systems. In a number of Islamic countries the application of Sharia law tends to be limited to the personal status of Muslims. Several of the countries with the largest Muslim populations, including Indonesia, have largely secular constitutions and laws, with only a few Islamic provisions in family law. Turkey has a constitution that is officially based on strong laicism although it has a predominantly Muslim population. India, although it only has a Muslim minority, has passed special legislation making Muslim personal law applicable to Muslims.

Most countries of the Middle East and North Africa maintain a dual system of secular courts and religious courts, in which the religious courts mainly adjudicate marriage and inheritance disputes. Saudi Arabia and Iran maintain religious courts for all legal issues, and religious police assert social compliance with Islamic values and principles. Laws derived from Sharia are also applied in Afghanistan, Libya and Sudan. Some states in northern Nigeria have (re)introduced Sharia courts as provided for in the constitution, which, however, remains secular in general.
I. Islam as the State Religion

In constitutions of Muslim countries, many provisions may relate to Islam. Those constitutions that establish an Islamic state contain diverse references to the religion ranging from the establishment of a state religion to the foundation of Islam in education and the creation of Sharia courts.

1. The Proclamation of a State Religion

Most Muslim countries prominently establish Islam as the religion of state in their constitutions. Art. 12 of the Iranian Constitution confirms that Islam in the interpretation of the Shiite Jafari School of law is the unchangeable state religion. Saudi Arabia, although it has no constitution in the formal sense, prescribes the Salafi or Wahhabi school of thought. In Pakistan, Art. 2 of the Constitution stipulates that Islam shall be the state religion. In Mauritania, the same is provided for by Art. 5 of the Constitution. In the Constitution of Afghanistan, the respective regulation establishing Islam as the religion of the state is Art. 2. Similar provisions can be found in the constitutions of Egypt, Morocco, Malaysia, Bangladesh and other countries.

2. The Prohibition of Amendment

Some countries which have declared Islam as the state religion have also included a provision barring the countries’ institutions from changing this provision. This accords a special importance to the principle of an Islamic state, since this principle cannot be changed by
constitutional amendment. This is for instance corroborated by Art. 149 of the Afghan Constitution and Art. 177 of the Iranian Constitution.

II. Integration of Sharia Law in the Constitution

As mentioned above, there are different options for integrating Sharia law into the legal system of a country.

1. Supremacy of Sharia Law

The question may be raised whether the idea of a constitution enjoying superior normative force is compatible with the concept of an Islamic state at all. Some might think that an Islamic state cannot be ruled by man-made law, which binds all organs of the state. Following this view one could argue that the Sharia remains the only normative force. The legal system of Saudi Arabia, for instance, is based on the perception that there can be no legal basis of the state apart from the Sharia. As a consequence of this perception in Saudi Arabian constitutional doctrine, the country does not have a formal constitution.

2. Priority of Sharia Law within the Framework of the Constitution

Within the discussion of the supremacy of Sharia law, there are also Islamic scholars who explicitly embrace the idea of a constitution based on the Sharia as a necessity for the establishment of an Islamic state, since the Sharia stakes out the legal boundaries which the Muslim community ought to develop but leaves a multitude of possible legal situations to be decided from case to case in accordance with the requirements of time and of changing social circumstances. Therefore, the legal systems of three other Islamic Republics such as Iran, Mauritania and Pakistan are all based on constitutions. Art. 4 of the Iranian Constitution, for instance, states that all laws and regulations must be based on Islamic criteria.

\[\text{Article 4}\]

All civil, penal, financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria. This principle applies absolutely and generally to all articles of the Constitution as well as to all other laws and regulations, and the fuqah’ of the Guardian Council are judges in this matter.

Hence, the requirement of Sharia compatibility in the Iranian Constitution pertains not only to laws passed by Parliament but also to the constitution itself.

3. Sharia as a Source for Legislation

Most countries that have introduced Sharia law in their constitutions did so by provisions that refer to the Sharia as the basic source of legislation. This provides for a constitutional guarantee
of the compatibility of all legislation with Islamic law. Examples of such provisions can be found in Art. 2 of the Constitution of Iraq which states that “Islam [...] is a fundamental source of legislation”. Art. 227 of the Pakistani Constitution reads: “All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions.” Art. 8 of the Transitional Federal Charter of Somalia makes “the Islamic Sharia [...] the basic source for national legislation.” The same has been done in Art. 2 of the Egyptian Constitution which states that “Islamic law (Sharia) is the principal source of legislation”.

4. Compatibility of Legislature with Islam

Some corresponding provisions in other constitutions require only legislation to be compatible with the principles of Islam. Art. 3 of the Afghan Constitution promulgates that in Afghanistan, “no law may be contrary to the beliefs and provisions of the sacred religion of Islam”. The wording of Art. 3 of the Afghan Constitution is relatively vague and open to interpretation. Likewise, Art. 2 of the Constitution of Iraq, while establishing Islam as a fundamental source for legislation, continues to provide:

A. No law that contradicts the established provisions of Islam may be established.

B. No law that contradicts the principles of democracy may be established.

C. No law that contradicts the rights and basic freedoms stipulated in this Constitution may be established.

In these constitutional formulations, the requirement of the compatibility with Islamic requirements is not an absolute obligation, which would mean that regulations of the Sharia have to be implemented at any rate. Rather the obligation to respect the Sharia in legislation is not the only obligation conferred upon the state by the constitution. For instance the Afghan state is also obliged to respect its obligations concerning the protection of human rights as laid down in Art. 6 and 7 of the Afghan Constitution. In this respect the drafters of the Afghan Constitution have left a constructive ambiguity. Hence, in case of a conflict between these two obligations, a balance between these obligations has to be found by which the core of each of the diverging interests is respected. The idea of balancing obligations stemming from Sharia law with other obligations such as international human rights is a relatively new concept in the Islamic world.

5. Secular System and Parallel Sharia Law Applicable to Certain Fields

Some countries that have large or majority Muslim populations have committed to secular systems and have not instituted Sharia law in any of the models mentioned above. Nonetheless certain legal aspects of life might be regulated by Sharia law Muslims in the society. This is most pertinent to the areas of personal law such as marital law or law of succession. Art. 7 of the Constitution of the Gambia, for instance, states that the laws of the Gambia consist amongst
others of the Sharia as regards matters of marriage, divorce and inheritance among members of the communities to which it applies. The Indian Constitution makes no mention of Sharia law. Nonetheless, the Muslim Personal Law (Sharia) Application Act, 1937, provides for the application of the Islamic Law Code of Sharia to Muslims in India. In Indonesia, a controversial debate was roused during the drafting of the constitution in 1945 on whether to establish an Islamic state. Although finally no mention of Sharia was made in the constitution, Sharia is in practice applied in the fields of family law, marital law and law of succession. Currently the call for integrating Sharia into the constitution is louder again and the autonomous province of Aceh has begun implementing the Sharia. Similarly, some Malaysian states have implemented the Sharia in certain cases, while the Malaysian Constitution contains no reference to Sharia.

III. Judicial Review of Adherence to Sharia Law

In order to render the constitutional guarantee of the compatibility of all legislation with Islamic values and principles effective and to guarantee the factual compatibility of legislation with them, most Islamic countries have established a special procedure. Such a review can be achieved either by a preventive and general review of every law prior to its coming into force, or by an ex post facto review of questionable laws. The various Islamic constitutions have followed different approaches. In Iran, the Guardian Council, established by Art. 91 of the Constitution, examines the compatibility of legislation passed by the Islamic Consultative Assembly with Islam prior to its coming into force according to Art. 94 of the Iranian Constitution. The Constitution requires the members of the Guardian Council to be Sharia experts. The Council is composed of six experts (religious scholars), to be selected by the Leader, and six jurists, specializing in different areas of law, to be elected by the Islamic Consultative Assembly from among the Muslim jurists nominated by the Head of the Judicial Power according to Art. 91 of the Iranian Constitution.

Art. 203C and 203D of the Pakistani Constitution introduce a special Shariat Court to review the compatibility of questionable laws with the provisions of Islam on appeal of certain bodies of the state or on the court’s own motion.

In Afghanistan, both preventive review of legislation and review of its implementation are possible. The President of the Republic has a veto right on legislation, which he may use if he perceives a law to be repugnant to Art. 3 of the Afghan Constitution. The Independent Commission for the Supervision of the Implementation of the Constitution and the Supreme Court may review the constitutionality of laws, and thereby also their adherence to Art. 3 of the Constitution, after they have entered into force.
IV. Structure of the Courts

1. Sharia Legal Systems

Those Countries that have established an Islamic Republic usually confer the judicial powers to a judiciary based completely on the Sharia. In this respect, the judiciary functions under one consistent system.

a) Iran

The complete conferral of judicial powers to Sharia based courts is the case in Iran. The head of the judiciary according to Art. 157 of the Iranian Constitution as well as the chief of the Supreme Court and the Prosecutor-General according to Art. 162 of the Iranian Constitution must be mujtahids. Art. 163 of the Iranian Constitution leaves the conditions and qualifications to be fulfilled by the other judges to be determined by law, but requires these to be in accordance with the criteria of fiqh. Therefore only religious scholars trained in Islamic law may become judges.

b) Afghanistan

Art. 116 of the Afghan Constitution provides for the establishment of a Supreme Court, Courts of Appeal as well as Primary Courts whose organization and authority shall be regulated by law. Other than listing these courts, the constitution does not contain any provisions concerning the structure of the courts or the legal recourse to them. Only the requirements for judges of the Supreme Court are laid out in the Afghan Constitution. Art. 116 of the Afghan Constitution establishes the Supreme Court as the highest court of Afghanistan. The Supreme Court is composed of nine judges as members of the court, one of whom is appointed Chief Justice. Prerequisites for their appointment are stipulated by Art. 118 of the Constitution. Of special interest are the prerequisites concerning legal education. Here the constitution stipulates that candidates must have attained either higher education in law or in Islamic jurisprudence and shall have sufficient expertise and experience in the judicial system of Afghanistan. Hence, the appointment of judges having either an education solely based on statutory law or solely on religious law is explicitly allowed. However, the requirements of “expertise and experience in the Afghan legal system” in the present constitution implies knowledge in both legal orders, religious and statutory, since the Afghan system has roots both in Islamic law and statutory laws. Therefore, a candidate who is only experienced in one of these systems without sufficient knowledge of the other would not qualify as a Supreme Court judge. The court system under the Supreme Court applies both state law as well as Islamic jurisprudence. There are no separated Sharia courts.
2. Mixed Legal Systems

In countries with a mixed legal system, for example where Sharia law and common or civil law coexist, it is also possible to establish a separate jurisdiction with its own courts for one of the legal systems. Pakistan has established such a system. Since mixed legal systems are very common in the Islamic world, the court system in Pakistan is briefly presented:

Example: Court System in Pakistan

The judiciary in Pakistan is composed of three levels of federal courts, three divisions of lower courts, and a Supreme Judicial Council. On the local level there are Subordinate or Village Courts dealing with civil matters and Magistrates dealing with criminal matters. There are District Courts in every district of each province, having both civil and criminal jurisdiction. The High Court of each province has jurisdiction over civil and criminal appeals from lower courts within the provinces. The Supreme Court has exclusive jurisdiction over disputes between or among federal and provincial governments, and appellate jurisdiction over High Court decisions. There is also a Federal Shariat Court established by Art. 203C of the Pakistani Constitution. This Court has exclusive jurisdiction to determine, upon petition by any citizen or the federal or provincial governments or on its own motion, whether or not a law conforms to the injunctions of Islam. An Islamic advisory council assists the Federal Shariat Court in this capacity.
E. **Formal Aspects of Structuring a Constitution**

There is no uniform practice on how a constitution can be structured in detail. However, certain common parts of constitutions may be distinguished and thus a typical system of structuring a constitution is presented here.

I. **The System of Structuring a Constitution**

Generally, the skeleton of a constitution adheres to the following default system for structuring bills that might be classified in:

- *preamble*
- *preliminary provisions*
- *bill of rights*
- *organization of the state*
- *security*
- *constitutional guarantees*
- *final provisions*
- *annexes*

<table>
<thead>
<tr>
<th>Part of the constitution</th>
<th>General content</th>
</tr>
</thead>
</table>
| Preamble                 | • Purpose of the constitution  
                            | • Underlying philosophy  
                            | • Historic developments leading to the constitution |
| Preliminary provisions   | • System of state  
                            | • General principles and values |
| Bill of rights           | • Civil, political, social rights  
                            | • Group and minority rights  
                            | • Solidarity rights |
| Operational provisions   | • The Executive  
                            | • The Legislature  
                            | • The Judiciary  
                            | • Sub-units and local government |
| Organization of the state| • Military  
                            | • Police  
                            | • Intelligence Services |
| Security                 | • Review of the Constitutionality of Laws  
                            | • Amendments to the Constitution |
| Constitutional Guarantees| • Transitional provisions  
                            | • Coming into force |
| Final provisions         | • Lists of competencies  
                            | • Country borders  
                            | • Location of courts |
| Annexes                  |                 |
However, this is only one example how to structure a constitution. The order of the different fundamental subjects regulated in a constitution and the placement of a particular subject matter may vary. For example, in the Kenyan Constitution the Protection of Fundamental Rights and Freedoms of the Individual is regulated in chapter V, after the operational provisions on the organization of the state (i.e. Chapter I on the Republic, Chapter II on the Executive, Chapter III on the Parliament and Chapter IV on the Judiciary). Also in Indonesia, the Human Rights catalogue is contained in Chapter X A, following the Chapters on the institutions of the state, the state’s territory and citizenship.

II. The Division of a Constitution into Different Sections

Usually the parts of a constitution are further subdivided into different units. The number of levels and their respective names may vary, but as a general rule of thumb constitutions are structured as follows.

<table>
<thead>
<tr>
<th>Part / Title</th>
<th>Generally, the parts or titles constitute a constitution’s largest division (example from the Interim Constitution of Sudan, 2005: Part Three – The National Executive).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chapter</td>
<td>Chapters are introduced to designate the grouping of articles within each part (example from the Interim Constitution of Sudan, 2005: Chapter I – The National Executive and its powers).</td>
</tr>
<tr>
<td>Article / Section</td>
<td>Articles / sections are the constitution’s basic building blocks; Each article / section comprises a single legislative idea and generally has its own heading (example from the Interim Constitution of Sudan, 2005: Article 58 – Functions of the President of the Republic).</td>
</tr>
<tr>
<td>Sub-article/Sub-section</td>
<td>Subdivisions of articles / sections (example from the Interim Constitution of Sudan, 2005: 58 (1) – The President of the Republic […] shall perform the following functions).</td>
</tr>
<tr>
<td>Letter</td>
<td>Subdivision of a sub-article (example from the Interim Constitution of Sudan, 2005: 58 (1) – The President of the Republic […] shall perform the following functions: - (a) preserve the security [...]).</td>
</tr>
</tbody>
</table>

III. The Intensity of the Regulations of Elements in a Constitution

While the formal structure of a constitution may give the framework, it is the content of the constitution which shapes the political structure of the country. This content may vary with regard to the detailed regulation of any specific element. It can either be regulated in great detail or only the parameters can be provided in a more general way. In such areas where the constitution only sets an overall framework, it is usually left to the legislature to regulate the subject in more detail by statutory law. The degree to which the detailed regulation of a specific topic can vary in different constitutions can be seen by the example of the regulations about citizenship in different constitutions:
• The constitution setting a framework:

As regards citizenship, the Ethiopian Constitution only provides for an overall framework. Art. 6 of the Ethiopian Constitution only states that any person of either sex shall be an Ethiopian national where both or either parent is Ethiopian and foreign nationals may acquire Ethiopian nationality. All further particulars relating to nationality are left to be determined by statutory law.

• The constitution providing relevant parameters

Art. 18 of the Iraqi Constitution provides for some relevant parameters regarding citizenship, but still leaves the details to be determined by the legislature. For example, it states that the citizenship can be withdrawn from naturalized persons, but not from Iraqis by birth and that multiple nationalities are possible with the exception of citizens in senior security positions, but the details are explicitly left to be regulated by statutory law.

• The constitution establishing a detailed setting

In Malaysia the constitution contains detailed provisions about citizenship. In Part III of the Malaysian Constitution the different modes of acquisition of citizenship are regulated (Art. 15-22), as well as different modes of termination of citizenship (Art. 23-28). In addition the constitution contains detailed provisions about the procedures, the administration and the interpretation of the regulations regarding citizenship (in Art. 18, 27 and 31, as well as in the Second Schedule of the Malaysian Constitution).

IV. **The Enforceability of Provisions in a Constitution**

To ensure that provisions in the constitution are not disregarded, it is important to consider what effect the provisions contained in the constitution shall have and how and to what extent they can be enforced:

• Directly enforceable

The provisions that are directly binding have the force of law and can usually be enforced by the courts of the country. Such provisions are usually worded rather precisely, to facilitate their understanding and interpretation, both by the citizens and the courts. For example, the bill of rights usually grants rights which are legally enforceable. If the state violates these constitutional rights individuals can address the courts to enforce their rights. However, provisions regarding the organization of the state are usually also directly binding. If, for example, Parliament passes a law (which is consistent with the constitution) and the respective constitution contains a provision to that effect, the President must assent to the law and promulgate it and the executive must implement and enforce that law. This can be seen in the example of South Africa: Section 79 of the South African Constitution requires the President to assent to laws passed by Parliament as long as they are constitutional; if he refuses, the Constitutional Court may decide that he has failed to fulfill a constitutional obligation and may
order him to act in accordance with the constitution (Section 167 of the South African constitution).

- **Not directly enforceable**

Provisions framed as principles, directives or policies impose moral, political and social obligations on the state. However, such directive principles or state policies contained in a constitution are usually not directly enforceable. For example, the Constitution of Sudan contains in Chapter II guiding principles and directives. Art. 12 of the Sudanese Constitution stipulates amongst others that the state shall develop policies and strategies to ensure social justice among all people of the Sudan through ensuring means of livelihood and opportunities of employment. However, such directives do not establish any rights or duties which could be claimed in a court of law, but state policy objectives (i.e. social justice), which the government should try to achieve and which serve as guidelines for the state’s policies. But it is at the state’s discretion by what means and to what degree these principles and goals are to be put into practice. If the state simply refuses to act according to this guiding principle, the implementation of specific strategies to achieve these goals of social justice cannot be enforced. In case the state does not comply with these principles the sanctions are usually political rather than legal. Such provisions can thus serve as political guidelines which the government may follow at its discretion. However, in a democracy there are usually political means to influence the state’s behavior, be it by pressure from the electorate or by the opposition.

- **Binding, but dependant on further legislative action**

Other provisions might be intended to be binding, but need further legislative or administrative action before they can be enforced. Such provisions are often phrased in terms like “in accordance with the law”, meaning that parliament has to enact a specific law regarding that matter before binding and enforceable obligations can arise.

For example, Art. 35 of the Iraqi Constitution protects the liberty and dignity of man. It also states that any victim of torture “shall have the right to compensation in accordance with the law for material and moral damages incurred”. Thus, the compensation has to be regulated in greater detail by statute before such a compensation can be enforced in a court of law.

- **Limitations**

However, with regard to some obligations of the state in the field of human rights (especially social and economic rights) the binding character of a provision may be limited by the state’s capacity to really fulfill the obligations imposed by the provisions. For instance, the social and economic rights (i.e. the right to housing, health care, food, water etc.) in the South African Constitution are limited insofar as “the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization” of these rights (i.e. Section 27 of the South African Constitution).
F. Fundamental Issues Regulated in a Constitution

I. Fundamental Values and Principles in a Constitution

Since the constitution is the most important legal document of a country, one must draft it very carefully to reflect the values and policy objectives by which a country is to be governed. Often these basic values and principles, on which the society and the state are based, are incorporated into the constitution. Most constitutions stipulate at least the nature of the state (i.e. as democracy), others contain more detailed information. Most common are for example:

- The nature of the state as democracy;
- The nature of the state as republic or parliamentary monarchy;
- The structure of the state as unitary, decentralized or federal;
- Sovereignty and independence;
- The rule of law;
- The economic system of the country.

Often material values and fundamental principles of the state are set out in some form in the constitution to guide the state, public institutions and citizens. For example, it may declare:

- The respect of human rights;
- The commitment to a state religion or the secular or laical nature of the state;
- Good governance
- The commitment to social principles.

These principles are generally intended to guide the state, public institutions and citizens but usually cannot be used as the basis for legal claims. Nonetheless, they can be used as a means to help in the interpretation of the constitution (and other law). Some courts even use such directive principles to interpret constitutional rights in a way that obliges the state to take action. For example, in India the right to life has been interpreted, with the help of directive principles, to include the right to basic needs (i.e. food)\(^\text{25}\).

Often such basic principles are only found in the preamble of the constitution, but sometimes they are included explicitly in the operative part of the constitution. Especially the character of the state, i.e. as a republic, and the structure of the state as federal, unitary or decentralized is often stated this way. For example, the Sudanese Constitution stipulates in Art. 1 the nature of

\(^{25}\) For example in Kapila Hingorani vs. State of Bihar (2003; 6 SCC 1) the Supreme Court of India interpreted the right to life to include the right to food, referring to Part IV of the Indian constitution where the directive principles of the state policy are stipulated. In C.E.S.C. Ltd. vs. Subhash Chandra Bose (1992; 1 SCC 441 at p.462) the Supreme Court also stated that the Preamble and Part IV of the Indian constitution reinforced their decision to interpret the right to life in such a manner as to include the right to food.
the Sudanese state as an “independent, sovereign republic, which is a democratic, decentralized, multi-cultural, multi-racial, multi-ethnic, multi-religious, and multi-lingual country where such diversities co-exist”.

The Afghan Constitution stipulates in Art. 1 that Afghanistan is “an Islamic Republic and an independent, unitary and indivisible State”. In addition, Art. 2 defines the sacred religion of Islam as the religion of the state.

Another example is the Iraqi Constitution, where Art. 1 stipulates that the Republic of Iraq is a “single, independent federal State with full sovereignty” and that its system of government is “republican, representative (parliamentary) and democratic”. Art. 2 of the Iraqi Constitution defines Islam as the official religion of the state.

In addition, the fundamental principles and the objectives to be followed by the organs of the state may be regulated in more detail, particularly with regard to human rights, a healthy economy, social rights like the right to work, the right to good health care or the right to education. In some constitutions therefore a whole chapter is dedicated to stating directives for state policies (e.g. Part IV of the Indian Constitution, Chapter VI of the Ghanaian Constitution).

Such directive principles in a constitution should be considered carefully, in particular since they are often phrased in relatively ambiguous terms and whether they are legally binding is questionable. For example in Ghana, the implementation of the directive principles of state policies is regulated explicitly in Art. 34 of the Constitution, which stipulates that the principles shall guide all citizens and political institutions. This article also contains the provision that the President has to report to Parliament at least once a year on all the steps taken to ensure the realization of the policy objectives contained in the constitution.

II. The Political System of a Country

Basically, the system of a country describes the form of its government. At a first level, one might distinguish between a monarchy, a republic, and a theocracy.

1. Monarchy

In a monarchy an individual king or queen rules as Head of State, usually for life or until abdication. Currently 44 nations in the world have monarchs as heads of state, 16 of which are Commonwealth realms that recognize the respective king or queen of the United Kingdom as their Head of State.

In an absolute monarchy the monarch rules as an autocrat, with absolute, undivided power over the state and government. That means that he/she has the right to rule by decree, make laws, and impose punishments. Among the few states that retain an almost absolute monarchy are Brunei, Oman, Saudi Arabia and Swaziland.

Nowadays most countries which have a monarch as Head of State are constitutional monarchies, where the monarch is subject to a constitution and bound by the laws of the country. The constitution thus defines the role of the monarch in the state, which can vary
widely. The monarch can be the de facto Head of State with extensive executive powers little different from those of an elected President in many republican regimes (i.e. in Jordan, Bahrain or Morocco) or rather a symbolic figurehead and ceremonial leader (i.e. in Sweden or in the United Kingdom).

2. Theocracy

A theocracy is a state which is based on a certain religion and in which the Head of State enjoys a special religious legitimacy. Presently, no purely theocratic systems are in place. Examples coming closest to a kind of theocratic state are to some extent the Vatican and the Islamic Republic of Iran.

The doctrine on which the system of government of Iran is based is called vilayat al-‘amr al-faqih which was derived out of the Shiite concept of the Immat by Ayatollah Khomeini. According to Art. 5 of the Iranian Constitution the Head of State is the so-called “Revolutionary Leader”. The leader is elected by a special council, whose delegates are elected by public vote. As a peculiarity of the theocratic regime of Iran, only members of the Shi'ite ulema, the Islamic religious scholars, who have reached the rank of mutahid are eligible for the position of the Leader and for membership in the Assembly of Experts. According to Art. 57 of the Constitution, the Revolutionary Leader is obliged to supervise the legislative, judicative and executive power. This supervision of every exercise of public power by the Revolutionary Leader is an important characteristic of the constitutional system of Iran.

Some authors classify Saudi Arabia as a theocracy, since the state is based on Sharia law, but the majority classifies it as a monarchy.

Vatican City is an ecclesiastical or theocratic-monarchical state, ruled by the Bishop of Rome, the Pope. It is the sovereign territory of the Holy See. The highest state functionaries are all clergymen of the Catholic Church.

3. Republic

In a republic it is the people who are sovereign. The word originates from the Latin term “res publica”, which translates as “public thing” or “public matter”. Thus all authority in the state originates from the people. In contrast to a monarchy, the Head of State in a republic is accordingly not a hereditary position. A republican Head of State does not have the power to designate his successor. Instead, the Head of State is usually determined by the people, even though that does not necessarily mean that it is through democratic processes. However, nowadays a republic is usually associated with democracy, where the country is led by an elected Head of Government/State and in which the people (directly or through representation) can influence the government. Depending on how the powers within the republic are allocated between the executive and the legislature and their relationship to each other, one might differentiate between presidential republics (with a full-, semi-, or mixed presidential system) and parliamentary republics (see section G.III.1.).
III. General Issues to be Regulated in a Constitution

If a constitution is supposed to be “the instruction book for how things work”, certain issues have to be regulated in every democratic state:

- To enact the statutory laws is the task of the legislature (parliament) which is considered as one of the most important powers of the state.
- The law needs to be observed by the people and applied and executed by state organs as well. This is the task of the executive. Additionally it is also the task of the executive to represent the country’s government abroad. Usually a country is represented by the Head of State.
- The state has the responsibility to put in place mechanisms and procedures to resolve disputes which might arise when applying the relevant laws within the society. Hence a judiciary has to be established by the constitution to decide on such legal disputes.
- Another important function of the state is the designation of its economic order.
- To limit the state’s power and to protect the rights of the individuals, a constitution usually contains a bill of rights.
- Another primary responsibility of the state is the establishment of security services to guarantee law and order and to defend the country against external attacks.

The composition of the different institutions of the state and the allocation of powers to these institutions essentially determines the functioning of the state. In the constitution these institutions and their mutual relationships are established according to what is best suited to the interests of the specific country. In this regard, one of the most important decisions to be taken is, whether the system of government is to be unitary or decentralized (i.e. federal or some other form of devolution). Although the decision about some form of decentralization does not necessarily affect the system of government (such as whether it is presidential or parliamentary), the structure and the powers of the authorities, and to some extent, the
structure of the bodies of governance depend on this decision. For example in a federal system, there is the need to accommodate the interests of the federal sub-units on the national level; thus, a bicameral legislature might be required or certain state functions must be carried out by the federal sub-units, which might reduce the number of ministers necessary in the cabinet at the national level.²⁶

1. The Bill of Rights

Because a constitution is not only intended to organize the powers of the state, but also to prevent abuse of these powers by state authorities, it usually contains a bill of rights. This bill of rights is a collection of human rights norms, which set the limits for any governmental conduct toward individuals. Basically all constitutions contain a bill of rights of some sort. Moreover, most states have ratified international human rights treaties. Therefore one may say that the universality of human rights is nowadays generally agreed upon. Naturally, the understanding of human rights as such is not completely the same in all countries of the world. There are some basic divergences from the western liberal concept of individual rights as developed in 18th century Europe. The concept of rights and the concept of the individual are different, for instance, in Islam. According to Islamic scholars, rights are the corollaries of duties owed to God and to other individuals. To put it broadly, communalism prevails over individualism. Further, the relationship between the individual and the state is not seen as an adversarial one as it often is in the development of the concept of human rights.

Nonetheless the constitutions of Islamic states usually contain a human rights catalogue similar to those of their western counterparts. For instance, Parts 2, 3 and 4 of the Constitution of Egypt contain a list of civil, political, economic, social and cultural rights, which reflect in general international human rights standards. Chapter 2 of the Constitution of Jordan contains political, civil and economic rights but does not cover all the rights enshrined in the Universal Declaration of Human Rights of 1948. In particular, there is no reference to the equality of men and women. Chapter II and III of the Constitution of Bahrain contain the international human rights standards concerning civil and political rights and several of the economic, social and cultural rights. The equality of men and women is expressly stated. The Constitution of the United Arab Emirates contains in its Parts 2 and 3 a catalogue of human rights and freedoms covering most of the international civil and political rights as well as several of the economic, social and cultural rights. There is no direct mention of the equality of men and women. Chapter I of the Constitution of Chad contains an elaborate list of civil, political, economic, social as well as cultural rights which mirrors international human rights standards although a reference to the equality of men and women is missing. Title II of the Constitution of Senegal, for instance, contains a catalogue of human rights (“public liberties”) containing the traditional civil and political rights as well as most of the economic, social and cultural rights as enshrined in the two International Covenants. Part II of the Constitution of Sudan contains a Bill of Rights and – apart from that – Art. 27.3 declares: “All rights and freedoms enshrined in international human rights treaties, covenants and instruments ratified by the Republic of Sudan shall be an integral part of

²⁶ The impacts of a decentralized state structure on the political system of a country will be presented in more detail later in this manual in chapter G IV and even more detailed in a separate manual on decentralization.
this Bill.” Considering this analysis, one may gather that the convergence between catalogues of human rights in Muslim states and international standards is substantial. Differences only become apparent with regard to certain rights. Most controversial in this respect are the status of women and the freedom of religion.

In Islamic as well as in western states, all branches of government are bound to respect the human rights contained in their respective constitutions. If the executive exercises its powers, it is allowed to do so only within the framework of the applicable bill of rights. The same holds true for the legislature: Laws have to be drafted within the scope of the human rights guaranteed by the constitution. Moreover, the judiciary, has to respect human rights, and is required to consider them in the interpretation of other laws. Accordingly the South African constitution provides in Section 8: “The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.”

a) The Different Types of Human Rights

The human rights in national constitutions may be classified as different types of rights. Four groups of human rights may be distinguished: civil and political rights; economic and social rights; solidarity rights; and group rights.

• Civil and political rights

These human rights norms represent a protective mechanism for individuals against the arbitrary exercise of state power. Individual rights usually guarantee certain protections against bodily harm or death and freedoms, like the freedom of movement and contain civil rights, like the right to associate and assemble or the right to freedom of expression, and political rights, such as the right to vote and stand for elections. Art. 19 of the Constitution of India for example guarantees the freedom of speech. Apart from such substantive rights, procedural rights can be distinguished. These rights might be broadly summarized as rights to a “fair trial”. For instance, Art. 21 of the Constitution of India states “No person shall be deprived of his life or personal liberty except according to procedure established by law”. Likewise, Art. 34 of the Sudanese Constitution guarantees rights to a fair trial.

• Economic, social and cultural rights

This second type of human rights urges the government to improve the well-being of its people in terms of education, health, infrastructure, etc. They typically include the right to education, employment, shelter, health, and food. However, even if such social and economic rights are often contained in a constitution, they are seldom enforceable. Rather, the states are obliged to implement them within the limits of their respective capacities. In most European constitutions these rights are accorded relatively little space, whereas in African constitutions they are more visible. The South African Constitution, for instance, contains a particularly extensive catalogue of economic, social and cultural rights, providing for the right of access to health care (Section

27 R Wolfrum “Constitutionalism in Islamic States: An International Law Perspective” in Constitutionalism in Islamic Countries: Between Change and Continuity (expected to be published by Oxford University Press, New York, in 2009).
27), the right to education (Section 29), the right to choice of language and culture (Section 30 and 31), and the right to adequate housing (Section 26). More commonly these rights are, however, not worded as rights, but rather as duties of the state. For instance Art. 37 of the Constitution of Pakistan provides:

The State shall:
(a) promote, with special care, the educational and economic interests of backward classes or areas;
(b) remove illiteracy and provide free and compulsory secondary education within minimum possible period;

• Solidarity rights

In addition, states nowadays tend to recognize solidarity rights, such as the right to a clean, healthy, and sustainable environment, peace, and development. However, such rights rather represent policy objectives, and their enforcement encounters significant challenges. Many constitutions of Muslim states emphasize the principle of solidarity amongst the population. In this respect, Art. 7 of the Constitution of Egypt provides that: “Social solidarity is the basis of the society.”

• Group rights or minority rights

Furthermore, rights may be given not only to individuals, but rather to groups. Such rights are most relevant for ethnic, religious, or other minority groups. They protect these groups from being repressed by the majority and ensure equal treatment and equal opportunities. Minority rights can cover subjects like the protection of existence, the protection from discrimination and persecution, protection and promotion of identity, and participation in political life. For instance, Art. 29 and 30 of the Indian Constitution provide for the protection of the interests of minorities regarding cultural and educational rights such as the right to establish and administer their own educational institutions or the right to conserve the minority’s distinct language and culture.

b) The Protection of Human Rights

The mere existence of a bill of rights in a constitution does not of itself guarantee the proper conduct of governmental activities. This is similar to the fact that a legal prohibition does not always prevent people from committing a crime. Therefore it is important to have a viable and independent system in place that guarantees the proper implementation and enforcement of human rights. A constitution may only provide the base for a functioning system of government if the people realize that it goes beyond putting black letters on white paper. A viable system that truly enforces the bill of rights is of utmost importance to build trust in the constitution. In order to achieve a proper implementation of the bill of rights, two approaches might be considered:
• **Access to the courts**

One way to promote the protection of human rights is to establish a judiciary and a court system that allow for easy and equal access to courts with regard to human rights cases. Most countries have a functioning court system and provide for recourse to the courts by providing for a human rights complaints procedure in their constitution. Some constitutions expressly afford a special status to the human rights complaints procedure by enabling individuals to bring their claim of violation of their rights by a public authority directly to the Constitutional or Supreme Court. A very comprehensive procedure can be found in the German Basic Law ("Verfassungsbeschwerde", Art. 93). Art. 122 of the Sudanese Constitution provides for original jurisdiction of the Constitutional Court in human rights complaints by individuals. Procedures to the same effect can be found in Art. 46 of the Constitution of Malta and in Art. 122 of the Constitution of Benin. A complaint by an individual after exhaustion of the legal remedies is also possible in many other states, where the human rights complaints are more completely integrated into the standard system of recourse to the courts. According to Section 167 of the Constitution of South Africa, for instance, these complaints are constrained to constitutional matters.

• **Special institutions for the protection of human rights**

Another way to implement human rights can be to create special institutions which support the people in understanding and pursuing their constitutional rights. The name and form of such institutions vary considerably, ranging from Human Rights Commission (HRC) and Consultative Council to Human Rights Ombudsman, Public Defender or Peoples Protector. Despite these differences, all such national institutions share certain common features: they are expected to work independently from the government, cooperate with relevant actors at home and abroad and contribute to the implementation of national and international human rights standards by acting as “guardians”, “experts” and “teachers” of human rights. Since it is the task of these special human rights institutions, to remind powerful governmental actors of their constitutional obligations, they and their members must enjoy real independence. In order to establish a strong Human Rights Commission (or similar institution), the appointment procedure of its members, their reputation and qualification as well as the powers given to the institution have to be considered carefully.

According to Art. 2 para. 3 of the Indian Protection of Human Rights Act, e.g., the National Human Rights Commission consists of:

(a) a Chairperson who has been a Chief Justice of the Supreme Court;
(b) one Member who is or has been, a Judge of the Supreme Court;
(c) one Member who is, or has been, the Chief Justice of a High Court;
(d) two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.
The members are appointed by the President but recommended by a special committee, in which the opposition is to be represented.

The Human Rights Commission has the power to file a claim of human rights violation at court on behalf of the victims, if mediation with the government fails. It further has the power to detect human rights violations on its own. Similar powers are given to the Human Rights Commissions in other countries, for example in South Africa, where Chapter 9 of the Constitution provides for a whole array of human rights institutions (the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality). Art. 58 of the Afghan Constitution likewise establishes the Independent Human Rights Commission of Afghanistan “to monitor respect for human rights in Afghanistan as well as to foster (behbud) and protect it”. Every individual can complain to this Commission about the violation of personal human rights and it shall refer human rights violations to legal authorities and assist in defense of their rights.

c) The Internationalization of Human Rights

In today’s globalized world, the legal definition and practical implementation of human rights are no longer exclusively domestic matters for the states.

- Human rights treaties

An increasing number of international treaties and declarations on human rights and institutions to supervise the implementation of these rights exist on the international level. Most of the international human rights treaties have set up committees of experts to supervise the domestic implementation of the treaties. Currently, the implementation of the universal international human rights treaties is monitored by the following eight human rights treaty bodies:

- Human Rights Committee (CCPR)
- Committee on Economic, Social and Cultural Rights (CESCR)
- Committee on the Elimination of Racial Discrimination (CERD)
- Committee on the Elimination of Discrimination against Women (CEDAW)
- Committee Against Torture (CAT)
- Committee on the Rights of the Child (CRC)
- Committee on Migrant Workers (CMW)
- Committee on the Rights of Persons with Disabilities (CRPD)

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Member states that adhere to the respective international human rights treaties have to submit periodic reports to the committees. In addition, there are optional protocols to human rights treaties, which establish procedures under which individuals can address the supervisory committees (e.g. the Subcommittee on the Prevention of Torture established under the Optional Protocol to the Convention against Torture). Even if these committees do not have the power to enforce their interpretation of the obligations of the member states regarding the rights of the individual, many states nonetheless follow the decisions of the committees.

Furthermore, several regional human rights systems exist, for example in Europe, Latin America or in Africa. These regional systems usually have their own courts or other supervisory instruments. Some of these have the authority to issue binding decisions, as for example the European Court of Human Rights or the Inter American Court of Human Rights. The African human rights system is the most recent regional system. One of the most distinctive features of the African Charter on Human and Peoples’ Rights is its recognition of collective rights. It views individual and peoples’ rights as linked. The other distinctive feature is the recognition of the right to development. So far, the African human rights monitoring system has been less effective than the European and Inter-American ones. This is partly due to the political climate and preference for diplomatic solutions, partly because of some weaknesses in the language used in the African Charter on Human and Peoples’ Rights. Moreover, efforts to promote human rights were essentially concentrated on the monitoring by the African Commission on Human and Peoples’ Rights. Nonetheless, the Commission’s resolutions have often created substantial political pressure, e.g. with respect to the situation in Darfur.

- **The United Nations**

Within the United Nations, there are several mechanisms to protect and promote human rights. The Human Rights Council is the most prominent UN-Charter based body for the universal promotion and protection of human rights. It reviews whether individual countries observe human rights.

Moreover, when acting under the authority of the UN Security Council the United Nations can even intervene directly in the internal affairs of a country if there are massive violations of human rights.

This happened, for example, in 1977 when the UN Security Council imposed a mandatory arms embargo (under chapter VII of the UN Charter) against South Africa because of apartheid and the connected human rights violations. The Security Council deemed the deprivation of the human rights of non-whites through the apartheid system to be a direct threat to international peace and security.\(^{29}\)

Similar, the UN Security Council implemented mandatory sanctions against Southern Rhodesia in 1965/66 when a white minority in the British colony of South Rhodesia declared its independence. The Security Council condemned “the unilateral declaration of independence

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made by a racist minority” and instructed UN member states to prevent trade with Southern Rhodesia of arms and other goods (e.g. aircrafts and motor vehicles).  

2. Duties of the Individual Citizen

Many constitutions do not only provide rights of the individuals, but also establish some duties of the citizens. Most common are:

- The duty to serve in the military

For example, Art. 59 of the Swiss Constitution stipulates that every male Swiss citizen is obliged to perform and render military service. However, for conscientious objectors there is a possibility to render some kind of alternative service.

- The duty to vote

A few countries contain not only a right to vote, but even make it a duty for its citizens to vote. For example, Section 72 of the Thai Constitution establishes the duty for Thai citizens to exercise their right to vote at an election.

- The duty to speak the official language of the state

For example, Art. 3 of the Spanish Constitution stipulates that all Spaniards have the duty to know the official language, which is Castilian. In Kenya persons are only eligible to be naturalized as Kenyan citizens if they have an adequate knowledge of the Swahili language (Art. 93 of the Kenyan Constitution).

In addition, a number of other constitutions contain certain duties and responsibilities for its citizens (i.e. Uganda, India or Papua New Guinea). However, these duties are usually more general and aim at promoting the welfare and social and economic advancement of the country. They are usually not enforceable. Typically, these responsibilities include duties to

- defend the constitution,
- protect the security and independence of the state,
- obey the law,
- pay taxes,
- respect the rights and culture of others,
- take responsibility for the welfare of family and children.  


3. **State Finances**

Running a government requires the establishment of various institutions and the respective personnel, be it ministers, civil servants, police, etc. In addition, for the proper implementation of the constitution’s mandate, the state has to provide healthcare, education and adequate infrastructure to its people. To meet these requirements, a government needs to generate revenues and administer its finances. Constitutions therefore generally include a chapter on the state’s financial structure, covering issues like the levying of taxes, the adoption of the annual budget, auditing of the annual budget, etc.

a) **Levying of Taxes**

The main purpose of levying taxes within a state is ensuring state revenues. Taxes raise money to spend on governmental functions like providing infrastructures (such as roads, schools and hospitals), or on more complex government functions like market regulation or the maintenance of a national justice system. A second purpose can also be the redistribution of income. Normally, this means transferring wealth from the richer sections of society to poorer sections in that richer citizens have to pay more taxes while poorer citizens pay less or none while they benefit more from governmental services. A third purpose of taxation is to influence the citizens’ conduct: Thus, alcohol is taxed, for example, to discourage drinking. Thus, a nation’s tax system is often a reflection of its communal values or the values of those in power. To create a system of taxation, a nation must make choices regarding the distribution of the tax burden—who will pay taxes and how much they will pay—and how the taxes collected will be spent. In general, the following taxes can be identified:

- **Taxes on income, profits and capital gains** (of individuals or corporations)
- **Social security contributions** (by employees, employers, self-employed or non-employed)
- **Taxes on property** (on immovable property; net wealth; estate, inheritance and gifts; financial and capital transactions)
- **Taxes on goods and services** (on the production, sale, transfer, leasing and delivery of goods and rendering of services; value added taxes; sales taxes; customs and import duties; taxes on exports; taxes on investment goods; taxes on use of goods, or on permission to use goods or perform activities)

b) **The National Budget**

The annual budget of a country is an itemized summary of estimated or intended expenditures for the next year along with proposals for financing them. There are several principles that most countries consider to be crucial when drafting a budget, most importantly:

- The principle of **comprehensiveness** (all expenditures and incomes are to be listed).
• The principle of **specificity** (a detailed statement of revenues and expenditures).
• The principle of **publicity** (the budget has to be published).

In most countries, Parliament has the final say on the budget, or may at least assure whether certain standards were met in its drafting. In a democratic society, this approach reflects the fact that revenues of a country mainly derive from raising taxes from the people. For this reason, parliament, as the organ representing the people, also needs to play a decisive role in the decision on how to spend this money. However, in decentralized systems the sub-units also have to play a role in this regard. The constitution thus needs to determine how the powers of taxation and spending money are divided between the central government and the country’s sub-units (see section G.IV.4.h.).

The involvement of the executive with regard to the annual budget varies greatly. Usually, the budget is prepared by the government and then submitted to Parliament. The extent to which Parliament has the power to amend the executive’s suggestions varies from country to country. In some countries any change of the budget needs to be consented to by the government (President), while in others the Parliament is free to amend the budget as long as additional expenses are covered.

c) **Auditing of the National Budget**

This is the last stage in the budget cycle and aims at measuring the effective use of public resources. The major player at this stage usually is an Auditor General. For example under Art. 121(1), of the Zambian Constitution there is an Auditor General to be appointed by the President subject to ratification of the National Assembly. The principle function of the Auditor General is to audit the public accounts and all fiscal activities of the government shall be subject to regular reviews by the Auditor Generals office. It is then the function of the Auditor General to submit the audited public accounts within 12 months to the Public Accounts Committee of parliament. This committee then scrutinizes the audit report and makes final recommendations.

The auditing of the national government accounts is also a clear constitutional requirement under Sections 85 and 86 of the Nigerian Constitution. The Supreme Audit Institution is the Office of the Auditor-General. It has the responsibility for auditing the annual accounts of Federal and State governments, and is entitled to have access to all books, records, returns and other documents relating to government accounts. It is further provided that within 90 days of the receipt of the annual accounts from the Accountant General of the Federation, the Auditor-General shall submit a report to either the National Assembly or State House of Assembly, as the case may be, and that the report in turn shall be considered by the legislative committee responsible for public accounts.

Essentially, the role of such an auditing authority is to give an independent assessment of whether government accounts have been properly kept and the extent to which actual outcomes match the enacted budget. Consequently, transparency and accountability in public institutions and public finance are enhanced by such an auditing authority providing comprehensive and timely audit reports or information about the outcomes or achievements of government revenue collection and spending.
4. **Economic System**

In addition, the constitution may contain provisions regarding the general economic system of the country. However, many constitutions do not regulate this topic explicitly but leave this decision open. In general, two basic types of economy can be differentiated:

a) **Planned Economy**

A planned economy is an economic system in which the government manages the economy. Thus, the central government takes the fundamental decisions on the production and consumption of goods and services. In a planned economy, major enterprises can be owned by the state and private enterprises can be directed by the state. A current example is Syria, where Art. 13 of the Syrian Constitution provides: “the state economy is a planned socialist economy which seeks to end all forms of exploitation”. The Constitution regulates three kinds of ownership that is public ownership, collective ownership and individual ownership (Art. 14 of the Constitution). Public ownership includes natural resources and public utilities. These are to be exploited by the state which also supervises the administration of this property. Collective ownership includes the property belonging to popular and professional organizations and to production units, cooperatives, and other social establishments. The law guarantees its protection and support. Individual ownership (property belonging to individuals) is limited insofar as “the law defines its social task in serving the national economy within the framework of the development plan” and that it “should not be used in ways contrary to the people’s interests” (Art. 14 of the Syrian Constitution).

A similar socialist approach was formerly used within the Egyptian Constitution. At that time, Art. 24 of the Egyptian Constitution stated that “the people shall control all the means of production and direct their surplus in accordance with the development plan laid down by the State”. However, in the mid-1980s, partly due to the collapse of oil prices, Egypt became engaged in a process of structural reform whose aim was to increase the role of the private sector, the market and international trade in the economy. Under comprehensive economic reforms initiated in 1991, Egypt reduced price controls, subsidies and inflation, cut taxes, and partially liberalized trade and investment. Thus, a process of public sector reform and privatization enhanced opportunities for the private sector. After a constitutional amendment in March 2007 Art. 23 and 24 are now worded as follows:

“The national economy shall be organized in accordance with a comprehensive development plan which ensures the growth of the national income, fair distribution, higher living standards, elimination of unemployment, the increase of job opportunities, the linking of wages to productivity and the determination of minimum and maximum wages in a manner which guarantees the reduction of disparities between incomes”.

“The State shall sponsor the national production and work for the realization of social and economic development”.

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The exclusive public ownership of the national development plan that was expressed formerly in Art. 24, has thus been reduced and the private sector has been integrated more effectively and recognized officially.

b) Market Economy

A market economy is an economic system based upon the free choices of the individual market participants in which the prices of goods and services are determined by supply and demand. In the real world, market economies do not exist in pure form, as societies and governments regulate them to varying degrees rather than allow merely a self-regulation by market forces. Thus, most countries have chosen a rather mixed system which incorporates a mixture of private and government ownership or control. Relevant aspects include: a degree of private economic freedom (including privately owned industry) intermingled with centralized economic planning and government regulation (which may include regulation of the market for environmental concerns and social welfare, or state ownership and management of some of the means of production for national or social objectives).

For example, Art. 41 of the Mozambican Constitution states that “the economic order of the Republic of Mozambique shall be based on the value of labor, on market forces, on the initiatives of economic agents, on the participation of all types of ownership, and on the role of the state in regulating and promoting economic and social growth and development in order to satisfy the basic needs of the people and to promote social well-being”. Furthermore, Art. 41 of the Mozambican Constitution highlights these different forms of ownership by stating that “the national economy includes the following complementary types of ownership: a) state ownership; b) cooperative ownership; c) joint private-state ownership; d) private ownership”. Finally, Art. 41 of the Mozambican Constitution states that “the State shall ensure that economic activities conform with the Constitution and the law”.

Another example is the Sudan where Art. 10 of the Constitution stipulates that “the State shall develop and manage the national economy in order to achieve prosperity through policies aimed at increasing production, creating an efficient and self-reliant economy and encouraging free market and prohibition of monopoly”.

As mentioned above, many constitutions do not entail explicit constitutional regulations on the economic system of the country. Nevertheless, the economic system becomes evident by analyzing the constitutional provisions with regard to private property and the freedom of the professions.

For example in the Iraqi Constitution, there is no explicit mention of the country’s economic system in Section 1 on the fundamental principles, but Section 2 concerning individual rights and liberties envisages a mixed market economy. According to Art. 23 (1) of the Iraqi Constitution “Personal property is protected. The proprietor shall have the right to exploit, utilize and benefit from personal property within the limits of the law”. And according to Art. 25 of the Iraqi Constitution “the State guarantees the reform of the Iraqi economy in accordance with modern economic principles to insure the full investment of its resources, diversification of its sources and the encouragement and development of the private sector”. The investment of
private property and private assets is to be encouraged. According to Art. 26 of the Iraqi Constitution “the State guarantees the encouragement of investments in the various sectors. This will be organized by law”.

Another example for this approach can be found in Uganda. The Ugandan Constitution also does not explicitly envisage any particular form of economic system. But Art. 40 of the Ugandan Constitution regulates that “(1) Parliament shall enact laws—(a) to provide for the right of persons to work under satisfactory, safe and healthy conditions; (b) to ensure equal payment for equal work without discrimination; and (c) to ensure that every worker is accorded rest and reasonable working hours and periods of holidays with pay, as well as remuneration for public holidays. (2) Every person in Uganda has the right to practice his or her profession and to carry on any lawful occupation, trade or business.” Thus, the state may enact regulations to create a fair and non-discriminatory working environment and respective conditions, but may not interfere with the citizen’s right to carry on any lawful occupation, trade or business.

5. Defense and Security Issues

One of the most fundamental responsibilities of the state is to guarantee the security of the country and thus the people living in it. This includes the protection of the state against dangers from the outside or from insurgencies within the country, as well as the protection of individual citizens from each other or even from agents of the state.

To provide this protection the state has to rely on its security forces, which monopolize the legitimate use of force. But these security forces themselves need to be controlled, to prevent them from abusing their power. As history shows, the security forces have often been used to back up an undemocratic regime. Whoever has the command over the armed forces has a strong power base. Thus it is important that the security services refrain from meddling in politics. As a safeguard, the whole security sector is often placed under democratic and civil control to ensure greater civilian control and accountability vis-à-vis the security forces.

To achieve and ensure such civil control the supreme command over the armed forces is usually vested in civilian authorities, usually the executive branch of government. For instance, Art. 74 of the Ethiopian Constitution vests this power in the Prime Minister and Art. 87 of the Ethiopian constitution requires the minister of defense to be a civilian. In addition, the constitution can provide for civilian oversight of the security services, for instance by means of parliamentary committees (e.g. Section 199 of the South African Constitution).

Such control is also seen as important to ensure that the budget of the security sector is still acceptable to the public. As the procurement of military supplies is a major area of corruption in many countries, transparency in this regard seems to be especially important.

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Most, if not all, constitutions regulate the structure and the control of the armed forces, police and other security-oriented services. In post-conflict countries constitutions may contain provisions regarding the status of paramilitary forces (which are usually prohibited) and the demobilization of former fighters and their reintegration. For example, Art. XVIII Section 24 of the Philippine Constitution states that “all paramilitary [...] shall be dissolved or, where appropriate, converted into the regular force”.

a) Military

The protection of the sovereignty and integrity of the state from any outside dangers is usually the responsibility of the military. A constitution should therefore define which organ of the country has the operative command of the military. This power is customarily vested in the Head of State, i.e. the President or the monarch in a constitutional monarchy. This is the case in most presidential democracies, for example in Nigeria, where the President is commander in chief of the armed forces (Art. 218 of the Nigerian Constitution). However, today this power may also be vested in the Head of Government. For example, Art. 74 of the Ethiopian Constitution states that the Prime Minister is commander in chief of the armed forces. In Germany, the Minister of Defense is commander in chief of the armed forces, and only in the case of a state of emergency does this power pass to the Head of Government (Art. 65a, 115b German Basic Law). Today the title of commander in chief is often only a formal title, or at least strongly limited, insofar as Parliament controls the funds for the security forces and has to consent to any declaration of war.

Regarding the armed forces constitutions often may also contain provisions regulating:

- The duty of citizens to serve in the armed forces.
- The establishment of an advisory body such as an Armed Forces Council. For example, in Ghana such a council is established, which comprises senior military commanders as well as civilian politicians, such as the minister of defense. Its function is to advise the President on matters of policy relating to defense and strategy (Art. 211, 214 of the Ghanaian Constitution).
- The prohibition for military personnel to assume civil offices.
- Special provisions about the power to declare war. Such a declaration can generally be made by the Head of State, but often Parliament needs to approve this decision.
- The prohibition for military personnel to engage actively in politics (i.e. Art. 9 of the Iraqi Constitution).
- In addition, a constitution can provide regulations about the conduct of security forces and general principles for the security forces. For example, Sections 198, 199 of the South African Constitution stipulate essentially the requirement for the military to act in compliance with the constitution.
b) Police

In order to prevent the police from taking the law into their own hands or that they are used by an oppressive government to persecute political opponents, the police force has to be controlled in some way as well. Thus constitutions regularly define the structure of and the command over the police forces as well as their duties and competencies. Because the work of the police often intrudes into the private lives of the citizens, international standards call for a high level of integrity, respect for privacy, respect for human rights and human dignity, transparency and accountability. Moreover, police forces must use force proportional to the circumstances, and use firearms only in extreme situations.\(^{35}\) To comply with these standards and to prevent corruption and nepotism, adequate remuneration and training as well as a fair and impartial recruitment processes have to be provided. For example, in South Africa the constitution obliges the national legislature to enable the police service to discharge its responsibilities effectively, but also contains provisions about the political responsibility for the police and the control of police service by establishing the office of a national Commissioner of the police service (Sections 205-207 of the South African Constitution).

c) Other Security Services

There is a variety of other, more or less secretly operating services such as intelligence services and offices for the protection of the constitution. Nonetheless, people generally should be entitled to assume that their private lives remain private, unless there is some probable cause to suspect them of a crime. However, as far as intelligence services are deemed to be necessary, some monitoring of these services by outsiders is essential. Otherwise the secret services might develop powerful parallel structures that do not safeguard but threaten the constitutional organs of the country and the rights of the citizens. Therefore a constitution not only must define the competencies and duties of such services but also needs to provide for their supervision by parliament, the president or specific control councils.

The South African Constitution, for example, stipulates that any separate intelligence service has to have a head appointed by the President and that either the President or a member of the Cabinet must assume political responsibility for the control of that service. In addition, an inspector, who is appointed by the President and approved by the legislature with a supporting vote of at least two-thirds of its members, has the responsibility to monitor the activities of the service (Section 210 of the South African Constitution).\(^{36}\) The Iraqi Constitution states that the National Security Service “shall be under civilian control and shall be subject to legislative oversight and shall operate in accordance with the law and pursuant to the recognized principles of human rights” (Art. 9 of the Iraqi Constitution).


d) **Emergency Powers**

Emergency powers usually give the executive extensive legislative powers and allow the suspension or restriction of human rights. While there are occasions when such emergency powers are necessary, for example in cases of natural disasters or insurgencies, there is always the danger of abuse. Emergency powers can easily be abused to establish a totalitarian regime, limiting the rights of the individuals and allowing a single leader or a small group to seize power. The danger of such abuse can be addressed in the following ways:

- The reasons for which the state of emergency can be declared should be narrowly drawn, specifying clearly in which situations it can be declared and by whom.
- Any declaration of a state of emergency should require parliamentary approval within a short period of time after the declaration, as should any renewal (perhaps even with escalating majorities).
- Certain rights that cannot be suspended under emergency law should be specified (e.g. the right to life).
- There should be the possibility to monitor the use of emergency powers, either by the courts or by other independent institutions.

6. ** Territory and Symbols**

A sovereign state classically requires a state territory, a state population and state authority. While the territory can be defined geographically, the state population usually defines itself by means of common historical development, ethnic ties, language and culture. Because state power itself is less visible, there are usually symbols representing it. Most constitutions contain provisions about the territory of the state as well as about unifying elements and symbols, like the official language, the flag, citizenship etc.

a) **Territory**

Every state has a demarcated territory which is essentially the physical space in which state authority is exercised. The territories of states are often referred to and described in constitutions. This can be done either by describing the geographical boundaries, by referring to the entities which constitute the state (i.e. existing districts, states etc.), or by referring to the territory regarded by the international community as the territory of the state.

For example, Art. 1 of the Namibian Constitution identifies the country’s territory as the whole of the territory recognized by the international community through the organs of the United Nations and then delineates in detail that this includes certain enclaves as well as the off-shore islands of Namibia. The constitution even identifies the exact location of its southern boundary at the middle of the Orange River.

Especially federal countries often specify their territory by enumerating all the sub-units forming the federation. For example, Art. 1 of the Swiss Constitution contains a detailed enumeration of all the cantons that are members of the Swiss Confederation, thereby specifying its territory.
India does so in the First Schedule of its Constitution, which contains a detailed enumeration of all the Indian states which form the Indian Union. In addition, Art. 1 of the Indian Constitution expands its territory to such territories as may be acquired.

Often, not only federal countries but also countries with a strong form of decentralization which give certain parts of the country a great degree of autonomy want to emphasize that these regions are still part of a unified country. For example, Art. 2 of the Tanzanian Constitution specifies that the territory of the United Republic of Tanzania consists of the whole of the area of mainland Tanzania as well as the whole of the area of the island of Zanzibar.

While the boundaries between states nowadays are generally defined by principles of international law and by international treaties, most borders either have been changed at some point in time or may even be artificially drawn (for example many of Africa’s borders were imposed by the former colonial powers). Thus many countries still claim territories they lost during such processes, but which they believe still belong to the motherland because of ethnic, linguistic or religious ties, for geographical or historical reasons or due to a previous possession. Such claims are called irredentist claims.

Several constitutions contain typical irredentist claims. For example, the Argentine Constitution in the transitional provision refers to the Argentine sovereignty over the Falkland Islands as an integral part of its territory. China includes Taiwan explicitly in its territory in the Preamble of the Chinese Constitution. The South Korean constitution mandates national unification with North Korea (Art. 4 of the South Korean Constitution) and states that the territory of the Republic of Korea consists of the whole Korean peninsula (Art. 3 of the South Korean Constitution).

The Pakistani Constitution contains a provision claiming the state of Jammu and Kashmir (which is a part of India) and regulating this state’s relationship to Pakistan for the case “when the people of the state of Jammu and Kashmir decide to accede to Pakistan” (Art. 257 of the Pakistani Constitution).

However, such irredentist claims in constitutions are mostly of a political nature. If a state actively pursues such claims, for example by supporting secessionist movements in neighboring states, this usually violates the prohibition in international law of non-intervention in another state’s domestic affairs.

b) The People

Every state consists of a community of people; this is an essential element of the state. Thus the constitution may contain some reference to the different communities within the state, be it the sub-units in a decentralized state or the different ethnic groups or clans. Sometimes simply the plurality of communities is acknowledged. For example, Art. 1 of the Sudanese Constitution

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specifically acknowledges the co-existence of culturally, racially, ethnically, religiously and linguistically diverse groups within the country.

As some rights and duties stipulated in the constitution apply first and foremost to citizens of the country, a constitution usually contains provisions about citizenship, specifying who is a citizen, how to become one (for example by birth, by descent, by naturalization or by marriage) and under which circumstances individuals can lose the citizenship (for example by voluntary renunciation or by deprivation by the executive). For instance, the Gambian Constitution contains detailed regulations on this subject, specifying not only how to become a citizen of the Gambia, but also the deprivation and restoration of citizenship (Art. 8-15 of the Gambian Constitution). In addition, regulations about dual citizenship may be adopted (this is the case, for example, in Art. 8 of the Ghanaian Constitution).

In addition, most constitutions try to stipulate certain aspects which are common to all the people in a country, like an official language or a state religion. However, while defining these common features, most constitutions acknowledge cultural differences within their populations and try to protect the cultural characteristics of minorities within the country. For example, Art. 2 of the Afghan Constitution establishes Islam as the state religion, but at the same time stipulates that followers of other religions are free to perform their religious rites within the limits of the provisions of law. Art. 16 of the Afghan Constitution states that from among the languages spoken in the country (Pashtu, Dari, Uzbeki, Turkmani, Baluchi, Pashaei, Nuristani, and others), Pashtu and Dari are the official languages of the state. However, Art. 16 also obliges the state to strengthen the other languages.

Another example is Art. 8 of the Sudanese Constitution which states that all indigenous languages of the Sudan are national languages and shall be respected, developed and promoted while Arabic, as a widely spoken language in the Sudan, and English are established as the official working languages of the national government.

The Indian constitution also contains detailed provisions regarding the languages of the country, such as regulations about the language spoken in the different institution of the Union. Part XVII of the Indian Constitution (Art. 343-351) contains provisions about the official language: Hindi is stipulated as the official language of the Union (Art. 343 of the Indian Constitution), while other languages can be the official language in the states (Art. 345 of the Indian Constitution). However, while calling for respect of the other languages spoken in India, Art. 351 of the Indian Constitution states that “it shall be the duty of the Union to promote the spread of the Hindi language, to develop it so that it may serve as a medium of expression for all the elements of the composite culture of India [...]”.

c) Symbols

To make the abstract idea of the nation more perceptible, there are usually some symbols representing the state as such. These are often also regulated in the constitution. Most common are the national flag; the national anthem; the national emblem; and the public seal (which is used on official documents to ensure their authenticity).
For example, Art. 2 of the Namibian Constitution contains detailed provisions about the National Flag, the National Coat of Arms, the National Anthem and the National Seal. The importance attached to these symbols becomes apparent considering that a two-thirds majority of all the members of the National Assembly is needed for the adoption and any amendment of these symbols.


IV. Specific Elements of a Constitution with Regard to the Special Situation in a Country

Each country has specific issues that need to be addressed. Depending on the history and the social, economic and political fabric of each country, different problems may need to be solved and the constitutional setting should be adjusted accordingly. Such specific problems can vary widely, and can cover topics such as

- ethnic diversity,
- land reform issues,
- reconciliation between former conflict parties,
- disarmament of former conflict parties,
- territorial integrity, irredentist claims and secession,
- the integration of traditional structures and customary law in a constitution.
G. The Structure of a Country

The structure of the state is one of the most fundamental issues, which is generally regulated in a constitution. This means basically that the constitution regulates how the government should function: how many branches and levels of government should exist and how the powers should be allocated among them. In democratic constitutions power is not vested in one single person or institution, but is divided between different institutions. In addition, in some countries the structure of the country is decentralized in some form, so power does not reside in one central government, but some competences are assigned to regional or local powers.

I. The Separation of Powers

In democracies, the structure of the state is based upon the principle of separation of powers which is incorporated in the constitution, as it is considered to be the core element of any rule of law based constitution. It means that the power of the state is divided between different institutions. The horizontal separation of powers means that all the power of the state is divided between three different branches of government, which are the judiciary, the legislature and the executive. This principle was essentially developed by the French political philosopher Charles de Montesquieu, who stipulated it in his famous work “De l’esprit des lois” (“The spirit of laws”).

Horizontal separation of powers:

- Legislative Power
- Executive Power
- Judicial Power

In a federal state a further dimension of separation of powers exists: the vertical separation of powers. This refers to the distribution of powers particularly in countries with some form of decentralization. In addition to the horizontal distribution of powers between different
branches of government, in a decentralized system the powers are further divided between the different levels of government. Thus, the three branches of government do not exist only on the national level of the country, but also on the level of the sub-units. That means there is an executive, a legislature and a judiciary on the national level, but also a separate executive, legislature and judiciary on the state level. In some federal systems state power is also vested in the local level of government.

**Vertical separation of powers:**

<table>
<thead>
<tr>
<th>Federal Level</th>
<th>Legislative Power</th>
<th>Executive Power</th>
<th>Judicial Power</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sub-national Level</td>
<td>Legislative Power</td>
<td>Executive Power</td>
<td>Judicial Power</td>
</tr>
<tr>
<td>Local Level</td>
<td>Legislative Power</td>
<td>Executive Power</td>
<td>Judicial Power</td>
</tr>
</tbody>
</table>

By combining both, the horizontal and the vertical powers, the question arises to what extent the horizontal separation of powers is reflected on all the vertical levels of government. In Germany, for example, a judiciary exists on the federal level as well as on the state level, but there is no judiciary on the local level. Local courts are administered and paid for by the states.\(^{39}\) In South Africa the three levels of government are explicitly foreseen in the constitution: the national, provincial and local sphere of government (Section 40 of the South African Constitution). However, while there is an executive and a legislature at all three levels, a judiciary exists only at the national level which is responsible for all three levels. Thus all courts are organized and administered by the national level.

**Reflection of the horizontal separation of powers on the vertical levels in a federal country:**

<table>
<thead>
<tr>
<th></th>
<th>Germany</th>
<th>South Africa</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>executive</td>
<td>legislature</td>
</tr>
<tr>
<td>National Level</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Sub-national Level</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Local Level</td>
<td>✓</td>
<td>O limited</td>
</tr>
</tbody>
</table>

\(^{39}\) Compare Max Planck Institute for Comparative Public Law and International Law *Manual on the Judicial Systems in Germany and the Sudan* (Heidelberg 2006), p. 3.
II. Checks and Balances

The separation of powers is usually not carried out in its most absolute form. Instead, under most constitutions the different branches of government have to collaborate to a varying degree and to exercise a certain amount of control over each other. The interrelations and balances of the different powers and their mutual control and moderation form a system of “checks and balances”. The term thus refers to a variety of procedural rules that allow one branch to limit another. This means that in most of the cases, when one of the three branches exercises its power, the other two powers are also involved to some extent. Either the powers have to cooperate in certain activities (the legislature passes acts, the President needs to sign them, the rest of the executive has to implement their content) or they control each other (the judiciary scrutinizes whether legal acts are executed correctly; Parliament discusses the performance of the executive and makes it transparent for every citizen). Such a system of “checks and balances” is supposed to restrain the different powers within the state, thus guarding the freedoms of the individual citizen. By avoiding the accumulation of power in one single organ (or even person), none of the different branches of government can become too dominant or even omnipotent. This prevents one branch of government from being able to repress the citizens or limit their freedom excessively. However, “checks and balances” or the separation of powers do not aim only at the protection of the freedoms of the individual citizens. Another aim is the efficient attribution of state functions through the appropriate allocation of competences, which increases the general stability of government. The simplified chart below provides an overview of the usual distribution of competences between the different branches of government:

<table>
<thead>
<tr>
<th>Executive</th>
<th>Legislative</th>
<th>Judiciary</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Operational command of the military (which might include the competence to declare war, often subject to the approval of parliament)</td>
<td>• Debates and enacts laws</td>
<td>• Determines which laws apply to any given dispute</td>
</tr>
<tr>
<td>• Enacts decrees or declarations (for example, declaring a state of emergency) and promulgates lawful regulations and executive orders</td>
<td>• Levies taxes, sets the budget</td>
<td>• Determines whether a law is unconstitutional</td>
</tr>
<tr>
<td>• May veto laws</td>
<td>• Often approves declaration of war / state of emergency</td>
<td>• Interprets the law</td>
</tr>
<tr>
<td>• Might appoint judges</td>
<td>• May start investigations, especially against the executive branch</td>
<td>• Might nullify laws that conflict with a hierarchically superior law, in particular the constitution</td>
</tr>
<tr>
<td>• Has power to grant pardons to convicted criminals</td>
<td>• Might appoint the head of the executive branch (in a parliamentary system)</td>
<td></td>
</tr>
</tbody>
</table>

To enhance the understanding of the different mechanism of the separation of powers / the system of checks and balances, it is necessary to look at examples of existing constitutional arrangements in this field. This will be done in detail in the specific manuals concerning the
three powers respectively. The following section gives only an overview of the relationship between the three powers.

III. The Horizontal Separation of Powers

The following section will take a closer look at the horizontal separation of powers. As the distribution of powers between the different branches of government essentially shapes the functioning of government and the whole political system of a country, a closer look will be undertaken at the presentation of the different branches and their main powers.

1. The System of Government

Depending on the allocation of powers between the different branches of government and their relationship with each other, different systems of government can be distinguished.

- Parliamentary systems of government:

In a parliamentary system the legislature is formally supreme and appoints and controls the executive (government). In this system, it is primarily the parliament which is responsible for providing for a functioning government. Hence the government is dependent on the legislature insofar as parliament chooses the government, which continues to require the legislature’s confidence. The Head of State (the President or a monarch) is more often a ceremonial figurehead, but has little political power, which is vested instead in the cabinet, acting under the Prime Minister. The United Kingdom, Ethiopia, and India are examples of a parliamentary system of government.

- Presidential systems of government:

In presidential systems the legislature and the executive are considered equally powerful and independent of one another. In full presidential systems, the two branches are generally separated, institutionally as well as personally. The separation of powers is thus more pronounced in the presidential system. In particular, the executive does not derive its mandate from the legislature, but is elected separately by popular vote.
In such a system, the President is usually elected directly and is Head of State as well as Head of Government. Although some forms of checks and balances might exist, neither the President nor the Cabinet are generally accountable to the legislature with regard to their political performances. The United States, Sudan and the Democratic Republic of the Congo for instance have chosen the presidential system.

- **Mixed systems**

Mixed or hybrid systems usually include features of both systems, the parliamentary as well as the presidential. Depending on the specific allocation of powers between the legislature and the executive varying forms of semi-presidential (e.g. in France) and semi-parliamentary systems (e.g. in South Africa) exist.

The notion of semi-presidential is used to describe a system where a prime minister and a president share the responsibility for the actual running of the country. Semi-presidential systems differ from a parliamentary system insofar as they are headed by a popularly elected President who plays an active role in political life. In contrast to full presidential systems, the cabinet is responsible to the legislature, which may force the cabinet to resign through a motion of no confidence.

The term ‘semi-parliamentary’ describes a parliamentary system in which the president does not have a merely ceremonial role.

Each of these systems has advantages as well as disadvantages. Whether a system is suited for a specific country depends, among other things, on the national economic, social, cultural and historical context. Such specific circumstances as the homogeneity or diversity of the population, the size of the country, the social and religious structures of society, the traditions and the legal culture of a country influence how a system of government works. Other determining factors are the electoral and the party systems which shape the composition of parliament as well as the functioning of the executive.
2. The Executive

a) Introduction: What is the Executive? What is the Government?

Since many notions in this area are used inconsistently, a clarification of the terminology is necessary. The relevant notions are not fixed and nowhere legally defined. But a discussion should be based on a clear and common understanding of the relevant notions:

- **Government**: the whole governmental system. This includes all branches of government, i.e. the legislature, the executive and the judiciary. However, sometimes government is used to refer to the top executive only, i.e. to the cabinet or the council of ministers.

- **Executive**: only the branch of government which is neither Parliament nor judiciary (negatively defined). Its task is the execution or implementation of laws. Although the notion executive usually refers to the whole branch, sometimes a distinction is needed between the leading political organ (i.e. the President, the Prime Minister and/or his/her cabinet or council of ministers) and the entire bureaucracy (i.e. the sum of all administrative bodies within the country). The distinction is based on their respective political involvement and parliamentary responsibility.

In some countries, however, the President is not only considered to be part of the executive but in his or her function as Head of State also as a part of other branches of government. This is the case for instance in Kenya, where the President is considered to be the head of the executive branch of government as well as part of the legislative branch, by way of his/her right to initiate legislation, veto legislation and to officially promulgate laws. Thus Art. 30 of the Kenyan Constitution on the exercise of legislative power states that “the legislative power of the Republic shall vest in the Parliament of Kenya, which shall consist of the President and the National Assembly”. Similarly, the Sudanese Constitution gives the
President important functions within the legislative process. While the Sudanese President is clearly a part of the executive, he has the right to initiate laws and has to assent to them (Art. 58 (1) (h) of the Sudanese Constitution). In case he withholds his assent to a law, his objections can only be overridden by a two-thirds majority in both chambers of the legislature (Art. 108 of the Sudanese Constitution).

- **Administration**: yet another word for executive. As far as executive is used to refer to the political officials at the top of the executive, the notion of administration refers to the whole system of administrative bodies.

b) **Functions of the Executive**
The most visible element in the daily operation of the state and its governance is the executive, as it is responsible for the routine management of the country. Its main function is to implement and enforce the laws enacted by the legislature. The essential functions of the executive are:

- to execute the laws made by parliament;
- to formulate laws for the approval of the legislature;
- to prepare the budget for the approval of the legislature and determine the rates of taxation and other revenue-raising measures and the expenditure of public money, as well as the allocation of state resources;
- to handle foreign policy and relations;
- to exercise powers of prosecution;
- the operational command of the military;
- to appoint individuals to key offices in the public service.

Depending on the system of government, the executive in addition may have some of the following powers:

- to dissolve the legislature in cases of dissent and blockage;
- to veto bills;
- to issue legislation during a state of emergency;
- to issue regulations and executive orders;
- to appoint people to other important offices within the other branches of government, for example judges.
c) Different Types of Government

Depending on the system of government, the powers of the executive as well as its structure may vary:

- The executive in a presidential system

In a presidential system, the head of the executive is the President (who is often also the Head of State, exercising additional functions, including legislative and judicial ones). As he/she is directly elected by popular vote his/her legitimacy is very strong. Since the legislature is not involved in his/her election, the office of the President is generally independent from Parliament. The President thus can usually only be removed by a special procedure (impeachment), which not needs not only a qualified majority in parliament, but often also involves the judiciary. The President usually appoints his ministers, but often the legislature has to approve these appointments. Examples for this system are the United States of America and Nigeria.

- The executive in a parliamentary system

In a parliamentary system the Prime Minister or Chancellor is the head of the executive. He/she is elected by the majority in Parliament and is usually the head of the majority party in Parliament. The legitimacy and power of the Prime Minister thus rests on his/her ability to form a stable majority in Parliament. The Parliament, having elected the Prime Minister, also has the power to withdraw its support and remove him/her from office. Hence, the Prime Minister and his/her administration always depend on the support of a majority in Parliament. Next to the Prime Minister there is often a (mostly symbolic) President as Head of State. Examples for this system are Ethiopia and India.

d) Composition of the Executive

Regardless of whether the executive is elected by Parliament or directly by the people, there can usually be only one winning side. The losing political parties usually form the opposition in Parliament, but are not represented at the top level of the executive. In a homogenous society this may be acceptable, because there is a realistic chance that the losing party will win the next elections. But in more fragmented societies, minorities may never have the chance to participate in the exercise of executive functions. In these cases, an inclusion of all groups and a fair representation of minorities not only in Parliament, but also within the executive, may be accomplished through power sharing in the cabinet, or even through the establishment of a collective Head of State/Government. The composition of the national executive, i.e. especially the nomination of the ministers, can follow two different models:

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40 Switzerland offers an exception in this regard: although it has a parliamentary system where Parliament appoints the executive (Federal Council), the latter is not dependent on Parliament.
• Composition along party lines

The candidate who has been elected as Head of Government chooses his/her ministers mainly or only along party lines. Here, the origin, ethnicity, language and religion of a minister do not matter, but only his/her political affiliation. Examples for this approach can be found in India, Germany and the USA.

• Power sharing

In this model, the composition of the government is not left up to the elected Head of Government /state, but is stipulated in the constitution. The government thus can be composed of representatives from different regions or provinces, from different language groups or from different religious groups.

For example, the constitution of Fiji provides for power sharing in the government by all parties that have ten per cent or more of parliamentary seats (Art. 99 of the Constitution of Fiji). Another example is Switzerland, where the different cantons have to be represented in the Federal Council (Art. 175 of the Swiss Constitution).

Power sharing is sometimes used as a means to manage future relations between the opposing parties after an internal armed conflict. It is usually much easier to share power within a parliamentary system than in a presidential system, for negotiations and alliances among political parties are much more common in a parliamentary system. In addition, in a presidential system the executive power is usually vested in one person, the President, while the ministers have mostly advisory functions. The Sudanese Constitution tries to overcome this predicament by establishing a Presidency consisting of the President and two Vice-Presidents representing the different parts of the country (see Art. 51 and 62 of the Sudanese Constitution).

However, governments based upon power-sharing agreements are often difficult to operate as recent experiences, for example in South Africa or Bosnia-Herzegovina, have shown. Therefore, power-sharing models may serve primarily to consolidate peace after times of conflict for a transitional period, rather than to be established permanently.\(^{41}\)

e) The Administration

It is usually the administration that runs the everyday business of a country, executing the decisions of the legislature and the government as such. To ensure the quality and reliability of the administration, some constitutions contain provisions about its public administration. For example, Sections 195-197 of the South African Constitution encompass the basic values and principles governing public administration and establishes a Public Service Commission. In addition, some countries try to achieve a proportionate representation of different regions or provinces, different language or religious groups within their civil services. Art. 136 of the Sudanese Constitution, for instance, stipulates that “the national civil service shall be

representative of the people of Sudan” and that there “shall be no discrimination on the basis of religion, ethnicity, region or gender”.

3. The Legislature

a) Functions of the Legislature

The main responsibility of the legislature is to make laws. However, in a representative democracy the legislature has further, equally important functions. While there are numerous differences between the responsibilities and powers of the legislature in a presidential and a parliamentary system, the main functions remain the same:

- To enact laws;
- To represent the people: the members of Parliament are representatives of the people, that means that they may not follow their personal interest but are expected to promote the interest of their constituency or of the people in its entirety;
- To approve the budget: the authorization and supervision of the raising and the spending of the public revenue is one of the oldest function of parliament (“no taxation without representation”);
- To hold the executive accountable and monitor it, mainly through examining the members of the government, setting up committees of inquiry etc.

Depending on the system of government, the legislature in addition may have some of the following powers to control the executive:

- To appoint and dismiss the Prime Minister (in parliamentary systems);
- To impeach the President;
- To approve international treaties entered into by the state;
- To approve other appointees (i.e. ministers, judges, ambassadors etc.).

In a system of separated powers the legislature may enact the laws, but it may neither interfere with their implementation nor administration, which is the task of the executive power, nor with their interpretation in the adjudication of disputes, which is the exclusive competence of the judiciary.

b) Unicameral and Bicameral Systems

The legislature may be unicameral, which means that only one legislative body exists at a given level, or bicameral, which means that there exist two chambers involved in the legislative process at the same level of government.
In a bicameral legislature the two separate chambers work together to some degree but have different duties and powers. Their role in the legislative process is usually regulated in the constitution.

There are different types of bicameral systems:

- **In federal states**

In a federal state, the second chamber of a bicameral legislature may be established to represent the level of the sub-units on the national level, thus safeguarding regional interests of the sub-units. This aspect is presented in detail in section G.IV.4.b. of this manual.

- **In unitary states**

A second chamber may also exist in unitary states. There it may be used to represent traditional power groups (such as, historically, the aristocracy in the United Kingdom) or simply different groups of society (e.g. in Burkina Faso or in Ireland). The involvement of the second chamber in the legislative process, its powers and duties may vary, as will be further shown in a separate, more detailed manual on the three branches of government.

c) **Composition of the Legislature**

Most drafters of a constitution try to achieve a representative and well-balanced composition of parliament. For that reason, some constitutions contain special provisions about the composition of parliament, for example a certain quota for women or representatives of ethnic minorities in parliament. Apart from that, the composition of the legislature largely depends on the electoral system being used. The whole functioning of the democratic system of a country and particularly its party-system are fundamentally shaped by the applicable election laws. Since electoral law and legal provisions covering political parties will be a topic of a separate manual, this section will only outline the most basic features of the relevant issues.

- **Majority system**

In a majority system the candidates or parties which have won most votes are declared the winners. All votes that have been cast for other candidates or parties do not carry any consequences. A majority system thus produces clear results, meaning that there are either winning or loosing parties. In the context of Parliament this means that there is a clear majority, which can decide easily without having to rely on coalitions. This facilitates the formation of a government in a parliamentary system and eases the decision-making process within the legislative branch in a presidential system. Because the majority in Parliament can make their decision easily this system also tends to produce more stability. Furthermore, because in a majority system there is only one elected Member of Parliament per constituency, the link back to the voters is stronger, leading to more transparency. In addition, this strong connection to the voters back home facilitates the representation of regional interests and greater accountability. At the same time, such a system favors personal voting, where the voters choose a person to vote for instead of a party.
On the other hand, in the majority system a great part of the votes, those not given to the winning party, are lost. This in effect makes it hard for small parties to remain on the scene, since it gives the advantage to parties with a broad base. A majority system thus often leads to a two-party system, since either one or other of the big parties comes to power after elections. Smaller parties are usually underrepresented in this system since they cannot form part of the government. This makes it difficult to represent all parts of society. Minorities, which do not have a forum in either of the two main parties, are excluded from representation.

The majority system is seen to work best in societies that are homogenous and have a high degree of social cohesion. Decisions are made on the basis of the majority and the minority must accept them. This system is only stable and perceived to be fair, if the minority shares the same fundamental values and principles as the majority, and if the minority also has a chance of at some point winning elections and taking part in governing the country.

- **Consensual system**

The consensual system is based on the proportional electoral system. In the proportional electoral system the share of votes is translated into a share of seats in parliament. For example, a party which has gained 10% of the votes would receive 10% of the seats. Conversely, in a majority rule system, it might with the same percentage of votes receive no seat if its candidates have not reached the majority in any of the electoral districts.

In the context of Parliament, the notion consensual means that there is no overwhelming majority of one party that basically makes decisions all by itself. Rather the different parties are represented proportionally, thereby making it necessary for the Members of Parliament representing different parties to reach compromises. This usually leads to the formation of coalitions, where (typically) the party that has received the highest percentage of votes works together with others to form a majority that eventually elects a functioning government.

A proportional electoral system usually leads to more representative results. Votes are not lost, since it is not only the winning party that makes it into Parliament, but also small parties can gain some seats in Parliament. Thus usually more than two parties flourish in this system, which are then represented in the parliamentary assembly proportionately and take part in the decision-making process in Parliament. Thus this system is more inclusive, meaning not only the majority but most groups of society are represented. This system makes it harder to vote for single representatives, since the votes are distributed proportionally to parties. Voters therefore tend to vote according to their preferred party program instead of for an individual candidate.

- **Mixed systems**

Mixed electoral systems combine elements of a majority system with elements of a system of proportional representation. Thus a combination of two electoral systems is used simultaneously. The voters therefore have to vote for two kinds of representatives: a first set of representatives is elected under a majority system, a second set under a proportional representation system. Mixed electoral systems combine the advantages of the majority and the proportional representation system. On the one hand, they have directly elected candidates bound to their constituencies; on the other hand, they ensure a more equitable representation
of smaller parties, minorities and more women through the candidates elected by way of party lists.

- Constitutional provisions

In many countries the electoral system is not explicitly regulated in the constitution itself. Especially the details of the electoral system are usually left to be regulated by special electoral laws (i.e. Art. 54 of the Angolan Constitution or Art. 101 of the Constitution of the Democratic Republic of Congo).

Other constitutions stipulate general principles of a specific electoral system.\textsuperscript{42} For example, the Nigerian Constitution foresees that the election of the Senators and the members of the House of Representatives will be based on the majority system. Art. 77 of the Nigerian Constitution stipulates the direct election of Senators and Representatives, one in each Senatorial district or Federal constituency.

The consensual system on the other hand is stipulated in the South African Constitution for the election of the members of the National Assembly. Section 46 of the South African Constitution states that the members of the National Assembly are elected in terms of an electoral system that “results, in general, in proportional representation”.

Only few constitutions contain detailed regulations of elections, for example the Thai Constitution. There, the constitution provides explicitly for a mixed system to be used to elect the members of the House of Representatives. Section 93 of the Thai Constitution stipulates that 5/6 of the members of the House of Representatives shall be elected on a constituency basis and 1/6 shall be elected on a proportional basis. Section 94-103 then contain more details about the elections, such as the determination of the number of members of the House of Representatives in each constituency, the determination of constituencies, the lists of candidates to be prepared by the parties etc.\textsuperscript{43}

4. The Judiciary

The third branch of government in a system of horizontal separation of powers is the judiciary. Its principal functions are:

- The interpretation of the laws in controversial cases;
- The application of the law for the decision of legal disputes between citizens;
- The decision in legal disputes between citizens or the state in public law cases;
- The determination of the guilt or innocence of an accused person in a criminal law case; and
- The guarantee of a fair trial to all parties in all procedures before a court of law.

\textsuperscript{42} However, in this regard it should always be kept in mind that different electoral systems may be used for different institutions.

In addition, the judiciary may be assigned the role of an arbiter, guarding and interpreting the constitution in constitutional law disputes between the citizens and the state, or among organs or institutions of the state.

a) Judicial Independence

To protect the rule of law and the supremacy of the constitution it is crucial that the judiciary be independent of the other two branches of government. This judicial independence comprises two main aspects: the institutional independence of the judiciary and the individual independence of the judges.

• Institutional independence

Because of the principle of the horizontal separation of powers, no other branch of government may interfere with the functions of the judiciary. Naturally, the judiciary is bound to apply the statutory law passed by Parliament as well as certain administrative regulations issued by the executive within its competences. However, once these provisions stand, neither the legislature nor the executive may get involved in their application by the courts. Encroaching on an ongoing court case either by the executive or legislature is hence incompatible with the institutional independence of the judiciary.

In addition, it is important that the financial and administrative independence of the judiciary be ensured as well. Art. 123 of the Sudanese Constitution, for example, stipulates explicitly that “the National Judiciary shall be independent of the Legislature and the Executive, with the necessary financial and administrative independence”.

To ensure this financial and administrative independence more and more constitutions either provide for some involvement of the judiciary itself in the administration of the courts and the budgetary decisions (for example in Afghanistan or in Uganda) or establish an independent institution which is responsible for these tasks (for example a Judicial Service Commission as in Sudan).

• Individual independence

The notion of individual independence is guided by the idea that judges should be able to decide cases solely based on the law and facts, without letting the media, politics or personal or other concerns sway their decisions, and without fearing penalty in their careers for their decisions. Constitutions usually contain specific provisions to ensure that each individual judge is able to render his/her judgments “without fear or favour”.

The selection of judges: Judges can either be elected or appointed. While the elective method guarantees democratic legitimacy for the judges, it is often controversial because the selection is considered to be rather politically motivated than based on the judicial merits of the individual judge. Thus many countries prefer the appointive method, where the judges can be appointed in adherence to objective selection criteria. The institution responsible for the appointments can be the government (e.g. in Russia) or the legislature (e.g. in Ethiopia). However, to strengthen the independence and objectivity of the selection process more and
more countries involve an independent commission, such as a Judicial Council, in the selection process (e.g. in South Africa or Italy).

**Tenure:** To ensure the judges’ independence it is important that the individual judges do not depend on the body that nominated them. This is often believed to be best attained by an extended tenure. Thus many countries appoint the judges permanently until a mandatory retirement age is reached (e.g. in Nigeria or in the Gambia). However, others require a re-appointment after a period of time (e.g. in Korea).

**Disciplinary action:** While it is crucial that the judiciary be independent, judges are still humans and therefore fallible. Hence it is also important that judges can be held accountable to some degree. However, to prevent the possibility that a judge might be punished for politically disagreeable judgments by dismissing or transferring him/her or by reducing his/her salary, the requirements for such disciplinary actions are often regulated in the constitution. For example, judges can usually only be dismissed on grounds of serious misconduct or incapacity before the expiration of their term. To further ensure the judicial independence it is often the responsibility of an independent Judicial Council to decide about disciplinary actions against judges.

**Remuneration:** In addition, an adequate remuneration should be provided for the judges as a precaution against corruption. As long as adequate salaries are paid, the judges are less inclined to rely on bribes or other sources of income to secure their living.

b) **The Judiciary as Guardian of the Constitution**

Another important task of the judiciary is to ensure that the constitution is implemented and that the other branches of government act within the limits of the constitution. While all courts protect the constitutional rights of citizens and other persons, there is usually one court in every country which is the highest authority in constitutional law disputes. Many countries have set up a special Constitutional Court to review the constitutionality of acts of the other two branches of government and to settle constitutional law disputes. In other countries the Supreme Court is the highest judicial body, which is also the last instance for constitutional law questions. Depending on their competencies as defined in the constitution, these courts may

- Annul laws that contradict the constitution;
- Interpret the constitution;
- Settle constitutional disputes between different institutions of the state or between individuals and the state.

The case law of such a court substantially shapes the legal order of the country by providing guidelines on how to interpret the different values and principles contained in the constitution.

c) **The Courts**

The working of the judiciary is determined substantially by the organization of the country’s court system. Most constitutions thus contain provisions about the organization of the judiciary and the courts.
• **The Supreme Court**

To provide the possibility of judicial review, the court system is usually structured hierarchically with a Supreme Court at the top. Usually a constitution stipulates the powers of such a court, its jurisdiction and its composition. Often there are special regulations about its judges, their necessary qualifications, appointment, tenure and terms of service.

• **Other courts**

The higher courts are usually established by the constitution itself, while the setting up of lower courts is left to the legislature. For example in Uganda the constitution establishes the Supreme Court, the Court of Appeal and the High Court of Uganda, whereas it is up to Parliament “to establish by law such subordinate courts as it deems necessary” (Art. 129 of the Ugandan Constitution).

• **Specialized courts**

In some constitutions different courts with special jurisdictions are established for different areas of law, for example administrative courts, military courts, financial courts etc. Many countries have a constitutional court which is specialized on constitutional law.

In Algeria, for example, the constitution establishes the following specialized judicial bodies: An Audit Court with jurisdiction for matters concerning the state’s finances (Art. 170), a Council of State with jurisdiction for administrative cases (Art. 152), a Tribunal of Conflicts for the regulation of conflicts concerning the competence between the Supreme Court and the Council of State (Art. 152) and a High Court of State with jurisdiction for crimes committed by the President (Art. 158). In addition, there is a Constitutional Council “to watch over the respect for the Constitution” (Art. 163).

In addition, courts specialized in the application of Sharia or customary law may be established. This has been done, for example in Nigeria, where the establishment of specialized Sharia and Customary Courts is stipulated in the constitution (Art. 260, 265, 275 and 280 of the Nigerian Constitution).

The Constitution of Nigeria provides for Federal and State Courts, as well as Election Tribunals. At the top of the Judiciary is the Supreme Court.

Next to the courts of the common law system, the Nigerian Constitution also provides for Sharia Courts and Customary Law Courts. On the federal level, the constitution provides for the government to establish a Federal Sharia Court of Appeal. However, the government has not established such a court since it remains politically controversial. The highest appellate court for Sharia law remains the Supreme Court manned by common law judges who need not have and usually do not possess any formal training in Sharia law. On the state level the court system includes Sharia courts. In the year 2000 the 12 northern Nigerian states decided to reintroduce and enforce criminal aspects of the Sharia legal system. The constitution provides that states may establish courts based on Sharia law in Art. 175. Adherence to Sharia criminal law is compulsory for Muslims in some states and optional in others. In Zamfara State, a Sharia court must hear all criminal cases involving Muslims. Other states, including Niger and Kano, that
utilize the Sharia legal system permit Muslims to choose common law courts for criminal cases. While the constitution (Section 262.2 and 277.2) technically does not permit non-Muslims to consent to Sharia jurisdiction, in practice, non-Muslims have the option of submitting to Sharia jurisdiction when the penalty under the Sharia is less severe, such as paying a fine rather than a jail sentence under common law. Defendants have the right to challenge the constitutionality of Sharia criminal law through the common law appellate courts. In this respect no challenges with adequate legal standing has yet reached the common law appellate system.

Apart from the common law and Sharia courts the Nigerian Constitution provides for Customary Law Courts that exist in many states. They have civil jurisdiction in cases of family law and criminal jurisdiction in specific areas. They are under the control and supervision of the Minister of Justice of the respective state. Art. 280 of the Nigerian Constitution establishes a Customary Court of Appeal for each state. Furthermore Art. 265 of the Nigerian Constitution establishes the Customary Court of Appeal of the Federal Capital Territory, Abuja.

IV. The Vertical Separation of Powers

In the following section, this manual introduces the constitutional concept of the vertical separation of powers. As already referred to above, the separation of powers in a democratic state that follows the rule of law comes in two dimensions: horizontally, between the different branches of government; and vertically, between the different levels of government. The main advantage of power sharing between different levels of government is that government gets closer to the people. Political, cultural, religious or economic interests and differences among different geographic areas within a given country can thus be better addressed. Furthermore, the opportunities for the citizens to participate in political decision-making are increased. Lastly, the checks and balances between the different levels of government may enhance the control of the central decision-makers and may protect against corruption and tyranny. The most common options to guarantee the vertical separation of powers are decentralization and
federalism. Being aware that the issues of decentralization and federalism are a vast area of constitutional law, this manual only provides insight into some of their most relevant aspects. The detailed study of vertical separation of powers is reserved to a further workshop and corresponding manual.

1. The Notion of Decentralization

The term “decentralization” can be used in two different ways: in a broader or a more narrow sense.

a) Decentralization as a Broad Concept

Quite often, the term decentralization is applied to describe legal and political structures that distribute power territorially within a state. Understood in this broad sense, the notion of decentralization encompasses confederations, federations and decentralized unitary states, since all of these systems, in one way or the other, distribute governmental powers over at least two levels.

b) (Administrative) Decentralization

In a narrower sense, the term “decentralization” describes a form of administration within a unitary state. Using the term “decentralized state,” a person may refer to a federal system, with the broad concept of that term in mind, at the same time another person might think rather of the administrative structure within a unitary state. Whenever the term “decentralization” is applied in this manual, it is used in the narrow sense.
2. The Legal Characteristics of a Confederation, a Federal State and a Unitary State\textsuperscript{44}

a) Confederate Systems

• Definition

A confederation is a union of equal, independent and sovereign states that retain their status as autonomous states in international law and therefore remain separate states in the perception of the international community.

\begin{itemize}
  \item **Confederal System**
  \begin{itemize}
    \item States are represented at the central unit. This means that confederate legislation needs to be transformed into internal legislation in its member states in order to be binding on the citizens of the member states and enforceable in the national court systems.
    \item The central unit lacks an independent fiscal or electoral base.
    \item Confederations are often based on agreements for specific tasks and the common government may be completely carried out by delegates of the states.
  \end{itemize}
\end{itemize}

\textsuperscript{44} Max-Planck-Institute for Comparative Public Law and International Law Manual on Different Forms of Decentralization (2\textsuperscript{nd} edition Heidelberg 2007), pp. 3.
• **Examples**

**Benelux Economic Union**

A current example for a confederation is the *Benelux Economic Union* between Belgium, the Netherlands and Luxembourg. This confederal union was founded in 1958 to coordinate certain governmental powers among the three member states with regard to a common economic market and a common trade policy. Since today all three states are members of the European Union, the functions of the Benelux Union have become less significant. Nonetheless, it continues to provide common regulations for trademarks and design standards for the three states. Those regulations are enacted by a Council of Ministers of the Benelux Economic Union, consisting of the responsible national Minister in the respective field the regulation deals with. The regulations enacted by the Union still need to be implemented by the national parliaments to become national law within the member states.

**The Former Swiss Confederacy**

Despite its name, the *Confoederatio Helvetica* (Switzerland) is not a confederation anymore since, today, sovereignty is shared between the centre and the states (called Cantons) and the people directly elect both the government of the centre and the state level. However, the name of today’s federation goes back to the former structure of a confederation between the Swiss cantons: The Swiss Confederacy was founded in the year 1291, when three cantons concluded a treaty and created a defense union combined with a system of conflict arbitration among the cantons. The union was intended to prevent outside dominance and guarantee a balance of power within the confederacy. Other cantons joined by concluding further treaties with the union, so that a confederation based on a treaty system developed. Later, in order to withstand pressures, both external (invasion by France under the regime of Napoleon I in 1798) and internal (civil war among protestant and catholic cantons in 1847) the people of the cantons of Switzerland adopted a federal constitution in 1848.
**United Arab Emirates**

Some confederal elements can also be found in the Constitution of the United Arab Emirates (UAE). Here, the Supreme Council of the Rulers is the highest federal authority, and has both, legislative and executive powers. It is not an elected institution but consists of the traditional rulers of the constituent Emirates (Emirs) who together decide on Union matters like the appointment of the President and the Vice-President of the Union. Since the emirs derive their status from their position within the emirates, this gives the federation a confederal character. Nonetheless, the constitution refers to the structure of the state as a federal one (Art. 1 UAE Constitution). The Emirates are not considered to be independent states anymore. To some extent only the most populated emirates, Abu Dhabi and Dubai, are sovereign since they have a veto-power and thus can effectively block decisions within the Supreme Council of the Rulers (Art. 49 UAE Constitution).

b) **Federal Systems**

- **Definition**

Federalism is defined as “an institutionalized division of power between a central government and a set of constituent governments, variously denominated as States, Regions, Provinces, Länder or Cantons, in which each level of government has the power to make final decisions in some policy areas but cannot unilaterally modify the federal structure of the state.”

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• **Structural characteristics of a federal state**

Certain basic features are typical for a federal state:

- There are at least two levels of government, i.e. the federal level and the state (sub-unit) level, each in direct contact with its citizens. Hence, citizens have to elect two distinct governments.

- Both central government (the federal level) and regional government (the sub-unit level) possess a range of powers, which the other cannot encroach upon. These include some degree of legislative and executive authority and the capacity to raise revenues and thus a degree of fiscal independence.\(^\text{48}\)

- The sub-unit level is represented within federal decision-making institutions, usually guaranteed by the specific legislative structure of a federal Second Chamber.

- The responsibilities and powers of each level of government are defined in a codified or written constitution that neither level can alter unilaterally.

- An arbitration mechanism, in the form of a supreme or constitutional court or a referendum, is provided to resolve disputes between the federal level and the sub-units level.

• **Examples**

**The South African Constitution:**

Even though, the South African Constitution avoids the term federalism, the constitution of 1996 has a strong federal character. Section 40 states that the government “is constituted as national, provincial and local spheres of government, which are distinctive, interdependent and interrelated”. 9 Provinces were established, which are equally represented in a second chamber, the so-called National Council of Provinces. The Provinces are involved in the legislative process on the national level through the National Council of Provinces as the Upper House of the National Parliament (Sections 74 and 75). Legislative powers are distributed among all three spheres and cannot be taken from the national or the provincial sphere without their respective consent since amendments to the pertinent constitutional provisions require at least a majority of 75 per cent of the votes in the first chamber of Parliament, the so called National Assembly, together with a majority of at least six provinces in the National Council of Provinces.

The Indian Constitution:

Art. 1 of the Indian Constitution stipulates that India is a union of states. Thus, a federal system is established, which, today, after the formation of new states comprises 28 constituent states and 7 union territories having a special status. The union and the states have parliaments with cabinet governments with specific responsibilities at both levels. The states are represented at the level of the union through a second chamber, the House of States and thus are involved in the legislative process at the level of the union. The members of the House of States are elected directly by the people of the states on the basis of proportional representation. Together with the elected members of the first chamber, the House of the People, and the elected members of the legislatures of the individual states, the elected members of the House of the States form an Electoral Assembly which elects the President of the union. An amendment to the Indian Constitution can be initiated only by a bill of parliament which can be introduced in either House of Parliament and has to be passed in each House by a majority of the total membership of that House. Additionally, the amendment procedure also requires ratification by at least one-half of the legislative assemblies of the states.
The Nigerian Constitution:
The “federal character” of the country is enshrined in the new Nigerian Constitution of 1999. Section 14(3) of the Nigerian Constitution states that the composition of the government of the federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity. Section 2(2) of the Nigerian Constitution states that Nigeria is a federation consisting of 36 states and a Federal Capital Territory. The legislative powers of the Federal Republic of Nigeria are vested in a National Assembly, consisting of two chambers, namely the House of Representatives and the Senate. The Senate consists of three Senators from each state and one from the Federal Capital Territory, Abuja, and thus guarantees the participation of the states in the legislative process on the national level. Section 9(2) of the Nigerian Constitution states that an act of the National Assembly for the alteration of the constitution “shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the states”.

c) Unitary Systems

A unitary state is a state or country that is governed as a single unit. In a decentralized form of a unitary state, governmental power may nonetheless be (even constitutionally) transferred to lower levels. However, in contrast to federal systems, the central government can unilaterally create, withdraw or modify the powers of any sub-unit. There are several grades of decentralization: de-concentration, delegation and devolution.
• **De-concentration**

As the weakest form of decentralization, de-concentration is a geographical concept. Governmental officials exercising an administrative function are reallocated from one or a few locations to several or many locations.

![Forms of Administrative Decentralization in an Unitary State](image)

**Deconcentration**

The two sided arrow and the same color of the central circle and the other dots shall highlight the identity between the central agency / institution and its dependences.

• **Delegation**

As a more extensive form of decentralization, delegation involves the assignment of defined decision making powers by a superior authority to a subordinate one. The superior authority is entitled to override the decisions of the subordinate, and ultimately remains responsible for the exercise of power. Depending on the tasks delegated, the subordinate authority may also have some discretion in decision-making.
Forms of Administrative Decentralization in an Unitary State

- Devolution

As a strong form of decentralization, devolution involves the transfer of decision-making powers from a superior to a subordinate individual or agency, but in this case the subordinate is directly answerable to some authority other than the superior, usually the local electorate. Once devolved, power is exercised independently of the superior, who cannot override the subordinate’s specific decision. However, the superior can still unilaterally revoke the transfer of power to the lower level.

3. Decentralization in Unitary States

Most contemporary states are governed as unitary states. This does not mean, however, that they are governed merely by the centre. In so called unitary systems many administrative powers are also exercised on lower levels by sub-national authorities, whether regional or local. Nonetheless, the sub-national authorities may design policies and implement them only if the centre allows them to do so. In unitary systems, sovereignty lies exclusively with the central government. The location of sovereignty, however, is rarely an adequate guide to the political
realities and a unitary government is not necessarily centralized in its operation. Although the final responsibility may be with the central government, many state functions tend to be exercised on lower levels (regional or local) which are closer to the people and their needs. Traditionally, the functions of local governments are two-fold: providing local public services and implementing national welfare policies.\(^{49}\) Thus typical competences are economic development, local planning, social assistance, social housing, cemeteries, fire service, libraries and primary education. However, one has to bear in mind that sub-national public authorities in unitary states can operate and fulfill the above named tasks only within the limits of the powers that are assigned to them by the centre. Therefore the workability of decentralization depends on the good will of the unitary central government, instead of relying on existing constitutional divisions of power. In general, there are two different systems of central-local relations to be identified in unitary state systems: The dual and the fused system.

a) Dual System

Under a dual system, local governments retain freestanding status. This means, they are empowered to create their own internal organization and to employ staff on their own conditions of service. Thus, a formal separation of central and local government is maintained and although the centre is sovereign, local authorities are not seen as part of one single state government. The local level of government exercises the delegated powers and functions rather independently from the centre. However, the centre retains the power to decide finally which powers and functions these are.

Traditionally, the United Kingdom is regarded as an example of such a dual system. This characterization became less pronounced during the centralization-phase of the 1980s and early 1990s but rebounded in the process of devolution, starting in 1998, by introducing devolved governments to Scotland, Wales and Northern Ireland.

Another example for such a dual system is Uganda. The Ugandan Constitution of 1995 devolved responsibilities and powers to the local government under a dual system. The Local Government Act of 1997 enhanced this form of decentralization by giving authority to local councils at the sub-county level to raise revenues and initiate development projects. Fiscal decentralization has by now accompanied the decentralization of responsibilities. Today, sub-counties may retain about two-thirds of the revenue collected within their area.

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b) Fused System

Under a fused system, by contrast, central and local authorities are joined in an office such as the prefect. This tends to be a central appointee who oversees the administration of a particular community and reports to the central level, normally the Ministry of the Interior. A prefectural system signals central dominance by establishing a clear unitary hierarchy running from national government through the prefect to local authorities.

France is the classic example of this fused approach. Established by Napoleon early in the 19th century, the current system consists of 96 departments, each with an elected department assembly as main sub-national political body and its own prefect appointed by the central level of government to oversee the conduct of administration on the level of the departments. In practice, although the prefect is sent by the central government, he/she must cooperate with the local councils rather than simply oversee them and is, today, as much an agent of the department as of the centre. In this sense, he/she represents views upwards as well as transmitting orders downwards. This system has often been imitated, primarily in states that had been colonization by France, but also in many post-communist states.

Another example for a fused system is Morocco. Since the 1960s, the Moroccan government has assigned certain management and decision-making functions to the local level. The process has by now taken on the form of moderate devolution. However, while the sub-national authorities can already exercise a number of legislative and administrative powers, the central government still limits the resources allocated to the sub-national governments. In addition, the local entities have only a limited degree of autonomy in the allocation of their resources since under the fused system in Morocco they are under the direct authority of the Ministry of the Interior.
4. Decentralization in Federal States

a) Two Dimensions of Power Sharing in Federal States

To fully grasp the idea of power sharing in a federal state one has to look at both dimensions of power sharing (vertical and horizontal) and at their interplay. As already pointed out above, both dimensions of power sharing pursue the same objective, namely to prevent a concentration of power that can lead to arbitrariness, tyranny, loss of individual freedom or inefficient government.

b) Distribution of Powers in a Federal State

- Distribution of Legislative Powers between Federal and State Level

Constitutions normally assign competencies to the different levels of government in schedules, tables or annexes. These schemes list competencies for the national, the sub-national and often also the local level of government. Usually, the principle guiding the assignment of competences is that the level which is most suited for dealing with an issue should have the power to legislate with respect to it. Some legislative competencies are assigned exclusively to one level. Among them one usually finds e.g. competencies concerning national currency or passports. Conversely, the employment conditions for civil servants of sub-units are normally the exclusive competence of these sub-units. Other legislative competencies are assigned to several levels of government. One level, for example the national level, can thus regulate a subject matter as long as another level does not. In this case, constitutional law scholars talk about concurrent competencies. Of course, difficulties arise when several levels want to use their concurrent legislative competences with respect to the same subject matter. In this case, certain constitutions give one level of government (often the national one) priority over the other level. In shared systems, conversely, both levels of government can regulate at the same time. Only in cases of a direct collision between the regulations does it have to be determined which legislation should prevail. This determination is made on a case by case basis according to certain principles listed in the constitution (see e.g. Sudan Schedule D and F of the Sudanese Constitution). Legislative competencies can also appear as framework competences: This means
that a federal framework law gives a general outline for the regulated matter, and subsequent state legislation regulates the details. Some constitutions contain a provision assigning residual powers for matters which the constitution has not expressly assigned to a specific level. Such matters are either assigned to the central level (e.g. Art. 248 Indian Constitution), the sub-units (e.g. in Art. 1 Sec. 8, 10th amendment of US Constitution) or flexibly according to the nature of the matter (Sudan, Schedule E of the Sudanese Constitution; South African Constitution).

**Vertical Separation of Powers**

<table>
<thead>
<tr>
<th>Sets of Laws</th>
<th>National Laws (enacted by the National Legislature)</th>
<th>State Laws (enacted by the State Legislatures)</th>
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</table>

- **Distribution of Executive Powers between Federal and State Level**

Federal constitutions also determine which level has the power to implement the laws, thereby transferring the competence to govern directly the conduct of the citizens and to influence the way laws are understood and applied. The executive power can be linked to the legislative one. In that case the level of government that has made a law implements it (legislative federalism). Examples can be found in the USA or in Nigeria:

**Legislative Federalism**

In other countries, most legislation, including national legislation, is implemented and administered by the sub-level (administrative federalism). This approach has been followed, for instance, in South Africa and Germany.
• Distribution of Judicial Powers in a Federal System

Federal systems have to decide what kind of court system should be created in order to guarantee an effective and transparent way of adjudicating disputes on the basis of national and state laws. In the separated model, as applied in the USA, both the national level and the state level each have their own three-tier court system (Local Court, Circuit Courts of Appeal, Supreme Court). State courts only apply the laws of their respective states, whereas federal courts exclusively adjudicate federal law. This also means that there are federal courts everywhere in the country, which exist next to the state courts. In addition to the federal courts there are also different levels of state courts in each state, each with its own State Supreme Court at the top.

In contrast, in an integrated model, courts have the competence to deal with both state and federal law cases. Hence judges, even at lower courts are authorized to adjudicate on the basis of both sets of law. In some systems that follow the integrated model, the highest court of the country at the federal level has only jurisdiction over federal law cases, whereas the highest court in the state is the court of last instance for state law. In other systems, both types of cases, those involving state law as well as those involving federal law, can be appealed before the Supreme Court (e.g. India).

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c) Participation of States on the Federal Level

States participate in the exercise of federal powers by their participation in federal bodies. In most federal states, the federal Parliament is organized in a bicameral system, where one of the chambers wholly or partially represents the states and may be classified as a states’ chamber. The way in which the states’ chamber is organized may differ considerably from one country to another. The practical organization is always the result of various factors, such as the current electoral system, the origin and development of the federal structure and the number of states and their mutual demographic and economic relationship. There are basically two different methods of how the second chamber can be composed:

One is based on the senate principle. As in the constitutions of Australia and the USA, Senators in the upper chamber of the national legislative body are directly elected by the population of the territorial sub-units. There are, in other words, two forms of popular representation. The members of the lower house jointly represent the entire population of the federation. Senators in the upper house, on the other hand, represent the regional populations of their respective sub-units.

The other way to compose the second chamber is based on the council principle. As in the German case, the members of the federal council, as the second chamber of parliament, are
instructed representatives of the governments of the sub-units. Thus, the essence of the council principle is indirect representation of the regional populations. They are not directly represented as in a senate, but indirectly by its regional government.

There are also further models to enable the sub-units to participate on the federal level. For example in India, the members of the Council of States are elected by the populations of the different state legislatures. In Canada, the senators are appointed by the federal government on the basis of regional representation.

Some countries mix these approaches: In South Africa, for example, 60 percent of the members of the National Council of Provinces are elected by the provincial legislative assemblies and 40 percent delegated by the provincial executives. In the Russian Federation, the same approach is followed, only with different percentages (50/50). In Ethiopia, it is up to each state to decide, if the members of the House of the Federation are to be elected directly by the state’s population or indirectly through the state’s legislative assembly. In Malaysia, 63 percent of the senators are appointed by the federal government and 37 percent are elected by the states’ legislatures. These approaches have different advantages and disadvantages:

For example where the members of the second chamber are appointed by the federal government as in Canada, and to a large extent in Malaysia, their mandate as spokespersons for regional interests is not as strong. In Canada, the lack of democratic legitimacy of the senators led to the political practice of the senate’s not voting against the House of Representatives. Hence, the Canadian senate does not really carry out the functions of a federal second chamber. On the other hand, in Malaysia the purpose of the appointment of the majority of senators by the federal government was to ensure the representation of particular, sub-unit linked minority interests on the federal level. This objective could only be reached through the strong influence of the federal level.51

The direct election of the members of the federal second chamber by the people of each federal sub-unit enhances democratic legitimacy. However, in many federal countries where the members of the federal second chamber are directly elected by the people, they tend to vote along party-lines rather than strictly for the regional interests they represent. Thus, this approach seems to be more consistent with the democratic principle but less consistent with

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the federal idea. Where the members of the federal second chamber are elected indirectly through the legislative bodies of the sub-units, they are more likely to represent regional interests. Nevertheless, regional political party interests can also play a significant role within this representation.\textsuperscript{52} Where the members of the federal second chamber are instructed delegates of the governments of the sub-units, they represent primarily the views of those governments and only indirectly those of the electorate. Therefore, this method seems to be more consistent with the federal idea but may be seen as less consistent with the democratic principle.\textsuperscript{53}

With regard to the weight each sub-unit has within a second federal chamber two different approaches can be identified:

Composition of the 2\textsuperscript{nd} Chamber

The first approach opts for a strictly equal representation of states in the second chamber, irrespective of their size and population. This approach reflects a strong confederal element and is followed by the United States, Nigeria, South Africa, Sudan, Mexico, and the Russian Federation.

South Africa: Representation of the Provinces on the federal level

Some argue that the concept of equal state representation infringes the democratic right of the individual citizens to be equally represented in a legislative decision-making body at the federal level. As a consequence, other countries base the representation of their states on the size of the state population, e.g. Austria, or on a weighted voting system within the second chamber, e.g. Germany.

An example of weighted representation can be found in India: All sub-units are represented in the second federal chamber (Council of States) in proportion to the size of their respective populations. The sub-unit with the largest number of citizens currently delegates 31 members; every other sub-unit delegates as many representatives as the ratio in which its citizens stand to those in the first-mentioned sub-unit. However, each sub-unit is entitled to at least one representative. This ratio is regulated in Schedule 4 of the Indian Constitution.

![India: Representation of the States on the federal level](image)

In Ethiopia, the second chamber is not composed of representatives of states but of representatives of Nations, Nationalities and Peoples. Each of those entities has to be represented in the second chamber by at least one member. Although some nations/nationalities/peoples coincide with a state, others do not. The number of nations/nationalities/peoples in a state determines the number of members of the second chamber coming from one state. In addition, each nation or nationality gets one additional seat for each million of its population.
d) State Competences with Regard to the Amendment of the Federal Constitution

It is a core element of federal systems that neither level of government can unilaterally alter the competences of the other one. The allocation of competences in a federal system is usually enshrined in the national constitution. Consequently, in all federal countries, the states (sub-units) must have a say if the constitution is to be amended in a way that affects their competences. States (sub-units) either get involved through the consent of a governmental body at the state level (i.e. the parliament of the respective sub-unit) or through their representative body at the national level, the second federal chamber.

In Austria, the requirement of the second chamber’s consent is limited to the amendment of those constitutional provisions which affect the interest of the sub-units. A similar approach is
taken in South Africa. There the consent of the second chamber is only required for provisions that (a) form the basis of the constitution, (b) relate to a matter that affects the Council, (c) alter provincial boundaries, powers, functions or institutions, or (d) amend a provision that deals specifically with a provincial matter. In addition, whenever a single state or a specific group of states are affected by the amendment of the constitution, their respective state parliaments have to consent as well. Other federal countries require a qualified majority of both chambers for each amendment of the constitution (Germany, India, Spain, and Sudan). In the majority of cases, a constitutional amendment, at least if it affects the interests of states, not only needs the qualified majority of the two federal chambers, but also involves other stakeholders. Often, the consent of a certain percentage of state parliaments is required (Nigeria, Canada, USA, Mexico, Russia, Ethiopia).

e) Solution of Conflicts in Federal Systems

In a federation, there is always a certain degree of intergovernmental competition and controversy between the different levels of government. Differences of opinion may arise as regards the exact scope of powers that the constitution assigns to each level. Many federal constitutions provide explicitly that in case of conflict between federal law and state law, the former prevails (e.g. in Australia and India).

The institution to decide such disputes finally is usually the highest court of the country. Two types of courts for ultimate constitutional jurisdiction may be found in federations: One is a supreme court serving as the final adjudicator in relation to all laws including the constitution. Examples are the Supreme Courts of the USA, Canada, Australia, India, Pakistan, Malaysia, Nigeria, Argentina, Brazil, Mexico and Venezuela. The other is a constitutional court, specialized in constitutional interpretation, which is the approach followed in Germany, Austria, Russia, Bosnia and Herzegovina, the United Arab Emirates, Belgium and Spain.

The South African Constitution emphasizes a particular aspect of constitutional disputes within its federal order, which holds true for any federal system: Every level of government is explicitly required to operate in accordance with the letter and spirit of the principles of cooperative government. All spheres of government need to exhaust “every reasonable effort to resolve any disputes through intergovernmental negotiation” (Section 41(3) of the South African Constitution). This implies that they need to employ every method before approaching the courts to resolve the matter. The courts can even refer such a dispute back to the different parts of government if they hold that substantial efforts have not been made in this regard. If a court of law is unable to resolve a dispute, national legislation prevails over
provincial legislation or the provincial constitution in cases where conflict over the interpretation of statutory law is concerned (Sections 146(3) and 148 of the South African Constitution). Nevertheless, the Constitutional Court has the final say about issues affecting central, provincial and local government.54

In Switzerland the Constitutional Court may decide on public law disputes between the Confederation and the sub-units (cantons), or amongst cantons. It also rules directly on the conformity of cantonal law with federal law and its validity. Additionally, federal legislation can be challenged by either public initiative of at least 50,000 citizens or by a decision of at least 8 cantons (Art. 141 of the Swiss Constitution). Once federal legislation has been challenged, the respective federal law must be submitted to a direct popular vote in a referendum.

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effectively take part in the legislative process. Thus, it technically does not represent the states on the federal level but provides for a formal representation in a more regulative body and serves as the crucial institution to decide on federal matters and disputes over jurisdiction.55

f) Guidelines in the National Constitution for the Constitutions of Federal Sub-Units

Federal sub-units often have their own constitutions in order to highlight their independence and sovereignty within the federal state structure. Therefore content and structure of the sub-units’ constitutions need to be coordinated with the principles of the national constitution. In order to avoid inconsistencies, many national constitutions provide guidelines for the sub-units’ constitutions. Some of these guidelines are very detailed and strict, whereas others are more open for variations among the sub-units.

In a federal constitution without detailed guidelines, the sub-unit may be free to establish institutions or a distinct system of government as far as these remain consistent with the national constitution. There can be considerable differences between the constitutions of the sub-units. In Australia, for example, some provide for unicameral, others for bicameral systems. In Malaysia, some are monarchical, others republican. The advantage of less detailed guidelines is greater freedom for the consideration of cultural identities and political decisions in the sub-units.

In countries with more detailed guidelines for the sub-units, there is relatively little freedom for the sub-units. Accordingly, there is less variation among them. This is, e.g., the case in India, Nigeria and Pakistan, where the national constitutions regulate in detail the structures of government in the sub-units. This approach leaves less scope for accommodating traditional structures and cultural identities. It is often employed in federations that are centrally oriented. The advantages of detailed guidelines are greater uniformity in the state structure and a reduced potential for later disputes and conflicts.

g) Local Government in Federal Systems

In most federations, there are three levels or tiers of government. Typically, the constitutional status for the second level of government, the federal sub-units, does not apply to the third, the regional or local level. Local government is usually subordinate, existing and operating on the basis of delegated powers as if in a unitary system. The determination of the scope and powers of local governments is usually left to the intermediate sub-unit governments. But it is worth noting that there have been efforts in some federations to formally recognize the position and powers of local governments in the constitution of the federation (e.g. India, Nigeria, Switzerland). For example Art. 7 of the Nigerian Constitution states that “the system of local government by democratically elected local government councils is under this Constitution guaranteed; and accordingly, the Government of every State shall, subject to section 8 of this Constitution, ensure their existence under a Law which provides for the establishment, structure, composition, finance and functions of such councils”. Thus, this provision

constitutionally guarantees the existence and status of local governments. However, it still leaves it to the state level to legislate and determine the concrete scope of jurisdiction and powers of the local level.

A different approach has been followed in Brazil and South Africa, where the federal constitutions fully recognize local governments as a fully-fledged third order of government. In South Africa, the local sphere of government is regulated in Section 151-161 of the South African Constitution. Section 151 of the South African Constitution guarantees the status of the municipalities within the states’ structure and provides for the constitutional right of each local municipality “to govern, on its own initiative, the local government affairs of its community”. Furthermore Section 151 of the South African Constitution contains a feature of co-operative federalism by requesting the national and provincial spheres of government not to compromise the right of a municipality to exercise its powers or perform its functions. This feature is reinforced by Section 154 of the South African Constitution stating that

(1) The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

(2) Draft national or provincial legislation that affects the status, institutions, powers or functions of local government must be published for public comment before it is introduced in Parliament or a provincial legislature, in a manner that allows organized local government, municipalities and other interested persons an opportunity to make representations with regard to the draft legislation.

Even the structure of the local sphere of government is regulated in detail in the South African Constitution: The establishment of municipalities (Section 155), their powers and functions (Section 156), the composition and election of Municipal Councils (Section 157), the term of Municipal Councils (Section 159) and the internal procedures within the Municipal Councils (Section 160). Section 163 of the South African Constitution also outlines the integration of the local sphere in the national and provincial spheres of government by requiring an Act of Parliament to “determine procedures by which local government may consult with the national or a provincial government and designate representatives to participate in the National Council of Provinces and participate in the national legislation process”.

h) Fiscal Federalism

A decentralized or federal system of government is not only a mechanism of power sharing between the different levels of government, but also of distributing the public revenues of the country between them. This distribution is necessary in order to enable the different levels to fulfil their respective functions. The fiscal design in decentralized states has to answer to three essential questions:

- Which level pays (expenditure responsibility)?
- Which level has the command over the revenue sources (revenue-raising responsibility)?
• How are revenues shared and imbalances between lower levels equalized (intergovernmental transfers)?

Intergovernmental Fiscal Relations

Assignment of Expenditure Responsibility
Assignment of Revenue-Raising Responsibility
Intergovernmental Transfers

• The assignment of expenditure responsibility

The responsibility for expenditure can only be assigned if one has first looked into the question of which level should provide which public services. In this respect, it is argued that resources are spent most efficiently if the level of government that most closely represents the beneficiaries of the public service is responsible for it.56 This fosters transparency since citizens recognize more easily who spends their money. At the same time, this enhances responsibility on the part of the politicians at the respective level. For certain public services, such as national defence or foreign affairs, the level that most closely represents the beneficiaries of the service will be the national level. Typical lower level expenditure responsibilities on the other hand include local infrastructures such as police, fire prevention and sanitation.57

Another factor determining which level should provide a certain public service is the efficient size of the program: some programs might only function efficiently if provided for the whole country by the national level of government. The weather forecast provides an example of such a public service.58 Regional preferences also affect the question which level should deliver a certain public service. For example, many sub-levels and their respective populations might want primary education to include the teaching of local languages. Here, a nationwide program that defines the curriculum for primary education might not serve them well.59 Citizens should have equal access to some public services, regardless of their origin, for reasons of equity. Such programs (e.g. retirement pensions, unemployment benefits) would have to be provided by the national level. The demand for minimum standards throughout the country concerning certain

public services (e.g. health, education) might call for national regulation of policy guidelines for the implementation of public service programs at a lower level, but does not require the central administration of these services. In order to prevent the expenditure responsibility of the sub-levels from causing economic instability or imbalances, the constitution should confer the responsibility for expenditures that have a particularly strong impact on demand or are particularly sensitive to changes in the economic cycle (such as unemployment benefits) to the national government.

- The assignment of revenue-raising responsibility

Constitutional provisions that assign all or most taxing powers to local or sub-units’ governments would deprive the national government of tax instruments for macro-economic management and hinder it in redistributive policies. Arrangements that assign all or most taxing powers to the national government are undesirable as well: “By separating spending authority from revenue-raising responsibilities, these arrangements obscure the link between the benefits of public expenditures and their price, namely, the taxes levied to finance them. Thus, they do not promote fiscal responsibility for sub-national politicians and their electorate.” For these reasons, it is usually recommended that each level of government be provided with its own sources of revenue, and, additionally, that intergovernmental transfers be used to overcome the remaining gaps between the revenue sources assigned to a certain level and its expenditure responsibilities. Two principles should guide constitutional provisions that assign revenues to sub-national governments: (1) The revenues assigned to the sub-national governments should suffice for at least the richest sub-national government to finance all locally provided services that primarily benefit local residents from its own resources. (2) The sub-national revenues should be collected from local residents and should be related to the benefits they receive from local services. By establishing this link, the acceptance of a certain tax in the local population and the accountability of the sub-national government to its population for service delivery are strengthened.

Taxes with the following characteristics should be assigned to the national government because sub-level competences in these fields typically cause economic imbalances between the sub-national governments of a federal state.

- Taxes levied on the more mobile tax bases, such as income taxes on enterprises: The latter may easily move from one state to another in order to avoid the heavier tax load in the first state. In this case, the assignment of the revenue-raising responsibility to the national level avoids the tax-induced movements of the factors of production and tax

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competition which could drive down public revenues. In contrast, an example for an immobile tax which could easily be assigned to the sub-level governments would be property tax since real estate cannot be moved from one state to another.

- Taxes that are especially sensitive to changes in income, such as income tax on individuals: This is to provide the federal government as the protector of the federal state with economic stabilization instruments and to shelter the sub-national governments from fluctuations in their income base.

- Taxes that are levied on tax bases that are distributed unevenly across regions, such as taxes on natural resources: By assigning this type of taxes to the national government, one avoids that sub-national levels differ greatly in income and thereby in their standards of living. On the other hand, where the exploitation of natural resources causes damage to the environment of the state of origin, much can be said for a sharing of revenues between the national government and that state.

In other words: the national government is assigned those tax raising responsibilities that could easily turn out to cause economic imbalances at or between the sub-levels if these responsibilities were assigned to them.

• **Intergovernmental transfers**

If the constitution distributes public spending and the revenue raising responsibilities between the levels of government according to the criteria mentioned above, certain economic imbalances may arise: Due to the tax bases assigned to the national level which usually account for the majority of the revenue raised on the one hand, and the substantial spending responsibilities typically assigned to the sub-levels on the other hand, the sub-level governments have to spend more than they are able to raise in revenues. Additionally, there are usually imbalances among sub-national levels: The sub-level governments usually have neither exactly the same capacity to raise revenues in their jurisdiction, nor do they all face the same costs for their expenditure responsibilities.\(^6^5\) These imbalances make intergovernmental transfers, i.e. payments between the national government and the sub-national governments (vertical transfers) or between sub-national governments (horizontal transfers), necessary. The aim of these payments is on the one hand to redistribute resources in order to remedy horizontal and vertical imbalances. Moreover, such transfers aim at ensuring that effective limits can be set for the borrowing of sub-national governments.

*Revenue sharing arrangements*

Sharing of tax revenues can be arranged on a tax-by-tax basis or be applied to the entire pool of revenues raised by the national government. In the first case, the lower levels of governments each receive a certain percentage of the public revenue raised by a certain national tax. However, this system might discourage the national government from levying such shared taxes and provide it with an incentive to concentrate on taxes which it will not have to share with lower levels. Therefore the second option, the sharing of a part of the entire pool of taxes

collected by the national government is generally preferred. To a certain extent, revenue-sharing of nationally collected taxes between lower level governments can also be arranged on a derivation basis. This means that each lower level of government receives the share of the revenue collected on its territory. For instance, the personal income tax collected from the inhabitants of state A will be handed over to state A. However, this method does not remedy disparities among different sub-units since those sub-units with a higher taxing capacity (i.e. a wealthy part of the country) will thereby get back more revenues than a sub-unit with a low taxing capacity (i.e. a relatively poor part of the country). Thus the existing imbalances between sub-level governments will remain the same. To counterbalance these differences in taxing capacity, other formulas based on redistributive criteria are necessary. Such criteria are, for example, the population size of a state, the per-capita income, the degree of economic and infrastructural development and the state’s own efforts to raise revenues.66

Grants

Grants are intergovernmental transfers from higher to lower levels of government, especially from the national level to the state level. There are different kinds of grants. General purpose grants are not subject to specific conditions. They seek to redress vertical and horizontal imbalances. Specific grants are only accorded if specific conditions regarding the use of the funds are met. On the one hand, such conditions can infringe on the autonomy of sub-national governments. On the other hand, the imposition of conditions may be justified by policy objectives and equitable considerations, e.g. the objective that sub-levels provide an adequate standard of primary education and health care. In contrast to the revenue sharing arrangements which need to be regulated by statutory laws, the national government may exercise discretion in allocating grants. Therefore, grants are a very flexible instrument for the national level to remedy imbalances arising or existing between states.

5. Asymmetric Federalism and Decentralization

The main purposes of, on the one hand, creating a federal state and, on the other, granting autonomy to a region within a state are quite distinct: While the former serves the vertical separation of powers, the latter serves the protection and self-determination of a minority, i.e. a part of the population, within a state.67 Where the protected minority is not territorially concentrated, but scattered over the territory of the State, the granting of “personal” instead of territorial autonomy can be considered.

The federal state model and regimes of autonomy can be combined. The type of federalism that is created by this mixture is called asymmetrical federalism, since the autonomous status of one or several of the sub-units means that these sub-units have special rights or more competencies

than the rest of the sub-units. Thus the symmetry of rights and duties between all sub-units and the federation is no longer a given.\footnote{Some federal systems “discriminate” among constituent states on grounds of population: this is the case where more populous units play a greater role in federal institutions. This also creates a kind of asymmetry. However, this type of discrimination is widely accepted and generally not focused on when discussing the issue of asymmetric federalism.}

The Interim National Constitution of Sudan provides an example for such an arrangement where the legal status of the different sub-units is not identical. The Republic of Sudan is composed of one national government and 25 states (two of which have a particular status). An additional level of government, the Government of South Sudan (GoSS), is inserted between the ten states in the south and the national government. Pursuant to Art. 162 of the Constitution, its primary responsibility is “to promote good governance, development and justice, exercise authority in respect of southern Sudan and the states of southern Sudan, act as the link between the National Government and the states of southern Sudan and to ensure the protection of rights and interests of the people of southern Sudan.” The specific legislative powers of GoSS are listed in Schedule B of the constitution.

![Diagram of the National Government of Sudan](image-url)

An asymmetric constitutional status with regard to sub-units does not arise only in federal systems but appears also in decentralized unitary states (e.g. France/Corsica; Denmark/Greenland; Tanzania/Zanzibar; United Kingdom/Northern Ireland, Scotland, Wales; Finland/Sami). There may be two reasons for that phenomenon: First, unitary states find it easier to create formal asymmetrical arrangements than federations that either already exist with a symmetrical assignment of rights and duties or that have just come together. This is because unitary states do not have sub-units in place that possess constitutional veto powers and that are likely to regard asymmetry as conferring second-class status on them. Secondly, in unitary states, power devolved by the national level to the regional level is, in fact, power retained by the national level, since it is still, at least formally, entitled to revoke the devolution. There may be less resistance to asymmetrical devolution when the experiment can be revoked or mistakes corrected by the unilateral actions of the central government. Hence, an asymmetric structure within a country is not a genuine issue of federalism, but rather a potential answer to the question of how to accommodate a minority group in a State.
In Tanzania, the formerly independent states of Tanganyika and Zanzibar were unified in a way that granted the island of Zanzibar a special status of autonomy within the constitution of the new Republic. This special status conveys autonomous competencies and independent government. The latter consists of a presidential executive and a legislative assembly, the House of Representatives of Zanzibar (Chapter 4 of the Tanzanian Constitution). The national government constitutionally has no power to infringe on the autonomous competencies of Zanzibar. Constitutional provisions relating to the unification between Tanzania and Zanzibar, namely the special constitutional status and the autonomous competencies of Zanzibar, may be amended only by an Act of Parliament requiring a 2/3 majority of the national parliament as well as the assent of 2/3 of the House of Representative of Zanzibar (Art. 98 Tanzanian Constitution). This special constitutional status only applies to Zanzibar. All other regions within Tanzania are governed centrally by the national government.

H. **Models of Democracy: Majoritarian vs. Consensual**

The two models of democracy described below make clear that there are various ways to set up a democracy in a constitution. Different societies at different times have different needs, expectations and values. The following models show how institutional arrangements are linked to the broader social structure.

I. **Majoritarian Democracy**

In a majoritarian democracy, decisions are generally taken by the majority while the minority has to yield. The majoritarian democracy usually corresponds to an electoral system based upon the majority principle and relies on a two-party system. This form of democracy is only desirable, where the fundamental values, principles and assumptions about what a society stands for are not contested. Only in such a situation, can the minority accept the decisions of a majority, because it knows that it is not threatened in its fundamental beliefs (which it shares with the majority). Moreover, the minority always has the chance to become the majority at a later stage. This system is based on a high degree of social cohesion and homogeneity as to race, religion, languages, or cultures. An example for a functioning majoritarian democracy is the United Kingdom.

II. **Consensual Democracy**

Where society is more heterogeneous and composed of antagonistic groups such as clans, ethnicities, religions, etc., it is more appropriate that a consensual system of democracy be
developed. In such a society decisions are more likely to be accepted if they are reached by way of compromise between most groups. To include the different groups of society such systems often have a multi-party system. Their election law is based on proportional representation. In a consensual democracy, political questions are often taken out of the merely political sphere of party politics and majority rule and handed over to expert institutions, like courts, independent commissions or a central bank instead. This helps to keep contentious questions out of the daily political debate. Such a system is often found in decentralized or federal states, for example in Switzerland.

I. **Protection of the Constitution**

There are always threats to the constitutional order: Individuals can abuse the power that the constitution has bestowed upon them, government official’s can disregard its values. To protect the constitutional order against an overthrow, it is essential that there be popular support for the constitution. Such popular support is best achieved by an inclusive constitution-making process and in the long term, this support may be strengthened by the constitution’s effectiveness and by increasing the people’s knowledge about the constitution. However, to effectively protect the constitution, particular attention should be paid to the possibilities of amending the constitution. At the same time it is important to have an independent judiciary to review the acts of the other two branches of government to ensure their compliance with the constitution, thus preventing the abuse of the authority of the state.

I. **Constitutional Review**

As already mentioned above, one of the most important tasks of the judiciary is to protect the constitution and to monitor that the government complies with it. Thus the judiciary usually has the power to review all executive acts with regard to their conformity with the law. Especially acts of the state infringing on any area of personal freedom have to be subject to legal review. Many constitutions grant citizens the right to bring an individual complaint to the courts alleging that their fundamental rights have been infringed upon by the action of the state (see above, section F.III.1.b.). In addition, the judiciary often has the power to review acts of the legislature in order to ensure that all laws are in accordance with the constitution. In case a law is deemed to be unconstitutional, the Constitutional or Supreme Court as highest authority in constitutional questions often has the power to annul the law. Because of the great importance of such constitutional review many constitutions contain detailed provisions about different modes of constitutional review:

- **Incidental or specific review:** An act of the executive is usually reviewed if it directly affects someone who brings the case before the courts. Statutory laws, too, can be reviewed incidentally, when an unconstitutional law has already been enforced in an actual case which then goes to trial.

- **Abstract review:** Statutory laws can also be reviewed when they are objected to on grounds of unconstitutionality without a specific case. However, such abstract review can usually only be initiated by institutions of the state.
• Preliminary or preventive review: In some countries statutory laws can be reviewed before they have come into force.

The possibilities of constitutional review vary widely. Often constitutions limit certain modes of constitutional review to specific laws, or grant standing only to specific actors (such as governmental bodies). Further details will be given in a separate manual on the judiciary.

II. Non-amendable Provisions in the Constitution

In some constitutions, there are provisions and principles that cannot be amended at all. Because of their importance, they are meant to be in the constitution forever. Art. 149 of the Afghan Constitution provides that the adherence to the sacred religion of Islam and the republican regime cannot be amended, and that the amendment of the fundamental rights of the people is permitted only in order to make them more effective. In East Timor, the constitution contains limits on matters of an amendment of the constitution (Art. 156). In addition, Art. 157 prohibits any amendments of the constitution during a state of siege or a state of emergency. In Germany, amendments to the Basic Law affecting the federal division of the country, the participation of the sub-units in the legislative process, the basic principles of human dignity, democracy, separation of powers and the rule of law are inadmissible (Art. 79 of the German Basic Law). In India, the constitution does not contain any explicitly non-amendable provisions. Nonetheless the Supreme Court has established the doctrine that the basic features of the constitution cannot be amended (republicanism, secularism, federalism, and human rights). 69

III. Procedural Safeguards for Amendments of the Constitution

To the extent that the constitution can be amended, there are usually special procedural safeguards to prevent hasty or inconsiderate amendments. One of these safeguards is that the legislature cannot use the ordinary procedures for enacting laws to change the constitution. Instead, any amendment of the constitution requires special majorities in the legislature or the participation of other institutions in addition to the legislature, such as regional authorities or, through a referendum, the people themselves. In some countries amendments always require the consent of the people. Hence a referendum has to be held to approve the amendment. In some countries such additional requirements are only established for the amendment of some particular provisions of the constitution, either because they are considered to be of special importance or because they specifically affect the institutions, which therefore should agree on any amendment thereof.

In Switzerland, an amendment of the constitution not only has to pass both chambers of Parliament, but also requires a double majority of the votes at a referendum. The first one focuses on the nationwide majority of votes, the second one requires that the citizens in more than half of the sub-units (cantons) voted in favor of the amendment (Art. 195 of the Swiss

Constitution). In Italy, unless a two-third majority is achieved in both houses, one-fifth of members of either house may call for a referendum (Art. 138 of the Italian Constitution).

In Uganda, the required participation and majority for the amendment of a constitutional norm depends on the provision that is to be amended: The amendment of some provisions has to be agreed upon by the people through a referendum; other provisions require the consent of the district councils (Art. 258-262 of the Ugandan Constitution).

The most drastic consequences of a constitutional amendment may be found in Belgium. There, the legislature can declare the necessity of a constitutional amendment. After this declaration, both chambers of Parliament are automatically dissolved and a new parliament is convened. The two newly convened chambers then may amend the constitution by a two-thirds majority (Art. 195 of the Belgian Constitution).
 Again, the reason for such a high thresholds is to provide for stability by preventing hasty or poorly considered amendments and to guarantee that any amendment of the constitution is widely accepted. In countries with a decentralized system, the sub-units usually have to be involved in the amendment procedure, at least if their constitutionally guaranteed interests or rights are at stake. In federal countries, the involvement of the sub-units is an essential feature of the federal system (see also above, section G.IV.4.d).
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