Constitutions in OECD Countries: A Comparative Study

BACKGROUND REPORT IN THE CONTEXT OF CHILE'S CONSTITUTIONAL PROCESS

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BETTER POLICIES FOR BETTER LIVES

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Foreword

Shaping a constitution presents a country with an exceptional opportunity to create a shared vision of the future. It represents a chance to lay the foundations for a strong democracy, government stability, and the protection of fundamental rights. Initiation of the current constitutional reform process in Chile was met with remarkable citizen support following the outcome of a referendum that took place in October 2020. That process has set democratic Chile on a new, promising path.

For all countries embracing such an endeavour, drafting a new constitution or amending an existing one is a stimulating challenge, but also a demanding process from both a political and technical standpoint. With a view to providing background contribution for the members of the constitutional convention in their drafting endeavour, the OECD was invited to conduct a benchmarking exercise covering a range of possibilities for constitutional provisions, reflecting the experiences of selected OECD member countries. Acknowledging that constitution making is a sovereign national process that must be fully owned and led by the Chilean people, consideration of the lessons offered by comparative experience can help Chile reap the full benefits of the ambitious constitution-building process and support its successful outcome. This report therefore presents an overview of several components of contemporary OECD member country constitutions, highlighting key options in areas of special interest for the Chilean political-institutional context – such as the system of government, constitutional review, territorial organisation, economic and social rights, and fiscal institutions. While many crucial topics necessarily remain outside the remit of this review, they should not be considered any less important or worthy of inclusion in constitutional text. The focus here is on particular areas where the OECD can offer the most significant expertise and experience.

Chile is widely recognised as an exemplary pillar for the OECD in Latin America and a global leader in supporting the dissemination of OECD best practices and standards. Over the past ten years, Chile has undertaken ambitious reforms with support from OECD experts to continue improving its policies, regulations and institutional frameworks in key areas such as governance, competition, education, tax policy, and anticorruption. This report builds on that close relationship, while emphasising the sovereign nature of the constitutional process in Chile. The OECD congratulates Chile for managing to successfully launch this constitutional rewrite process under the extraordinary and pressing circumstances prompted by the COVID-19 pandemic, thereby demonstrating that diverging views can be addressed through dialogue and democratic process.

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This publication is the result of contributions from a wide range of sources and expertise. The report was overseen by constitutional experts Josep Maria Castellá, Professor of Constitutional Law, University of Barcelona and Member of the Venice Commission; Mark Tushnet, William Nelson Cromwell Professor of Law (Emeritus), Harvard Law School; and Guillaume Tusseau, Professor of Public Law, Sciences Po and former member of the French Superior Council of the Judiciary. Their outstanding guidance and detailed review is gratefully acknowledged. The work was reviewed by the OECD Public Governance Committee, consisting of representatives of 38 members of OECD.

The report was co-ordinated by María Pascual, Justice Policy Analyst at the OECD Public Governance Directorate. The introduction and Chapter 2 were drafted by Professor Mark Tushnet, with direction and input from Tatyana Teplova, Gandia Robertson and María Pascual. Chapter 3 was drafted by Evan Rosevear, University of Toronto, and Sam Bookman, Harvard Law School, under the guidance of Monika Queisser, Senior Counsellor of the OECD Employment and Social Affairs Directorate. Helpful guidance was also provided by Ulrich Becker, Director of the Max-Planck-Institute for Social Law and Social Policy. Substantial drafting contributions in relation to gender equality and women's rights were provided by Carolina Silva-Portero, Harvard Law School. The Chapter also benefitted from valuable comments and inputs from colleagues the Environmental Affairs Directorate, Science and Technology Directorate, the Digital Government Unit at the Public Governance Directorate and the Centre on Well-being, Inclusion, Sustainability and Equal Opportunity at the OECD.

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Abbreviations and acronyms

APEC	Asia-Pacific Economic Cooperation
CBR	Council for Budget Responsibility (Slovakia)
CODELCO	Corporación Nacional del Cobre de Chile (the National Copper Corporation of Chile)
CYP	Children and young people
ECB	European Central Bank
ECHR	European Convention on Human Rights
ESCB	European System of Central Banks
ESCNRs	Economic, social, cultural and new rights
FOMC	Federal Open Market Committee, United States
FSAP	Financial Sector Assessment Program
IFIs	Independent fiscal institutions
LAC	Latin America and the Caribbean
LOLF	Loi organique relative aux lois de finances (Organic Finance Law), France
MPs	Members of parliament
MPC	Monetary policy committees
NABO	National Assembly Budget Office, Korea
PBOs	Parliamentary budget offices
QPC	Question prioritaire de constitutionalité (Priority Question of Constitutionality)
SAI	Supreme audit institution
STV	Single Transferable Vote
TFEU	Treaty on the Functioning of the European Union
UNDRIP	UN Declaration of the Rights of Indigenous Peoples

Executive summary

Constitutions provide the essential framework that governs (and delineates) a nation's political life, protecting crucial elements of a stable and thriving democracy, such as the separation of powers and the protection of fundamental rights. They also bring together the core values, national identity and collective vision for the future of a particular society, and ground citizens' trust in government. In the context of the Chilean journey towards its new constitution, this report brings together lessons derived from constitutional frameworks across the OECD Membership, offering a range of design options to serve as background for the Constitutional Convention deliberations throughout 2021-22.

It identifies the key options to consider when designing particular areas of governance, and discusses some of their advantages and associated challenges to provide constituents with additional elements to consider when drafting the text. It focuses on a few selected OECD countries for benchmarking that have been identified as relevant examples and cover a representative spectrum of political design options that exist across the OECD membership, with occasional references to partner countries. The specific countries selected vary depending on the topic that is being discussed.

This report begins by outlining the role of a constitution and the fundamental elements it usually regulates, while underscoring the importance of an inclusive drafting process for a successful and representative outcome that is fully owned by a majority of citizens and provides a strong foundation for harmonious democratic governance. Each chapter explores specific building blocks of constitutions that hold special relevance. It first discusses key elements of the frame of government, including the three powers (the executive, legislative and judiciary branches) and the most common mechanisms included in OECD Members' constitutions for constitutional amendment and stability. In the next chapters, it assesses the constitutional entrenchment of economic, social, and new types of emerging rights. It examines the main systems of government that countries may opt for to promote stability, inclusiveness, and co-operation among branches of power to produce better policy outcomes. The report also provides a comparative description of constitutional provisions for multi-level governance, and the existing mechanisms for constitutional review. Finally, it provides an overview of constitutional provisions in the areas of fiscal governance and central banks in selected OECD countries.

1 Introduction

This introductory chapter presents the highlights of the relationship between Chile and the OECD. It considers the role of constitutions in modern democracies and the importance of the drafting process to foster inclusiveness and ownership of the text. Finally, it provides readers with an overview of the structure, methodology and definitions used throughout this report.

Towards a new constitution in Chile

Chile has embarked in a multi-stage process to forge a new social contract enshrined in a new constitution. The new text will be drafted by a Constitutional Convention, formed of 155 men and women in equal numbers – a world first – elected last May by direct and popular vote. The Convention will work for nine months to draft the new constitution, a period that may be extended up to a maximum of one year. The overall process of rewriting the constitution will last two years and finish with final public referendum at the end of 2022.

A cross-sectoral political agreement to rewrite the constitution was adopted on October 2019 following social protests that revealed mounting social discontent with unequally distributed income and well-being outcomes. The possibility of a new constitution has long been present in Chilean debate. Indeed, a deliberative process to draft a new constitution was officially announced in 2015 involving first citizen dialogues that would give rise to a broader exercise at the local, intermediate, and national levels (OECD, 2017[1]).[1] According to official numbers, 204 000 people participated in local meetings and 17 000 in the parallel Indigenous consultation.

Apart from being an exceptional opportunity, drafting a new constitution or amending the existing one is for any country a social, political and technical challenge. As the expectations placed on constitutions have increased, they have also become complex and lengthy, and hence more difficult to design. International experiences illustrate a large spectrum of constitutional options, and provide the lessons learned over years associated with each choice. Access to these experiences can help Chile understand the strengths and drawbacks presented by each choice; identify key factors to consider; and learn about different governance models that can be entrenched in the constitution. The OECD has been invited to provide inputs from comparative experience across member countries in terms of the possibilities, scope and dynamics of selected constitutional provisions, based on its long-standing relationship with Chile (Box 1.1).

Box 1.1. Chile and the OECD

The year 2020 was a momentous one in terms of the relationship between Chile and the OECD, as it marked the tenth anniversary of Chile becoming a member country.

Chile's accession process to the OECD started in May 2007 and culminated in May 2010. Throughout it, Chile was exemplary in its efforts to join the Organisation, undertaking major reforms to move closer to OECD standards and best practices. In response to recommendations made by OECD bodies, Chile adopted major pieces of legislation including: on the exchange of bank information for tax purposes; the criminal liability of legal persons for bribery of foreign public officials; the creation of its Ministry of Environment in 2009; and improving the corporate governance of state-owned enterprises such as CODELCO (Corporación Nacional del Cobre de Chile, the National Copper Corporation of Chile) by eliminating the presence of ministers on boards. Chile also improved competition and consumer protection laws, among others.

The accession process, which resulted in Chile becoming the first South American country to join the Organisation, was also an important learning exercise for existing OECD members who have continued to benefit from the Chilean experience in certain areas, for example the open government and transparency reform Chile undertook in 2008.

The OECD accession process is only the start of a journey. As such, the Organisation continues to follow up closely on the country's post-accession commitments. Most recently, Chile has successfully established the main elements of an industrial chemicals management system as recommended by the OECD Chemicals Committee, including through publication of a Globally Harmonised System of Classification and Labelling of Chemicals Regulation. The only area in which commitments are still ongoing is that of digital economy policy. Chile has been working to bring its privacy legislation in line with the relevant OECD standards, and the OECD Digital Economy Policy Committee is waiting for the adoption of a draft bill amending its personal data protection laws, which is currently under discussion in the Chilean Congress.

Once it became a member, Chile flourished as one of the most active OECD countries. Over the past ten years, Chile has worked with OECD experts to continue improving its policies, regulations and institutional frameworks in key areas such as environmental policy, competition, education, skills and abilities, tax policy, governance and anticorruption. The country's membership has helped the OECD better understand Latin America and the complexity and enormous potential of emerging economies. In addition, Chile has been a genuine pillar in the region, supporting the dissemination of OECD best practices and standards. Chile has also achieved significant economic advances, such as the fiscal surplus rule that contributes to the country's economic stability, and the creation of the Autonomous Fiscal Council. During the Chilean chairmanship of the OECD Ministerial Council Meeting (2016), the OECD launched the Latin America and the Caribbean (LAC) Regional Programme and Chile became its first co-Chair along with Peru. Chile also paved the way for the accession of other countries in the region, such as Colombia and Costa Rica. Chile has also enhanced the OECD partnership with regional economic blocks such as the Pacific Alliance and the Asia-Pacific Economic Cooperation (APEC).

This report has been prepared in the context of the drafting exercise of the Constitutional Convention, with the aim of serving as background support for the Convention members in their activities interest for the Chilean political-institutional context and to which the OECD can meaningfully contribute given its comparative knowledge: economic, social and emerging rights; system of government; multi-level governance; constitutional review; fiscal institutions; and the functioning of the central bank. This introduction presents an outline of key ideas concerning the constitution: What is its role? What are its key building blocks? Finally, it guides the reader through this report's methodology and structure.

The role of constitutions

In democratic systems, constitutions are created to ensure that a nation's people receive as good a government as seems possible by creating a solid and sustainable framework of institutions for democracy. Constitutions provide a legal foundation that governs (and binds) the nation's political life, a crucial element for a democracy that is stable and thriving. Constitutions also most often enshrine fundamental rights as a crucial element. Modern democratic constitutionalism is thus grounded on two principles: representative government that allows citizens to participate in public affairs and hold the government to account, safeguarded by the establishment of the separation of powers; and the protection of rights, through which citizens are sheltered from abuses of power (International IDEA, 2014[2]).

In general terms, written constitutions create the framework for government. At a minimum, they identify the body or bodies responsible for making law (legislatures), enforcing it (executives), and interpreting it (judiciaries). In doing so they specify how people are to be chosen as members (elected or appointed), how long they serve, and sometimes the qualifications for membership. A constitutional order also represents "a fundamental commitment to the norms and procedures of the constitution" (Ghai, 2010[3]). Several contemporary constitutions stop close to that point. The vast majority, however, cover much more.

Constitutions emerge not from a vacuum but from pre-existing institutions, economic conditions, social and cultural features, and political objectives of both the people and the numerous political actors that make up a community. Constitutional designs are thus context-driven and necessarily amalgamate political ideology and influence, legal theory, culture, historical experience, and legal technique. A comparative overview of constitutional choices made among the OECD membership points to two important considerations that should precede any examination of choices beyond the minimum:

- Items included in a constitution and the related details associated with each choice result largely from local circumstances, including the history against which the constitution is written. For some areas, "good practices" can be identified that have emerged from constitutional experience around the world, but sometimes there are important local reasons for making a choice that diverges from such good practice. The fact that a local proposal could differ from what is found elsewhere may signal to constitution drafters that they should examine the choice carefully, although that is not in itself a strong argument against the choice. In other words, best practices are not universal, and their adequacy hinges on the national history, context and preferences.
- Every choice made at the level of the constitution – if the choice is legally binding – removes that topic from the play of ordinary legislative policy making. The choice is then said to be entrenched in the constitution. This does not necessarily mean that the choice is irrevocable, only that it will stay in place until a majority sufficient to amend the constitution is assembled. Such "amendment" majorities are usually larger than those needed to modify or repeal an ordinary statute. Choices entrenched in the constitution are "stickier" than choices made by legislatures.

In general, this stickiness counsels against including detailed "programmatic" provisions[2] in constitutions as legally binding. Some constitutions include such provisions as recommendations to the legislature (these are sometimes called "directive principles" [Ireland]) or even as duties for the legislature to act on (as in requirements to enact organic laws, i.e. laws requiring a qualified majority, dealing with specified topics [France]). Some constitutional provisions can be made enforceable only through politics (these provisions receive different labels, such as "political questions" and "non-justiciable" matters). The general rule, however, is that everything included in a constitution is presumed to be legally enforceable. This means that a court may issue an order directing that the provision be complied with. If constitution drafters include provisions in a constitution that are not to be legally enforceable, such should be clarified to the extent possible. In any case, the proposition would benefit from being as clear as possible.

Drafting a new constitution

Both the process by which a constitution is built and its substantive content are the keys to its legitimacy (Böckenförde, Hedling and Wahiu, 2011[4]). The drafting process not only can endow the new constitution with necessary democratic legitimacy, but also can increase public awareness of it; instil a sense of public ownership; and create the expectation that the constitution will be observed by the whole of society (Saunders, 2012[5]). A successful constituent process that will lay the groundwork for future adherence to the constitutional text thus requires that as many relevant sectors and institutions of society as possible participate actively in its different stages. The Venice Commission in its report on constitutional amendment emphasises the participation of civil society and the centrality of parliament during the process.

In order to ensure this, constitutions and constitutional reforms in the past century have been carried out by both sitting parliaments and bodies chosen for the specific purpose of constitution drafting ("constitutional conventions" or "assemblies"); this will be the case with the Chilean Constitutional Convention. In Latin America, 46% of constitutional reform has taken place through a constitutional convention or assembly since 1947 (UNDP, 2015[6]). In other cases, it has been carried out by a selected group of experts. Sometimes, especially after severe civil strife is winding down, it has been drafted through negotiations ("roundtables") among important political actors, including parties and actors outside the existing government structures. Empirical studies suggest that constitutions written by parliaments, by constitutional conventions and in roundtable processes do not systematically produce better or worse constitutions. The most adequate system hinges on the national context, and a constitution's ultimate quality and stability appears to depend more on its substance than on the process by which it was drafted and adopted.

Several features of contemporary constitution drafting are worth noting:

- Except in unusual circumstances, a degree of citizen and stakeholder participation in drafting a constitution is widely believed necessary. The form of public participation varies: election of some or all members of a constitutional convention, for example, or a referendum to ratify a constitutional draft developed either by the parliament or a constitutional convention.
- In constitutional conventions, it is believed crucially important to ensure plural representation of views, to avoid skewed partisan interests from influencing or dominating the discussion. Ensuring the voice of different groups of society, the inclusion of minorities and gender parity are thought to be good practice.
- The general constitution-drafting body often meets in plenary form, but may delegate to a subcommittee the power to reduce general ideas to precise language (a "committee on detail," as in the drafting of the United States Constitution). The drafting body also may form specific thematic committees where specific matters are discussed, and at times could invite external experts. The proposed text is then reviewed by the plenary.
- A substantial degree of transparency in the drafting process is widely thought desirable. According to the UNDP Comparative Study of 95 constitutional reform processes (UNDP, 2015[6]), the vast majority of constitutional conventions opted for open door policies for their assembly deliberations and promoted transparency of the decisions adopted. Yet country experiences show that complete transparency can be difficult to achieve, as relevant discussions can occur in informal meetings. In addition, constitution-drafting bodies at times delegate to a "subcommittee" that can exercise outside the public's view the power to develop compromises on issues that prove difficult to work out within the body.

Structure of the Report and methodology

This report undertakes a comparative study of the constitutional provisions relating to six key building blocks of constitutions that are considered important in the Chilean context and where the OECD can offer relevant expertise, based on the experiences of its members. The countries selected for benchmarking cover wide spectrum of options across the OECD membership, and there are occasional references to partner countries. The countries selected as benchmarks vary depending on the topic that is being discussed.[3]

At the beginning of each chapter, there is an introduction to the importance of the topic and a box of key issues to be addressed, as well as a brief overview of the topic. Each section then identifies core features and considerations, and their historical evolution, with links to specific country examples. Where relevant, the chapter also considers those issues that are usually entrenched in the constitutional text and which are left to the secondary legal framework. The Annex presents a comparative table of the benchmarking countries' constitutional or legal provisions for consideration by the Chilean Constitutional Convention. The way in which key concepts are used is defined in Box 1.2.

Box 1.2. Key definitions in the report

For the purposes of this report , a *constitution* is understood in a formal sense, as a written instrument or instruments that provide a framework for the system of government, national self-expression and the protection of fundamental rights, and that are accepted as fundamental law. Such a law is hierarchically superior due to a special and rigid procedure of amendment and to constitutional review.

Most of the benchmark countries have such a constitution, although in Canada and Austria more than one instrument comprises the written constitution. The exception is New Zealand, which has no written entrenched constitution of this kind; instead, rules are provided in statutes, judicial decisions and, importantly, a treaty with some of the country's Indigenous peoples of New Zealand.

Constitutionality is understood as the notion that the authorities' actions shall be at one with the values, normative arrangements, institutional designs, and political processes promoted by a constitution, be it a single legal text, a series of separate legal texts or provisions, or a non-written constitution.

Special laws (also called *organic laws or qualified majority laws*) are those above ordinary laws but below the constitution in the hierarchy of laws. Special laws require a qualified majority (i.e., require majorities larger than simple ones) to be adopted, amended or repealed.

Ordinary laws or statutory laws are those subordinate to constitutional and special laws, and are easier to adopt and amend as they usually only require a simple majority of the legislature.

In terms of the types of constitutional reviews, *intense or strong-form review* occurs where either the Constitutional Court or the ordinary courts have the last word regarding interpretation of the constitution, and the constitutionality of a statute or act. Alternatively, a *mild or weak-form judicial review* is a form of judicial review in which judges' rulings on constitutional questions are expressly open to legislative revision in the short run. Courts are given the opportunity to explain why in their reading a challenged statute is unconstitutional, but the legislative deliberations are not bound by the court's arguments.

This report presents building blocks that may individually either be chosen or not. The combination of the chosen items in practice, however, will not be neutral. For example, more fundamental rights can be added in a very generous declaration in order to give the maximum amount of rights to the people and protect them from the institutions or from other citizens (horizontal effect), on the one hand; on the other, large powers can be granted to the constitutional court. The latter case however leads to lessening power of the parliament, in spite of the fact that the people at large generally retain more democratic control over the parliament than over the judiciary.

The OECD emphasises that constitution making is a sovereign national process that must be fully owned and led by the Chilean people. This report thus aims to provide a comparative range of options as found in the constitutions of its selected OECD member states, with full awareness that there are no “one size fits all” constitutional models. In order to ensure that the comparative exercise is useful, the report has attempted to present trends and examples that could be relevant and operative in Chile. Following an introduction to some of the building blocks of contemporary democratic constitutions (Chapter 2), there is a comparative overview of the constitutional inclusion and design of economic, social, and new rights (Chapter 3), systems of government (Chapter 4), multi-level governance (Chapter 5), forms and models of constitutional review (Chapter 6), fiscal institutions (Chapter 6) and central banks (Chapter 8).

Chapters 7 and 8, related to fiscal governance and central banks respectively, differ in significant ways from the rest of the report. These two chapters draw on OECD data and official recommendations more heavily than the others, given the long-standing tradition of the OECD advising countries specifically on those issues and the Organisation’s support for particular institutional designs surrounding those topics. They also draw on economic analysis more than legal or public governance considerations, as do the other chapters.

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Notes

[1] The process was organised into three main stages. First, an online individual questionnaire gathered 90 804 responses. Next, there were local self-convened meetings of 10 to 30 people, taking place mostly in private spaces but also in universities, schools, churches and other social spaces. Finally, more institutionalised participation took place through local *cabildos* or town hall meetings at the provincial and regional level.

[2] According to the RAE, in its legal dictionary, a programmatic norm is one that "does not contain imperative propositions or establish sufficient mechanisms to ensure its application, but is limited to formulating a program of action, criteria or legislative policy guidelines, or to declaring rights whose definitive consecration, endowing the declarative norms with full effectiveness, is left to the subsequent intervention of the secondary legislator.

[3] Australia, Finland, Germany, New Zealand, Portugal, Spain and Switzerland have been analysed as central benchmarking countries for the majority of topics. France has been analysed as part of the chapters on system of government, constitutional review and multi-level governance. Costa Rica has been analysed as part of the system of government chapter and for the chapter of central banks. Colombia has been examined to inform the analysis on constitutional review and multi-level governance. Austria and Mexico have been analysed for the chapter of constitutional review. Examination of the Netherlands and Greece complemented the analysis of multi-level governance. The chapter dealing with central banks has focused on the euro area as a whole instead of individual countries, and in addition on Poland, Turkey and Mexico.

2 The basics of constitutions: An overview

This chapter provides an overview of a number of basic aspects of the constitution that will need to be taken into consideration by constitutional drafters regardless of the institutional choices they make. It begins by outlining the key elements usually regulated in constitutions, and how they are often an instrument of national self-expression. It goes on to discuss key elements of the frame of government, including its territorial structure (which is further elaborated in Chapter 4) and the three powers (the executive, legislative and judiciary). It concludes by providing an overview of the most common mechanisms included in OECD member countries' constitutions for constitutional amendment and stability.

Introduction

As noted in the previous chapter, the vast majority of contemporary constitutions establish at a minimum the basic principles of the state, including as a form of national self-expression; the structures and processes of the chosen form of government; and the fundamental rights of citizens that are protected. They also enshrine these arrangements in a foundational law that cannot be amended by way of ordinary legislation and that entrench some sort of constitutional review to ensure constitutionality. Different options for the configuration of these essential elements will be analysed throughout the report. This chapter outlines the basic aspects that are usually regulated in constitutions, regardless of the specific institutional choices that are made. It starts by analysing what elements are normally part of the constitution, including the three branches of government, the territorial structure and its function as a form of national self-expression. It considers key mechanisms contained in the majority of constitutions to protect their continuity and stability, such as provisions for amendment, emergency power regulation, and independent electoral and audit institutions.

What do constitutions usually do?

- They provide a *frame of government*. Choosing one type of government over another in democratic constitution-making instances means deciding which patterns of political decision making would better serve the rights, needs and expectations of the higher number of citizens, while protecting fundamental rights and minorities. Different institutional arrangements to regulate relations between the legislative and the executive powers in particular give rise to several types of government (widely categorised as parliamentarism, presidentialism, and semi-presidentialism).
- Most constitutions are expressly forms of *national self-expression*. They often describe the nation, its history, and the reasons for adopting the constitution in a preamble. The list of rights in the constitution will refer to what the constitution's adopters think is most important for their nation. And sometimes even particular structures of government – elements of the frame of government – will similarly communicate how the nation understands itself.
- Nearly all contemporary constitutions *regulate the relation between the government and the nation's residents* (the latter usually described as its citizens, though the relevant population often includes many non-citizens). This occurs most obviously in the rights the constitution identifies, because those rights typically insulate residents from actions the government would otherwise be empowered to take. But the relation between the government and citizens can be found as well in the affirmative powers held by the government – the things the constitution authorises the government to do. Closely associated with the constitution's role in regulating relations between the government and citizens is its role in regulating relations among the citizens themselves (known as the constitution's "*horizontal effect*").
- Even if the government's powers are plenary – in the sense that it can act on any issue (as long as it does not violate constitutional rights), constitutions sometimes can single out some *areas for special attention*. At the most abstract level, they can provide that the government must act to promote general welfare; at a more concrete level, they can charge the government with ensuring that its policies preserve the economy and the environment for future generations. Such crucial provisions deserve a careful approach, as they would need to be specific enough not to put the constitutional court and other institutions interpreting the constitution in the field of arbitrariness (instead of allowing only a margin of appreciation, which is inevitable).
- Constitutions almost always tend to provide *mechanisms for their own amendment*. Constitution drafters recognise this need because they acknowledge the uncertainty of future challenges, as well as how constitutional provisions will work in practice. Unanticipated developments in the

national and world economies, as well as technological innovations, might generate challenges that can best be handled at the level of the constitution rather than by ordinary legislation.

- Well-designed constitutions are also *self-stabilising*. The systems of government they create should be able to preserve themselves when ordinary or moderate disruptions occur. Amendment mechanisms are one form of self-stabilising; well-designed provisions for choosing legislatures and executives can also promote constitutional stability. Contemporary constitution drafters have increasingly recognised what are sometimes called additional "institutions for protecting constitutional democracy" as desirable. The most widely adopted of these institutions are a specialised constitutional court, an electoral management body, and a supreme audit authority, each with constitutional guarantees of independence.

What do constitutions usually not include?

As outlined above, there are a number of basic choices that the constitution must make. Among these there is the possibility of leaving some matters to the regular legislative process. That would involve adoption of either ordinary laws or "organic" laws requiring special procedures (typically a special quorum requirement, less commonly a requirement that the law receive more than mere majority support and mandatory review by the constitutional court). Conversely, the constitution's drafters could decide to establish how the legislature, the executive and the judiciary should be chosen, and leave everything else to later determination by ordinary laws. Existing constitutions usually go beyond that scope. Still, all existing constitutions do leave some of the matters discussed above to be resolved by adopting ordinary or organic laws, such as for example regulation of basic rights and the composition and powers of specific institutions. Which choices are made and entrenched, and which are left to later determination, usually depends on the circumstances facing the constitution's drafters. Yet as noted, entrenching larger numbers of the drafters' choices has the effect of narrowing the range of policy making through ordinary legislation.

Constitution drafters might be guided by very general principles in determining what to include (other than the most basic provisions) and exclude. Constitutional issues make up the fundamental legal and political order of a community. The delimitation should therefore be determined by what society considers being fundamental to the community. In this way, it is preserved from the play of majorities and political conjuncture and is therefore the expression of the constituent consensus. In particular, the composition choice and functions of the constitutional institutions or bodies and the relationship among them, as well as the definition of the form of government and its basic principles, should likely be defined at the level of the constitution in order to ensure protection of minorities. If everything included is considered fundamental, and many aspects are covered in the constitution, very little is left to the democratic principle in the hands of successive majorities, binding them and preventing them from taking decisions in accordance with the will of the electors at each moment. To the contrary, if nothing is fundamental, everything is at the mercy of the majority of the day, and nothing is preserved against it. A balance between a position of hyper-constitutionalisation and de-constitutionalisation would be optimal.

When deciding on the inclusion of particular issues and the level of detail required, drafters could ask themselves, Are we ourselves better positioned than legislators will be to devise good policies on the issues we have identified? Legislators would typically have more time and better access to resources dealing with policy specifics than constitution drafters usually would. Those considerations counsel against attempting to address complex issues where good policy will have to contain many details. Yet, a constitution's drafters may believe – typically based on their nation's recent experiences – that the regular legislative process is unlikely to produce good policy on the issue. That might occur because (in the drafters' view) legislators, acting with an eye to elections, would be unable to develop appropriate policies. Or it might occur because (again in the drafters' view) the issue creates widespread conflicts of interest among legislators (as, for example, rules for ethical legislative behaviour might).

Even if the constitution drafters believe that ordinary legislation is not likely to produce good policy on some issue, they also have to conclude that they themselves can do so. And once again, the more detailed or complex the policy issue is, the less likely it is that constitution drafters – constrained by time and the availability of resources to investigate the issue – would be better positioned than even an imperfect legislative process.

In addition, constituent political consensus is sometimes difficult to achieve because of conflicting political positions on fundamental issues. In order to avoid deadlock, several avenues can be taken: a) include in the constitution only a few principles that empower the legislature to consider them and make the final decision, regulating the details; and in case of controversy empowering the constitutional judges or reviewers to adjudge on the matter; b) defer to the law, organic and ordinary, depending on the subject, to specify the constitutional mandates – in the case of matters of high relevance, defer to laws requiring a qualified majority; c) in the case of rights, introduce a clause referring to international human rights law. In this way, the need for consensus could be avoided: it is noted that there is no agreement, but a wording is sought that does not imply a specific position. A common pitfall when attempting to accommodate many views could be the inclusion of a list of potentially contradictory rights, which could lead to significant deadlocks in the medium term. The criterion for the fundamentality of rights may be given by the rights recognised in international instruments, as well as by other comparative law experiences.

National self-expression

A constitution traditionally aims at defining the polity's identity. It becomes the embodiment of the country's values and its project as an historical actor. As a consequence, this proclamation is often specifically protected through the constitutional rigidity mentioned above and constitutional review. The majority of modern constitutions contain preambles that describe the constituent nation. Preambles vary in length, tone and content, all of which are determined by local circumstances. Topics dealt with in preambles include the constitution's general purposes (including what it commits the nation to do in the future), the historical conditions leading up to the constitution's adoption, and the nation's place in the international community. In addition, some constitutions have specific provisions that reflect judgements about the nation's self-identity. These provisions can include the definition of the nation's territory; a description of the national flag and other symbols of the nation; the official language(s); and whether the state is to be considered secular or considered to have official religion(s). A few constitutions create specific institutions – such as ones dealing with Indigenous populations – and specific rights that also communicate to the nation's people and to the world the drafters' understanding of what the nation is. Whether a constitution's preamble has independent legal force varies. In some nations the preamble can support legal conclusions that a piece of legislation is constitutionally permissible or is unconstitutional; in others, the preamble has no independent legal force, though it might serve as background to explain why or how other provisions should be interpreted.

Frame of government

Unitary or federal

Constitutions usually specify the overall form of government (see Chapter 4), and whether the national government has power over all matters in a single "unitary" system, or whether subnational governments have constitutionally defined ranges of power to determine policy on some subjects. They can also define which policies the national government may not displace (in a federal system). Federal systems generally contain lists of powers held exclusively by the national government, of powers held exclusively by the subnational governments, and of powers that are shared between the two levels of government (Canada

§§91-92 1867 Constitution Act; India Seventh Schedule [Union List]).[1] Experience has proved that determining whether a given policy falls within either of the two exclusive domains or is shared can be difficult; the resolution is usually worked out in an ad hoc manner by political bargaining between the two levels, or decided by the constitutional court.

The three classical branches of government

A long tradition lies behind the creation of three "branches" of government (and some constitutions create a fourth or even a fifth). For each branch, the constitution describes the associated powers, the ways people become members of the branch (including the qualifications for membership), and the length of tenure within it. Many of the relevant issues are dealt with later in this report, including a discussion on the system of government in Chapter 4.

The legislature/parliament

The majority of constitutions have created legislatures that either have two chambers or are unicameral. Typically the "lower" chamber (or house or congress) is designed to be "closer" to the people – an arrangement ordinarily defended on the grounds that the lower chamber will be more responsive to popular needs and demands. Upper chambers (or senates) usually represent the subnational territories and regions. However, large degrees of subnational devolution or decentralisation usually require an upper chamber able to adequately represent the interests of subnational governments.

Inclusiveness in the legislature

Some constitutions provide that a proportion of seats in either or both chambers be reserved for specific groups, including women and Indigenous populations (New Zealand Constitution Act 1986 §45 [Indigenous], Tunisia §46 [women]). Determining district boundaries requires a reasonably accurate census of both the general population and, where relevant, the population of Indigenous communities. Some constitutions provide for a periodic census (Canada §51.1.1). Boundary drawing also requires action by an institution, a task that in almost all constitutions is allocated to an electoral management body. A question to be considered is whether the basic elements of the electoral system are addressed at the level of the constitution. If not, a law enacted with qualified majority could be recommended, as the electoral system is a substantial part of the rules of the political and democratic system.

Lawmaking

Ordinarily, both chambers must concur before a bill can become binding law. Some constitutions, however, give the upper chamber only suspensory power on all or some matters (United Kingdom Parliament Act 1911). Under such arrangements, the upper chamber returns proposed legislation sent to it by the lower one with a statement of its objections. The lower chamber then must address those objections by adopting them, modifying the proposal in light of the objections, or expressly rejecting them. Once the lower chamber acts, the upper chamber typically has no additional role (the most common form of the upper chamber's power to suspend but not absolutely veto proposals involves the national budget). Usually in presidential systems of government the president can take the legislative initiative, but parliaments (lower chambers) may reject presidential proposals and if the president insists on their proposal an increased majority vote may be required at the lower chamber. In some countries, there is also a popular legislative initiative awarded to the electorate. In other countries the electorate customarily votes on referendums (e.g. in Switzerland).

Parliaments are responsible for crafting binding statutes. Constitutions sometimes contain provisions allowing for "direct" legislation as well. These provisions allow for law to be made by the people directly, bypassing the legislature and executive – or at least supplementing them (e.g. in Switzerland). The

rationale is that elected representatives may find themselves locked in disagreement and unable to act on some matter that the nation's people would like to see resolved.

The forms of direct legislation vary: in some versions, a referendum will itself enact binding law; in others the referendum directs the legislature to adopt a law dealing with a specific topic. Sometimes only the legislature can authorise holding a referendum; other times referendums are allowed upon receipt of petitions with a specified number of signatures. Some constitutions that allow direct legislation limit the topics (for example they exclude budgetary matters or bar referendums on the constitution's guarantees of rights) (Italy, art. 75). The details of the procedures used for referendums are typically left in the hands of the nation's electoral management body or the courts.

The executive

The fundamental choice of form of government (presidential, parliamentary, or other) is dealt with in Chapter 4. The section on amending the constitution below highlights one aspect that arises regardless of the form of government chosen – regulation of emergency powers.

The judiciary

Constitutions in democracies assign to the judicial branch responsibility for interpreting the law and settling disputes by applying the law in the cases that come before it (International IDEA, 2014[1]). With these powers, courts uphold the rule of law. In several constitutions, courts are also given the power to carry out constitutional review. The most fundamental requirements for courts are that they be independent, accessible and accountable. Many constitutions make an express commitment to the principle of judicial independence,[2] which is an essential cornerstone for a functioning constitution. Courts authorised to decide constitutional questions should also be accountable politically to some degree, but not so much as to compromise accountability to law.

Judicial tenure

One of the most important choices about courts concerns the length of time judges can serve, particularly the tenure of judges on the highest court authorised to decide constitutional questions. While long tenures insulate judges from political influence and reprisals due to their decisions while on the bench, and limit any personal interests when handing down particular rulings, they may also weaken any accountability of judges to other powers and to the public, as well as to progress and innovation in legal interpretation (Böckenförde, Hedling and Wahiu, 2011[2]). The tenure and terms of service of judges deciding on constitutional questions, which are of particular importance to the issue of judicial constitutional review, are analysed in Chapter 6.

Judicial management and removal

The circumstances under which judges are removed can have a significant impact on their independence. Judges should not fear dismissal or reprisals in case they make particular decisions. Appropriate mechanisms to ensure independence through autonomous management and limited removal differ for ordinary and constitutional courts. In civil law systems, judicial management and removal is ordinarily performed by a council of judges (given varying names). In these courts, judicial independence and accountability to law usually strongly dominate the need for political accountability, even when the courts have some responsibility for constitutional interpretation. Here again constitutional courts, and especially the apex constitutional court, tend to be different, as analysed in Chapter 6.

The Government and the citizens: Rights provisions

While Chapter 3 focuses primarily on social and economic rights as well as other emerging rights, contemporary constitutions contain – indeed, often begin with – a list of fundamental human rights, which are outside of the scope of this report. Templates are available in a number of international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Discrimination against Women, and the Convention on the Rights of Persons with Disabilities.

In particular, these rights can include provisions for minority groups, women and groups that can be considered vulnerable due to their age (particularly children, youth and the elderly). Defining who constitutes a minority can be challenging given the implications of the term and the difficulty to identify a firm "boundary". The vast majority of constitutions contain provisions that prohibit discrimination on the grounds of origin, language, ethnicity, race and so on, thus entitling minorities to enjoying the same rights as the rest of the citizens. A further step that constitutions sometimes take is to include what is known as "affirmative action", or special rights that can only be claimed by the particular minority. Such provisions can take many forms, including recognition of particular characteristics such as the minority group's language, tradition and symbols, preferential treatment in particular ways, and state-funded support for the group.

Moreover, a commitment to gender equality, along with the prohibition of discrimination on the grounds of gender and age, is almost universally proclaimed in constitutions. Some constitutions go one step further in their commitments by enshrining affirmative action initiatives to support the inclusion and participation of women, youth and the elderly in different aspects of politics and the economy. The use of inclusive language throughout the constitution can also serve as a tool to further integrate gender equality (see Chapter 3).

Ensuring the inclusion of these rights from a representative perspective often calls for the integration of a diverse group in the constitution-drafting process from the standpoint of gender, age and ethnicity.

Amending the constitution

As each country and its social, economic and cultural contexts evolve, constitutions drafted in the past may stop responding to societal priorities. Provisions and institutions can interact in problematic ways that drafters could not have anticipated. Technological development can generate novel problems, most of which are best handled by ordinary legislation. Emergencies can require immediate and unprecedented action to safeguard the national territory or citizens' security.

For all these reasons, constitutions contain provisions for their own amendment. Many different amendment procedures are found in constitutions around the world. One general principle is that an amendment should only be allowed when there is reason to think that the proposed change has support from a significant majority of the nation's people, sustained over a reasonable period. That principle can be implemented by requiring that an amendment receive support by more than a simple majority (France, art. 89), or that it receive support at least twice (often with an election intervening between the two times the amendment is put to a vote) (Netherlands, art. 137). Local circumstances determine the precise form the constitution gives to this principle.

Some modern constitutions provide two different amendment rules, one stronger than the other (though both conform to the general principle of sustained support by more than a simple majority) (Canada Act Part V, with several different amendment rules). The stronger rule – for example, that an amendment receive 75% approval rather than two-thirds approval – applies to topics the constitution's drafters regard

as particularly important. A common, although not universal, practice is to use a stronger rule for constitutional "replacements" than for ordinary or discrete constitutional amendments.

Such "tiered" amendment rules, if they are adopted, come with additional requirements, necessary to make the system effective. One that is minor though sometimes overlooked is that the provision identifying the topics subject to the stronger amendment rule should itself be protected from amendment by use of the weaker rule. A more important requirement is that constitutions that use tiered amendment rules should have an institution that is authorised to say that a proposed amendment may be adopted according to the weaker rule or may only be adopted according to the stronger one, and that a proposed amendment or group of amendments is or is not a constitutional replacement. This institution can be a court or an electoral management body.

A significant number of constitutions identify provisions that may not be amended at all; such provisions are protected by what have come to be called "eternity" clauses (Germany, art. 79 (3)). Such clauses typically protect provisions that the constitution's drafters regard as truly fundamental to the operation of the constitutional system or to the nation's self-identity. A common shorthand for this is that eternity clauses protect the constitution's "basic structure" or general principles from amendment: they often refer to the form of government (democracy, monarchy or republic), the rule of law and judicial independence, fundamental rights, human dignity and/or territorial integrity. The content of the basic structure varies from nation to nation.

Over the past several decades an increasing number of constitutional courts have developed a doctrine, usually not rooted in specific eternity clauses, that constitutional amendments inconsistent with what the courts deem to be the constitution's basic structure are unconstitutional. Review by the courts of questions regarding whether an amendment was adopted in a procedurally regular way is usually seen as uncontroversial. Review of the substance of constitutional amendments was initially seen as controversial, though the basic-structure doctrine now appears to be part of the general armamentarium of constitutional courts. A few constitutions have addressed this doctrine by limiting the courts' power to determine that the substance of a constitutional amendment is inconsistent with the pre-existing constitution (Hungary, art. S).

Besides the formal mechanisms to amend a constitution, some countries integrated the possibility for citizens to initiate or be involved in a constitutional change, through citizen-initiated or traditional referendums, or Citizens' Assemblies (OECD, 2020[3]). This is the case for example in Ireland: the Constitutional Convention and the Citizens' Assembly recommended to the relevant special parliamentary committees that there should be referendums concerning numerous constitutional issues; this prompted the government to hold several referendums (in 2015, 2018 and 2019) on amendments to the Irish Constitution. The Irish (Citizens' Assembly on Gender Equality, 2021[4]) also treated issues that could lead to potential constitutional amendments (this was ongoing at the time of publication). In 2008, Iceland established an innovative framework using deliberation and co-creation mechanisms to include citizens and stakeholders in a participatory constitution-making process. Another example, albeit at a subnational level, is the constitution of Mexico City, which was crowdsourced with citizens and civil society in a process that involved online/offline consultations, working groups, and a petition platform. Citizen participation can promote the creation of future-looking constitutions.

The majority of constitutions also include provisions awarding the executive particular powers that they may exercise only in extreme circumstances; these are known as emergency powers. These powers, unlike constitutional amendments that are entrenched following their adoption, are always limited in time and scope, and their application is restricted to the duration of the state of emergency. Nevertheless, they can significantly alter the scope of powers of the executive and the governance system throughout the emergency, and so appropriate safeguards must be included. These are discussed in more detail below.

Constitutionalising emergency powers

How constitutions deal with the government's power to act when an emergency arises is one of the most contentious and difficult questions in constitutional design. Once an emergency is declared, ordinary rules about the allocation of power within the government change, as do some of the limits on the government's power to regulate the daily lives of the nation's citizens. In particular, emergency powers can alter the ordinary separation of powers on the one hand, and limit the fundamental rights of citizens on the other.

The difficulties can arise because emergencies tend by nature to require quick action, far more readily taken by the executive branch than by the legislature. This in broad terms implies that the executive should have the power to declare an emergency. The changes in constitutional arrangements that follow upon a declaration of emergency, though, can make such declarations attractive to chief executives who want to consolidate personal power.

Guarding against abuse of the power to declare an emergency usually can take two forms:

- *Substantive*: Constitutions attempt to identify the circumstances under which emergencies can be declared. These include natural disasters, invasions, and economic collapse. However, the forms that emergency takes are indeed varied, and some constitutions use a general formulation such as "where the proper functioning of the constitutional public authorities is interrupted" (France, art. 16). The majority of constitutions attempt to establish clear constitutional criteria for declaring an emergency. The degree to which those limitations have been effective has also varied. An approach adopted by many countries is to specify that some aspects of the constitution cannot be suspended during an emergency. Rights to personal security, for example, are often insulated from change during an emergency. So are the right of the legislature to convene without approval from the executive (France, art. 16) and the right of ordinary courts to continue to function, physically insofar as possible. In addition, a safeguard often included is the fully fledged scrutiny of all actions of the executive by the courts.
- *Procedural*: The constitution can specify that while the executive has the power to declare an emergency, the legislature must ratify or reject the declaration within a relatively short period (ranging from weeks to a few months) (Spain, art. 116.1, referring to the state of alarm). Constitutions often limit the time that an emergency can be declared for, although they also allow emergency declarations to be renewed periodically – again with legislative ratification. On the other hand, the state of emergency can sometimes only be declared following approval by legislature, for example in Spain (art. 116). The success of this control method appears to have been mixed. In parliamentary systems, where the executive commands a legislative majority at the outset, ratification could be relatively easy. That might not occur where the executive government is a coalition, or where the chief executive's support within the majority weakens as the emergency period lengthens. In presidential systems, political scientists observe a trend of increased short-run popular support of the country's political leaders during periods of crisis, leading to straightforward ratification of initial declarations of emergency.

As such, there are various challenges associated with effective control of the power to declare an emergency. Constitutions could employ a number of techniques of substantive and procedural control, yet constitutional drafters need to be aware of the inherent difficulties in enforcing that control effectively.

Promoting constitutional stability

Some older constitutions and many newer ones give constitutional status to several institutions other than the classical three branches. The institutions singled out for such treatment are varied, but many can be understood as institutions for the protection of constitutional democracy. These institutions serve to stabilise the democratic system from internal forces that might lead to instability.

Historically, constitution drafters relied upon competition between and within the executive and legislative branches to protect against constitutional instability, with courts providing some guarantees that majorities would not oppress minorities. The rise of nationally organised political parties introduced uncertainty about competition between the branches as a mechanism for preserving constitutional democracy. The most obvious case involves a president whose party has a majority in the parliament; the branches will then co-operate rather than compete. Other configurations of party control of legislatures and the executive can lead to different but predictable situations in which competition will fail. Nationally organised parties have also led to difficulties in sustaining the division of authority between the national and subnational governments.

These problems associated with governance through political parties led initially to the creation of constitutional courts with the power to determine the proper allocation of power. Acting upon application from the legislative minority, for example, the constitutional court could declare unconstitutional actions by the president's supporters in the legislature that gave the president too much power. Experience suggested to constitution drafters that constitutional courts should sometimes be backed up by other institutions. The most common are electoral management bodies – sometimes defined as electoral courts, sometimes as election commissions – and supreme audit agencies, also sometimes designated as courts of audit (see Chapter 7).

Many of the design issues associated with constitutional courts arise afterward, and the design after all do play a similar role in seeking to guarantee constitutional stability. In particular, design must achieve an appropriate balance between independence and accountability, usually through qualifications for membership, mechanisms for appointment, and clearly defined term lengths for the members of these bodies (see Chapter 6).

Electoral management bodies

Several constitutions provide electoral management bodies with constitutional status. In order to ensure that elections are free and fair, election management is placed in the hands of a neutral body that is above partisanship. This helps avoid undue influence from politicians who control the executive and legislature and who may have an interest in tilting the electoral playing field to favour their own parties.

Electoral management bodies are often given tasks such as defining election rolls and constituency boundaries, operating polling places and counting ballots. An important issue is also to define . 1) The body can be bi-partisan or multi-partisan, with representation from the major parties. Many variants of this model exist, and most often the choice is determined primarily by local political conditions. 2) The body can be non-partisan. Some members might be career civil servants, others chosen by and from non-governmental organisations, including universities. In this model commission members usually cannot have or have had significant recent roles in political parties (although mere membership in a party is rarely disqualifying). Achieving full non-partisanship in this model has in practice proved to be difficult.

A significant number of constitutions assign some of these tasks, especially the resolution of controversies over ballot counting, to the constitutional court instead. Doing so raises the possibility, which has often been realised, that those courts become embroiled in extremely high-stakes political controversies, and whatever they do might weaken their credibility according to the side they rule against. This in turn might

undermine their credibility when they resolve other contentious constitutional issues, particularly those involving individual rights.

Audit institutions and other independent bodies

Supreme audit agencies, sometimes designated as audit courts, have a long history. Initially designed to ensure that public money is spent solely for its intended purposes, audit agencies have evolved into important anti-corruption bodies. Typically they have the power to issue public reports but not initiate criminal prosecutions, which are left to other agencies (Austria, art. 126D). The heads of supreme audit bodies are normally expected to have significant experience in managing and auditing public budgets, but specifying such a qualification in the constitution is rather unusual.

Contemporary constitutions sometimes place other institutions within the category of those protecting constitutional democracy. These include human rights agencies and ombudsman offices. The case for giving such institutions constitutional status rests in large part on the proposition that they can exercise functions similar to courts, including investigating individual complaints about government misconduct, but also can have the power to engage in public education campaigns and, importantly, issue reports based on general investigations that courts cannot do, or cannot do as easily. No standards have yet been developed regarding *which* institutions – even electoral management bodies – should be included in contemporary constitutions, and each nation's constitution reflects local conditions and choices.

Empirical studies show that a stable and growing economy contributes to constitutional stability as well. Sometimes short-term political considerations can dominate the ordinary processes of developing a budget (and other policies) in ways that overlook the longer-term economic and environmental consequences of today's decisions.

These considerations have led some constitution drafters to give central banks and environmental protection agencies constitutional status, usually independent of direct political control (though with some degree of accountability, akin to that associated with constitutional courts). Doing so for central banks is relatively uncommon though not unknown (see Chapter 8). When constitutions do give central banks constitutional status, they do not specify much about the bank – occasionally the terms of service on the board or as chair, almost never the goals the bank is to pursue).

With respect to fiscal policy, as noted in Chapter 7 some national constitutions include "balanced budget" requirements (Peru, art. 78, Constitution of 1993) or limitations on the rate of growth of the national budget (Brazil, Amendment 95, 2016). These limitations are controversial, in part because economists disagree about the importance of balanced budgets and limiting the rate of growth of the national budget, and in part because they acknowledge that sometimes breaching such limits is sound economic policy yet capturing in constitutional language those circumstances is quite difficult.[3]

Some constitutions adopted in the 21st century also include environmental protection. These constitutions establish a national environmental protection agency (Tunisia, art. 129), although experience with constitutional provisions for such institutions is still limited.

References

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Notes

[1] References are to the pertinent sections of national constitutions, and are included to illustrate possibilities without identifying all the constitutions that include relevant provisions.

[2] Over 90% of constitutions introduced since the Second World War contain this provision. *Source*: Comparative Constitutions Project, Report on judicial independence (2008).

[3] Balanced budget requirements exist in many subnational constitutions in the United States, but efforts to insert such a requirement in the national constitution have regularly failed.

3 Economic, social, cultural and new rights

This chapter examines the constitutional inclusion of economic, social and new types of emerging rights, drawing from experience in OECD countries. After briefly outlining their prevalence in contemporary constitutions, the first sections present the debates regarding the advisability of their constitutionalisation, the "strength" they ought to be accorded, and the impact of differences between constitutional ideals and reality. It discusses particular economic, social, cultural, and new rights, including health, education, employment, environmental, privacy and digital rights, making reference to existing patterns of entrenchment. Issues pertaining to accessibility and enforcement as well as the potential contribution of human rights commissions are noted. Finally, some cautionary concerns are raised about the specificity of rights language, progressive realisation and deference to the elected branches.

Key issues

When considering the inclusion of economic, social, cultural and new rights (ESCNRs) in a constitution, four key questions present themselves:

- *Which rights, if any, should be included?* Nearly every constitution written in the past two decades includes at least some ESCNRs, and most contain a large number. However, this does not mean that it is necessary to include them. Rights ought to be included only if the ideas and goals they represent are thought desirable and worthy of some level of protection from the will of the majority. Including a large number of rights risks lessening their rhetorical value, as well as undermining the value of those rights deemed to be of the greatest importance. Moreover, many developed countries have made significant advances through civil society mobilisation and legislation (e.g. employment standards and minimum wages) alone. Decisions regarding whether and which rights should be included need to carefully balance these considerations.
- *How strong should those rights be?* As explained in Box 3.1, rights may be strong-form justiciable, weak-form justiciable, or aspirational. The violation of each comes at a cost, - which can be legal, political, or both - but the certainty and severity of those costs vary. Strong-form rights are associated with the idea of "judicial supremacy" in that the highest court, rather than the legislature or executive, has the final say on what is or is not constitutional. This accords a great deal of power to judges. On the one hand, judges are likely to be better insulated from political and partisan considerations than their elected counterparts. On the other, they are not necessarily best situated to fully understand the complexities and nuances of the relevant social issues. Nor are they accountable to the people to the same degree as elected officials. It may well be that the matter of how to best realise the goals of these rights is best left to the legislature. In this respect, weak-form review offers a degree of protection in that it provides an institutional mechanism by which a legislature must expressly justify its intent to violate a right, while leaving planning and policy to the civil service under the direction of elected officials. Aspirational rights do not provide direct legal protection, but have frequently proved effective at shaping the discourse concerning the performance of sitting governments and increasing public awareness and concern about specific issues. There is no single "best" approach, nor is it necessary to assign the same strength to each right included in the constitution.
- *How specific should those rights be?* In general, rights ought to set out broad principles and goals that are to be protected or pursued. The more complex the issue, the more rights will need to be left to the discretion of politicians and bureaucrats to address in the manner they believe to be most effective. However, in certain instances more concrete provisions may be appropriate, particularly if the right is intended to prevent a particularly egregious event or to insulate a particular issue or matter from political interference in light of past scandals or abuse.
- *Who will defend these rights and how?* Courts will likely serve as the principal interpreter of ESCNRs, but they are far from the only actors involved. Court cases require claims; who is able to bring those claims and how much it costs to do so will significantly impact the types of claims brought. Individuals, particularly those without independent wealth, are likely to find it difficult to find redress for a violation of their rights if there is not some form of civil society or public defender support mechanism. Other institutions – such as human rights commissions – can also be created to aid in the realisation of these rights. If they are to be meaningful, rights should have a solid, real-life basis and credible methods for correcting violations, even if somewhat slow, should be in place.

Introduction

Bills of rights are a defining feature of contemporary constitutions. In addition to civil and political rights,[1] the vast majority of constitutions drafted in the past several decades have included at least some economic and social rights – for example, rights to a pension, to education, and to healthcare.[2] More recently and in response to emerging ideas and technologies, constitutions have also begun to include new types of rights relating to matters as diverse as environmental sustainability, digital access and privacy, indigeneity, and consumer protections. These economic, social, cultural and new rights (ESCNRs) find support in many of the ideas that underlie civil and political rights, such as human dignity, cultural and religious identity, and the belief that individuals are entitled to lead the types of lives they choose in pursuit of their visions of "the good life" without undue interference from the state (Fredman and Campbell, 2016[1]). They can also serve as powerful symbols of national values, commitments and beliefs. At the same time, it has been argued that ESCNRs inevitably raise political questions – the answers to which are best left to the elected branches – and that attempting to constitutionalise them may unduly limit the ability of the state to implement policies and programmes that are responsive to changing circumstances and needs.

Their inclusion in a nation's constitution is also part of an attempt to achieve and/or protect concrete benefits, such as a living wage for all workers or access to healthcare treatment and medicines for all citizens. But simply placing these rights in a constitution does not achieve their goals; that requires more than words on paper. Indeed, there are countries that have constitutionalised these rights but not achieved their underlying goals, and others that have not constitutionalised yet have realised those goals. Realising ESCNRs requires popular support, buy-in by political parties, extensive planning, sustained investment, and a responsive judicial system capable of holding the relevant public authorities to account. Not only will policies and programmes intended to give effect to these rights be competing for the limited resources of the state, but the rights themselves can conflict with other legitimate aims of government as well as with one another. Should living wages always take precedence over economic competitiveness? If a group of people establish an informal settlement on a privately-owned farm because they have nowhere else to go, must the farmer accept the trespass, or ought the squatters to be evicted despite a constitutional guarantee to adequate housing? If a seriously ill patient goes to court seeking much-needed kidney dialysis on the basis of a constitutional right to healthcare, what is the response to a department of health that says it has no more resources to expend on dialysis because of its commitments to innumerable other worthy treatments and facilities?

The decision as to which ESCNRs – if any – are to be included in a constitution and how they should be structured should give due consideration to the values and beliefs of the nation to which it will apply; the interconnectedness of the rights with one another as well as with the nations' other goals and priorities; and the measures that will be put in place to ensure that policy makers are held accountable for the decisions they make about where and how they choose their resource allocation.

Brief overview of issues

Should such rights be constitutionalised?

The first issue to consider with respect to ESCNRs is whether they ought to be included in a given constitution. In addition to the more general concerns about the undemocratic aspects of judicial review, several objections have been raised about these rights in particular. The core of the concerns appears to be that unlike "negative rights" – such as freedom of speech – that limit the ability of the state to act, ESCNRs are principally "positive rights" in that they tend to compel state action and may require significant expenditure. Although negative rights are not costless (Holmes and Sunstein, 1999[2]), there is something unquestionably different about a right that could cause a judge to require the executive to spend tens or hundreds of millions of euros to, for example, build new schools or expand the eligibility criteria for public

pensions. The inclusion of some or all of these rights will not necessarily result in such decisions, but regardless of their constitutional status, achieving the goals they encapsulate will almost certainly involve large investments and ongoing expenditures.

A stronger set of objections to the inclusion of such rights, particularly in their "strong" form,[3] is that the complexity and uncertainty of the issues involved, coupled with the reality of limited state resources, means that there is generally no one, "best" way of achieving the goals these rights seek to advance: providing healthcare to all citizens is not simply a matter of hiring doctors and building hospitals. Decisions must be made about the allocation of resources across preventive, curative, and rehabilitative care as well as how best to provide service to marginalised communities. Moreover, there is often no clear way to determine which right(s) ought to take priority over others in terms of state resources. For example, is it more important to ensure that all workers (or citizens generally) can rely on a pension that will prevent their destitution in old age, or that life-saving medication be provided to a small number of people suffering from a rare disease? Similarly, court-ordered provision of specific goods or services (e.g. textbooks) could very easily lead to reduced spending in other areas such as school maintenance, as individual government departments are compelled to reallocate their budgets to comply with their legal obligations.

In general, the choices will not be nearly so stark, nor is it truly a zero-sum game – some options will be more or less obviously preferable, and others will have foreseeable knock-on effects that would make future goals less (or more) costly to achieve.[4] On the other hand, difficult decisions with serious consequences will need to be made based on imperfect information. Such decisions necessarily involve moral judgements and guesswork and it is very possible for reasonable people to disagree about which choice is "best." At least in their official capacity, these are decisions that judges may not be well equipped to make. From this perspective, they are more appropriately made by elected officials – the representatives of the people – based on information provided to them by a civil service staffed with experts in the relevant areas. In short, so the argument goes, in the absence of uniquely correct answers, the ultimate responsibility for deciding such matters should lie with elected officials who are accountable to the people via elections, than with judges, who are not.

On the other hand, rights, both individual and group/cultural, are by definition counter-majoritarian, and leaving their realisation and protection in the hands of majoritarian institutions such as legislatures presents its own problems. If human dignity and cultural vibrancy are to be taken seriously, it should not be possible to ignore the rights intended to ensure their protection simply because it is inconvenient for the majority or costly. This is particularly true where, as is often the case, these rights are intended to address historical marginalisation or disadvantage caused by a failure of the political system to adequately represent the interests of all members of society. Nor does a winner-takes-all approach to electoral democracy fit with contemporary ideas about legitimate and, perhaps more importantly, stable democracy. More contentiously, it has been argued that democratic legitimacy is contingent on the ability of all those subject to its laws having a meaningful opportunity to have the information, abilities, and material security necessary to participate in political life in an informed manner (Shue, 2020[3]); many of the rights discussed in this chapter directly support such legitimacy.

Some constitutions contain no ESCNRs. Indeed, a number of well-established democracies with high standards of living do not include such rights in their national constitutions – The United States, for example.[5] Others, such as Canada and Germany, contain relatively few.[6] Instead, matters such as healthcare, unionisation and consumer rights are dealt with by statute, and the benefits and protections they accord to citizens (or groups) can, at least conceivably, be altered or even revoked by a simple legislative majority. Indeed, despite the lack of constitutional rights to healthcare in Australia, Canada or the United Kingdom, all three have robust systems of public healthcare that, although not immune from criticism, ensure that at least a basic level of medical care is provided to all regardless of ability to pay. That said, almost all countries falling into this category industrialised and expanded the size of their state apparatus more than half a century ago, and their constitutions tend to date from before that era. It should not be assumed that what worked in the past will continue to work in the present.

Concerns have been expressed about the effectiveness of constitutionalising these types of rights, and that if viewed as a formality, doing so may actually be harmful in the medium to long term (OECD, 2017[4]; Bjørnskov and Mchangama, 2019[5]). In fact, there is a good deal of evidence supporting their direct and, more commonly, indirect effectiveness in achieving their intended goals.[7] According to this research, allocation of benefits from rights litigation is not restricted to elites and, more importantly, can trigger important policy changes that have significant "pro-poor" consequences (OECD, 2017[4]; Ferraz, 2020[6]). There is also a clear trend in practice: new constitutions almost invariably contain economic and social rights and many contain other emerging rights.

How "strong" should economic, social, cultural and new rights be?

ESCNRs can be included in constitutions as either justiciable or aspirational rights. Justiciable rights are legally enforceable in that the government can be taken to court for failing to meet the obligation(s) placed on it by a particular right. The specific mechanisms by which such claims can be made, which vary significantly, are discussed in Chapter 6. Rights entrenched in this way give some element of society – often all citizens, but sometimes a narrower set of actors such as opposition parties, trade unions, or non-governmental organisations (NGOs) – legal recourse to ensure fulfilment of their constitutional rights. This can occur via challenging the constitutionality of a piece of legislation in the abstract; or by alleging that they have experienced a concrete harm as the result of an action taken by or on the authority of the state; or by alleging that an "unconstitutional state of affairs" exists because of the absence of a constitutionally adequate system for providing the guaranteed rights.

Box 3.1. The "strength" of rights

Rights are included in constitutions in a variety of ways, and a number of different terms are used to describe how this is done. For the most part however, constitutional rights are found in one of three forms. In descending order of "strength," these are:

- *Strong-form justiciable* – The right is included in the constitution, an alleged violation can serve as the basis for a court case, and the elected branches cannot (legally) disregard or overrule a judicial decision finding that a right has been violated or directing a particular action to correct the violation.
- *Weak-form justiciable* – The right is included in the constitution and an alleged violation can serve as the basis for a court case. However, the elected branches have at least some ability to (legally) disregard or overrule a judicial decision that a right has been violated. This may be a matter of design (as it is in Canada) or the result of a constitutional document that has quasi- rather than full constitutional status (as in New Zealand).
- *Aspirational* – The right is included in the constitution, but an alleged violation cannot serve as the basis for a court case. Rather, the right is supposed to act as a directive principle of state policy that is to inform all government decision making. To the extent that there are consequences for failing to respect such rights, they come via popular opinion and voting.

The strength of rights tends to be indicated by explicit language in the constitution itself. For example, the Finnish Constitution states, "Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice" (art. 21).

In general, rights included in that constitution are justiciable.

Other constitutions expressly preclude challenging the validity of laws on the basis of some or all rights included in the constitution. Article 41 of the Swiss Constitution, which lays out a number of economic and social guarantees, includes a clause that "No direct right to state benefits may be established on the basis of these social objectives" (art. 41(4)). However, constitutions tend to be complex documents and there are often qualifications, even to seemingly clear statements about justiciability. The Spanish Constitution, for example, contains several clauses indicating that specific rights are justiciable, others are aspirational, and others still are justiciable but only under certain circumstances. The particulars of the language vary from jurisdiction to jurisdiction, but it is important to recognise the differences between rights' "strengths" and to consider (and specify) how each particular right is to be included in the constitution.

Sources: Gardbaum (2001[7]), "The New Commonwealth Model of Constitutionalism," *The American Journal of Comparative Law*, Vol. 49/4, pp. 707–760, https://doi.org/10/dp6q36; Jung, Rosevear and Hirschl (2019[8]), "Justiciable and Aspirational ESRs in National Constitutions", *The Future of Economic and Social Rights,* Cambridge University Press, pp. 37-65.

The outcome of a successful constitutional challenge is principally determined by whether a jurisdiction employs an intense/strong or mild/weak form of judicial review (see Chapter 6). Where strong-form review is in place, a court may invalidate some or all of the offending legislation or require the state to provide the claimant(s) with a particular good or service, as has frequently been the case with medicines in countries such as Brazil and Colombia. It may also result in a court requiring the state to provide details on its plan to address a particular rights-related issue – for example, a national housing policy – and demonstrate that all rights-relevant factors, including the views of those affected by the policy, were given the appropriate weight when the policy was crafted, an approach that has been employed a number of times by the South African Constitutional Court. The remedy may also take a number of other forms, depending on the nature of the violation, past practice in the jurisdiction, and the creativity of the judges hearing the case. Although the mechanisms for bringing claims relating to justiciable rights are generally well defined in constitutions, the precise nature of the remedies used to correct violations tends to be somewhat ambiguous, perhaps necessarily so.

In many ways, mild (weak-form) review is an intermediate category, located between aspirational and justiciable rights. The form and procedure of the court's activities are similar to intense (strong-form) review, but courts are restricted to advising the legislature of their finding that an act of government violated a right (as in the United Kingdom) or requiring the legislature to reconsider a piece of legislation in light of the fact that it has been found inconsistent with a right (as in New Zealand).[8] A more powerful version of weak-form review that exists in a limited set of circumstances in Canada accords the courts the power to strike down offending legislation, but gives the legislature the option to temporarily override the court by declaring that it operates "notwithstanding" its unconstitutionality. The capacity of mild review to defend constitutional rights depends on the context. In many countries that have adopted it (including Canada), a relatively high degree of popular support for the courts and the constitution make contravening even the advisory rulings of the courts a politically costly decision. How costly, however, could be subject to changes in public sentiment, particularly with respect to the relative trustworthiness of the courts and elected branches. Mild reviews are often seen as less rigid and able to strike a balance between the judicial and elected branches, discouraging overreach or abuse by either.

Aspirational rights express the values, goals and priorities of the nation and articulate a vision of what the country strives to be. As such, they are often considered to be directive principles of state policy, articulating a set of medium- to long-term goals intended to guide the actions and choices of elected officials, bureaucrats and other state actors. Although the failure to meaningfully pursue these principles carries no formal legal sanction, aspirational rights can have a concrete impact on state policy in at least two ways. The first can be observed in the electoral arena. To the extent that these rights accurately reflect widely held societal values and beliefs, or that there exists a strong belief in the value of operating in line

with constitutional principles, a decision to disregard these directive principles by a sitting government is likely to be seized upon by opposition parties as a rallying cry for support and negatively impact popular and electoral support for the governing party. A second area of potential impact exists where the non-enforceability of a right is not made explicit in the constitution. There have been instances in which a court or a particular judge has, when confronted with ambiguous phrasing or terminology in the text of a constitution, determined that what many believed was (and may well have been intended as) an aspirational right was, in fact, grounds for the judiciary to pass judgement on the actions of state actors, or to interpret other laws or rights in light of these aspirations.

Constitutions in books versus constitutions in action

Another consideration regarding the inclusion of ESCNRs is the likelihood of "slippage" between the rights and obligations outlined in the text of the constitution and their application. Constitutions tend to contain both backward- and forward-looking elements. The former seek to prevent past excesses or failures by outlining a set of proscribed practices and imposing certain conditions on the use of state power.[9] The latter tend to articulate goals or ideals that a society seeks to achieve.[10] Both elements legitimately fall within the scope of a constitution as they serve to identify and, to a limited extent, operationalise the values and beliefs of the nation. However, caution should be exercised when articulating these rights. In particular, the practicality of their realisation ought to play a role in determining their "strength" in relation to the judiciary and the capacity of the state to realise them; a piece of paper guaranteeing healthcare for all regardless of ability to pay does not, in and of itself, provide such care.

To the extent that an expansive set of rights, guarantees and obligations is set down in the constitution without regard to practicality, unrealistic expectations could be created. If expectations are set too high or the constitution demands too much within too short a time, the rights and the constitution itself may come to be perceived as formalities that are not necessarily connected to reality. This, in turn, can damage the credibility – and potentially, stability – of the political system. The implication here is not necessarily to lower expectations, but rather to temper them with recognition of the reality of incremental change. To the extent that grand goals are to be included, they should be expressed in a way that communicates that they are to be progressively realised over time. Striking the right balance between realistic expectations on the one hand and a vision of a good and just society that sparks hope and commitment in the people on the other is one of the most difficult challenges of the drafting process.

Core Features

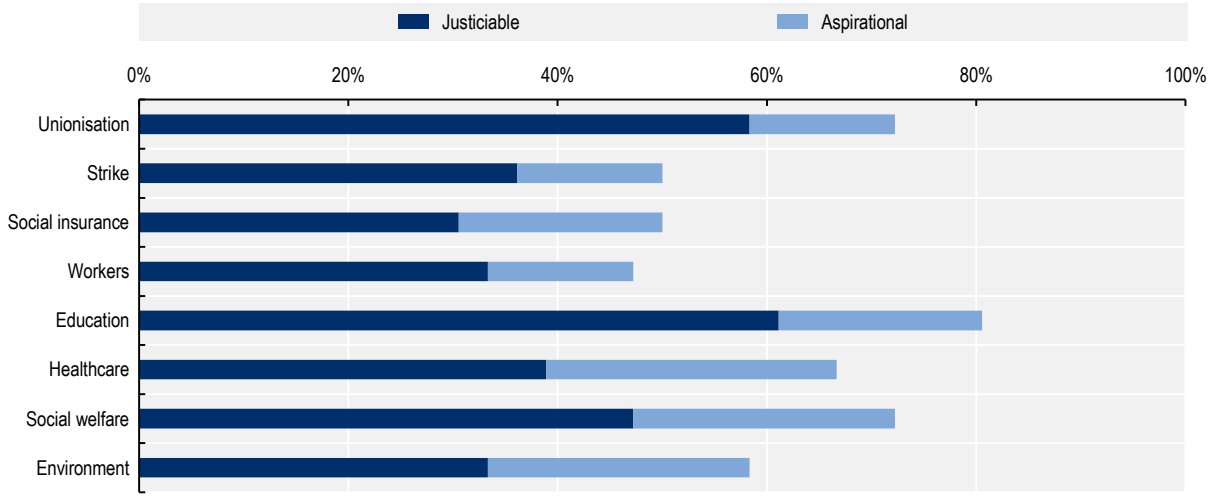
The following section discusses economic, social and new rights in turn, with a special focus on the constitutions and quasi-constitutional documents of Australia,[11] Finland, Germany, New Zealand,[12] Portugal, Spain and Switzerland. While such comparisons could be valuable, there is no one-size-fits-all model of constitutional design; a country's history, politics, economy and culture each have a significant impact on how well a particular model, structure or clause will work. Moreover, international and regional law may supersede, at least formally, some of the rights discussed below.

Broadly speaking, economic rights are rights that accrue to individuals due to their engagement with the formal labour market and persist only as long as they remain employed or in some relationship with the formal economy. Included in this category are rights such as those to form or join a trade union and to strike; contribution-based social security (particularly pensions, but also parental leave, disability insurance, and similar matters) and, somewhat less commonly, rights relating to working conditions, wages and rest periods. These types of rights often necessitate the difficult task of balancing the ability of business to be globally competitive and responsive to changes in demand against a desire to provide citizens with steady employment, living wages, and decent standards of living.

Unionisation and strikes

The rights to join or form a trade union and to strike are two of the most common economic rights. As shown in Figure 3.1, they appear in approximately 75% and 50% (respectively) of OECD area constitutions. They are also closely connected with the right to free association, a civil and political right. However, they are distinctive in that they enable a specific class of people—workers—to unite in a legally protected manner in order to offset perceived power imbalances between employers and employees and, in turn, to seek job security, higher wages, and better working conditions.

Figure 3.1. OECD area constitutions containing ESCNR provisions



Note: As of 1 January 2016, without including Chile.
Source: Based on Jung, Rosevear and Hirschl (2019[8]), "Justiciable and Aspirational ESRs in National Constitutions", *The Future of Economic and Social Rights*, Cambridge University Press, pp. 37-65.

Trade unions, collective bargaining and strikes exist, to varying degrees, in each of the seven comparison countries. However, they are not constitutionally protected in either Australia or New Zealand, where they exist by virtue of a combination of case law and legislation. The right to unionise is included in the Finnish and German Constitutions, but the right to strike is not expressly guaranteed. Both rights are constitutionally protected in Portugal, Spain, and Switzerland.

Where the right to strike is present, it is generally subject to limitation. This tends to manifest itself as prohibitions on strikes by those who render essential services and an indication in the constitution that the precise nature of the limitations and which services are "essential" should be defined by legislation. In Spain, for example, the legislature can limit or prohibit unionisation for members of the military or other security forces, and set special conditions on civil servant unionisation (art. 28(1)).

In some cases certain measures affecting the balance of power between workers and employers have been included in constitutions. The Constitution of Portugal, for example, prohibits employer lockouts and forbids the legislature from limiting the scope of interests that are to be defended by a strike (art. 57). In contrast, the Swiss Constitution expressly permits the formation of employer/sectoral organisations and prohibits compulsory union membership (art. 28). While such variation may not seem significant, changes such as these could have a strong impact on the power dynamic between labour and capital. Close attention should be paid to both the structure of the economy and the historical dynamics of the relationship between the two in order to ensure that the proper balance is struck.

Social insurance (Including pensions, unemployment, and disability)

Old-age pensions involve a complex set of issues relating to eligibility and benefit amounts, public versus private management, contribution requirements, and tax incentives. Other social benefit schemes relating to unemployment, disability, and survivorship involve a similar set of issues. This chapter divides these benefits into two categories: i) those funded at least in part by employee/employer contributions and eligibility for which is contingent upon having contributed; and ii) those funded largely from general revenues and eligibility for which depends on meeting a certain condition (e.g. having children, being over a certain age) and/or falling below a certain level of income. The former are discussed in this section and the latter in the section on social welfare below. However, this distinction is somewhat artificial, as the two types will often work in conjunction with one another, frequently supported by supplementary private investment or insurance coupled with tax incentives.

There are no constitutional guarantees for old-age or disability pensions in Australia, Germany or New Zealand. Nor are there explicit rights to unemployment benefits. Both the Finnish and Spanish Constitutions make general guarantees regarding public provision of adequate benefits during unemployment; in Spain these are extended to cover times of hardship generally (art. 41), and in Finland they cover retirement or disability as well as leave during the birth of a child or the loss of a provider (s. 19). Both documents leave the details of eligibility, funding and benefit level to legislation.

The Portuguese Constitution contains a more detailed set of guarantees in this area. It explicitly entrenches the right of workers to material assistance when involuntarily unemployed or unable to work due to a work-related injury (art. 59). Moreover, it tasks the state with organising and subsidising a unified and decentralised social security system to protect individuals who are disabled, elderly, widowed or orphaned (art. 63). It also requires that all periods of work, regardless of sector, be included in the calculation of benefit levels for old-age and disability pension amounts and guarantees the right to maternity leave and a period of leave post-childbirth for mothers and fathers (arts. 63, 68).

The Swiss Constitution contains the most specific prescriptions in this area. The various levels of government are required to establish compulsory insurance schemes for old age, survivorship, and invalidity; the minimum benefit level is required to cover basic living expenses and the maximum benefit level cannot exceed double the minimum.[13] These schemes are to be funded by a combination of employee and employer contributions as well as state subsidies; the latter cannot amount to more than half of the value of disbursements (arts. 112, 112b, 112c). The Confederation (as opposed to the cantons[14]) is also required to create: i) a mandatory occupational pension scheme that, in conjunction with the three previously mentioned, is intended to allow retired individuals to maintain their "previous lifestyle in an appropriate manner"; and ii) an unemployment insurance scheme. Both are to be funded by employee and employer contributions, with employer contributions equivalent to at least half of employee contributions in the former and the latter being evenly split (arts. 113, 114).

Workers' rights: Working conditions, wages and leisure

Workplace health and safety standards are nearly universally accepted as legitimate limitations on freedom of contract and free enterprise. The most common of these rights are those to a fair wage, to healthy working conditions, and to rest. Each are present in over 30% of OECD area constitutions and nearly 50% contain at least one. These rights imply the existence of a reasonably well-established formal economy and, in conjunction with unionisation, can be seen as an additional layer of protection aimed at allowing individuals to provide themselves and their family with the means of material subsistence without damaging their health as a result of overwork or unsafe conditions.

The constitutions of Australia, Germany and New Zealand do not include any explicit constitutional protections in this area, but as with most OECD member countries there is statute law addressing these matters and affording workers a significant degree of protection. Statutory protection can sometimes be

problematic because it can be repealed or amended by a simple majority of the relevant legislature. For instance, in a number of jurisdictions, legislation excludes or allows lower wages for specific occupations or groups such as farm labourers or domestic workers (ILO, 2020[9]), despite the fact that such groups are often those most in need of protection from exploitation. At the same time however, most of the improvements in employment standards over the past century have come via legislation rather than constitutional law.

In Finland there are no explicit guarantees, but the state is tasked with the protection of the labour force generally (s. 18). More concretely, the Swiss Government must endeavour to ensure that everyone who is fit to do so can earn a living by working under fair conditions (art. 41(1)). The most expansive guarantees in this area in the comparison country group are found in the constitutions of Spain (arts. 35, 40(2)) and Portugal (art. 59), both of which include rights to a fair or living wage, safe working conditions, limitations on the length of the working day, and periodic days of rest and holidays. In Portugal these rights are justiciable; in Spain however, while the right (and duty) to work for sufficient remuneration is justiciable, the other rights of this type are aspirational. However, neither document moves beyond general statements. For example, no specifics are given as to what constitutes a fair wage or the maximum number of hours that can be worked in a day or week. The highly variable nature of employment, however, means that it may not be realistic to outline a more specific set of protections for workers at the level of constitutional law.

Social rights

Constitutional social rights grant personal entitlements to both in kind and monetary transfers, generally on the basis of citizenship. In contemporary constitutions, the most commonly found social rights are those to education, healthcare and social welfare benefits (frequently tied to old age or disability). In addition to this, many constitutions also identify specific aspects of individuals' material well-being that are to be ensured by the state, such as rights to adequate housing, water, and proper nutrition. Although there is often overlap with economic rights such as the right to a contribution-based pension, these rights are distinct in that they are not directly contingent on participation in the formal labour market. In addition to promoting human dignity, these rights can be understood as facilitating democratic legitimacy (and stability) in that they are directly connected to providing the underlying conditions necessary for meaningful participation in political life.

Education

The right to education is the most common economic or social right in the OECD area, present in 80% of constitutions. Broadly speaking, constitutional guarantees having to do with education are of three types: those relating to the free provision of basic education; those pertaining to the accessibility of higher education; and those relating to the permissibility and regulation of private and/or religious education.

Although Australia, Germany and New Zealand have freely available public education, it is not constitutionally guaranteed. The constitutions of Finland, Portugal, Spain and Switzerland on the other hand do guarantee the right to a free basic education for all.[15] The right to basic education appears in a number of subnational constitutions throughout the world. In the United States for example, a number of state constitutions contain that right, and there has been extensive (often successful) litigation on the matter in states such as New York, New Jersey, Kansas and Washington (Weishart, 2017[10]).

Higher education is not addressed in the Australian, German or New Zealand Constitutions, nor is it mentioned in the Spanish Constitution other than to assert the autonomy of universities. The Finnish Constitution guarantees everyone equal opportunity to receive other educational services in accordance with their abilities and special needs. As with basic education, the details of how this is accomplished are to be set out in legislation (s. 16). The Swiss Constitution also makes reference to ensuring access to higher education on the basis of ability and contains provisions permitting confederal contributions to

cantonal grants for higher education (arts. 63a, 66), while the Portuguese Constitution tasks the government with progressively making all levels of education free as well as with creating a preschool system, eliminating illiteracy, and providing disabled children with access to education (art. 74).

Private educational institutions, subject to state oversight and regulation, are explicitly or implicitly permitted in the Finnish, German, Portuguese, Spanish and Swiss Constitutions. The Swiss Constitution also contains several provisions relating to the promotion of vocational/professional education, musical education, sport, and culture (arts. 64a, 67-69). With respect to religious education, the right of parents to have their children educated in accordance with their beliefs is guaranteed in Germany (art. 7) and Spain (art. 27(3)).

Healthcare

The right to good health is present in nearly 70% of OECD area constitutions. Key issues relating to its entrenchment and operationalisation tend to revolve around the role of the private sector; the allocation of resources between what is preventative (e.g. vaccinations, health education) and curative (e.g. surgery, pharmaceuticals); the extent of goods and services to be provided; the matter of progressive realisation; and how the state is to be held accountable for healthcare's realisation. In general, public healthcare systems operate in conjunction with private healthcare facilities and insurance providers, but there are numerous models of healthcare system design. The complexity, expense and gravity of the issues involved suggest caution with regard to the level of detail to be included at the constitutional level.

Australia, Germany, and New Zealand do not constitutionalise the right to healthcare but substantively realise the related services via extensive public healthcare systems. The Finnish Constitution adopts a straightforward, high-level approach stipulating that the state must guarantee adequate medical and health services for all, the details of which are to be provided by law (s. 19). The Swiss Constitution requires the national and subnational governments to seek to ensure access to healthcare for all and, within their respective powers, promote the adequate and accessible provision of primary medical care for all (arts. 41(1) and 117a). This obligation, however, is framed "as a complement to individual responsibility and private initiative", which are understood to be the primary drivers of healthcare provision. The national government is required to establish health and accident insurance, but can decide whether to make participation mandatory.

The Spanish Constitution explicitly recognises a right to health, and tasks the state with oversight of the public's health and responsibility for implementing appropriate preventative measures as well as the provision of necessary benefits and services. The specifics of these obligations are to be established by statute law (art. 43). The Portuguese Constitution also adopts a state-centred approach to health, assigning the state primary responsibility for guaranteeing access to preventative, curative and rehabilitative care regardless of individuals' ability to pay. However, in view of the scale of such an undertaking – both administratively and financially – the state is directed to *work toward* as opposed to simply "creating" a fully public healthcare system that is rational and efficient (art. 64). The relevant article of the constitution also provides direction as to how the right is to be realised, including through the establishment of a national health service with a decentralised and participatory management structure and a general requirement to improve economic, social, cultural and environmental conditions that will benefit the health of the population as a whole.

Social welfare (including housing, food and water)

In contrast to the rights and associated programmes discussed in the section on social insurance, the rights discussed in this section deal with benefits in cash or in kind available to all citizens as opposed to only those who had contributed to a specific social insurance scheme. Historically, programmes of this type were restricted to the "deserving poor" who were not thought capable of providing for themselves. Included in that category would often be widows, the elderly, young children, and the physically or mentally

disabled. Able-bodied men, however, tended not to be considered "deserving"; that they did not earn a living via their labour was deemed to be a moral failing on their part and their plight did not warrant society's charity. Attitudes have changed substantially in this regard. Particularly since the Second World War there has been an increasing acknowledgement, manifest in the structure of state benefits, that individuals are not necessarily under- or unemployed because of any personal failing. When coupled with growing recognition of the link between income and human dignity, there has been increasing support for at least some level of universally accessible benefit capable of providing for the basic subsistence of all adults.[16]

The constitutions of Australia and New Zealand do not entrench any rights of this type, although as with most other categories discussed herein both countries do have a system of basic social supports.[17] None are explicit in the German Constitution, but case law has given rise to a quasi-constitutional state duty to provide social welfare assistance to those in need.[18] The Finnish Constitution guarantees the "means necessary for a life of dignity" to those otherwise unable to obtain it, as well as requiring the public authorities to "promote the right of everyone to housing and the opportunity to arrange their own housing space" (s. 19).

The Portuguese Constitution contains a justiciable general right to social security with particular reference to the elderly, who have a right to economic security independent of their eligibility for contribution-based pensions or insurance, and for whom policies must be created that provide opportunities for personal fulfilment (arts. 63, 67, 72). It also states that everyone is entitled to adequately sized housing, and obligates the state to take action to realise that right. The Spanish Constitution contains a set of aspirational social welfare rights guarantees nearly identical to those of Portugal, with two principal differences. The first is the absence of an explicit statement that everyone has the right to social security. The second is a requirement that regulation of land use and the prevention of speculation play a role in facilitating realisation of the right to adequate housing (art. 47). Both the Spanish and Portuguese Constitutions also include provisions requiring the state to take measures to ensure that those with disabilities are capable of fully enjoying their rights.

The Swiss Constitution is the most specific in this area of social rights. With respect to housing, the constitution requires the Confederation and cantons to facilitate the ability of all individuals to secure adequate housing (art. 41(d)). In furtherance of this requirement, the Confederation is required to pay particular attention to the interests of vulnerable populations when making policies intended to encourage the production of housing stock; interestingly, no more than 20% of residential units in any given area can be second homes (art. 75b). In addition, supplementary benefits are to be provided to those whose basic needs are not met by the mandatory contributory schemes, with the amount determined by law (art. 112a). The state is also responsible for managing the availability of food and potable water, although no specific rights to either are guaranteed (arts. 76, 104a).

A number of constitutions also recognise and address the particular challenges and vulnerabilities experienced by elderly people. The Spanish Constitution, for example, directs the state to develop a system of social services that supports the elderly in terms of health, housing, culture and leisure (art. 50). More assertively, the Portuguese Constitution contains several justiciable guarantees intended to foster the continued autonomy and dignity of the elderly, including the provision of opportunities for "active participation in community life" (art. 72). The Swiss Constitution also contains provisions of this type.

It should also be noted that the right to housing has proven contentious in a number of jurisdictions, generally in relation to conflicts between the so-called "occupiers" of informal settlements and the owners of the property. For example, in some countries (e.g., South Africa), the courts have frequently prevented the eviction of informal settlement dwellers until there is a specific place for them to go, thus denying the property owners redress for the infringement of their rights. However, should it be determined that the state has taken too long to fulfil its obligation to secure alternative accommodation, it is possible for the property owner to claim "constitutional damages" for the inability to enjoy their property (Stuart and Clark, 2016[11]). Disputes of this type raise the issue of whether property rights ought to be considered absolute. On the

one hand, it can be problematic to violate one right (housing) in order to protect another (property), suggesting that some form of judicial balancing should be considered. On the other hand, there can be a legitimate concern that failure to vigorously protect property rights would have a negative impact on investment and economic growth.

Cultural rights

An increasing number of jurisdictions have added constitutional protections to protect aspects of culture. These include rights to maintain group identity through language and culture; rights for specific communities to develop; and specific rights for Indigenous communities. Many of these rights have been recognised in international law, including the United Nations Declaration on Human Rights. Such rights differ from more traditional anti-discrimination rights (such as rights to be free from discrimination on the basis of gender, race or sexual orientation), which protect individuals.

Language and culture

Many constitutions protect rights to culture and language, although the varying manner in which they are expressed suggests different purposes. In some instances, the protections appear to be directed at majority groups. The Constitution of Portugal, for example, protects a general individual "right to education and culture" (art. 73) as well as "the right to enjoyment and creation, together with the duty to preserve, defend and enhance the cultural heritage" (art. 78). In other jurisdictions cultural rights are primarily addressed to minority groups, or to foster cultural diversity. In Spain the constitution provides that "all are entitled" to culture (art. 44(1)), and the preamble says that the state will "protect all Spaniards and peoples in the exercise of human rights, of their culture, traditions, languages, and institutions". In addition, article 3 of the Spanish Constitution establishes Castilian as the official language of the state, but declares the other Spanish languages as also official in the respective Autonomous communities and proclaims that "the wealth of the different language modalities of Spain is a cultural heritage which shall be the object of special respect and protection". Similarly, in Canada the constitution contains a clause requiring it to "be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians" (art. 27). Similarly, the quasi-constitutional bill of rights in New Zealand protects the rights of members of minorities "in community with other members of that minority, to enjoy the culture, to profess and practice the religion, or to use the language, of that minority" (s. 20)) via weak-form review. Similar protections exist in the statutory bills of human rights of two subnational units in Australia (Victoria and Queensland).

Indigenous rights

Recognition of Indigenous peoples in constitutions can be achieved in many different ways. Sometimes this will be through recognition of Indigenous self-government as part of the state's vertical allocation of power, discussed in more detail in Chapter 5. Indigenous peoples may also be constitutionally protected, often through general rights to culture and language. Some constitutions, however, recognise the special place of Indigenous peoples by explicitly providing for Indigenous constitutional rights.

Indigenous rights provisions are common in Latin America. The Constitution of Mexico, for example, includes significant protections for Indigenous peoples, including rights to representation, voting, education and health. It also guarantees their rights to self-determination, self-government, and development (art. 2). Many of these rights are also recognised in international law;[19] among other things, they emphasise the rights of Indigenous peoples to free, prior and informed consent concerning the use of their land or other resources. This approach is also reflected in the decisions of some constitutional courts, which require states to "meaningfully engage" with Indigenous groups before making decisions that affect their well-being or self-determination (Rodríguez-Garavito and Kauffman, 2014, pp. 46-49[12]).

Other OECD member countries also include specific protections for Indigenous peoples. The Finnish Constitution contains specific protections for the culture and language of the Sami people (art. 17) and the Canadian Constitution protects First Nations' rights to land guaranteed by treaties (art. 35). It also stipulates that Indigenous treaty rights and freedoms are not affected by other rights guaranteed in the charter (art. 25).

In New Zealand, Māori rights are also considered protected by the constitution. The Treaty of Waitangi, the founding treaty between the British Crown and Māori representatives, has constitutional status and influences the interpretation and application of New Zealand law (New Zealand Ministry of Justice, 2020[13]). Māori are also guaranteed rights to minimum parliamentary representation under the country's quasi-constitutional electoral law. In Australia, the quasi-constitutional rights charter of the state of Victoria provides that "Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community" to goods such as identity, culture, language, kinship ties, and the natural world (art. 19(2)).

Cultural and indigenous rights interrelate with the social and economic rights discussed above. Sometimes cultural rights will require other rights to be exercised in a way that is consistent with the culture or language of a particular group. For example, article 23 of the Constitution of Canada provides that English- or French-speaking children have the right to receive education in their first language, and article 2(B)(III) of the Constitution of Mexico specifies the healthcare rights of Indigenous peoples, including support for traditional medicine. Provisions such as these may ensure that social and economic goods are not provided in a way that is inconsistent with cultural rights, such as education policies which suppress Indigenous cultures, or housing policies which are not suited to minority cultures. In some cases, however, cultural rights have conflicted with states' provisions of economic and social goods. For example, in 2013 the Supreme Court of Justice of Mexico found that a major infrastructure project, which would have provided water to the city of Hermosillo, violated the rights of the Indigenous Yaqui tribe to be consulted on the project, in accordance with their own habits and customs *Independencia Aqueduct Case* (2013[14]).

Emerging or "new" rights

The rights discussed in this section address important issues arising from technological development, improved understanding of the world, globalisation, and changing attitudes about the importance of and respect for diversity and difference, both natural and cultural. Their relative "newness" should not be taken as evidence that they are somehow less important than more commonly constitutionalised rights. Box 3.2 reflects examples of rights included in new, progressive constitutions around the world.

Box 3.2. New constitutions around the world: Progressive viewpoints

While this report analyses constitutional provisions primarily from OECD member countries, it recognises that many of the recent new constitutions and amendments have been adopted elsewhere, in OECD partner countries around the world. These contemporary constitutions show examples of progressive approaches to a number of key topics covered in this report, some of which are highlighted below:

1. *Well-being* – There is no single definition of well-being, although most approaches agree that it is a multi-dimensional concept encompassing material and non-material dimensions.[20] Some countries have integrated an idea similar to that of well-being into their constitutions, for example South Africa (Chapter III), Bolivia (art. 8) and Ecuador (art. 3 and Chapter II), in the latter cases dubbed "*buen vivir*".

2. *Citizen participation* – The Brazil Constitution of 1988, through a 2020 amendment, states that the government will guarantee the participation of society in the process of formulation, monitoring, control and evaluation of social policies (Article 193). The Ecuadorian Constitution contains a chapter on participation in democracy, with several articles describing the forms of citizen and stakeholder participation to ensure that "citizens, individually and collectively, participate as leading players in decision making, planning and management of public affairs…" (Article 95). More recently, in 2019 the subnational Constitution of Mexico City included a right to good government though open government initiatives (Articles 60 and 26).
3. *Gender equality* – In Tunisia, the state guarantees equal opportunity access for women and men to all levels of responsibility in all domains, including attainment parity in elected assemblies. It also outlines that the state shall take all necessary measures in order to eradicate violence against women (art. 46). In Bolivia, the Constitution establishes that women have the right not to suffer physical, sexual or psychological violence, either in the family or in society (art. 15.II) and that the state shall prevent, eliminate and punish sexual violence, or any form of physical, sexual or psychological suffering, whether in the public or private spheres (art. 15.III). The constitution also establishes that internal election of the leaders and the candidates of the citizen associations, and of the political parties shall guarantee the equal participation of men and women (art. 210). In Namibia, the constitution establishes that the parliament shall enact legislation considering the fact that women in that country have traditionally suffered special discrimination and that they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation (art. 23.2).
4. *Reproductive and family rights* - the Constitution of Paraguay protects "the rights of persons to freely and responsibly decide on the number and frequency of the birth of their children" (art. 61); the Constitution of Venezuela establishes that "couples have the right to decide freely and responsibly how many children they wish to conceive" (art. 76). In the case of Brazil, the Constitution establishes that "couples are free to decide on family planning; it is incumbent upon the State to provide educational and scientific resources for the exercise of this right, prohibiting any coercion on the part of official or private institutions" (art. 226.7).

Environmental rights

Most countries' constitutions include environmental provisions. As of 2012, 147 constitutions protected the environment in some way (Boyd, 2012[15]). This included provisions involving: i) enforceable *rights* to environmental quality (such as a "clean", "healthy" or "pollution-free" environment); ii) state *duties* to protect to environment, or environmental principles; iii) specific rights or duties addressing environmental issues (such as forests or future generations); and iv) "rights of nature". Environmental rights have also been recognised as aspects of other constitutional rights, such as the right to life or human dignity (Boyd, 2011[16]). Environmental issues are also affected by other human rights. For example, the right to health might require governments to ensure there is clean air and water; procedural rights may help people access information about the environment; and Indigenous rights may empower Indigenous peoples to protect their lands and resources against environmental damage.

The most common form of constitutional protection is an individual right to environmental quality. The right is sometimes paired with a duty to defend the environment, as is the case in Portugal: "everyone shall possess the right to a healthy and ecologically balanced human living environment and the duty to defend it" (art. 66(1)).

In some countries the right is justiciable: claims can be brought against the government in court. For example, the Portuguese Constitution specifies that environmental claims can be brought in the interests of the general public through a streamlined process called an *actio popularis* (art. 52(a)). Constitutions in

a number of Latin American jurisdictions, including Colombia and Mexico, allow these rights to be enforced through streamlined individual claims (*tutela* or *amparo* procedures). In Colombia, they can also be enforced following collective claims, such as the *acción popular*. They can moreover amount to restrictions on other constitutional rights, especially property rights. Courts have interpreted the Finnish Constitution to permit deprivation of property when such deprivation is proportional to environmental benefits (KHO, 2014[17]).

Environmental rights can also take the form of procedural rights. These rights protect access to information, participation and justice. For example, the Finnish Constitution guarantees citizens the right "to influence decisions concerning their own living environment" (art. 20). This obligation has been implemented in several statutes, and used to appeal environmental decisions in the Finnish courts.

In some countries, environmental rights are not justiciable. Instead, legislatures and executives are directed to respect environmental rights through legislation and regulation, as is the case in Spain (arts. 45(1), 53(3)). The Spanish legislature has enacted environmental legislation in accordance with article 45(1), which specifies rights that can be enforced. Other constitutions impose duties on the state, rather than guaranteeing individual rights. The constitutions of Germany and Switzerland require public authorities to "protect the natural foundations of life and animals" (Germany, art. 20A) and to "legislate on the protection of the population and its natural environment" (Switzerland, art. 74). In both cases, governments have passed statutes and regulations referring to these directives.

Rather than protecting "the environment" in general, some constitutions outline detailed environmental rights and duties. In 2004, the Constitution of France was amended to include a justiciable ten-article Charter for the Environment; and a constitutional change is under way (via the proposal of the Citizen Convention on Climate) to amend the constitution and include in the first article a state responsibility to ensure the preservation of the biodiversity, the environment and the fight against climate change.[21] Article 66(2) of the Portuguese Constitution has both a general rights provision (article 66(1)) and a set of more specific responsibilities related to pollution, conservation and education, while articles 73-80 of the Swiss Constitution set out a detailed set of directions for federal and subnational implementation, including for issues such as spatial planning, water, forests and conservation. Several constitutions also include a right to clean drinking water (that of South Africa, for example). Others, such as art. 20a in Germany and art. 73 in Switzerland, include rights or duties owed to "future generations", provisions relating to "sustainability", or the obligation to safeguard resources for future use. The concept of sustainability is connected to the issue of "environmental justice", the rights of which require states to pay attention to the ways that environmental harms and benefits are distributed – for example, across race, gender and class. Environmental justice also requires expanding the definition of "environment" to include everyday places where people live, play and work (for example, the fair siting of waste facilities, rather than focusing only on national parks and species preservation) (Schlosberg, 2007[18]).

More recently, several countries have assigned rights to specific natural phenomena such as rivers or forests. These rights allow people to bring judicial proceedings, and the establishment of bodies to govern, on behalf of nature. Such rights can be found in the constitution of Ecuador (arts. 71-74), the law of New Zealand, and Colombian judicial decisions (Centre for Social Justice Studies et al v. Presidency of the Republic, 2016[19]).

Environmental rights can sometimes conflict with other rights, such as the right to property. For example, the Constitutional Court of Hungary has found that in the context of forestry conservation, environmental rights and principles are sufficiently important that they outweigh private property rights (*First Forests Case, 1994; Second Forests Case,* 2020). In South Africa, the Constitutional Court has applied the concept of "sustainable development" as a way to proportionately balancing environmental rights and competing considerations, such as the right to development (*Fuel Retailers Association v. Director General, Environmental Management*, 2007). Finally, environmental rights and policies may align with indigenous rights, or be in conflict with them. For example, the Constitutional Court of Colombia has found that river

pollution will often violate both indigenous *and* environmental rights (Centre for Social Justice Studies et al v. Presidency of the Republic, 2016[19]). On the other hand, government programmes that aim to improve the environment – such developments of renewable energy – may violate the rights of indigenous peoples to manage their own lands, or be afforded a consent process that is free, prior and informed. This has been the case in Mexico, where a wind farm development was first blocked by the Supreme Court as a violation of indigenous rights (*Wind Farms Case*, 2018), before later being permitted to proceed.

Rights of women and gender equality

Constitutions can play an important role in achieving gender equality by including provisions that protect and enforce the rights of women, and by enshrining provisions that could guide the enactment of legislation and policies to promote particular features of gender equality. While gender equality and non-discrimination clauses are common markers of constitutional commitments to formal equality, the current tendency in global constitutionalism is to include gender-specific provisions that can promote substantive equality. Based on the premise that formal equality is necessary but not sufficient to attain equality between men and women, constitutional provisions increasingly reflect the idea of "equal outcomes". In this context, they may acknowledge the unequal position of women in society "in order for them to be able to take advantage of [their access to] opportunities and resources".[22]

Gender-specific drafting style strategies of modern constitutions increasingly reflect the use of gender-neutral language. The cases of the constitutions of the OECD countries under study reflect this tendency: Finland, Switzerland, New Zealand, Germany and Colombia use gender-neutral language.

In addition, some constitutions establish provisions that acknowledge the importance of having women in government, or provisions that recognise the obligation of the state to address women's equality in different spheres. In the case of Portugal, for example, the constitution establishes that a "fundamental task of the state" is to promote equality between men and women" (art. 9). In Austria, "the Federation, Länder and municipalities subscribe to the de-facto equality of men and women. Measures to promote factual equality of women and men, particularly by eliminating actually existing inequalities, are admissible" (art. 7.2). The French Constitution establishes that "statutes shall promote equal access by women and men to elective offices" (art. 1), and on its preamble it mentions that "the law guarantees women equal rights to those of men in all spheres".

The following sections examine gender-inclusive constitutional practices with regard to gender equality and women's rights paying special attention to the constitutions and quasi-constitutional documents of Australia, Finland, Germany, New Zealand, Portugal, Spain, Switzerland and Colombia.

Framing gender equality

Gender equality provisions within constitutions can reflect commitments to both formal and substantive equality. Formal equality is approached by including non-discrimination provisions that prohibit discrimination on the basis of sex and gender, as well as equality provisions that state that everyone is equal before the law, emphasising equality between men and women. An approach to substantive equality takes into consideration differences between men and women. Substantive equality provisions aim to address how women can be found in an unequal position in accessing specific areas of social life such as work or education, often due to historical trends. Consequently, provisions that target substantive equality often aim for equal access to opportunities and equality of outcomes through a recognition that equal treatment alone may not result in similar outcomes for women as compared to men.

The constitutions of Switzerland, Finland, Germany and Colombia include an explicit declaration that men and women are equal. These constitutional provisions also address a specific goal on substantive equality that should be achieved by the state. For example, in the case of Switzerland, the constitution mandates that "men and women have equal rights" and that "the law shall ensure their equality…in the family, in

education, and in the workplace. Men and women have the right to equal pay for work of equal value" (art. 8.3). The Constitution of Finland similarly indicates that "equality of the sexes is promoted in societal activity and working life, especially in the determination of pay" (s. 6). The Constitution of Germany establishes that "men and women have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist" (art. 3). Finally, the constitution of Colombia establishes that "women and men have equal rights and opportunities…during their periods of pregnancy and following delivery, women will benefit from the special assistance and protection of the State" (art. 43).[23]

All the constitutions of the OECD countries under study include non-discrimination provisions that prohibit discrimination based on a number of factors, including gender or sex.[24] Constitutional recognition of multiple grounds of discrimination has the potential to require states to enact legislation and policies that can tackle the layered nature of women's inequality. In this context, non-discrimination clauses usually specify that discrimination is prohibited based on "one or more grounds", and can include an open list of other types of discriminatory factors that intersect with gender or sex, such as race, religion, national origin and language.[25]

Women's rights

Constitutional regulation of the *political rights* of women includes provisions related to their participation and representation in the political system. These provisions are typically oriented toward increasing the participation of women in political parties, and ensuring their inclusion in decision-making structures across the legislative, judicial and executive branches of government. For example, Portugal affirms that "the direct and active participation in politics by men and women is a fundamental instrument in the consolidation of the democratic system, and the law shall promote both equality in the exercise of civic and political rights and the absence of gender-based discrimination in access to political office" (art. 109). Similarly, the constitution of Colombia mandates that state authorities "will guarantee the adequate and effective participation of women in the decision-making ranks of the public administration" (art. 40). Also, the constitution of Belgium establishes that "the law, federate law or rule referred to in Article 134 guarantees that women and men may equally exercise their rights and freedoms, and in particular promotes their equal access to elective and public mandates" (art. 11). The constitution of Italy establishes that "any citizen of either sex is eligible for public offices and elected positions on equal terms…the Republic shall adopt specific measures to promote equal opportunities between women and men" (art. 51).

The constitutional protection of the *social and economic rights* of women aims to advance substantive equality, as it may address specific inequalities between men and women relative to education, property, employment – including equal pay and protections related to maternity – and the participation of women in economic activities. For example, the Spanish Constitution establishes, in relation to the right to work, that "under no circumstances may they be discriminated against on account of their sex" (s. 35). Similarly, Portugal establishes that the state shall implement policies aimed at creating conditions to avoid "gender-based preclusion or limitation of access to any position, work or professional category" (art. 58). Workers, regardless of their sex, have right to remuneration that respects the principle of equal pay for equal work, and that the state should ensure "special work-related protection for women during pregnancy and following childbirth" (art. 59). The Colombian Constitution also mandates that the appropriate labour law "will take into account at least the following minimal fundamental principles: … special protection of women, mothers, and minor-age workers" (art. 53).

Some countries also put in place constitutional provisions that aim to protect women's right to health, which may include the obligation of the state to provide access to healthcare, including family planning and abortion. For example, Portugal includes a provision that guarantees "the right to family planning by promoting the information and access to the methods and means required therefore and organizing such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned" (art. 67.d).[26] The Czech Republic Constitution establishes that "women, adolescents, and

persons with health problems have the right to increased protection of their health at work and to special work conditions" (art. 29.1), while the Slovak Republic Constitution indicates that "women, minors, and persons with impaired health are entitled to an enhanced protection of their health at work, as well as to special working conditions" (art. 38.1). Some constitutions recognise women's right to a *life free from violence* and discrimination. This right protects women from gender-based violence, "one of the most systematic and widespread" human rights abuses worldwide.[27] The Colombian Constitution establishes on its article 43 that women cannot be subject to any type of discrimination. While it does not specifically mention gender violence, it indicates that "any form of violence in the family is considered destructive (…) and will be sanctioned according to law" (art. 42). .

Women's reproductive capacities are connected to their ability to make decisions related to their bodies and overall health. From this perspective, *women's right to health and access to health care* is important to protect women's agency in making their reproductive choices. Constitutional provisions that aim to protect this right may include the obligation of the state to provide access to healthcare, including family planning and abortion. In this context, Portugal includes a provision that guarantees "In order to protect the family, the state shall particularly be charged with: (d) with respect for individual freedom, guaranteeing the right to family planning by promoting the information and access to the methods and means required therefore, and organizing such legal and technical arrangements as are needed for motherhood and fatherhood to be consciously planned." (art. 67.d).[28]

As noted in the example of Portugal, some countries of the OECD include provisions that protect the family as an institution. Some countries, such as Colombia and Mexico, mention that it is the obligation of the State to protect and even promote the family, however, they also include a provision that regarding family planning to protect the right of couples or individuals to decide when and how many children they want to have. In the case of Colombia, for example, in the context of the protection of the family, the Constitution establishes that "the couple has the right to decide freely and responsibly the number of their children" (art. 42). In the case of Mexico, the Constitutions establishes that "every person has the right to decide, in a free, responsible and informed manner, about the number of children desired and the timing between each of them. (art. 4)." These norms can be interpreted as protecting the right of women to make decisions in relation to reproduction and on the number of children to have.

Special measures

While the elimination of discrimination is important in achieving gender equality, a commitment to achieving substantive equality between men and women often calls on states to take specific actions that may be incorporated in the constitution. Provisions may include the passing of laws, policies or programmes aimed at granting preferential treatment for women that may be temporary (e.g. quotas) or permanent (e.g. maternal healthcare, parental leave), or that provide incentives that target women's exercise of the above-mentioned rights (e.g. education programmes).

Apart from the examples of special measures mentioned in the previous sections, the constitutions under study include other types of measures. In Spain for example, the constitution broadly mandates "special protection of mothers" (art. 39.2), while that in Switzerland establishes the creation of a maternity insurance scheme (art. 116.3). Similarly, the constitution of Portugal protects mothers and establishes that "women shall possess the right to special protection during pregnancy and following childbirth, and female workers shall also possess the right to an adequate period of leave from work without loss of remuneration or any privilege" (art. 68). New Zealand also grants preferential treatment to women during pregnancy or childbirth.[29]

Enforcement

The mechanisms of enforcement of the rights of women and the prohibition of discrimination on the grounds of gender are found in the larger mechanisms of protection of fundamental rights enabled in the constitutions under study. Beyond these mechanisms, constitutions may establish a national women's or gender commission or other institution in charge of developing a national agenda or policy on gender and women's rights. The constitution of Sweden, for example, includes a provision that authorises the Committee on the Labour Market to prepare matters concerning "equality between women and men, insofar as these matters do not fall to any other committee to prepare" (art. 13). Many other countries opt to rely on other types of legislation to establish the gender machinery.

Rights of children and young people

Many constitutions recognise the rights of children and young people (CYP).[30] Some states have recognised that CYP are vulnerable because of their relative lack of power and inability to vote. CYP are therefore often dependent on adults. Constitutions frequently require the state to recognise minimum rights standards for CYP, especially when the state regulates childcare and families. As noted above, many constitutions also recognise the rights of "future generations" as a part of environmental rights. CYP rights are also connected to the rights to social security, healthcare and education discussed above. CYP moreover will often be protected by fundamental rights against aged-based discrimination. The rights of CYP are also prominent in international law; the Convention on the Rights of the Child is one of the most recognised international human rights treaties.

Constitutions tend to balance the rights of children to a minimum standard of care (and the state's role in guaranteeing that care) against the rights of parents to raise children as they see fit (e.g. in line with religious or cultural beliefs). Many constitutions address this balance by stating that parents have *rights*, but also *duties*. For example, the German Constitution states that "the care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The state shall watch over them in the performance of this duty" (art. 6). Article 6(3) allows the state to separate children from their parents or guardians, but only if they "fail in their duties or the children are otherwise in danger of serious neglect". Article 37 of the Portuguese Constitution clarifies that "parents shall possess the right and duty to educate and maintain their children" and limits the circumstances under which children can be separated from their parents. The Spanish Constitution recognises similar rights in an aspirational manner.

Many constitutions also contain individual rights for CYP. The Finnish Constitution protects the right of children to be treated as equals, and to "influence matters pertaining to themselves to a degree corresponding to their level of development" (art. 6). In addition to a general right to protection, the Portuguese Constitution also contains specific language regarding the development of CYP, child labour, education, housing, and leisure (arts. 69-70). The Swiss Constitution also requires the state to "take account of the special need of children and young people to receive encouragement and protection" (art. 67) in furtherance of their development (art. 11).

Some constitutions protect the rights of CYP in the criminal justice system. The New Zealand Bill of Rights Act 1990, a statute that has constitutional significance, guarantees "the right, in the case of a child, to be dealt with in a manner that takes account of the child's age", whenever children are charged with a criminal offence (section 25). Similar rights are included in the charters of several Australian states. A number of constitutions, including those of Germany (art. 6(5)) and Portugal (art. 36(4)), prohibit discrimination against children based on whether they were produced in or outside marriage.

Digital rights, emerging technology rights and the right to privacy

As digital technologies are increasingly used in the daily activities of people, governments and businesses, opportunities to improve the efficiency, transparency and inclusiveness of their use emerge. Alongside new opportunities, the digital government, economy and society also generate risks in terms of ethics, privacy, security and equity. Governments have a critical role to play in guaranteeing that the digital disruptiveness under way does not harm fundamental rights and pillars of democratic societies. Legal and regulatory frameworks need to be in place to enable governments to seize opportunities and navigate the complexity brought about by digital transformation (OECD, 2014[20]). For example, online interactions have taken existing rights such as those related to freedom of speech and privacy to new dimensions. New technologies have also created new potential rights such as Internet access and protection of genetic material. Validity of and respect for fundamental rights and democratic values in the digital sphere are thus becoming increasingly relevant, and in some cases this is reflected in constitutional text.

Many constitutions include general privacy protections, the importance of which has been exacerbated with the increased risks to privacy posed by the use of digital tools. Examples include Portugal (art. 26(1)), Spain (art. 18), and Germany (arts. 1, 2, 10). In each of these countries the right to privacy is enforceable through intense (strong-form) judicial review. In the United Kingdom and in two Australian states, privacy is protected through mild (weak-form) review.

Courts have often interpreted the general right to privacy, as well as other constitutional rights, as protecting personal data. The German Constitutional Court has interpreted constitutional guarantees of "personality" and "dignity" as an individual's right to decide on the disclosure and use of personal data. In doing so it has struck down inconsistent legislation, and the German Government has legislated for digital privacy rights in accordance with this judicial interpretation. The Court's reasoning has been influential in Latin America where many countries, such as Argentina (art. 43), have included a "habeas data" right in their constitution that allows individuals to view government information held about them.

Other constitutions contain explicit provisions. The constitution of Switzerland, for example, provides that "every person has the right to be protected against the misuse of their personal data" (art. 119(2)). Other constitutions task public authorities with legislating in this area. The constitutions of Finland (art. 10) and Portugal (art. 26) both contain general privacy rights and direct legislatures to enact data protection laws. Article 35 of the constitution of Portugal also contains an extensive and specific set of data privacy protections, combining individual rights (such as a person's right "to access all computerised data that concern him" (art. 35(1)) and directives ("the law shall define the concept of personal data" (art. 35(2)).

Other constitutional provisions reflect specific concerns raised by new technologies. One example is the use of genetic materials. In Portugal, article 26 directs that the law shall "guarantee the personal dignity and genetic identity of the human person". This directive can also be found in the constitution of Switzerland, which justifies restrictions on the use of genetic materials with reference to "the protection of human dignity, privacy, and the family" (art. 119).

As more services become accessible primarily online, some constitutions have included a right to Internet access. The constitution of Portugal provides that "everyone shall be guaranteed free access to public-use computer networks" (art. 35(6)), while the constitution of Mexico directs the state to "guarantee access to information and communication technology, access to services of radio broadcast, telecommunications, and broadband Internet" (art. 6). The recently revised OECD Recommendation on Broadband Connectivity (2021) includes provisions on eliminating digital divides and reducing barriers in broadband deployment. Rights of use and management of the radio spectrum, net neutrality, accessibility, digital literacy and access to public services regardless of the channel are also relevant to ensure universal access to online information and public services.

Consumer rights

Although most countries have legislation relating to consumer protection, relatively few include consumer rights in their constitutions. When included they concern the quality and safety of consumer goods and consumers' ability to access information, and may also protect the rights of consumer associations. These rights have the potential to conflict with other rights such as freedom of speech (when advertising or labelling is regulated)[31] and labour rights (which affect the production of consumer goods).

The Portuguese Constitution includes provisions relating to advertising, the quality of goods, training and information, health and safety, and reparations for damages (art. 60). It also includes consumer protection as one of the grounds on which individuals can bring *actio popularis* proceedings (which make it easier to bring cases to court). The constitution of Argentina allows individual consumers to bring lawsuits to defend their consumer rights (art. 43), while the constitution of Spain contains directive principles requiring public authorities to "safeguard the protection of consumers" and "regulate domestic trade and the system of licensing commercial products" through legislation and regulation (art. 51).[32]

Finally, the Spanish and Portuguese Constitutions both include protections for consumer associations. Article 51(2) of the constitution of Spain directs public authorities to "foster the organisation" of consumer associations so that they receive state support, are heard in relation to consumer protection issues, and represent their members.

Key options and questions to consider

Models of entrenchment

One approach to the entrenchment of constitutional rights might best be described as "minimalist". As noted, Australia and New Zealand do not constitutionally entrench any ESCNRs in the strictest sense of the word.[33] At the national level in New Zealand and in two subnational units in Australia there are statutory bills of rights that contain some ESCNRs.[34] Although ordinary legislation, they are considered quasi-constitutional in the sense that other legislation is to be interpreted in accordance with the principles they lay out and, where this is not possible, the statutory bill of rights will take precedence over the other legislation unless that legislation explicitly states the contrary.

The German Constitution guarantees very few economic or social rights explicitly. Reference is made to the importance of children and education; however, to the extent they are dealt with in the context of rights, it is to assert that the state can oversee and regulate in those areas but is not explicitly obliged to provide the relevant goods or services. As noted above, however, the German Constitutional Court has determined that the constitution requires provision of a minimum level of social assistance to those in need. Although the "strength" of international treaties is not explicit in the constitution, judicial decisions suggest that they have the same status as legislation; as such, they cannot be used to invalidate laws passed by the legislature.[35]

As previously noted, constitutionally entrenched ESCNRs can be either justiciable or aspirational. In terms of enforcement, an additional layer of complexity is added by the possibility of strong-form and weak-form judicial review. The Finnish Constitution employs the justiciable model of ESCNR entrenchment, although the text of the rights themselves stipulates that their specific details are to be given effect by legislation. The same is largely true of the Portuguese Constitution.

Not all constitutions assign the same strength or review process to all the ESCNRs (or other rights) that they include. In many, the distinction is made explicit by including rights in different sections of the constitution and including specific details regarding their enforceability. The Spanish Constitution, for example, includes ESCNRs in three separate sections. Two of these contain justiciable rights[36] –including those to education, to join or form a trade union, and to strike – that can be challenged directly via the

courts. The “Principles Governing Economic and Social Policy” contains rights that are aspirational only, such as those to social security, housing, and healthcare. However, even here in one of the more straightforward cases, there is a degree of complexity. These aspirational rights cannot by themselves be used to challenge the state; yet to the extent that the state has legislated in a particular area (as it is generally directed to do by the text of aspirational rights), the rights can be used in court to the extent that the legislation permits challenges (art. 53(3)). The Swiss Constitution adopts a similar model, leaving the state with a wide variety of detailed obligations relating to economic and social rights issues. However, with limited and contestable exceptions relating to basic education, child protection, trade unions, collective bargaining and (possibly) social assistance, they are directive principles of state policy that cannot form the basis of a legal challenge.

There could be valid reasons to adopt any one of these approaches, or to pick and choose elements from them in crafting a set of ESCNRs for inclusion in a constitution. The decision to make some rights justiciable, others aspirational, and exclude still others from constitutional protection should be made in the full light of day by those with a knowledge of and experience with the people, groups and institutions to which the document will apply. Experience with benchmarking countries suggests that it is also important to clearly specify whether and when a particular right is to be judicially enforceable as well as by whom and in what venue(s).

Accessing the courts

Courts can only adjudicate cases, including constitutional rights cases, that arrive before them instigated by users of the legal system. As such, the accessibility of the justice system is a key determinant of the ability of litigants to bring forward their claims and uphold their fundamental rights. Individuals, groups and businesses can face different barriers to effectively accessing the court. Some of them stem from the formal institutional rules, while others are more informal barriers, such as the complex language and procedures of the courtroom, which are often difficult to comprehend and may well be intimidating or even frightening to poorer or less well educated individuals. There can also be geographical and cost-related barriers (OECD, 2019[21]). Formal institutional rules determine what types of claims can be considered and when, who can bring them, and what court(s) are able to adjudicate them. These matters are discussed in more detail in Chapter 6.

In many jurisdictions individual-driven rights litigation is thought unlikely, often because of financial barriers. Advancing claims, particularly those based on constitutional rights, could be difficult given the associated high costs which are likely to be beyond the reach of most individual actors. While in criminal trials there is, either as a matter of law or policy, a widespread tendency to make legal aid available for those unable to afford the costs themselves, that is much less common with respect to rights claims. The tendency is therefore to rely on the legal assistance sector (NGOs and law firms acting pro bono) to support such litigation (OECD, 2019[21]).

Many Latin American countries, including Colombia and Mexico, have put procedural mechanisms in place to expedite claims relating to individual rights violations (*tutela* and *amparo*, respectively). Although these procedures lower barriers to accessing the courts, the increased level of access could also lead to a high volume of cases, which can generate backlogs and in turn slow the efficiency and effectiveness of the judicial system. In 2019 for example, there were over 200 000 right-to-health *tutelas* in Colombia (La Tutela, 2020, p. 63[22]).

A number of other strategies have been adopted to improve access to justice in the field of fundamental rights – some at the level of the constitution, others via statute or policy. In some instances, an autonomous section of the public prosecutor’s office will take on the responsibility of advancing claims of this type, as is the case in Brazil. An alternative approach is to include an obligation to assist in reconciling the offending issue or action in the mandate of a Human Rights Commission or other such institutions.[37] Some common

law jurisdictions, such as in Canada, have also established a fund to support constitutional claims through the appeals process if they have the potential to shed light on important concerns or clarify the law.

Judicial interpretation and progressive realisation

In practice, constitutionally guaranteed ESCNRs have been interpreted in two principal ways. The first is as administrative law principles, so that social rights are understood to allow individuals or groups to have their rights considered in a meaningful manner that results in a reasonable solution. These are procedural or justificatory rights that expose to "rational" scrutiny what might otherwise be considered "political" decisions. This model of rights interpretation is most commonly associated with the South African Constitutional Court. Secondly, they have also been interpreted as representing directly realisable guarantees that may well require judicial definition of their contents. These are absolutes which, if abrogated, entitle the bearer to a court order mandating explicit levels of expenditure and/or actions by the state in order to ensure realisation. This approach is most frequently associated with litigation relating to the provision of medicines and medical treatment in the Brazilian courts.

These are, however, general characterisations. The particulars of how constitutionally entrenched ESCNRs will be interpreted will vary from jurisdiction to jurisdiction, likely even from right to right. Constitutional documents articulate general rights and principles that, like all abstract normative values and beliefs about the appropriate ordering of social relations, must be translated into specific directives and obligations taking into consideration contextual factors. This translation process is not a straightforward or uncreative exercise, but neither is it an exercise involving the unrestricted articulation of judges' policy preferences. The way in which the rights are framed – for example, whether the constitution guarantees access to medical treatment regardless of ability to pay, or sets out a general right to healthcare that the state is required to take steps to progressively realise – will have a significant impact on judicial interpretation, as will explicit instructions regarding what can and cannot serve as the basis of legal claim. However, constitutions cannot conceive of every possible set of circumstances; at some point, the judiciary (and others) will need to apply the general principles and guarantees it expounds to specific circumstances.

The reality of scarce resources and the timelines involved in infrastructure and human capital development means that regardless of what one may desire, not all rights can be realised immediately, nor are they likely to progress evenly. With respect to ESCNRs in particular, their proximity to (and in many cases overlap with) what have traditionally been considered political matters means the judges must be cognisant of the context in which they are deciding while maintaining their role as arbiters of the law. This is often a difficult balance to strike, but for rights to be given effect in a meaningful way it is a necessary role; to a certain extent, judges – as is the case with public officials – must be accorded a degree of trust if the state is to function reasonably fairly and effectively. At the same time, the statements of public officials and judges alike must not be believed simply by virtue of the office they hold. Often, an important guarantor of fairness and justice is likely to be an informed and engaged general public to oversee the system. In addition, in most continental Europe systems, the economic and social rights entrenched in the constitution need to be elaborated in more detail in legislation.

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Notes

[1] For example, the rights to vote, to free expression, to practice the religion of one's choice, and to not be discriminated against based on gender, ethnicity, race or disability. Civil and political rights will not be analysed here.

[2] Of the 64 constitutions promulgated between 2000 and 2016, only 3 contained no economic or social rights; on average they contained nearly 10 such rights (Rosevear, Hirschl and Jung, 2019[25]).

[3] Strong and weak rights are discussed in the next section.

[4] For example, the provision of basic education for all may result in overall improvements in economic productivity and competitiveness, generating both additional revenue for the state to devote to rights realisation and reduce the proportion of the population in need of state assistance.

[5] However, several US states do have constitutions that guarantee a right to education.

[6] The German Constitution explicitly includes the rights to unionise and to the environment. Its text has also been interpreted as imposing certain obligations on the state regarding social welfare and digital rights. In Canada indigenous and language rights are constitutionally entrenched, and the existence of a right to strike is a matter of debate in the courts.

[7] In this context, "direct" effects are those that occur via the enforcement of specific judicial decisions (e.g. the provision of medical treatment to a litigant who was seeking it). "Indirect" effects include things such as raising public awareness of specific rights-related issues, the promotion of public debate and calls for reform, and policy changes in response to the cost of complying with multiple adverse decisions relating to a specific policy or programme (Rodríguez-Garavito, 2011[24]).

[8] New Zealand and the United Kingdom do not have constitutions in the contemporary sense – a single document that lays out a country's political structure, allocates powers, and identifies rights and responsibilities. However, they do have legislation that outlines citizen and group rights that are recognised by many as having near or "quasi-" constitutional status, although it can technically be amended or repealed by a simple legislative majority. The most prominent of these are the New Zealand Bill of Rights Act and the UK Human Rights Act.

[9] For example, in light of the widespread use of arbitrary arrest and detention validated by various emergency orders and national security laws during the 1970s and 1980s, the article outlining the rights of the arrested, detained, and accused (Art. 35) in the post-apartheid constitution of South Africa consists of 41 clauses, sub-clauses, and sub-sub-clauses that take up three pages of the constitutional document. In addition to precluding such actions in the future, it also serves as a declaration of the principles and practices that are to guide the country's new constitutional era.

[10] For example universal access to healthcare, adequate housing for all who need it.

[11] Although it does guarantee a limited number of procedural rights, the Australian Constitution does not contain a separate bill of rights. However, three subnational units—the Australian Capital Territory and the states of Queensland and Victoria—have enacted human rights legislation intended to promote consideration of such matters in the legislative process (Staub, 2019[23]).

[12] As noted above, New Zealand does not have a written constitution in the contemporary sense. It does, however, have a set of legal instruments, including the New Zealand Bill of Rights Act and the Treaty of Waitangi, which are recognised as being of constitutional significance (Keith, 2019[26]).

[13] Here too, there is an element of uncertainty as no specific amount or definition of "basic living expenses" is provided.

[14] The 26 Swiss cantons are the federal member states of the Swiss Confederation.

[15] Analysis of the right to education is complicated by the tendency for education to be the responsibility of subnational governments in federal countries. In Switzerland and Germany for example, authority over and responsibility for the provision of basic education lies with the cantons and *Länder,* respectively.

[16] This idea has received renewed attention in recent years with pilot projects being either discussed or implemented by governments in Canada, Finland and the Netherlands (see e.g. *Basic Income as a Policy Option*, 2017).

[17] New Zealand, for example, has a flat-rate pension funded from general revenues (*Pensions at a Glance 2019*).

[18] This jurisprudence is based on the German Constitution's identification of Germany as a social welfare state – *Sozialstaat* – governed by the rule of law – *Rechtsstaat*.

[19] In particular via the UN Declaration on the Rights of Indigenous Peoples and Convention 169 of the International Labour Organization.

[20] The OECD Well-being Framework covers 11 current dimensions (income and wealth, work and job quality, housing, education, health, environmental quality, safety, civic engagement, social connections, subjective well-being, and work-life balance) and 4 resources for future well-being (human, natural, economic and social capital).

[21] www.lemonde.fr/planete/article/2020/12/15/emmanuel-macon-veut-reformer-la-constitution-pour-y-integrer-la-preservation-de-l-environnement_6063409_3244.html.

[22] Constitutional Assessment, 2016, p. 23.

[23] The constitutions of Australia and New Zealand (bill of rights) do not include an equality provision.

[24] While Spain, Portugal, Finland, Germany, New Zealand and Australia mandate prohibition based on "sex", Switzerland and Colombia prohibit discrimination based on "gender". While these provisions do not define either sex or gender, the first denotes biological differences while the latter is related to socially constructed roles.

[25] None of the constitutions of the OECD countries under study specifies "one or more grounds".

[26] The rest of the constitutions under study do not include any explicit constitutional protections in this area.

[27] Global Database on Violence against Women. https://evaw-global-database.unwomen.org/en

[28] The rest of the constitutions under study do not include any explicit constitutional protections in this area.

[29] New Zealand, Human Rights Act 1993, s. 74.

[30] Laws often differentiate between “children” and “young people”/”youth”. “Children” usually refers to a younger age bracket, typically those who are unable to make decisions for themselves. “Young people” usually refers to an older age bracket, such as teenagers, who are capable of making some decisions for themselves.

[31] This is illustrated by the complex and controversial “commercial speech” doctrine in the United States. For more information, see www.law.cornell.edu/wex/commercial_speech.

[32] The Spanish provision is not enforceable by courts, unless provided for in specific legislation or regulation.

[33] The one possible exception to this is the Treaty of Waitangi, which has constitutional status in New Zealand and outlines rights related to indigeneity and culture.

[34] Courts in these countries have also developed doctrines requiring the state to act in accordance with international human rights instruments, including the International Covenant on Economic, Social and Cultural Rights.

[35] The exception to this is the European Convention on Human Rights, which appears to have a quasi-constitutional status (Kadelbach, 2019[27]).

[36] Articles 15-29 (Fundamental Rights and Public Freedoms) and articles 30-38 (Rights and Duties of Citizens).

[37] For example an Ombudsperson with a generalist remit, or specialised agencies with expert knowledge in particular areas such as housing or the environment.

4 System of government

Constitutions create a framework for government that enables a country's stability, inclusiveness, and co-operation among branches of power. Chapter 4 draws some practical lessons for promoting those values by providing an overview of presidential, parliamentary, and semi-presidential systems and benchmarking the existing institutional framework in selected OECD constitutional democracies. In particular, it describes the main types of governance arrangements between the executive and legislative powers. It explores how the executive and legislature interact, the patterns of separation of powers between the two and which are the most likely outcomes of the political system resulting from those interactions, with mentions of other important aspects such as the electoral and party systems. It also highlights elements of direct citizen participation.

Key issues

The system of government refers to the governance arrangements that allocate powers between the executive and legislative.

- The quest for the most adequate system of government involves an assessment of the relative merits of each system so as to reach the overarching goals of a particular society.
- It is important to assess which patterns of political decision making would better serve the expectations of the higher number of citizens, while protecting minorities' interests. Social satisfaction with policy outcomes is usually higher the closer the outcome is to the social majorities' preferences.
- The design of constitutional mechanisms has an important impact on the interaction between the branches of power and within individual branches, and represents an important set of choices to consider (e.g. to avoid potentially negative consequences of either systems, such as policy gridlocks or authoritarian tendencies).
- The actual functioning and interaction of these mechanisms depend on national context (and the functioning of other branches such as the judiciary and other mechanisms such as the electoral system). When designing system of government mechanisms, special attention must be paid to countering political fragmentation (in parliamentary systems), ensuring inter-branch co-operation and managing cohabitation (in presidential systems).
- In establishing the electoral system, the value of proportionality would need to be considered in balance with that of majoritarianism. While an inclusive electoral system with low entry thresholds can benefit a culture of co-operative government, often leading to coalition governments, majoritarian electoral systems can lead to the strongest political parties catalysing more political sensitivities into a single option. The greater the representativeness, the more difficult it might be to form stable governments.
- Three main patterns or types of government have emerged historically; these are covered in this chapter:
  - *Parliamentarism* – The single electoral origin of the legislature and the government can make it possible for a parliamentary regime with inclusive electoral rules to facilitate the coexistence of multipartyism with fair representation, socially efficient outcomes and relatively effective government. Parliamentary systems could also help maximise inclusiveness and give rise to coalition governments that are representative of several political choices. However, this could at the same time generate instability and deadlocks due to limited majorities. Parliamentary systems are inherently flexible, as they enable removal of the head of government when the majority of parliament no longer supports the government's approach. However, these mechanisms may also weaken the separation of powers between the executive and the legislative.
  - *Presidentialism* – Presidential systems provides the electorate with a direct mandate that empowers citizens through greater choice**.** They can select both a head of state and members of the legislature, and reward well-performing politicians through re-election. Nonetheless, presidents in this type of system are often elected by slim majorities (a characteristic that hinges on whether there exist runoffs or party systems), and still acquire the power to form full cabinets regardless of the share of seats obtained in parliament or of the policy position of the presidential party in parliament. Presidents do not depend on the legislature, as there is a stronger separation of powers – a situation that can generate a stable government but also political deadlocks when the government is unable to obtain the

support of the legislature for its policy programme. There are several mechanisms for resolving these deadlocks.

- *Semi-presidentialism (or lessened presidentialism)* – This system's distribution of powers represents greater integration of the executive and the legislature than purely presidential systems. It approximates a presidential system that has characteristics of multiparty parliamentary regimes. As such it can, in the best-case scenarios, combine the strengths of the two systems. It can also generate a particular challenge: due to the dual legitimacy of the president and the prime minister, the authority of both may conflict.

Introduction

This chapter presents an overview of the main types of governance arrangements between the executive and legislative powers in some OECD constitutional democracies. It explores how the executive and legislative interact, the patterns of separation of powers between the two, and which are the most likely outcomes of the political system resulting from those interactions. The chapter primarily focuses on the cases of Australia, Colombia, Costa Rica, Finland, Germany, Ireland, New Zealand, Portugal, Spain and Switzerland, with several references to other countries that can support the analysis.

Generally, while there is no consensus on the definition of each system, three patterns or types of government have historically emerged: parliamentary, presidential, and semi-presidential. The interaction patterns between the legislative and executive in any country result from specific historical, geographical, and cultural national contexts.

Choosing one type of government over another in democratic constitution making means deciding which patterns of political decision making would better serve the expectations of the higher number of citizens. Therefore, a policy outcome-oriented approach could help in making the choice. Social satisfaction with policy outcomes is higher the closer the outcome is to the social majorities' preferences (or, as some analysts put it, to an abstract "median voter preference"). Regulation of the elections (i.e. popular access to institutions), the party system, and regulation of institutional interactions following elections (i.e. type of government) are also important for making policy outcomes closer to most of the voters' preferences. They also have a strong influence over how each system of government actually works in practice. Those circumstances often depend upon the party structures in place (most notably whether there are many or few), but also whether the parties are organised around ideological positions or are vehicles for ambitious individuals, and whether those structures are influenced by the electoral rules. In addition to inclusiveness, electoral systems need to ensure open competition for power, space for minority groups to make their voices heard, and a degree of government accountability and stability.

The chapter examines government designs in constitutional democracies by looking into presidential, parliamentary and semi-presidential systems. It will also highlight elements of direct citizen participation through direct democracy mechanisms, and introduce some considerations regarding legislative power. The general thrust of the chapter is to draw some practical lessons in government design that combine stability, inclusiveness, and co-operation among branches of government to produce better policy outcomes. In Colombia for example, government design is aimed "*to work harmoniously for the realisation of the nation's goals*" (art. 113 of the constitution).

Overview of issues

The traditional distinction between parliamentarism and presidentialism still influences constitutional designs in practice around the world. The key difference between the two systems hinges on whether the government is collectively dependent upon the legislature for staying in power (Cheibub, Elkins and Ginsburg, 2013[1]). If a government can be removed by the legislature for political reasons (i.e. not for criminal misconduct), the system can be considered largely parliamentarian. If not, then it is considered presidential (as long as the head of state is popularly elected). Another practical distinction between the presidential and parliamentary system is that in the presidential one, the president acts as both head of the executive and head of state, whereas in the parliamentary system the government acts as executive and president or monarch as head of state. A number of countries have adopted mixed forms of government design (most importantly, semi-presidentialism).

Governments in parliamentary systems tend to follow closely and control the legislative agenda through legislative initiatives in view of potential risks of removal in case of losing an important vote in parliament (e.g. on a budget law). In parliamentary systems, the legislative agenda is normally set by the executive: if the latter loses control of the agenda, it would likely mean that the executive is no longer supported by the majority in parliament, which is likely to lead to a vote of no confidence. In contrast, the risk of removal from power in the middle of their term is lower for governments in presidential systems; hence, there is greater acceptance of the agenda-setting powers of the legislature. Veto power, i.e. the mechanism that allows presidents to react to proposals initiated in the legislature, is typical of presidential constitutions, although that power can be relatively easily overridden by parliament, as happens in Colombia, Costa Rica, Finland and Portugal. Where presidential veto power is difficult to override, it could lead to political impasses that may be ultimately conducive to political unrest and instability.

A further distinction among existing systems is the degree and scope of specific powers assigned to the executive. A distinction can be made between tasks traditionally under the authority of the legislature but with executive involvement, and powers that are often reserved for the executive – such as declaring war or a state of emergency, or granting pardons. Within the first category, executive powers might include the ability to veto bills approved by parliament, enact legislation by decree, take the initiative in some policy matters, initiate referendums or plebiscites, and exercise significant control over the budget.

There are a variety of approaches to maintaining the balance of authority between the executive and the legislature. In addition to removal from office, other attributes can distinguish executive-legislative relations in presidential and parliamentary constitutions (Ginsburg, Cheibub and Elkins, 2013[2]):

1. *Veto power* – Executive veto powers originated with the US Constitution and are a quintessential characteristic of presidential systems. Many constitutions have some sort of presidential or royal approval of legislation and many have a veto, even if it can be overridden or involves only a delay in adopting legislation. Many constitutions allow the head of state (the monarch, the governor-general or the president) to send a bill back for reconsideration by the legislature; often a super majority is required to override the veto; and occasionally the head of state can submit the matter to a public referendum if he remains unhappy with the law, or to a constitutional court to assess the constitutionality of the bill. In Colombia, Costa Rica, Finland and Portugal, parliaments may override presidential vetoes except if the objection concerns unconstitutionality, in which case the constitutional court shall intervene (Colombia and Portugal). The President of Ireland may not veto bills passed by the *Oireachtas* (parliament) but may, after consultation with the Council of State, refer them to the Supreme Court for a ruling on whether they comply with the constitution. The French president does not have the power to veto legislation; they are required to promulgate acts of parliament within fifteen days of their final passage. Yet they can ask parliament to reopen the debate on the act or any part thereof, or forward it to the Constitutional Council for its assessment of unconstitutionality. More details on veto powers will be given below under the section on presidential regimes.

2. *Executive decree* – Executive decree power formerly could be found in presidential and monarchic systems though not in parliamentary constitutions, where executive decrees now do exist but need to be ratified by parliaments and are known as "decrees with the force of laws". The power to legislate by decree can derive from the legislature (where the legislature can control the authority to use this power) or from the constitution directly (i.e. either in exceptional circumstances [such as in state emergencies or when legislature is not in session] or on particular matters) (Böckenförde, Hedling and Wahiu, 2011[3]). The ability to enact norms by the government exists in France (*engagement de responsabilité* in art. 38 of the constitution), but it is granted by the parliament to the government on an *ad hoc* basis.
3. *Legislative initiative* **–** Legislative initiative of the executive has been traditionally part of parliamentary governments, where the executive is granted the power to introduce important bills and therefore shape the legislative agenda. Statutes often delegate to the executive branch the power to create binding norms through such instruments as decrees, secondary legislation or administrative rules. Several constitutions go beyond authorising the use of these instruments (France, arts. 37-38). Given that gaps needing addressing can occur in any statute, constitutions usually do not specify the topics for which decrees can be used. In many parliamentary constitutions, this power extends to include the possibilities of forcing the end of legislative debates, of imposing a yes/no vote, and of tying the outcome of a vote to the survival of the government. The presidential constitutions in turn have traditionally contained at least one of four areas of legislative initiative: ordinary laws, the budget, referendum, and constitutional amendment. In some cases, such as in Brazil, the president holds the *exclusive* power to initiate the budget bill. Constitutions tend to leave the boundary between permissible delegation of the power to fill in details and impermissible lawmaking by the executive alone to be determined by courts through administrative law and constitutional doctrine. For example, the constitution of France allows the government to issue decree laws that would otherwise require legislation, but such laws must be ratified by the legislature relatively quickly (art. 38).
4. *Legislative oversight* – Because of the existence of the confidence vote, it could be assumed that parliamentary constitutions would contain fewer provisions for legislative oversight, such as the requirement that the government reports to the legislature periodically or that the legislature be allowed to investigate the government. Presidential constitutions tend to contain such oversight provisions more frequently than do either parliamentary or semi-presidential constitutions, although the difference is usually small. The three systems contain provisions on parliaments being able to inquire, question and interpellate the executive. In some constitutions (Colombia, France, Costa Rica) impeachment can be used for removal of the president, based on "indignity causes" but not on lack of political confidence.
5. *Cabinet appointment* – Another characteristic of presidential systems is the power to appoint the cabinet. Usually appointments are left to the president's discretion and there seems to be little tradition of collective responsibility of the cabinet in presidential systems. Nevertheless, in a number of countries, executives in parliamentary and semi-presidential constitutions also have this power, at least in the post-1945 era. The power is in practice an executive prerogative common to nearly all constitutions. In presidential systems, presidents generally wield unilateral control of the appointment and removal of cabinet members. Such power is left to the assembly in parliamentary systems that entrust the prime minister to form his/her cabinet, and thus the latter will hold collective political responsibility.
6. Some constitutions recognise a few "prerogative*"* powers of the executive (United States, art. II §2, cl. 2), including the power to pardon (the most common, sometimes accompanied by procedural requirements such as consultation with a pardon council [Greece, art. 47]) and powers in international affairs, including the power to negotiate treaties (the latter is sometimes also within the executive's prerogative power). The existence of prerogative powers can give rise to a conflict between the legislature and the executive, with the former contending that a given executive action

is secondary legislation not authorised by statute, and the latter contending that the action is an exercise of one of the prerogative powers.

Empirical research shows that in cases of dual legitimacy (i.e. separate popular elections of the president and parliament), electoral timing and a distribution of powers able to produce good governance outcomes provide presidents with an incentive to co-operate with parliament. This often implies greater integration between president and parliament, in which the latter also can have powers of legislative initiative and a say in cabinet formation. This has generically been labelled as "parliamentarising presidentialism" (Colomer and Negretto, 2005[4]). These tendencies may be observed in the constitutions of Colombia and Costa Rica, which while remaining presidential systems have enhanced parliamentary decision-making power. But generating those incentives to co-operate is not automatic, as other factors come into play such as the political culture, political fragmentation and the electoral system. The coincidence of mandatory (United States, Costa Rica) or contingent (France) elections is also a relevant explanatory factor. Another factor impacting the likelihood of co-operation among branches is the existence (or not) of a tie-breaking procedure in case of a deadlock between the two powers. In some cases, the possibility of consulting the citizenship is provided for. In others, simultaneous dissolution of the parliament and calling for a presidential election is envisioned (known as *muerte cruzada*: see articles 130 and 148 of the 2008 Ecuadorean Constitution).

Presidential systems

The presidential system of government implies that the executive and legislative branches are separate. It can also imply that their establishment and the time they remain in power are separate. The president normally serves as both the head of state and the head of government, and is elected by popular vote. Usually the term of office of the president is fixed, with no political accountability to the legislature (or dependence on the support of the political parties), including the cabinet whose authority derives exclusively from the president. The president also often has a certain degree of political impact in the lawmaking process. At the same time, degrees of presidential power and accountabilities can vary depending on the constitutional design, thus resulting in different models of presidential systems.

With much caution, the most common impacts of presidential systems on governance could be summarised as follows (Cheibub, 2007[5]):

- Governments are likely not to be supported by a majority of the legislature since generally there are no guarantees in the system that such a majority can exist, except by using electoral calendars allowing for coattail effects seeking government trifectas in presidential bicameral systems.[1]
- Gridlocks between the executive and the legislature could arise and can lead to conflict between the two powers, unless the constitution provides for designs that compel them to co-operate (for instance through easy presidential veto override and parliamentary control mechanisms such as questions, interpellations and impeachment).
- Coalitions are relatively rare as there are limited incentives in the system for individual politicians and their political parties to co-operate with one another and the government. However, the more *parliamentarised* a presidential regime, the likelier are the coalitions.
- Decision making is normally considered to be decentralised – that is, to be such that the president can respond to proposals originated in the legislature, which are in turn organised in such a way as to allow for political representatives to pursue individualistic rather than partisan strategies. Consequently, the government's ability to influence and implement policy can be reduced.[2]

Several areas are deemed important for the effectiveness of the presidential regime (in addition to the notion of "*parliamentarising the presidency*", as described earlier) (Cheibub, 2007[5]):

- The legislative and agenda powers of the presidency
- Electoral rules for legislative and presidential elections
- Constitutional term limits on presidential re-election
- Strong forms of presidentialism
- Presidentialism and political fragmentation
- Adoption of legislation.

These are discussed below.

a) Legislative and agenda powers of the presidency

Any presidential constitution gives some legislative powers to the presidency. The most important powers include:

- *Veto power* – After the legislature passes a bill, many constitutions enable the president to influence or halt it (e.g. Colombia, Portugal). This power stems from the provision that for it to become law, any legislative bill must be signed by the president. The president in turn may object to the bill and hence refuse to sign it. When the president can only refuse the bill in its entirety, they have *complete* or *total veto power*. When the president may object only to portions of the bill, the president has *partial veto power.* Presidents with partial veto power are often not presented with an all-or-nothing choice, but they may have more ways to influence legislation and hence can exercise greater power. When the president vetoes a bill (either partially or completely), the bill is often sent back to the legislature, which is then given the opportunity to reaffirm its will and override the presidential veto. Another distinction can be made with regard to the type of presidential intervention the constitution allows: the president may reject a bill strictly for policy reasons, or challenge the constitutionality of a bill. The first is considered a policy veto, the second a veto on the constitutionality of a bill (e.g. the latter in Colombia and Portugal). Thus, a constitution can define the extent veto powers can also concentrate or limit power. Policy vetoes are more commonly embedded in presidential and semi-presidential systems, where the electorate rather than the legislature elects the president directly. The legislative majority required for veto overriding is usually larger than the majority required for the approval of the bill in the first place. Most presidential constitutions (including the US Constitution and most of the Latin American presidential Constitutions) require a two-thirds majority of the legislature to override a presidential veto. If such a majority exists, then the president is required to sign the bill and it becomes law. Strong presidential veto powers may lead to frequent political gridlocks, whereas if overriding the presidential veto in parliament requires less qualified majorities, the system can work more smoothly (e.g. in Colombia, Costa Rica, Finland and Portugal). The same appears to be the case in systems where the president has no veto or a very weak (delay) veto power (e.g. France).

  The use of vetoes in multiparty presidential systems suggests that the nature of executive-legislative bargaining can be fundamentally altered when multiple parties compose the legislature and when presidential veto prerogatives are extended to incorporate partial (line-item) vetoes. The level of significance of legislation is relevant for predicting vetoes, with landmark legislation being more likely to be vetoed regardless of levels of support for the president in congress. In addition, partial vetoes often can become the preferred alternative when confronting legislation initiated by the president (Palanza and Sin, 2013[6]).

- *Decree power* – This refers to the executive's ability to issue new laws, which exists in a variety of constitutions, both presidential and parliamentary. Decree power varies widely. First, it varies with respect to the areas where it may be issued. Some constitutions only allow for presidential "executive orders", that is administrative acts pertaining to the implementation of laws already approved by the legislature. Others allow for presidential decrees under special circumstances that can be rather broad (e.g. "relevance", "urgency", "economic or financial matters when so required by the national interest", and so on). Second, presidential decree power varies with respect to its time frame. Typically, presidential decrees enter into force as soon as they are issued. In a few cases, some time must elapse before they enter into force, during which the legislature is given the opportunity to reject them. Finally, in some cases executive decrees automatically become permanent laws, whereas in other cases they expire if not approved by the legislature within a given time frame.
- *Exclusive power to introduce legislation* – Usually the president is accorded certain legislative powers, although in some systems (such as in the United States) the constitution allows for legislation to be initiated only from within the congress. In most Latin American presidential democracies, the role of the assembly in initiating legislation is restricted in some areas, such as in legislation pertaining to the size of the armed forces, the creation of public jobs, the structure of public administration and, most importantly, the budget. Normally the assembly can amend these bills, even if constrained by provisions stipulating, for example, that it can only propose amendments that do not increase the deficit or the overall level of spending. And in a bargaining situation, the party that sets the agenda has a large advantage over the other party. Increasingly, in presidential constitutions there is no exclusivity in legislative initiative, as in Colombia. In Costa Rica and Portugal there is a plurality of constitutional bodies that can propose legislation, including through some form of popular initiative.
- *Urgency requests* – In many presidential constitutions, presidents can declare a bill "urgent". When they do, the assembly is required to vote on the bill in a relatively short time (e.g. in 30 or 45 days). This is another constitutional provision that can grant the president the power to significantly influence the legislative agenda. In France, a fast track procedure of legislation is frequently used. Instead of two readings by each house of parliament, only one takes place.
- *Declaring a state of emergency* – The possibility, scope and mechanisms to declare a state of emergency is a crucial feature defining the relation between the executive and other institutions. Constitutions often strike a difficult balance between providing the executive with a certain degree of discretion in taking extraordinary measures to meet a range of critical circumstances that cannot be comprehensively predicted at the time of drafting (such as invasion, natural catastrophe, terrorism or a public health emergency) and empowering other institutions to evaluate or ultimately validate the declaration and its associated measures. The power to declare a state of emergency can entail a concentration of power, and has occasionally given rise to abuses, particularly in post-conflict societies.
- *Impeachment* enables removal of the head of the executive on the grounds of their legal misbehaviour, in contrast to the political control exercised by a vote of no confidence. Two key aspects should be considered: the type of offence that can give rise to an impeachment procedure, which is sometimes limited to severe offences such as treason; and other branches' involvement in that procedure.

b) Electoral rules for legislative and presidential elections

Election rules for the presidency and the parliament affect the way in which these institutions will interact.

- *Parliamentary elections* – Presidential systems could generate stronger policy outcomes if, in principle, the parliamentary fragmentation is low. For this reason, presidential political systems have traditionally tended to limit the number of parties acceding to parliament. This effect is generally achieved by setting up a restrictive electoral system, which could be developed through different ways: a) single-member electoral districts (they can reduce the proportionality of the system and thus the accession to parliament is limited), b) high electoral thresholds to attain seats in parliament; c) legal restrictions on building up new political parties. At the same time, accumulated evidence points to challenges in presidential systems when the number of political parties is relatively low. Importantly there is evidence that when the constitutions of countries like Colombia (after 1991) and Costa Rica (after 1949) eased the access of more layers of the population to parliamentary representation and thus increased parliamentary plurality, that made the systems more stable than before. In these cases, several experts pointed out that the proportional vote for the parliamentary lower chamber could make parliament more inclusive and produce better governance and better policy outcomes (Colomer and Negretto, 2005[4]). Brazil offers a counter-example, with a very pluralist congress.
- There is also evidence that the efficiency of a presidential system can increase with a strong president and a unicameral assembly (Reilly, 2003[7]). Yet there may be costs in terms of representation, and it can become difficult for individual legislators to "represent" their constituencies' interests inside the assembly. Thus, the legislative success of presidents may stem from a restriction on legislators' ability to represent their constituents. As Moe and Caldwell (1994[8]) put it, "when nations choose a presidential or parliamentary form, they are choosing a whole system whose various properties arise endogenously – whether they like it or not – out of the political dynamics that their adopted form sets in motion…Presidential and parliamentary systems come with their own baggage. They are package deals".

In sum, there appear to be two alternatives for enhancing "governability" in presidential systems:

- Limiting representation by restraining the variety of views that can enter the political process: restrictive electoral and party legislation can reduce the number of running parties and increase the likelihood that governments would obtain majorities in the legislature, thus increasing governability and stability.
- Adopting a more inclusive electoral and political party legislation (see Box 4.1). Doing so allows for a larger variety and plurality in the views that can enter the political process, but limits the role that individual representatives have in deliberation and decision making. This alternative requires strengthening the role of the political parties in the policy-making process, such as in the United Kingdom or Spain.

In both approaches, there is a trade-off between "governability" and "representation." Both systems seem to provide similar chances of survival for democracies (Cheibub, 2007[5]). While one of them gives varied political views a further chance of being heard by allowing them to compete more easily in the electoral arena, the other can facilitate agreements and stable majorities in the legislature.

There are several important aspects regarding the way presidents are elected. Two of them seem particularly relevant for governability:

- *Presidential elections* – One of the advantages of presidentialism is that it provides a nationwide constituency for the president's office. This may be advantageous in situations of high political volatility and social heterogeneity, since the presidency may operate as a centripetal force toward unity and integration. But for this to occur, the rules for electing the president would need to be carefully drafted so that they provide an incentive for integration rather than a reinforcement of

existing political, ethnic, income, geographic or religious fault lines. While the adequate formula depends on the local context, it is worth remembering that the rules for presidential elections can be used to mitigate existing socio-political divides.

- *Timing of elections* – Countries have different approaches when it comes to the timing of presidential and legislative elections. In some countries, the two elections can happen always at the same time or be near in time (e.g. in Colombia, Costa Rica and France); happen always at different times (e.g. in Brazil during the 1946-64 democratic period); or they may alternate (e.g. in the United States where, with a legislative term of two years and a presidential term of four years, elections coincide every four years). Emerging evidence suggests that when they occur together, presidential elections can reduce the number of political parties acceding to parliament (Borges and Turgeon, 2019[9]; Costa Lobo, Lago and Lago-Peñas, 2016[10]). Presidents may generate major *coattail effects*[3], thus aiding the election of legislators of their own parties. Thus, if fragmentation of the party system is a concern, the stipulation of concurrent presidential and legislative elections may reduce the number of political parties in competition without implementing a restrictive electoral system for legislative elections. The cases of Colombia, Costa Rica and France may illustrate this point.[4]

Box 4.1. Inclusive electoral systems

Electoral systems are as important as the institutional processes of decision making. Where electoral rules are non-inclusive, effective institutions could promote collective decisions consistent with the preferences of the political actors directly involved in institutional decision making, which may not match those of voters. The electoral system also should ensure a certain stability, in the identification of a winner empowered to govern effectively while making changes possible; but it should also ensure representativity. These goals are not always entirely compatible, and a balance must be struck. It is thus not sufficient that electoral systems are fair and inclusive, as they need to be supplemented by an institutional design able to ensure the effective capacity of political representatives to make decisions producing socially efficient policy, meeting the criteria of collective satisfaction and social utility. In sum, the choice of electoral systems and the choice of type of government can have a strong impact on policy outcomes.

The electoral district magnitude, which is the number of members to be elected in each electoral district, is an important factor to translate votes cast into seats won in a proportional way. The rationale underpinning proportional systems is to reduce the disparity between a party's share of the national vote and its share of the congressional seats. If a major party wins 40% of the votes, it would win approximately 40% of the legislative seats, and a minor party with 10% of the votes would gain 10% of those seats. The congruity between a party's share of the vote and its share of the seats provides an incentive for all parties to support and participate in the system.

Proportionality is often seen as being best achieved using party lists – where political parties present lists of candidates to the voters on a national or regional basis – but preferential voting can also be an effective option. For example, the Single Transferable Vote (STV), used among others in Australia, Ireland and New Zealand, where voters rank-order candidates in multi-member districts, is another well-established proportional system.

The strongest arguments for proportionality derive from the way in which the system can avoid the anomalous results of plurality/majority systems and could better produce a representative legislature. For many new democracies, particularly those facing deep societal divisions, the inclusion of all significant groups in the legislature could be a critical condition for democratic consolidation.[5]

All electoral systems have thresholds of representation, i.e. the minimum level of support a party needs to gain representation. Legal thresholds range from 0.67% in the Netherlands, 3% in Spain and 5% in Germany to 10% in Turkey. The lower the threshold, the higher the representativeness of the system. In contrast, the greater the representativeness, the more difficult it might be to form stable coalition governments – or to have a coherent "opposition" bloc in the parliament.

In parliamentary systems, representation is mainly determined by the election to parliament. In presidential systems, representation also depends on the separate election of the chief executive (the president). In contrast with proportional representation in congressional elections, there appears to be no formula in presidential elections able to guarantee the selection of a candidate who corresponds with the preferences of the median voter. The runoff tends to be the most used mechanism, as in France, Finland, Colombia, Costa Rica and most Latin American presidential systems.

c) Constitutional term limits on presidential re-election

Most constitutions set a limit to the number of times that a president can be re-elected. Two types of term limits can be distinguished: those where there are a limited number of consecutive terms in office allowed, and those where there is an absolute limit on the total years that an individual can be in office. For example, France (article 6 of the Constitution) awards a presidential mandate of 5 years and allows for only one successive re-election, totalling 10 years.

In Latin America, up until the early 1990s, the most common constitutional limit on presidential re-election was the "one term out" rule (e.g. in Mexico), according to which a president had to wait for a full term out of office before standing for election again. Since then, several countries (e.g. Argentina, Costa Rica and Brazil) changed their constitutions and adopted the two-term limit, while others have stayed with the one-term-out mandate. For example, in Colombia, since 2015 the president has been confined to a single four-year term and is barred from running for re-election, even for a non-consecutive term.

Presidential term limits are important as they affect the relationship between the president and voters. Elections are normally considered one of the most important instruments to encourage governments to act in the interests of voters. In principle, in anticipating voters' future judgement of their past performance, political figures should have incentives to pursue the interests of voters in order to be re-elected. While there is debate on whether elections are a sufficient instrument to induce this type of behaviour, it appears that if elections are to affect the behaviour of politicians at all, voters must be able to reprove executives who perform badly by not re-electing them, and they must be able to reward incumbents who perform well by giving them another term in office. Both are necessary if elections are to induce governments to act in the interest of voters.

Term limits appear to restrict the full spectrum of choice of the people as to whom they elect to office, as well as the ability of voters to reward well-performing incumbents. However, the limits are also an essential mechanism to ensure democratic transformation. Individual alternation of the chief executive is considered important for various reasons. In particular, the possibility of indefinite re-election could eventually tempt presidents in power to use their position and powers while in office to create an institutional and social environment that guarantees their subsequent re-election.

Presidentialism can possibly give an advantage to the incumbents when they are legally permitted to run for re-election. In turn, preventing the incumbents from exploiting this advantage by limiting terms in office leads them to leave office even if voters might wish for them to stay. Constitutional term limits could serve as a relevant middle-ground tool. Other instruments to limit the ability of presidents to use the office for undue electoral advantage include strict regulation of campaign finance and procedures, public funding of campaigns, free access to media and the strengthening of agencies that oversee campaigns and elections, such as in Colombia and Costa Rica.

d) Strengthened presidentialism

Strengthened (or exaggerated) presidentialism is a modality of presidentialism in which the constitution concentrates all or many crucial powers in the executive. It is also known as centralised presidentialism. Key powers allotted to the executive may include the exclusive right to initiate legislation in strategic areas; the executive's ability to determine the priority with which bills will be debated in legislature; its capacity to act as co-legislator, as for example through amendatory observations (*indicaciones*) at any time during the discussion of a bill; its ability to attend commissions discussing bills and express opinions; and the power to veto a bill passed by legislature or to reintroduce a bill rejected by one of the houses.

There are in addition differences in the informal powers of the executive and the legislature that favour the former in terms of access to information and staff to prepare discussions and draft bills. The allotment of formal legal powers to the executive by the constitution does not mean that presidents in fact make use of all of them all the time. Presidents tend to negotiate with other political actors, including those from parties different from those represented in parliament. Analyses of this modality of presidentialism tend to distinguish between the large constitutional formal powers attributed to the president and the actual exercise of political power, which is not always in the executive's hands. The contrast between "strengthened" formal constitutional powers allotted by the constitution to the executive and the relative moderation in its actual exercise by presidents could be explained by a political context able to moderate the formal powers in practice.

e) Presidentialism and political fragmentation

Where the party system fragmentation is limited, the need for interparty coalitions is diminished and the perils of presidentialism are usually attenuated. The president may not enjoy a majority in congress, but their party is very likely to be a major party that controls a significant share of the seats. This situation can mitigate the challenge of competing claims to legitimacy because many legislators are likely to support the president. Conflicts between the legislature and the executive arise, but they tend to be less gridlocking than when most legislators are against the president. Mechanisms to handle cohabitation situations would be required, as in Colombia, Costa Rica, and France. The mechanism most used is designing the electoral calendar to produce coattail effects.

With regard to coattail effects, holding assembly elections concurrently with the presidential election results, as noted, in a strong tendency for two major parties to be the most important, even if a proportional electoral system is used. In view of the importance of the presidential election, it tends to divide voters into two camps, and voters are more likely to choose the same party in legislative elections as in Costa Rica and France, as they do when presidential and legislative elections are non-concurring, as in Portugal. If assembly elections are held at times that differ from presidential elections, the political fragmentation of the assembly becomes more likely.

Inter-branch co-operation under presidential government can be achieved by giving the congress the capacity to participate in appointing and dismissing the executive cabinet, including the opportunity to censure and provoke the dismissal of cabinet members, such as in Colombia and Costa Rica. These formulae can be combined in different ways. This has been a common feature in constitutional reforms in Latin America in the 1990s, such as those in Argentina, Colombia, and Paraguay.

f) Adoption of legislation

In presidential systems, both the congress and the president usually can act proactively, introducing legislative proposals, or reactively, approving or rejecting other actors' proposals. When the president has great legislative powers, the ability of the congress to debate, logroll and offer compromises on controversial issues tends to be constrained. Instead, the presidency can take on legislative importance and the incumbent can have tools with which to fine tune legislation to possibly fit their preferences and

limit consensus building in the assembly. Hence, some countries have considered the need to lessen the powers of the president in order to strengthen the representativeness and inclusiveness of democracy For example, in semi-presidential systems (e.g. France and Portugal), the president has little or no legislative power, as that generally tends to lie within the government's mandate.

Considerations in lessening the powers of the presidency

It would be useful to consider factors that can attenuate the challenges of presidentialism, as in, some cases it may be politically more feasible to modify presidential systems than to switch fully to parliamentary government:

- Presidents usually have greatest power if their veto cannot be overridden; they have least power if they have no veto or if a veto can be overridden with a simple majority.
- The partial veto is an important instrument in the hands of some presidents; they can thereby reject parts of bills rather than accepting or rejecting the whole bill. Presidents have greatest power if they can exercise a partial veto that cannot be overridden, and weakest if they have no partial veto.
- Reduce decree powers, i.e. the authority of presidents to make laws without prior consultation with congress.
- Reduce powers granted to presidents to act as the sole agenda setters in certain key policy areas (e.g. taxation, budget, etc.). In such areas, legislation cannot be considered unless first proposed by the president. Exclusive presidential law-making initiatives are most powerful if the assembly cannot amend the president's initiatives but must either accept them as presented or reject them in block.
- Limit the extent to which the president has primacy in the budgetary process, which reduces the ability of congress to change revenues or expenditures. At one end of the spectrum, the president prepares the budget and congress may not amend it. At the other end, the assembly either prepares the budget or has constitutionally unrestricted authority to amend it, as in France.
- Strong presidents may submit legislative proposals to the voters directly, thereby bypassing the congress, while if such presidential powers are lessened this is not possible, and referendums can be a joint proposal of the president and the parliamentary assembly.
- As mentioned, limiting the number of terms that a president can serve in office, and the number of years of each term, could also be an effective limit to the powers of the presidency. For example, in Costa Rica the president is directly elected for a four-year term and can seek a non-consecutive second term.

Parliamentary systems

Many OECD member countries have put in place parliamentary systems of government. The primary overarching feature defining a parliamentary system is the blending of the executive and legislative powers and the accountability of the government to the parliament. The government must have the support of the parliament for it to enter and remain in office. The parliamentary right to a vote of no confidence against the government is the primary criterion that differentiates parliamentarian from presidential systems. The system may have a president (or monarch) with the role of head of state, but that person may not necessarily be popularly elected (although in several countries with parliamentary systems there may be presidents directly elected by the electorate, such as in Ireland or Finland, or by the parliament, such as Germany, who hold limited political power). Moreover they are not the same person as the head of government.

The legislature plays a central role

- In parliamentary systems, *parliament holds significant political control, and is central in the selection of the head of the government* (prime minister). The selection method can range from a formal election that is exclusively in the hands of parliament (e.g. in Sweden) to selection by the president of the nominee from the party who obtained the highest number of seats in the election (as in Greece), to a middle-ground system where the president can nominate a candidate but parliament may appoint another if the candidate is not supported by an absolute majority of votes, whom the president must then appoint (e.g. in Germany). Other systems elect prime ministers based on the emergence of informal agreements through inter-party negotiations in the legislature, followed by an official appointment by the head of state[6] (e.g. Portugal and Spain).
- *The parliament can also remove the head of government* through a vote of no confidence. In other words, the legislature retains the power to decide on the head of government's survival. Despite this, several constitutions introduce restrictions on this possibility, including the ability to vote no confidence only after the prime minister has spent a set period of time in the post, or the ability to dismiss only a limited number of cabinets per term. Some constitutions require a "constructive" motion, meaning that the majority dismissing the head of government must select a new one simultaneously (for example in Germany, Hungary, Poland and Spain). As a result, a motion of no confidence does not automatically force either the resignation of the cabinet or a new election.
- Parliamentary systems also often entrust the legislature with the *authority to oversee other branches of government, particularly the executive*. In other words, aside from political control, there can also be *legal* or at least quasi-legal control to scrutinise the actions of government: the constitution might, for example, empower the legislature to *initiate legal investigations*, including the ability to request officials of the executive branch to appear in the chambers. A majority of constitutions offer some options for the legislature to question the actions of the executive and request an explanation of its policies. On occasion they specify the maximum time frames in which interpellations must be answered (e.g. in Albania). In a number of constitutions, the legislature can conduct an independent investigation of the executive, or is even compelled legally to do so if a percentage of parliamentary votes is reached.
- *In most parliamentary systems, one of the chambers, the lower one, deals with the relationship with government***.** Existent constitutions have created legislatures that either have two chambers (80 countries) or are unicameral (112 countries).[7] Typically, the "lower" chamber (house or congress) is designed to be "closer" to the people – an arrangement ordinarily defended on the grounds that the lower chamber will be more responsive to popular needs and demands. Upper chambers (or senates) usually represent the subnational territories and regions. Bicameral legislatures may increase forms of representation, and can halt the approval of sudden or impulsive laws by requiring additional deliberations. They can also become a limit to the power of a simple majority and to that of powerful interests that may try to control the chamber in different ways. By contrast, unicameral systems may enable passing legislation more efficiently, and as a single body it may become easier for the citizens to monitor. Smaller countries more commonly have unicameral systems, while large or very plural states with high degrees of territorial complexity tend to have bicameral ones. In addition, in some larger and complex countries, transitions to unicameral systems have historically reflected growing authoritarian tendencies.

The executive power is exercised collegially

Executive powers are exercised by a collegial body: the cabinet or council of ministers. The head of government's constitutional position can vary from pre-eminence to virtual equality with the other ministers, but there tends to be a relatively high degree of collegiality in decision making, **traditionally making**

collective responsibility, or "cabinet solidarity", a key formal feature of parliamentary government, even if today this collegiality is diminished in most countries.

Two general issues have featured greatly in political debates on the constitutional regulation of parliamentary systems, one of a conceptual nature and the other more practical. The first debate concerns the relationship between parliamentary government and the separation of powers; the second concerns the role and effectiveness of constitutional regulation to ensure governmental stability (Grote, 2016[11]).

Ensuring the separation of powers

The concept of separation of powers rests on the distinction between three basic functions of the state – executive, legislative and judicial. The separation was meant to apply to the relations between the executive and the legislature, which had to be "balanced" to allow the system to function properly ("*seul le pouvoir arrête le pouvoir", "*only power stops power*"*).[8]

The separation of powers between the executive and the legislative, understood as checks and balances, is more common in presidential systems, but it also has a role to play in a parliamentary system based on close co-operation between the government and the parties forming the majority in parliament. A fundamental distinction exists within parliament between the majority, whose main political mission is support of the government and its agenda, and the opposition parties whose role consists of monitoring and criticising the government's policies and proposing policy alternatives.

An important challenge in constitutional regulation of a parliamentary government is thus the recognition and proper definition of the role and the rights of the political opposition. Regulation should allow it to present its political alternatives freely and to become and remain a credible alternative to replace the current government and its parliamentary majority. In other words, the separation of powers between the executive and the legislative in parliamentary systems should not rely on the judiciary alone. It also necessitates that the statute of the opposition parties in parliament is well defined and respected.[9]

As regards the role and functions of the political opposition in general and parliamentary opposition in particular, there are few international standards that promote the protection of parliamentary opposition and minorities as such. Many national constitutional systems do not regulate these issues. Some categories that ought to be protected are i) procedural rights of participation in parliamentary committees and the right to propose legal amendments (some parliaments even reserve the presidency of certain important committees, such as budget, for the opposition); ii) rights to initiate and participate in the supervision and scrutiny of the government; iii) rights of veto or delay for certain decisions of a fundamental character or landmark decisions; iv) the right to demand constitutional review; v) protection against persecution and abuse (Venice Commission, 2010[12]). Constitutions may recognise these rights of the opposition in a general manner, to be developed by the relevant parliamentary rules.[10]

Stabilising the government

As the government is dependent on the confidence of the legislature, governmental stability becomes a more acute issue in parliamentary than in presidential systems. This requires mechanisms to ensure that the government remains stable and is not constantly challenged. The most important of those instruments are the following.

Regulating the censure motion and parliament's power to appoint a new government

The head of government normally has a wide discretion in deciding whether, and on which issue, to ask the parliament for a vote of confidence. By contrast, the votes of no confidence brought by members of parliament (MPs) are often subject to a number of strict procedural requirements: they must be signed by a minimum number of MPs to be admissible; a vote on the motion may not take place immediately, but

only after a "cooling off" period has lapsed, to allow MPs to reflect properly on the potential consequences of their decision; and confidence can only be withdrawn from the government by a qualified majority vote.[11]

Some constitutions prescribe that for a no confidence motion to proceed, it must contain the name of the person who shall replace the incumbent head of government (constructive censure motion, German Basic Law, art. 67(1); Spain, art. 113). MPs who have signed a censure motion that has been rejected may be barred from bringing a new one before the end of a constitutionally prescribed waiting period (France, art. 49(2); Spain, art. 113(4)).

Constitutional provisions on the formation of the government are usually explicit about the level of parliamentary support needed for a new cabinet to enter office.[12] Constitutional provisions frequently require a *formal vote of parliament* demonstrating its support for the new government, either in the form of the election of the designated candidate for the office of prime minister or chancellor; by the directly elected chamber as a necessary condition for its appointment (Finland, art. 61(1); German Basic Law, art. 63; Spain, art. 99); or in the form of a parliamentary confirmation vote on the government and/or its political programme immediately following its appointment (Poland, art. 154(2); Romania, art. 103(2)).

Some constitutions *ensure that the new government disposes of a stable majority in parliament*: the election or confirmation vote must take place by qualified majority, and only if several attempts to elect or to confirm a new head of government by qualified majority have failed may the election or confirmation proceed with a relative majority of votes[13] (German Basic Law, art. 63; Finland, art. 61; Spain, art. 99(3)). If the proposed prime minister does not achieve a majoritarian support of members of parliament, then the general solution tends to be the dissolution of parliament and a call for fresh parliamentary elections.

Strengthening the position and the powers of the prime minister

Seeking cabinet stability has tended to strengthen the role of the prime minister and led to its explicit constitutional recognition. The prime minister "directs the work of the government" (e.g. France, art. 21(1); Spain, art. 98(2); Poland, art. 55(1); Romania, art. 107(2)), and the chancellor "determines the general guidelines of policy" (German Basic Law, art. 65). Moreover, it is the head of government with whom the final decision rests whether to ask parliament for a vote of confidence and thus to put the government's existence on the line (France, art. 49; Spain, art. 112; German Basic Law, art. 68). If the prime minister resigns, the other members of the government also lose their offices and a new government must be appointed (German Basic Law, art. 69(2); Spain, art. 101(1); Japan, art. 70; see also France, art. 8(1)).

Correspondingly, the prime minister (in France, the president) can dissolve the parliament at any time and call for fresh parliamentary elections, or simply resign. How this works in practice depends in part on the specific circumstances of each event (such as, for example, whether there is a politically feasible, alternative government that can be formed without needing a new election), but it also depends on the existing constitutional rules. Some constitutional rules favour the dissolution of parliament and holding new elections, while other rules favour trying to form a new government without an intervening election. Given this close association, both conceptually and in practice, between dissolution rules and the rules of government formation and removal, it is important to consider these two constitutional design issues side by side.[14]

Source of legitimacy: Double legitimacy and inter-branch co-operation

In most parliamentary systems, the executive is chosen by and is responsible to the parliamentary assembly. The legitimacy of such an executive is thus underpinned by the democratically elected parliament. Nevertheless, it may happen that the existence of two agents of the electorate (president and parliament), each endowed with different although carefully defined authorities, can serve as an advantage for presidentialism. The key is to define the powers and the method of election of the two branches so as to mitigate inter-branch conflict (Mainwaring and Shugart, 1993, p. 10[13]).

At the same time, parliamentary systems tend to vary regarding the extent to which the parliament and its committees are disposed to amend bills submitted by the cabinet and the ease with which majorities may vote to displace a cabinet. As such, the simple dichotomy, presidentialism vs. parliamentarism, while conceptually useful, can prove generally insufficient to assess the relative merits of different constitutional designs (Mainwaring and Shugart, 1993, p. 14[13]).

Mixed or semi-presidential systems

Mixed or semi-presidential systems are characterised by a dual executive approach, where the constitution includes both a popularly elected president and a prime minister and cabinet accountable to the parliament. This usually means that the prime minister is accountable to the legislature (through the vote of no confidence) and the government can be removed by the legislature; and that there is a popularly elected head of state (president), which the legislature cannot remove through censure motion. Thus, neither the president nor the legislature fully controls the selection and appointment of the prime minister, nor their removal from office. A core idea of semi-presidentialism is that the respective roles of the dual executive, the president and the prime minister, should be complementary: the president upholds popular legitimacy and represents the continuity of the state and nation, while the prime minister exercises policy leadership and takes responsibility for the day-to-day functioning of government (double legitimacy).

The number of semi-presidential systems has increased in recent decades (Ginsburg, Elkins and Melton, 2008[14]). Semi-presidential systems can now be found in several OECD countries, including France, Portugal, Lithuania and South Korea. The exercise of political power and the allotment of authority between the two leaders of the executive vary significantly. This can make semi-presidential systems closer to a presidential or to a parliamentary system. In France, when the president and a majority of the national assembly belong to the same party, there is a tendency to *presidentialisation*. Conversely, when the situation is one of cohabitation (like in 1986-88, 1993-95, 1997-2002), there is a tendency to *parliamentarisation*, as the prime minister is truly the leader of the parliamentary majority and the president's power decreases. Examples of recent OECD country transitions from or towards semi-presidentialism to other types of systems can be found in Box 4.2.

Box 4.2. Transitioning from a semi-presidential system

Finland

A case on point on transitioning from a semi-presidential to a fully-fledged parliamentary system can be observed in Finland where the 1999 Constitution (in force from 2000) operated that shift.

Within the framework of a 'mixed constitution', the Finnish political system wavered during a period of 80 years between genuine parliamentarism and effective semi-presidential rule. The new constitution, adopted in the parliament almost unanimously and carried into effect on 1 March 2000, aimed to reduce the powers of the president and to bind the exercise of the President's remaining powers more tightly to the cooperation with the parliamentary government. At the time of drafting, it was considered that the strengthening of the parliament–government axis and the reduction of the President's powers emphasized, as was assumed, the President's role as a support of the government of the time, a moderator in conflicts and a mirror of popular opinion. In the future, it was assumed, the functioning of the political system would be distanced from the political activity and personal activities of the president, but rather by reference to the parliamentary constellation, party interrelations and the ebb and flow of governing coalitions.[15]

After parliamentary elections, the parties represented in the Parliament negotiate on the political programme and composition of the Government. On the basis of the negotiations, and having heard the views of the Speaker of Parliament, the President of the Republic informs Parliament of the nominee for Prime Minister, who is elected by Parliament and then formally appointed by the President of the Republic. The President appoints the other ministers in accordance with a proposal made by the Prime Minister. In the current system the leading position in forming of the Government is within the political parties represented in the Parliament, not on the President of the Republic as before the year 2000.

The President possesses primarily residual powers since 2000. Because the Constitution of Finland vests power to both the President and Government, the President has veto power over parliamentary decisions, although this power can be overruled by a simple majority vote in the Parliament. Legislative power is exercised by Parliament. An act enacted by Parliament must be submitted to the President for confirmation. The President may refuse to confirm the Act, and in this case the Act will be reintroduced in Parliament. The Act can be adopted again in Parliament unchanged in a single vote with a simple majority. If passed, the Act will become law without confirmation by the President.

The President leads the nation's foreign politics in conjunction with the Government and is the commander-in-chief of the Finnish Defence Forces. The President decides on military matters on the recommendation of the Commander of the Defence Forces together with the Prime Minister and the Minister of Defence, generally in an in-camera presentation outside regular Government meetings. Finland's foreign policy is led by the President of the Republic in co-operation with the Government. For other matters, the president exercises his/her governmental powers "in council" with the Government, echoing the royal *curia regis*, usual in other Scandinavian monarchies.[16]

Costa Rica

Costa Rica in 1949 also introduced a degree of *parliamentarisation* of its presidential system in the new constitution and a progressive *technocratisation* of certain key policy areas (e.g., elections, and budget among others). Since then, the country has sustained continuous civilian, inclusive democratic governance. The qualified plurality system for electing presidents and the use of proportional representation (PR) to elect members of the Legislative Assembly encourage politicians to pursue policies favourable to the median voter. The qualified system of plurality rule usually awards the presidency to the candidate who obtains the most votes and at least 40 percent of the valid vote. The

Costa Rican separation of powers does not compel the different parts of government to share responsibility over all or even many governmental functions. The 1949 Constitution instead promotes the isolation of key bureaucratic responsibilities from the vicissitudes of partisan politics. By fragmenting state power, the constitution aims to promote a consensual style of policymaking that, in tandem with regularly held elections, keeps elected officials focused on the median voter. Creating the decentralized sector or the autonomous institutions was also part of the 1949 constitutional convention's effort to remove as many functions of the modern state as possible from the purview of the elected branches of government. As of 2004, there were more than 55 autonomous institutions in Costa Rica, 12 of which were created before 1950.

For the elected branches of the government (president and parliament), the 1949 Constituent Assembly strengthened the powers of the legislature as they reduced those of the executive branch of government by restricting the decree-making power of presidents and confining their powers to the execution of existing laws. The 1949 Constituent Assembly also adopted practices characteristic of parliamentary regimes: it empowered the Legislative Assembly to conduct interpellations of cabinet ministers and to subject them to censure, given two-thirds deputy support. The executive power is exercised in each subject area by the President and the corresponding Minister (art. 140 of the Constitution). The President is both the Chief of State and the Head of Government. The vice-presidents and cabinet members are appointed by the president. The president is directly elected for a four-year term and can seek a non-consecutive second term. The Legislative Assembly or *Asamblea Legislativa* is unicameral, and it has 57 seats. Members are elected by direct popular vote to serve four-year terms. Elections for the 57-seat unicameral Legislative Assembly occur every four years, and deputies are elected by proportional representation. Deputies may not run for two consecutive terms but may run again after skipping a term. To ensure coattail effects, the legislative elections are held concurrently with the first round of the presidential poll.[17]

In dual executives, an important consideration relates to ensuring a fair balance of powers between the president and the prime minister in choosing the members of the cabinet. For example, in France the Prime Minister recommends candidates for appointment or removal to the President, who then decides. Parliament's vote of no confidence affects only the government as such, not its individual composition.

Often the decisive aspect defining a semi-presidential system is the power attributed to the president. Too many powers for the president can make the system shift towards presidentialism or semi-presidentialism; too few and it becomes a parliamentary system of government (Siaroff, 2003[15]).

The president may or may not have a) discretionary power to appoint key individuals like judges, public attorneys, diplomatic and military figures, central bankers, or regulators; b) the right to chair formal cabinet meetings; c) the right to return legislation for further consideration or the right of definite veto on legislation, except if the veto power can be reversed by the parliament; d) broad emergency or decree powers during crises; e) a central role in executive and policy-making issues like foreign affairs and defence; f) a central role in forming the government; namely selecting and/or removing the prime minister and/or other cabinet ministers; g) the ability to dissolve the legislature at will, subject at the most to only temporary restrictions; h) the right to send messages to parliament; i) the right to propose legislation to parliament.

Citizen and stakeholder participation in constitutions

Citizen and stakeholder participation is at the very heart of the concept of democracy. The participation of the governed in the ruling exercise is a fundamental value of modern democratic societies. Citizen and stakeholder participation does not replace formal rules and principles of representative democracy – such as free and fair elections, representative assemblies, accountable executives, a politically neutral public administration, pluralism and respect for human rights (OECD, 2001[16]). Except for the most advanced

forms of participation (such as co-creation or co-production), the ultimate responsibility for decisions usually remains with elected governments, which are accountable to the population. Rather than replacing these formal rules and principles, citizen participation aims to renew and deepen democracy by narrowing the gap between governments and the public they serve (Sheedy, 2008[17]).

Participation is not a linear concept; it can have different modalities as well as degrees of involvement and impact. According to the OECD Recommendation of the Council on Open Government (2017[18]), participation includes "all the ways in which citizens and stakeholders can be involved in the policy cycle and in service design and delivery". Participation thus refers to the efforts by public institutions to hear the views, perspectives and inputs from citizens and stakeholders. Participation allows citizens and stakeholders to influence the activities and decisions of the government at different stages of the policy cycle and through different mechanisms. Evidence shows that participation, if well executed, can produce better policy outcomes that are informed by citizens' needs; improve the legitimacy of even complex and challenging decisions (Sheedy, 2008[17]); and enhance public trust in government and democratic institutions (OECD, 2020[19]).

Constitutions can include the participation of citizens in decision making as part of the system of government. The text can include different participatory mechanisms and set the rules for the interaction with formal representative institutions such as parliament and the executive. The following is a non-exhaustive list of different participatory mechanisms that can be included in a constitution:

- *Citizen agenda-setting* mechanisms such as petitions, citizen initiatives and citizen-initiated referendums, that when supported by a required number of signatures allow the electorate to place a particular issue on the agenda of a government or legislative authority. The constitution can include the right, the conditions for this right to be exercised, and the effects on decision making (binding or consultative).
- *Legislative initiative* grants citizens the right to propose new legislation; however, it regularly requires formal approval by elected representatives (parliament) or support from government. The constitution sets the conditions for citizens to exercise that right and the procedure for reaching the final decision-making stage. This mechanism exists in France, Colombia, Finland, Italy, Mexico, Spain and Latvia, among others.
- *Referendums* grant citizens the right to vote for or against a topic or a proposed piece of legislation. The constitution defines the conditions and rules for organising such processes. Mandatory referendums are held when a referendum vote is required by law for deciding a specific subject (e.g. to adopt a constitution). Referendums also may be initiated by the government or the legislature to gather citizen views on a specific matter. On occasion, minorities that would be affected by a piece of legislature are also entitled to demand such a vote. This is the case in countries such as France, Spain, Mexico and Colombia, among many others.
- *Institutionalised participation and deliberation* mechanisms function on a regular and ongoing basis, compared to an ad hoc participatory mechanism (such as a consultation). Institutionalised participation can exist as consultative bodies (Councils and Conferences in Brazil) or a third chamber such as the Economic, Social and Environmental Council (Conseil Économique Social et Environnemental – CESE) in France. In 2013, deliberative Citizens' Councils were institutionalised in the Austrian state of Vorarlberg, accompanied by guidelines developed by the Office of Future Affairs on how these councils are initiated and the steps involved in the deliberative process. These guidelines provide for the possibility for citizens to initiate such a process by collecting a thousand signatures in support of it. Since then, citizens have already initiated a Citizens' Council twice — over the issues of land use (in 2017) and the future of agriculture (in 2019).
- *Consultation mechanisms* allow citizens to express their opinion on a topic, a question or a legislative text. Consultation mechanisms are usually not binding (compared to a referendum). The

constitution can include mandatory consultations for specific cases (such as major infrastructure projects) and establishes the conditions for these consultations to be organised.

- *Recall* is the name given to a mechanism by which voters can end an elected official's period of office before the next scheduled election for that office. Combining elements of the initiative process and a regular candidate election, a recall initiative is launched when a motion is filed with the relevant administration. Proponents are then required to gather a specified number of signatures in support of the recall measure. In most states in the United States the recall mechanism can be used to recall all elected state officials, from local and county officials up to the office of governor. Judges may also be the subject of recall initiatives. In some US states, some non-elected officials such as administrative officers can also be recalled.[18] Yet while many state constitutions provide for recall, the mechanism is not used at national level. Provision for the recall mechanism outside the United States and at national level is rare, even in countries where direct democracy prevails (e.g. Switzerland). Only in Venezuela does the recall mechanism apply to a country's elected head of state.

Many of the above-mentioned examples are not only compatible with representative democracies, but they can also complement the decisions taken by elected and appointed officials. Present-day mechanisms of citizen participation thus do not operate in isolation, but are linked to the structures of an overall political system that includes major representative democratic institutions (Schiller, 2020[20]). As such, they can complement the mechanisms of representative democracy and enrich them.

Mechanisms such as the referendum are considered part of a direct democracy, in contrast to indirect or representative democracy. The normative theory of direct democracy primarily rests on ideas about popular sovereignty, freedom and political equality.[19] In the most prominent example in modern times, Switzerland practices a form of direct democracy under which any law enacted by the nation's elected legislative branch can be vetoed by a vote of the population.[20] Citizens can also vote at least four times on national proposals every year, as well as vote to require the national legislature to consider amendments to the Swiss constitution. Any Swiss citizen may request an optional referendum to contest a new or revised law. To do so they must gather 50 000 signatures within 100 days. If the referendum goes ahead, the new law is passed or rejected by a simple majority.

Key options and questions to consider

As has been explored in this chapter, the different existing systems of governments present different strengths and challenges. The quest for the most adequate system of government would undoubtedly involve an assessment of the relative merits of each system to reach the overarching goals of a particular society.

A way to frame the choice of one type of government over another in democratic constitution making can be to assess which patterns of political decision making would better serve the expectations of the higher number of citizens. Social satisfaction with policy outcomes is higher the closer the outcome is to the social majorities' preferences (or, as some analysts put it, to an abstract "median voter preference") (see also (Colomer and Negretto, 2005, pp. 60-89[4]; Negretto, 2013[21]).

Focusing on institutional variables related to the system of government without attention to contextual factors can be misleading. The design of constitutional mechanisms such as powers and checks and balances can have an important impact on the interaction between the branches of power and within individual branches, and represents an important set of choices to consider (e.g. to avoid the potentially negative consequences of either systems, such as policy gridlocks or authoritarian tendencies). And the actual functioning and interaction of these mechanisms depend on national context (and the functioning of other branches such as the judiciary – see the Chapter 6 on constitutional courts) (Böckenförde, Hedling and Wahiu, 2011[3]).

Historical lessons

History may shed some light when choosing the type of government, but only to a limited extent. Historical lessons from other countries need to be taken with caution. Nevertheless, some elements could be worth keeping in mind:

- One of the important questions in considering government models relates to the options for deconcentration of executive powers (e.g. involving different actors in decision-making processes, creating a system of checks and balances). History shows that while a strong executive branch can be beneficial in some cases (e.g. in creating stability, in bringing divided countries together, in facilitating long-term planning), high-powered concentration can result, at least partly, in violent conflicts and a shift to autocracy and undemocratic rule. At the same time, a careful balance is needed in order not to create a system where decision making is very complex and delayed (Böckenförde, Hedling and Wahiu, 2011[3]).
- Most of the long-established democracies (i.e. with longevity of at least 25 years of uninterrupted democracy) (Mainwaring and Shugart, 1993[13]) in the world tend to have parliamentary systems (Linz, 1990, pp. 51-69[22]), although the exact nature of the relationship between the system of government and longevity of democracies is unclear (Linz, 1990, p. 7[22]).
- In contrast, the stability of parliamentarism in less developed countries seems to be low. “The poor performance of parliamentarism in poor countries indicates that inauspicious social and economic conditions and limited elite commitment to democracy create grave difficulties, regardless of regime type” (Linz, 1990, p. 8[22]).
- Despite the historical precedents, the choice of institutions usually results from processes of strategic interaction in which actors with different preferences behave in accordance with their own interests: political actors may choose institutions not to enhance social efficiency but to maximise their probability of winning office and their capacity to influence policy outcomes once elected.

Institutional design

As has been outlined throughout this chapter, constitution drafters have **three main institutional design options** with regard to the system of government, each with its own advantages and disadvantages:

- *Parliamentarism*: Governance that derives its legitimacy from the legislature, or in other words, the single electoral origin of the legislature and the cabinet can make it possible for a parliamentary regime with inclusive electoral rules to facilitate the coexistence of multipartyism with fair representation, socially efficient outcomes and relatively effective government. While a consensual parliamentary regime may be less decisive than the Westminster type (“first past the post”), it could nevertheless secure a certain level of legislative effectiveness because it forces the executive to maintain broad support in parliament to remain in power. As such, parliamentary systems are able to maximise the inclusiveness of parliament and can give rise to coalition governments that are representative of several political choices, even in divided societies. At the same time, this might potentially generate instability and deadlocks in parliament due to limited majorities. Parliamentary systems are also inherently flexible, as they enable removal of the head of government or the call of new elections when the majority of parliament no longer supports the government’s approach. However, these mechanisms may also weaken the separation of powers among the executive and the legislative: while parliament may avoid criticism of the government given their close relationship, government may refrain from making bold moves to reduce the chances of a vote of no confidence. Finally, efficiency and effectiveness can be furthered in parliamentary systems since bills are infrequently vetoed.

- *Presidentialism* – Presidential systems provides the electorate with a direct mandate that empowers citizens through greater choice. They can select both a head of state and members of the legislature, and reward well-performing politicians in a more direct manner than is possible in parliamentary systems. Nonetheless, presidents in this type of system are often elected by slim majorities, and still acquire with the right to form cabinets regardless of the share of seats obtained in parliament or the policy position of the presidential party in congress. Despite sometimes thin margins of majority support, the sense of being the representative of the entire nation may lead the president to be intolerant of the opposition. On the other hand, this system can generate a stable government, since fixed terms of office for the president can provide more predictability in the policy-making process than can sometimes be achieved in parliamentary systems, where coalition cabinets and parliamentary agreements are prone to shifting. This system can also present a stronger separation of powers between the legislative and the executive powers, which function as separate structures with autonomous legitimacy. This can enable different actors to propose policies without fear of reprisals and removal that can be experienced in parliamentary systems. In turn, this starker separation can also give rise to political deadlocks when the government is unable to achieve support of congress for its policy programme (Böckenförde, Hedling and Wahiu, 2011[3]).
- *Semi-presidentialism* – The distribution of powers that semi-presidentialism suggests represents a greater integration of separate branches of the government, especially between the executive and parliament, than more purely presidential systems. This greater integration and inclusiveness manifests itself particularly in sharing powers in cabinet formation and in legislative initiative. It approximates the system to the logic of multiparty parliamentary regimes. The semi-presidential experiences of France and Portugal could offer relevant examples, while the experiences of Colombia and Costa Rica show that sharing power between presidents and parliament in presidential regimes can produce policy outcomes satisfying the median voters. In turn, it can generate a particular challenge: due to the dual legitimacy of the president and the prime minister, the authority of both may conflict, particularly when they belong to different political parties. Where semi-presidential systems lean more in their configuration towards one of the systems above, they are likely to give rise to similar challenges.

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Notes

[1] A government trifecta is a political situation in which the same political party controls the executive branch and both chambers of the legislative branch in presidential countries that have a bicameral parliament. The term is primarily used in United States, Argentina, Bolivia, Brazil, Colombia and France. The coattail effect or down-ballot effect is the tendency for a popular political party leader to attract votes for other candidates of the same party in an election. For example, the party of a victorious presidential candidate will often win many seats in congress as well; these congressmen are voted into office "on the coattails" of the president. For that effect to happen it is necessary that the presidential and legislative elections are held simultaneously or very near each other on the calendar.

[2] https://cic.nyu.edu/sites/default/files/en_cheibub_sys_gov_parl_pres.pdf.

[3] The coattail effect is the tendency for a popular political party leader to attract votes for other candidates of the same party in an election.

[4] In Costa Rica this is established in the Electoral Code: Código electoral: Ley N.º 8765 (Publicada en el Alcance 37 a La Gaceta n.º 171 de 02 de setiembre de 2009). Article 98: Elections shall in any case be held on the first Sunday in February of the year in which the President and Vice-Presidents of the Republic and Deputies to the Legislative Assembly are to be renewed. The renewal of all these offices shall take place every four years at the same election.

[5] https://aceproject.org/ace-en/topics/es/esg/esg01.

[6] Political scientists refer to the person chosen (by the head of state) to attempt to form a coalition government as the "formateur."

[7] Inter-parliamentary Union, https://data.ipu.org/compare?field=country%3A%3Afield_structure_of_parliament#pie.

[8] "*Pour qu'on ne puisse abuser du pouvoir, il faut que par la disposition des choses le pouvoir arrête le pouvoir.*" ("If power is not to be abused, it is required that power stop power by the way things are arranged")– Montesquieu (1689-1755), L'Esprit des Lois (1748).

[9] See Parliamentary Assembly of the Council of Europe Resolution 1601 (2008[23]) on "Procedural guidelines on the rights and responsibilities of the opposition in a democratic parliament", https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17626&lang=en. See also Venice Commission (2010[12]), "Draft Report on the Role of the Opposition in a Democratic Parliament", www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2010)100-e.

[10] See also "Parameters on the relationship between the parliamentary majority and the opposition in a democracy: A checklist", adopted by the Venice Commission at its 119th Plenary Session (Venice, 21-22 June 2019) and endorsed by the Committee of Ministers on 5 February 2020, at: www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2019)015-e.

[11] See for example Rule 119 of the Rules of Procedure of the European Parliament on the Censure on the European Commission, www.europarl.europa.eu/doceo/document/RULES-8-2018-07-31-RULE-119_EN.html.

[12] For example Art. 99(1) Constitution of Spain; Art. 187(1) Constitution of Portugal; Art. 61(2) Constitution of Finland.

[13] Referring to the majority where more votes for than against are required.

[14] www.idea.int/sites/default/files/publications/dissolution-of-parliament-primer.pdf.

[15] Jaakko Nousiainen (2002[24]): From Semi-presidentialism to Parliamentary Government: Political and Constitutional Developments in Finland, in Scandinavian Political Studies, Vol 24, Issue 2, June 2001, Online 17 December 2002, pages 95-109. https://doi.org/10.1111/1467-9477.00048

[16] See: https://valtioneuvosto.fi/en/government/the-government-and-parliament; https://en.wikipedia.org/wiki/President_of_Finland; https://www.presidentti.fi/en/presidency/duties/; https://finland.fi/life-society/parliamentarism-in-finland/

[17] Lehoucq, F. "Political Competition, Constitutional Arrangements, and the Quality of Public Policies in Costa Rica," *Latin American Politics and Society,* Vol. 52, No. 4 (November 2010): 54-77. http://libres.uncg.edu/ir/uncg/listing.aspx?styp=ti&id=9889

[18] ACE Project: https://aceproject.org/ace-en/focus/direct-democracy/recall/mobile_browsing/onePag.

[19] "Toute loi que le peuple en personne n'a pas ratifiée est nulle; ce n'est point une loi." ("Any law which the people themselves have not ratified is void; it is not a law") – Jean-Jacques Rousseau (1712-1778), Du contrat social (1762).

[20] Switzerland is a federal state comprised of 26 different cantons that created an alliance. The federal constitution was created in 1848, founding the federal parliament and giving central government certain powers. Switzerland represents a collegial executive, with the Federal Council being the executive institution. Each of its seven federal councillors is head of one of the government's departments or ministries, is elected for a four-year term, and cannot be removed from office. The councillors are elected by the Federal Assembly and usually represent the four main parties, which often helps in forming a stable government. They engage in what can be termed as the collective, rotating presidency. The parliament also elects the Swiss president from within the seven federal councillors. They serve for one year only and do not have any more powers than their peers but are considered "the first among equals". The president chairs meetings of the Federal Council and has special duties linked to representing Switzerland when necessary. Federal laws are created by parliament, which comprises two chambers whose members are elected by the Swiss public every four years. The lower house, the National Council, represents the Swiss population as a whole and comprises 200 MPs. The upper house, the Council of States or senate, represents the cantons and has 46 senators. The chambers have the same powers. Together they are known as the Federal Assembly, which is the highest elected authority in the land.

5 Multi-level governance and territorial organisation

This chapter considers a comparative assessment of constitutional provisions for the relative responsibilities of central and subnational government and how they interact, or “multi-level governance”, in selected OECD countries. It aims to identify how countries have included arrangements for multi-level governance and territorial organisation in their constitutions, and highlights that they vary greatly across constitutions. First, the chapter introduces the different categories of multi-level governance in the selected countries. Second, it presents a cross-country comparison of six foundational themes and related sub-themes through which multi-level governance arrangements and territorial organisation can be determined constitutionally. These themes are territorial organisation, structure of sub-national government, division of powers and responsibilities, finance mechanisms, impact on central state decision-making, and co-ordination mechanisms. In doing so, it provides specific examples of how benchmarked countries have included provisions regarding these themes and subthemes in their constitutions.

Key issues

Multi-level governance structures and mechanisms vary greatly from country to country, and the past few decades have been marked by an increasing diversity in associated governance arrangements around the world in both unitary and federal countries (OECD, 2019[1]).

Decisions on territorial organisation and multi-level governance can have important implications for the quality of public services, local democracy, and fiscal sustainability of public finances, among other elements.

Multi-level governance arrangements and territorial organisation can be determined constitutionally through provisions relating to the following six themes:

- *Territorial organisation* – This is one of the core elements of most forms of multi-level governance. The constitution can recognise multi-level governance as a principle for organising a territory by detailing the number and organisation of subnational levels of government, establishing their relative autonomy, and determining whether special status is granted to selected territories on the basis of particular characteristics.
- *Structure of subnational government* **–** This is an important component of the practice of multi-level governance. The institutions of the subnational government level(s), and the degree to which subnational units have the competence to determine their own institutional set-up, can be determined through constitutional provisions. The same applies to the electoral system and protection of subnational cultural rights, such as regional languages, cultures, and traditions.
- *Division of powers and responsibilities* **–** The constitution can determine the division of competencies and tasks between the central government and the different subnational level(s) of government. Similarly, it can include provisions on subsidiarity, as well as oversight by higher levels of government on subnational governments' exercise of powers.
- *Finance mechanisms* **–** Constitutional provisions can define the financial autonomy of subnational governments – including their taxing powers – as well as arrangements for revenue redistribution through equalisation mechanisms.
- *Impact on central state decision making* **–** Constitutional arrangements can define whether subnational level(s) of government have special representation in central government institutions, for example in legislative assemblies, and the mechanisms under which they operate. Likewise, constitutions can stipulate the extent to which subnational level(s) of government need to be consulted on certain matters or with respect to certain decisions.
- *Co-ordination mechanisms* **–** A constitution can set forth solidarity principles among the different levels of government. Similarly, it can give constitutional status to vertical and horizontal co-ordination mechanisms.

Decisions relating to whether and how to include these six elements in the constitution require finding a balance between laying down fixed constitutional rules and establishing basic governing principles on the one hand, and adopting discretionary laws and procedures on the other. As this chapter demonstrates, the experience OECD member countries have had in this area is greatly varied.

Introduction

In the 21st century, multi-level governance within countries has taken a variety of forms. Past decades have seen a trend towards greater diversity of these governance arrangements around the world, in both federal and unitary countries. Given that most responsibilities and resources are shared among levels of government, multi-level governance policies imply that managing mutual dependence is the way to achieve common objectives (OECD, 2019[1]).[1]

In this chapter, *multi-level governance* refers to any significant form of dispersal of public power across a country on a territorial basis, and thus covers a wide range of approaches, spanning both federal and unitary countries (Box 5.1). Indigenous communities with protected autonomy are also included as a form of multi-level governance, even though these are not necessarily organised by territory.

As will become clear in this discussion, many of the details regarding countries' multi-level government arrangements and territorial organisation are defined in regular or special legislation and not in the constitution itself. In fact, some constitutions explicitly require specific legislation to be adopted on these topics.

In addition, a core issue in the constitution-making process is defining the cases and circumstances in which the central government can annul decisions taken by subnational levels of government or impose on them specific policies and regulations, or in which it needs to consult with lower-level authorities.

All countries analysed use one or more forms of multi-level governance. In all of them – with the exception of New Zealand for reasons that are explained below – a dedicated segment of the formal constitution makes some provision for multi-level governance, leaving the rest to legislation and practice. The use of a constitution to provide some protection for varied forms of multi-level governance has in general become more widespread in recent times.

Box 5.1. Federal and unitary countries

There are three broad state typologies: federal, unity and quasi-federal. A minority of countries have the federal system of government: of the 193 UN member states, 25 are governed as federal countries (40% of the world population) and 168 are governed as unitary states (Forum of Federations, 2021[2]).

Federal countries

In federal countries (or federations), self-governing regional entities (the federated states) have their own parliament and government and, in many cases, their own written constitution. In a federation, the self-governing status of the component states may not be altered by a unilateral decision of the federal government.

Powers and responsibilities are assigned to the federal government and the federated states by or under the provisions of a constitution. In general, federal governments have exclusive or concurrent listed responsibilities such as foreign policy, defence, immigration and currency. Many federated states also have listed competencies. Some also have residual power[2].

Unitary countries

A unitary state is a state in which the central government is ultimately supreme. This means that citizens are subject to the same final source of authority throughout the national territory.

This does not preclude the existence of subnational governments, also elected directly by the population and sometimes with significant political and administrative autonomy. Even so, subnational governments exercise only the powers that the central government chooses to delegate or devolve. Unitary states are thus decentralised to some extent, depending on the character and scale of subnational powers, responsibilities and resources, and the degree of autonomy they have over these different elements. In a unitary state, subnational units can in principle be created and abolished and their powers may be broadened and narrowed by the central government, subject to the constitution. Some unitary countries also recognise autonomous regions, sometimes including cities, which have more autonomy than other local governments because of geographical, historical, cultural or linguistic reasons.

Quasi-federal countries

Between these two main forms there is an intermediate status, albeit still emerging and amorphous: that of “quasi-federal” or regional state.. This status applies to unitary countries with federal tendencies, i.e. having some characteristics of a federal country, typically because aspects of subnational autonomy are constitutionally protected. As a generalisation, there is a growing tendency for constitutions to make some provision for multi-level governance, causing the boundaries between federal, quasi-federal and more localised forms of decentralisation to blur. Subnational regions in otherwise unitary states usually have less constitutional autonomy than those in formally federal states. Spain is an example of a state often described as “quasi-federal”.

Source: OECD (2019[1]), *Making Decentralisation Work: A Handbook for Policy-Makers*, OECD Multi-level Governance Studies, OECD Publishing, Paris, https://doi.org/10.1787/g2g9faa7-en; Forum of Federations (2021[2]), “Countries”, www.forumfed.org/countries/ (accessed on 15 April 2021).

Brief overview of issues

This chapter groups approaches to multi-level governance into the following four categories:

- general devolution/decentralisation within any form of multi-level governance that applies across all or most of the country, whether federal, quasi-federal or regional or more localised governance
- arrangements that single out any part of the country for a measure of autonomy that is distinct from the rest and not granted to other parts
- any arrangements for multi-level governance that apply specifically to Indigenous communities
- constitutional provisions that apply specifically to particular cities, to cities generally, or to territorial groupings of cities.

Each of these categories identifies an aspect of territorial organisation that is significant in its own right. In some cases there is overlap between them. For example, Indigenous communities that are territorially organised may comprise one or more units in a general scheme of decentralisation; they may also, in some circumstances, have special autonomy. These nuances are explained in the relevant sections of the chapter.

Collectively, the 12 OECD countries covered by this chapter use all these categories of multi-level governance. In most cases, at least foundational principles are included in the constitution. In summary, the breakdown between categories and countries is as follows:

- General devolution/decentralisation exists in all benchmarking countries in some form. In three of them it takes the form of federalism: Australia, Canada and Germany. Spain is a unitary state, but has a form of deep regionalism that sometimes is described as quasi-federalism. The remainder are formally unitary countries with significant general decentralisation on a territorial basis. In all of them there is a trend toward increasing decentralisation. General decentralisation has a base in the written constitution of all countries except New Zealand, where no such constitution exists.
- Special autonomy exists in Finland (Åland Islands), Portugal (the Azores and Madeira), France (communities with special status and various overseas territories), Greece (Aghion Oros) and the Netherlands (Aruba, Curaçao, Sint Maarten). In each of these cases except the Netherlands, these arrangements are reflected in some way in the constitution. Australia and Canada also have self-governing territories that are not formally part of the federal organisation of territory but are treated as broadly equivalent and have been established by legislation.
- Indigenous communities have a form of multi-level governance in Finland, Colombia, Canada, New Zealand and (in a limited and patchy way) Australia. This type of governance is not necessarily linked to territory, although territorial organisation can be used as well (it is for example with the territory of Nunavut in Canada). In Finland, Colombia and Canada there is some reference to multi-level governance for Indigenous communities in the constitution. In both New Zealand and Canada some of these arrangements originate in treaties. In all countries there also is supporting legislation, which is likely to be regarded as highly significant (the Treaty of Waitangi Act 1975 (New Zealand) is an example).
- The constitutions of several countries provide autonomy for one or more major cities, or contemplate a specific status for them: Portugal (“large urban areas”), Colombia (Bogotá). The constitutions of Australia and Canada and the German Basic Law also recognise the seat of the federal government. Cities constitute territorial units in some forms of general devolution that is recognised by the constitution, including in Germany (Berlin, Bremen and Hamburg), where they are constituent units in federal governance arrangements. In France, Paris, Lyon and Marseille are “communities with special status” within the terms of Article 72 of the constitution. In Japan, many cities are territorial units within one of the layers of local self-government prescribed by legislation, for which the constitution provides only a very general framework.

Forms of decentralisation share some similarities across countries. They also differ, however, in conception and depth, in ways that affect the particular constitutional provisions made for them. In considering forms of decentralisation, to assist comparison, the following six themes are considered:

- Territorial organisation
- Structure of subnational government
- Division of powers and responsibilities
- Finance mechanisms
- Impact on central state decision making
- Co-ordination mechanisms

In addition, it is important to clarify the terminology linked to decentralisation/devolution (Box 5.2).

Box 5.2. Defining multi-level governance and decentralisation: The OECD approach

Multi-level governance

Multi-level governance is the interaction among levels of government when designing and implementing public policies with subnational impact. This interaction is characterised by a mutual dependence, running vertically (among different levels of government), horizontally (across the same level of government), and in a networked manner with a broader range of stakeholders (citizens, private actors). Multi-level governance practices are part of every country's governance system, regardless of its institutional form (federal or unitary, centralised or decentralised), and in the vast majority of regions of the world (OECD, 2021[3]).

Decentralisation

Decentralisation refers to the transfer of a range of powers, responsibilities and resources from central government to subnational governments. The latter are thus governed by political bodies (deliberative assemblies and executive bodies), and have their own assets and administrative staff. They can raise own-source revenues – such as taxes, fees and user charges – and they manage their own budget. Subnational governments have a certain degree of decision-making power; in particular, they have the right to enact and enforce general and specific resolutions and ordinances.

Decentralisation and devolution

Devolution is a subcategory of the decentralisation concept. It is a stronger form of decentralisation, as it consists in the transfer of powers from the central government to lower-level autonomous governments, which are legally constituted as separate levels of government.

Decentralisation and federalisation

The next stage after devolution is federalisation, although some federal countries may actually be quite centralised systems, with few powers exercised by subnational entities.

In federal countries (or federations), sovereignty is shared between the federal government and self-governing regional entities (the federated states), which have their own parliament, government and, in some cases, constitution. In a federation, the self-governing status of the component states may not be altered by a unilateral decision of the federal government.

Decentralisation and deconcentration

Decentralisation and deconcentration are sometimes used interchangeably, but they are actually profoundly different. In decentralisation, there is a transfer of power from the central government to

autonomous/elected subnational governments. In deconcentration, there is a geographic displacement of power from the central government to units based in regions (territorial administration of the central government, line ministerial departments, territorial agencies, etc.).

Source: OECD (2019[1]), *Making Decentralisation Work: A Handbook for Policy-Makers*, OECD Multi-level Governance Studies, OECD Publishing, Paris, https://doi.org/10.1787/g2g9faa7-en.

Multi-level governance and territorial organisation in the constitutions of OECD countries: Core features and key considerations

Territorial organisation

A country's territorial organisation or configuration is one of the foundations of most forms of multi-level governance. To better understand how constitutions might provide for territorial organisation, this section highlights the following considerations linked to whether, in each country, the constitution:

- Recognises multi-level governance (or other terms, such as devolution, decentralisation, autonomy or self-government) as a principle for the organisation of territory.
- Prescribes the number of constituent units, and their territorial configuration.
- Provides for levels of general multi-level governance. For example, a constitution may provide for one level or multiple levels of devolved government. It may characterise the type of decentralised government at each level, in terms of depth or autonomy, and provide for evolution towards increasing decentralisation over time. In addition, it may identify whether multi-level governance also provides for special autonomy, or Indigenous communities, or specifically for cities.
- Provides for the alteration or protection of the internal territorial boundaries, including through the admission of new constituent units or the reclassification of existing territorial units.
- Provides for inter-territorial co-operation and co-ordination mechanisms.

Recognition of a principle of multi-level governance

All benchmarking countries recognise some form of decentralisation as an organising principle. Each of the four federal or quasi-federal countries does so either expressly or by necessary implication from the structure of the state. Six of the eight unitary benchmarking countries expressly recognise such a principle in the constitution. Of the remaining two, while the Netherlands has a chapter in the constitution dealing with subnational government, it does not specifically recognise decentralisation as a principle. In New Zealand, such matters are necessarily dealt with in legislation.

Each of the unitary countries expresses this principle in different ways. In some countries the principle is cast in terms of administrative decentralisation. For example, Article 1 of the constitution of France provides that the state shall be "organised on a decentralised basis". Similarly, the constitution of Greece requires the administration of the state to be "organised according to the principle of decentralisation" (art. 101(1)).

In other countries, decentralisation is explicitly coupled with autonomy in the constitution. For example, Article 1 of the constitution of Colombia provides that the country is to be "decentralised, with autonomy of its territorial units". The constitution of Japan refers to the principle of "local autonomy" (art. 92), and the constitution of Finland articulates the principle in terms of "self-government" of municipalities (Section 121). The quasi-federal constitution of Spain also makes the point in terms of principle, guaranteeing "the right to self-government of the nationalities and regions" comprising the state (Section 2).

In some countries Spain is an example – the constitution recognises both the administrative decentralisation of the state and a principle of autonomy (Sections 2, 103). In Portugal, Article 6 of the constitution provides that the state is to operate so as to respect both "the autonomous island system of self-government" and "the principles of subsidiarity, the autonomy of local authorities, and…democratic decentralisation" of state administration.

Provision for the number of constituent units and territorial configuration

In the benchmarking countries, the number and territorial configuration of the constituent units is specified in a mixture of the constitution and legislation. Even in federal countries, constitutions are rarely prescriptive about territorial configuration, because of the possibility of change over time. The constitutions of Canada, Australia, Germany and (in transitional provisions) Spain nevertheless refer to the constituent units that are known at the time the constitution was drawn up. The German Basic Law anticipates change, requiring regard to "regional, historical and cultural ties, economic efficiency, and the requirement of local and regional planning" in territorial redivision (art. 29(1)).

In all eight unitary countries also, the particular territorial configuration of the constituent units in a system of general decentralisation typically is not constitutionally specified but is left to legislation. Even so, in some cases the constitution prescribes a principle to guide territorial division by law. For instance, the constitution of Greece requires the territorial configuration of the state to be based on "geo-economic, social and transportation conditions" (art. 101(2)). The constitution of Finland requires territorial divisions to be "suitable", so that the Finnish-speaking and Swedish-speaking populations of the state have the opportunity to receive services in their own language on equal terms (Section 122).

The number and configuration of territories with special status are more likely to be constitutionally specified. The constitution of France, for example, makes specific provision for each of that country's overseas territories (art. 72). The constitution of Greece identifies the territory of the self-governing region of Aghion Oros(art. 105). The constitution of Portugal identifies the territory of the autonomous islands comprising the Azores and Madeira archipelagos (arts. 6, 225). The constitution of Finland makes special provision for the self-governing Åland Islands (Section 120).

Provision for drawing and protecting boundaries

In most countries, even when the initial configuration of territorial boundaries is left to legislation, the constitution prescribes procedures for altering them in the future. Such procedures ensure a degree of stability for existing boundaries and reinforce principles of local self-government.

In some cases, the constitution provides that territorial change requires the passage of further legislation and consequently the approval of a territorially representative central legislative chamber. For example, the constitution of the Netherlands requires any alteration to boundaries to be approved by a central statute and therefore the approval of the territorially representative Upper House (art. 123). In other jurisdictions, the degree of protection is stronger. Some constitutions, for example, provide for subnational consultation in addition to the passage of legislation. The constitution of Portugal requires alteration of municipal areas by legislation, following "prior consultation" with the local authorities concerned (art. 249).

In federal countries, the degree of protection for boundaries is likely to be stricter still. The constitution of Canada for instance requires not only central legislation but also approval of the legislature of the affected province (art. 43). Similarly, the constitution of Australia requires the approval of a majority of the electors in the affected state (Section 123). The German Basic Law requires a law for territorial revision to be confirmed by referendum in the affected *Länder*; it also provides a framework for *Länder* to agree on territorial alteration among themselves, again subject to referendum (art 29). Article 79.3 of the Basic Law prohibits abolishing the federal structure, the importance of which is singled out by the name of the state: the Federal Republic of Germany.

Prescribed levels of constituent units

The constitutions of all countries except New Zealand make some provision for the levels and type of multi-level governance. New Zealand provides for both a level of general decentralisation and Indigenous self-governance in legislation.

In some countries, constitutions specify only a single level of general subnational government; the federations of Canada and Australia are examples. Other levels of government exist in these countries, but they are found in other sources: in Canada, local government derives from provincial statutes; in Australia it derives from the constitutions and legislation of the Australian states and territories. In an example of a different kind, the unitary country of Japan also deals only with "local self-government", although greater diversity is achieved through legislation, granting wider functions to communities with larger populations (Omnibus Decentralization Law 1999).

The constitutions of most countries, however, specify multiple levels of general subnational government. The most common configuration provides for two levels comprising regional and municipal units, although the terms for these levels differ between jurisdictions. In Spain and the Netherlands, for example, the respective constitutions provide for both "provinces" and "municipalities". The "first" and "second" administrative levels provided for by the constitution of Greece are also municipal and regional levels (art. 102(1)). Other countries specify more than two generally devolved levels. Colombia (art. 286), France (art. 72) and Portugal (art. 236) are examples. The constitutions of these three countries also provide procedures through which territories can move between levels, including through amalgamation of smaller territories into larger regions.

The constitutions of countries that have regions with special status may specify levels of government applicable in those regions, in addition to recognising the regions themselves. Portugal is an example – its constitution specifies two levels of government within its island autonomous regions: municipalities and parishes (while specifying three levels for the generally devolved mainland) (art. 236).

Some countries specifically recognise Indigenous communities as a level of government. The constitution of Colombia does so most clearly, recognising Indigenous communities as a form of territorial unit distinct from the three levels applicable to general decentralisation (art. 286, 329-330). Meanwhile**,** the constitution of Finland recognises that the Sami people have "linguistic and cultural self-government" in their region, the details of which are left to legislation (Section 121).

Finally, some countries constitutionally provide for major cities. The constitution of Portugal provides for the creation by law of specific forms of local government organisation for "large urban areas" in accordance with the applicable local conditions (art. 236(3)). The constitution of Colombia creates an elaborate special regime applicable to Bogotá, as capital of the Republic, the political and fiscal and administrative characteristics of which are determined by a combination of constitutional provisions and special laws (art. 322). In France, constitutional provision for special status communities has been applied by legislation to the cities of Paris, Lyon and Marseille. In Japan, legislation has been used to distinguish cities with larger populations from other local government, although this distinction is not reflected in the constitution itself.

Structure of subnational government

The structure of subnational government is an important component of the operation of multi-level governance in practice. To better understand what constitutions might say about the structure of subnational governments, this chapter focuses on the following sub-themes to consider whether, in each state, the constitution or legislation:

- affords a degree of autonomy, or self-government, to the constituent units
- makes provision for asymmetry (i.e. different applicable rules) among the constituent units
- prescribes subnational government institutions
- prescribes an electoral system at subnational level
- offers protection to subnational cultural rights, such as regional languages, cultures, and traditions.

Degree of autonomy

In almost all countries, the constitution deals to some extent with the degree of autonomy of generally decentralised levels of government. In the federated countries of Australia, Canada and Germany the degree of autonomy necessarily is prescribed by the constitution. In regionalised Spain also, the constitution makes considerable provision for regional autonomy. To this end, for example, it identifies the competencies on which regions may draw for their respective autonomy statutes and with which they can make laws with the status of full legislation, subject to review by the Constitutional Court (Sections 150, 153).

In the other unitary countries, details of the scope of subnational autonomy typically are left to legislation, subject to a constitutional guarantee. For example, the constitution of Japan recognises the principle of "local autonomy" while leaving the "organisation and operations" of the constituent units to be fixed by laws in accordance with that principle (art. 92). The constitution of France provides that territorial communities are to be "self-governing", leaving the parameters of self-governance to legislation (art. 72). The constitution of Greece requires local government agencies to have "administrative and financial independence" while leaving it to law to allocate powers and responsibilities to them (art. 72). The constitution of Finland specifies that municipal and regional administration shall provide for the "self-government" of their residents, while leaving most of the principles and duties applicable to such administration to be established by a central statute (Section 121).

Countries in which one or more units have special autonomy are likely to specify the degree of autonomy for that unit in the constitution. In Greece for instance, while the generally devolved constituent units are guaranteed "administrative independence", the autonomous region of Aghion Oros is declared to be "self-governed and sovereign" with special responsibility for spiritual matters (art. 105(1)). Similarly, the constitution of Portugal provides for the "autonomy" of the generally devolved units, but entitles the autonomous units of the Azores and Madeira archipelagos to "their own political and administrative statutes and self-government institutions" (art. 6.2). By contrast, in Finland and France, while the constitutions suggest a significant level of autonomy for particular territorial communities, the detail is left largely to specific legislation.

Countries in which provision is made for Indigenous communities also often recognise a degree of autonomy in the constitution, even if some of the detail is left for legislation or agreement between the centre and the communities. For example, the constitution of Finland provides that the Sami community have "linguistic and cultural self-government" in their native region, the content of which is left to legislation (Section 121). The constitution of Colombia provides for self-governance of Indigenous territories on specified matters, which may be supplemented by statute (art. 330). The constitution of Canada recognises Indigenous self-government by affirming the "aboriginal and treaty rights" of the Indigenous peoples of Canada, defined to include rights by way of land claim agreements (Constitution Act 1982, Section 35).

Many indigenous communities have negotiated self-government or land claim agreements with the centre; those that have not are afforded a more limited form of local autonomy under central legislation.

Provision for asymmetry

A significant number of benchmarking countries made at least some provision for asymmetry: that is, the differential treatment of constituent units. Inevitably, this was more common in jurisdictions in which generally devolved constituent units co-existed with units having special autonomy (including for Indigenous communities or cities). Examples of constitutionally prescribed asymmetry include Spain (where the autonomy statutes differ among autonomous communities), Colombia (where there is differential treatment between generally devolved units, Indigenous territorial units, and the capital), France (where there is differential treatment of the generally devolved units and various categories of overseas territories), and Canada (where the province of Quebec is guaranteed a degree of special treatment under the Constitution – for example, in the composition of the Supreme Court). In some countries asymmetry may be in tension with constitutional requirements for equality. The Spanish Constitution expressly denies that such differences "imply economic or social privileges" (art. 138.2).

Prescribed institutions of subnational government

In the federal countries the constituent units have considerable discretion in designing their own institutions, subject to any general restrictions in the national constitution; Australia and Germany are examples. Canada is more complicated because the federal constitution specifies the initial provincial institutions, subject to alteration by the provinces themselves. The constitution of Spain is somewhat more prescriptive as to the form of subnational government institutions, but leaves the "name, organisation and seat" of those institutions to the applicable statute of autonomy (Sections 147, 152).

In unitary countries the constitution may make some provision for core subnational institutions. The Netherlands, for example, provides for legislative councils and a form of executive government at both the provincial and municipal level. The constitution of Portugal does so too, but only at the provincial level. In some of the other countries, the constitution provides only for a single subnational governing body at the first level of generally devolved units. The constitution of Greece, for example, provides only for elected local government agencies, the constitution of France for elected councils, and the constitution of Japan for deliberative local public assemblies. In still other countries, constitutional provision for subnational institutions of government is non-specific and legislation is needed to shape them. For example, the constitution of Finland requires subnational self-governing administrations, but leaves it to legislation to determine the form of the institutions themselves (Section 121).

Countries that have special status autonomous regions commonly specify or recognise the government institutions for those regions through the constitution. The constitution of Portugal, for example, prescribes legislative and executive branches of government for its autonomous regions (art. 231). The constitution of Greece recognises a distinctive monastic system of government for the Aghion Oros region (art. 105).

Countries that provide a degree of autonomy for Indigenous communities as constituent units also commonly specify their governance institutions. Usually this is done by legislation, as in Finland, New Zealand and Canada. For example, in Finland, legislation establishes the Sami Parliament as a representative body responsible for Indigenous cultural autonomy (Act on the Sami Parliament, Section 1(1)). The exception is Colombia, where the constitution itself provides for traditional council government in Indigenous territories (art. 329).

Countries that make provision for cities as constituent units also may specify governance institutions. The constitution of Colombia, for example, provides for council governance in respect of Bogotá (art. 322). The constitution of Spain recognises council governance for Ceuta and Melilla.

Prescribed electoral system

The constitutions of the unitary countries covered by this chapter commonly make some provision for election to the subnational institutions of government. One approach is for a constitutional provision to set down broad principles with which an electoral system to be defined by law must comply. For example, the constitution of the Netherlands transposes the central suffrage requirements to the subnational level and prescribes a subnational electoral system of "proportional representation" within boundaries laid down by a central law (art. 129). In a number of other countries, the constitutional requirements are more precise. The constitution of Portugal for example prescribes a hybrid electoral system for regional units: a combination of direct election and electoral college components, using a specified method of calculation (arts 231, 239, 260). In other countries, the constitutional requirements are less prescriptive: usually they impose a general requirement for a popular election of some kind, leaving the rest to legislation. Greece, Finland, Colombia and Japan are in this category.

As in other matters, the position in federal countries is somewhat different. Subnational electoral systems are more likely to be left to the constitutions or laws of the subnational units, subject to an overriding requirement or assumption of democratic choice. Treatment of electoral systems for regions with special autonomy varies, but Portugal offers an interesting medium position: the assemblies of the autonomous regions can draw up their own electoral laws, but they must finally be passed by the Assembly of the Republic itself (art. 226).

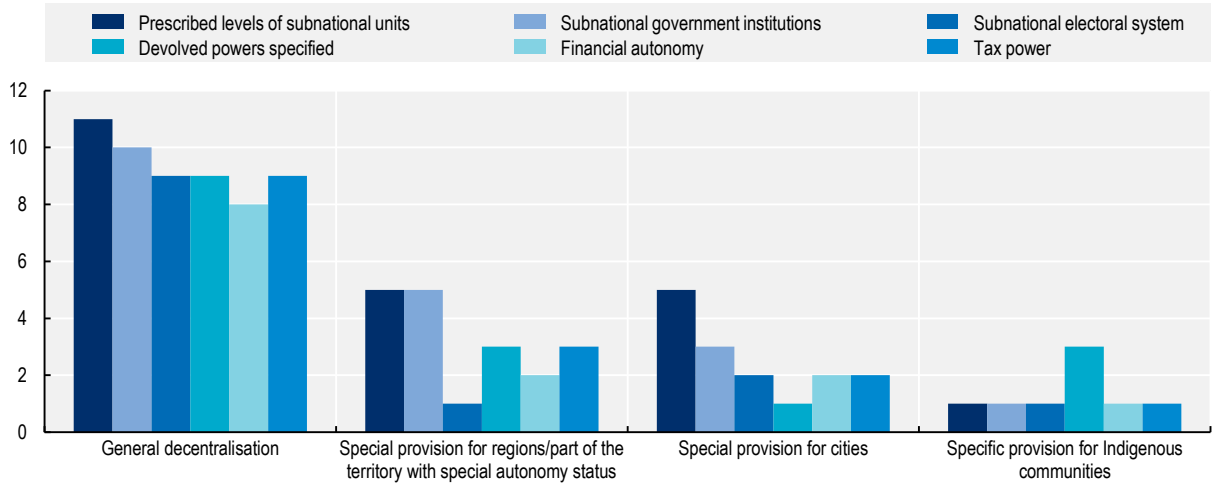
Protection of cultural rights

Cultural rights for communities recognised through multi-level governance also contribute to the nature and depth of self-government. For present purposes, cultural rights encompass regional or Indigenous languages and regional traditions, insignia and cultural practices (see Chapter 3 for more comprehensive discussion on economic, social and new rights). Regional and Indigenous languages are protected in the constitutions of France, Finland, Canada, Colombia and Spain in ways that include recognition as heritage, recognition as local official languages, and the right to use regional languages in dealing with public authorities. Cultural rights more broadly are recognised in the constitutions of Finland, Greece, Portugal, Colombia and Spain. In some countries, protections for rights of this kind are also provided in legislation. For example, the constitution of Finland recognises Sami linguistic and cultural self-government as determined by legislation (Section 121). This legislation in turn recognises the Sami "linguistic and cultural autonomy in the Sami homeland" (Act on the Sami Parliament, Section 1(1)).

Division of powers and responsibilities

This section focuses on how benchmarking countries divide legislative and other powers and responsibilities between the central and subnational levels. In doing so, it distinguishes among the four categories of decentralisation set out at the beginning of the chapter. Figure 5.1 below provides an overview of the number of countries with constitutional provisions in these themes, by subnational group.

Figure 5.1. Number of countries with constitutional provisions in various themes of multi-level governance and territorial organisation, by subnational group



Note: 12 countries are reviewed (n=12).
Source: Author's elaboration.

General decentralisation/devolution

Seven of the benchmarking countries make specific provision for the powers and responsibilities of subnational levels of government in the constitution itself (Portugal, Colombia, Spain, Japan, Australia, Germany and Canada).

Among these countries, there is a high degree of variation in the level of prescription in the constitution and in the nature and scope of what is prescribed. It is useful here to distinguish between federal countries on the one hand and unitary countries on the other. Spain has a particular system, which is unitary but with a strong degree of decentralisation through its autonomous communities system.

In all three federations the constitutions divide legislative power, in the sense that both levels of government have identifiable competencies and both may make laws within their areas of competency in a form that is accepted as legislative in character. In these countries, the division of power is constitutionally protected and cannot, as a general rule, be changed by legislation. In regionalised Spain also, the autonomous communities can exercise full legislative power in the areas of their own competency. These areas are secured by their respective statutes of autonomy. However, the constitution itself lists only the exclusive competencies of the central state (Section 149).

It should be noted in passing that federations often have multiple levels of government and the powers and responsibilities of lower-level constituent units are not necessarily enumerated in the national constitution or in national legislation. Germany is an example of one approach: while the Basic Law comprehensively sets out the division of legislative powers between the federal government and the *Länder* (states) and offers some protection for the municipal level of government, the powers of municipalities are left largely to the *Länder*.

In contrast, the other unitary countries are less constitutionally prescriptive as to the division of power. In other words, constitutions in these countries often recognise subnational autonomy in relatively general terms, but leave details of the scope of subnational powers to legislation. Typically also, laws made by subnational units within their allocated powers are described in terms of "regulation" (or another similar term) rather than "legislation", a distinction that has greater practical significance in countries with a specialist constitutional court that controls only the validity of legislation.

Some examples illustrate the point. The constitution of Japan affords local public entities the power to enact "their own regulations, within law" (art. 94). The constitution of France provides that "territorial communities may take decisions in all matters arising under powers that can be best exercised at their level" and "have power to make regulations for matters coming within their jurisdiction", leaving the precise boundaries of that jurisdiction to law (art. 72). The position is broadly similar in Portugal (art. 241) and Greece (art. 102(1)).

Autonomous regions

The powers and responsibilities of special autonomous units in unitary countries typically are more extensive than those at the levels of government under the scheme of general devolution. Typically also, this is recognised in the constitution even if to a varying extent such powers usually are further governed by central laws. The constitution of Finland, for example, recognises the special autonomy of the Åland Islands but also enumerates the legislative powers of this autonomous region in special legislation it refers to (Section 75; see Autonomy of Åland Act 1991, rticle 5). The constitution of France confers on overseas territories the power to make rules adapting central law (otherwise automatically applicable) on a limited number of matters where empowered by law, but within strict bounds and to the exclusion of matters of central concern that are enumerated (e.g. nationality, criminal justice, foreign policy, and defence). These excluded matters may be clarified or amplified by a central statute (art. 73). The constitution of Greece constitutionally devolves local spiritual supervision to the entities of the Aghion Oros regions, leaving other matters to central law (Art. 105). The position is somewhat different in Portugal, where the constitution identifies the legislative powers of the autonomous regions in greater detail, although in terms that still leave considerable work for legislation (Arts 227, 228).

Indigenous communities

The powers and responsibilities of Indigenous communities are prescribed in the constitution, organic law and/or legislation in five of the benchmarking countries: Canada, New Zealand, Finland, Colombia and, through recognition of land rights, in Australia, where Indigenous self-governance is still evolving. In each case the scope of powers and responsibilities are shaped to a significant degree by the historical treatment and legal recognition of Indigenous peoples by the state.

In terms of constitutional protection, the constitution of Colombia defines Indigenous communities as a "special jurisdiction", whose authorities may exercise "jurisdictional function" within their territory in accordance with their own law so long as it is not inconsistent with the constitution and central laws (art. 246). In Finland the constitution recognises the right of the Indigenous people (the Sami) to develop and maintain their own language and culture (Section 17). In Canada, "aboriginal and treaty rights" are recognised and affirmed" (Section 35). In New Zealand, the fundaments of the relationship between the Māori and the state are governed by the Treaty of Waitangi Act 1975. This document establishes core principles to govern the relationship, often referred to as the principles of partnership, participation, and protection. Ordinary legislation both references and incorporates the treaty and gives particular roles, powers and responsibilities to the Māori (for example, Local Government Act 2002, Section 4; Resource Management Act 1991, Section 8; Climate Change Response Act 2002, Section 3A.).

Cities

Generally, the constitutions of the benchmarking countries do not treat cities differently for the purposes of allocating roles and responsibilities to them. On the other hand, cities sometimes may be territorial entities for the purposes of the general system of devolution and so have powers allocated to them on that basis. Colombia is an exception; the constitution of Colombia makes special provision for Bogotá as the national capital. It elevates the city to a district and gives it distinct if general responsibilities to "guarantee the

harmonious and integrated development of the city and the efficient provision of services for which the district is responsible" (Art. 322).

Finance mechanisms

This section deals with the extent to which the financial arrangements for subnational government are reflected in constitutions rather than in legislation. In particular, it addresses the following elements:

- financial autonomy, including taxing power
- arrangements for revenue redistribution
- fiscal equalisation.

It is important to note that the meaning and effect of all constitutional provisions depend on factors beyond the constitutional text and legislation. This is particularly so in relation to fiscal arrangements for subnational government, which may also depend on less formal arrangements and governmental practice.

Financial autonomy, including taxing powers

In the category of *general decentralisation,* most of the countries covered by this chapter recognise some level of financial autonomy for subnational units in the constitution, with further details elaborated in legislation. Each country does so, however, in different terms and to different degrees.

The constitutions of most countries set forth a principle of fiscal autonomy for subnational units; sometimes also, they acknowledge the importance of a power to tax, or to share the proceeds of taxation, in order to realise that principle. At one end of the spectrum of practice, however, some constitutions do not prescribe a particular degree of financial autonomy and leave the details of the taxation arrangements to be determined by legislation. The constitution of the Netherlands is in this category; it provides that "the taxes which may be levied by the administrative organs of provinces and municipalities and their financial relationships with the central government shall be regulated by Act of Parliament" (art. 132). Greece is another example, where the constitution requires the central state to adopt measures necessary for ensuring the "financial independence" of local government (art. 102.5). To illustrate a different approach, the constitution of France authorises territorial communities to receive the proceeds of taxation imposed by the central state and to vary the bases of assessment and rates if authorised to do so by law (art. 722). Further along the spectrum of other constitutions, the German Basic Law provides detailed arrangements for tax sharing with the *Länder*, with provision for modification by legislation, within limits. Even in relation to municipalities, otherwise a *Länd* competency, the Basic Law recognises that "the guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right…to a source of tax revenues" (art. 28).

The constitutions of most of the countries confer on subnational governments an express power to impose taxation generally, or particular taxes on one or more levels of subnational units (Finland, Portugal, Colombia, France, the Netherlands, Australia, Germany, Spain and Canada). In federal countries, this conferral is an aspect of the federal division of powers. In unitary countries, it is more likely to be in terms of principle, leaving the detail to be determined by legislation (for example in the constitution of Finland, Section 121). Less often, some countries studied confer an exclusive power on a designated level of government to impose particular taxes. For example, the constitution of Colombia provides that "only municipalities may tax real estate".[3]

Tax powers for units with *special autonomy* may receive more explicit constitutional protection and be more extensive. The constitution of Portugal provides the Azores and Madeira regions with a tax power subject to central law (art. 227(j)). On the other hand, such arrangements may be tied to institutional law passed within the framework of the constitution, as in Finland and France.

The constitution of Colombia provides that *Indigenous communities* can be territorial entities with the right to administer their resources. It establishes the taxes necessary for the exercise of their functions, subject to the constitution and relevant central law (arts 286, 287).

Only one of the countries covered by this chapter has a constitution that specifically assigns a tax power to cities, and that is in the unusual case of the Spanish cities of Ceuta and Melilla on the Moroccan coast. These enclaves are established as self-governing cities, with tax powers subject to the constitution and central law, as in the case of local entities and autonomous communities generally (Sections 133(2), 142, 157(1)(b)). In Colombia, by contrast, the special regime for Bogotá leaves fiscal arrangements to special or general laws (art. 322). Where cities also form part of the general scheme of decentralisation, as in Germany or France, they enjoy whatever fiscal autonomy and taxation authority is conferred on other units.

Provision for revenue redistribution and fiscal equalisation

Many countries, including all of the federal countries, make provision in the constitution for revenue redistribution, in the sense of moving revenue from one level of government (usually, the central level) to another. Transfers of this kind may contribute to fiscal autonomy, may compensate for the transfer of substantive functions, or may be a vehicle for achieving fiscal equalisation.

Again, there is wide variation. Some countries, such as Germany, provide a relatively detailed fiscal constitution (Basic Law). Other countries include normative principles or objectives for financial arrangements in the constitution, leaving details to be prescribed in legislation, sometimes through co-operative arrangements among levels of government. Portugal is an example: in relation to the general scheme of devolution, its constitution provides for promotion of “the just division of the national product between…regions” (art. 90). More specifically still, in relation to the autonomous regions of Portugal, the constitution requires the “sovereign power” to ensure the “economic and social development” of the regions with a particular view to the correction of inequalities deriving from their “insular nature” (art. 229). In an example of another kind, the constitution of Spain guarantees implementation of the principle of solidarity by seeking a “fair and adequate economic balance” among different Spanish territories (art. 138).

The constitutions of at least eight of the benchmarking countries provide a guarantee of some kind that when the responsibilities of some subnational units are increased (through delegation in particular) from the centre, the financial allocation to the unit will be increased as well. For example, the constitution of France provides that when powers are transferred between the central government and territorial communities, revenue equivalent to that given over shall also be transferred (also see the constitution of Greece, art. 102(5)). The actual mechanisms for that transfer are contained in legislation.

Some countries also make specific provision for the principle of fiscal equalisation and its realisation, in the constitution or in legislation. Fiscal equalisation in this context refers to the allocation of public funds to ensure that the fiscal capabilities of subnational units are roughly equal, or at least meet an acceptable minimum standard. In Canada and Germany such arrangements have constitutional protection; in Australia, they derive from legislation and practice. In other countries, a form of equalisation may be assumed from provisions dealing with, for example, solidarity.

Impact on central state decision making

This section focuses on the effect of multi-level governance on the decision-making structures and procedures of the central state. It highlights the following elements*:*

- an obligation for the centre to consult with the subnational units or to co-operate with them on certain matters or in respect of certain decisions
- a central institution of government that represents the subnational units, for instance a territorially representative second chamber in the central legislature

- central supervision or monitoring of subnational governance or decision making.

Obligation to consult

Among the benchmarking countries, it is relatively common for the constitution to oblige (or at least encourage) the centre to consult with subnational units in respect of certain matters of subnational concern.

One such matter concerns changes in territorial configuration, or the status or numbers of subnational units. For example, the constitution of France provides for the consultation of voters in respect of the creation or modification of a special status region, or the status of an overseas territorial community. Similarly, the constitution of Portugal mandates that municipal governance institutions be consulted before the creation, abolition or alteration of municipalities (art. 24).

Constitutions may also mandate or encourage consultation in central decision making that concerns overlap with subnational responsibilities. An example is Portugal, where the constitution mandates that bodies exercising sovereign power co-operate with the self-governing institutions in relation to "such issues as fall within their own responsibilities and concern the autonomous regions" (art. 229(2)). The German Basic Law requires that the central government consult subnational unit governments before concluding any treaty affecting the "special circumstances" of that unit.

The usefulness of subnational perspectives for central decision making means that constitutional provision for consultation sometimes is made in relation to other matters as well. National planning is an example. For example, the constitution of Colombia provides for a consultative body: the National Planning Council, made up of representatives of the subnational units, provides a forum for discussion on national development planning (art. 340). The constitution of Spain includes a provision requiring the central government to base planning projects on forecasts provided by self-governing units (Section 131(2)). General provisions of this kind may have varying degrees of effectiveness in practice, but they nevertheless can provide valuable guidance on the principles that inform the constitution.

Territorially representative central institutions

Among the benchmarking countries, two of the three federations have a central institution with constitutional status that represent the territorial units as currently configured. In Germany, the Bundesrat or Federal Council comprises representatives of the *Länd* governments and plays a role in the legislative process; it has a veto in matters affecting the *Länder* in particular ways and other specific powers where the interests of the *Länder* are concerned. Australia has a senate that represents the constituent units equally, with veto power over all legislation. Paradoxically, from the standpoint of multi-level governance, the Bundesrat is more representative of the regions. In some cases, second chambers representing other levels of government have additional scrutiny powers and influence over appointment to other central institutions. By way of example, the Bundesrat plays a role in appointing members of the Federal Constitutional Court. Canada also has a senate, but its members are appointed by the central executive on a regional basis (art. 21-3).

A territorially representative central institution of governance is less common in the unitary jurisdictions. Nevertheless, France and the Netherlands have institutions of this kind. France has a senate – a territorially representative body – which is constitutionally assigned special responsibilities, some of which directly affect subnational matters. For example, bills in respect of the organisation of territorial communities must be first discussed in the senate (art. 39); the senate also appoints three members of the *Conseil Constitutionnel* (Constitutional Council) and performs other national roles. The Netherlands has an Upper House, whose members are elected by members of the subnational governments (art. 55). In a variation, while the Colombian senate is not representative of different levels of government, the constitution provides for two senators from Indigenous communities, elected from a nationwide constituency; indigenous communities also have a special constituency in the House of Representatives (arts 171, 176). In

unicameral Finland, the constitution provides that the Åland Islands have their own constituency for election to the parliament (art 25).

Central supervision or monitoring

Among the benchmarking countries, many make provision of some kind for central supervision or monitoring of subnational governance or decision making. There is something of a trade-off here, between local autonomy subject to judicial control to ensure compliance with law, and administrative supervision from the centre that can diminish that autonomy. For these reasons, central intervention is often available only on limited grounds and in accordance with specified procedures that may require consultation with the units concerned or consent from a territorially representative chamber of the central legislature. The constitution of Greece, for example, guarantees subnational governance "initiative and freedom of action" while providing for central supervision to an extent permitted by law, and limited to reviewing the legality of subnational action (art. 102). The constitution of the Netherlands requires supervision of subnational bodies to be regulated by law and restricts the grounds on which decisions can be quashed by "law or the public interest" (art. 132). The constitution of Spain also provides for central scrutiny in the exceptional case where it appears that a self-governing community has not complied with constitutional or other legislative obligations, or has prejudiced the national interest (Section 155). But the interests of the subnational units receive some protection from this procedure: the central government must first raise the issue with the government of the subnational unit, and any scrutiny requires majority approval of the territorially representative senate.

The scope of supervision is often linked to powers shared with or delegated by the state. For example, the German Basic Law gives the federal government more control over *Länd* execution of federal laws on federal commission than over *Länd* execution of federal laws in their own right (art. 85). The constitution of Portugal provides for limited central legislative scrutiny, in respect of constitutionally shared powers (art. 162). It establishes a somewhat different regime for its self-governing autonomous regions, in each of which there is a representative of the republic with responsibility for monitoring regional legislative decrees (arts 230, 233).

Co-ordination and co-operation mechanisms

This section deals with other co-ordination mechanisms connected with multi-level governance in the benchmarking countries. In some countries they overlap with institutions through which lower levels of government are represented in central institutions, which were considered in the previous section. The *key issues* here include:

- recognition of the principles of solidarity/loyalty or co-operation between governments at all levels
- mechanisms for horizontal co-ordination
- mechanisms for vertical co-ordination.

Principles of solidarity or loyalty

The constitutions of countries with multi-level governance in the civil law tradition often include reference to principles of solidarity or loyalty, expressly or by implication. Germany, Spain, Colombia and Portugal are examples. The meaning attributed to them varies, but they may have implications for fiscal equalisation, for example. Other countries, of which Canada and Australia are examples, typically do not recognise such principles, but may give effect to them in practical ways (again, including fiscal equalisation).

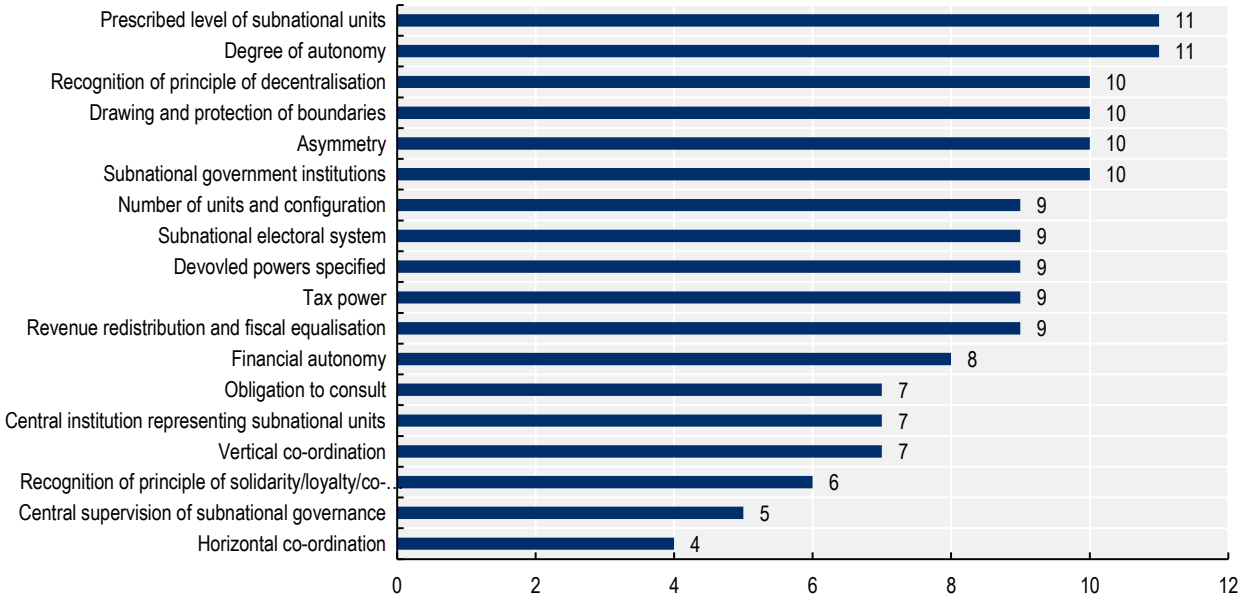
Horizontal co-ordination

Many countries have arrangements for co-ordination among units on the same level, including to resolve cross-border problems. Typically these are not included in the constitution but may be found in legislation or created ad hoc as the need arises. Spain is an exception, where Section 145 of the constitution anticipates the need for self-governing communities to co-operate in managing and delivering services, if authorised to do so by their statutes or autonomy, or if the agreements are approved by the parliament. Horizontal co-ordination also may sometimes be needed between territorial units and their equivalents in neighbouring countries: art. 289 of the constitution of Colombia makes provision for such co-ordination, if authorised by central legislation.

Vertical co-ordination

Countries typically have a range of institutional mechanisms for vertical co-ordination between the centre and other levels of government. Similar mechanisms may exist between constituent units and local government. These may take a variety of forms, some of which have constitutional status. The representation of constituent units in central institutions may, depending on design, contribute to vertical co-ordination: the institution of the Bundesrat in Germany is an example. The constitution of Portugal offers a good example of express provision for vertical co-operation, with requirements for central institutions to work in co-operation with self-government bodies; to consult them on matters that affect them; and to develop other forms of co-operation, including in relation to the delegation of responsibilities (art 229). A number of other constitutions identify other forms of co-operation: Article 73 of the French Constitution, for example, envisages central legislation allowing overseas territories to adapt central legislation to local conditions, at the request of the territorial community and subject to the applicable institutional act.

Figure 5.2. Number of countries with constitutional provisions in different themes of multi-level governance and territorial organisation (12 OECD countries)



Note: 12 countries are reviewed (n=12).
Source: Author's elaboration.

Key options and questions to consider

The core issues presented in this chapter are the need to identify the desired form(s) of multi-level governance and to decide on the extent to which the constitution should provide a framework for them rather than providing for them in special or general legislation.

Territorial organisation

- One core consideration related to the territorial organisation of the country is whether to opt for establishing a general system of multi-level governance. If the country does, governance can take the shape of a federation, as in the case of Mexico or the United States, for example; or that of a unitary state, such as in France or the Netherlands. A possible third option would be a "quasi-federal" or "regional state", which as indicated earlier applies to unitary countries having some characteristics of a federation. If selecting that third option, it is important to establish the degree of autonomy that the subnational level(s) of government will have. Examples range from relatively deep regional autonomy, as is the case of Spain, to lesser levels of autonomy, as in the case of Finland or Greece. In addition, it can be decided to have either one or multiple levels of devolved government.
- Another important issue to resolve regarding the country's territorial organisation has to do with the degree of symmetry in the autonomy provided to the subnational units. It can be decided to establish an asymmetrical territorial organisation wherein an additional degree of autonomy is granted to one or more selected territories due to their geographical location, the cultural identify of their population, or some other characteristic. For example, in case Indigenous communities are territorially concentrated, these could either be considered standard units in the general system of multi-level governance, or alternatively be granted a form of special autonomy. In case the Indigenous communities are not territorially concentrated, they might be recognised as a non-territorial constituency for the purposes of multi-level governance. Similarly, special recognition could be granted to one or more cities due to their political or economic relevance. They can also be defined as normal units in the general system of multi-level governance.
- In all of these cases, it is important to determine whether to specify the general territorial configuration and its particular arrangements – regarding, for example, the number of subnational government levels (regional/intermediary levels, municipal levels), or the status of Indigenous communities or certain cities – in the constitution, or rather in general or special legislation. In the case of the former, other relevant issues to consider are the level of detail provided in the constitution about the territorial organisation; the extent to which subsequent changes to the territorial configuration should be subject to special procedures that are protected by the constitution; what such procedures would entail; and whether consent from the affected units should be required.

Structure of subnational institutions

- Besides territorial organisation, consideration should be given to what institutions at the subnational level(s), such as legislative assemblies or forms of executive government, should be constitutionally specified or recognised, and what the constitution should say about these. Consideration can also be given to the question of whether subnational units should be able to propose their own legislative or executive institutions or rather consent to those proposed by the central government, and if such provisions need to be included in the constitution or rather in specific legislation. A particularly relevant question to reflect upon is whether or not to include articles pertaining to the electoral system of the subnational level(s) of government in the

constitution – as is the case with Colombia and Finland – or rather in general or special legislation – as is the case with Canada and France.

Division of powers and responsibilities

- The division of powers/competencies and functions among the different levels of government, and whether to embed these in the constitution or in specific legislation, are other crucial elements to take into consideration; such decisions have implications for a wide range of issues, such as service delivery and (democratic) oversight. It is important to make the distinction between competencies and functions. For each area of competency, different key functions can be distinguished: regulating, operating, financing and reporting.
- Questions arise in this regard. What powers/competencies and functions should (each of) the level(s) of subnational government have? What powers and functions are shared among one or more levels of subnational government and with the central government? What should the constitution stipulate on these matters? For example, it could include a general statement regarding the principles of subsidiarity or grassroots democracy, and leave specification of particular powers/competencies to general or special legislation. Alternatively, the constitution could confer general power on the subnational level(s) of government, subject to the reservation of specified exclusive powers by the centre.
- In most countries, rather than a clear-cut separation of responsibilities, the majority of them are shared across levels of government; the trend toward shared responsibilities has increased over the past decades. This may be explained by functional factors. For example, it is common for municipal and regional tiers of government to share responsibilities around issues of transport, infrastructure and water. Yet the trend may also be due to financing reasons (OECD, 2019[1]). This mutual dependency requires a clear assignment of functions, mutual understanding of who does what, and well-developed co-ordination mechanisms (OECD, 2019[1]). Furthermore, considerations about the assignment of powers/competencies should be closely linked to the conversation about the number of subnational levels of government. In two-tier subnational government systems across the OECD area, the regional level usually provides services of regional interest. In systems with more tiers, the breakdown of competencies can be more complex, sometimes resulting in co-ordination challenges (OECD, 2019[1]).
- Other issues to resolve in this regard have to do with the exercise by the subnational level(s) of government of their powers and functions on the one hand, and the checks and balances on their actions on the other. For example, subnational units could be allowed to exercise their competencies through legislation or rather a lower form of legislative power such as “regulation”. The decision in this matter is also related to the question of whether the lawfulness of the exercise of subnational competencies should be controlled by a constitutional court or by another type of court.
- Finally, consideration must be given to the issue of administrative oversight and control of subnational government units by the central government. There are important questions in this regard. To what extent should the exercise of subnational competencies be supervised administratively by the centre? Should the centre be limited in its powers of intervention, and if so, how? What should the constitution say about this?

Finance

- Regarding the topic of subnational finance, an especially relevant issue has to do with determining whether the constitution should recognise the financial autonomy of the subnational level(s) of government and if so, what principles should be established. For example the constitution, or alternatively general or special legislation, could set forth how subnational level(s) of government are to be funded (e.g. by their setting and collecting their own taxes, through a tax-sharing mechanism, by revenue redistribution from the central government, or through a combination of these).
- Additional questions to be considered include whether the constitution should contain a general commitment to fund any additional functions that may be transferred to the subnational level(s) of government from the centre; and if the constitution should incorporate a commitment to the equalisation of available public funds in order to ensure some equivalence in prosperity and well-being across the country. Regarding the latter, as mentioned earlier some of the benchmarking countries have included objectives for financial arrangements in their constitution, such as the "the just division of the national product between…regions", as is the case in Portugal, while others have a more detailed fiscal constitution. When considering including provisions on fiscal equalisation, it is important to take into account trade-offs related to, for example, the fiscal autonomy of subnational level(s) of government.

Central state decision making

- As shown previously, the benchmarking countries have created different institutions and procedures to ensure representation of the subnational units in central government decision-making mechanisms. In this regard, a relevant issue to reflect upon is whether the central legislature should have a second chamber that represents subnational government and, if so, how they should be represented, and how the Constitution should deal with this.
- In case subnational representation in the central legislative organ is adopted, for example through the creation of a second chamber, several additional questions arise that merit consideration. For example, should it have functions that are specifically related to subnational government (e.g. boundary changes, setting of local taxes or central government intervention in subnational unit affairs), and should such a chamber also represent any subnational units that are granted special autonomy? Similar issues to be considered include whether or not to regulate through the constitution representation of the subnational level(s) of government in other central government institutions, and whether to lay down constitutional provisions about the different forms of participation by subnational units in central government decision making about issues affecting them.

Co-ordination and co-operation

- Consideration should also be given to the issue of horizontal and vertical co-ordination. First, references to principles of solidarity or loyalty among the different levels of government can be included in the constitution. Such references may be tied to constitutional provisions for possible fiscal equalisation mechanisms. Secondly, consideration can be given to the question of whether to include in the constitution any provisions for horizontal co-ordination among subnational units, for example to deal with service delivery or cross-border problems. However, in most countries analysed for this chapter arrangements related to vertical co-ordination are found in general or special legislation. Similarly, consideration should be given to the question of whether or not the constitution should include provisions for vertical co-ordination (i.e. between the centre and one or more subnational levels, or between the intermediate/regional and lower subnational levels in the case of a three-tier system).

Table 5.1. Comparative overview of multi-level governance and territorial organisation

P=Present in jurisdiction; A=Absent in jurisdiction; U= presence uncertain; N/A=Not applicable to jurisdiction

1. Territorial organisation		Finland	Portugal	New Zealand	Colombia	France	Greece	Netherlands	Japan	Australia	Germany	Spain	Canada
Recognition of principle of decentralisation	Constitutional provision	P	P	N/A	P	P	P	A	P	P	P	P	P
	Provision in law	P	P	P	P	P	U	U	P	P	P	U	P
Provision for number of units and configuration	Constitutional provision	P	P	N/A	P	P	P	A	A	P	P	P	P
	Provision in law	P	P	P	P	P	P	P	P	P	P	P	P
Drawing and protection of boundaries	Constitutional provision	P	P	N/A	P	P	P	P	A	P	P	P	P
	Provision in law	P	P	P	P	P	U	P	U	P	P	P	P
Prescribed levels of subnational units													
General decentralisation	Constitutional provision	P	P	N/A	P	P	P	P	P	P	P	P	P
	Provision in law	P	U	P	P	P	P	U	P	P	P	P	P
Special autonomy	Constitutional provision	P	P	N/A	N/A	P	P	N/A	N/A	N/A	A	A	P
	Provision in law	P	U	N/A	N/A	U	P	U	N/A	N/A	A	U	U
Indigenous communities	Constitutional provision	A	A	N/A	P	A	A	A	A	A	N/A	A	P
	Provision in law	P	A	P	P	A	U	A	A	A	N/A	U	P
Cities	Constitutional provision	A	P	N/A	P	P	A	A	P	P	A	A	A
	Provision in law	A	P	P	P	P	U	U	P	P	U	U	U
2. Structure of subnational government		Finland	Portugal	New Zealand	Colombia	France	Greece	Netherlands	Japan	Australia	Germany	Spain	Canada
Degree of autonomy	Constitutional provision	P	P	N/A	P	P	P	P	P	P	P	P	P
	Provision in law	P	P	P	P	P	P	P	P	A	P	P	P
Provisions for asymmetry	Constitutional provision	P	P	N/A	P	P	P	A	P	P	P	P	P
	Provision in law	P	U	P	U	U	U	U	P	P	P	P	U
Provision for subnational government institutions													
General decentralisation	Constitutional provision	P	P	N/A	P	A	P	P	P	P	P	P	P
	Provision in law	P	P	P	P	P	P	P	P	P	P	P	P
Special autonomy	Constitutional provision	P	P	N/A	N/A	P	P	A	N/A	N/A	N/A	A	P
	Provision in law	P	P	N/A	N/A	P	P	A	N/A	N/A	N/A	U	U

Indigenous communities	Constitutional provision	A	A	N/A	P	A	A	A	A	A	N/A	A	A
	Provision in law	P	A	P	P	U	A	A	A	A	N/A	U	P
Cities	Constitutional provision	A	P	N/A	P	A	A	A	A	A	A	P	A
	Provision in law	A	P	A	P	U	U	U	P	A	U	U	U
Provision for subnational electoral system													
General decentralisation	Constitutional provision	P	P	N/A	P	A	P	P	P	P	P	P	A
	Provision in law	P	P	P	P	P	P	P	P	P	P	P	A
Special autonomy	Constitutional provision	A	P	N/A	N/A	A	A	N/A	N/A	N/A	N/A	A	A
	Provision in law	P	P	N/A	N/A	P	P	N/A	N/A	N/A	N/A	U	A
Indigenous communities	Constitutional provision	A	A	N/A	P	A	A	A	A	A	N/A	A	A
	Provision in law	P	A	P	P	A	A	A	A	A	N/A	U	P
Cities	Constitutional provision	A	A	N/A	P	A	A	A	A	A	A	P	A
	Provision in law	A	U	P	P	A	A	A	P	A	U	U	U
Protection of cultural rights	Constitutional provision	P	P	N/A	P	P	P	A	A	A	A	P	P
	Provision in law	P	U	P	P	U	U	U	U	A	A	U	P
Degree of central/ local control	Constitutional provision	A	P	N/A	P	A	A	A	P	A	P	P	P
	Provision in law	P	U	P	P	U	U	U	P	A	P	U	U
3. Division of powers and responsibilities		Finland	Portugal	New Zealand	Colombia	France	Greece	Netherlands	Japan	Australia	Germany	Spain	Canada
Devolved powers specified													
General decentralisation	Constitutional provision	A	P	N/A	P	A	A	P	A	P	P	P	P
	Provision in law	P	P	P	P	P	P	P	P	A	A	P	A
Special autonomy	Constitutional provision	A	P	N/A	N/A	P	P	N/A	N/A	N/A	N/A	A	P
	Provision in law	P	P	N/A	N/A	P	P	N/A	N/A	N/A	N/A	A	A
Indigenous communities	Constitutional provision	P	A	N/A	P	A	A	A	A	A	N/A	A	P
	Provision in law	P	A	P	P	A	A	A	A	P	N/A	A	P
Cities	Constitutional provision	A	A	N/A	P	A	A	A	A	A	A	A	A
	Provision in law	A	U	A	P	A	A	U	P	A	A	U	U
4. Finance mechanisms		Finland	Portugal	New Zealand	Colombia	France	Greece	Netherlands	Japan	Australia	Germany	Spain	Canada
Provision for financial autonomy													
General decentralisation	Constitutional provision	A	A	N/A	P	P	P	P	A	P	P	P	P

	Provision in aw	P	U	A	P	P	P	P	P	P	P	U	U
Special autonomy	Constitutional provision	P	A	N/A	N/A	A	A	N/A	N/A	N/A	N/A	A	P
	Provision in law	P	U	N/A	N/A	P	U	N/A	N/A	N/A	N/A	U	U
Indigenous communities	Constitutional provision	A	A	N/A	P	A	A	A	A	A	N/A	A	A
	Provision in law	A	A	A	P	A	A	A	A	A	N/A	A	P
Cities	Constitutional provision	A	A	A	P	A	A	A	A	A	A	P	A
	Provision in law	A	U	A	P	A	U	U	P	A	A	U	U
Tax power													
General decentralisation	Constitutional provision	P	P	N/A	P	P	A	P	A	P	P	P	P
	Provision in law	P	P	P	P	P	P	P	P	P	P	P	P
Special autonomy	Constitutional provision	A	P	N/A	N/A	P	A	N/A	N/A	N/A	N/A	A	P
	Provision in law	P	P	N/A	N/A	P	P	N/A	N/A	N/A	N/A	A	P
Indigenous communities	Constitutional provision	A	A	N/A	P	A	A	A	A	A	N/A	A	A
	Provision in law	A	A	A	P	A	A	A	A	A	N/A	U	A
Cities	Constitutional provision	A	A	N/A	P	A	A	A	A	A	A	P	A
	Provision in law	A	U	A	P	P	U	U	A	A	A	P	U
Revenue redistribution and fiscal equalisation	Constitutional provision	P	P	N/A	P	P	P	A	A	P	P	P	P
	Provision in law	P	U	P	P	P	P	U	P	P	P	P	P

5. Impact on central state decision making		Finland	Portugal	New Zealand	Colombia	France	Greece	Netherlands	Japan	Australia	Germany	Spain	Canada
Obligation to consult	Constitutional provision	A	P	N/A	P	P	A	A	P	A	P	P	P
	Provision in law	A	U	P	P	U	U	U	P	A	P	P	U
Central institution representing subnational units	Constitutional provision	P	A	N/A	A	P	A	P	A	P	P	P	A
	Provision in law	A	A	A	A	A	A	A	P	A	P	A	A
Central supervision of subnational governance	Constitutional provision	A	P	N/A	P	A	P	P	A	A	A	P	A
	Provision in law	A	U	P	P	U	U	P	P	A	P	U	A

6. Co-ordination mechanisms		Finland	Portugal	New Zealand	Colombia	France	Greece	Netherlands	Japan	Australia	Germany	Spain	Canada
Recognition of principle of solidarity / loyalty / co-operation	Constitutional provision	A	P	N/A	P	P	A	A	A	A	P	P	A
	Provision in law	P	U	P	P	U	U	U	U	A	P	U	P
Horizontal co-ordination	Constitutional provision	A	A	N/A	P	A	A	A	A	A	P	P	P

	Provision in law	P	U	A	P	U	U	U	P	P	P	U	U
Vertical co-ordination	Constitutional provision	A	P	N/A	P	P	P	A	A	A	P	P	P
	Provision in law	P	U	P	P	U	U	U	P	P	P	U	U

Note: This table compares the extent to which there is constitutional provision for each of these themes and associated sub-themes across all 12 countries. Where it is useful to do so, the table also breaks down sub-themes in line with the four different forms of territorial organisation. For each sub-theme, the status of provision in the constitution and in legislation are indicated for each country.
The category of "legislation" is used in the table to cover all the sources of authority for multi-level governance that fall outside the concept of a formal constitution. For the most part, the category comprises ordinary statutes or their equivalent. In some cases however, it also includes statutes with special status, sometimes referred to as "organic" law, which are used for various purposes in France, Spain, Colombia and Portugal. In addition, for the sake of completeness of coverage, but with some loss of accuracy, the legislation category includes some of the other sources for organising multi-level governance – including codes of practice, which sometimes are used for intergovernmental co-ordination in older constitutional systems.

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Notes

[1] The OECD has conducted extensive analyses on multi-level governance and decentralisation frameworks in recent years, including in its report *Multi-Level Governance Reforms* (OECD, 2017[4]); *Making Decentralisation Work: A Handbook for Policy-Makers* (OECD, 2019[1]); and through the *2019 Report of the World Observatory on Subnational Governance Finance and Investment* (OECD/UCLG, 2019[5]), among others.

[2] Power that is retained by the government after other powers were distributed to other authorities in the course of elections or by the process of delegation.

[3] Constitution of Colombia, art. 317. This article also provides for a proportion of that revenue to be allocated to certain matters, including protection of the environment, specified by legislation.

6 Constitutional Review

Chapter 6 deals with the various forms for assessing the constitutionality of the actions and decisions of governments, parliaments, and other authorities, collectively referred to as constitutional review. It highlights that constitutions often put in place provisions to this end on whom should be entrusted with the responsibility of interpreting and enforcing the constitution, and how this responsibility should be allocated. The chapter provides an overview of the different forms and models of constitutional review, and offers several considerations for striking the right balance among different values, including the protection of democracy, upholding the rule of law and the superiority of the constitution, but also the insulation of the courts from political influences, the protection of minorities' representation and individual human rights.

Key issues

The experience of OECD member and partner countries can suggest and help inform several considerations for the design of a system of judicial constitutional review, especially one that involves the operation of a constitutional court. Establishing a model of constitutional review often involves balancing different values: democracy, majoritarian rule, upholding the rule of law and the supremacy of the constitution, protection of minorities' representation, and individual human rights – as well as affirming the constitutional court's independence from political parties while preventing excessive judicial activism through self-restraint. Constitutional courts' design involves political trade-offs among these values. Key issues and options may include:

- *Limiting and clearly demarcating the powers of constitutional courts,* in the constitution or in subsequent constitutional legislation, may facilitate a balance among conflicting values and reduce institutional disagreements in the future between constitutional and ordinary courts.
- *Three essential tenets for constitutional courts design include partisan independence, a balanced composition and self-restraint*. Constitutional courts tend to acquire legitimacy if they contribute to democracy and human rights protection, are perceived as politically independent, and practice a moderate activism or self-restraint, even if certain constitutional courts have been quite active in policy making (e.g. Colombia). *Due consideration of the form of judicial review (mild, strong, or a mixed system)* is also key.
- *The substantive scope of competencies assigned to the constitutional court varies across countries.* One option is for the constitutional court to deal mainly with the "organic" part of constitutional provisions, i.e. the vertical and horizontal allocation of powers and responsibilities to the various political actors in the country**.** In some countries, constitutional courts have also been entrusted with ancillary functions.
- *The protection of fundamental rights***.** A specific area of substantive competency that should be considered when designing a system of constitutional review is to decide whether the constitutional court will oversee fundamental rights protections, or whether that will be left for ordinary courts, including administrative and criminal courts. If ordinary courts are to enforce fundamental rights, some aspects of traditional judicial education would have to be modified by adding attention to matters linked to that rights protection, beyond the usual insistence on technical legal analysis. Another option is to entrust the protection of fundamental rights to the constitutional court. Assigning the constitutional court a last instance character in the national sphere does not preclude appealing to supranational courts, such as the ones outlined below.

Introduction

This chapter deals with the various forms of assessing the constitutionality of the actions and decisions of governments, parliaments and other authorities.[1] Reviewing the constitutional conformity of public authorities' behaviours and decisions is an almost universally accepted practice, one that has grown exponentially over the past few decades in most democracies in Europe and elsewhere (Ramos, 2006[1]).

Constitutions often put in place provisions detailing who should be entrusted with the responsibility of interpreting and enforcing the constitution, and how this responsibility should be allocated. Thus 158 out of 193 countries in the current membership of the United Nations, including 33 of 37 OECD member countries, include some sort of formal provision for constitutional review (Ginsburg, 2007[2]). With some exceptions (e.g. Denmark, Sweden, Finland, the Netherlands, the United Kingdom, New Zealand and Israel, with variations), the great majority of constitutional systems around the world today give judges the power to rule on the constitutionality of government action; the proportion of constitutions that explicitly provide for judicial review has increased from 38% in 1951 to 83% in 2011 (Ginsburg, 2007[2]). Seventy-nine written constitutions have designated constitutional courts or councils (including 14 OECD countries: Austria, Belgium, Colombia, the Czech Republic, Germany, Hungary, Italy, Latvia, Lithuania, Luxembourg, Portugal, Slovenia, Spain and Turkey). For example, constitutional review in continental Europe is usually entrusted to a constitutional court that centralises the constitutional interpretation and assessment of constitutionality. The constitutional courts are usually outside the ordinary judicial systems, although there is a wide range of different approaches. The French 1958 Constitution in turn created the *Conseil Constitutionnel* (Constitutional Council), a non-judicial, political body to establish political control of constitutionality. Another 60 constitutions have explicit provisions for judicial review by ordinary courts or the supreme court. Finally, a small number of constitutions provide for review of constitutionality by the legislature itself (Project Comparative Constitutions, n.d.[3]). There are no universal models. In Finland, Sweden and Switzerland, for example, assessment of the constitutionality of legislation is mainly parliamentarian and recently also judicial, though limited. In the British Commonwealth countries, the constitutionality assessment rests mainly with parliaments and, in a limited way, the high courts.

Moreover, institutions that can provide *ex ante advice* on the constitutional implications of potential legislation also exist, such as the Chancellor of Justice in Estonia, the Cabinet Legislation Bureau in Japan, the US Office of Legal Counsel in the Department of Justice, the Council of State in the Netherlands and the State Council in Spain. The sharing of interpretive responsibility across multiple institutions usually means that these institutions will need to exchange views and perhaps disagree with each other on matters of constitutional interpretation in the normal course of events. This dialogue is not limited to courts and legislatures (Ferreres Comella, 2009[4]). Not only do the executive and non-partisan bodies participate in constitutional dialogues, but their participation also may be formalised and mandatory.[2]

Several models of constitutional judicial review are designed to address questions of democratic legitimacy; these are known as the "*the anti-majoritarian difficulty*" (Waldron, 2008[5]). The essence of these is that when a judge or a constitutional court can review a piece of parliamentary legislation, it can pose a possible problem in relation to democratic principles (Cappelletti, n.d.[6]). Courts that exercise the power of constitutional review – that is, the power to set aside legislative and executive action on the basis of a conflict with constitutional norms – play a prominent and potent role in democracies. From defining the personal freedoms of individuals and regulating the financing of political competition to ending election disputes and even removing elected prime ministers from office, courts may significantly influence politics (Vanberg, 2015[7]). This political nature of constitutional courts is highlighted by the fact that the appointment of their members often fundamentally follows political criteria, not just merit-based principles (Commission, 1997[8]).

Brief overview of issues

At their origin in the 1920s, constitutional courts were designed to deal solely with conflicts between the other branches, and in federal nations between the national and subnational governments. By mid-century though, courts were given the power to resolve complaints brought by individuals that their constitutional rights – and sometimes the constitutional rights of others – had been violated. Procedures for resolving individual rights complaints vary widely. In contemporary democracies, what can be affirmed is that almost all contemporary constitutions provide that a constitutional challenge to legislation or executive action can be brought in court, no matter whether the complaint relates to individual rights or to provisions dealing with the allocation of power within the government. Most constitutional systems have exceptions for a small class of constitutional claims, labelled "political questions" or "non-justiciable" questions. The modern tendency is to define these exceptions rather narrowly.

There is often a distinction between challenging primary legislation (statutes) and secondary (executive) legislation. Particularly in systems with constitutional courts, challenging primary legislation usually can be possible only before the constitutional court, whereas regular courts can assess conformity of the secondary legislation with the primary legislation (often only *inter partes*, i.e. applicable for the specific individual case, by not applying the legislation they consider contrary to the statute – so-called *exceptio illegalis*). In such systems, when a regular court comes across a constitutionally doubtful provision of a statute, they can refer the case to the constitutional court.

Historically, the choices between a specialised constitutional court and a generalist one, and between concentrated and dispersed constitutional review, were thought to be consequential. Experience over the past century has shown that the differences in practice were relatively small. Contemporary constitutions tend to disperse constitutional review, though modern constitutions continue to choose between creating a specialised constitutional court and having a single apex supreme court with jurisdiction over claims arising under ordinary and constitutional law. In systems with two apex courts, conflicts between the courts occasionally arise – usually when the constitutional court says that a statute would be unconstitutional unless it is interpreted in a specific way – but overall these conflicts have been worked out harmoniously.

Given the great variety of ways and means of settling constitutional disputes and ensuring the prevalence of the constitution, the analysis below aims to systematise the multiple models of constitutional review that exist in OECD countries on a continuum from the absence of judicial review (e.g. the Netherlands) to constitutional courts that have supremacy in emitting authoritative (binding) interpretations of the constitution (e.g. Germany or Spain).

Core features of the main models and forms of constitutional review

A number of historical and institutional factors have influenced the design of constitutional review, including but not limited to decentralisation structure, institutional legacy, type of legal family, the degree of political fragmentation, authoritarian past, cross-fertilisation across countries, and undisrupted parliamentary sovereignty (Castillo-Ortiz, 2020[9]). A first categorisation should be put forward between mild (weak) and intense (strong) court intervention.

Forms of review: Mild and intense forms of judicial constitutional review

Looking at this dichotomy among OECD benchmark countries, variations occur from Finland, New Zealand, Australia and Switzerland, where the judicial intervention is comparatively mild, to Austria, Colombia, Germany and Spain, where it can be rather intense. France, Mexico and Portugal are countries in between, with varied forms of intensity. Thus there is a clear continuum of approaches to address this tension through different forms of judicial review in OECD countries.

With both mild- and weak-form judicial reviews, judges' rulings on constitutional questions are expressly open to legislative revision in the short run. Courts are first given the opportunity to explain why in their reading a challenged statute is unconstitutional. Having done so, they then step aside and let the legislature respond. The legislative deliberations are thus informed, but not bound, by the courts' arguments. In the end, if a majority of legislators disagree with the courts' constitutional interpretation, a mild-form review allows them to adopt their own vision (Mailey, 2018[10]) (Tushnet, 2006[11]). Nonetheless, in most cases, mild review enables the courts to invalidate legislation when it is patently inconsistent (or as the Finnish and Swedish Constitutions put it, "in evident conflict") with any reasonable interpretation of constitutional language. In terms of scope and timing, mild-form review could be employed for varying parts of a constitutional regime and tailored to the political situation. For example, it could apply to rights provisions (the dogmatic part of the constitution) and not to the structural components (the organic part of the constitution), such as federalism or separation of powers, or to certain rights but not others. It could apply to legislative action only but not executive, or include a legislative override of judicial decisions on executive power but not an executive override of judicial decisions.

Intense or strong-form review occurs when the courts have the last word (as opposed to parliament). In countries with strong-form review, the constitutional court is able to enforce its own interpretation of the constitution.

A question that may arise about strong-form review concerns what is known as the "counter-majoritarian difficulty" (Bickel, 1962[12]). This refers to the apparent democratic anomaly that non-elected judges may have the ability to strike down laws approved by elected representatives of the people. Mild-form review is seen by proponents as an effective remedy to overcome this tension, as it provides an institutional mechanism to ensure implementation of laws that correspond to the interpretation of constitutional rights held by the majority of citizens (through their representatives in parliament). However, legitimacy of strong-review mechanisms in the countries that have adopted them can be seen to rest on society's acceptance and recognition of such review through the constitution. The advantages and challenges generated by each model are the subject of debate.

Models of constitutionality assessment: Parliamentary, Kelsenian and Diffuse

Three broad models of constitutionality assessment may be identified that much depend on the political and constitutional history of each country. These three models hinge on the locus of the review (parliament or courts). While these categories are largely grounded in legal theory and regulations, and may not have a strong bearing on the different outcomes and effectiveness of constitutional review in practice, they can frame the discussion around the main options to establish constitutional review:

- parliamentary sovereignty model
- European continental (or Kelsenian-Austrian) concentrated and abstract model
- diffuse or dispersed judicial review model.

Parliamentary sovereignty model with limited or mild judicial review

In these models, judicial review of constitutionality is either forbidden (art. 120 of the constitution of the Netherlands) or limited (Finland, Sweden, New Zealand, Canada, the United Kingdom and Switzerland). In both Finland and Sweden there is an article in the constitution that allows courts to perform constitutional judicial review and to disapply a provision that is seen to be in *evident conflict* with the constitution (in Finland, the *Perustuslaki* [Finnish Constitution], art. 106; in Sweden the *Regeringsform* [Swedish Constitution], art. 14, chapter 11).[3] At present only one decision can be found where Article 106 has been applied by the Finnish Supreme Court with an outcome that left a provision of a law unapplied. Importantly,

the power to control constitutionality in Finland is still mainly concentrated in the Constitutional Law Committee of Parliament (*Perustuslakivaliokunta*) (Hautamäki, 2006[13]).

In some countries under this model, the legislature may stand on equal or even superior footing to the courts, as demonstrated by the "new Commonwealth model of constitutionalism" (Gardbaum, 2013[14]) found in Canada, the United Kingdom and New Zealand. According to this model, supreme authority over all matters in the legislature is vested in parliamentary sovereignty – including the articulation and enforcement of constitutional norms, as well as responsibility for implementing constitutional values.

In these countries, courts interpret and enforce the constitution, yet the legislature retains the final word on what will be law. All three countries plus Australia employ a mild type of judicial review. In Canada, parliament can pre-emptively immunise statutes from judicial scrutiny on fundamental rights grounds and override court decisions invalidating statutes deemed in breach of the 1982 Charter of Rights and Freedoms. In the United Kingdom, the courts may declare that a law violates the European Convention on Human Rights, but parliament has the power to leave the law in place. In New Zealand, the courts are obligated to interpret statutes in such a way as to avoid conflict with the Bill of Rights, although the parliament can override such an interpretation (De Visser, 2019[15]). Likewise, in Switzerland federal laws have immunity from judicial scrutiny (art. 190 of the Constitution).

The main idea that appears to unite the primary bills of rights of Canada, New Zealand and the United Kingdom ("New Commonwealth" Bills of Rights) is that while courts can and should play an important role in the protection of fundamental rights, they should not be the only institutions capable of interpreting those rights. In this context, Section 33 of the Canadian Constitution Act 1982 gives federal and provincial parliaments in Canada the power to "override" certain rights contained in the 1982 Canadian Charter of Rights and Freedoms for renewable five-year periods, while the Human Rights Act 1998 in the United Kingdom withholds from courts the power to invalidate acts of parliament, thereby enabling the UK central parliament to simply ignore human rights rulings with which it disagrees (Mailey, 2018[10]). In case of a declaration of incompatibility, a fast-track legislative procedure can be triggered pursuant to the Human Rights Act 1998.

In Sweden, if a court or any other public body considers that a legal provision conflicts with the provision of a fundamental law, the legal provision may not be applied. However, if the provision has been approved by the parliament or by the government, it may be set aside only if the *fault is manifest* ("evident conflict", Article 14, Section 11 of the Swedish Constitution).

The Kelsenian model of abstract, concentrated review by one specialised court

The Kelsenian model is named after Hans Kelsen, whose proposals served as the conceptual basis for the constitutional courts created after the First World War: the Austrian and Czechoslovakia Constitutional Courts established in 1920 and the Spanish Court of Constitutional Guarantees established in 1931. These types of courts for constitutional review are now found around the world. They exist in most EU countries within the civil law tradition, except in the Netherlands and the Scandinavian countries. France put in place a narrower judicial review of legislation in accordance with its traditions, although in 2008 this was expanded to include a form of concrete review (i.e. the *question prioritaire de constitutionalité,* or QPC).

The centralised Kelsenian system of constitutional judicial review is built on two pillars. First, it concentrates the power of constitutional review within a single judicial body, typically called a constitutional court; second, it situates that court outside the traditional structure of the judicial branch.

These pillars are based on several assumptions. First of all, ordinary judges are seen as mandated to apply law as legislated or decided by the parliament; consequently, there is subordination of the ordinary judges to the legislator. At the same time, due to a strict hierarchy of laws, constitutional judicial review is seen as incompatible with the work of an ordinary court. Hence, under this model only an extrajudicial organ can effectively restrain the legislature and act as the guarantor of the will of the constitutional

legislator. To this end, the Kelsenian model proposes a centralised body outside the judiciary to exercise constitutional review (Garoupa, 2016[16]).

Application of the Kelsenian model in each country has conformed to local conditions, and therefore the competencies and organisation of constitutional courts are usually much broader than that of a simple "negative legislator".[4]

Abstract review (as traditionally employed in France) involves political institutions asking the court to provide an authoritative interpretation of the constitutional text removed from a real, concrete dispute. Abstract constitutional review by its very nature limits the ability of a constitutional court to attempt to condition other courts, because there is no direct relation between the review of legislation in abstract and concrete adjudication – yet it can create a strong bulwark against political transformation. This type of review can make a constitutional court less judicial and more political-legislative in nature. It must be noted that where the question of constitutionality of a statute arises in a concrete review, the same can apply (see below for further discussion).

Abstract review has existed in tandem with *concrete review* (in Germany and Spain, for example). Concrete review requires that the court deal with "a specific case and controversy" in which the constitutional question is raised. There is also a heterogeneity of approaches in *concrete reviews* under this model. There are examples where in Kelsenian-type courts concrete review has blurred the separation between the constitutional court and the rest of the judiciary – either in the form of incidental referrals (*incidentaliter*) such as the QPC in France, or as direct constitutional complaints such as *amparo* in Spain[5] or *tutela* in Colombia (*principaliter*). It can induce the constitutional court to interfere with judicial decisions and participate in the resolution of individual cases, which can result in a less distinct delimitation of jurisdictions, and consequently in the occasional emergence of conflicts of competence between the constitutional court and other higher courts.

Some countries have only put in place abstract or concrete reviews, while others combine both. Thus the first version of the 1920 constitution of Austria granted to the Constitutional Court the powers to perform the abstract review of legislation and did not provide for any direct links between the judicial application of statutes and the jurisdiction of the Constitutional Court. In this procedure, the right to bring the case before the Constitutional Court is reserved for the highest state bodies and officials (the president of the republic, the cabinet, the ombudsman), groups of members of parliament (i.e. parliamentary opposition) and similar bodies. The constitutionality of a statute is examined *in abstracto*, not in the context of any actual case. Within a decade, Austria also introduced a procedure for the incidental review of statutes by the constitutional courts, which was based on referrals of constitutional questions by ordinary courts to the constitutional court. In most systems, if an ordinary court finds that a statutory provision that it must apply in a concrete case is unconstitutional, it must refer the question of constitutionality to the constitutional court. Since then, different combinations of abstract and incidental review of statutes have become a more common feature of all the constitutional courts gradually emerging in Europe – the French Constitutional Council being the last one in 2008, as mentioned.

The procedures for constitutional complaint (*Verfassungsbeschwerde* [Germany] or *amparo* [Spain]) were in turn first introduced in Austria and later adopted in Germany, Spain and several democracies of Central and Eastern Europe. Both procedures (incidental review and the constitutional complaint) tend to invite the constitutional courts to participate in the adjudication of individual cases by ordinary jurisdictions, either by resolving preliminary questions of the constitutionality of statutes or by reviewing the constitutionality of final ordinary judicial decisions (Garlicki, 2007[17]).

Ancillary powers

Some constitutional courts have expanded ancillary powers in different yet important areas such as verifying elections and regulating political parties (illegalising them or auditing their accounts), as in Colombia, Germany, Portugal and Turkey. Besides the core task of constitutional review of legislation and

administrative action, constitutional courts have been granted other powers, including such duties as proposing legislation (Colombia); certifying states of emergency; impeaching senior governmental officials; adjudicating election violations (France); and auditing political party financing (Portugal and Turkey). However, caution is needed in giving ancillary powers to constitutional courts: "the further the court gets away from its paradigm task of review based on interpretation of a fundamental text, the more it may find itself acting in a fashion that undermines its own legitimacy. Furthermore, the need to act strategically over a long series of cases that call on various powers of the court means that sometimes 'pure' dispute resolution will be compromised by political expediency. Ancillary powers, then, are some, but only some, of the tools the court must use to build up its political role over time" (Ginsburg and Elkins, 2009, p. 1461[18]).

The model of diffuse judicial constitutional review

The model of diffuse constitutional review is also often called the American model because it originated from case law of the US Supreme Court (Marbury v. Madison). According to this model, any American courts have the power to strike down laws, statutes and certain government actions that they find violates the constitution of the United States.

The model is a dispersed system, meaning that judicial constitutional review can be exercised by any judge or court that is trying a case. There is no special court or specific procedure. Each judge can apply the constitution in their own manner, and *disapply* the law in favour of the constitution. The questioned law will not apply in the particular case nor in subsequent cases, but it is not expelled from the legal system; it remains in place, even if this does not change the criteria taken into consideration to declare its inapplicability.

The decision of the judge produces *inter partes* effect only, given that there is no annulment of the general effects (Campillay, 2017[19]). Under this diffuse system of constitutional review, constitutional matters are dealt with by any ordinary court (a decentralised, diffuse) under ordinary court proceedings whereby the supreme (or high) court in the system provides for the uniformity of jurisdiction through the established appeals system. In Europe, Denmark, Estonia, Ireland, Norway, and Sweden have this system. Canada and the United States as well as many Latin American countries (except Colombia, Ecuador and Peru) also adopted this system or some of its variations. However, in Colombia the protection of constitutional rights can be invoked before any court in the land as well as in Mexico. Therefore, these countries enjoy a mixed system of concrete and diffuse constitutional review.

Selected procedural aspects of judicial constitutional review

This section focuses on key procedural aspects linked to constitutional judicial review: standing rights, contents and effects of the constitutional action, adjudication and dissenting opinions, while acknowledging that some of them may at times be more substantive than procedural.

Standing rights

Typically, three different actors can access a constitutional court (including in diffuse models such as in Mexico with *amparo*): a) institutional-political actors/officials; b) ordinary judges; and c) private litigants (Pasquino, 2013[20]).

Institutional-political actors/officials

The most common cases of referral by institutional-political actors involve 1) a selected number of public authorities (president, prime minister, parliamentary speaker, etc.); 2) representatives of the *Länder* (in general the political sub-units of a federal system: regions, provinces, states), as in Germany, Austria,

Spain, Switzerland and other countries with strong decentralisation; 3) a number of members of parliament, as in the French, German and Spanish constitutional review systems.

The French *saisine parlementaire (*parliamentary referral) of Article 61 of the constitution, as amended in 1974, means that the Constitutional Council functions as an *intermediary body* between the majority and the minority in parliament at the very moment statute laws are passed by the majority but not yet promulgated by the president of the Republic or published in the Official Gazette. In that case the Constitutional Council plays the role of a balancing mechanism between the party or coalition that wins the election and the loser(s), avoiding a case where the relationship among them becomes one of all or nothing: all the power to the majority, no power to the minorities. Important also in this first category of referrals is the situation where there is a conflict among the high state bodies. Constitutional democracy (*état de droit constitutionnel* in France*, verfassungsmässiger Rechtstaat* in Germany) is a system of shared/divided power, not only vertically as in federal regimes, but also horizontally among the different branches exercising political authority at the central level. In these cases, the constitutional court works as the organ that must arbitrate, maintain the balance among the different branches of political authority, and protect the polyarchic/pluralistic structure of the constitutional order.

Ordinary judges

When the referral comes from ordinary judges, as is the case with the Italian *questione incidentale*, the Spanish *cuestión de inconstitucionalidad*, the German *konkrete Normenkontrolle*, and since 2010 the French QPC, the role of the court is to be a counter-power in relation to the elected lawmakers both present and past, something that is not possible through control *ex ante* like the role performed by the *saisine parlementaire.* In the case of the diffuse control model, ordinary judges do not refer the issue to the constitutional court, but they adjudicate the legal controversy themselves and subsequently it may reach the constitutional court (e.g. in Colombia and Portugal) or the supreme court (e.g. in Mexico) through the ordinary appeal mechanisms or some variation of it (see next paragraph).

A special mention of administrative law

Public law combines constitutional, criminal and administrative concerns. In Germany administrative law is referred to as “concretised” constitutional law, and in the United States it is often called “applied” constitutional law. In the United Kingdom, given that there is no written constitution, it is sometimes referred to as “natural justice”.

Administrative law has a constitutional character in that its goals are the protection of rights, control of the administration and the setting of limits to government (Ginsburg, 2009[21]) (Ginsburg and Chen, 2009[22]). In the OECD benchmark countries, administrative justice is the ordinary/usual instrument to challenge government decisions and protect individual rights before the public powers of the state (e.g. in New Zealand, Australia, Colombia, Portugal, Mexico, Spain, France, Germany, Austria and Switzerland).

Constitutional courts, by the very nature of their exclusive and high jurisdiction, frequently become embroiled in high-profile politics that can sometimes undermine rather than enhance their ability to protect the fundamental rights of citizens. Administrative courts may in such circumstances be more effective on several levels. Routine matters like driver’s licences, taxation disputes and building permits make a great deal of difference to more people than the high principles of a constitutional text, although they do not always carry as much symbolic weight. Even if administrative law cannot avoid confrontations with politics (Rose-Ackerman and Lindseth, 2010[23]), in transitions from authoritative regimes to democracy administrative and criminal law, and especially administrative and criminal justice, may be more effective than constitutional law and constitutional courts in bringing about real transformation, through the mundane interaction that takes place between the public authorities and the citizens.

Private litigants or constitutional complaint

Referral by litigants and by private individuals exists in several countries, such as Germany *(Verfassungbeschwerde),* Spain *(recurso de amparo),* Colombia *(tutela),* Portugal *(appeal)* and Mexico *(amparo),* which allows a citizen to appeal to the supreme court or to the constitutional court. In this case the court acts as the guardian in the last instance of constitutionally protected rights after all appeals have been exhausted within the ordinary court system. The appeal for constitutional protection in Spain shall be available in accordance with the provisions of Organic Law 2/1979 on the Constitutional Court, against violations of freedoms resulting from provisions, legal enactments, omissions or flagrantly illegal actions (*via de hecho*) by public authorities of the state, the autonomous communities and other territorial, corporate or institutional public bodies, as well as by their officials or agents. The right to lodge an appeal for protection with the Constitutional Court requires that the individual seeking protection first exhaust all judicial remedies available, because the ordinary courts are considered the "first guarantors in the legal system". In practice, the Constitutional Court is a "special court of appeals" when ordinary legal means cannot repair the violated fundamental rights. In addition to the exhaustion requirement, petitioners must demonstrate the "special constitutional relevance" (*especial transcendencia constitucional*) of their complaint. The Portuguese constitutional appeal resembles the Spanish *amparo*, although in Portugal the litigant must follow an appeal system and does not need to demonstrate a special constitutional relevance, only that their fundamental rights have not been respected.

The German Constitutional Court exercises centralised review, which means that it is the only body that interprets the Basic Law (i.e. Constitution). The Basic Law did not include a constitutionally guaranteed right of direct access to the Constitutional Court (via the constitutional complaint or *Verfassungsbeschwerde*) until 1968. In fact, over 95% of the Court's proceedings are now hearings on constitutional complaints. Any natural or legal person may lodge a constitutional complaint at the Constitutional Court "stating that their fundamental rights or certain rights that are equivalent to fundamental rights have been violated by a German public authority". The constitutional complaint must also affect the complainant "individually, presently and directly with regard to his or her fundamental rights". Lastly, the constitutional complaint is only admissible before the Court once all other legal remedies are exhausted. To satisfy the exhaustion requirement, the petitioner must seek non-constitutional legal avenues in the ordinary courts and appeal unfavourable rulings within the ordinary courts, except in (rare) cases when a statute affects the petitioner individually and directly and no intervention in the form of administrative or court decision is needed.

The Colombian Constitution mixes a Constitutional Court, which is typical in centralised systems, with a diffuse form of judicial review, the *acción de tutela*. This is a preferential and summary procedure lodged by an individual with any court seeking immediate protection of their fundamental constitutional rights. In Mexico, the individual complaint, or *juicio de amparo* (writ of amparo) is a request for protection from laws or acts issued by the authority, or omissions committed by the authority, which infringe the fundamental rights recognised and protected by the Constitution. There are direct and indirect *amparo* actions. Indirect *amparos* begin in a district court with the option to appeal to a higher court, and are brought against non-judicial government agents (i.e. the police, the public administrators) to challenge, among other things, federal or local laws, international treaties, regulations and decrees. Direct *amparos* are initiated in the Collegiate Circuit Courts, but may be brought directly to the Supreme Court, and challenge final judgements in lower, labour and administrative courts. There are five types of specific amparo actions: amparo as a defence of individual rights, amparo against laws, amparo questioning the legality of judicial decisions, administrative amparo, and amparo for agrarian matters (Lalisan, 2020[24]).

Contents and consequences of the constitutional action

The differentiation between abstract and concrete constitutional review is perhaps the first important aspect to understanding the various modalities of judicial constitutional review adjudication (Ginsburg and

Garoupa, 2011[25]) (Garoupa and Ginsburg, 2015[26]). In abstract review, the main addressee of the constitutional court ruling is the political establishment, whereas in concrete review the main interested public in the constitutional ruling is judicial and the involved individuals:

- *Political audience in abstract review* – The main influence of the court is exercised through screening legislation and shaping policy making. Here, the political audience appears to be more directly relevant to this activity than the judicial audience, although in many cases the constitutional court may need the judicial courts to enforce its decisions, such as with the French "conforming interpretation" approach (particularly if other branches of government reject the constitutional court's decision to void legislation).
- *Judicial audience in concrete review* – The judicial audience plays an important role in concrete review cases because its implementation often (though not always) requires co-operation between the constitutional court and ordinary courts. In many cases, concrete review can blur the separation between the constitutional court and the rest of the judiciary, whether it is initiated by incidental referrals from ordinary judges or direct constitutional complaints by an interested litigant. It can induce the constitutional court to participate in the resolution of individual cases, either substituting for or complementing ordinary dispute resolution. The constitutional court substitutes for ordinary courts when it decides cases that would otherwise be within the judicial remit; it complements them when it serves to resolve constitutional questions that are then implemented by ordinary courts.

While concrete review is often not immune from politics, the capacity to advance a political agenda through concrete review tends to be more limited than through abstract review. Concrete review requires the constitutional court to develop specific legal reasoning for a decision that often makes it resemble the decision of an ordinary court.

Adjudication: The relationship between constitutional and ordinary courts

Constitutional adjudication needs to be distinguished from ordinary judicial adjudication: ordinary law is made by the public powers and applies to the people. If individuals do not obey, the government is entitled to use force. Constitutional law, on the contrary, is made by or at least attributed to the people as its ultimate source, and it is to constrain the public authorities. If the government does not comply with the requirements of constitutional law, there is no superior power to enforce it. For example, there is evidence that, regarding the constitutive function (i.e. the organic part of the constitution), the structure of public power will usually conform to the constitutional arrangement; while in the case of its function to regulate the exercise of political power (i.e. the firmly established part of the constitution), enforcement cannot always be taken for granted (Grimm, 2011[27]).

Systems of judicial review also vary in the *effect of their pronouncement on legislation in concrete cases*. For example, US, Finnish, Mexican and Portuguese courts[6] technically do not void laws that they find to be unconstitutional. Rather, since in the United States subsequent similar cases must follow the rule in previous cases (*stare decisis*), the voided law remains on the books (although dormant, as no court will enforce it). In Mexico and Portugal, successive similar decisions result in *erga omnes* effect[7]. A constitutional amendment in Mexico in 2020 confers erga omnes effects to the decisions of the Supreme Court, which have been adopted by a qualified majority. In systems with a Kelsenian-type constitutional court, in contrast, the court usually has the power to declare the laws unconstitutional and immediately void. That decision means the law cannot be applied. In some countries with a tradition of parliamentary sovereignty, courts are not allowed to declare laws unconstitutional (e.g. New Zealand and Australia). Instead, they make a recommendation to the parliament, which is the only body that can repeal or amend law.

In both cases, and despite the varying degrees of ability of ordinary judges to affect constitutional interpretation, it is especially important to achieve a constitutional design of the judiciary that guarantees its impartiality through its independence. The judiciary could be designed as a major guarantor of the

constitutional values (i.e., of the dogmatic part of the constitution) and apply the constitution as the fundamental law of the country to any legal controversy where those values appear to be at stake.

Dissenting opinions

Dissenting (judicial opinions that differ in the reasoning and in the outcome from the one adopted by the majority) or separate opinions (judicial opinions that differ in the reasoning, but not in the outcome, of the analysis from the one adopted) are those issued by one justice or a minority of justices in a court dissenting from the majoritarian understanding of the issue at stake. Dissenting or separate opinions usually tend to carry little authoritative legal force and generally have no precedential value. At the same time, in some countries dissenting opinions are regarded as significant for several reasons, including fostering the transparency of the judicial process since they enable individual judges to voice their disagreement with a majority opinion. Separate opinions are also seen as serving important functions in some countries. First, they provide reasons for expressing disagreement with a majority decision legitimising the decision. Their function is thus to persuade the reader that the dissent is justified. In this respect, separate opinions resemble other types of opinions in that they all seek social legitimacy stemming from the transparency of the judicial decision-making process, and consequently they increase credibility of courts in the eyes of the litigants and the public. An alternative view espoused in a separate opinion could encourage an appeal (in lower courts). Dissenting opinions also enrich the constitutional culture and the engagement with constitutional interpretation. A more dynamic constitutional culture follows, marked by greater levels of reasoned discourse. This fosters constitutional debate by showing the plurality of constitutional meanings. For the individual judge, such a culture can represent independence. It highlights underlying constitutional choices and does not conceal them.

Other functions of separate opinions may vary depending on the addressees or recipients. In general, justifications of separate opinions are often seen as contributing to the development of law because they provide alternative ways of interpreting legal provisions; they may become a useful point of reference in other cases heard by the court or for other courts, the legal doctrine, and legislation.

Some EU Member States disallow separate opinions or have no related provisions, and reject this practice (Austria, Belgium, France, Italy, Luxembourg and Malta). The European Court of Human Rights, the European Convention on Human Rights, and the Rules of the Court (i.e. of the European Court of Human Rights) expressly mention separate opinions. Moreover, these opinions play an important role in the European Court's jurisprudence. At the same time, at the Court of Justice of the European Union, separate opinions are not allowed (Venice Commission, 2018[28]). In Latin America, dissenting votes are allowed in constitutional or supreme courts of Mexico, Brazil, Argentina, Colombia, Ecuador, Uruguay and Peru (Verdugo, 2011[29]).

Selection of constitutional judges

The selection of constitutional judges can be a controversial area, given the importance of the constitutional court’s task and the politically sensitive cases it reviews. A key objective sought by the majority of countries in this regard is to ensure that no particular group controls the selection process and becomes able to dominate the outcome in their favour. It is also often the case that the decision making of constitutional judges (given the very abstract constitutional texts) could be significantly impacted by their worldview. It could therefore be worth investing efforts in finding a path to a balanced composition of the constitutional court. This section will focus on the appointment of constitutional judges only.

Tenure

One point unique to constitutional judges is that the system for their selection does not tend to resemble that for ordinary judges. Ordinary career judges are normally appointed under strict meritocratic procedures and are awarded independence through protection of their tenure, salary and pensions. Constitutional judges are appointed specifically for the task of serving in that specialised court, usually for a fixed period, or for an unlimited tenure (for example in Portugal, judges serve for 9 years and are irremovable. In Austria, judges are appointed for a lifetime until they reach the age of 70, and they are irremovable). The number of term years varies widely across countries, from three or six years-renewable, to longer, non-renewable terms of eight (Colombia), nine (France, Italy, Portugal and Spain) and fifteen years (Mexico). Limited terms aim to strengthen judges' independence from the different powers, as their reappointment is not subject to approval of their performance.

Required qualifications

Because of the political dimension of their functions, the required qualifications of constitutional judges vary widely across countries and generally differ from the required background for ordinary judges. Constitutional judges are often not career judges, but rather highly qualified and respected lawyers, legal academics or former officials with many years of experience. In some countries the required qualifications will depend on the appointing institution, or there will be a set minimum for the number of jurists that must be chosen; some will apply a minimum number of years of experience while others do not. For example, in Austria judges proposed by the parliament can belong to any professional category requiring a law degree and must have at least 10 years' experience; those acting as president and vice president of the court, proposed by the federal government, must be judges, civil servants or law professors. In Germany, each justice must have completed a legal education that qualifies them for judicial office pursuant to the German Judiciary Act, and must be over forty years old. In Portugal, six persons appointed by the Assembly of the Republic are required to hold a doctorate, a master's degree or a first degree in law, or to be judges from other courts. The three judges co-opted by the court plus the remaining must be judges (arts. 12-14 Law on the Constitutional Court). In Spain, a legal background with 15 years of experience is required. In Mexico, candidates must hold a law degree. In France, no particular professional background or age limits apply (art. 56 of the constitution).

Selection mechanisms

Selection by the executive and the legislature

An approach regularly adopted divides the task between the executive and legislative powers. In many cases this takes the form of an appointment by the president of the state followed by approval by the legislature, which may allow for a certain level of democratic scrutiny through hearings of the candidates before the chambers. For example, the judges of the Constitutional Court of Austria are appointed by the president of the Republic upon proposal by the federal government (six plus president and vice president) – three are proposed by the National Council (the parliamentary chamber directly elected by the electorate) and three by the Federal Council (parliamentary chamber elected by the *Länder*). In Mexico, the Supreme Court has 11 justices, called *ministros*, appointed by the president and confirmed by the senate. In France, the members of the Constitutional Council are all former presidents of the Republic (appointed if they wish) and are called *membres de droit*, plus 9 members (*membres nommés*), appointed for a 9-year non-renewable term by the Senate (3), the National Assembly (3) and the sitting President of the Republic (3).

Selection by the legislature

Another option is to award this capacity solely to the legislature. This enables significant democratic scrutiny. Several countries require reinforced majorities (i.e., more than a simple majority) for these appointments, such as two-thirds (Germany) or three-fifths (Spain). This ensures that opposition parties have some say in selections. On the other hand this solution, which tends to ensure the highest level of support for each of the judges from various parts of the political spectrum, can also lead to bargains and sometimes to deadlocks – as has been the case in Spain, where it has proved difficult to renew Constitutional Court members in the past decade. In Finland, constitutional review is entrusted mainly to the parliament (parliamentary committee on constitutional law). In Germany, the Federal Constitutional Court has 16 justices filling two Senates (chambers), 8 in each. Half the members of the Federal Constitutional Court shall be elected by the *Bundestag* (parliament) and half by the *Bundesrat* (representation of the German *Länder*). They may not be members of the Bundestag, the Bundesrat, the federal government, or any of the corresponding bodies of a *Länd*. In Spain, the Constitutional Court has 12 magistrates proposed by the Senate (4), the Congress of Deputies (4), the government (2) and the Judicial Council (2). In Portugal, the Constitutional Court has 13 justices 10 are appointed by the unicameral Assembly of the Republic and 3 are co-opted by the Court. In Colombia, the Constitutional Court has 9 magistrates appointed by the Senate upon proposal by the President (3), Supreme Court (3) and State Council (3) for an 8-year term. Magistrates are required to be lawyers with ten years' experience (art. 232 of the Constitution). The Constitutional Court is included among the judiciary under the rubric of constitutional jurisdiction (art. 239), but the election of its judges is political (art. 239), as the parliament or senate votes and appoints the majority of the constitutional court judges.

Selection by the executive, the legislature and the judiciary

A further option is to give to each of the three branches of power the ability to nominate a given number of judges (as happens for example in Italy and South Korea). A potential challenge here might be a divided panel, where judges may be sympathetic to the institutional interest that selected them.

Selection by a commission or dedicated selection committee

In a number of systems, a commission (as in South Africa or the United Kingdom) or especially dedicated selection committee (as in Thailand) makes an important contribution to the selection process before the candidates are finally endorsed. In these cases, a prior issue is to decide who should be chosen to be part of the committee/commission, which may have partisan interests or even comprise elected officials. One approach to ensure further neutrality has been to professionalise the membership through the appointment of legal practitioners and judges. The leader of the opposition is sometimes required to be a member.

Dismissal of constitutional judges

Rules on the dismissal (understood as putting an end to a judge's term in office) of a constitutional judge are generally very restrictive. Stringent rules on dismissal aim to protect the independence of judges from pressure that political actors disadvantaged by political decisions could try to exert (European Commission for Democracy Through Law (Venice Commission), 1997[30]). In a majority of OECD countries, constitutional judges cannot be dismissed by the authority that appointed them, and they can only be dismissed by the constitutional court itself. The possible reasons for the dismissal vary widely from one jurisdiction to another (European Commission for Democracy Through Law (Venice Commission), 1997[30]).

For example, no constitutional provision exists on removing members of the French Constitutional Council. Similarly, in Germany, there is no legal provision on the removal of constitutional court judges in the 1949 Constitution (Basic Law) nor in the Act of the Constitutional Court of 1951. The German Constitution (art.

92) considers the constitutional judges as being part of the judiciary, and relatedly, article 97 establishes that: “Judges appointed permanently to positions as their primary occupation may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiry of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws (…)”.

In Spain, per article 23 of the Organic Law 2/1979 on the Constitutional Court, the following can be grounds for dismissal of Judges of the Constitutional Court: i) resignation accepted by the President of the Court; ii) expiry of their term of office; iii) existence of any of the grounds of disability applicable to members of the Judiciary; iv) any incompatibility that may arise; v) failure to perform the duties of their office with the required diligence; vi) failure to maintain the reserve pertaining to their office; vii) being found responsible in court proceedings for malicious acts or being convicted of a malicious or a seriously negligent crime. The removal of a Judge of the Constitutional Court shall be decreed by the President in the first and second cases as well as in the event of decease. In the other cases, the full Court shall rule by a simple majority in the third and fourth cases and by a three-quarters majority of its members in all other cases. Art. 24 determines that Judges of the Constitutional Court may be suspended by the Court, as a preliminary measure, in cases of indictment or to allow the time indispensable to establish whether any of the grounds for termination defined in the previous article exists. Suspension must be approved by three quarters of the members composing the full Court. No constitutional magistrate has been removed since the creation of the Constitutional Court.

In Austria, an earlier removal from office is only possible by decision of the Court itself, for grounds specified in the Constitutional Court Act (occurrence of incompatibility, absence from deliberations without excuse, conduct - in office or otherwise - unworthy of the respect and confidence required by their office, gross disregard of the obligation of non-disclosure of confidential information, or physical or mental incapacity with regard to their office).[8] A decision to remove a constitutional judge (or a substitute judge) from office can be rendered only with a majority of at least two thirds of the judges. No removals have taken place to date. Similarly, in Belgium and Italy, judges may only be removed by the court itself and there have been no cases since the inauguration of the courts. In Italy, however, if a judge has not attended the Court's meetings for six months, he will lose his seat.

In Portugal, (arts. 22 and 23 of the 1982 Law on the Constitutional Court), judges of the Constitutional Court are independent and irremovable, and their duties may not cease before the term for which they were appointed has elapsed, except in the cases envisaged in the following article, which states that the duties of the judges of the Constitutional Court cease prior to the end of their term of office when any of the following situations is verified: a) Death or permanent physical incapacity; b) Renunciation; c) The acceptance of a position or practice of an act which is incompatible with the fulfilment of their duties as defined by the law; d) Dismissal or compulsory retirement as a result of a disciplinary or criminal procedure, as determined by the Court itself and published in the official gazette.

In the Czech Republic, Estonia and Iceland, in addition to removal by the Court itself, constitutional court judges may be dismissed by ordinary courts if they find a judge guilty of intentionally committing an indictable offence, whereupon the decision automatically results in the judge’s loss of office. In Slovenia, the National Assembly may dismiss a judge on the grounds of permanent incapacity, or if the judge is sentenced to imprisonment for a criminal offence. Impeachment proceedings may also form part of the dismissal process (as in Denmark, Finland, Japan and Lithuania). In Japan, the Impeachment Court is composed of members of Parliament (art. 64, Constitution of Japan).

Key options and questions to consider

Defining the institutionalisation of constitutional review draws attention to key issues related to the role and powers of the courts, the constitutional court and the protection of fundamental rights. The experience of

the benchmark countries and other OECD member countries can suggest and help inform several considerations for the design of a system of judicial constitutional review, especially one that involves a constitutional court (Castillo-Ortiz, 2020[31]):

1. *There is no perfect model of constitutional review.* Designing constitutional review, whether through the judiciary or by establishing a specialised constitutional court, often involves balancing different values: democracy, majoritarian rule, protection of minorities' representation, and individual human rights, as well as affirming the constitutional court's independence from political parties while preventing excessive judicial activism through self-restraint. Constitutional courts' design necessarily involves trade-offs among these values.
2. *Limiting and clearly demarcating the powers of constitutional courts in the constitution or in subsequent constitutional legislation may facilitate a good balance among those values and reduce institutional disagreements in the future* – This is especially true given that in some cases, constitutional courts have interpreted their own jurisdictional powers broadly and have extended the parameters of their control, as well as the object of that control. Institutional conflicts usually stem from the double legitimacy of constitutional and ordinary (especially supreme) courts. Conflicts have occurred where judicial intervention by the constitutional court is intense and strong (Mańko, 2014[32]) (Geisler, n.d.[33]) (Garlicki, 2007[17]).
3. *Three essential tenets for constitutional courts include partisan independence, a balanced composition and self-restraint* – Constitutional courts tend to acquire legitimacy if they contribute to democracy and human rights protection; are perceived as politically independent; achieve a balanced composition (politically and in terms of diversity); and practice self-restraint. Judicial independence is linked to the principle of the rule of law, as the ideal of rule of law can only be realised through an independent court. However, constitutional courts, in contrast to ordinary courts, are relatively new institutions (if compared to ordinary courts); they specialise in politically sensitive issues; their members are usually selected in a more political manner; and sometimes they decide challenges brought by political institutions. Constitutional restraint is linked to the democratic principle: exhibiting self-restraint in relation to the parliament, constitutional courts allow a democratically elected actor to make the most important policy decisions. And protection of democracy and human rights is linked to the general preservation of liberal constitutionalism, as liberal constitutionalism has political freedom at its core. Failure to uphold any of these tenets on the part of constitutional courts can result in important reputational costs (Castillo-Ortiz, 2020[31]).
4. *Due consideration should be given to the form of judicial review (mild, strong, or a mixed system)* **–** In reflecting on the options for designing constitutional review, the question is not only whether to have a constitutional court, but also what to have as a range of review powers available to it, and where to allocate the final authority.
5. *Umpiring role of constitutional courts* – When constitutional courts are not part of the judiciary (i.e. when they are set up as a court outside the judicial system), their main role can be to arbitrate, in a concentrated way, in political conflicts among the various governance institutions. In these cases, constitutional judges are often selected under the aegis of political actors (as Kelsen suggested). Some countries have also emphasised that the facilitation role of constitutional courts requires judicial restraint to appease tensions between the constitutional review function, the legislative and the executive (as reiterated by the French Constitutional Council on many occasions, e.g. pointing out that "the Constitution (article 61) does not confer on the *Conseil Constitutionnel* a general or particular discretion identical to that of Parliament".[9] In general terms, self-restraint refers to a judicial reluctance to declare legislative or executive action unconstitutional, generally based on an attitude of respect or in judicial deference to the elected branches of government (Posner, 2012[34]). An argument in favour of judicial restraint has to do with the sometimes tense relationship between constitutional judicial review and democracy (the "*mighty problem*" or the "*counter-majoritarian difficulty*"). Without self-restraint on the part of the

constitutional court, its role of political mediation among various governance institutions could become difficult. That role could also include protection of the rights of Indigenous minorities as collective human groupings (e.g. in Colombia and New Zealand).

6. *The organic part of the constitution* – The substantive scope of competencies assigned to the constitutional court varies across countries. One option is for the constitutional court to mainly deal with the "organic" part of constitutional provisions, i.e. the vertical and horizontal allocation of powers and responsibilities to the various political actors in the country, especially among the executive, the parliament and the judicial system, as well as with competency conflicts between lower levels of government (local and regional or federated governments) and the central government. Another option is for the constitutional court to also cover protection of fundamental rights provisions, either as a first or last instance. This is explored in the following point (7). In some countries, constitutional courts have also been entrusted with varied ancillary functions, besides the core task of constitutional review of legislation and administrative action. Ancillary powers can include proposing legislation; determining whether political parties are unconstitutional; certifying states of emergency; impeaching senior governmental officials; and adjudicating elections.
7. *Protection of fundamental rights* – A specific area of substantive competence that should be considered when designing a system of constitutional review is to decide whether the constitutional court will oversee fundamental rights protections, or whether that will be left to ordinary courts.
   - Fundamental rights protection in ordinary courts:
     - Protection of the fundamental rights of citizens could be entrusted to the ordinary courts in a somewhat diffused system. Citizens could seek further redress through the appeals system, and ultimately in the supreme courts and/or in supranational human rights courts (for instance the European Court of Human Rights, the Inter-American Court of Human Rights, or the African Court on Human and Peoples' Rights) (Gardbaum, 2008[35]). The abundant jurisprudence produced by supranational human rights courts could be important as a guide for rulings of domestic ordinary courts, including the supreme courts, as the case of Mexico among others shows.
     - Assigning this task to ordinary courts could prevent or take the edge off unnecessary conflicts of jurisdiction associated with "dual systems" (systems in which two jurisdictions – ordinary and constitutional – deal with the same field of law: protection of individuals in concrete cases). Judicial independent control by professional judges constitutes the strongest guarantee for individuals in their dealings with the public administration – and with any public powers in general – that their rights will be upheld, especially in the areas of administrative and criminal law, where violations of fundamental rights more often occur. This protection is entrusted to ordinary courts in Mexico (*amparo*), Australia, Austria (where individuals have limited access in practice to the constitutional court[10]), Colombia (*tutela*), Finland, New Zealand, Portugal (appeal system within ordinary courts), Spain (*amparo*), Germany (*incidentaliter*) France (*incidentaliter* through the QPC) and Switzerland.
   - Fundamental rights protection by the constitutional court:
     - Another option is to entrust protection of fundamental rights to the constitutional court. In this system, fundamental rights protection is more centralised (e.g. in Spain and Germany). Assigning the constitutional court a last instance character in the national sphere does not preclude appealing to supranational courts, such as the ones outlined above. Constitutional courts often refer to international human rights rulings. In addition, a significant amount of cross-fertilisation and "borrowing" exists among constitutional courts when deciding cases, suggesting that human rights protection is increasingly a transnational process and embedded in what has been called an "international judicial dialogue" (Ginsburg, 2008[36]).

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Notes

[1] Australia, Austria, Colombia, Finland, France, Germany, New Zealand, Mexico, Portugal, Spain, and Switzerland are the benchmark countries for this chapter.

[2] A recent review of the nature and merits of constitutional dialogues between the judicial, legislative and executive branches can be seen in Sigalet, Geoffrey, Grégoire Webber and Rosalind Dixon (eds.) (2019[37]), *Constitutional Dialogue: Rights, Democracy, Institutions*, Cambridge University Press.

[3] The main reason in Sweden for enacting the article was that judicial review was seen as a protection against the misuse of legislative power by political parties.

[4] *Ex ante* review of legislation (i.e. before promulgation) has been extended to *ex post* review (i.e. after promulgation) in many countries.

[5] In Spain, *amparo* is ordinarily a last resort and can only be accessed after going through the different stages of the ordinary courts' decisions.

[6] Generally there is a precedent effect; more specifically in Mexico and Portugal, successive similar decisions result in an *erga omnes* effect. A constitutional amendment increasing the *erga omnes* effect of the Mexican Supreme Court's decisions provided they are approved by a supermajority was adopted in December 2020.

[7] *Erga omnes* effect implies that the consequences of a ruling apply to all citizens of a community as a whole, even if they were not parties to the proceedings.

[8] See Brigitte Bierlein (2011): Speech at the Rio de Janeiro Conference on Constitutional Justice. Accessible at: https://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Bierlein_E.pdf https://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Bierlein_E.pdf

[9] *Décision* n° 74-54 DC of 15 janvier 1975, www.conseil-constitutionnel.fr/decision/1975/7454DC.htm.

[10] Pursuant to art. 144 C individuals have access to the Austrian constitutional court for constitutional complaints.

7 Fiscal governance

This chapter describes how OECD countries have incorporated fiscal management issues in their constitutions, studying the regulation of areas such as budget scope and timing, fiscal rules, legislative procedures, and independent fiscal institutions. It highlights how certain provisions can help ensure governments' adherence to high-level principles of financial prudence, transparency, and accountability. It analyses the potential benefits of enshrining such matters in constitutional terms, such as immutable standards by which the electorate can hold successive governments accountable, lower borrowing costs from reassuring financial markets of commitments to fiscal sustainability, and a more informed legislature to scrutinise fiscal policy. It also assesses the drawbacks, in particular, the fact that they can reduce a government's flexibility to respond to unexpected developments and to adapt the rules to new state-of-the-art practices.

Key issues

Defining the budget practices of and constraints on the conduct of fiscal policy in the constitution can protect a country against financial mismanagement. As these laws cannot be easily altered, it is difficult for elected governments to circumvent the principles that their country has enshrined in its highest governing documents. However, fiscal rules are only rarely placed in constitutions and even when they are, the specific provisions are developed in further laws.

- *Financial management principles can be set constitutionally under several rubrics*, including budgeting form, procedures and fiscal frameworks – that is, the institutional coverage, the specific scope of revenues and expenses, whether the budget is presented on a ministerial or programme basis, and whether it must include medium-term planning, among other details.
- *Fiscal rules:* whether governments must run balanced budgets or conform to spending ceilings, and in which circumstances rules should be suspended.
- *The role of the legislature:* how control is split between houses in bicameral systems, whether they have the power to introduce amendments of their own, and at which level control is exercised (such as aggregate revenue and spending amounts, line items, ministry level or programme level, borrowing or debt limits).
- *Research support and independent monitoring and auditing bodies:* whether parliaments are guaranteed to have research support with adequate resources to assist oversight; whether independent fiscal institutions will be assigned to monitor and report on fiscal rules; the responsibilities of state audit institutions to scrutinise financial statements; and the powers of all to compel the government to provide information.
- Constraining a government's fiscal authority may also have drawbacks, such as restricting it from pursuing the optimal fiscal policy at a given time. Further, constraints can act against the principles of representative democracy, which would imply that a government with a strong electoral mandate would need to be free to manage fiscal policy according to the will of those who elected it.
- The choice of legal frameworks for setting fiscal policy can therefore involve striking a balance between fixed constitutional rules and more discretionary lower laws and procedures. Regardless of the balance struck, the ultimate constraint on fiscal governance is democratic accountability, which is strengthened by transparency with the legislature and the public.

Introduction

The powers of legislatures and governments in the budget process vary across the OECD area. But responsible fiscal management continues to grapple with a state of ongoing tension between the two: legislatures authorise the raising of public funds and the ability to spend them, while governments decide exactly how to do so. The legal basis of a country's budget process and fiscal institutions is the playing field on which the tension manifests itself, and the outcome for these competitors ultimately determines the quality of public services.

Following the success of the institutional design of independent monetary policy, some countries looked to depoliticise fiscal policy by limiting the discretion of governments and enshrining principles of responsible fiscal management in law. Countries may indeed benefit from constraining the public purse to overcome public choice problems such as deficit bias, which can result from self-interested voters, competition

among political parties, or free ridership among the members of a common currency area. The legal mechanisms for tying the hands of government vary along a spectrum, from strict constitutional balanced budget rules to secondary regulations requiring medium-term forecasts in budget documents.

However, enshrining excessively detailed rules and procedures in the constitution constrains a government's authority to act in the interest of the public who granted them a democratic mandate, or to react to unexpected circumstances. While there may be benefits considering the big picture, constraints can prevent an optimal fiscal policy response at any one point in time.

Further, as has happened following the course of the global financial crisis and COVID-19 pandemic, a nation's attitudes, economic theory and public finance tools evolve over time and may outgrow the perspectives of a constitution's framers. Guardrails that are too restrictive can hold back the public good.

It is thus important to strike a balance between legal constraints and discretion. But regardless of the ultimate limits placed on a government's fiscal authority, if a country can succeed in enshrining principles of transparent budgeting in law, the benefits can be significant (Box 7.1).

Box 7.1. Benefits of budget transparency

- *Accountability* – Clarity about the use of public funds is necessary so that public representatives and officials can be accountable for effectiveness and efficiency.
- *Integrity* – Public spending is vulnerable not only to waste and misuse, but also to fraud. "Sunlight is the best policy" for preventing corruption and maintaining high standards of integrity in the use of public funds.
- *Inclusiveness* – Budget decisions can profoundly affect the interests and living standards of different people and groups in society; transparency involves an informed and inclusive debate about budget policy impacts.
- *Trust* – An open and transparent budget process fosters trust in society that people's views and interests are respected and that public money is used well.
- *Quality* – Transparent and inclusive budgeting supports better fiscal outcomes and more responsive, impactful and equitable public policies.

Source: OECD (2002[1]), *OECD Best Practices for Budget Transparency*, https://www.oecd.org/gov/budgeting/best-practices-budget-transparency.htm (accessed on 15 April 2021).

The remainder of this chapter describes the issues involved in enshrining principles of good financial management in law, and why countries may choose strict constitutional law over lesser statutory and regulatory law or customs. The last section provides key options and questions to consider for each of the relevant elements, with an indication of how frequently these elements are addressed in constitutional law. Where possible it places the issues in the context of international budgeting practices across OECD countries from the Organisation's survey work. The chapter also draws upon relevant OECD principles and recommendations, in particular:

- OECD Best Practices for Budget Transparency (2002) and OECD Budget Transparency Toolkit (2017)
- OECD Recommendation on Budgetary Governance
- OECD Principles for Independent Fiscal Institutions.

The chapter is based on analysis of the constitutions of OECD member countries, primarily Australia, Finland, France, Germany, Korea, the Netherlands, New Zealand, Poland, Portugal, Spain and Switzerland.[1]

While cross-country studies can provide useful ideas and benchmarks, budget practices across the OECD area have evolved according to a range of legal, constitutional, institutional and cultural practices. Countries must determine and manage their national frameworks according to their specific circumstances.

Brief overview of issues

Why define budget practices in law?

Budgeting under constraints is rarely optimal in confronting a single set of circumstances, be it a financial crisis or a pandemic. But while governments should have flexibility to set their own fiscal agenda, there may be benefits to limiting fiscal discretion to guard against systemic failures of incentives to align with the public good. What are the motivations a government may have for giving up flexibility, and how should it decide whether to base constraints in the constitution or in other types of legislation (ordinary legislation, guidelines, government agreements, etc.)?

- *To establish routines and standards* – Schick (2010[2]) calls budgeting the "routinisation" of choice. Because national budgets deal with vast sums across many diverse policy areas run by a large machinery of government, it may be disruptive to public services and legislative oversight to allow newly formed governments to decide their own budget processes at the start of a legislative term. By creating a legal foundation for routines (such as calendar milestones) and standards (such as the scope of institutions covered by budget votes), countries can minimise disruptions to public services and oversight.
- *To encourage fiscal prudence* – Establishing clear institutional roles and defining constraints on elected governments can help avoid a wide range of biases leading to excessive deficits and procyclical fiscal policy. These include election gaming, where incumbent governments spend excessively to influence voters or to reduce the fiscal space of an incoming government, or the "common pool" problem, where beneficiaries of public funds are more organised and vocal than general taxpayers, particularly in the economic cycle's good times (Ayuso-i-Casals et al., 2007[3]).
- *To ensure adequate information for accountability through democratic mechanisms* – The legislative branch's role is to influence and oversee government policy. To do so, legislators require information on government programmes that may not be in a government's interest to provide. To ensure that elected representatives have the tools to do their job, constitutional and statutory law can set minimum requirements for contents of budgets, designate an independent monitoring body to ensure that the requirements are met, and grant legislators powers to compel governments to remedy insufficient transparency. Further, if elections – the ultimate accountability mechanism – are to reflect the will of the electorate, the public requires adequate information against which to judge governments, such as *ex ante* performance targets and *ex post* financial reporting, to confirm the government's performance.
- *To ensure that the legislature is adequately supported in scrutinising budgets* – Understanding national budgets requires a diverse set of technical skills and expertise in accounting, actuarial sciences, economics and law. Elected representatives and their staff come from a diverse range of backgrounds. Laws can provide for institutions to support legislators in using the information available to them. Most notably, these institutions include supreme audit institutions and independent fiscal institutions. By enshrining these institutions in law they can be protected from interference from the governing party, which may not wish to face the criticisms they bring. They also provide specialised expertise, whereas legislatures are generalist institutions in nature.

Why define budget practices in the constitution?

In laying out mechanisms to establish routines and constraints on budgeting, countries must decide whether to use broad but strict constitutional provisions, narrower but more flexible financial management laws, or other internal rules and procedures.

Constitutional provisions are frequently used to clearly state that all public revenues and public expenditure shall be authorised through the annual budget. Some countries, such as Spain, also include the obligation to report tax expenditure: "The State budget shall be drafted annually and shall include the entire expenditure and income of the State public sector and specific mention shall be made to the amount of the fiscal benefits affecting State taxes" (Section 134).

Special laws are used to determine the organisation and operation of institutions, and are themselves determined by the constitution. In France for example, the constitution sets out the broad principles for the budget, but the detailed process and procedures of the budget are set in the "Organic Finance Law" (*Loi organique relative aux lois de finances*, LOLF), voted in 2001. This law is often referred to as the "financial constitution". In Poland, Article 219 of the constitution states, "The *Sejm* shall adopt the State budget for a fiscal year by means of a Budget. The principles of and procedure for preparation of a draft State Budget, the level of its detail and the requirements for a draft State Budget, as well as the principles of and procedure for implementation of the Budget, shall be specified by statute."

While the budget process may be defined in constitutional provisions or special laws, the annual budgets are usually ordinary laws. Ordinary laws are also the most common way to implement fiscal rules; they are used in 26 OECD member countries, although 8 of these also have constitutional provisions (OECD, 2019[4]).

Finally, internal rules and government (or coalition) agreements may also play an important role in setting the limits for budgetary processes and choices.

The motivation to enshrine budget laws under the constitution can be simple: a government with a strong majority can change statutory law as it wishes and rewrite its own fiscal constraints. Only by securing budget principles in the constitution will restrictions bind a government with strong popular support. OECD member countries tend to use constitutional provisions to set broad principles while leaving governments with flexibility for fiscal management, but governments are accountable to the election and ultimately constrained by democratic levers.

Identifying issues to be included in constitutional law: Core features and considerations

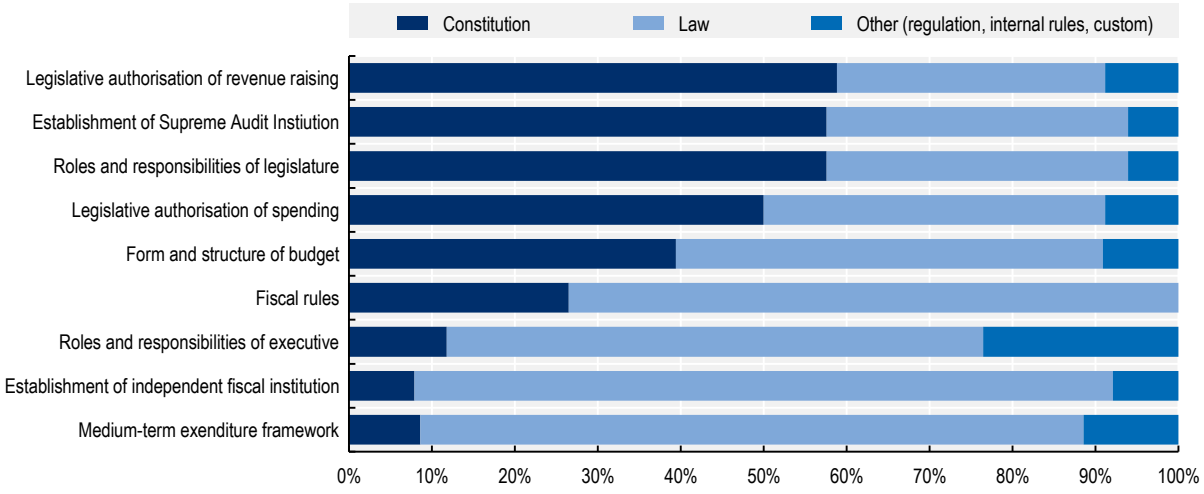
A country could enshrine fiscal management principles in constitutional law in the following broad areas:

- budgeting form, procedures and fiscal frameworks
- fiscal rules and borrowing authorities
- the role of the legislature
- research support and independent monitoring and auditing bodies.

The popularity of constitutional provisions in these areas among OECD countries is shown in Figure 7.1. The legislature's roles and establishment of supreme audit institutions are overwhelmingly established at the level of the constitution. Budget forms and procedures are generally set with statutory law. Fiscal rules enshrined in the constitution are in the minority (74% choosing statutory law instead), along with establishment of independent fiscal institutions.

Figure 7.1. Legal basis for a selection of budgetary practices across OECD member countries

Proportion of 34 countries responding to the survey



Source: OECD (2019[4]), *Budgeting and Public Expenditures in OECD Countries 2019*, OECD Publishing, Paris, https://doi.org/10.1787/9789264307957-en.

Budgeting form, procedures and fiscal frameworks

Budget structure and scope

OECD countries use legislation to restrict governments to a general form of budget documents with minimum contents requirements. Some of these characteristics are enshrined in their constitutions.

Periodicity of the budget – The budgets of most countries cover one year; however, this is rarely stated in the constitutions. Exceptions include the constitution of Finland, which states that "The Parliament decides on the State budget for one budgetary year at a time (Section 83)", and the Constitution of the Kingdom of the Netherlands which states, "Bills containing general estimates shall be presented by or on behalf of the King every year on the date specified in Article 65 (Article 105)

Scope of the budget – Constitutional clauses stating that all government revenues and expenditures must be included in the budget are frequent, for example in Germany and Spain. Some countries such as Spain go as far as to require the disclosure of tax expenditures in their constitution. Other countries mention that the state budget should include the social security budget (this is the case for example in Portugal). Countries have also found it important to define whether government business enterprises are to be included in the consolidated government accounts.

Structure of the budget – The structure of the budget and basis for votes (line item, programme, by ministry, etc.) is usually set out in special or ordinary legislation, but can be described in the constitution. In Portugal for example, the constitution mandates that the budget shall be structured by programmes (Article 105). This is the only example among the countries analysed.

Budget process

OECD countries use a mix of laws to prescribe budget timetables, contingencies, etc. Some of these characteristics are enshrined in their constitutions.

Budget calendar, roles and responsibilities – The calendar for the budget cycle, from formulation to discussion and approval, are laid down in legislation. The important dates of the budget cycle are frequently

mentioned in the constitution. Several countries also describe in the constitution the roles and responsibilities of the executive and the legislative and the adoption process (for example Finland, Germany, Poland and Spain. Usually, the government submits a draft budget to the parliament, which examines it, amends it (see next section) and adopts it. Some countries state this in their constitution (e.g. Spain, Article 134). The constitution of Portugal also mentions that it is the responsibility of the executive to oversee the execution of the budget (Article 199).

The time given to Parliament to discuss, amend and adopt the budget is frequently stated in the Constitution. Many countries allow three months for parliamentary discussions (e.g. Poland, Spain). Some countries allow less time, while other countries such as Finland remain more vague: the Finish Constitution states that "the government proposal concerning the State budget…shall be submitted to the Parliament well in advance of the next budgetary year" (Article 349).

Supplementary budgets **–** Procedures for funding unexpected spending and emergencies should be prescribed by law. The use of supplementary budgets is in line with the OECD Best Practices for Budget Transparency, which advocates that new spending and significant changes to previously approved allocations should be authorised by parliament through supplementary budgets before spending occurs (OECD, 2002[1]). Some countries, such as Finland, Poland and Spain, describe the process for approving supplementary budgets in their constitutions. The Polish Constitution for example states, "In exceptional cases, the revenues and expenditures of the State for a period shorter than one year may be specified in an interim budget. The provisions relating to a draft State Budget shall apply, as appropriate, to a draft interim budget" (Article 219).

Mandatory policy costing – Some countries require any financial legislation to contain estimates of their fiscal impact, but these are rarely stated in constitutions. These estimates are intended to ensure that when the legislature considers bills, it has all the information necessary to assess the budgetary consequences of enacting that legislation.

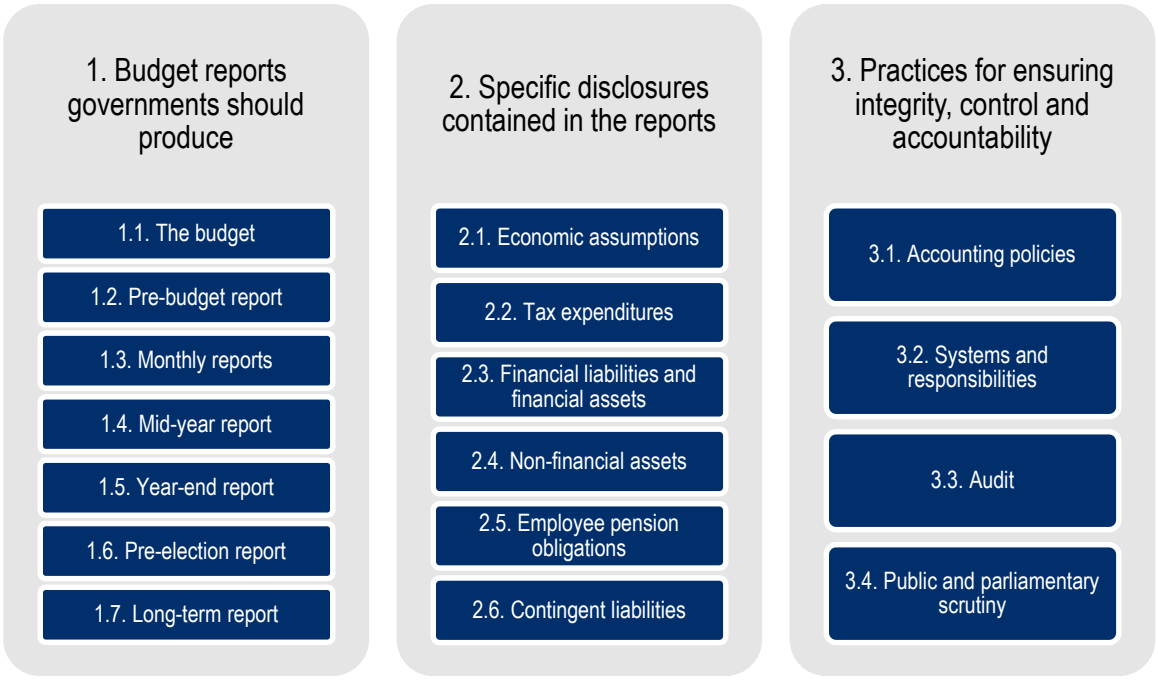
In Brazil, the New Fiscal Regime of 2015 created a requirement in statutory legislation for costings and cost-benefit analysis of new measures for a more informed budgetary debate. The United States has also made it mandatory that certain bills and resolutions approved by congressional committees contain a policy costing produced by the Congressional Budget Office. This requirement is enshrined in the Congressional Budget and Impoundment Control Act of 1974. In Iceland, all legislation must be assessed for its costs by the ministry of finance for bills initiated by government; and by parliamentary research staff for bills initiated by the legislature.

Budget transparency

Budget transparency is defined as the full disclosure of all relevant fiscal information in a timely and systematic manner, to inform better scrutiny and decision making throughout the budget cycle (OECD, 2002[1]).

Reporting requirements – Across the OECD area, various laws describe the budget reports that governments must produce; the specific disclosures to be contained in the reports, including both financial and non-financial performance information; and practices for ensuring the quality and integrity of the reports. The OECD Best Practices for Budget Transparency (OECD, 2002[1]) and the OECD Budget Transparency Toolkit (OECD, 2017[5]) provide a reference tool to ensure budget transparency (Figure 7.2).

Figure 7.2. Main reporting requirements described in OECD Best Practices for Budget Transparency



Source: OECD (2002[1]), *OECD Best Practices for Budget Transparency*, https://www.oecd.org/gov/budgeting/best-practices-budget-transparency.htm (accessed on 15 April 2021).

In EU Member Countries, the European Semester and the Stability Programme define the minimum information that budget documents and mid-year or pre-budget financial updates must contain. Several countries mention in their constitutions the obligation to provide an account of all revenues, expenditures and debts incurred during the fiscal year (e.g. Germany, Finland, Poland, Portugal and the Netherlands). However, few countries provide a detailed list of reporting requirements in their constitutions – Portugal and Finland are exceptions. The Finnish Constitution provides a detailed list of budget transparency provisions, "in a way as to preclude the existence of secret appropriations and funds". In particular, the constitutions of these two countries require revenue forecasts to be justified.

Contingencies and resolution mechanisms

Constitutions often prescribe a process for ensuring continuity of government action when the parliament fails to approve a budget. In some cases, such as Spain, the previous year's budget is automatically enacted. In others, such as France and Germany the government may then authorise expenditure by decree. In Germany, the government can even borrow in order to cover committed expenditures. In other countries, the draft budget submitted is used. For example, in Poland, if the parliament (*Sejm*) fails to agree on a budget, the constitution states that the president may dismiss the legislature. However, not all countries analysed describe this process in their constitution: Australia, the Netherlands, New Zealand, Portugal and Switzerland do not have a constitutional clause to determine the actions to be taken when a budget is not voted before the beginning of the following fiscal year.

Strategic plans and medium-term perspective

Multi-year strategic plans and medium-term budget frameworks – Governments in nearly all OECD member countries prepare multi-year strategic plans beyond the annual appropriations cycle. For example,

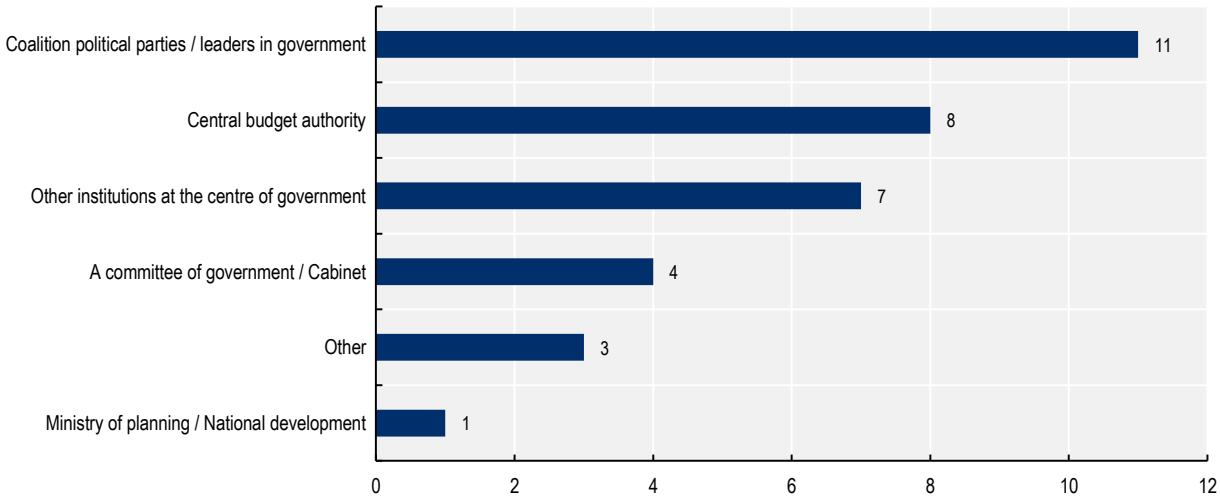
only three countries of 34 respondents to the OECD's latest Budget Practices and Procedures Survey reported that they do not make use of medium-term expenditure frameworks: Belgium, Mexico and Norway (OECD, 2019[4]). These medium-term frameworks typically include rolling forecasts of the main fiscal aggregates and detailed expenditure plans for the next three to five years, so that national priorities can be compared with available resources. Medium-term objectives and adjustment paths are a key component of EU stability and convergence programmes.

Only 10% of OECD countries define requirements for medium-term strategic plans in the constitution (OECD, 2019[4]). The vast majority (80%) define it in statutes or other non-constitutional procedures. The strategic plans can take several forms, such as three- to five-year medium-term fiscal frameworks or medium-term expenditure frameworks, but most commonly they are in some form of medium-term expenditure ceiling.

Figure 7.3 shows the breakdown of institutions that OECD member countries have designated to be responsible for medium-term strategic documents according to the OECD's Budget Practices and Procedures Survey. It is common (11 of 34 respondents) for strategic plans to be left to the responsibility of governing parties, which typically formalise a plan as part of government formation and submit it to the legislature (usually in countries where coalitions are the norm). It is also popular among countries to require that the central budget authority (for example, the ministry of finance) prepare strategic planning documents (8 of 34 respondents). Elsewhere, strategic planning is the responsibility of committees (4 of 34 respondents). In Poland, a separate Ministry of Development produces medium-term planning.

Figure 7.3. Institution responsible for medium-term strategic planning

Number of countries among the 34 responding to the survey



Source: OECD (2019[4]), *Budgeting and Public Expenditures in OECD Countries 2019*, OECD Publishing, Paris, https://doi.org/10.1787/9789264307957-en.

Although in Canada the medium-term strategic planning document has become synonymous with the budget, Canada has no requirement that such a document be presented to the parliament. Instead, statutes prescribe that only an appropriation act (Main Estimates) and any other appropriation acts (Supplementary Estimates) must be presented to the parliament.

Long-term anchors – Budget frameworks often include fiscal anchors beyond medium-term strategic plans, such as ensuring debt solvency over several projected decades and accounting for the healthcare and pension liabilities of an ageing population. Although summary statistics are not available, observations

from the OECD Senior Budget Officials networks, which include five regional networks and six associated networks, suggest that these long-term anchors are increasingly being enshrined in legislation and incorporated into supranational frameworks such as the European Commission's multidimensional surveillance approach for the euro area. The Commission uses an "S1 indicator" that shows the upfront adjustment effort required to ensure a country's debt-to-GDP ratio is below 60% ten years in the future, and an "S2 indicator" that shows the adjustment to the current structural primary balance required to fulfil the infinite horizon inter-temporal budget constraint.

Fiscal rules

Rationale for introducing fiscal rules

Setting fiscal rules such as balanced budget laws and expenditure ceilings in constitutions or statutory legislation can act against deficit bias and fiscal complacency. Deficit bias refers to structural deficits (unexplained by tax smoothing or the economic cycle) that arise when government agents face incentives to overspend. Deficit bias is explained by public choice theories related to the following, among others:

- *Intergeneration redistribution* creates excessive deficits because current taxpayers can vote for their preferred policy outcome, while future generations of taxpayers cannot.
- *Fiscal illusion* arises because voters do not fully understand the trade-off between current spending and future fiscal burdens, and do not always see the true individual costs and benefits of the public services they receive.
- *Competition among political agents* arises because uncertainty about the outcome of elections means governments in power do not fully internalise the cost of debt, which may be passed on to successive governments.
- *The free rider problem* arises in the governments of countries that are part of a currency area and can take advantage of the responsible fiscal governance of other member states in protecting their currency and access to capital markets.

Fiscal rules with a legal basis have grown considerably over the past decade, having been established in 29 OECD member countries. All OECD countries in the euro area (along with Denmark) are also bound by the EU Fiscal Compact.[2]

Poterba (1997[6]) suggested two mechanisms through which fiscal rules affect fiscal outcomes:

- They provide an objective benchmark for legislators, media and the public to assess the government's performance, raising the reputation and electoral costs of fiscal mismanagement.
- Fiscal rules, particularly those with automatic enforcement mechanisms, allow policy makers to deflect the political repercussions of austerity to the budget law.

Fiscal rules, whether legislated in the constitution or in lower law, typically contain escape clauses for exceptional circumstances such as severe recession or natural disasters. This is the case for example in Germany, Spain and Switzerland.

Legal basis for fiscal rules

Constitutions – Because statutory legislation may be changed at any time by a majority government with strong support, implementing fiscal rules in strict constitutional provisions would more firmly bind a government's hands against financial mismanagement. Of the 34 respondents to the OECD's Budgeting Practices and Procedures Survey, nine reported including specific fiscal rules in their constitutions. These include Germany, Hungary, Italy, Mexico, Poland, Slovenia, Spain, and Switzerland. For example, the German Constitution states that "the budgets of the Federation and the *Länder* shall in principle be balanced without revenue from credits" (Article 109). In Poland, the constitution states that "it shall be

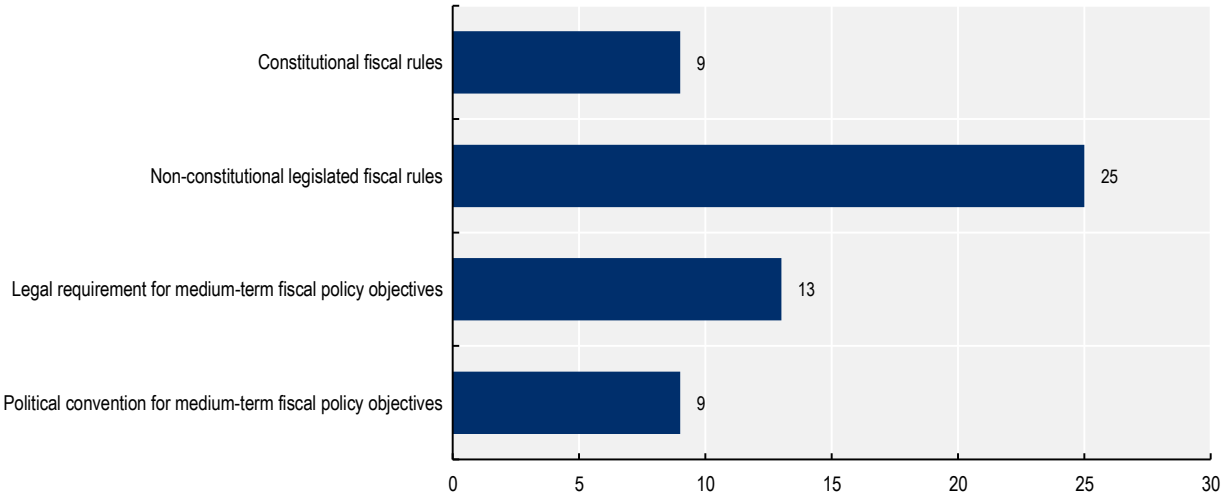
neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product" (Article 216). In the United States, while there are no national fiscal rules, the vast majority of states have implemented balanced budget requirements through their state's constitutions. Only one country (Slovenia) relies solely on constitutional provisions for fiscal rules, with most preferring to prescribe details in statutory law (OECD, 2019[4]).

Primary and secondary laws – The most common way to implement fiscal rules, reported by 25 of 34 respondents to the OECD's Budget Practices and Procedures Survey, is through statutory law (Figure 7.4). The Spanish Constitution for example mentions that an organic act shall develop the principles referred to in the constitution; in particular the distribution of deficit and borrowing limits between different public administrations, the methodology and procedure for calculating structural deficits, and the consequences in case the rules are breached (Article 135).

Procedural rules and political agreements – Other countries have implemented fiscal rules only through procedural rules or conventions, such as requirements to establish medium-term fiscal objectives that are not in themselves legally binding, but are a form of mandatory transparency to strengthen political accountability (Figure 7.4). Of these, 13 respondents reported legislative requirements for governments to formulate medium-term fiscal objectives, while nine respondents reported political conventions. For example, the Charter of Budget Honesty (1998) in Australia requires the government to regularly publish fiscal targets consistent with the balanced budgets over the economic cycle, encouraging but not requiring them. Similarly, the *Budget Responsibility and National Audit Act, 2011* in the United Kingdom requires the government through HM Treasury to prepare a Charter for Budget Responsibility that explicitly lays out its objectives for fiscal policy and national debt.

Figure 7.4. Legal basis for fiscal rules

Number of countries among the 34 responding to the survey



Source: OECD (2019[4]), *Budgeting and Public Expenditures in OECD Countries 2019*, OECD Publishing, Paris, https://doi.org/10.1787/9789264307957-en.

Evidence and experience of legal provisions for fiscal rules

To prepare for fiscal adjustments following the COVID-19 pandemic, the OECD has begun a programme to empirically assess the relative merits of a wide range of fiscal practices and institutions, including fiscal rules. In the meantime, recent studies such as Caselli and Reynaud (2019[7]), who estimated the causal

effect of fiscal rules on fiscal balances in a panel of 142 countries over the period 1985-2015, and meta-analysis such as Heinemann, Moessinger and Yeter (2018[8]) suggest that if empirical assessments adequately control for other influencing factors, there is little to no statistically significant impact of fiscal rules on fiscal balances. That said, the same studies and others such as Eyraud et al. (2018[9]) show that more granular analyses of specific country cases suggest that design features such as broad institutional coverage, ease of understanding and monitoring, and clauses to support countercyclical fiscal policy can make fiscal rules more effective.

Some notable case studies among OECD countries include the Czech Republic, which introduced a debt brake in 2016 that required budget cuts when national debt passes 55% of GDP. However, initially the legislation was intended to place the restriction in the constitution, which would have required any future amendments to be approved by three-fifths of members of the lower and upper houses. The constitutional amendment was rejected in favour of introducing the same requirements under statutory law. Germany's constitutional debt brake at the state level forbids them from taking on additional debt. This has faced criticisms for not considering that they do not have tax autonomy and that it limits scope for large investments (Kirchgassner, 2017[10]).

The role of the legislature

Limits to parliament's capacity to amend the budget

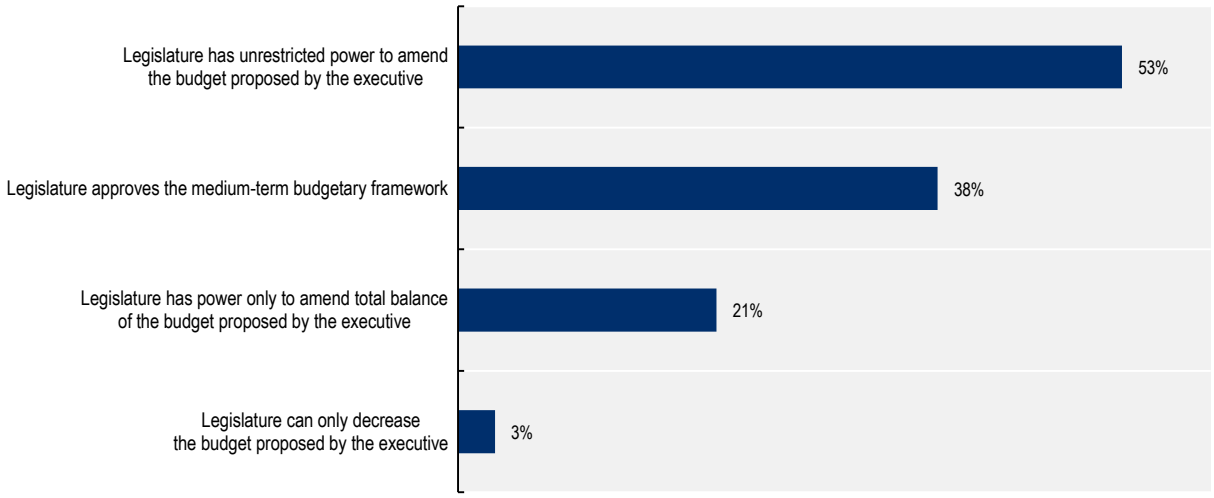
An effective budgetary role for the legislature is crucial for transparency, inclusiveness and democratic accountability. The OECD Principles on Budgetary Governance state that legislators, as representatives of the public, should have the opportunity to provide input to the budgets and financial measures to ensure that fiscal policy is consistent with the will of the public, while ensuring fiscal sustainability.

OECD country legislatures are subject to a range of different legal frameworks, procedures, customs and traditions. The scope of legislative activity varies most significantly between presidential systems and parliamentary systems**.** At one end of the spectrum of influence, the US Congress can redraft the president's budget proposal and actively does so. At the other end, the legislature in parliamentary systems typically has little engagement during budget approval and no formal amendment powers. The restriction most frequently found is that the legislature cannot increase the deficit (i.e. can reallocate expenditures, but can neither increase total expenditures, nor decrease total revenues).

While legislatures in all OECD countries have a role in authorising public expenditures and revenue-raising (Figure 7.5), roughly half have the power to amend budgets though these are not widely exercised. Generally there is a trend of growing legislative oversight responsibilities for budget matters.

Figure 7.5. Role of legislatures in the budget process

Proportion of 34 countries responding to the survey



Source: OECD (2019[4]), *Budgeting and Public Expenditures in OECD Countries 2019*, OECD Publishing, Paris, https://doi.org/10.1787/9789264307957-en.

These restrictions are usually found in statutory legislation, but in some countries they are described in the constitution (Table 7.1). For example, in France the constitution states that "Private Members' Bills and amendments introduced by Members of Parliament shall not be admissible where their enactment would result in either a diminution of public revenue or the creation or increase of any public expenditure" (Article 40).

Table 7.1. Comparative perspective: Types of constitutional restrictions on the capacity of parliament to amend the budget

No restrictions mentioned in the constitution	Cannot make any change to the proposed budget	Can decrease proposed expenditures	Can amend the budget but not increase total expenditure, decrease revenues or increase deficit	Can amend the budget but requires government approval to do so
Australia			Poland	Germany
Finland			Portugal	
Netherlands			France	
New Zealand				
Spain				
Switzerland				

Source: Authors, based on analysis of constitutions consulted on www.constituteproject.org.

Authorising taxation and debt

Authorising taxation and debt are typically prerogatives of the legislature, and these are clearly stated in the constitution in many countries. Regarding debt, the Finnish Constitution mentions that “the incurrence of State debt shall be based on the consent of the Parliament, which indicates the maximum level of new debt or the total level of State debt” (Section 82).

Governance issues

Primacy of the executive branch versus the legislative branch in budget matters – Constitutions or primary legislation typically describes which branch of government has ultimate authority over fiscal policy. Some legislatures are given considerable power over financial management by constitutions, although this is rare. In Poland, if the legislature (the Sejm) fails to pass the budget, the president of the Republic may order the shortening of the Sejm's term of office (Article 225).

Control over specific budget totals or line items – Laws also describe which budget amounts require legislative approval, by granting responsibility for approving fiscal aggregates (the budget balance, total spending, total debt, etc.), programme-based amounts, allocations at the ministry or department level, or individual line items.

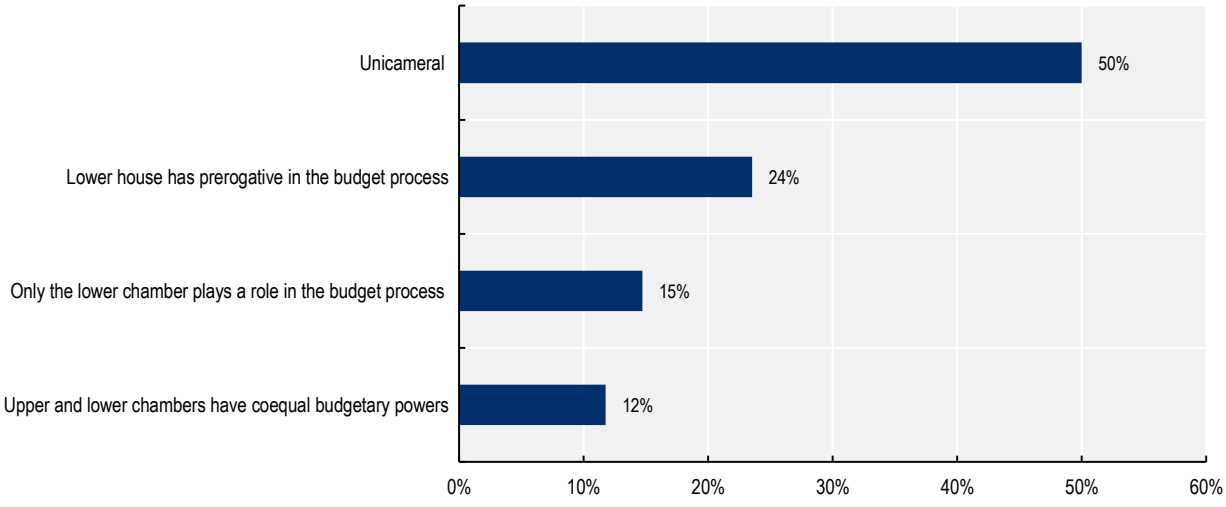
Role for committees – Budget and audit committees and sectoral committees play a vital role in scrutinising budget documents and fiscal plans. A country's constitution often provides for the existence of standing committees and investigative committees, whose specific functions and operations are later laid down by a chamber's rules of procedures. For example, the constitution of Finland dictates that for purposes of supervising the state finances and compliance with state budget law, the parliament "shall have an Audit Committee" that "shall report any significant supervisory findings to the Parliament" (Section 90).

Some constitutions contain provisions for making the legislature's committee meetings open to the public (for example, the constitution of Sweden).

Role of each chamber – Only two countries describe the respective roles of each chamber in financial matters in their constitutions, Austria and Switzerland (Figure 7.6). Half of the OECD countries are unicameral. In legislatures with two chambers, the lower chamber is most often given ultimate say in financial matters, playing the sole role in 15% of legislatures. Upper chambers tend to have a much shorter period to debate the budget, and often do not have the right to amend or reject budget bills. Only 12% of OECD legislatures grant coequal power over financial matters to upper and lower chambers (Figure 7.6).

Figure 7.6. Role of each chamber in the budget process

Proportion of 34 countries responding to the survey



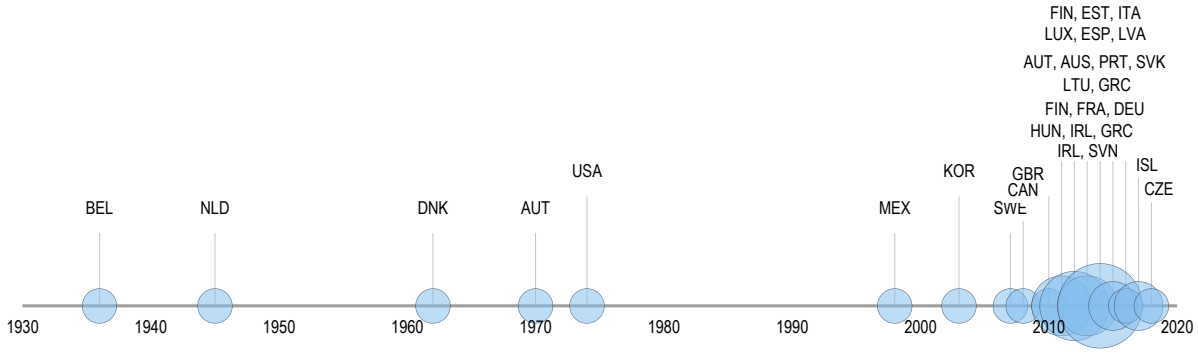
Source: OECD (2019[4]), *Budgeting and Public Expenditures in OECD Countries 2019*, OECD Publishing, Paris, https://doi.org/10.1787/9789264307957-en.

Even with these legal authorisations, conventions tend to play a larger role. For example, some legislatures have a history of introducing a large number of amendments to tax legislation and adjustments to expenditure proposals despite having executive branch primacy defined in constitutions.

Research support and independent monitoring and auditing bodies

There is a growing trend across OECD countries to empower legislatures with research resources and to create independent monitoring bodies to hold governments accountable for their fiscal policy choices. These include budget scrutiny units and independent fiscal institutions (fiscal councils and parliamentary budget offices) that scrutinise budget bills and high-level fiscal issues, primarily before funds are spent. These bodies complement well-established supreme audit authorities that ensure the accuracy of financial statements and do a wide range of *ex post* financial and performance auditing.

Figure 7.7. Independent fiscal monitoring bodies have rapidly increased in popularity



Note: Timeline shows the creation of Independent Fiscal Institutions, with bubble size increasing proportionately in years with multiple institutions.
Source: OECD Independent Fiscal Institutions Database 2019.

As with other budget procedures and institutional design, research, monitoring and auditing institutions are established under a variety of constitutional and legal forms.

Specialised research services or staff

Over a third of OECD area legislatures that responded to the OECD's Budget Practices and Procedures Survey reported having a specialised unit for budget analysis, usually placed within their wider research services (OECD, 2019[4]). These units typically have around a staff of 10, although they range from as low as 2 in Spain to 40 in Turkey. The UK House of Commons Scrutiny Unit has 14 staff and supports departmental select committees in undertaking systematic reviews of the main and supplementary estimates, departmental annual reports and accounts, settlements and budget statements among other activities. Some legislatures do not have a specialised unit but report having a small number of specialised staff within their broader legislative research services that provide budget analysis. This is the case in Canada, the Czech Republic, Estonia, Latvia and Norway.

Aggregate data on the legislative basis of research services across the OECD area is not available; however, a desk review of participants in the OECD Network of Parliamentary Budget Officials and Independent Fiscal Institutions suggests that the services are not enshrined in constitutions but rather are provided for under statutory law or through the standing orders of the legislature. For example, in Canada the Library of Parliament's leadership, salaries, staff and duties are established in primary legislation as a section of the Parliament of Canada Act.

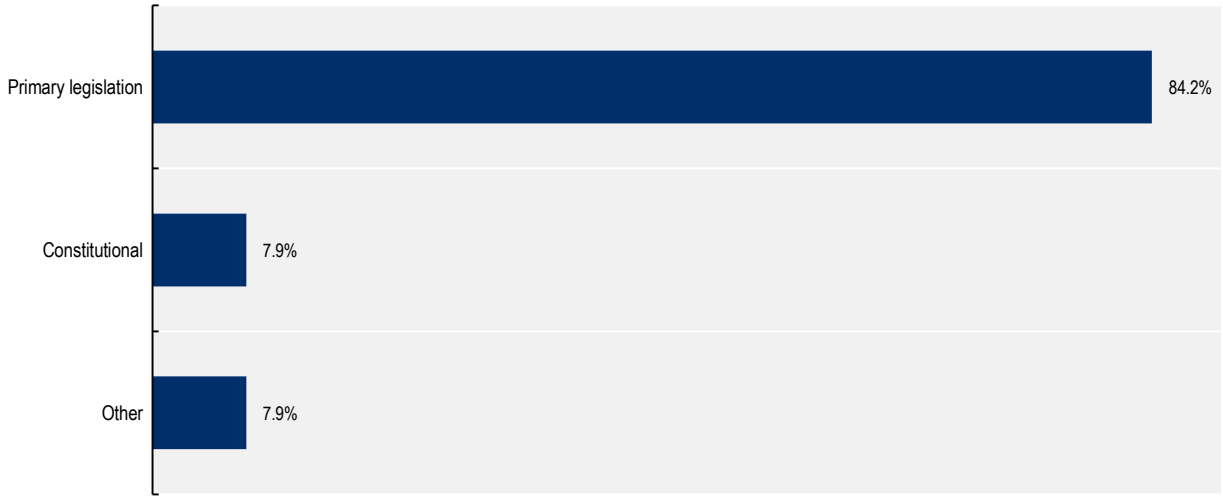
Independent monitoring of fiscal policy

Independent fiscal institutions (IFIs) have been established across the OECD area to provide independent analysis of fiscal policy and to promote fiscal transparency, sound fiscal policy and sustainable public finances. They take one of two forms: 1) independent parliamentary budget offices (PBOs), typically attached to the legislature with a single designated leader, and 2) fiscal councils, independent from the legislature and government and headed by a panel of several appointees with a chair.

Core functions across IFIs vary, but they commonly include producing, assessing and/or endorsing macroeconomic and fiscal forecasts; monitoring compliance with fiscal rules; policy costing; long-term fiscal sustainability analysis; and supporting the legislature in budget analysis.

The overwhelming majority of IFIs (84.2%) have been established in primary legislation (Figure 7.8). However, some countries that faced particular financial management challenges in the past chose to provide for greater protections for their IFIs in national constitutions. These include Hungary, Lithuania and the Slovak Republic (Box 7.2). Austria established its Parliamentary Budget Office through procedures of the legislature as part of an agreement among parties. The Swedish Fiscal Council was established with secondary legislation.

Figure 7.8. Legislative basis for independent fiscal institutions



Note: Proportion of total IFIs in OECD countries.
Source: *OECD Survey of Independent Fiscal Institutions* (forthcoming).

The OECD Principles for Independent Fiscal Institutions identify several key design features for IFIs that should be enshrined in legislation, including their independence and non-partisanship, transparency requirements, and freedom to communicate with the public. For example, legislation should prescribe that the institution be separate from the executive branch and contain provisions to ensure that leaders are appointed and dismissed in a nonpartisan manner and that the institution's ongoing resources are protected.

Importantly, IFI access to information should be guaranteed in legislation. This should describe in detail the body's powers to compel information on methodology and assumptions underlying the budget and other fiscal proposals. Legislation should also specify any restrictions on access to information and mechanisms for redress if government departments fail to comply with information requests.

Box 7.2. Legal frameworks underpinning independent fiscal institutions

Korea

The Korean National Assembly Budget Office is underpinned by two pieces of legislation. First, the National Assembly Act 1948 was amended in July 2003 to provide for NABO autonomy within the National Assembly. The National Assembly Budget Office Act, also adopted in July 2003, elaborates on the duties and organisational arrangements for NABO (von Trapp, Lienert and Wehner, 2016[11]).

Mexico

The Mexican *Centro de Estudios de las Finanzas Públicas* was established by congressional agreement in April 1998 and formally recognised in the Organic Law of Congress in September 1999 as one of the five study centres serving the congress.

Hungary

A fiscal council was initially set up as part of the Fiscal Responsibility Law passed in 2008. In 2011 a new fiscal council was established, legally separate from the first fiscal council. The new council became embedded in the Hungarian Constitution as part of constitutional reforms. Further reforms in 2013 linked the fiscal council operationally to the National Assembly. Hungary's Fiscal Council has veto power, which can stop the legislative process of the budget at its final vote in case of serious breach of the debt reduction rule (government debt-to-GDP ratio should not exceed 60%; if it does, it must be reduced).

Lithuania

The constitution references a budget policy monitoring authority to fulfil certain functions, although it is not named or established. The National Audit Office has been selected to fulfil the functions with its Budget Policy Monitoring Department, as laid out in the Republic of Lithuania Law on National Audit Office. The functions are established by the constitution.

Slovak Republic

The Slovak Council for Budget Responsibility (CBR) was established through Constitutional Act No. 493/2011 on Budgetary Responsibility, which received approval on 8 December 2011.

Independent auditing of financial statements and performance

All OECD countries have an independent supreme audit institution (SAI) as one of the fundamental links in their budget accountability chain. SAIs are established by the constitution in 23 countries and in primary legislation in 7 countries.

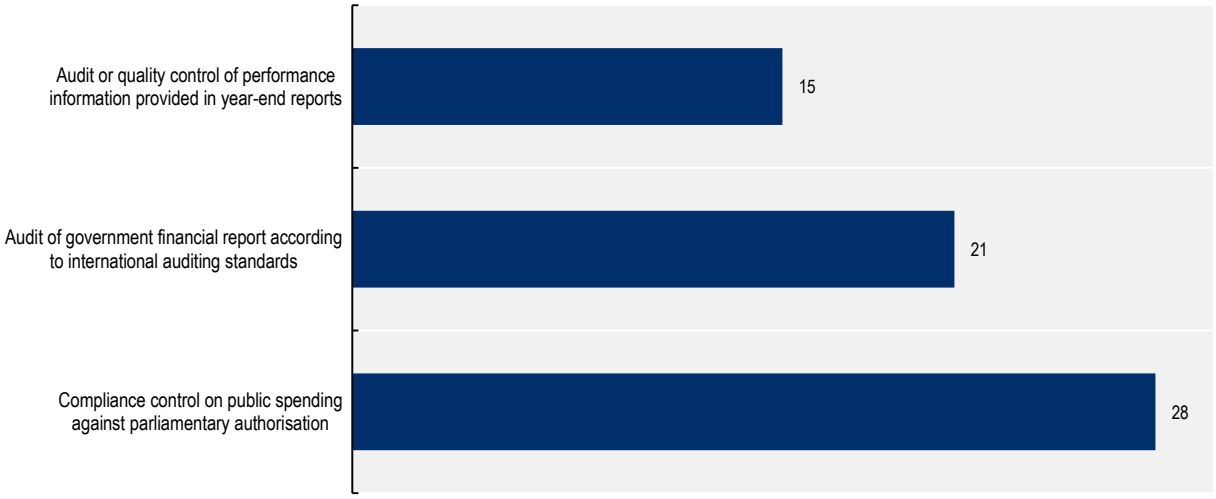
Laws may place SAIs under the legislative branch or the executive branch of government, or they may declare the office independent of both. In Latin America, constitutional reforms are increasingly prescribing the duties of SAIs under a new branch of power (beyond legislative, executive and judiciary), listed as bodies of control or citizen representation. SAIs that function independently from the legislative branch nonetheless direct most of their analysis at a legislative audience, and will respond to questions submitted from legislators and committees. The power of SAIs to compel governments to provide information is generally very strong and enshrined in statutory legislation.

The OECD has not conducted empirical assessments of the impact of SAIs on fiscal policy administration and sustainability; however, observations from the OECD Senior Budget Officials networks suggest that

their influence is expanding beyond simply monitoring compliance with controls on public expenditure and accounting conventions towards broader evaluation of the performance of government programmes. Fifteen OECD countries report that their SAI reviews performance information (Figure 7.9).

Figure 7.9. Activities of Supreme Audit Institutions across the OECD

Proportion of 34 countries responding to the survey



Source: OECD (2019[4]), *Budgeting and Public Expenditures in OECD Countries 2019*, OECD Publishing, Paris, https://doi.org/10.1787/9789264307957-en.

Key options and questions to consider

Good fiscal management thrives when the budget cycle and the role of the legislature are put on a strong legal footing, be it constitutional, statutory or otherwise. The legal basis for budget practices varies across OECD member countries along a spectrum of constitutional and statutory frameworks, and each country must take into consideration country-specific circumstances. In general, countries with strong fiscal management laws prescribe only high-level financial management principles in the constitution while creating requirements for governments to be explicit and transparent in their budget plans. Even in countries with strict attitudes toward fiscal discipline, governments are given significant leeway to exercise their democratic mandate to manage the public finances as they see fit in statutory law.

The key options to consider when deciding whether to constitutionalise a budgeting and financial oversight framework are presented below, together with an indication of how frequently these elements are enshrined in the constitution in benchmark countries.

Budgeting form, procedures and fiscal frameworks

Prescribing specific budget forms, procedures and frameworks in the constitution can level the playing field between different government branches by ensuring they cannot change the standards by which they govern public finances or the amount of disclosure they provide to the legislature and public. It can also reduce political gamesmanship – for example, a constitutional provision that automatically approves the previous year's budget if an agreement cannot be achieved prevents "fiscal cliff" type negotiations. Constitutional provisions can also lead to policy that is more aligned with the public interest, for example

by forcing medium-term and long-term planning beyond the political cycle and guaranteeing high levels of transparency, which increases democratic participation and pressure.

On the other hand**,** constitutional amendments may require lengthy processes and very high thresholds of political support. Including budget forms, procedures and frameworks in the constitution can greatly constrain a government's flexibility in a crisis compared to lower legislation, which can be more easily adjusted. For example, a provision forbidding a government from seeking mid-year increases in appropriations except for a schedule of natural disasters such as earthquakes and floods may not have been able to adequately respond to the COVID-19 pandemic. Governments with budget submission and approval procedures set only in statutory legislation or parliamentary standing orders were able to temporarily suspend debate and committee scrutiny requirements to push emergency pandemic legislation through the approval process in a matter of days, rather than the usual weeks or months. Further, accounting standards and best practices are constantly evolving and innovations in the machinery of government are frequent. If these details (beyond high-level principles) are set in constitutions, there is a risk for them to quickly be out of date and the necessary amendments could require years and costly national referendums to approve. With these caveats in sight, the following aspects may need to be considered when defining the budget form and framework:

1. *The budget's timing* – Whether public finances are to be set annually, and by calendar year or an alternative financial year, and prescriptions such as the minimum number of days or weeks that a budget must be provided to the legislature before it votes. Few countries (only two) explicitly state that the budget should be *annual*, but the budget scope and calendar are frequently described in the constitution.
2. *The budget's structure, contents and transparency* – The specific control mechanism of legislative votes, for example line budgeting versus programme budgeting, as well as the reporting requirements and minimum information criteria. Whether bills with financial consequences must be submitted with an estimate of their fiscal impact provided by legislative staff, the public service, or an independent fiscal institution. Only one benchmark country states in the constitution that the budget should be structured by programmes. Transparency requirements are frequently mentioned in the constitution as broad principles, but precise requirements are rarely described in the constitutions. Only one country requires mandatory costing of policies in the constitution.
3. *Contingencies* – What should be done in case the legislature and executive cannot reach an agreement to pass the budget. The one from the previous year may automatically be adopted; continuing appropriations may be provided until a budget is adopted; the budget of the government may be brought into force by ordinance; or the legislature may be dissolved (that is, the budget may be a confidence vote). Contingencies and resolution mechanisms are frequently described in the constitution.
4. *In-year adjustments* – What should be done in case unexpected expenses arise. A fixed number of opportunities and dates to submit supplementary budgets may be prescribed, or adjustments may be unlimited and at the government's discretion. Supplementary budgets may be allowed to raise borrowing ceilings, or they may only permit reallocation among spending programmes. About half the benchmark countries describe the process for in-year budgetary adjustments in their constitution.

Fiscal rules

1. *Fiscal rules* – Whether to set specific requirements a government must meet in planning or realising fiscal aggregates such as the budget balance or total spending. Specific rules may be defined or governments may simply be compelled to clearly indicate their fiscal management targets. Specific adjustment mechanisms may be described in case the rules are not met. Prescribing fiscal rules in the constitution sharpens their teeth, ensuring that governments cannot simply sidestep them with a simple majority when they prove inconvenient. Constitutional rules demonstrate a country's commitment to sound economic and fiscal policy, which can possibly increase the attractiveness of the country's borrowing instruments in international financial markets and reduce borrowing costs.
2. *Exceptions* – Real and financial shocks are unpredictable and all contingencies cannot be planned for under a constitutional rule framework. If rules cannot be readily changed by the government, that can limit the flexibility of policy makers in responding to different economic and political challenges. In this regard, having clear escape clauses together with the fiscal rules is essential. Monitoring constitutional provisions may also require new statistical tools and changes in institutions. Under which circumstances (natural disaster, economic crisis) are rules set aside and by how much can budget aggregates vary? Few countries mention escape clauses to their fiscal rules in their constitutions. Achieving the right balance between stringency of the rule and flexibility is very difficult, and may require a process of trial and error. Optimal fiscal rule design and targets may also depend on broad macroeconomic trends (such as the level of inflation or interest rates), and committing to a very detailed description of the fiscal rule in the constitution may not allow for such adaptation.
3. *Monitoring* – Whether an official arbiter of fiscal rules is named. This role may be given to an existing body, or the law may create a new one, be it an IFI (fiscal council or PBO model), SAI, legislature, or international organisation. Its degree of independence from the legislature and executive may be prescribed. Supreme audit institutions and their relation to the legislature and executive are frequently mentioned in constitutions.

The role of the legislature

Ensuring that the legislature's role in budget practice is clearly defined in the constitution and is unable to be changed by a simple majority government of the day supports the fundamental democratic checks and balances envisioned in the separation of powers in most OECD countries. Constitutions that require budgets to be reviewed in detail and authorised by the elected representatives of the public and their committees ensure that fiscal policy is generally consistent with the will of the public. However, legislative oversight can be time-consuming, and strict requirements can tie the government's hands in a crisis. Constitutional provisions can also interfere with some interpretations of democratic principles that view each new parliament as having the right to set its own rules and procedures to govern itself. Keeping in mind these trade-offs, the following aspects ought to be analysed:

1. *The legislature's control* – How are budgetary powers split between the upper and lower chambers – do both chambers play a role, does the lower house have prerogative, or is the lower chamber solely responsible? Whether the legislature must approve increases in taxes or debt, and which definition of debt to use. Very few countries detail the specific role of each chamber in budget matters in the constitution.
2. *The legislature's control levers* – What is the basis of voted appropriations: fiscal aggregates, ministry allocations or programme line items, etc. Does the legislature vote on the medium-term budget framework? The legislature may debate and vote, it may hold debates but not vote, or it may neither vote nor debate. The capacity of the legislature to amend the budget and the restrictions faced in doing so are frequently described in the constitution.

3. *The legislature's oversight workflow* – Whether committees are chaired by the government or opposition, whether only budget committees scrutinise financial plans versus sectoral committees. Openness of debates to the public. This is rarely mentioned in the constitution.

Research support and independent monitoring and auditing bodies

Empowering legislatures with research support through the constitution and creating strict constitutional institutions to independently monitor fiscal policy and audit financial statements can improve democratic oversight and create better fiscal outcomes through transparency, expert guidance and the creation of a political cost and strong disincentive against public finance mismanagement, dishonesty and corruption. Despite these potential benefits, constitutionally empowered independent institutions led by unelected officials can be seen to potentially undermine democratic principles of representative and accountable government if they wield too much authority over fiscal policy levers. The appropriate economic and fiscal policy for a country's circumstances may largely be a subjective question, best left to be determined by elected politicians with democratic mandates.

A constitution can thus regulate whether decisions regarding institutions to support oversight are left to parliaments on an ad hoc basis through internal procedures and standing orders, including whether they are funded out of the general parliament budget or whether they are given explicit guaranteed institutional support. Resources for supported institutions may be protected in legislation. The details of how leadership of the institutions is appointed may be prescribed. Access to information may be guaranteed. Placement among existing institutions or as a separate legal entity may be defined. While several OECD countries describe institutional support in their constitution, none of the benchmark countries do.

Regardless of the legal basis for budget processes and fiscal institutions, much of the ultimate success of fiscal frameworks comes instead from a country's norms and the oversight culture that has developed. A culture of responsible fiscal management can be fostered not only by ensuring that legislatures have the necessary information and support to fulfil their roles, but also by practicing principles of good budgeting and financial oversight in all that public bodies do.

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Notes

[1] Constitutions were retrieved from national legal databases and the resources provided by constituteproject.org.

[2] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union, Council of the European Union.

8 Central banks' governance and operations

This chapter outlines the importance of central banks in ensuring price stability and thus contributing to economic development and financial stability. It provides an overview of how the central bank can be institutionalised through the constitution. It shows that central bank legal frameworks vary across countries, reflecting differences in history and legal systems, and that while in some countries the central bank's role and responsibilities are referred to in the constitution, in most countries they are set out in detail in primary legislation in the form of a specific central bank law. This chapter stresses that, irrespective of the legal framework and specific arrangements, central bank independence requires legal guarantees of operational autonomy combined with accountability and transparency requirements.

Key issues

- While there is no commonly accepted international standard dealing with the independence of central banks, there is strong agreement among scholars and policy makers on the merits of having a central bank with both *de facto* and *de jure* independence.
- Independence in monetary policy conduct ensures that the central bank sets and implements policy to achieve its mandate without interference from the government, while the objectives of monetary policy can be set by the government.
- Strong legal provisions are key to ensuring central bank independence; they may or may not be included in the constitution.
- Central bank legal frameworks vary across the benchmark countries. In most of them the roles and functions of the central bank are set in primary legislation in the form of a specific central bank law. Only in a few countries are the central bank's roles and responsibilities defined in the constitution, and even in those cases provisions are specified in a central bank law.
- The overall strength of central bank independence depends on provisions regarding mandates, functions and governance rules, and requires an appropriate level of accountability and transparency.
- All of the benchmark countries identify price stability or stability of purchasing power as the primary mandate; some central banks have additional objectives. In a number of cases, broad goals (price stability, full employment) are established in constitutions or primary legislation, but the central bank determines operational targets that it considers to be consistent with those goals.
- Strong legal provisions are needed to ensure that the central bank governor and members of the monetary policy-setting committee are protected from unilateral government appointment or dismissal, and enjoy the full legitimacy of non-elected professionals in carrying out their duties. Only a few countries have constitutional provisions about the appointment and/or dismissal of the central bank governor.
- In most benchmark countries, primary legislation prevents central banks from financing government expenditure or purchasing debt directly from the government; some of them have this provision in the constitution.
- Only a few countries have provisions that explicitly prohibit other governmental and political bodies from seeking to influence central bank officials, or prohibit the central bank from taking instructions from others.
- An independent central bank should be accountable to lawmakers and the public. There is no best-practice compromise between independence and accountability; practical solutions differ among benchmark countries. A few countries specify legal provisions for central bank accountability in the constitution or an international treaty.

Introduction

Since the 1990s, many OECD countries have made legislative changes to ensure central bank autonomy in conducting monetary policy. These changes were motivated by cross-country evidence that a lack of *de jure* or *de facto* central bank operational independence from government resulted in high inflation. That consequence in turn undermined the stability of currency and real incomes and increased the cost of credit, with negative implications for economic growth and the distribution of income and wealth.

This chapter reviews legal frameworks of central bank governance and operations in 12 benchmark countries, covering both advanced and emerging-market economies: Australia, Brazil, Costa Rica, the euro area, India, Mexico, New Zealand, Poland, Sweden, Switzerland, Turkey and the United States. All of these but Costa Rica and Switzerland have adopted an inflation-targeting regime.

Brief overview of issues

The importance of central bank independence

The objectives and status of central banks have evolved over time.[1] In recent decades, central banks have played an important role in ensuring price stability and thus contribute to economic development and financial stability. Their independence developed out of concern that governments pursuing short-term political goals could resort to forcing central banks to finance excessive government spending by issuing ("printing") money. Prolonged and excessive money creation by central banks has frequently lead to high inflation and even hyperinflation, and considerable depreciation of domestic currency. This in turn has been associated with negative economic consequences, such as falling real incomes (especially for lower-income households), high nominal and real interest rates, and heightened economic uncertainty, all of which have undermined consumer spending and business investment (Adrian and Khan, 2019[1]) (Weidmann, 2019[2]; Sargent, 1982[3]).[2]

The relationship between the independence of central banks and price stability has been subject of an intense academic research, resulting in a strong agreement among academics and policy makers on the merits of having an independent central bank (Lastra, 2015[4]). In the late 1970s, a number of studies examined the empirical relationship between central bank independence and inflation, of which the experience of the German Bundesbank and its high level of independence was considered to be instructive. This research, in particular involving the development of a central bank independence index, convinced policy makers globally on the benefit of central bank independence and this has become a standard policy recommendation made through the IMF/World Bank Financial Sector Assessment Program and OECD accession process since the 1990s.

To avoid the negative outcomes mentioned, *de jure* independence of central banks, where the operation of monetary policy is determined by professionals, should be underpinned by provisions in constitutions and/or primary legislation (Lybek, 2005[5]).[3] Acceptance of the model as an international standard has been helped by widespread adoption of flexible inflation-targeting frameworks since the early 1990s (Ciżkowicz-Pękała et al., 2019[6]; Bordo, 2007[7]).[4]

Autonomy in monetary policy conduct essentially means that the central bank sets and implements policy to achieve its mandate without interference from the government. However, it is essential to distinguish between goal independence – when a central bank is free to determine its policy objectives independently – and instrument independence – when a central bank determines its operational means independently (Debelle and Fischer, 1994[8]).

Under the inflation-targeting framework currently adopted by many central banks, the implementation of policy instruments such as changes in interest rates and unconventional policy measures – including large-

scale purchases of government bonds – is left to the monetary authorities, but the power to set goals is not always granted to central banks.[5] In some cases, broad goals (such as price stability and full employment) are established in constitutions or primary legislation, but the central bank determines operational targets that it considers to be consistent with those goals. Central bank governors and monetary policy committees are responsible, either explicitly or implicitly, for achieving the operational targets as well as the broad goals.

De jure independence is a necessary but not sufficient condition for independent monetary policy. Without strong institutions and well-functioning democratic political systems, clear legal provisions are not enough to prevent political attempts to influence central bank decisions (Binder, 2021[9]; Balls, E. et al., 2018[10]).[6] Ensuring that central banks have clear objectives, appropriate tools and competencies to meet these objectives, and that they are accountable for their actions, all contribute positively to their independence (King, 2006[11]).

Overview of legal frameworks in the benchmark countries

Countries with a civil law tradition sometimes have constitutional provisions for the central bank, but such provisions are generally not used in common law countries (BIS, 2009[12]).[7] Common law countries, including Australia, India, New Zealand and the United States, do not have any central bank-related provisions in their constitutions (Table 8.1), while such provisions are present in some of the other benchmark countries. In the euro area, the Treaty on the Functioning of the European Union (TFEU) sets fundamental principles of the European System of Central Banks and the European Central Bank (Amicorum and Garavelli, 2005[13]).[8]

Constitutional provisions are usually broad, leaving it to primary legislation to clarify the details. The overall strength of central bank independence depends on the provisions for mandates, functions and governance rules. All countries have primary legislation to regulate the specific roles and functions of central banks.

In most countries, governments formally own central banks, like any other public institution, without any prejudice to central bank instrument independence (Bholat and Gutierrez, 2019[14]).[9] In some countries, central banks are incorporated as companies with partial or total ownership by private sector shareholders, but they are still responsible for delivering public goods related to price and financial stability, as stated in their statutory mandates, rather than pursuing profits for shareholders. In Switzerland and Turkey, both the government and private shareholders own the central bank in roughly equal proportions, although both are established as special statute joint stock companies, with specific central bank laws dictating their operations and preventing private shareholders' involvement in policy making. In the United States, commercial banks that are members of the Federal Reserve System hold stocks in their Reserve district bank, but the Federal Reserve System is considered not to be "owned" by anyone.[10] The ECB is owned by the national central banks of EU countries,[11] according to the capital key based on population and GDP. Most of EU national central banks are fully owned by the state with the exception of those in Belgium, Greece and Italy, which are partly owned by private sector shareholders.

Table 8.1. Comparative overview of legal frameworks for central banks in benchmark countries

	Central bank	Year established	Legal tender	Related provisions in constitution or international treaty	Primary legislation	Ownership
Australia	Reserve Bank of Australia	January 1960	Australian dollar	-	Reserve Bank Act, 1959	Fully owned by the state.
Brazil	Central Bank of Brazil	December 1964	Brazilian real	Articles 52, 84 and 164 of the Constitution of the Federative Republic of Brazil	Law No. 4.595,1964	Fully owned by the state.
Costa Rica	Central Bank of Costa Rica	January 1950	Costa Rican colón	Articles 188 and 189 of the Costa Rica Constitution	Organic Law of the Central Bank of Costa Rica, 1995	Fully owned by the state.
Euro area	European Central Bank	June 1998	Euro	A number of articles in TFEU	Statute of the European System of Central Banks and of the European Central Bank, 2016	Owned by all EU central banks; ownership of these central banks varies (most are owned by the Member State).
India	Reserve Bank of India	April 1935	Indian rupee	-	Reserve Bank of India Act, 1934	Fully owned by the state.
Mexico	Bank of Mexico	September 1925	Mexican peso	Article 28 of the Political Constitution of the United Mexican States	Bank of Mexico Law, 1993	Fully owned by the state.
New Zealand	Reserve Bank of New Zealand	August 1934	New Zealand dollar	-	Reserve Bank of New Zealand Act, 1989	Fully owned by the state.
Poland	National Bank of Poland	January 1945	Polish złoty	Article 227 of the Constitution of the Republic of Poland	Act on Narodowy Bank Polski, 1997	Fully owned by the state.
Sweden	Sveriges Riksbank	September 1668	Swedish krona	Articles 13 and 14 of Chapter 9 of the constitution of Sweden	Sveriges Riksbank Act, 1988	Fully owned by the state.
Switzerland	Swiss National Bank	June 1907	Swiss franc	Article 99 of the Federal Constitution of the Swiss Confederation	Federal Act on the Swiss National Bank, 2003	Around half owned by the cantons and cantonal banks, with the remainder owned by private individuals.
Turkey	Central Bank of the Republic of Turkey	June 1930	Turkish lira	-	Law on the Central Bank of the Republic of Turkey, 1970	55% owned by the state and 45% owned privately (mainly banks).
United States	Federal Reserve System	December 1913	US dollar	-	Federal Reserve Act, 1913	Commercial banks hold stocks.

Source: Constitutions/TFEU, central bank laws and websites of the benchmark countries.

Core features of constitutional and legislative provisions related to central banks

Constitutional provisions related to central bank independence are in general less susceptible to amendments compared with primary legislation, consolidating *de jure* central bank independence. However, they may make adjustments to certain aspects of central bank autonomy, which could sometimes be required due to changing, more difficult economic circumstances. In addition, the frequently abstract nature of the provisions contained in the constitution may not be enough to ensure independence.

All public entities are subject to certain governance-related requirements in the execution of their responsibilities, but unlike other public institutions central banks may have conflicts of interest with governments over the conduct of monetary policy. From this point of view, the essential issue is whether the government can unilaterally dismiss and appoint the governor (and policy board members) without parliamentary or other approval. [12]

While the mandates and responsibilities of central banks in the benchmark countries are comparable, the degree of central bank independence in terms of appointment and termination provisions varies (Table 8.2). Other aspects such as the qualification criteria required for their appointment are discussed below.

Table 8.2. Comparative overview of provisions on central bank independence

	Mandate	Responsibility	Appointed solely by executive branch	Dismissed solely by executive branch	Provisions for dismissal of governor	Governor's tenure	Accountable to
Australia	Price stability, maximum employment, economic prosperity and welfare	Monetary policy, prudential supervision	Yes	Yes	Yes	7 years	Government
Brazil	Price stability, financial stability	Monetary policy, prudential supervision	No (Senate's approval is necessary)	Yes	No	Not specified	National Monetary Council and Congress
Costa Rica	Price stability, currency stability, general economic stability, financial stability	Monetary policy, prudential supervision	No (Legislative Assembly's approval is necessary)	No	Yes	4 years	Legislative Assembly
Euro area	Price stability***, support general economic policies	Monetary policy, prudential supervision	No	No	Yes	8 years	EU Parliament and EU Council
India	Price stability, financial stability	Monetary policy, prudential supervision	Yes	Yes	Yes	5 years	Government
Mexico	Price stability***, financial stability	Monetary policy, prudential supervision	No (Senate's approval is necessary)	No (Senate's approval is necessary)	Yes	6 years	Congress
New Zealand	Price stability***, financial stability	Monetary policy, prudential supervision	Yes	No (Council's Order is necessary)	Yes	5 years	Government
Poland	Price stability, currency stability, financial stability, support economic policy	Monetary policy, macro-prudential supervision	No	No	Yes	6 years	Parliament

	Mandate	Responsibility	Appointed solely by executive branch	Dismissed solely by executive branch	Provisions for dismissal of governor	Governor's tenure	Accountable to
Sweden	Price stability, financial stability	Monetary policy, macro-prudential supervision	No	No	Yes	6 years	Parliament
Switzerland	Price stability***, development of economy	Monetary policy	Yes	Yes	Yes	6 years	Confederation
Turkey	Price stability***, currency stability, financial stability, maximum employment	Monetary policy, macro-prudential supervision	Yes	Yes	Yes	5 years	Government
United States	Price stability, maximum employment, long-term interest rate stability	Monetary policy, prudential supervision	No (Senate's approval is necessary)	Unclear	Partial	4 years	Congress

Note: The underlined items are enshrined in the constitutions or TFEU. The other items are laid down in central bank laws. Asterisked items represent the primary mandate.
Source: BIS (2009[12]); Dall'Orto Mas et al. (2020[15]); constitutions/TFEU, central bank laws and websites of the benchmark countries.

Mandate and responsibility

All of the benchmark countries identify price stability or stability of purchasing power as the primary mandate, with some central banks having additional objectives such as currency and financial stability or ensuring maximum employment.[13] To fulfil these mandates, central banks have responsibilities to conduct monetary and prudential policies.[14] In general, primary laws stipulate the specifics of the mandate and responsibilities of central banks. In Mexico, Poland, Sweden and Switzerland, these are stated explicitly in the constitution (Table 8.3). Similarly, in the euro area, these objectives are stated in TFEU.

Table 8.3. Constitutional provisions regarding central banks' mandate and responsibility

	Article of constitution	Stipulated mandate	Stipulated responsibility	Relevant provisions in the constitution or an international treaty
Euro area	Articles 3(1) and 127(1), (5) (TFEU)	Price stability, support general economic policies	Monetary policy, prudential supervision	The Union shall have exclusive competency in monetary policy for the Member States, whose currency is the euro (Article 3(1)). The primary objective of the European System of Central Banks (ESCB) shall be to maintain price stability. Without prejudice to that objective, the ESCB shall support general economic policies with a view to contributing to the achievement of the objectives of the Union. The ESCB shall contribute to the smooth conduct of policies pursued by the competent authorities relating to the prudential supervision of credit institutions and the stability of the financial system (Article 127(1) and (5)).
Mexico	Article 28	Price stability (stability of purchasing power)	-	The primary objective of the Bank of Mexico shall be to attain the stability of the purchasing power of the national currency, strengthening the guiding role of the state with regard to national development (Article 28).
Poland	Article 227(1)	Currency stability	Monetary policy	The National Bank of Poland shall have the exclusive right to issue money as well as to formulate and implement monetary policy. It shall be responsible for the value of Polish currency (Article 227(1)).
Sweden	Articles 13 and 14 of Chapter 9	-	Monetary policy	The Riksbank is responsible for monetary policy. No public authority may determine how the Riksbank shall decide in matters of monetary policy (Article 13 of Chapter 9). The Riksbank alone has the right to issue banknotes and coins (Article 14 of Chapter 9).
Switzerland	Article 99	-	Monetary policy	The Swiss National Bank, as an independent central bank, shall pursue a monetary policy that serves the overall interests of the country (Article 99).

Source: Constitutions/TFEU and central bank websites of the benchmark countries.

Appointment and dismissal of central bank governors

Processes for the appointment and dismissal of governors are specified in the legal framework in almost all countries. The appointment process is intended to ensure that non-elected members of the central bank have legitimacy in carrying out their duties, and that there is a clear process and rationale for any dismissal. The framework intends to prevent arbitrary use of power by requiring the involvement of more than one governing body in such decisions. For example, Brazil, Mexico, Poland and Sweden have constitutional provisions about an appointment and/or dismissal of a central bank governor (Table 8.4). Similar provisions are provided in TFEU for the euro area. In the euro area and Poland, the governor's tenure and qualification criteria for central bank executives are also prescribed in the treaty/constitution. Even though the number of countries with constitutional provisions is limited, several benchmark countries have central bank laws that prohibit the government from unilaterally appointing or dismissing central bank governors, to ensure their independence.

Table 8.4. Constitutional provisions regarding appointment/dismissal of central bank governors

	Article of constitution	Stipulated procedures	Stipulated qualification criteria for the appointment	Relevant provisions in the constitution or an international treaty
Brazil	Articles 52 and 84	Appointment procedures of the governor	-	The Senate has the competence to give prior consent by secret voting, after public hearing, on the selection of president and directors of the Central Bank of Brazil (Article 52). The president of the Republic shall have the exclusive power to appoint, after approval by the Senate, the president and the directors of the Central Bank of Brazil (Article 84).
Euro area	Article 283(2) (TFEU)	Appointment procedures, terms of office, and qualification criteria for the governor	Standing and professional experience in monetary or banking matters	The president, the vice-president and the other members of the executive board shall be appointed by the European Council, acting by a qualified majority, from among persons of recognised standing and professional experience in monetary or banking matters, on a recommendation from the Council, after it has consulted the European parliament and the governing council of the ECB. Their term of office shall be eight years and shall not be renewable (Article 283(2)).
Mexico	Article 28	Appointment and dismissal procedures of the governor	-	Management of the Bank of Mexico shall be entrusted to the persons appointed by the president of the Republic with the consent of the Senate or the Permanent Committee, as the case may be. They shall hold office for the terms which duration and staggered sequences are best suited to the autonomous exercise of their duties; they may only be removed for a serious cause and they cannot hold any other employment, position or assignment. The persons in charge of the Bank may be subjected to impeachment in accordance with the provisions established in the Article 110 of this constitution (Article 28).
Poland	Article 227(3), (5), (7)	Appointment procedures and terms of office of the governor; qualification for the Council for Monetary Policy members	Distinguished by their knowledge of financial matters	The Sejm, on request of the president of the Republic, shall appoint the president of the National Bank of Poland for a period of 6 years (Article 227(3)). The Council for Monetary Policy shall be composed of the president of the National Bank of Poland, who shall preside over it, as well as persons distinguished by their knowledge of financial matters (Article 227(5)). The organisation and principles of activity of the National Bank of Poland, as well as detailed principles for the appointment and dismissal of the governor shall be specified by statute (Article 227(7)).
Sweden	Article 13 of Chapter 9	Appointment and dismissal procedures of the governor	-	The Riksbank has a general council comprising eleven members, who are elected by the Riksdag. The Riksbank is under the direction of an executive board appointed by the general council. The Riksdag examines whether the members of the general council and the executive board shall be granted discharge from liability. If the Riksdag refuses a member of the general council discharge from liability, they are thus severed from their appointment. The general council may only dismiss a member of the executive board if they no longer fulfil the requirements laid down for the performance of their duties, or are guilty of gross negligence (Article 13 of Chapter 9).

Source: Constitutions/TFEU and central bank websites of the benchmark countries.

In a few benchmark countries, however, independence in relation to the appointment and dismissal of the central bank governor has been recently challenged by other governing bodies (Dall'Orto Mas et al., 2020[15]). In Turkey, a recent legislative change based on the Statutory Decree allows the government to shorten the tenure of the central bank governor (OECD, 2021[16]). This right has been already exercised, leading to negative market reactions.

In order to ensure monetary policy autonomy, not only the central bank governor but also members of monetary policy committees (MPC) must be protected from unilateral government appointment or dismissal, as – in most central banks – monetary policy decisions are taken by the MPC by majority vote.[15]

Legal frameworks and procedures for appointing members of an MPC vary across the benchmark countries (Table 8.5). In the euro area, Poland and Sweden, the MPC is explicitly mentioned in TFEU and constitutions. In Poland, qualification criteria for MPC members are also prescribed in the constitution.

The specific appointment, dismissal and terms of office of MPC are often stipulated in primary legislation. In Brazil, India, Switzerland and Turkey, the executive branch of the government appoints the members, while in other countries other stakeholders are involved in the appointment. For example, in the United States, members of the Federal Reserve Board are nominated by the president of the United States and have to be confirmed by the Senate.[16] In Poland, the president of the Republic, the Sejm (lower house of the country's bicameral parliament) and the Senate each appoint three members of the MPC.

In most benchmark countries, the tenures of MPC members are in practice staggered. This arrangement provides stability of policy implementation, and prevents any given administration from appointing/dismissing several members and having political sway over monetary policy. In Costa Rica, Mexico and the United States, the mechanism of staggered tenures is enshrined in their constitutions.

Table 8.5. Comparative perspective of legal frameworks for monetary policy committees

	Monetary policy committee	Appointed solely by executive branch	Dismissed solely by executive branch	Board member's tenure	Decision-making style	Relevant provisions in constitution or international treaty
Australia	Reserve Bank board; governor, deputy governor, secretary to the treasury and 6 other members appointed by the Treasury.	Yes	Yes	5 years	Majority vote	No relevant provisions.
Brazil	Monetary policy committee; 9 central bankers, including governor and deputy governors.	Yes (based on *Decreto* No. 91.961)	Yes (based on *Decreto* No. 91.961)	Not specified	Majority vote	No relevant provisions.
Costa Rica	Board of directors; president, minister of finance, 6 central bankers.	No	No	90 months, staggered	Majority vote	No relevant provisions.
Euro area	Governing council; 25 central bankers, including president and vice-president.***	No	No	Not specified	Majority vote	The governing council shall comprise the members of the executive board of the ECB and the governors of the national central banks of the Member States whose currency is the euro (Article 10.1).
India	Monetary policy committee; governor, deputy governor in charge of monetary policy, 1 central banker and 3 officials appointed by the central government	Yes	Yes	4 years	Majority vote	No relevant provisions.
Mexico	Board of governors; governor and 4 deputy governors.***	Yes	No	8 years for deputy governors, staggered	Majority vote	No relevant provisions.
New Zealand	Monetary policy committee; governor, deputy governor, 1 or 2 internal members, 2 or 3 external members.	Yes	No (council's order is necessary)	5 years for internals, 4 years for externals	Majority vote	No relevant provisions.
Poland	Council for monetary policy; president of the National Bank of Poland, 9 specialists appointed by the president of the Republic, the Sejm and the Senate in equal numbers.	No	No	6 years	Majority vote	The Council for Monetary Policy shall be composed of the president of the National Bank of Poland as well as persons in equal numbers, from the president of the Republic, the Sejm and the Senate for a period of 6 years (Article 227(5)).
Sweden	Executive board; 6 members appointed by the general council.	No	No	5 or 6 years	Majority vote	The Riksbank has a general council, elected by the Riksdag. The Riksbank is

	Monetary policy committee	Appointed solely by executive branch	Dismissed solely by executive branch	Board member's tenure	Decision-making style	Relevant provisions in constitution or international treaty
	(General council members are elected by the Riksdag)					under the direction of an executive board appointed by the general council (Article 13 of Chapter 9).
Switzerland	Governing board; 3 members appointed by the Federal Council.	Yes	Yes	6 years	Not specified	No relevant provisions.
Turkey	Monetary policy committee; 6 central bankers, including governor, deputy governors, and 1 member endorsed by the governor.***	Yes	Yes	5 years	Majority Vote	No relevant provisions.
United States	Federal Open Market Committee; 7 members of the board, the president of the New York Federal Reserve Bank and 4 of the remaining eleven Reserve Bank presidents.	No (Senate's approval is necessary)	Unclear	14 years, staggered	Majority Vote	No relevant provisions.

Note: Items with asterisks indicate that there are provisions for non-voting government representatives to be present.
Source: BIS (2009[12]); Dall'Orto Mas et al. (2020[15]); (BIS, 2019[17]); constitutions/TFEU and central bank websites of the benchmark countries.

Accountability

Since an independent central bank is not an elected body yet has sweeping economic powers, in a democratic society it should be accountable to lawmakers and public. The key issue is to strike the right balance between independence and accountability. On the one hand, central banks need independence, since the best policy for the economy may not be aligned with the political goals of governments. On the other hand, in fulfilling their mandate, central banks must be accountable to society through their elected representatives. There is no best compromise between these principles. While every country aims to balance independence and accountability, solutions differ among countries (Van den Berg, 2018[18]).

In some benchmark countries, legal frameworks for central bank accountability are specified in the constitution or an international treaty (Table 8.6). For instance, in Poland the constitution stipulates that the central bank shall be accountable to the Sejm and it must present monetary policy objectives every year. The Sejm can only be informed; it cannot give instructions to the central bank. In Switzerland the central bank shall be administered with the co-operation and under the supervision of the Confederation. The ECB president is legally required to submit reports annually to both the European parliament and the European Council, and the Chair of the US Federal Reserve is required to give a semi-annual testimony to Congress.

An important aspect of central bank accountability is transparency, which involves public press conferences, publication of minutes of meetings, and responding to inquiries beneficial to the public (Adrian and Khan, 2019[1]) (IMF, 2019[19]). As such, central bank transparency contributes to *de facto* accountability, and accountability and transparency are closely related in central bank legal frameworks. A high degree of transparency and accountability, and a well-defined and narrow mandate anchored in a strong institutional setting, help to maintain central bank independence (Mersch, 2019[20]).

Table 8.6. Constitutional provisions regarding central banks' accountability and transparency

	Article of constitution	Stipulated accountability partner	Stipulated ways to ensure transparency	Relevant provisions in the constitution or an international treaty
Euro area	Article 284(3) (TFEU)	EU Parliament and EU Council	Submit a report to the Parliament annually	The ECB shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and current year to the European Parliament, **the Council** and the Commission, and also to the European Council. The President of the ECB shall present this report to the Council and to the European Parliament, which may hold a general debate on that basis (Article 284(3)).
Poland	Article 227(6)	Parliament	Submit a report to the Parliament annually	The Council for Monetary Policy shall annually formulate the aims of monetary policy and present them to the Sejm. Within 5 months following the end of the fiscal year, the Council for Monetary Policy shall submit to the Sejm a report on the achievement of the purposes of monetary policy (Article 227(6)).
Switzerland	Article 99	Confederation	-	The Confederation is responsible for money and currency, and it has the exclusive right to issue coins and banknotes. The Swiss National Bank, as an independent central bank, shall pursue a monetary policy that serves the overall interests of the country; it shall be administered with the co-operation and under the supervision of the Confederation (Article 99).

Source: Constitutions/TFEU and central bank websites of the benchmark countriess.

Legal basis for the autonomy of monetary policy

Although the provisions concerning monetary policy autonomy are abstract and broad, they can directly or indirectly affect monetary policy implementation (Table 8.7). Brazil, the euro area, Mexico, Poland, Sweden and Switzerland have constitutional/treaty provisions that grant the central bank exclusive rights to issue currency.[17] The central bank's monopoly on currency is the basis of its ability to control the growth of the monetary base.[18] As it is fundamental to the implementation of monetary policy, central banks in all benchmark countries have the statutory authority to issue currency, even if there is no provision in the constitution/treaty.[19]

The euro area and Sweden have provisions that prohibit other bodies from seeking to influence the central bank, and prohibits the central bank from taking instructions from others.

Provisions in Costa Rica, the euro area, Mexico and Switzerland ensure central bank independence directly by including the words "autonomy" or "independence" in their constitutions. Brazil and Turkey have similar provisions in their central bank laws.

In most benchmark countries, primary legislation prevents central banks from financing government expenditure or purchasing debt directly from the government. In Brazil, the euro area, Mexico and Poland, such restrictions are stated in the constitution.[20]

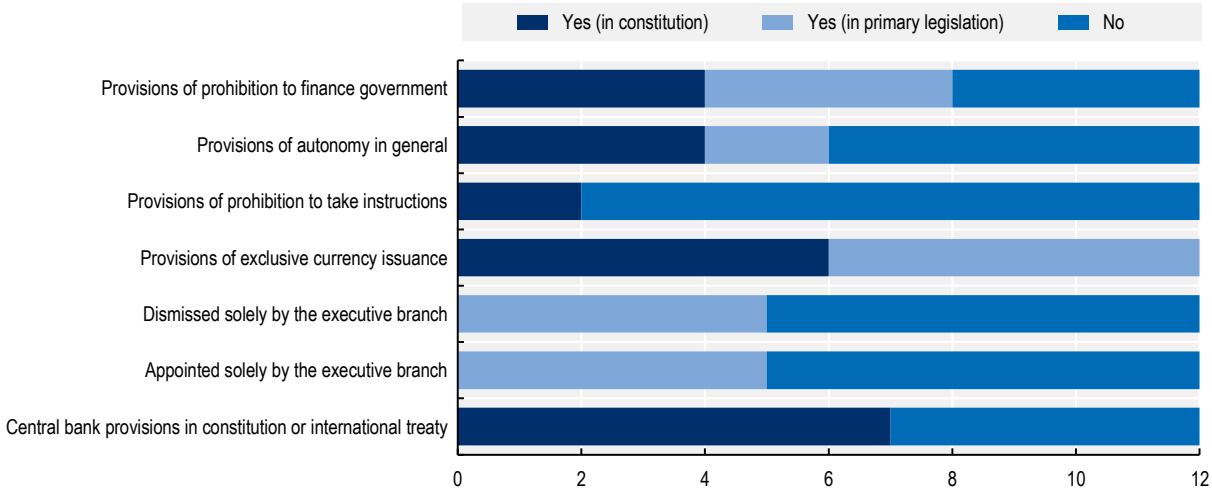
Monetary policy operations, including inflation targeting and unconventional monetary instruments, are usually not based on primary legislation or in a broad context. The policy goals are often set in accordance with agreements with or instructions from governments, but the choice of how to operate is left to the central bank. This is because central banks need to be agile and flexible in their policy implementation, in response to changes in financial and economic conditions.

Key options and questions to consider

Constitutional provisions on central bank independence vary across countries (Figure 8.1). A constitutional provision would ensure stronger legal protection in general, but some central banks, such as the Federal Reserve System in the United States, do not have constitutional provisions yet enjoy sufficient independence under primary law. Thus, the need for a constitutional provision should be considered in the context of the country's history and legal system.

Figure 8.1. Legal provisions regarding central bank independence vary across the benchmark countries

Number of central banks in benchmark countries



Note: "No" accounts also for cases with unclear provisions.
Source: OECD compilation based on central banks' legal documents.

Key legal provisions governing the independence of the central bank should include a well-defined mandate to attain and maintain price stability; the process for appointing and dismissing senior officials and protecting them from unilateral government action; the role and operation of the monetary policy committee and the autonomy of its decisions; and a high degree of accountability and transparency to the government and the public.

Table 8.7. Comparative overview of monetary policy autonomy provisions

	Article of constitution or central bank law				Key relevant provisions in the constitution, an international treaty, or central bank law
	Exclusive currency issuance	Prohibition from taking instructions	Autonomy in general	Prohibition from financing government	
Australia	Section 34(2)	-	-	-	Australian notes shall be printed by, or under the authority of, the Reserve Bank of Australia (Section 34(2)).
Brazil	Article 164	-	Article 8	Article 164	The competency of the Union to issue currency shall be exercised exclusively by the Central Bank of Brazil. It is forbidden for the Bank to grant, either directly or indirectly, loans to the National Treasury or to any body (Article 164).
Costa Rica	Article 43	-	Articles 188 and 189	Article 59(a)	The autonomous institutions of the state enjoy administrative independence and are subject to the law in matters of government (Article 188). Those established by this constitution are autonomous institutions (Article 189).

	Article of constitution or central bank law				Key relevant provisions in the constitution, an international treaty, or central bank law
	Exclusive currency issuance	Prohibition from taking instructions	Autonomy in general	Prohibition from financing government	
Euro area	Article 282(3) (TFEU)	Article 130 (TFEU)	Article 282(3) (TFEU)	Article 123(1) (TFEU)	Overdraft facilities or any other type of credit facility shall be prohibited (Article 123(1)). Neither the ECB nor a national central bank shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body (Article 130). The ECB shall have legal personality. It alone may authorise the issue of the euro. It shall be independent in the exercise of its powers and in the management of its finances. Union institutions, bodies, offices and agencies and the governments of the Member States shall respect that independence (Article 282(3)).
India	Article 22(1)	-	-	-	The Reserve Bank of India shall have the sole right to issue bank notes in India (Article 22(1)).
Mexico	Article 28	-	Article 28	Article 28	The Bank of Mexico shall be autonomous in the exercise of its functions and its administration. No authority can order the Bank to provide financing. Those functions shall be carried out exclusively by the state through the Bank in the strategic areas of coining and note printing (Article 28).
New Zealand	Article 25(1)	-	-	-	The Reserve Bank of New Zealand shall have the sole right to issue bank notes and coins in New Zealand (Article 25(1)).
Poland	Article 227(1)	-	-	Article 220(2)	The budget shall not provide for covering a budget deficit by way of contracting credit obligations to the National Bank of Poland (Article 220(2)). The National Bank of Poland shall have the exclusive right to issue money as well as to formulate and implement monetary policy. The Bank shall be responsible for the value of Polish currency (Article 227(1)).
Sweden	Article 14 of ch. 9	Article 13 of ch. 9	-	-	No public authority may determine how the Riksbank shall decide in matters of monetary policy (Article 13 of Chapter 9). The Riksbank alone has the right to issue banknotes and coins (Article 14 of Chapter 9).
Switzerland	Article 99	-	Article 99	Article 11(2)	The Confederation is responsible for money and currency, and it has the exclusive right to issue coins and banknotes. The Swiss National Bank, as an independent central bank, shall pursue a monetary policy that serves the overall interests of the country; it shall be administered with the co-operation and under the supervision of the Confederation (Article 99).
Turkey	Article 4 II	-	Article 4 III	Article 56	The privilege of issuing banknotes in Turkey shall rest exclusively with the Central Bank of the Republic of Turkey. The Bank shall enjoy absolute autonomy in exercising the powers and carrying out the duties granted by this law under its own responsibility (Article 4). The Central Bank of the Republic of Turkey may not grant, advance or extend credit to the treasury or to public establishments or institutions, and may not purchase debt instruments issued by the treasury or public establishments or institutions in the primary market (Article 56).
United States	Section 16(1)	-	-	Section 14(2)	Any bonds, notes, or other obligations that are direct obligations of the United States or that are fully guaranteed by the United States as to the principal and interest may be bought and sold without regard to maturities but only in the open market (Section 14(2)). Federal Reserve notes, to be issued at the discretion of the board of governors of the Federal Reserve System for the purpose of issuing advances to Federal Reserve banks through the Federal Reserve agents as hereinafter set forth and for no other purpose, are hereby authorised (Section 16(1)).

Note: The underlined items are enshrined in the constitutions or TFEU. The other items are set forth in central bank laws.
Source: Constitutions/TFEU, central bank laws and websites of the benchmark countries.

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Notes

[1] The Swedish Riksbank was established in 1668 as a joint stock bank to lend the government funds and to act as a clearing house for commerce. In 1694, the Bank of England was founded also as a joint stock company to purchase government debt. Other central banks in Europe were set up later for similar purposes, though some were established to deal with monetary disarray. The Federal Reserve System was created by the US Congress in 1913 as the nation's central bank in which commercial banks hold stock with the aim to provide a safer, more flexible and more stable monetary and financial system.

[2] For example, Sargent (1982[3]) describes the historical experiences of hyperinflation in Austria, Hungary, Germany and Poland in the 1920s, stressing that the creation of an independent central bank – that was legally prohibited from extending unsecured credit to government – would have been one of the essential measures to prevent such hyperinflation. In the past decade, Zimbabwe has experienced hyperinflation fuelled by the central bank printing money.

[3] Some prefer the term "autonomy" to the frequently used term "independence" because autonomy entails operational freedom, while independence indicates a lack of institutional constraints (Lybek, 2005). This chapter uses these two terms interchangeably except where it might be misleading.

[4] Bordo (2007[7]) provides a brief history of central banks, including the transition to independence.

[5] In some countries (e.g. Australia, India, New Zealand and Turkey) the government is involved in determining policy objectives, including the target inflation rate.

[6] Based on a sample of 118 central banks between 2010 and 2018, Binder (2021[9]) illustrated that on average about 10% of these banks reportedly face political pressure every year.

[7] The civil law system is based on the codification of the core principles of laws, whereas the common law system derives from uncodified judge-made case law, which gives precedential authority to prior court decisions.

[8] With the establishment of the ECB, national central banks in the euro area countries no longer set monetary policy but they continue to maintain many important functions. Such changes were brought about by the ratification of TFEU. For further details on the legal framework of the European System of Central Banks and the ECB, see Amicorum and Garavelli (2005[13]).

[9] The owners of central banks are responsible for making executive appointments, and receive a share of central banks' profits, while the banks' senior management and policy committees are responsible for controlling daily operations and the conduct of monetary policy.

[10] For details see the FAQ prepared by the Federal Reserve: www.federalreserve.gov/faqs/about_14986.htm.

[11] Central banks from EU countries that are not members of the monetary union do not participate in the ECB policy-making body (governing council).

[12] The principle of independence of the central bank from the government has much in common with the principle of the independence of the judiciary. See the commentary on the constitutional court in Chapter 5.

[13] Central banks in the euro area, Mexico, New Zealand, Switzerland and Turkey have price stability as their most important mandate. In the other economies, each mandate is regarded as being of equal importance.

[14] Prudential policies consist of micro- and macro-prudential policies. Micro-prudential policies aim at protecting individual financial institutions from idiosyncratic risks and encouraging sound management. The objective of macro-prudential policies is to ensure the stability of the financial system as a whole, by taking into account interactions among financial institutions as well as the feedback loops of the financial sector with the real economy. Examples of prudential regulation include minimum required liquidity and capital ratios, and caps on loans in relation to the value of purchased property or to income. In almost all countries the central bank is responsible for macro-prudential policies, and in some countries also for micro-prudential policies, in co-ordination with the financial supervisory authority.

[15] On most monetary policy boards, the chairperson has a casting vote when votes for and against are in equal numbers.

[16] In the Unites States, the policy-making Federal Open Market Committee (FOMC) consists of seven governors of the Federal Reserve System; the president of the Federal Reserve Bank of New York; and four of the remaining 11 Reserve District Bank presidents. The US president's nomination and Senate's confirmation processes are required only for the seven governors of the Federal Reserve Board.

[17] According to the constitution of Costa Rica, the Legislative Assembly has sole powers to establish the law on the unit of currency and enact laws on currency, credit, weights and measures (Article 121). However, there are no relevant provisions on the central bank's right to issue currency.

[18] Central banks have an ability to manipulate the monetary base during the conduct of monetary policy. The monetary base is the total amount of currency in circulation plus commercial bank deposits held as the central bank's reserves.

[19] Future possible implementation of central bank digital currencies, which are under considerations in several countries, would require new legal provisions on currency issuance (BIS, 2020[21]).

[20] The United States guarantees monetary policy autonomy by permitting the Federal Reserve to purchase government debt only in the secondary market. The other countries, such as Costa Rica, Switzerland and Turkey, have similar provisions in their primary legislation.

Annex A. Comparative Tables

Table A A.1. Comparative Perspectives on Economic Rights, Social Rights, Cultural Rights and "New Rights"

Economic Rights

	Social Welfare	Unionisation and Striking	Workers' Rights
Australia	Not present.	Not present.	Not present.
Finland	Justiciable guarantee of means of subsistence during unemployment, retirement, or disability as well as during the birth of a child or the loss of a provider. Need for contribution, past employment not made explicit. Details to be defined by law (s. 19).	Justiciable right to join/form union. Details on the exercise of the right (and free association generally) to be established in law (s. 13). Right to strike: not present.	Not explicitly guaranteed. But, the public authorities are assigned responsibility for the protection of the labour force and no one is to be dismissed without a lawful reason (s. 18).
Germany	Not present.	Justiciable right to unionise for every individual and occupation (art. 9(3)). Right to strike: not present.	Not present.
New Zealand	Not present.	Not present.	Not present.
Portugal	Workers have a justiciable right to material assistance when involuntarily unemployed or unable to work due to a work-related accident or illness (art. 59). The state is tasked with organizing and subsidizing a social security system to protect disabled individuals, widows and orphans, the elderly, and the unemployed. All periods of work to be included in the calculation of old age and disability pension amounts (justiciable, art.63). Maternity: leave guaranteed and law to provide mothers and fathers a period of leave from work in the interests of the child (justiciable, art. 68).	Justiciable rights to unionise (art. 55) and strike (art. 57). Right to strike subject to limitations where "essential services" are involved. Essential services includes military and police (art. 270). Extent of limitations to be defined by law. No law can limit the scope of interests that workers seek to advance via strikes, and lockouts are explicitly prohibited (art. 57).	Justiciable rights to a fair/living wage, rest and leisure time, limits on the working day, and to healthy, safe, and hygienic working conditions (art. 59).
Spain	The existence of a public social security system that provides adequate benefits for all citizens during times of hardship is required and particular emphasis is placed on	Justiciable right to join/form a union, but a law may limit or except its exercise by members of the armed services and lay out special conditions for civil servants (art. 28).	Justiciable right (and duty) to work for sufficient remuneration with the particulars to be regulated by law (art. 35). The state is to ensure workplace safety and hygiene, suitable

	ensuring benefits for the unemployed (aspirational, Art. 41)	The right to strike is also justiciable, subject to the possible legal regulation to ensure the maintenance of essential public services (art. 28(2)).	limits on the working day, adequate rest periods, and periodic paid holidays (aspirational, art. 40(2)).
Switzerland	Compulsory Old-age, Survivors', and Invalidity insurance to be established by law. Minimum benefit to be sufficient to cover basic living expenses; the maximum amount not to exceed twice the minimum. Funding provided by a combination of employee/employer contributions and state subsidies (aspirational, arts.112, 112b, 112c). State required to create a mandatory occupational pension scheme funded by both employee and employer contributions, the latter of which must be at least half that of the former. This scheme intended—in conjunction with old-age, survivors, and disability insurance—to allow retired individuals to maintain their "previous lifestyle in an appropriate manner" (aspirational, art.113). State required to create an unemployment insurance scheme to be equally funded by employee and employer contributions (aspirational, art. 114).	Justiciable right of workers to join/form a union and of employers to form associations as well as a right to not join such associations (art. 28). Strikes and lockouts permissible provided they are directly related to employment relations. "Certain categories of person" may be prohibited from striking by law (justiciable, art. 28).	The state is to endeavour to ensure that everyone who is fit to work can earn a living by working under fair conditions (aspirational, art. 41).

Social Rights

	Education	Healthcare	Social Welfare
Australia	Not present.	Not present.	Not present.
Finland	Justiciable right to basic education. Opportunity to access to other educational services based on ability and/or need as well as opportunity to develop oneself without being prevented by economic hardship also guaranteed. Details of all three to be provided for in law (s.16).	Justiciable right to adequate health and medical service for all. Details to be provided by law (s.19).	Justiciable guarantee to the "means necessary for a life of dignity" to those otherwise unable to obtain them (s.19). *Housing*: public authorities to "promote the right of everyone to housing and the opportunity to arrange their own housing." (justiciable, s.19)
Germany	A specific right to education is not articulated. However, art. 7 gives the state oversight over the education system, parents the choice to have their children receive religious education, and permits private schools provided certain conditions are met.	Not present.	Not present.
New Zealand	Not present.	Not present.	Not present.
Portugal	Justiciable right to education for all. The state is tasked with "ensuring universal, compulsory and free basic education," creating a pre-school system, eliminating illiteracy, progressively making all levels of education free of charge, ensuring access to and support for the education of disabled individuals (art. 74).	Justiciable right to health care to be realised via a national health service that is universal and general and which "shall tend to be free of charge" (art. 64). The state is assigned primary responsibility for guaranteeing access to preventative, curative, and rehabilitative healthcare regardless of ability to pay, ensuring nationwide coverage,	All individuals have a justiciable right to social security (art. 63(1)). *Housing*: everyone is entitled to adequately sized housing. The state is required take action to realise this and to allow public participation in the development of relevant policy (justiciable,

	The state is also responsible for the licensing and regulation of private educational institutions (art. 75).	"work[ing] toward the public funding of the costs of medical care and medicines" and regulating private healthcare provision (art. 64).	art. 65). *Old Age:* notwithstanding contributory pensions, the elderly have the right to economic security and to circumstances of housing and community that respect their personal autonomy. The state is required to establish policies for the elderly that address their economic, social, and cultural needs and provide opportunities for personal fulfilment (justiciable, arts. 67(2), 72). *Disability*: citizens with disabilities are entitled to the full enjoyment of their rights and subject to the constitutional duties that their condition permits. The state is required to develop policy for the prevention, treatment, rehabilitation, and reintegration of disabled citizens as well as the provision of support to their families (justiciable, art. 71).
Spain	Justiciable right to free elementary education (which is also compulsory). Private educational institutions may be established but must respect the principles of the Constitution (art. 27).	Right to health protection; state tasked with ensuring appropriate preventative measures and providing necessary benefits and services. The specifics of the State's obligation are to be established by law (aspirational, art. 43).	*Old Age:* right of the elderly to an adequate pension and the promotion of their welfare through a system of social services (aspirational, art. 50). *Disability:* the public authorities are to take measures to ensure disabled individuals are able to enjoy the rights granted to all citizens. In particular they are to provide the necessary specialised care they require (aspirational, art. 49). *Housing*: right to adequate housing; state to promote conditions and standards to realise this right, particularly the regulation of land use and the prevention of speculation (aspirational, art. 47).
Switzerland	Justiciable guarantee of a free and adequate basic education (art. 19). That guarantee is supplemented by a number of aspirational rights relating to the ability of individuals to access "advanced training in accordance with their abilities" (41(1)(f)) while several additional articles relate to particular aspects of education in vocational and profession (art. 63), higher (art.63a), grants to students to pursue higher education (art.66), musical education (art. 67a), sport (art. 68), and culture (art.69).	Confederation and Cantons, "as a complement to personal responsibility and private initiative" are to "endeavour to ensure" access to health care (aspirational, art. 41(1)). Additionally, the state is to establish health and accident insurance by law and may declare it compulsory (aspirational, art. 117). Further, the Confederation and the Cantons shall, within their respective powers, ensure the adequate provision of primary medical care accessible to all and promote family medicine as an essential component of primary care (aspirational, art. 117a).	Persons in need and unable to provide for themselves have a justiciable right to assistance (art. 12). *Social Insurance:* Supplementary benefits will be provided to those whose basic expenses are not met by the benefits provided via the Old-age, Survivors', and Invalidity insurance, the amount of such benefits to be determined by law (aspirational, art. 112a). *Maternity*: The confederation is required to establish a maternity insurance scheme and may require persons who cannot benefit from that scheme to contribute (aspirational, art. 115(4)). *Housing*: The Confederation and Cantons to endeavour to ensure that individuals are able to secure suitable accommodation (aspirational, art. 41). No more than 20% of the total stock of residential units and

			gross residential floor area in any commune may be used as second homes (aspirational, art. 75b) In addition, the Confederation is required to take particular account of the interests of families, the elderly, those with disabilities, and low income persons when encouraging the increase of housing stock (aspirational, Art. 108) *Food & Water*: General management addressed, but no specific guarantees made (arts.76, 104a).

Cultural Rights

	Culture/Language Rights	Indigenous Rights
Australia	Not Present (protected by some states at the subnational level).	Not Present (protected by some states at the subnational level).
Finland	Protection of the rights to use one's own languages in courts and with other authorities, and for specific protection of indigenous, Roma, and other minority languages. The National languages are Finnish and Swedish (art. 17).	The Sami, as an indigenous people, as well as the Roma and other groups, have the right to maintain and develop their own language and culture. Provisions on the right of the Sami to use the Sami language before the authorities are laid down by an Act. The rights of persons using sign language and of persons in need of interpretation or translation aid owing to disability shall be guaranteed by an Act (justiciable, s. 17).
Germany	Not Present	Not present.
New Zealand	A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority (weak-form, s. 20).	Rights are diffuse throughout the legal order, rather than a specific constitutional text. The Treaty of Waitangi/Te Tiriti Waitangi, signed between the British Crown and Māori (a people indigenous to New Zealand) leaders in 1840, is regarded as having quasi-constitutional status. Both the text of the Treaty, as well as its subsequent interpretation by courts, impose significant obligations on the government to engage in partnership with Māori, and to respect (and honour) claims for self-determination and redress for Treaty breaches.
Portugal	Justiciable right. The state, in cooperation with civil society, must "promote the democratisation of culture by encouraging and ensuring access by all citizens to cultural enjoyment and creation" (justiciable, art. 73(3)).	Not present.
Spain	Article 44(1) – which is aspirational – requires public authorities to safeguard culture, "to which all are entitled". The preamble to the constitution makes reference to the "culture and traditions, languages and institutions" of "all Spaniards and peoples of Spain". Article 3 protects Castillian as "the official Spanish language of the State', but also provides that "other Spanish languages shall also be official in the respective self-governing communities". Article 3(3) affirms the linguistic diversity of Spain.	Not present.
Switzerland	While not a specific right, cultural issues are provided for in the constitution. Article 69(1) specifies that cultural matters are the responsibility of subnational cantons. Article 78 regulates the protection of national cultural heritage. Article 18 provides that "the freedom to use any language is guaranteed", while article 70 sets out protections for official languages.	Article 72(2) requires subnational cantons to "respect the traditional distribution of languages and take account of indigenous linguistic minorities".

"New Rights"				
	Environmental Rights	**Digital Rights**	**Consumer Rights**	**Children and Young People**
Australia	Not present.	Not present.	Not present.	Not present at the federal level (included in constitutionally-significant statutes in some states).
Finland	Justiciable right which has been interpreted as giving rise to procedural guarantees. Article 20 provides that the environment is the responsibility of everyone. It also provides that public authorities "shall endeavour to guarantee for everyone the right to a healthy environment and for everyone the possibility to influence the decisions that concern their own living environment."	A general justiciable right to privacy is included at article 10. That article also provides that "More detailed provisions on the protection of personal data are laid down by an Act", and that "The secrecy of correspondence, telephony and other confidential communications is inviolable."	Not present.	Article 6 protects the rights of children to be treated as equals, and to "influence matters pertaining to themselves to a degree corresponding to their level of development". Article 19 guarantees social security for families raising children.
Germany	Non-justiciable state responsibility. Article 20A imposes environmental obligations on the state that cannot be enforced by courts: "Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."	Justiciable right. Germany's general privacy provision (article 10), together with protections on human dignity and personal freedoms (articles 1-2), have been found to require state action to protect personal data.	Not present.	Article 6 sets out rights and duties of parents in relation to children. It affirms that caring for children is "the natural rights of parents and a duty primarily incumbent upon them", and restricts the circumstances in which children can be removed from their parents. Article 7(2) guarantees the right of parents to decide on whether their children receive religious instruction. Article 6(5) protects children from discrimination based on whether they are born outside of wedlock.
New Zealand	Not present.	Not present.	Not present.	The New Zealand Bill of Rights Act 1990 is a statute recognised to be of constitutional significance. Article 25(i) protects the right of a child, charged with a criminal offence, "to be dealt with in a manner that takes account of the child's age".
Portugal	Justiciable right. Article 66(1) includes a general "right to a healthy and ecologically balanced human living environment and the duty to defend it". Article 66(2) sets out specific state duties,	Justiciable right. Article 35(1) protects the right of citizens to access and correct personal data. Article 35(2) requires the state to define the concept of "personal data" and to regulate it through an independent	Justiciable rights. Consumer rights are established in article 60. Article 60(1) sets out a general rights of consumers to "the good quality of the goods and services consumed, to training and information, to the protection of health, safety and their	Article 36(4) protects children against discrimination based on whether or not they are born in wedlock. Article 36(5) provides that parents have both a right and duty to educate and maintain their children, and restricts the circumstances in

	including pollution control, planning, conservation, resource use, preservation, policy integration, environmental education, and fiscal policy. Article 52(3) protects the right of citizens to petition in cases of violation of environmental rights under the *actio popularis* procedure.	administrative body. Article 35(3) requires individual consent for certain uses of data. Article 35(4) prohibits third-party access to personal data, except "in exceptional cases provided for by law". Article 35(5) prohibits "the allocation of a single national number to any citizen". Article 35(6) guarantees free access to public-use computer networks. Article 35(7) extends all these protections to manually-held data.	economic interests, and to reparation for damages". Article 60(2) requires that advertising be regulated, and concealed, indirect, and fraudulent advertising be prohibited. Article 60(3) specifically protects consumer associations. Article 52(3) protects the right of citizens to petition in cases of violation of consumer rights under the *actio popularis* procedure.	which children can be separated from parents. Article 64 sets out specific health-related rights and obligations for children and young people. Article 67 provides protection for the family, including a right of the family to by protected "by society and the state". Article 68 sets out specific social security and labour rights for pregnant and post-partum women, as well as family leave rights for fathers. Article 69 sets out specific rights for children, including "the right to protection by society and the state". Article 70 contains specific protections for young people. All the rights listed above are judicially enforceable.
Spain	Article 45 establishes aspirational environmental rights. Article 45(1) sets out a general right of individuals "to enjoy an environment suitable for the development of the person, and the duty to preserve it". Article 45(2) imposes a duty on public authorities to "watch over a rational use of all natural resources with a view to protecting and improving the quality of life and preserving and restoring the environment, by relying on an indispensable collective solidarity." Article 45(3) requires that sanctions be imposed for violations of article 45(2).	The Constitution of Spain contains a justiciable right to privacy, which states that "the law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights" (art. 18(4)).	Non-justiciable right. Article 51(1) requires public authorities to guarantee consumer protection. Article 51(2) requires public authorities to promote consumer information and education, and support consumer organisations. Article 51(3) requires that the law "regulate domestic trade and the system of licensing". Article 51 is aspirational.	Article 27(3) protects the right of parents to decide whether their child receives religious instruction. This right is judicially enforceable. Article 39 sets out rights of children to protection of the law, and to freedom from discrimination on the basis of whether or not they are born in wedlock. It also guarantees children the benefit of their rights guaranteed in international law. These rights are aspirational.
Switzerland	Article 73 provides generally that "The Confederation and the Cantons shall endeavour to achieve a balanced and sustainable relationship between nature and its capacity to renew itself and the demands placed on it by the population." However, the extent to which this article is justiciable is unclear. Articles 74-80 then impose specific obligations on the federal and subnational	Article 119(2) restricts the use of gene technology involving humans.	Not present.	Article 11(1) guarantees the rights of children and young people to "the special protection of their integrity and to their encouragement and development". This right is enforceable. Article 41 sets out a range of aspirational "social objections". Several of these make reference to children and young people. Article 67 directs national and subnational governments to "take account of the special

	governments, including environmental legislation, spatial planning, national land survey, restrictions on second homes, water, forests, protection of national heritage, fishing and hunting, and animals.			need of children and young people to receive encouragement and protection". Article 116 sets out social security responsibilities that specifically relate to children and families.

Table A A.2. Comparative Perspective on Systems of Government: Heads of State and Heads of Government

Heads of State

Country	Name and general functions	Pardons and army powers	Legislative powers	Ceremonial and/or Procedural Powers	Substantive powers
Australia	Governor-General. Not part of the government or the opposition, must remain neutral.	Pardons on the advice of the Attorney-General. Army powers on the Governor-General with the advice of the ministers of the government	Legislation needs its assent (royal assent) to start its effect. This power has never been used.	Ceremonial role in receiving oath and accepting the resignations of Members of Parliament. Meeting foreign heads of state and ambassadors.	All faculties are exercised "in council". Can dismiss the PM, and dissolve (or refuse to dissolve) the parliament, on the advice of the PM.
Colombia	President. Head of Government and Head of State.	Can grant pardons and is Supreme Commander of the Armed Forces.	Urgency powers, forcing the congress to debate a law in 30 days, and can change the legislative agenda by insisting in the urgency. Can veto sending back for discussion any bill. Has decree powers, must enact rules for implementation of certain laws, can propose bills for its discussion in the parliament.	Appoint members of the government and authorities of some administrative departments. Directs international relations. Budget law is prepared by the government. Parliament needs governmental agreement to modify budget.	Can convoke the parliament for extraordinary sessions, controls and present the plan of budget and national investment, oversees general policy of the government, chooses ministers, celebrates agreements and international treaties.
Costa Rica	President. Head of Government and Head of State. Some of these powers must be exercised jointly with the respective Minister (arts. 139 and 140).	Pardons through the Council of Government. Exercises the supreme command of the public force, through the Council of Government, presided by the President.	It has right of initiative and Veto. Sanction and promulgate laws, issue decrees for its implementation.	Represents the Nation and directs the international relations, receiving foreign representatives. Decrees and orders of the Executive Power, require the signatures of the President of the Republic and of the Minister of the branch.	Choose ministers, celebrate agreements and public treaties. Convoke the Legislative Assembly to ordinary and extraordinary sessions. Prepare and send to the Legislative Assembly the bill of National Budget. Decide in case of

					disagreements between the parliament and the budgeting department.
Finland	President. Elected by direct vote. Can send back an act for further consideration of the parliament. Mainly ceremonial role.	Can grant pardons. Is also the commander-in-chief, but on the advice of the Government.	Issue decrees. Acts shall be submitted to the President for confirmation, who has three months to decide. The President may obtain a statement on the Act from the Supreme Court or the Supreme Administrative Court.	The President appoints the heads of Finland's diplomatic missions abroad (ambassadors). Diplomats present their credentials to him. Appoints Ministers in accordance with a proposal made by the PM, and appoints the PM.	Can issue an order concerning extraordinary parliamentary election. If the President does not confirm an Act, it is returned to the Parliament, who can insist.
France	President. Chooses the Prime Minister. Lower house can dismiss the PM, so the president must name a PM who commands wide support. Appoints members of the government and presides over the council of ministers.	Can grant pardons. Is also Commander-in-Chief of the Armed Forces and presides the higher national defence councils and committees.	Can force the parliament to reopen debate on laws, parliament cannot refuse. Can refers Acts to the Constitutional Council before their promulgation. May refer treaties or certain types of laws to popular referendum.	President accredits ambassadors and envoys (Art. 14). Signs the Ordinances and Decrees deliberated upon in the Council of Ministers.	President of the Republic shall negotiate and ratify treaties. He also appoints three members to the Constitutional Council, and also appoints its President, who has casting vote in case of a tie. Can dissolve the Parliament. Exceptionally can rule by decree when there's a "serious and immediate threat".
Germany	Federal President. Upon proposal of the Federal Chancellor or when no federal chancellor can be elected, can dissolve the bundestag. Can veto laws, by not signing and preventing to promulgate them.	Can grant pardons but no powers over the army.	Can veto laws, by not signing them and preventing to promulgate them (art. 82).	Appoints and dismiss members of the federal government upon the proposal of the chancellor. Can awards honours and represent Germany at home and abroad.	Propose a chancellor candidate to the Bundestag, declare "state of legislative emergency" allowing the federal government and the Bundesrat to enact laws without the Bundestag. Can dissolve the bundestag in some cases.
Ireland	President. Mainly ceremonial. Can dissolve the Lower House upon the advice of the PM and also refuse to do it. Can refer any bill to the Supreme Court, before	Can grant pardons and is the Commander-in-chief, but on the advice of the Government.	Promulgate the laws made by the parliament. Can't veto bills but can refer them to the Supreme Court asking for abstract constitutional review. Can also delay	Appoints the PM upon Lower House's nomination, and also members of the government on advice of the PM and approval of the Lower House. Similarly,	The President can convene a meeting of either or both Houses of the Parliament, but must first consult with the

	promulgation, for abstract constitutional review.		promulgation for 2 days, and can call a referendum to pass a bill.	appoints Judges, the Attorney General, the Comptroller and Auditor General, and others.	Council of State. Can address a message to the nation on any matter, with the approval of the government and after consultation with the council of State.
New Zealand	Governor-General. Represents the queen. Ceremonial powers only.	On the Advice of the Government can grant pardons, and has powers over the army on the advice of the Minister of Defence.	No.	Gives "Royal Assent" to transform bills into official laws. However, by convention, cannot veto a bill.	The governor-general may reject the advice to dissolve parliament if the prime minister has recently lost a vote of confidence.
Portugal	President. Directly elected by vote.	Can grant pardons and is Supreme Commander of the Armed Forces.	Can avoid promulgating. Can ask the Constitutional Court for a preventive control of constitutionality. If the Constitutional Court rules unconstitutional the president may not promulgate and the bill returns to the parliament. Can exert a purely "political" veto, that the government can't get around, but the Parliament can.	Represents the Portuguese Republic. Appoints ambassadors and envoys at proposal from the Government. Accredits foreign diplomatic representatives and ratifies international treaties. Appoints the prime minister.	Dismiss the government, following a hearing of the Council of State. Can dissolve the Assembly of the Republic in some cases, setting the date of new parliamentary elections at the same time.
Spain	King. According to the Constitution. Assumes the highest representation of the Spanish State in international relations, especially with the nations of its historical community" (Art. 56).	Can grant pardons and is the Commander-in-chief, but on the advice of the Government, who directs defence.	The king sanctions and promulgate laws, can also call for a referendum and issue some decrees.	Accredits ambassadors and diplomatic representatives, gives assent to international commitments through treaties. Proposes and appoints candidates for Presidency of the Government, as well members of the Government on the President proposal.	Approves general legislation by sanctioning and promulgating the laws, and can also summon and dissolve the Parliament and call for elections under the terms provided for in the Constitution.
Switzerland	Federal Council. 7-member collegiate body. The president is a 1-year rotating member of the Federal Council, who has not other extra powers over the other members than represent Switzerland abroad.	See section on Head of Government			

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Heads of Government

Country	Name and general functions	Pardons and Army powers	Legislative powers	Ceremonial and/or Procedural Powers	Substantive powers	Additional information
Australia	Prime Minister. Defines and carries out national policy with members of the government	Can't grant pardons. PM decides whether or not to send Australian troops to war zones.	Introducing bills to the parliament, through the Government.	Acts as the chief government spokesperson, represents the Government and advises the Governor-General on the appointment of ambassadors and government members.	Chairs policy and legislative meetings of the Government. Selects members of the government to be ministers. Advises the Governor-General about constitutional matters and on when to call a federal election.	
Colombia	President.	See Head of State.	See Head of State.			
Costa Rica	President.	See Head of State.	See Head of State.			
Finland	Prime Minister. Directs the activities of the Government, chairs its meetings and oversees the preparation and consideration of its matters.	Can't grant pardons. On the proposal of the Government, the President of the Republic decides on the mobilisation of the defence forces	Has Right of Initiative. Can send a Bill to the Parliament and issue decrees that don't deal with rights and obligations of individuals.	Represents Finland on the European Council, the European Union, and abroad. Drives foreign policy through the Minister of foreign affairs.	Issue the state budget to be discussed by the parliament. Prepare the decisions to be made in the European Union. Chairs sessions of the Government, deciding days and order of discussions. Coordinates Government and Parliament work.	The negotiation of the governmental political program is made by the parliament in session, before electing the Prime Minister and its government. The election is based on the result of the discussion.
France	Prime Minister. Directs the actions of the Government, oversee everyday policy guidelines. Relative political power depend on his status as opposition or not.	Can't grant pardons. Jointly with the President. Prime Minister shall be responsible for national defence.	It has right of initiative. Must discuss all proposals in the Council of Ministers, presided by the President.	Countersign some instruments of the president of the republic. The agenda of the Council of Ministers is decided	Recommends the appointment and removal of government members. Can call extraordinary parliament sessions. Must ensure the coordination of	

				jointly by the President and the Prime Minister.	Government action and prevent different ministers from taking contradictory initiatives.	
Germany	Federal Chancellor. Leader of the majority coalition in the Parliament.	Can't grant pardons. Is the commander-in-chief.	Having right of initiative can introduce bills in the Bundestag.	May set the number of cabinet ministers and dictate their specific duties.	Nominates Vice Chancellor and determines policy, and the composition of the Federal Cabinet, whose meeting she chairs. Ministers prepare legislative proposals autonomously as long as consistent with the chancellor's broader guidelines.	If the Bundestag wants a removal of the Chancellor, it must elect another one. This prevents power voids.
Ireland	Taoiseach (Prime Minister). Central coordinator of the work of the Ministers, setting Government policy and keeping the President informed.	Can't grant pardons. Has powers over the army, vested collaboratively in the government and the President.	May sponsor legislation and participate in debates in the parliament. The lower house shall not pass some financial bills unless recommended by a message from the Government.	Appoints the Deputy PM and dismiss the Attorney General, nominates 11 people to serve in the House of Lords.	Advice the president to dissolve the Lower House and request a member of the Government to resign. Also assigns particular Departments to the Ministers.	There's a Council of State that "aid and counsel the president on all matters on which the president may consult the said council in relation to the exercise of powers".
New Zealand	Prime Minister. Sets the Cabinet agenda, thereby controlling items for discussion. Appoints and dismisses ministers, and allocate portfolios. Principal adviser to the sovereign.	Can't grant pardons. PM customarily has overall ministerial responsibility for national security and intelligence matters	Determines the title and scope of each portfolio, including legislation administered within the portfolio. Publishes laws and administers all legislation, making sure it gets implemented. Can veto some bills that would have a "fiscal impact".	Confers New Zealand honours. Appoints the Governor-General. Principal advisor to the Governor-General on appointing, dismissing or accepting the resignation of ministers.	Calls general elections by advising the governor-general to dissolve parliament. Approves the agenda of the cabinet, leads its meetings, and is the final arbiter of Cabinet procedure. Oversees the government's general policy direction.	
Portugal	Prime Minister. Can hold the role of head of government with the portfolio of one or more ministries. Conducts the country's general policy and the supreme authority in	Can't grant pardons. Acting as a council, PM can propose the President the declaration of War.	Negotiating and finalising international agreements. Presenting and submitting government bills and draft resolutions	PM counter-signs acts of the President of the Republic	Directing the Government's work and general policy. Presides the Council of Ministers that defines policy and its implementation.	

	the Public Administration.		to the Assembly of the Republic. Makes executive laws and has exclusive responsibility to legislate on matters that concern its own organisation and proceedings.		Passes Government acts that reduce public revenues or expenditure.	
Spain	President. It's responsible to the parliament. Conducts domestic and foreign policy, civil and military administration.	Can't grant pardons. Makes the most important decisions on national defence.	Through the Council of Ministers, approves draft laws and international treaties and refers them to the parliament, approves the General State Budget Bill, Royal Decree-Laws and Royal Legislative Decrees.	Countersign acts of the King. Resolves conflicts of powers that may arise between the different ministries. He also calls, chairs and sets the agenda for the meetings of the Council of Ministers.	Create ministry departments, establish the political program and its policies, and ensure its implementation. Can propose the king, after consulting with the Council of Ministers, to dissolve the parliament. Can promote an motion of "no confidence".	
Switzerland	Federal Council. A 7 member collegiate body that reaches decisions collectively by unanimity. The Federal Administration is organised into Departments, each headed by a Federal Council member.	Can't grant pardons, only the Federal Council on Pardons or cantonal authorities (for cantonal crimes) can do it. It may mobilise the armed forces, but the Federal Assembly generally must be convened.	Right of general legislation initiative. Can submit drafts of legislation to the Federal Assembly. Can enact by-laws and also must implement legislation.	Signs and ratifies international treaties. It submits them to the Federal Assembly for approval. Supervises the Federal Administration and the other bodies entrusted with federal duties. Is responsible for maintaining relations between the Confederation and the Cantons. It may object to treaties between Cantons or between Cantons and foreign countries.	Is in charge of the Federal Administration, and ensures the implementation of legislation, the resolutions of the Federal Assembly and judgments of federal judicial authorities. Manages the federal budget, submitting a multi-year financial plan and an annual budget to parliament.	Reaches its decisions as a collegial body. All members must stand by the decisions, even if a decision may not accord with their personal or party views. There's also a Federal Chancellor that acts as the General Staff and can attend Federal Council meetings (without vote).

Table A A.3. Comparative overview of constitutional provisions on multi-level governance and territorial organisation

Territorial Organisation

Country	Territorial organisation			Prescribed levels of sub-national units			
	Recognition of principle of decentralisation	Provision for number of units and configuration	Drawing and protection of boundaries	General decentralisation	Special autonomy	Indigenous communities	Cities
Finland	Present in the Constitution The constitution affirms the "self-government" of municipalities.	Present in the Constitution. The constitution requires territorial divisions to be "suitable" to enable Finnish and Swedish-speaking populations receive services on their own language.	Present in the Constitution.	Present in the Constitution.	Present in the Constitution. The constitution recognises "linguistic and cultural self-government of Sami.	Absent in the Constitution.	Absent in the Constitution.
Portugal	Present in the Constitution. The Constitution protects “the autonomous island system of self-government” and “the principles of subsidiarity, the autonomy of local authorities, and… democratic decentralisation” of state administration.	Present in the Constitution. The Constitution identifies the territory of the autonomous islands comprising the Azores and Madeira archipelagos.	Present in the Constitution. The Constitution of Portugal requires alteration of municipal areas by legislation ‘prior consultation’ with the local authorities.	Present in the Constitution. The Constitution specifies more than two (municipal and regional) devolved levels. Also, it provides procedures through which territories can move between levels.	Present in the Constitution that specifies two levels of government for autonomous regions: municipalities and parishes.	Absent in the constitution.	The Constitution provides for the creation by law of specific forms of local government organisation for ‘large urban areas’.
New Zealand[1]	The country deals with this at legislation level.	Laws provides for both a level of general decentralisation and Indigenous self-governance.	Present at legislation level.	Present in the legislation.	The country does not have provisions for this.	Present in the legislation, on a treaty with Constitutional Hierarchy, the Treaty of Waitangi	Present in the legislation.
Colombia	Present in the Constitution. The Constitution provides that Colombia is to be ‘decentralised, with autonomy of its territorial units’.	Present in the Constitution.	Present in the Constitution.	Present in the Constitution. The Constitution provides procedures for territories to move between levels.	Category not applicable to this jurisdiction.	Present in the Constitution. The Constitution recognises indigenous communities as a different territorial	Present in the Constitution. The Constitution creates a special regime applicable to Bogotá the capital.

						unit.	
France	Present in the Constitution. The Constitution provides that the state shall be 'organised on a decentralised basis'.	Present in the Constitution. The Constitution makes specific provision for each of the overseas territories of France (Article 72).	Present in the Constitution.	Present in the Constitution that provides procedures allowing territories to move between levels. Smaller territories can be integrated into larger regions.	Present in the constitution.	Absent in the constitution.	Present in the Constitution. Constitutional provision for special status communities has been applied by legislation to Paris, Lyon and Marseille.
Greece	Present in the Constitution that requires the administration of the State to be 'organised according to the principle of decentralisation'.	Present in the Constitution. The Constitution requires the territorial configuration of the state to be based on 'geo-economic, social and transportation conditions'.	Present in the Constitution.	Present in the Constitution. The Constitution specifies municipal and regional levels.	Present in the Constitution. The Constitution identifies the territory of the self-governing region of Aghion Oros.	Absent in the Constitution.	Absent in the constitution
Netherlands	Present in the Constitution that has a chapter dealing with sub-national government.		Present in the Constitution that requires any alteration to boundaries to be approved by a central statute, thus requiring the approval of the territorially representative Upper House.	Present in the Constitution that provides for both 'provinces' and 'municipalities'.	Not special autonomy recognised.	Absent in the Constitution.	
Japan	Present in the Constitution. The Constitution mentions the principle of 'local autonomy'.	Absent in the constitution. The Constitution only deals with 'local self-government'.	Absent in the constitution.	Present in the Constitution.	Not applicable.	Absent in the Constitution.	Present in the Constitution.
Australia	Present in the Constitution.	Present in the Constitution. The constitution refers to the constituent units that are known at the time the Constitution is made.	Present in the Constitution.	Present in the Constitution. The Constitution specifies only a single level of general subnational government.	Not applicable.		Present in the Constitution.
Germany	Present in the Constitution.	Present in the Constitution. The Constitution refers to the constituent units that were known at the time the Constitution was made.	Present in the Constitution. Article 79.3 Basic Law prohibits abolishing the federal structure, whose importance is also singled	Present in the Constitution.	Absent in the Constitution.	Not applicable	Absent in the Constitution.

			out by the name of the State: Federal Republic of Germany.				
Spain	Present in the Constitution. The quasi-federal Constitution guarantees 'the right to self-government of the nationalities and regions' comprising the State (Section 2), and also recognises both the administrative decentralisation of the state and a principle of autonomy.	Present in the Constitution. The Constitution refers to the constituent units that are known at the time the Constitution is made.	Present in the Constitution.	Present in the Constitution. The Constitution provides for both 'provinces' and 'municipalities'.	Present at the Constitutional level.	Absent in the Constitution.	Absent in the constitution
Canada	Present in the Constitution.	Present in the Constitution. The Constitution refers to the constituent units that are known at the time the Constitution is made.	Present at constitutional level. Any change requires not only central legislation but also the approval of the legislature of the affected province (Art 43).	Present in the Constitution. The Constitution specifies only a single level of general subnational government. Local government derives from provincial statutes.	Absent in the constitution.	Absent in the Constitution.	Absent in the constitution.

Structure of Sub-national government

Country	Structure of Sub-national government		Provision for sub-national government institutions			
	Degree of autonomy	Provisions for asymmetry	General decentralisation	Special autonomy	Indigenous communities	Cities
Finland	Present at Constitutional level. Municipal and regional administration shall provide for the 'self-government' of their residents. The Sami have 'linguistic and cultural self-government'.	Present at Constitutional level.	Present at Constitutional level. The Constitution requires subnational self-governing administrations, but leaves legislation to determine the form of the institutions themselves (Section 121).	Present at Constitutional level.	Absent at Constitutional level.	Absent at Constitutional level.
Portugal	Present at Constitutional level. The Constitution provides for the 'autonomy' of the generally devolved units. Azores and Madeira can have 'their own political and administrative statutes and self-government institutions.	Present at Constitutional level.	Present at Constitutional. The Constitution prescribes legislative and executive branches of government for its autonomous regions.	Present at Constitutional level. The Constitution suggests a significant level of autonomy for particular territorial communities.	Absent at Constitutional level.	Present at Constitutional level.

New Zealand	Present at legislation level.	Present at legislation level.	Present at legislation level.	Not applicable.	Present at legislation level.	Absent at legislation level.
Colombia	Present at Constitutional level. The Constitution provides for self-governance of indigenous territories on specified matters, which may be supplemented by statute.	Present at Constitutional level. Differential treatment between generally devolved units, indigenous territorial units, and the Capital.	Present at Constitutional level.	Not applicable.	Present at Constitutional level. The Constitution provides for traditional council government in indigenous territories.	Present at Constitutional level. The Constitution provides for council governance in respect of Bogotá.
France	Present at Constitutional level. The Constitution provides that territorial communities are to be 'self-governing'.	Present at Constitutional level.	Absent at Constitutional level.	Present at Constitutional level. The Constitution provides for elected councils.	Absent at Constitutional level.	Absent at Constitutional level.
Greece	Present at Constitutional and Legislation level. The Constitution requires local government agencies to enjoy 'administrative and financial independence'. Aghion Oros is declared to be 'self-governed and sovereign' with special responsibility for spiritual matters.	Present at Constitutional level.	Present at Constitutional. The Constitution provides only for elected local government agencies.	Present at Constitutional level. The Constitution recognises a distinctive monastic system of government for the Aghion Oros region.	Absent at Constitutional level.	Absent at Constitutional level.
Netherlands	Present at Constitutional level.	Absent at Constitutional level.	Present at Constitutional level. The Constitution provides for legislative councils and a form of executive government at both the provincial and municipal level.	Absent at Constitutional level.	Absent at Constitutional level.	Absent at Constitutional level,.
Japan	Present at Constitutional level. The Constitution recognises the principle of 'local autonomy'.	Present at Constitutional level.	Present at Constitutional level.	Not applicable.	Absent at Constitutional level.	Absent at Constitutional level.
Australia	Present at Constitutional level.	Present at Constitutional level.	Present at Constitutional level.	Not applicable.	Absent at Constitutional level.	Absent at Constitutional level.
Germany	Present at Constitutional level.	Present at Constitutional level.	Present at Constitutional level.	Not applicable.	Not applicable.	Absent at Constitutional level.
Spain	Present at Constitutional level. The Constitution identifies where regions can make laws with the status of full legislation, subject to review by the Constitutional Court.	Present at Constitutional level. Autonomy statutes of regions differ between autonomous communities.	Present at Constitutional level. The 'name, organisation and seat' of sub-national institutions are governed by the applicable statute of autonomy.	Present at Constitutional level.	Absent at Constitutional level.	Present at Constitutional level.
Canada	Present at Constitutional level. The	Present Constitutional level.	Present at Constitutional level.	Present at Constitutional	Absent at	Absent at

	Constitution recognises indigenous self-government by affirming the 'aboriginal and treaty rights' and include rights by way of land claim agreements.	The province of Quebec is guaranteed some special treatment under the Constitution (like Supreme Court composition).		level.	Constitutional level.	Constitutional level.

Note:
1. New Zealand has no written entrenched constitution in the form of a written instrument or instruments that provide a framework for the system of government. Instead, in New Zealand, rules that elsewhere usually have at least a foundation in a written constitution are provided in statutes, judicial decisions and, importantly, a treaty with some of the Indigenous peoples of New Zealand. To reflect this situation as accurately as possible, the table attributes the New Zealand framework for multi-level governance to legislation and other sources even though, in context, some of these have constitutional significance.

Table A A.4. Comparative Perspective: Means to ensure constitutionality

Country	Title and General note	Composition and appointment	Standing rights and procedures	Type of Adjudication	Effects of Decisions
Australia	High Court. Diffuse system. Can also be carried out by ordinary courts whenever a constitutional question is raised.	7 judges, appointed by Governor-General in council, and with formal consultation with a judicial appointments commission.	Counsels can raise issues during cases, but most importantly, if legislation cannot be interpreted in a human rights-consistent manner, the High Court can issue a non-binding "declaration of incompatibility". Also, some bills must come with a Statement of Compatibility with the Human Rights Act.	No formal means of adjudication, besides the ordinary diffuse control carried out by every court. High Court can issue Declaration of Incompatibility, a message for the parliament.	Can't strike down.
Austria	Constitutional Court. Not permanently in session, but commonly convenes four times a year for three weeks at the behest of the President.	14 members. President and vice president appointed by the federal government and parliament on political basis. Six substitute members. 70 years limit. Legal, political science background and 10 years experience required.	Ordinary courts have to approach the constitutional court whenever they have doubts on a norm they have to apply in a certain case or this is raised by an individual. Ombudsman municipalities whose ordinances has been rescinded in some cases.	Concrete. Ordinary courts can approach the Constitutional Court to assess constitutionality of a norm. Parties in civil proceedings can file an appeal to the Constitutional Court if a provision is unconstitutional.	Can repeal provisions by declaring them totally or partly unconstitutional and void. It binds all administrative and judicial authorities but not the legislator. Court can postpone the effect of the repeal allowing the legislator to remedy the unconstitutionality of the provision.
Colombia	Constitutional Court. Appointments allows for political influence, but make the Court	9 judges. Appointed by the Senate, proposed by the President (3), Supreme Court (3) and State Council	Anyone through acción de tutela or public action of constitutionality (API).	Concrete and Abstract. In Public Actions of Unconstitutionality (tutelas), the court can review of actions of unconstitutionality presented by citizens to ordinary courts. The court decides	If the Court declares treaties constitutional, the Government may exchange said notes; in the contrary case the laws will not be ratified.

	somewhat difficult to pack.	(3) for an 8-year tenure.		definitively on international treaties, that may not be ratified. Abstract on constitutionality of bills, decrees that declare emergency, simple laws or laws that amend the constitution, and referenda.	
Finland	Constitutional Law Committee. Not a court but a parliamentary committee whose task is to issue statements on bills.	At least 17 members. The composition the committee reflects the relative strengths of the parliamentary groups.	The Committee is only called on when doubts about the constitutionality of a bill have been raised. The Committee's assessment is binding on Parliament, but the latter can still enact using the qualified procedure required for amending the Constitution.	Concrete and Abstract. In any case in which the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution. The Committee issues statements on the constitutionality of legislative proposals and international human rights treaties.	The Committee's assessment is binding on Parliament. The parliament can still enact unconstitutional bills by the qualified procedure required for amending the Constitution.
France	Constitutional Council. Not a court, but a Constitutional body.	9 judges. Appointed 3 by President, 3 by the Senate and 3 by the National Assembly, plus ex presidents who may opt in/out. President of the Council vote is tiebreaking.	The QPC is popular, before any court. Any person who is involved in legal proceedings before a court can argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution. If the issue complies with admissibility conditions, the court submits it to the Conseil d'État or the Cour de Cassation that decides to submit it to the Constitutional Council, who can repeal the provision.	Concrete and Abstract. QPC is concrete. Abstract, before their promulgation, Institutional Acts shall be referred to the Constitutional Council who rules on their conformity with the Constitution. Organic Laws, shall not be promulgated until the Constitutional Council has declared their conformity with the Constitution.	A provision declared unconstitutional shall be neither promulgated nor implemented. Binding on public authorities and on all administrative authorities and all courts.
Germany	Federal Constitutional Court.	16 judges that act divided in 2 senates of 8 members each. 12 years in office. 4 members elected by the bundesrat and 4 members elected by the bundestag for each senate.	The Constitutional Complaint is popular. The applicant must have used every possible other remedy. Abstract review of a parliamentary statute can be presented only by Federal, Land government, or parliament. If a court concludes that a law on whose validity its decision depends is unconstitutional a decision shall be obtained from the Federal Constitutional Court.	Concrete and Abstract. Constitutional Complaint (Verfassungsbeschwerde) can be presented against judicial decisions by any person if her fundamental rights are violated by public authority, when no other legal recourse exists. Abstract review It is instituted at the request of the Federal, Land government or of one third of the members of the Bundestag.	Can strike down, unless there's a tied vote.
Mexico	Supreme Court. Responsible for the Control of Constitutionality the amparo and can adjudicate jurisdictional disputes between the Federation and federal	11 judges. Pre-selection of candidates, by the President of the Republic, and election and appointment, by the Senate.	Amparo it's a popular action and can be promoted by any person in Mexico. The Constitutional Controversy can be lodged by authorities among which the competence controversy arises. Actions of Unconstitutionality can be brought by legislators, the Attorney General of the Republic, political parties and National	Concrete and abstract. Amparo is concrete to protect human rights established in the Constitution and international treaties. Constitutional Controversies are basically competence conflicts. Action of Unconstitutionality addresses possible contradiction between the Constitution and some norm or provision, to leave it without effect.	In the case of Amparo, after two decisions laws can be expunged. In the case of the Constitutional Controversy, the disposition can be declard invalid and without further effects. In the case of Actions of Unconstitutionality, if the court declares a norm to be contrary to the Supreme Law, it may not be

	member states.		Human Rights Commission.		reinstated or applied to any person.
New Zealand	Supreme Court. No formal jurisdiction nor constitutional remedy.	6 judges. Appointed by the Governor-General, on the advice of the Prime Minister and Attorney-General. 7 years of experience as a barrister minimum. Mandatory retirement at 70.	Since leading case R v. Hansen (2007) counsels can seek a declaration of inconsistency of a provision with standards of the Bill of Rights on a concrete case, but they're not allowed to strike down provisions. It facilitates a dialogue with the political branches.	No adjudication. Courts can declare an "inconsistency" when they consider an Act to infringe fundamental human rights in a way that cannot be justified in a free and democratic society. Attorney-General does abstract control of bills, checking the consistency between a bill introduced in the parliament and the NZBORA. Nothing prevents the parliament passing inconsistent laws.	Cannot strike down but only issue a "Declaration of Inconsistency".
Portugal	Constitutional Court.	13 judges. 10 appointed by the assembly and 3 by the ten court members. Six shall obligatorily be chosen from among the judges of the ordinary courts, and the others from among jurists. They last 9 years.	People don't have direct access, but through ordinary courts where they can ask for the unconstitutionality of a provision through appeal. The Public Prosecutor Office is entitled as well. Authorities such as the President can lodge for a prior review of the constitutionality of certain rules. Court has certiorari.	Concrete and abstract. In concrete judicial cases it is up to the Constitutional Court to control the process of selection of the cases it admits. For abstract, the Constitutional Court declares the unconstitutionality of rules that the Constitutional Court has already deemed unconstitutional in three specific cases.	In concrete control proceedings (90% of case docket) effects are produced inter partes. If the court has decided 3 times on the same issue, the provision can be eliminated by activating an abstract control. However, abstract control, not exactly strikes down but "returns" the statute or treaty to the body that passed it. The parliament may expunge the rule or pass it by a qualified majority.
Spain	Constitutional Court.	12 judges. 4 proposed by congress, 4 by senate, 2 by the government and 2 proposed by the Judicial Council. The king appoints the president by proposal of the tribunal as a whole. Non-renewable term of 9 years. Legal background of 15-year.	Abstract judicial review of laws at the request of the authorities, parliament and regional assemblies. Amparo is open to citizens after exhausting all ordinary court remedies, and to cases where the applicant demonstrates the case would hold 'special constitution significance'	Concrete and abstract. Amparo for the protection of fundamental rights against any exercise of public power, including parliamentary decisions other than laws. Must first exhaust ordinary remedies. Abstract judicial review and preventive review of international treaties prior to their ratification, and preventive review of drafts of statutes of autonomy prior to being object to a referendum and their promulgation.	In general, the filing of an amparo appeal does not suspend the effects of the contested act or decision, but the Court, may order its total or partial suspension.
Switzerland	Federal Supreme Court. Absence of any judicial review of constitutionality of federal laws. Can examine the constitutionality of cantonal laws and ordinances.	38 judges. Its work is organised by domains (social law, public law, civil law, criminal law). Judges are elected on partisan base, no specific training required but usually lawyers, judges or university professors.	Normally a wide standing, as in ordinary cases, but cantons can also trigger abstract constitutional review. The constitutional review is not only concentrated in the hands of the Federal Supreme Court but also decentralised. The question of constitutionality may be raised at any stage when applying the legal rules and before any authority.	Concrete and abstract. A concrete constitutional review of federal legal acts is undertaken only when they are applied. For abstract, Cantons can appeal to the Federal Supreme Court by claiming that a non-statutory act violates the Federal Constitution, and the division of powers between the Confederation and the cantons. Through this form cantons trigger an abstract constitutional review of federal acts by the Federal Court.	Abstract control generally does not prevent the entry into force of the norm.

Table A A.5. Comparative tables on Fiscal Governance

Scope of the budget and call for special budget laws

Country	Scope of the budget	Special budget laws called in constitution
Australia	"The proposed law which appropriates revenue or money for the ordinary annual services of the Government shall deal only with such appropriation" (Article 54)	Not mentioned in Constitution
Finland	Not mentioned in Constitution	Not mentioned in Constitution
France	Not mentioned in Constitution	"Parliament shall pass Finance Bills in the manner provided for by an Institutional Act." (Article 47) "Finance Acts shall determine the revenue and expenditure of the State in the conditions and with the reservations provided for by an Institutional Act." (Article 34)
Germany	"All revenues and expenditures of the Federation shall be included in the budget; in the case of federal enterprises and special trusts, only payments to or remittances from them need be included". (Article 110)	Not mentioned in Constitution
Netherlands	Not mentioned in Constitution	Not mentioned in Constitution
New Zealand	Not mentioned in Constitution	Not mentioned in Constitution
Poland		"The Sejm shall adopt the State budget for a fiscal year by means of a Budget. The principles of and procedure for preparation of a draft State Budget, the level of its detail and the requirements for a draft State Budget, as well as the principles of and procedure for implementation of the Budget, shall be specified by statute." (Article 219)
Portugal	"The State Budget shall contain: a breakdown of the state's income and expenditure, including that of autonomous funds and departments; and the social security budget" (Article 105)	"The Budget Law shall be drawn up, organised, put to the vote and implemented in accordance with the applicable framework law, which shall include the rules governing the drawing up and implementation of the budgets of autonomous funds and departments. The Budget bill shall be presented and put to the vote within such time limits as the law may set, and the law shall lay down the procedures to be adopted when such time limits cannot be met." (Article 106)
Spain	"The State Budget shall be drafted annually and shall include the entire expenditure and income of the State public sector and specific mention shall be made to the amount of the fiscal benefits affecting State taxes" (Section 134)	Not mentioned in Constitution
Switzerland	Not mentioned in Constitution	Not mentioned in Constitution

Budget form, procedures and fiscal frameworks

Country	Budget process	Supplementary budget process	Resolution mechanisms
Australia	Not mentioned in Constitution	Not mentioned in Constitution	Not mentioned in Constitution
Finland	"The government proposal concerning the State budget and the other proposals pertaining to it shall be submitted to the Parliament well in advance of the next budgetary year" (Section 83) "Once the pertinent report of the Finance	"An extra-budgetary fund may be created by an Act, if the performance of a permanent duty of the State requires this in an essential manner. However, the decision of the Parliament to adopt a legislative proposal for the creation of an extra-budgetary fund or the extension of such a fund or its purpose must be	"If the publication of the State budget is delayed beyond the new budgetary year, the budget proposal of the Government shall be applied as a provisional budget in a manner decided by the Parliament." (Section 83)

	Committee of the Parliament has been issued, the budget is adopted in a single reading in a plenary session of the Parliament" (Section 83)	supported by at least two thirds of the votes cast." (Section 87) "A proposal of the Government for a supplementary budget shall be submitted to the Parliament, if there is a justified reason for amending the budget. A Representative may submit budgetary motions for a budget amendment immediately linked to the supplementary budget." (Section 86)	
France	Not mentioned in Constitution	Not mentioned in Constitution	"Should the National Assembly fail to reach a decision on first reading within forty days following the tabling of a Bill, the Government shall refer the Bill to the Senate, which shall make its decision known within fifteen days. The procedure set out in article 45 shall then apply. Should Parliament fail to reach a decision within seventy days, the provisions of the Bill may be brought into force by Ordinance. Should the Finance Bill setting out revenue and expenditure for a financial year not be tabled in time for promulgation before the beginning of that year, the Government shall as a matter of urgency ask Parliament for authorisation to collect taxes and shall make available by decree the funds needed to meet commitments already voted for. The time limits set by this article shall be suspended when Parliament is not in session." (Article 47) "The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Finance Bill or Social Security Financing Bill an issue of a vote of confidence before the National Assembly." (Article 49)
Germany	"Bills to comply with the first sentence of paragraph (2) of this Article as well as bills to amend the Budget Law or the budget itself shall be submitted simultaneously to the Bundesrat and to the Bundestag; the Bundesrat shall be entitled to comment on such bills within six weeks or, in the case of amending bills, within three weeks." (Article 110)	Not mentioned in Constitution	"If, by the end of a fiscal year, the budget for the following year has not been adopted by a law, the Federal Government, until such law comes into force, may make all expenditures that are necessary: Budget bills to maintain institutions established by a law and to carry out measures authorised by a law; to meet the legal obligations of the Federation; to continue construction projects, procurements, and the provision of other benefits or services, or to continue to make grants for these purposes, to the extent that amounts have already been appropriated in the budget of a previous year. To the extent that revenues based upon specific laws and derived from taxes, or duties, or other sources, or the working capital reserves, do not cover the expenditures referred to in paragraph (1) of this Article, the Federal Government may borrow the funds necessary to sustain current operations up to a maximum of one quarter of the total amount of the previous budget." (Article 111)
Netherlands	Not mentioned in Constitution	Not mentioned in Constitution	Not mentioned in Constitution
New Zealand	Not mentioned in Constitution	Not mentioned in Constitution	Not mentioned in Constitution
Poland	"The right to introduce legislation concerning a Budget, an interim budget, amendments to the Budget, a statute on the contracting of public	“In exceptional cases, the revenues and expenditures of the State for a period shorter than one year may be specified in an interim budget. The provisions relating	"If a State Budget or an interim budget have not come into force on the day of commencement of a fiscal year, the Council of Ministers shall manage State

	debt, as well as a statute granting financial guarantees by the State, shall belong exclusively to the Council of Ministers." (Article 221) "The Council of Ministers shall submit to the Sejm (Parliament) a draft Budget for the next year no later than 3 months before the commencement of the fiscal year. In exceptional instances, the draft may be submitted later." (Article 222) "The Senate may, within the 20 days following receipt of the Budget, adopt amendments thereto." (Article 223) "The President of the Republic shall sign the Budget or interim Budget submitted to him by the Marshal of the Sejm within 7 days of receipt thereof, and order its promulgation in the Journal of Laws of the Republic of Poland" (Article 224)	to a draft State Budget shall apply, as appropriate, to a draft interim budget." (Article 219)	finances pursuant to the draft Budget." (Article 219) "If, after 4 months from the day of submission of a draft Budget to the Sejm (Parliament), it has not been adopted or presented to the President of the Republic for signature, the President of the Republic may, within the following of 14 days, order the shortening of the Sejm's term of office." (Article 225)
Portugal	Not mentioned in Constitution	Not mentioned in Constitution	Not mentioned in Constitution
Spain	The Government must submit the draft State Budget to the Congress at least three months before the expiration of that of the previous year" (Section 134)	"Once the Budget Bill has been adopted, the Government may submit bills involving increases in public expenditure or decreases in the revenue corresponding to the same financial year" (Section 134)	"If the Budget Bill is not passed before the first day of the corresponding financial year, the Budget of the previous financial year shall be automatically extended until the new one is approved" (Section 134)
Switzerland	Not mentioned in Constitution	Not mentioned in Constitution	Not mentioned in Constitution

Budget transparency and resolution mechanisms

Country	Budget transparency	Resolution mechanisms
Australia	Not mentioned in Constitution	Not mentioned in Constitution
Finland	"Estimates of the annual revenues and appropriations for the annual expenditures of the State, the reasons for the appropriations and other justifications of the budget shall be included in the State budget. It may be provided by an Act that, for certain revenues and expenditures immediately linked one to another, a revenue forecast or appropriation corresponding to their difference may be included in the budget. The revenue forecasts in the budget shall cover the appropriations included in it. When covering the appropriations, the surplus or deficit in the State's final accounts may be taken into account, as provided by an Act. The revenue forecasts or appropriations pertaining to linked revenues and	"If the publication of the State budget is delayed beyond the new budgetary year, the budget proposal of the Government shall be applied as a provisional budget in a manner decided by the Parliament." (Section 83)

	expenditures may be included in the budget for several budgetary years, as provided by an Act. The general principles on the functions and finances of state enterprises are laid down by an Act. As regards state enterprises, revenue forecasts or appropriations are taken into the budget only in so far as they are provided by an Act. When considering the budget, the Parliament approves the most important service objectives and other objectives of state enterprises." (Section 84) "The Budget shall be a single budget and shall set out expenditure in accordance with the organisational and functional classification thereof, in such a way as to preclude the existence of secret appropriations and funds." (Article 105)	
France	Not mentioned in Constitution	"Should the National Assembly fail to reach a decision on first reading within forty days following the tabling of a Bill, the Government shall refer the Bill to the Senate, which shall make its decision known within fifteen days. The procedure set out in article 45 shall then apply. Should Parliament fail to reach a decision within seventy days, the provisions of the Bill may be brought into force by Ordinance. Should the Finance Bill setting out revenue and expenditure for a financial year not be tabled in time for promulgation before the beginning of that year, the Government shall as a matter of urgency ask Parliament for authorisation to collect taxes and shall make available by decree the funds needed to meet commitments already voted for. The time limits set by this article shall be suspended when Parliament is not in session." (Article 47) "The Prime Minister may, after deliberation by the Council of Ministers, make the passing of a Finance Bill or Social Security Financing Bill an issue of a vote of confidence before the National Assembly." (Article 49)
Germany	"For the purpose of discharging the Federal Government, the Federal Minister of Finance shall submit annually to the Bundestag and to the Bundesrat an account of all revenues and expenditures as well as of assets and debts during the preceding fiscal year." (Article 114)	"If, by the end of a fiscal year, the budget for the following year has not been adopted by a law, the Federal Government, until such law comes into force, may make all expenditures that are necessary: Budget bills to maintain institutions established by a law and to carry out measures authorised by a law; to meet the legal obligations of the Federation; to continue construction projects, procurements, and the provision of other benefits or services, or to continue to make grants for these purposes, to the extent that amounts have already been appropriated in the budget of a previous year. To the extent that revenues based upon specific laws and derived from taxes, or duties, or other sources, or the working capital reserves, do not cover the expenditures referred to in paragraph (1) of this Article, the Federal Government may borrow the funds necessary to sustain current operations up to a maximum of one quarter of the total amount of the previous budget." (Article 111)
Netherlands	"The estimates of the State's revenues and expenditures shall be laid down by Act of Parliament." Article 105 "A statement of the State's revenues and expenditures shall be presented to the States General in accordance with the provisions of the relevant Act of Parliament. The balance sheet approved by the Court of Audit shall be presented to the States General." Article 105	Not mentioned in Constitution
New Zealand	Not mentioned in Constitution	Not mentioned in Constitution
Poland	"The Council of Ministers, within the 5-month period following the end of the fiscal year, shall present to the Sejm a report on the implementation of	"If a State Budget or an interim budget have not come into force on the day of commencement of a fiscal year, the Council of Ministers shall manage State finances pursuant to the draft Budget." (Article 219)

	the Budget together with information on the condition of the State debt." (Article 226)	"If, after 4 months from the day of submission of a draft Budget to the Sejm (Parliament), it has not been adopted or presented to the President of the Republic for signature, the President of the Republic may, within the following of 14 days, order the shortening of the Sejm's term of office." (Article 225)
Portugal	"The Budget bill shall be accompanied by reports on a forecast of the evolution of the main macroeconomic indicators that have an influence on the Budget, as well as the evolution of the money supply and the sources thereof; The grounds for variations in the income and expenditure forecasts compared to the previous Budget; The public debt, treasury operations and the Treasury accounts; The situation of autonomous funds and departments; Transfers of funds to the autonomous regions and local authorities; Such financial transfers between Portugal and other countries as affect the proposed Budget; Fiscal benefits and an estimate of the ensuing reduction in income." Article 106	Not mentioned in Constitution
Spain	Not mentioned in Constitution	"If the Budget Bill is not passed before the first day of the corresponding financial year, the Budget of the previous financial year shall be automatically extended until the new one is approved" (Section 134)
Switzerland	Not mentioned in Constitution	Not mentioned in Constitution

Fiscal rules

Country	Fiscal rules	Escape clauses
Australia	Not mentioned in constitution	Not mentioned in constitution
Finland	Not mentioned in constitution	Not mentioned in constitution
France	Not mentioned in constitution	Not mentioned in constitution
Germany	"The budgets of the Federation and the Länder shall in principle be balanced without revenue from credits." Article 109 Revenues and expenditures shall in principle be balanced without revenue from credits. This principle shall be satisfied when revenue obtained by the borrowing of funds does not exceed 0.35 percent in relation to the nominal gross domestic product [...] Deviations of actual borrowing from the credit limits specified under the first to third sentences are to be recorded on a control account; debits exceeding the threshold of 1.5 percent in relation to the nominal gross domestic product are to be reduced in accordance with the economic cycle." Article 115	"The Federation and Länder may introduce rules intended to take into account, symmetrically in times of upswing and downswing, the effects of market developments that deviate from normal conditions, as well as exceptions for natural disasters or unusual emergency situations beyond governmental control and substantially harmful to the state's financial capacity." Article 109
Netherlands	Not mentioned in constitution	Not mentioned in constitution
New Zealand	Not mentioned in constitution	Not mentioned in constitution
Poland	"It shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product. The method for calculating the value of the annual gross domestic product and national public debt shall be specified by statute." Article 216	Not mentioned in constitution

	"The Budget shall not provide for covering a budget deficit by way of contracting credit obligations to the State's central bank." Article 220	
Portugal	Not mentioned in constitution	Not mentioned in constitution
Spain	"All public administrations will conform to the principle of budgetary stability" (Section 135) “The State and the Self-governing Communities may not incur a structural deficit that exceeds the limits established by the European Union for their member states. An Organic Act shall determine the maximum structural deficit the State and the Self-governing Communities may have, in relation to its gross domestic product. Local authorities must submit a balanced budget" (Section 135)	"The limits of the structural deficit and public debt volume may be exceeded only in case of natural disasters, economic recession or extraordinary emergency situations that are beyond the control of the State and significantly impair either the financial situation or the economic or social sustainability of th State, as appreciated by an absolute majority of the members of the Congress of Deputies" (Section 135)
Switzerland	"The Confederation shall maintain its income and expenditure in balance over time. […] If the total expenditure in the federal accounts exceeds the ceiling in terms of paragraphs 2 or 3, compensation for this additional expenditure must be made in subsequent years." Article 126	"Exceptional financial requirements may justify an appropriate increase in the ceiling in terms of paragraph 2. The Federal Assembly shall decide on any increase in accordance with Article 159 paragraph 3 letter c." Article 126

Role of the legislature

Country	Capacity of Parliaments to amend the budget	Tax authorisation	Distinctions between the two chambers
Australia	Not mentioned in constitution.	"No money shall be drawn from the Treasury of the Commonwealth except under appropriation made by law." (Chap IV Art. 83)	Not mentioned in constitution.
Finland	Not mentioned in constitution.	"The state tax is governed by an Act, which shall contain provisions on the grounds for tax liability and the amount of the tax, as well as on the legal remedies available to the persons or entities liable to taxation." Section 81	Not mentioned in constitution.
France	"Private Members' Bills and amendments introduced by Members of Parliament shall not be admissible where their enactment would result in either a diminution of public revenue or the creation or increase of any public expenditure." Article 40	Not mentioned in constitution.	Not mentioned in constitution.
Germany	"Laws that increase the budget expenditures proposed by the Federal Government, or entail or will bring about new expenditures, shall require the consent of the Federal Government. This requirement shall also apply to laws that entail or will bring about decreases in revenue. The Federal Government may demand that the Bundestag postpone its vote on bills to this effect. In this event the Federal Government shall submit its comments to the Bundestag	"Federal laws relating to taxes the revenue from which accrues wholly or in part to the Länder or to municipalities (associations of municipalities) shall require the consent of the Bundesrat." Article 105	Not mentioned in constitution.

	within six weeks." Article 113		
Netherlands	Not mentioned in constitution.	"Taxes imposed by the State shall be levied pursuant to Act of Parliament. Other levies imposed by the State shall be regulated by Act of Parliament." Article 104	Not mentioned in constitution.
New Zealand	Not mentioned in constitution.	Not mentioned in constitution.	Not mentioned in constitution.
Poland	"The increase in spending or the reduction in revenues from those planned by the Council of Ministers may not lead to the adoption by the Sejm of a budget deficit exceeding the level provided in the draft Budget." Article 220	Not mentioned in constitution.	Not mentioned in constitution.
Portugal	"No Member, parliamentary group, Legislative Assembly of an autonomous region or group of registered electors shall submit bills or draft amendments which, during the then current financial year, involve an increase in the state's expenditure or a decrease in its revenues as set out in the Budget." Article 167	The Constitution of the Portuguese Republic prescribes that the Assembly of the Republic "shall possess exclusive responsibility to legislate on the following matters: The creation of taxes and the fiscal system, and the general rules governing duties and other financial payments to public bodies." Article 165	Not mentioned in constitution.
Spain	"Any non-governmental bill or amendment which involves an increase in appropriations of a decrease in budget revenue shall require previous approval by the Government before its passage" (Section 134)	Not mentioned in constitution.	Not mentioned in constitution.
Switzerland	Not mentioned in constitution.	Not mentioned in constitution.	The Federal Assembly determines the expenditure of the Confederation, adopts the budget and approve the federal accounts." Article 167

Research support and independent monitoring and auditing bodies

Country	Independent Fiscal Institutions	Supreme Audit Institutions
Australia	Not mentioned in constitution	Not mentioned in constitution
Finland	Not mentioned in constitution	"For the purpose of auditing State finances and compliance with the State budget, there shall be an independent National Audit Office in connection with the Parliament. More detailed provisions on the status and duties of the National Audit Office are laid down by an Act. [...] The Parliament supervises State finances and compliance with the State budget. For this purpose, the Parliament shall have an Audit Committee. The Audit Committee shall report any significant supervisory findings to the Parliament." Section 90
France	Not mentioned in constitution	"The *Cour des Comptes* shall assist Parliament in monitoring Government action. It shall assist Parliament and the Government in monitoring the implementation of Finance Acts and Social Security Financing Acts, as well in assessing public policies. By means of its public reports, it shall contribute to informing citizens." Article 47-2
Germany	Not mentioned in constitution	"The Federal Court of Audit, whose members shall enjoy judicial independence,

		shall audit the account and determine whether public finances have been properly and efficiently administered. It shall submit an annual report directly to the Bundestag and the Bundesrat as well as to the Federal Government. In other respects the powers of the Federal Court of Audit shall be regulated by a federal law." Article 114
Netherlands	Not mentioned in constitution	"The Court of Audit (Algemene Rekenkamer) shall be responsible for examining the State's revenues and expenditures." Article 76
New Zealand	Not mentioned in constitution	Not mentioned in constitution
Poland	Not mentioned in constitution	Not mentioned in constitution
Portugal	Not mentioned in constitution	"The Budget's execution shall be scrutinised by the Audit Court and the Assembly of the Republic. Following receipt of an opinion to be issued by the Audit Court, the Assembly of the Republic shall consider the General State Accounts, including the social security accounts, and shall put them to the vote." Article 107
Spain	Not mentioned in constitution	“The Auditing Court is the supreme body charged with auditing the State’s accounts and financial management, as well as those of the public sector. It shall be directly accountable fo the Cortes Generales (Parliament)”. Section 136 of the Constitution describes the functions of the Auditing Court and specifies the process for submission of the accounts and selection of members of the Auditing Court.
Switzerland	Not mentioned in constitution	Not mentioned in constitution

Table A A.6. Comparative perspective of provisions relating to the central bank independence

Country	Constitutional/Treaty Provisions	Key provisions of primary legislation
Australia	Not present.	Sections 11(2) and 13 of the *Reserve Bank Act* underline the importance to establish a dispute resolution procedure and a close liaison between the Reserve Bank of Australia and the Government: In the event of a difference of opinion between the Government and the Board about whether a policy determined by the Board is directed to the greatest advantage of the people of Australia, the Treasurer and the Board shall endeavour to reach agreement (Section 11(2)). The Governor and the Secretary to the Department of the Treasury shall establish a close liaison with each other and shall keep each other fully informed on all matters which jointly concern the Bank and the Department of the Treasury (Section 13). In addition, the *Statement on the Conduct of Monetary Policy* ensures the independence of the Reserve Bank, along with the Reserve Bank Act. The Governor and the members of the Reserve Bank Board are appointed by the Government of the day, but are afforded

		substantial independence under the Reserve Bank Act to conduct the monetary and banking policies of the Bank, so as to best achieve the objectives of the Bank as set out in the Act. The Government recognises and will continue to respect the Reserve Bank's independence, as provided by the Act.
Brazil	Articles 52 and 84 of the *Constitution of the Federative Republic of Brazil* statute the appointment process which requires a parliamentary approval: The Federal Senate has the exclusive competence to give prior consent on the selection of president and directors of the Central Bank (Article 52). The president of the Republic shall have the exclusive power to appoint, after approval by the Senate, the president and the directors of the Central Bank (Article 84). Article 164 statutes the exclusive right to issue currency and the prohibition to finance government. The competence to issue currency shall be exercised exclusively by the central bank. It is forbidden for the central bank to grant loans to the National Treasury and to any body or agency which is not a financial institution.	Article 8 of the *Law No. 4.595* admits a "semiautonomy" to the central bank. The current Superintendency of Currency and Credit is transformed into a semiautonomous federal agency denominated the Central Bank of the Republic of Brazil. Article 1 of the *Decreto No. 91.961* endows the President with the authority to dismiss board members of the central bank solely.
Costa Rica	Articles 188 and 189 of the *Costa Rica's Constitution* mentions the autonomy of the central bank to a certain extent. The autonomous institutions of the State, including the central bank, enjoy administrative independence and are subject to the law in matter of government.	Articles 1 and 17(a) of the *Organic Law of the Central Bank of Costa Rica* statutes the central bank independence in clearer language. According to the law, the Central Bank of Costa Rica is an autonomous institution under public law, with its own legal personality and assets, and the President of the Bank shall enjoy independence in the exercise of his or her powers. Article 59(a) prohibits the Bank to grant financing to the government or public institutions.
Euro area	Although there is no consolidated constitution in the euro area, the *Treaty on the Functioning of the European Union* (TFEU) is considered as the supreme source of law. Some provisions in TFEU ensure the independence of central banks in the euro area. For example, Article 123(1) prohibits the ECB or national central banks to provide credit facility or purchase debt instruments directly from the governing bodies. Article 130 prohibit the ECB or national central banks to seek or take instructions from the governing bodies. Article 282(3) gives the ECB the power to issue euros and the independence to exercise that power and control its finances.	Article 7 of the *Statute of the European System of Central Banks and of the European Central Bank* articulates that neither the ECB, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from governing bodies. Also, those governing bodies shall not to seek to influence the members of the decision-making bodies of the ECB or of the national central banks in the performance of their tasks.
India	Not present.	Articles of the *Reserve Bank of India Act* statute that the Central Government has strong power to control the Reserve Bank of India. The Central Government may from time to time give directions to the Bank as it may, after consultation with the Governor of the Bank, consider necessary in the public interest (Article 7(1)). The Central Government may remove from office the Governor, or a Deputy Governor or any other Director or any member of a Local Board. (Article 11(1)). In the event of the failure of the Bank to carry out any of its obligations, the general superintendence and direction of the affairs shall be entrusted to an agency to be determined by the Central Government, which may exercise the powers and do all acts and things as the Central Board may exercise (Article 30(1)).
Mexico	Article 28 of the *Political Constitution of the United Mexican States* guarantees various degrees of autonomy for the central bank. The central bank shall be autonomous in the exercise of its functions and its administration. No authority can order the central bank to	Article 1 of the *Bank of Mexico Law* stipulates that the central bank shall be a legal entity subject to public law, autonomous in nature, and shall be named Banco de México.

	provide financing. The central bank carries out exclusively in the strategic areas of coining and note printing. The management of the central bank shall be entrusted to the persons appointed by the President of the Republic with the consent of the Senate or the Permanent Committee. They shall hold office for the terms which duration and staggered sequences are best suited to the autonomous exercise of their duties; they may only be removed for a serious cause.	
New Zealand	Not present.	Articles 8 and 10 of the *Reserve Bank of New Zealand Act* statute the procedure to formulate monetary policy: The Bank, acting through the MPC, has the function of formulating a monetary policy directed to the economic objectives. The function includes deciding the approach by which the operational objectives set out in a remit are intended to be achieved (Article 8). The Minister must, after having regard to remit advice, issue a remit for the MPC. The remit must set out operational objectives for carrying out the function of formulating monetary policy (Article 10). Article 49(1) admits that the Governor-General may, by Order in Council, on the advice of the Minister, remove the Governor from office. In addition, the *Policy Targets Agreement*, an extra-statutory statement regarding monetary policy, must be agreed between the Governor and the Minister of Finance. It is consistent with the legal objective, although the Minister has the power to override that objective temporarily but publicly.
Poland	Article 227 of the *Constitution of the Republic of Poland* gives the National Bank of Poland a strong position among public institutions and specified the responsibility of the Monetary Policy Council. The Bank shall have the exclusive right to issue money as well as to formulate and implement monetary policy. The Bank shall be responsible for the value of Polish currency. The Sejm, on request of the President of the Republic, shall appoint the President of the Bank for a period of 6 years. The organisation and principles of activity of the Bank, as well as detailed principles for the appointment and dismissal of its organs, shall be specified by statute.	Article 9 of the *Act on Narodowy Bank Polski* elaborates on some provisions of the Constitution. The President of the Bank shall be appointed and dismissed by the Sejm, at the request of the President of the Republic of Poland. The President of the Bank may be dismissed if: 1) he/she has been unable to fulfil his/her duties due to prolonged illness, 2) he/she has been convicted of committing a criminal offence under a legally binding court sentence, 2a) he/she has submitted a vetting statement deemed false by court in a binding ruling, 3) the Tribunal of State has prohibited him/her from occupying managerial positions or holding posts of particular responsibility in state bodies.
Sweden	Article 13 of Chapter 9 of the *Constitution of Sweden* (Basic Laws of Sweden) refers to the legal foundation of the Riksbank. The Riksbank is the central bank of the Realm and an authority under the Riksdag. No public authority may determine how the Riksbank shall decide in matters of monetary policy. The Riksbank has a General Council comprising eleven members, who are elected by the Riksdag. The Riksbank is under the direction of an Executive Board appointed by the General Council. The General Council may only dismiss a member of the Executive Board if he or she no longer fulfils the requirements laid down for the performance of his or her duties, or is guilty of gross negligence.	Article 2 of Chapter 3 of the *Sveriges Riksbank Act* ensures that the Members of the Executive Board may neither seek nor take instructions when fulfilling their monetary policy duties.
Switzerland	Article 99 of the *Federal Constitution of the Swiss Confederation* embodies that the Swiss National Bank shall follow a monetary policy which serves the general interest of the country; it shall be administered with the cooperation and under the supervision of the Confederation.	The *Federal Act on the Swiss National Bank* sets out in detail the Bank's constitutional mandate and independence, as well as its accountability and information obligation towards the Federal Council, Parliament and the public. Federal Act on the Swiss National Bank. The Bank shall pursue a monetary policy serving the interests of the country as a whole. It shall ensure price stability. In so doing, it shall take due account of the development of the

		economy (Article 5). In fulfilling its monetary tasks, the Bank and the members of the Bank's bodies shall not be permitted to seek or accept instructions either from the Federal Council or from the Federal Assembly or any other body (Article 6).
Turkey	Not present.	The *Law on the Central Bank of the Republic of Turkey* ensures that the Central Bank of Turkey has been vested the independence. The Bank shall enjoy absolute autonomy in exercising the powers and carrying out the duties granted by this Law under its own responsibility (Article 4 III). The Governor may, in the case of his/her dissent from the decisions of the Board, postpone the execution of the decision and may demand it be reconsidered at the next meeting. In urgent circumstances, the Board shall convene upon the call of the Governor and reconsider the issue in dispute. In the event of a disagreement between the Governor and the Board, the President of the Republic shall act as an arbitrator (Article 26). A recent legislative change based on the Statutory Decree allows the government to shorten the tenure of the central bank governor (OECD, 2021).
United States	Not present.	The *Federal Reserve Act* provides comprehensive provisions, including regarding the purposes, structure, and functions of the system as well as its operations and accountability. Section 10(2) of the act states the appointment procedures of the Board members in details. Upon the expiration of the term of any appointive member of the Federal Reserve Board in office, the President shall fix the term of the successor to such member at not to exceed fourteen years, as designated by the President at the time of nomination, but in such manner as to provide for the expiration of the term of not more than one member in any two-year period, and thereafter each member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President. Of the persons thus appointed, 1 shall be designated by the President, by and with the advice and consent of the Senate, to serve as Chairman of the Board for a term of 4 years, and 2 shall be designated by the President, by and with the advice and consent of the Senate, to serve as Vice Chairmen of the Board, each for a term of 4 years, 1 of whom shall serve in the absence of the Chairman, as provided in the fourth undesignated paragraph of this section, and 1 of whom shall be designated Vice Chairman for Supervision (Section 10(2)).

Source: Constitutions/TFEU, central bank laws and websites of benchmark jurisdictions.

Constitutions in OECD Countries: A Comparative Study

BACKGROUND REPORT IN THE CONTEXT OF CHILE'S CONSTITUTIONAL PROCESS

Chile has embarked on an ambitious path towards a new constitution. For all countries, drafting a new constitution or amending an existing one is a stimulating challenge, but also a demanding process from both a political and technical standpoint. This report presents the results of a benchmarking exercise conducted by the OECD of possible constitutional provisions, reflecting the experiences of OECD member countries. The components covered include economic and social rights, the system of government, multi-level governance, constitutional review, fiscal governance and the role and functioning of central banks.

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