

What is a Constitution?

The constitution of a country is a set of rules that define the nature and extent of the country's government. It is sometimes referred to as the country's fundamental or basic law, and has supremacy over all other laws. A constitution establishes the basic institutions of the State and regulates the executive, legislative and judicial branches of government and the relationships between those branches; many modern constitutions also regulate relationships between individuals and their government, particularly by guaranteeing individuals certain fundamental human rights. The provisions that can and should go into a constitution will be dealt with under the following headings:

- I. Institutions of government
- II. Relations between individuals and the government
- III. Local government institutions
- IV. Amendment of the constitution
- V. Checks and balances
- VI. Other considerations

I. Institutions of Government

First and foremost, a country's constitution must set out how the country is governed, and must deal with the following institutions:

1. The Executive Branch of Government

A constitution must specify who will have executive powers in the State. It must say, for example, whether the powers should be exercised by a President or a Prime Minister; and if the powers are to be exercised by two or more people it must apportion the powers clearly between them [*This is one of the most serious defects of the present Constitution as amended by the GPA: the demarcation of powers between the President and the Prime Minister is so vague that it makes their relationship unworkable.*]. A constitution must also lay down

2. The Legislative Branch of Government

A constitution must establish the legislative or law-making branch of Government. If there are to be two or more law-making bodies (for example, a Senate and a National Assembly) the constitution must indicate the relationship between them and set out their respective powers. The constitution must specify if and how other institutions of the State, including the Executive, are accountable to Parliament. If the legislative branch is to control taxation, then the constitution must also specify this [*under the present Constitution, taxes cannot be imposed unless Parliament passes a law authorising their imposition*].

3. The Judiciary

The judiciary [i.e. judges, magistrates and the court system] perform a vital role in every State, by interpreting laws and resolving disputes. Hence a constitution must establish the country's court system and give the courts sufficient jurisdiction, i.e. power, to carry out their role. In particular the constitution should make it clear how far the courts can question the actions of members of the Government and the validity of laws made by the legislature.

4. Other Institutions of Government

In addition to the three main branches of Government, the Executive, the Legislature and the Judiciary, there are other important institutions of the Government which should be dealt with in a constitution. Some of these institutions form part of one or other of the three branches. For example, in many countries the Government's functions are exercised through a Cabinet of Ministers, and in that event the constitution should specify which Ministers form the Cabinet and what its functions are.

In the Zimbabwean context, the security forces [the defence forces and the police force] will need to be dealt with carefully because they exercise the coercive powers of the State: that is to say, they compel individuals to do what the Government wants, and the way they are currently exercising those powers is controversial. The constitution should indicate how far the security forces are to be under the control of the government – how far they are to be controlled by the President or the Prime Minister or the Cabinet – and whether Parliament should have a supervisory role over their activities.

Apart from the security forces, a constitution may set up other institutions such as commissions to conduct elections, to appoint people to public offices, to foster human rights, to combat corruption, and so on. These institutions should be established by the constitution rather than by ordinary legislation if they need to be independent in order to exercise their functions properly.

5. Appointment and Election to Governmental Institutions

A constitution must indicate how people are appointed or elected to the various institutions of the State, so that the institutions can continue to exist beyond the lifetime of their first members. In the case of the Legislature, for example, the constitution should state how members of Parliament are elected or appointed, though in many countries the details of the electoral or appointing process are left to be covered by ordinary legislation.

6. Relations Between Institutions of Government

A constitution must indicate how the different institutions of government function in relation to each other. For example:

Relations between the Executive and the Legislature

The constitution should state whether members of the Executive such as Ministers are to be members of Parliament. If not, how is the Executive to influence the laws passed by Parliament [as it must do, in a modern State]? The constitution should also indicate how far the Executive should participate in the law-making process: for example, must Acts of Parliament be assented to by the Head of State?

Relations between the Executive and the Judiciary

By specifying how judicial officers are appointed, the constitution will indicate how far the judiciary is to be independent of the Executive: in other words, if judges and magistrates are appointed at the discretion of the Head of State they will be subservient to the Executive, but if they are appointed by a non-partisan commission they are likely to be independent. The constitution should also state to what extent the actions of the Executive can be reviewed by the courts.

Relations between the Legislature and the Judiciary

Similarly, relations between the Legislature and the judiciary will be affected by how judges and magistrates are appointed, and the constitution should state what powers the courts have to declare laws to be invalid.

II. Relations Between Individuals and Government

An important part of every modern constitution is a Declaration or Bill of Rights, which sets out fundamental human rights which are at least partially protected against violation by the Government. The nature and extent of these rights vary from constitution to constitution, but generally all or most of the fundamental rights that are set out in such international conventions as the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights should be included. Most progressive constitutions also have provisions for Social and Economic Rights set out in the International Covenant Economic, Social and Cultural Rights.

III. Local Government Institutions

The history and circumstances of a country will determine whether, and to what extent, the country's constitution should deal with devolution of power [the transfer of power from central government to provinces, districts and local authorities]. In Zimbabwe it is essential for historical reasons that a new constitution should give at least some powers to provinces, and that urban and rural local authorities should be given more autonomy.

IV. Amendment of the Constitution

Every written constitution must state clearly how it can be amended. Usually a constitution requires special procedures — a referendum or larger than ordinary majority in Parliament, for example — which must be followed before an amendment can be validly made. If a constitution makes no provision for its amendment then it cannot be amended, because all the institutions of State are subordinate to the constitution and they have no inherent power to alter the law under which they were established.

V. Checks and Balances

Every constitution must set some limits on the exercise of power by members of the different branches of a State's government. If there are no such limits the State will tend to be despotic, where the powers concerned are exercisable by the Executive, or ineffective where they are exercisable by the Legislature or the Judiciary. This is the basis of the doctrine of separation of powers.

There is a particular need for limits and balance in regard to the following:

- *The extent of the powers exercisable by each of the branches of Government.* Power should not be concentrated in the Executive branch because, as indicated, that will lead to despotism. On the other hand, the other branches should not be allowed to exceed their legitimate powers either. If the Legislature has too much power and is able to pursue divergent policies from the Executive, there is a danger of government confusion or paralysis. If the courts are over-zealous in reviewing Executive decisions, there is a danger of the courts usurping the functions of the Executive; and similarly if the courts can too readily overturn legislation the courts may themselves become an unelected Legislature.

- *The way in which powers are exercised.* Particularly in the case of the Executive, decisions should be taken collectively rather than individually. For example, the power to make decisions should be vested in the Cabinet rather than in the President or the Prime Minister.

Checks and balances must not be so great as to prevent a government from taking effective action. There must be co-operation between the different branches of government if the business of government is to be conducted smoothly. Where a constitution divides governmental powers between different institutions, those institutions must learn to practise compromise and common sense. But compromise and common sense are habits of mind and cannot be embodied in a written constitution.

In addition to balancing the powers of the different institutions of government, every democratic constitution must try to balance the other conflicting interests that exist in every State. Some of the interests that need to be balanced are the following:

- *Individuals versus the State*

Zimbabwe's history, and the history of many other countries, shows that individuals and vulnerable groups need to be protected against oppression by their governments. The purpose of a Declaration or Bill of Rights is to provide this protection, but it mustn't go too far. The rights of the majority, who in a democratic State are represented by the Government, cannot be ignored. Governments must be able to take reasonable measures to preserve the national interest while at the same time trying to protect minority interests. In other words, a balance must be struck between general and particular interests.

- *Differing Class Interests*

In Zimbabwe there are stark differences between the lifestyle enjoyed by members of the wealthy élite, who wield political and economic power, and that of the rural and urban poor. The constitution-making process is directed and controlled by the élite, and there is a danger that their interests will be reflected in the new constitution to the detriment of the poor. That tendency must be resisted if the new constitution is to attain legitimacy, to be regarded as "our" constitution, by the majority of Zimbabweans. One way to ensure that the interests of ordinary people are reflected in the constitution is to protect their social and economic rights in the Declaration or Bill of Rights.

VI. Other Considerations

The need for flexibility

The governmental system established by a constitution must be flexible enough to allow institutions to develop over time and to cope with unforeseen situations. This entails, firstly, that the constitution should not seek to prescribe exhaustively what should happen in every conceivable situation; and, secondly, that the procedures for constitutional amendment should not be so difficult as to prevent amendments when they become necessary.

A written Constitution may not reflect the real constitution

One should remember that the wording of a written constitution very often does not reflect the true nature of a country's system of government. In the United States, for

example, procedures have evolved for encouraging co-operation and compromise between Congress, the legislature, and the President. These procedures are not mentioned in the constitution. And if a foreigner who was unfamiliar with the Zimbabwean political scene read our present Constitution before its latest amendment, he or she might well have believed that political parties were of little or no importance in our system of government, because the Constitution mentioned political parties only once (in section 41(1)(e)), and then only incidentally.

Culture of constitutionalism

If a constitution is not embraced by the people of the country, if it is not regarded as “our” constitution by the great majority, then it may lose legitimacy and either be subjected to frequent amendment by whichever group of politicians is currently in power, or ignored by a despotic government or else overridden completely in a coup d’état. To avoid that fate, the constitution must contain provisions that are acceptable to the majority. This doesn’t mean that most of the people must agree with everything in the constitution, only that the constitution as a whole is broadly acceptable. In addition, the government should make concerted and prolonged efforts to ensure that everyone is aware of the constitution and its importance to them. This goes further than informing people of their rights under the constitution; people must be made aware of their responsibilities too, and of the way in which the various institutions of government work and the part they play in the government of the country.

Conclusion

A constitution can be compared to a house. A house defines the space within which its inhabitants conduct their daily lives, and a constitution defines the way in which the inhabitants of a country conduct their political affairs. A house may be large or small, and a constitution may be lengthy or brief; a house and a constitution may be well-organised or haphazard. It is possible for a family to live happily in a small, disorganised house or to live miserably in a well-appointed palace; and it is possible for a nation to live peacefully and contentedly in a country whose constitution is badly thought out, or to live in disharmony in a country with a model constitution.

In other words, a constitution does not determine whether the inhabitants of a country will be happy and united or discontented and fractious. Our new constitution, whether it is well or badly drafted, will not itself bring happiness to Zimbabwe. That will depend on Zimbabweans themselves.