

Founding Principles of a Constitution

Founding Principles of the Constitution can be described as: *“those values that citizens commit themselves to their adherence. They are the foundations of the Constitution and they reflect the manner in which the people desire to be governed.”*

Introduction

Many constitutions contain underlying principles which are fundamental to the entire constitutional structure. Sometimes these principles are unstated and have to be inferred from the provisions of the constitution, but often — particularly in modern constitutions — they are stated expressly. The Constitution of the United States may have served as a model, with its preamble stating the following constitutional objectives: *“to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”* And of course there is the famous statement in the American Declaration of Independence, that everyone is endowed with certain unalienable rights, among them *“Life, Liberty and the pursuit of Happiness”*.

Purpose of Statement of Principles

A statement of principles is not mere window-dressing, because if the principles are set out clearly enough they may prevent governments from enacting constitutional amendments that run counter to them. This is the so-called “pillars of the Constitution” argument, which maintains that it is not permissible to amend a constitution in such a way as to remove any of its pillars or core values. If the Founding Principles are stated clearly they become the framework in which the Judiciary interpret the Constitution. The argument was developed by the Indian Supreme Court in interpreting the Constitution of India, and it has been adopted elsewhere. Sometimes, to put the inviolability of the principles beyond doubt, a constitution states expressly that they cannot be abrogated [*repealed or cancelled*]. The French Constitution, for example, prohibits any amendment that affects the republican form of government. And the German Constitution prohibits any limitation on the constitutional protection of human dignity, or any constitutional amendment that changes the democratic and law-based nature of the German state. The Namibian Constitution prohibits any amendment that would limit or abolish the rights protected in the Constitution’s Bill of Rights.

What Principles are Usually Protected?

The principles that are protected in different constitutions vary considerably.

The Ugandan Constitution has an enormous list, set out in 29 articles, ranging from encouraging citizens to participate actively in their own governance, through the defence of national unity, peace, stability and national sovereignty, all the way to protection of the aged and the promotion of recreation and sports and good water management.

The Malawian Constitution, in contrast, impliedly protects only the separation of powers, the rule of law and “the values which underlie an open and democratic society”.

The South African Constitution's first section declares that the State is founded on the following values:

- *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.*

The present Zimbabwean Constitution contains no express statement of fundamental principles, and it is difficult to discern any after the amendments to which it has been subjected since 1980.

The Constitutional Commission [Chidyausiku] 1999 Draft specified certain principles as fundamental, and stated that they could be amended only with the approval of the people voting in a referendum. These principles may be summarised as follows:

- *Authority of the people:* State power derives from the people and must be exercised within lawful bounds.
- *National unity, peace and stability:* The Government must promote national unity, peace and stability, in particular by integrating the peoples of Zimbabwe while recognising their diversity and tolerating their differing customs, traditions and beliefs.
- *Democratic principles:* All citizens must be encouraged to participate in government and must have access to positions of leadership. Government institutions must be broad-based and national but (*perhaps inconsistently*) functions and responsibilities must be devolved to the people at appropriate levels.
- *Rule of law:* Everyone, including public officers, must observe the rule of law, and no one is above the law.

The "Kariba Draft" constitution repeated these principles.

The NCA Draft also states certain fundamental values, but they are much closer to those in the South African Constitution. As in the Constitutional Commission draft, these principles would be amendable only with the approval of a national referendum.

- *Supremacy of the constitution and the rule of law.*
- *The inherent dignity and worth of each human being.*
- *Universal adult suffrage, multi-party system of democratic government and regular free elections.*
- *Equal status of all persons.*
- *Respect for fundamental human rights and freedoms.*
- *National unity, peace and stability (this is not protected in the South African constitution).*
- *Devolution of governmental functions to the provinces and other appropriate levels (nor is this principle).*

What Fundamental Principles Should be Protected in Our New Constitution?

Before we try to answer this question, some points need to be made:

- If the new Constitution is to protect fundamental principles, then those principles should be stated expressly; they should not have to be deduced from a minute examination of the provisions of the constitution. If they are not made absolutely clear in the constitution then they may be ignored by politicians and politically-motivated judges.
- The principles must be truly fundamental, underlying the entire constitutional structure. They should, moreover, have a close relationship to the constitutional structure and should not merely restate human rights that are protected elsewhere in the constitution, e.g. in a Declaration of Rights.
- A constitution must reflect the country's history, if the sins and misfortunes of the past are to be avoided in the future. The fundamental principles should be framed so as to overcome our past.

In the light of the above, here is a selection of fundamental principles that should be considered:

Supremacy of the constitution. This is worth emphasising as a fundamental principle, in order to bring about a constitutional State in which all State institutions respect the Constitution. The Constitution has had scant respect up to now. It has been amended 19 times, and the latest amendment, in so far as it limited the number of Ministers, was instantly ignored.

Observance of the rule of law. This is a far-reaching principle because, although the rule of law is a vague concept, it implies that:

- everyone, including the State and its officers, must obey the law;
- no one is above the law.

Respect for the inherent and equal dignity and worth of each human being. This is another important principle, particularly in the light of the country's history before Independence. And it may be worth specifying separately another principle which arises out of it:

Tolerance for the views, practices and cultures of other people. Tolerance has always been in short supply in Zimbabwe.

Advancement of fundamental human rights and freedoms. So stated, this principle would oblige the Government to advance, rather than simply respect, human rights.

A multi-party system of democratic government based on universal adult suffrage and regular, free and fair elections. All the elements of this principle — a multi-party system, democracy, universal adult suffrage, and regular free and fair elections — need to be emphasised in the light of Zimbabwe's history.

Separation of powers between the Legislature, which enacts laws, the Executive, which puts them into practice, and the Judiciary, which interprets them. Strictly speaking, separation of powers is an element of the rule of law, but it would be a good idea to mention it specifically since our present Constitution as amended violates this principle.

Devolution of governmental functions to the provinces and down to other appropriate levels. Zimbabwe has had an over-centralised government for many years, and it is high time for power to be devolved. Furthermore, a new constitution must take account of the wishes of people in the west and east of the country for greater autonomy.

Openness in government. All governmental processes must be subject to public scrutiny so far as possible, consistent with national security and the protection of the privacy of individuals. Such openness and transparency is essential to a proper democracy, and Zimbabweans have never enjoyed it. Limitations must be very specific, not broad and general.

Respect for accrued or existing rights, which should not be abrogated or diminished without good cause and, where appropriate, adequate compensation. This principle should apply not only to property rights but also to rights such as citizenship. Governments both before and after Independence have been prepared to ride roughshod over existing rights to suit temporary political interests, and they should be compelled by the new Constitution to think carefully before they do it again.

Some Suggested Principles Need Particularly Careful Thought

National unity is a dangerous concept. All too often when a political leader calls for national unity, he means that those with views that differ from his own should keep their mouths shut. In other words, “national unity” is an excuse for intolerance.

Peace, though a very good thing, cannot be achieved through a constitution.

Stability, like national unity, is a principle that can easily be misused by politicians – “if we’re voted out of power it will destabilise the country — so let’s cancel the election!”. All things considered, it may be worth omitting this principle or if it is included, it should be put in such a way that it cannot be misused.

New Constitution Must Itself Conform to Founding Principles Adopted

In conclusion, one further point must be made. Our new constitution must not specify fundamental principles and then proceed to ignore them. If, for example, separation of powers is stated to be a fundamental principle, then the new constitution should not go on to give the President and the rest of the Executive extensive legislative powers or the right to appoint members of the legislature. Nor should it give the Legislature absolute power, free from judicial scrutiny, to punish people for contempt. If the principles specify independence of the Judiciary then other provisions of the Constitution must not contradict, but rather give effect to, this principle.

In other words, if the new constitution is to state fundamental principles then they must be strengthened in the Bill of Rights and observed in framing of all other aspects of the Constitution itself.