

Constitutional Design and Public Policy

Lecture 1: Introduction to Constitutional Theory

(Universiteit Leiden, Fall 2003)

I. Finding the Constitution

- A. A nation's political constitution consists of durable procedures and constraints that define the methods and limits of lawful governance. The procedural aspects of a constitution include the general architecture of the government: the legislature, executive, court system, and power relationships among those parts of government.
- B. Constitutional procedures also specify, at least in a general way, how persons are to be selected for important official positions within government and what their general responsibilities are.
 - i. For example, the durable procedures of a democracy include explicit electoral rules and methods for selecting representatives and for making policy within the elected government.
- C. A constitution may also specify the proper domain of governance by assigning specific policy responsibilities to government and also by defining policy areas in which government policies cannot be made.
 - i. The latter areas are often characterized by a "bill of rights," which stipulates areas in which private decisions or those of other levels of government are to be protected from central government intrusion.
- D. Together, these procedures and constraints define the method and policy areas in which a national government may lawfully adopt new laws and implement them.
It is in this sense that a constitution may be regarded as the highest law of the land. A constitution is the law for making laws.

II. Note every Constitution is a Constitutional Contract

- A. It bears noting that not every constitution can be regarded as a social contract in the sense that it is broadly acceptable to all residents of a the country of interest.
- B. Stable procedures for enacting new laws and constraints on what rules can lawfully be adopted may be used by authoritarian regimes as well as by successful democracies.

- i. It is for this reason that constitutional design may be said to be one of the oldest areas of social science—even if it has been largely neglected by modern academics in political science and economics.
- C. Even in cases in which all procedures for making laws are codified in formal documents that bind the sovereign, the formal documents may have been agreed to by a relatively small portion of the society of interest and have relatively narrow support.
- D. Thus the existence of a constitution does not by itself have normative significance, although it may still have political significance.

III. The most obvious part of a nation's political constitution is that which is explicitly written down in its fundamental laws of governance.

- A. For example, chapter 2 of the most recent Dutch constitution specifies the relationship between the king, the government, and parliament.
- B. Chapter 3 calls for a bicameral parliament elected via proportional rule (art. 53) with the second chamber directly elected by voters (art. 54) and the first chamber indirectly elected by provincial councils (art. 55).
- C. The government, thus constituted, is forbidden to write laws that violate certain fundamental rights and freedoms specified in Chapter 1 and required provide certain services.
- D. In Chapter 8, that constitution also specifies how its own procedures and constraints can be revised: by super majority (2/3) approval of the two chambers, elected after the proposed amendment was accepted for consideration by the previous parliament. [http://www.oefre.unibe.ch/law/icl/nl00000_.html]
- E. These are common features of essentially all modern democratic constitutions, although the details (existing of king or not, type of election procedure, structure of parliament, etc.) vary from country to county.

IV. In addition to the formal procedures outlined by a nation's written constitution are the durable procedures and constraints of the unwritten constitution.

- A. The unwritten constitution is often implicit in the actual conduct of parliament and other branches of government.
 - i. For example, the degree of centralization in political decision-making procedures is largely determined by legislation and custom—even in cases in which

constitutions make explicit reference to the autonomy of local governments, interest groups, and individuals.

- ii. Moreover, in practice, much of the actual drafting of rules and regulations is delegated to commissions, government committees, local governments, party elites, and the bureaucracy in which unelected government officials and members of interest groups develop new laws that are never seen by members of the parliament.
- iii. These procedures for making laws have significant impacts on individuals, businesses, and other organizations, but are not specified by the written constitution, nor could such procedures be fully specified by a written constitution.
- iv. The relationship between the written and unwritten constitutions is itself largely unwritten.

V. It is clear that both the formal and informal parts of a nation's constitution are largely evolutionary products of trial and error.

- A. A good deal of what is written in new constitutional documents consists of procedures and constraints already contained in previous written documents, and most changes in formal procedures assume the continuation of most of the informal practices and constraints associated with the previous unwritten constitution.
 - i. This is, of course, what is meant by a constitutional amendment. Such piecemeal changes allow the gradual accumulation of constitutional knowledge and practice over the centuries.
 - ii. And, in this sense, a long-standing parliamentary democracy may be said to have a constitution that is substantially older than the government defined by its current constitution.
 - iii. Many parts of a nation's constitution are influenced by customs, procedures, and norms that have evolved over the centuries.

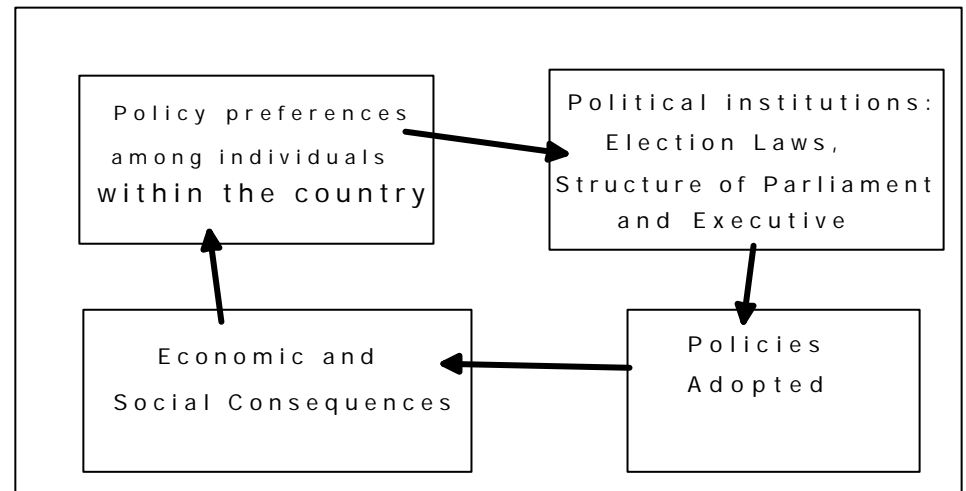
VI. None the less, every change in a nation's written constitution explicitly creates a new combination of procedures and constraints for the development of new law and every newly written constitution legally supersedes both the written and unwritten parts of the previous constitution.

- A. Moreover, changes in the formal written procedures and constraints tend to induce changes in both the unwritten practices and procedures of governance, especially in areas directly affected by the new formal procedures.

- B. In this sense, at least, major constitutional reforms can be thought of as revolutionary (discrete), rather than evolutionary (continuous) in nature.

VII. Constitutions are important because they influence the course of public policy, which in turn, has direct effects on people both inside and outside the country of interest.

- A. The reason most persons prefer democracies to dictatorship is not because they prefer to watch parliamentary debates to royal processions, which most do not, but because the anticipated policies produced by democratic governments are considered superior to those produced by dictators and kings.
- B. There are several reasons to believe that constitutions "matter" in this sense.
 - i. First, there are various theories of governance, both the intuitive theories of the "democratic polemicists" and the more carefully reasoned theories of philosophers and modern political economists.
 - ii. Second, there is a good deal of empirical evidence that constitutions have affected public policy broadly around the world.



- iii. (See for example, my book on Sweden (2003) or Persson and Tabellini (2003). Additional readings along these lines are available at my website under suggested readings in constitutional economics.)

VIII. This course will spend time developing both the rational choice models of the differences between constitutions, and exploring empirical evidence on the effects of constitutional designs.

- A. Discussion: positive and normative issues in constitutional design.
- B. Discussion: difference between history and social science.