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Constitutionalism  
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Constitutions and the Elements of Constitutionalism

At the end of the twentieth century, virtually every state has a constitution and, with rare exceptions (notably the United Kingdom), the constitution is a written formal document. Generally, a constitution sets forth the forms and institutions of government. Usually, it expresses or reflects a political-economic ideology, including the principles governing relations between individual and society.

Constitutions have varied markedly in character and in the ideology they reflect. Some constitutions -- such as the socialist constitutions of Eastern Europe after the Second World War -- have been essentially manifestoes, programmatic. They describe the kind and institutions of government that have already been established and indicate plans and make promises for the future. They nod to the rights of the individual in society but declare the rights which government is prepared to grant, rather than recognizing rights which the government is obligated to respect. (These constitutions also have tended to stress the citizen's duties rather than his (her) rights and to subordinate rights to duties.) Ordinarily, such constitutions have not been enforceable as law and had little normative character. They can be readily amended by political authority.

In contrast, other constitutions -- such as contemporary Western constitutions -- are normative, prescriptive. They do not describe what

is but ordain what must be, establishing a blueprint for how government is to be organized and what the governors must do if government and governors are to have constitutional legitimacy. These constitutions recognize individual rights, and obligate government to respect and ensure them. The constitution declares that it is supreme law and establishes institutions to assure that it is given effect as such. The constitution is not readily amended.

Prescriptive constitutions are not all alike, but in general modern prescriptive constitutions reflect and give effect to "constitutionalism" and "the rule of law." Constitutionalism is nowhere authoritatively defined, but, as commonly used, a constitution designed to reflect constitutionalism will have common elements, with variations. It declares the sovereignty of the people and derives its authority from the will of the people. It prescribes a blueprint for representative government responsible and accountable to the people through universal suffrage at periodic elections. Governmental authority is to be exercised only in accordance with law established pursuant to constitutional processes and consistent with constitutional prescriptions and limitations. Government is for the people, but is limited by a bill of individual rights. Many constitutional systems fractionate governmental authority by some separation of powers or other checks and balances. (Some systems divide authority "vertically" by forms of federalism.) Increasingly, constitutions provide for constitutional review by a court or other independent institution with authority to monitor compliance with constitutional prescriptions and to provide remedies against their violation. Constitutionalism implies also



that the constitution cannot be suspended, circumvented or disregarded by political organs of government, and that it can be amended only by procedures appropriate to change of constitutional character and that give effect to the will of the people acting in a constitutional mode.

Even constitutions committed to constitutionalism have included special accommodations responding to particular historical, political, or demographic considerations. For example, some modern constitutions have provided special representation in parliament for women. Other constitutions have provided for other forms of "benign discrimination" ("affirmative action") in constitutional political arrangements for ethnic groups, at least temporarily. Some constitutions have given constitutional status to a particular subject, removing it from disposition by the ordinary political process.

In these pages, I elaborate, though still in summary fashion, the elements that have been commonly recognized as essential to constitutionalism. I illustrate them with examples and annotations from existing constitutions, principally the U.S. Constitution, the constitution with which I am best acquainted. I refer also to international instruments, in particular the Universal Declaration of Human Rights and the covenants and conventions that have derived from it.

a. Government according to the constitution

Constitutionalism implies that public authority can legitimately be exercised only in accordance with the constitution. There can be no extra-constitutional government, no government by any person or institution not elected pursuant to the constitution. There can be no

continuation in office beyond the term for which officials were elected. A constitution may provide for suspension in emergency of particular institutions or processes but such suspensions are essentially deviations from constitutionalism and must be strictly limited and sharply scrutinized. (See pp. 16-17 below.)

b. Separation of powers

The French Declaration of the Rights of Man and of the Citizen (1789) declared that "any society in which rights are not guaranteed, or in which the separation of powers is not defined, has no constitution." (Article 16.) In the eighteenth century, enlightened opinion saw the separation of powers as essential to limited government and the prevention of tyranny. Separation of powers and other forms of checks and balances in the conduct of government remain essentials of constitutional government in some countries, particularly those with presidential systems of government, e.g., the United States and France. Parliamentary systems, on the other hand, have moved towards parliamentary supremacy essentially unchecked by any independent executive power. Such parliamentary systems may nonetheless maintain limitations on government -- through popular accountability by regular elections, through a bill of individual rights, and through constitutional review, generally by a judicial body, to assure conformity to the constitutional blueprint and its bill of rights.

Federalism. A federal state is no more conducive to constitutionalism than a unitary state, but division of authority between



a central government and constituent entities sometimes serves to protect against too-much concentration of governmental power.

Federal states have come about for different reasons in different circumstances -- to help persuade independent entities to join a new union, to protect ethnic, religious or other minorities. The history and purpose of creating a federal state have shaped the particular division of authority between the nation and the constituent units. Agreement on a federal character for a state has sometimes made unification politically feasible but federalism has often hampered the development of national policy and has constrained the conduct of international relations.

c. Popular sovereignty and democratic government

"Constitutionalist" constitutions prescribe government by the people through representative institutions. Usually, such constitutions establish a parliamentary or a presidential system, a legislature of one or two chambers operating by majority, an executive elected directly or indirectly. They provide for universal and equal suffrage by all citizens, freedom of political activity (speech, press, assembly, association), and political parties. Constitutions may provide for majority or proportional representation, or variations consistent with authentic representative government.

d. Constitutional review

Constitutionalism indicates the need for an institution and a process that will monitor governmental authority for conformity to the

constitutional blueprint and for consistency with constitutional limitations. Some constitutional systems (e.g., the United States) have given the power of constitutional review to its judiciary generally, some to a special constitutional court (e.g., the Federal Republic of Germany), some to a non-judicial body (such as the French Conseil Constitutionnel).

e. An independent judiciary

Whether or not the judicial branch of government has authority to exercise constitutional review, an independent judiciary is essential to the rule of law, to maintaining a constitutional order, to securing individual rights. The method of selecting judges, and their qualifications, tenure and compensation, can contribute to their independence, but in the end judicial independence has to be nurtured and protected as part of a political culture of constitutionalism.

f. Civilian control of the military

Civilian control of the military is essential to popular sovereignty, to democracy, to separation of powers, and to individual rights. Constitutionalism requires that the military remain in the barracks and have limited apolitical functions under mandate from constitutionally-constituted civilian authorities. Governance by military junta for however brief a period is anti-constitutional.

g. Individual rights



Constitutionalism implies obligations on government to respect and ensure individual rights for all inhabitants. An accepted catalogue of individual rights ("human rights") is set forth in the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948; the Declaration includes what have come to be characterized as economic-social rights as well as civil-political rights. Many states have incorporated the Declaration by reference in their constitutions or laws, or have borrowed particular provisions from the Declaration or from international covenants and conventions deriving from it.\*

Some national constitutions, e.g., that of the United States, have also provided models for constitutional rights provisions in other countries. Judicial review to define and protect rights, exercised by an independent judiciary, as in the United States, or by constitutional courts, as in Western European countries, has also served as an example to other constitutional systems. Constitutional jurisprudence in the United States, Canada, Australia, in European countries, in India, and other countries, and the jurisprudence developed pursuant to international agreements by international institutions, notably the European and the American human rights commissions and courts, have also had important influence in other parts of the world.

The jurisprudence as to several particular rights is especially noteworthy.

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\*The Declaration was later elaborated into two international agreements, a Covenant on Civil and Political Rights and a Covenant on Economic, Social and Cultural Rights. Particular rights have been elaborated in special conventions, for example, on slavery, on genocide, on torture, on freedom from racial discrimination, on discrimination against women.

-- The right to life. The Universal Declaration declares that everyone has the right to life. (Article 3.) The International Covenant on Civil and Political Rights obligates states parties to the Covenant to respect and ensure the right to life. (Articles 2, 6.) That provision prohibits lawless killing by governments and, by extension, also "disappearances." The Covenant does not prohibit capital punishment, but in 1989 the U.N. General Assembly approved a protocol that would abolish the death penalty in states adhering to it. Some national constitutions have outlawed capital punishment, others have not. The Covenant requires the state to protect the life of an individual against his (her) neighbor. It does not require the state to prohibit abortion.\* Some national constitutions have been interpreted as protecting a woman's right to have an abortion; other constitutions have been interpreted as permitting (or requiring) the state to prohibit abortion.

-- Liberty and security of person. Article 3 of the Declaration declares that everyone has the right to "liberty and the security of the person." Subsequent articles in the Declaration prohibit slavery and servitude, torture or cruel, inhuman or degrading treatment or punishment, arbitrary detention. The state may deprive a person of liberty (or life) for violation of law but only if the law is not arbitrary and the person is properly convicted; in the criminal process, the accused is entitled to various guarantees adding up to due process of

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\* The American Convention on Human Rights appears to require the state to prohibit abortion. Article 4(1).



law. The Declaration also recognizes the right to freedom of movement, residence and travel, and the right to free choice of employment. Later articles guarantee freedom of conscience, expression, religion, association and assembly (see below). Such provisions are common to many constitutions, but with important variations.

There has been debate as to whether the right to "liberty" has independent content -- that is, whether its content is defined by the protections for particular freedoms in the subsequent articles or whether it guarantees also freedoms other than those specified. In the United States, for example, "liberty" has been held to imply essential autonomy, freedom of choice in personal matters, as well as some freedom of economic enterprise (see below).

-- Freedom of religion, press and expression. Liberal constitutions, and the Universal Declaration, recognize a right to freedom of thought, conscience and religion, freedom of speech, press, association, assembly. These freedoms are deemed to be essential to political democracy as well as to individual human development and fulfillment.

-- Property and economic enterprise. The commitment to individual rights which is implicit in constitutionalism includes the right to property. The Universal Declaration recognizes everyone's right to own property and not to be arbitrarily deprived of it (Article 17).\*

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\*That right was omitted from the Covenants as a result of political tensions at the time the Covenants were concluded, reflecting differences as to the scope of the right and its protection, but the right to

the Declaration nor any other authoritative instrument defines the right to property, or indicates the permissible limitations on the use or ownership of property. The Universal Declaration was designed to be acceptable to countries of every economic ideology -- free-market, socialist or mixed -- and expresses no view on free enterprise generally.

The U.S. Constitution has been read as safeguarding freedom of enterprise including freedom of contract; it expressly protects against state impairment of the obligations of contracts. (Article I, Section 10.) The Constitution protects property against deprivation "without due process of law" (Amendment V) but does not preclude taxation as long as it is not confiscatory. (The Constitution now explicitly permits progressive income taxation. Amendment XVI.) Property and economic liberty are subject to reasonable regulation for public purposes.

The U.S. Constitution provides in addition that private property shall not be taken for public use without just compensation. (Amendment V.) The jurisprudence of such "eminent domain" (nationalization, expropriation) has not limited the public uses for which property may be taken; for example, the courts have upheld taking for aesthetic purposes, and for programs of land reform and redistribution. Constitutional jurisprudence in the United States has struggled with difficult issues as to whether a governmental action was a permissible regulation or constituted a taking requiring compensation, and what compensation is just in general or in particular circumstances.

A number of constitutions promulgated since the Second World War ordained socialism, prescribed public ownership of the means of  

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property was not questioned in principle.



production and imposed limitations on individual economic enterprise and private property.

-- Equality. Equality and the equal protection of the laws are prominent themes in national constitutional law and in international human rights. The Universal Declaration (Article 7) declares:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Equality, equal protection and non-discrimination are also principal themes of the international covenants. The special Convention on the Elimination of All Forms of Racial Discrimination has more adherences than any other human rights convention. The Convention on the Elimination of All Forms of Discrimination against Women has also been widely adhered to.

In the United States, the constitutional jurisprudence of equality and equal protection fills volumes. In general, it has required equal treatment of those similarly situated but has permitted (though not required) unequal, compensatory treatment for those in different circumstances. Constitutional jurisprudence has been uncertain as to various forms of "affirmative action." It is established that in the United States segregation -- "separate but equal" -- is not equal.

<sup>1</sup>See, e.g., Article 17 of the Constitution of India.

No one has suggested that the equal protection of the laws forbids progressive taxation. (In the United States, as indicated, progressive income taxation was expressly authorized by constitutional amendment.)

-- Economic and social rights. The Universal Declaration includes economic-social as well as civil-political rights. Economic and social rights include, inter alia, the right to work, to adequate food, housing, health care, education. The Covenant on Economic and Social Rights obligates a state party to achieve such rights progressively "to the maximum of its available resources."

Virtually all states are now essentially welfare states, but not all states prescribe welfare principles in their constitutions. Older constitutions (e.g., the United States) recognized only civil and political rights. Many constitutions developed in the second half of the twentieth century recognize economic and social rights but in general do not provide for their enforcement by means and institutions -- for example, judicial review -- available to enforce civil and political rights.\* In the law of some states, however, some rights recognized in the Covenant on Economic and Social Rights may be characterized -- and enforced -- as civil and political rights, for example, the right to choose one's occupation as a protected liberty, or the right to join a trade union as an aspect of the right of association.

-- Workers' rights. The Universal Declaration recognizes the right to work, to free choice of employment, to "just and favorable"

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\*See, e.g., Article 37 of the Constitution of India.



conditions of work, to protection against unemployment; to equal pay for equal work; to "just and favorable" remuneration ensuring an existence worthy of human dignity; to social security; to rest and leisure.

Everyone has the right to join a trade union.

Constitutional protections of the worker differ with different economic systems and in different constitutions. The constitutions of liberal states with liberal economic systems protect the freedom to choose one's work (and one's place of residence), as well as the freedom of association, which includes the right to form and join trade unions. Socialist constitutions may offer different or additional rights to workers, including a right to be provided with work by society.

-- Minority rights. Neither the Universal Declaration\* nor the U.S. Constitution addresses "minority rights." Both see rights as individual, and both assume that members of minorities will have their individual rights safeguarded equally with those of all other members of the community.

Increasingly, however, it has been recognized that membership in minority groupings has continued to be a cause and focus of human rights

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\*After World War I, the League of Nations, persuaded that oppression of minorities was a major source of international conflict, promoted a series of "minorities treaties" in which some states undertook to safeguard certain rights of members of ethnic or national minorities in their territories. After the Second World War, the international system took a different direction. It no longer focused on causes of war in Europe, and sought to maintain international peace and security through the United Nations and acceptance of the right to self-determination. Some minorities it was assumed would achieve self-determination and cease to be minorities. For the rest, members of minorities would find protection for their rights in the new international human rights movement which would protect all human beings equally.

problems. Inter-group hostility has been an important contributor to oppression and to discrimination against individuals. Also, some policies and practices related to group relations have human rights implications, e.g., policies of assimilating minorities ("melting pot") as distinguished from maintaining their identity ("pluralism"), affirmative action programs, group defamation laws, preferences for some groups in financing education. International human rights agreements have hardly addressed these problems; emerging constitutions have been taking account of them in different ways.

### Limitations on Rights

Constitutionalism, all constitutional systems, and all international human rights instruments, are at one in treating rights as subject to some limitations in the public interest. The Universal Declaration provides:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. (Article 29(2).)

The Covenant on Civil and Political Rights expressly permits restrictions on some rights, e.g., the freedom of movement and residence, if restrictions are "necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of



others." The Covenant permits similar limitations on the freedom of expression. (Article 19.)

Neither the Declaration nor the Covenant nor constitutions generally consider which right prevails when two rights compete. Nor is there a developed international jurisprudence as to the scope of "national security," "public order," or "morals," but scholars have explored the international meaning and scope of those terms.\*

The Covenant on Civil and Political Rights not only permits but requires states to impose certain restrictions on freedom of expression.\*\* Article 20 provides:

(1) Any propaganda for war shall be prohibited by law;

(2) Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The extent to which a constitutionalist society may or must limit freedoms in order to safeguard the rights and freedoms of others or the public good is not agreed. Even states committed to constitutionalism and individual rights differ, for example, as to what limitations they tolerate for the sake of public morality. In the United States, the

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\*See, e.g., A.C. Kiss, "Permissible Limitations on Rights," in The International Bill of Rights: The International Covenant on Civil and Political Rights (L. Henkin, ed.), Columbia University Press, 1981.

\*\*The Covenant (Article 17) also seems to require a state to protect individual honor and reputation, presumably, inter alia, by providing remedies against libelous expression. See also Article 19 which permits laws necessary for "respect of the rights or reputations of others."

constitution protects even expression that offends others, or that promotes uncivil or uncivilized ideas or policies.

United States jurisprudence draws a line between opinion and advocacy on the one hand and incitement to violence or to other unlawful action. Contrary to the International Covenant, the U.S. Constitution, as interpreted, prevents the prohibition of propaganda for war or racial hatred or discrimination; the law may prohibit such expression only if it incites to illegal action.

The jurisprudence of liberal constitutions -- e.g., the United States -- treats virtually no rights as absolute, but has created categories and hierarchies of rights and freedoms. In the United States, freedom of enterprise, and other economic-social activities, are subject to reasonable regulation in the public interest. Some rights, however, are fundamental and preferred, e.g., the freedom of speech, press, religion and assembly, and the right to autonomy (privacy) in intimate matters; infringements of such rights and freedoms are strictly scrutinized and will be upheld only if justified by a compelling public interest. Certain classifications and distinctions in the law, e.g., racial classifications, are suspect and are strictly scrutinized by the courts; distinctions on the basis of gender are also examined more carefully than distinctions on the basis of other criteria.

#### Suspension and Derogation

Authority to suspend basic elements of constitutional government in times of "emergency" poses what is probably the most serious threat to constitutionalism and constitutional government.



The Covenant on Civil and Political Rights (Article 4) provides:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation.\*

Even in such circumstances some rights -- e.g., the right to life, freedom from torture, freedom from slavery -- may not be derogated from, and no derogating measures may involve racial, gender or similar invidious discrimination.

Some constitutions provide for suspension of some institutions, or of some rights, in time of public emergency. Unlike most constitutions, the United States Constitution does not provide for suspension of the constitution, of the legislature, or of the courts, and does not permit executive government in any circumstances. Only the privilege of the writ of habeas corpus may be suspended, only in case of invasion or rebellion, and only by Congress. (Article I, Section 9.)

#### Constitutional Amendment

A constitution reflecting respect for constitutionalism has to be subject to amendment if it is to reflect the sovereignty of the people contemporaneously, rather than the sovereignty of their ancestors who framed the constitution. On the other hand, too-ready amendment would

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\*For interpretation of Article 4 see T. Buergenthal, "To Respect and To Ensure: State Obligations and Permissible Derogations," in The International Bill of Rights, cited above.

threaten the character of the constitution as fundamental, supreme law. Amendments, of course, should be effected by procedures that reflect the sovereignty of the people acting in a constitutional capacity and mode. Amendments must not be such as to derogate from the commitment to constitutionalism, including respect for individual human rights.

In brief, at the end of the twentieth century, legitimate, acceptable constitutions must reflect respect for constitutionalism including, in particular, respect for individual human rights. The jurisprudence of the international human rights movement and of developed constitutions provide the stuff on which new constitutions can draw.

There is no model constitution. Some constitutions are brief and simple, others extensive and complex. States differ as to how they distribute law between constitution and legislation. Putting provisions into constitutions gives them the status of supreme law and largely immunizes them from ordinary political process. There is ample room for differences reflecting local needs, but there can be no deviation from basic elements -- popular sovereignty, accountable government, and respect for the human rights of all the inhabitants without distinction. The Universal Declaration does not require that any rights be "constitutionalized," only that they be recognized, respected and ensured. But it is important that the idea of rights, and the principal rights, have constitutional supremacy, and some rights will not in fact be respected and ensured unless they are rendered effectively supreme law. It is important too that the constitution establish institutions --



e.g., an independent judiciary or constitutional court -- that will respect and have authority to assure that others respect individual rights.\*

No two constitutions are or should be the same. A constitution must reflect the particular society, its geography and history, economy, demography, traditions, culture. But whether a constitution prescribes for a unitary or a federal state, a presidential or a parliamentary system, a socialist, free-market or mixed economy, a constitution that is authentically constitutionalist must secure constitutional legitimacy and constitutional review, authentic democracy, accountable government and one that will respect and ensure individual human rights and secure basic human needs.

In the end, no document, no blueprint of government, no bill of rights is sufficient to guarantee constitutionalism. In the end, constitutionalism depends on political, social and economic stability and a political culture that is committed to constitutionalism. What the constitution provides will reflect, contribute to, and help maintain such a culture of constitutionalism.

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\*Some believe that a constitution should promote an independent legal profession to assure due process of law in criminal proceedings but not only in criminal proceedings.

