CONSTITUTIONAL GOVERNMENT

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Summary

The core element of constitutional government is, of course, the existence of a "Rule-of-Law" or set of “basic laws” that binds both public office-holders and all members of a society (i.e. citizens) within a given territory. Presently most states avail of a constitution, which directs the organization of the state, the relations between the public offices within the state, as well the human and civil rights of the individual. Constitutional governments, however, do not perform in the same manner everywhere.

In this contribution, the following aspects are discussed comparatively: (a) The relationship between constitutional features and the existing state format; (b) The key institutions which define the type of government and the relationship between the executive and legislative; (c) The existing systems of "checks and balances" between governments, assemblies and Heads of State, as well as the role of the judiciary; (d) The actual performance of constitutional governance in terms of human and civil rights.

Of course, these relations and practices of governance have been developing over time. It is also obvious that there is a strong tendency toward "liberal democracy" (in particular after 1991 when the USSR collapsed as a political system). It is equally clear that the state format, i.e. federal versus unitary states; decentralized versus centralized government, as well as the type of governance, varies considerably across the world of constitutional government.

In this contribution a fundamental distinction is made between democratic types of government, on the one hand, and one-party systems and other (mainly with unchecked powers or military rule) systems, on the other. Most of the latter types of 'defective' constitutional government can be found in developing countries, but not exclusively.

Finally, the relative degree of "polyarchy" (an empirical model of democracy) has been presented as an indication of the democratic performance. Contrary to the formal division of democratic government, it becomes clear that in practice well developed polyarchies only cover 23% of all constitutional governments. Hence constitutional government does by no means imply a working liberal polity.

1. Introduction

Constitutional Government is a regime type that is characterized by the fact that "Government" operates within a set of legal and institutional constraints that both limits its power and protects the individual liberty of the citizen of a polity. Central elements of constitutional government therefore are the set of rules or "basic laws" that establish (usually in writing) the duties, powers and functions of government (i.e. the institutional autonomy) and define the relationship between state and individual (i.e. individual autonomy). This complex of institutional relations is a regime type, because it is fundamentally different from those states where the "Rule of Law" is either absent (or suspended), or is defined on the basis of other principles than "liberalism" (meaning commitment to the principles of individual liberty, freedom to associate, tolerating other mans belief and respecting minorities, and consenting equal rights to all citizens within the polity; see *Liberalism*). Hence, constitutional government is based on a "contract" between the "Principal" and the "Population" at large and that can be considered as an authoritative guideline concerning the "Room to Maneuver" of government.

The origins and development of "constitutionalism" can be traced to its roots in the 18th Century enlightenment and the Bourgeois Revolutions in the US and Europe. This overview will show that at present the meaning of constitutional government appears to overlap stronglywith the idea of the "rule of law" and also has influenced the chosen organization of the state (its format, e.g. republicanism, federalism, parliamentarism,) and the values of a society (Liberty, Social and Economic aims like public welfare, human rights etc. (see *Human Rights*). Taken in this sense Constitutional Government is both a principle for organizing public life and a framework (of reference) for assessing the sustainability of a political system. It can be considered as one of the building blocks of not only organizing a society, but also as being crucial for understanding how and to what extent national government contributes to sustainable conditions of society (see *Economic Development and Government*).

Traditional concepts of Constitutional Government are often biased towards legalistic (and mechanistic) approaches of how government works. Conversely, Dahls "ideal type" of liberal democracy" Polyarchy" seeks to define an optimal and realistic relationship between institutional and individual autonomy within society. Hence, "Polyarchy" is the embodiment of liberal democratic rule as a political regime in development (i.e. more or less sustainable) and ought to be seen as the institutional design to assess the polity (the institutional framework) in terms of producing public

goods that are close to the individual preferences of all (see *Political Aspects of Government*).

The following elements will be discussed and illustrated to demonstrate how constitutional government looks in "reality":

- The origins and availability of constitutions across the world;
- What is a constitution and what not in terms of their respective features;
- The key institutions emanating from the constitutions which shape the state format and type of government;
- The relations between the Head of State, the Executive, the Assembly, the Judiciary;
- The distribution and frequency of human rights and civil rights across the world.

In this overview we will also devote attention to those governments, which do have a constitution (e.g. communist states) or have suspended it (e.g. military rule), but cannot be considered as liberal democratic polities (see *Democracy*). Finally, we shall present a cross-national survey of the relationship between constitutional government and liberal democracy to highlight the high level of cross-national variation with respect to the elements discussed in this contribution.

2. What is Constitutional Government?

Almost all nation-states have in common that they have a constitution. Only eight of the 192 countries listed by the UN did not have a basic document that could be considered as a constitution. Constitutions are apparently an important part of any political system across the world. This observation is further reinforced if one takes into account that constitutions had emerged already in the eighteenth century. Yet, the study of constitutions as part of political science (and also of Law) faded away in the post-war era and only became the subject of investigation again in the past decade. Two reasons can be given for this renewed attention:

- Since the late 1980s, around 45 per cent of all constitutions were either conceived and adopted or rigorously changed;
- In the same period, institutionalism regained its status as a valuable and viable approach to the study of how government works, namely as a result of the existing rules of the political game (see *Structures of Government*).

The first reason is not only due to the worldwide change in regimes, such as in the Communist World and the Third World, but also a consequence of a widely felt need to reconsider existing systems of governance. So new, or drastically renewed constitutions also emerged in Western Europe (e.g. The Netherlands and Belgium) or were heavily disputed (e.g. Canada, Italy, New Zealand and the United Kingdom). Arguably, constitutions are not only a widely spread phenomenon, but also considered as an important "epiphenomenon," as regards the direction and organization of the nation's polity, i.e. the organisation and role of government.

The second reason is mainly due to the growing dissatisfaction with the existing approaches within post-war political science. The focus of attention had slowly shifted from studying the (formal) rules of the political game towards structural functionalism in which the political system was treated as a part of a larger whole, on the one hand; and towards the behaviour of political actors as such (e.g. parties, interest groups, governments, bureaucracies, etc.), on the other. These approaches are considered as too limited or even as biased with respect to explaining how and why government acts or, equally interesting, does not act.

In conclusion, students of politics and government are increasingly interested both empirically and theoretically in the basic set of rules, or institutions, that both limit the powers of government and protects the individual liberty of the citizen within a country. In addition, political scientists are employing institutions as analytical tools to understand better the working of governments and its policy-making capacities.

Before elaborating on the concept of constitutional government and describing its comparative features for possible classification, it is helpful to dwell upon the origins of "constitutionalism" in the literature (see *Bibliography*); a broad and a narrow meaning is assigned to the study and interpretation of constitutions. Paul Heywood defines constitutionalism in the broad sense as: "a set of political values and aspirations that reflect the desire to protect liberty by internal and external checks on government power."

Taken in this sense, a constitution can be viewed as the core description of a political system, the relations between state and society, on the one hand, and establishing the relations between office holders within the government system, on the other. Such a description relates norms and values to activities of government and sets constraints to governmental actions. Examples of the first (values and activities) are constitutional chapters (or: preambles) in which, often, ideology forms a basic point of departure (as has been the case in many communist and some socialist constitutions), or where social development and public welfare is designed to be a concern of the "state" (e.g. in Germany, the Netherlands, Paraguay and Kenya). Examples of constitutional constraints are manifold and multifarious: they range from religious or ethnic safeguards to a special role for the Head of State, or the military, to preserve the nation (as in South Africa, Turkey and Indonesia).

Generally speaking, the purpose of a constitution and the related actions of government are:

- to embody the nation by empowering the state;
- to establish unifying norms and values and develop shared goals for society (ideology);
- to give public officials special (selective) powers, which are legitimized (institutional autonomy) and
- to limit these special powers by protecting freedom for (groups of) individuals (individual autonomy).

According to Heywood, this broad interpretation of constitutionalism almost fluently spills over in its more narrow sense, namely: "constitutionalism is said to exist if and

when government institutions and related political processes are effectively constrained by constitutional rules".

The narrow meaning of constitutionalism can be considered as a more legalistic and negative form. Instead of referring to values and goals, the emphasis is clearly more conservative. This version focuses more on the rules per se and whether or not they are effective in the sense of means-end relationship (assessing whether or not a specific rule is indeed conducive to its desired outcome). For example is the Judiciary indeed independent, if appointed by the Head of State? Or can they function independently if the constitution prescribes that judges are to obey the law only, which implies upholding specific values (like religion, ideology or the state)? The "narrow" approach should however not be dismissed too light heartedly: it enables the researcher to develop the "power map" of a political system and to analyze its political organization comparatively on an empirical basis.

These points were already in the mind of the pre- (Second World) war political scientists. A famous exponent was Lord Bryce, who compared the constitutions of (the then existing) democracies and deduced from this investigation the actual working of those democratic systems.

However, as the 1930s proved, the institutional design did not prevent systems from turning into authoritarianism (as in Germany and Italy) nor from establishing anything but personal freedom and protection of liberty (as in the USSR). This led to the demise and devaluation of the study of constitutional government in the post-war period and should be a caveat in studying and assessing constitutional development at present.

Modern constitutionalism therefore ought to be discussed both in the broader sense and in its narrower meaning. Point of departure is then the framework of reference it represents for a society at large and the institutionalization of public authority in the form of a political regime, a system of political rule by government. This implies that regime analysis is basically the analysis of constitutional government, since it asks persistent questions on how power in societies is distributed, and with what consequence for the public welfare. For example, Polybius and Aristotle developed typologies of political regimes on the basis of comparative evidence, in order to answer questions such as: "who rules" and "who benefits". The purpose of the analysis was to evaluate forms of government on normative grounds, hoping to identify the ideal constitution serving the community at large.

According to many political scientists, this type of regime-analysis lays the foundation for further ideas developed during the European era of "absolutism," by philosophers such as Thomas Hobbes (1588-1679) and Jean Bodin (1530-1596). In their view, the Aristotelian questions could only be answered by vesting the sovereignty into one indivisible principle (the monarch), who was bound only by a higher power (God) and its rules (e.g. the Bible). Whatever one may think of these ideas, the importance is that concepts like "sovereignty" and "authority" were introduced. The concepts pointed at a (necessary) relationship between the "state" and its jurisdiction over the inhabitants of a territory.

The writings of Locke (1632-1704), Montesquieu (1689-1775), and Madison (1751-1836), although developing alternative models, mark the beginning of what is still

considered as the contemporary study of constitutional government. Locke argued that sovereignty resided with the people (i.e. inhabitants), and proposed therefore that governmental powers should be limited mainly to protect individual rights to life, liberty and property. Montesquieu advocated a constitutional system of "check and balances" by means of the (well-known) "separation of powers," between the executive, legislative and judiciary institutions. The ideas of Locke and Montesquieu lay the foundation for the US constitution (1787), the French Revolution (1789), and were gradually dispersed first across Europe and later elsewhere in the form of liberal democratic government.

Many of these ideas indeed materialized in most of the constitutions that were developed in the aftermath of the Napoleonic era, which brought constitutional government in Europe, and both the Americas, in particular. With it, one can also witness a growing level of variety as to what appeared to be considered as the "ideal" constitution. Republicanism superseded monarchism, parliamentarism was distinguished from presidentialism, and unitary systems became accompanied by federal ones.

In conclusion, the emerging systems of political rule that developed over time had a number of identical features that originated from a debate among political philosophers on the relationship between State and Society and the role and position of government. On the other hand, the constitutional choices made and the ordering of these features, varied considerably, and led to a bewildering variety of constitutions across the world. We shall concentrate on this variation in constitutions, and on the attempts to classify constitutional government, in the next section.

3. Constitutional Features Across the World

A constitution, or if it does not concern a separate document, the "basic laws" of a nation-state, always refer to its/their supreme organic law. It is thus the law(s) from which all other laws are derived and it prescribes how a nation is governed and by what type of office holders, as well as the way these political actors can and must interact. Although most, if not all nation-states have a constitution or basic laws, the supremacy of the basic law is not only a matter of whether or not it exists, but also of how and by whom the law is upheld, and in what way and to what extent these basic laws can be changed and adjusted in order to make them work effectively in establishing state-society relations.

Two concepts are used to denote this phenomenon: the "Rule of Law" emanating from the constitution, and the development of "conventions". The Rule of Law is the idea that the law should "rule" and as such, establishes a framework by which the conduct and behaviour of political actors can be assessed. This principle applies equally to all members of society, be it private citizens, members of the civil and military service, but foremost, to political office holders (i.e. members of the executive and legislative).

The Rule of Law, or "Rechtsstaat" is thus an expression of the supremacy of the (basic) law, but is also subject to the scrutiny of the Judiciary and requires a liberal and democratic culture to survive as well as to be effective. This is often not the case, or only temporarily the case (e.g. military coups d'état or takeovers of government). If there is such a culture, then the second (informal) institution of constitutional

government: the emergence of conventions, is not only important, but also relevant, in order to make constitutional government work in a stable fashion.

Constitutional conventions are the rules of practice, which are considered as "correct" (how things should be done) and as "practical" (how procedures will be workable). These non-legal rules are, of course, to some extent flexible and dependent on the power relations in "political society". These exist in all types of constitutional government and guide the conduct and behaviour where formal rules are either unclear or incomplete (in particular in so-called "rigid" constitutions or basic laws). Conventions play a particularly important role if there is not a constitution, or a comparable codified document is not available. In essence, these informal rules modify the effect of the different powers laid down in law and define usually by means of the Judiciary the room to manoeuver of the ruling elites (this is, e.g., visible in the working of the "common law" in many Anglo-Saxon countries, and in the interpretations of "High", "Supreme", or "Constitutional" Courts).

Both the "Rule of Law" and "Constitutional conventions" are important elements for considering the actual working of constitutional government in reality and should always be taken into account whilst studying modern government, in particular as regards assessing the degree of its constitutionality in theory and practice.

3.1. Classifying Constitutional Government

Classifying constitutional government is not an easy task if one departs from the set of given rules. Some constitutions have been in existence for 200 years, others were only adopted a decade ago, and often follow existing patterns.

A first indicator for classification is the question of whether or not government is based on a written or codified document that directs its behaviour. Only a few nation-states have no codified set of basic laws that function as a constitution. Research conducted by Derbyshire and Derbyshire shows eight cases without such a document: Bhutan, Israel, New Zealand, Oman, San Marino, Saudi Arabia, the United Kingdom and Vatican City. Yet, even in these cases one should bear in mind that there is a minimal system of "checks and balances" and some kind of a "bill of rights," defining the status and "room to manoeuver" of government, on the one hand, and circumscribing protection of the liberties of the individual, on the other.

The exceptions to the rule concern firstly the sacred laws of the Koran and restricting the kingdom of Bhutan and Saudi Arabia, as well as the Bible directs the role of the Pope in the Vatican City. In addition, certain traditions have been institutionalized and work as conventions regarding decision making and, for instance, the succession of the Principal. The case of Israel is in part the same, since the Torah remains a source of political authority.

Yet, at the same time, Israel is different in that this nation has developed a set of rules that can be considered as basic laws. The same applies to New Zealand that has adopted a political system that is similar to that of the United Kingdom, where the development of Common Law shapes its practice. In the United Kingdom, in the course of time, a series of "Acts of Parliament" were adopted, from as early as 1688 (the "Glorious Revolution"), in which the Rights of Parliament and of the citizens is protected. (the

supremacy of parliament vis-á-vis government and the Crown, limiting the influence of the House of Lords, and the enlargement of political representation). Hence, it is misleading to classify constitutional government solely on the basis of the availability of a written constitution. All constitutions or sets of basic laws are in fact a blend of written and unwritten (conventions), although the mix of the two varies considerably across the nations.

Germany and France, for example, can be considered as having an extensive and detailed set of rules directing the working of government and the powers of the state. Conversely, the constitutions of the Netherlands and the US are short documents (ca. 10 000 words), in which broad principles of civil and political rights and a loose framework of government are laid down.

The main institutions of government, as in the relationship between the executive and the legislature, have evolved over time. For example, the role and position of the Dutch Head of State (the King or Queen) was fixed in 1848, by which a minister has the ability to exercise the Royal Prerogative, however still being fully responsible to parliament. This latter constraint is not actually mentioned in the Dutch constitution and has developed over time through a number of political clashes and is still based on convention.

It appears more fruitful therefore to ask whether or not a nation-state has a codified set of basic laws, which shape the state format (e.g. federalized or not), the organization of the executive (e.g. parliamentary or not), the independence of the judiciary and the existing civil and political liberties. Before treating these properties of constitutional government we shall devote some attention to other general features of constitutions and their development: changing the constitution.

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Biographical Sketch

Professor Hans Keman (1948) is professor of comparative political science in the Faculty of Social Sciences at the Vrije Universiteit (Amsterdam). He held positions at the University of Leyden and the Municipal University of Amsterdam. Furthermore he has been research fellow at the European University Institute (Florence, Italy), the Australian National University (Canberra, Australia) and the Netherlands Institute of Advanced Studies (The Hague). He has also been editor of the *European Journal of Political Research* and presently Editor-in-Chief of *Acta Politica*. His research is mainly comparative and focuses on political institutions, parties and government and social and economic policymaking. He has published many articles and several books, amongst others: *The Politics of Problem-Solving in Postwar Democracies*, London: MacMillan Press (1997), *Doing Research in Political Science* (as co-author), London: Sage Publishers (1999; 2nd Edition: 2006), and recently *Comparative Democratic Politics*, London, Sage Publishers (2002).