

Development of an entrenched constitution



How Entrenched or rigid should a state's Constitution be?

A constitution is defined as " a frame of political society, organised through and by law; that is to say one in which law has established permanent institutions with recognised functions and definitive rights" (Wolf-Phillips, 1972: 7). Thus a Constitution in itself is a legal framework through and by which a state is governed. This essay will assess factors that benefit and hinder constitutions based upon their depth of entrenchment.

An entrenched constitution will usually be derived from a single codified document which will itself set " special procedure... Different from that needed to amendment of extra constitutional law", (Wolf- Phillips, 1968: xiv) to allow amendments to be made. These codified constitutions are thus often difficult to amend due to the checks and balances built into the constitutional amendment procedure, to protect existing systems and institutions from radical short term ideas.

Conversely less entrenched constitutions are demonstrated through uncodified constitutions. These constitutions that outline the rules by which government and society function are not contained within a single document but are instead set out in a variety of forms, from statute law, to general conventions and also respected and influential academic writings. Here it is the case that " no special procedures are required for amendment" (Norton, 1982: 9).

This essay will attempt to argue that equilibrium needs to be established between entrenchment and flexibility, to ensure that basic civil rights of citizens are outlined and entrenched, but that ultimately the hands of

democratically elected persons should not be tied when taking important decisions by an overarching entrenched document smothering any political or societal advancement.

A major and frequent criticism of an entrenched constitution derives from their very defining factor, namely that they are difficult to change and amend (Hague, 2007: 261). This Critique is based upon the fact that as society changes, new challenges are faced by politics and that untimely a constitution constructed in some cases centuries before will not adapt and evolve to these needs and thus may become constrictive to generations requiring decision not explicitly contained within the document.

An example of a constitutional principle that illustrates this immovable nature of entrenched constitutions is the Basic Law of Germany where any proposed changes to articles, one and twenty are " inadmissible". Thus it is both theoretically and practically impossible for any changes to be made to these two articles that ensure Germanys Federal system and outline basic human rights of the German citizens. This explicit entrenchment although may be critiqued due to its cemented nature has to be taken in the context of the specific state to evaluate whether this ultimate entrenchment is justified. The German constitution was formed following the defeat of Hitler's fascism throughout Europe. Following this time of great instability it was agreed that " the principle of decentralised administrative and governmental authority", (Wolf- Phillips, 1968: 24) should be the key principle of any future German political system. This entrenched federalism was designed to stop future authoritarian governments taking power as power would now be distributed throughout the state.

In this case the entrenchment of certain clauses within a constitution may be justified due to the individual provenance of a state thus possibly undermining the critique that cementing certain clauses prevents organic evolution of a state's political system. Instead entrenchment aids in protecting and guaranteeing certain standards government and society and thus ensuring if not political development, political stability.

Although the above example highlights an instance where entrenchment of certain clauses may be beneficial in maintaining stability of government, not all clauses seem as rational to be entrenched as the ones described above. A Constitution that may be critiqued for its apparent outdated nature due to its arguably over entrenchment is the United States Constitution.

The second article amending the Constitution affirms citizen's rights to "keep and bear arms" (Wolf- Philips, 1968: 213). This example highlights the exact problem with having a too entrenched constitution. When this specific article of the constitution was framed into law in 1791, the need for the individual to protect themselves against attack from others or indeed an over powerful state was no doubt a legitimate reason to allow for citizens to carry firearms. However, many would argue that this article is outdated and also irrational not least due to America's stature as proprietor of modern day democratic values. Although in theory this article could be changed through "a two-thirds majority in both houses of Congress and approval by three-quarters of the state's" (Hague, 2007: 263), this type of amendment is very unlikely to take place however due to the separated American political system with three branches of government, often of different ideological stances vowing for influence coupled with notoriously weak party allegiances

<https://assignbuster.com/development-of-an-entrenched-constitution/>

making the legislative process very inefficient. In this case a too entrenched document can be seen as protecting irrational out of date clauses thus weakening the argument for entrenched constitutions.

On the other hand however this feature of entrenched constitutions as housing outdated yet immovable clauses can be seen as a great strength in ensuring law abides to civil rights of individuals. For example the first 12 amendments to be made to the Constitution of the United States are known as the Bill of Rights, these amendments guarantee freedoms and explicit rights of all Citizens of the Union (Mckeever, 1999: 46). A constitution containing explicit rights to citizens entrenched in the same way as the US Constitution ensure that it would be virtually impossible to neglect these rights in any laws proposed by government. This entrenchment of rights within a constitution may be particularly useful in states with very diverse populations where the rights of many different groups need to be protected both from government and others by an entrenched constitution outlining protection of minorities.

Flexible Constitutions however often lack this explicit definition of human rights. Britain “ lacks a bill of rights”, (Norton, 1982: 245) thus in theory, parliament has the legal ability to sacrifice rights of citizens due to the lack of an entrenched document protecting liberty of citizens. Therefore for many human rights activist groups an entrenched bill of rights is paramount to any modern state to outline citizen’s basic rights and to limit government power over the individual, thus strengthening the argument for more entrenched constitutions.

Another potential strength of entrenched constitutions is their ability to be interpreted and thus viewed in a more flexible light. This occurs through processes carried out by Supreme and Constitutional courts. For example the Supreme Court in the USA makes decisions based upon the interpretation of the constitution in modern day circumstances. This process to some extent can provide a constitution that although may have been framed centuries earlier, remains relevant to modern day circumstances through interpretation. This interpretation allows a historic document to act as a relevant legal framework with application to modern society. Within American political institutions the "Supreme court is the final arbiter of the meaning of the Constitution" (McKay, 2005: 281), this strengthens the concept of an entrenched constitution as ultimately the constitution, although entrenched still allows flexibility and relevance through open interpretation by a supreme law interpreting body. (McKay, 2005: 51)

The British Constitution is largely regarded as one of the most flexible or least entrenched constitutions largely due to its uncodified nature. The British Constitution requires no special amendment procedure and can be altered by any piece of statute law. This has led the British constitution to be labelled as "a living organism of perpetual growth and change" (Norton, 1982: 23). This fluid nature allows the constitution to grow and react to changes in society which allows the constitution to directly combat short term problems that may face the state.

An example of this organic nature can be derived from legislative procedure following the London terrorist bombings in July 2005. Here members of parliament voted to extend the detention of terror suspects to 28 days. This

action in many states with entrenched constitutions would have been in opposition to principles set within the Bill of Rights. For example the USA Constitution stipulates that “ No person shall be held to answer for a capital and be informed of the nature and cause of their accusation.” (Finer, 1995: 117). Thus any changes that are to be made to detention time without charge in the USA would be subject to great scrutiny to assess whether any increase is accepted within the nature of the constitution. Here we can see one of the possible weaknesses of an entrenched constitution in reacting to new threats as cases where supposed terror suspects may need to be held for longer gaining protection from a constitution failing to evolve to meet modern day threats, thus providing potential strength for a less entrenched and more reactionary constitution.

Despite this ability for less entrenched constitutions to react to short term issues within society, many defenders of more entrenched documents see the ability to place civil liberties under threat so easily through a simple change in ordinary legislation as a terminal flaw of flexible easily modified constitutions. The stability and uniform nature of age old, entrenched documents has the same effect on law and society that is not too be too reactionary and volatile. Many groups have critiqued the 28 day detention without charge holding period as fundamentally against individuals civil liberties but have little formal ways to attack such policies due to the none entrenchment of civil liberties within the constitution.

Overall we can see that both Entrenched and more flexible constitutions have strengths and weaknesses. Entrenched constitutions can become outdated and restrictive on dealing with current issues through a difficult <https://assignbuster.com/development-of-an-entrenched-constitution/>

amendment procedure. However, their entrenchment can provide a state with stability which is especially useful after revolution or war. Entrenched Constitutions have the benefit of protecting the explicit right of citizens within a Bill of Rights. On the other hand a more flexible constitution can evolve and grow as society changes around it. This helps politicians to not feel constrained to deal with current issues that face society. Despite this a flexible constitution may be reactionary and dangerous if not employed in the right type of system resulting in the possible abuse of civil liberties for short term reactionary policies.

Here it is arguable that the type of Constitution a state employs largely depends on the circumstances within that individual state. For example it is easy to see that post World War Two Germany required an entrenched constitution which guaranteed the separation of powers and human rights for citizens. On the other hand however Britain has arguably been a great promoter of democratic values where a more flexible constitution is seen as a virtue through the ability to change and amend the direction of the state without the need for ultimate written entrenchment.

In conclusion it will be offered that although a state should always have some written and entrenched articles largely relating to the human rights of citizens, constitutional formulation should always be based upon individual circumstance that dictates the extent a constitution should be entrenched. In an entrenched constitution however it must always be the case that a supreme court is present to interpret the Constitution for application to individual cases to keep the constitution relevant and living in modern society.

References

- Finer S E, Bogdanor Vernon, Rudden Bernard (1995), “ Comparing Constitutions”, New York: Oxford University press.
- Hague Rod, Harrop Martin (1982) seventh edition (2007), “ Comparative Government and Politics: An Introduction”, New York: Palgrave Macmillan.
- McKay David (1983), Sixth edition (2005), “ American Politics and Society”, Oxford: Blackwell Publishing.
- McKeever Robert, Zvesper John, Maidment Richard (1999), “ Politics USA”, Harlow: Pearson Education Limited.
- Norton Philip (1982), “ The Constitution in Flux”, Oxford: Blackwell Publishing.
- Phillips-Wolf Leslie (1968), “ Constitutions of Modern States”, London: Pall Mall Press.
- Phillips-Wolf Leslie (1972), “ Studies in Comparative Politics: Comparative Constitutions”, London: Government and Opposition.

Bibliography

- Finer S E, Bogdanor Vernon, Rudden Bernard (1995), “ Comparing Constitutions”, New York: Oxford University press.
- Garner, Robert. Ferdinand Peter. Lawson Stephanie (2009), “ Introduction to Politics”, New York: Oxford University press.
- Hague Rod, Harrop Martin (1982) seventh edition (2007), “ Comparative Government and Politics: An Introduction”, New York: Palgrave Macmillan.

- King Anthony (2007), “ The British Constitution”, New York: Oxford University Press.
- McKay David (1983), Sixth edition (2005), “ American Politics and Society”, Oxford: Blackwell Publishing.
- McKeever Robert, Zvesper John, Maidment Richard (1999), “ Politics USA”, Harlow: Pearson Education Limited.
- Mount Ferdinand (1993), “ The British Constitution Now: Recovery or Decline”, London: Mandarin Paperbacks.
- Norton Philip (1982), “ The Constitution in Flux”, Oxford: Blackwell Publishing.
- Phillips-Wolf Leslie (1968), “ Constitutions of Modern States”, London: Pall Mall Press.
- Phillips-Wolf Leslie (1972), “ Studies in Comparative Politics: Comparative Constitutions”, London: Government and Opposition.
- Sunstein Cass (2001), “ Designing Democracy: What Constitutions Do”, New York: Oxford University Press.