

Guide to Learning Features

Preview Each chapter begins with a short outline of the contents of the chapter, designed as a preview of what to expect in the pages that follow.

PREVIEW

So far we have looked mainly at the broad sweep of comparative politics, including key concepts, research methods and regime types. In the next few chapters we will focus on political institutions, beginning here with a review of constitutions and the courts that accompany them. Constitutions outline the rules of political systems, and tell us much about the aspirations of states, the structure of governments and the rights of citizens. For their part, courts strive to make sure that the rules are respected and equally applied. Just as humans are imperfect, however, so are the laws and institutions they create and manage; there are significant gaps between constitutional ideals and practice and questions about the efficacy of courts.

The chapter begins with an assessment of constitutions: what they are, what they do, their character and durability, how their performance can be measured, how they are changed and how they have evolved. There is no fixed template for constitutions; they vary widely in terms of their length and efficacy, and the gap between aspiration and achievement differs from one constitution to another. The chapter goes on to look at the structure and role of courts and their relationship with constitutions, examining the differences between supreme courts and constitutional courts and the incidence of judicial activism. It then focuses on judges: how they are recruited, the terms of their tenure and how such differences impact judicial independence. It ends with an assessment of the place of constitutions and courts in authoritarian regimes.

- Origins and evolution
- The role of courts
- The role of the judiciary
- Constitutions and courts in authoritarian regimes

Highlights Each chapter begins with six key arguments, chosen to underline some of the more important points made in the chapter.

HIGHLIGHTS

- Constitutions are critical to achieving an understanding of government, offering a power map through key political principles and rules.
- As the number of states increased, so did the number of constitutions, and more than half the states in the world have adopted a new constitution since 1990.
- Understanding governments requires an appreciation not just of the content of constitutions, but also of their durability and how they are amended.
- Awareness of the structure and role of courts is also critical, as is the distinction between supreme courts and constitutional courts.
- Judges have become more willing to enter the political arena, making it more important to understand the rules on judicial recruitment.
- In authoritarian regimes, constitutions and courts are weak, with governments either using them as a facade or bypassing them altogether.

Marginal definitions The first time a key term is used it appears in boldface and is defined in a marginal box. The definitions are kept as brief and clear as possible, and each term is listed at the end of the chapter in which it is defined.

Constitution

A document or a set of documents that outlines the powers, institutions and structure of government, as well as expressing the rights of citizens and the limits on government.



USING THEORY 7

INSTITUTIONALISM

The study of governing institutions has long been a central interest of political science in general and of comparative politics in particular. In fact, institutions were long regarded as the core subject matter of political science, and scholarship was dominated by **institutionalism**, using approaches that were often descriptive and less interested in developing theory. Institutionalism briefly fell out of favour in the 1960s as the behavioural movement emerged (see *Using Theory 14*) but was revisited in the 1980s when new research on social and political structures combined with the reform of governing institutions in developing countries to give birth to what became known as **new institutionalism** (or neo-institutionalism) (March and Olsen, 1984).

This reformulation looked not just at the formal rules of government but also at how institutions shaped political decisions, at the interaction of institutions and society and at the informal patterns of behaviour within formal institutions. This approach lent itself well to comparative politics as researchers undertook cross-national studies, many of them interested in better understanding the process of democratization.

One of the benefits of the institutional approach is that it can tell us not only how institutions work but also where their strengths and weaknesses lie and what can be done to make them more efficient. It also helps remind us that institutions are constantly changing in response to new circumstances and are frequently subject to a process of **institutionalization**. This begins following their creation, as they develop rules and procedures, build internal complexity, entrench their position, are clearly distinguished from their environment and come to be accepted by external actors as part of the governing apparatus. It continues as they evolve in response to pressures for change, as well as new needs and opportunities.

We should also remember that institutions do not tell us the whole story about a political system, because they rarely act independently of social forces. In many authoritarian regimes, for example, the entire superstructure of government is a facade behind which personal networks and exchanges are the key driving force in politics. Even in democracies, it is always worth asking whose interests benefit from a particular institutional arrangement, just as an institution can be created for specific purposes, so too can it survive by serving the interests of those in charge.

Using Theory A new feature is introduced in every chapter that focuses on one of the major theories used in comparative politics.

EXPLORING PROBLEMS 7

HOW CAN WE ENSURE THE INDEPENDENCE OF JUDGES?

It might be intuitive to believe that the political independence of judges is a key part of the foundation of an effective constitution, which is – in turn – a key part of the foundation of democracy. Just what judicial independence means, though, has long been a matter of debate, with particular questions asked about the difference between *de jure* independence (based on the formal rules of a legal system) and *de facto* independence (based on the political realities surrounding a legal system). Questions have also been asked about exactly how judicial independence should be measured, which raises questions in turn about how it is best protected.

Melton and Ginsburg (2014) developed a list of six constitutional features that they believe can be used to comparatively measure judicial independence:

- An explicit statement in a constitution on the independence of judges.
- The length of tenure of judges.
- The selection procedure for judges and the bodies involved.
- The removal procedure for judges and the bodies involved.
- The conditions under which judges can be removed.
- Protection of the salaries of judges.

Using these six features, the Comparative Constitutions Project (2021) – a US-based web site containing a wealth of information about constitutions – compares judicial independence around the world and produces some unexpected results. Only four countries (Argentina, Bulgaria, The Gambia and Nepal) have all six features, while several countries that are very different democratically (including Canada, Cuba, North Korea, Sweden and Venezuela) each have only one, and the United States and Russia both have three. Clearly *de jure* protection of judges and courts does not tell us much, and even Melton and Ginsburg themselves admit to being sceptical about the effect that a formal constitutional statement will have on judicial independence in practice.

- Where do these findings leave us in terms of measuring and achieving judicial independence?
- Is it something that we are most likely to understand intuitively when we see it (or find it to be missing), or do we need to rely on objective measures such as those listed above?
- Should we be surprised to see Sweden likened in any way to North Korea and the United States in any way to Russia?

Feature	Purpose
Preamble	Seeks popular support for the document with a stirring declaration of principles and, sometimes, a definition of the purposes of the state.
Organization	Sets out the powers and structure of government institutions.
Rights	Covers individual and often group rights, including access to legal redress.
Amendment procedure	Outlines the procedure for revising the constitution.

Figure 7.1 Features of constitutions

Table 7.2: Comparing supreme courts and constitutional courts

	Supreme court	Constitutional court
Form of review	Mainly concrete.	Mainly abstract.
Appellate function	Yes.	No.
Standing	Anyone with legal standing can bring a case.	Only specified institutions can bring cases.
Examples	Australia, Brazil, Canada, China, India, Japan, Mexico, Nigeria, Sweden, Turkey, United States.	Austria, Egypt, France, Germany, most of Eastern Europe, Russia, South Africa, UK.

DISCUSSION QUESTIONS

- Which is best: a constitution that is short and ambiguous, leaving room for interpretation, or one that is long and detailed, leaving less room for misunderstanding?
- What are the advantages and disadvantages of supreme courts and constitutional courts?
- Judicial restraint or judicial activism – which is best for the constitutional well-being of a state?
- What is the best way of recruiting judges, and what are the most desirable limits on their terms in office, if any?
- What are the best forms of protection to ensure the independence of judges and courts?
- Which of the four roles of constitutions in authoritarian regimes do you find most convincing?

FURTHER READING

- Ginsburg, Tom, and Alberto Simpser (eds) (2014) *Constitutions in Authoritarian Regimes* (Cambridge University Press). An edited collection on the design, content and consequences of constitutions in authoritarian regimes.
- Harding, Andrew, and Peter Leyland (ed) (2009) *Constitutional Courts: A Comparative Study* (Wildy, Simmonds & Hill). A comparative study of constitutional courts, with cases from Europe, Russia, the Middle East, Latin America and Asia.
- Issacharoff, Samuel (2015) *Fragile Democracies: Contested Power in the Era of Constitutional Courts* (Cambridge University Press). Argues that strong constitutional courts are a powerful antidote to authoritarianism because they help protect against external threats and the domestic consolidation of power.
- Rosenfeld, Michel, and Andr s Saj  (eds) (2013) *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press). A comparative collection of studies of history, types, principles, processes and structures of constitutions.
- Smith, Rogers M., and Richard R. Beeman (eds) (2020) *Modern Constitutions* (University of Pennsylvania Press).

Exploring Problems Another new feature is introduced in every chapter that focuses on a problem in government and politics and poses questions about how comparison gives us insight into possible solutions.


Figures A wide range of figures is used throughout the book to provide visual support to topics covered in the body of the text or to summarize lists of subjects covered in the text.

Tables These display statistics or key features of a topic in the nearby text, or summarize subjects covered in the text.


Discussion questions Each chapter closes with a set of six open-ended discussion questions, designed to consolidate knowledge by highlighting major issues and to spark classroom discussions and research projects.

Further reading An annotated list of six suggested readings is included at the end of each chapter, with an emphasis on the most recent and helpful surveys of the topics covered in that chapter.

GUIDE TO SPOTLIGHT FEATURES




SPOTLIGHT 7
SOUTH AFRICA




BRIEF PROFILE:

South Africa languished for many decades under a system of institutionalized racial separation known as apartheid. The ensuing privileges and opportunities for white South Africans at the expense of black, mixed race and Asian South Africans. In the face of growing resistance and ostracism from much of the outside world, an agreement was reached that paved the way for the first democratic elections in 1994. Much was originally expected from a country with a wealth of natural resources, but corruption is endemic, unemployment remains stubbornly high, many still live in poverty and South Africa faces major public security challenges, with one of the highest per capita homicide and violent assault rates in the world. Despite being the second largest economy in Africa (after Nigeria), it has only partly realized its potential as a major regional power.


Form of government	Unitary presidential republic. State formed 1910; most recent constitution adopted 1997.
Executive	Presidential. A president heads both the state and the government, ruling with a cabinet. The National Assembly elects the president after each general election. Presidents limited to two five-year terms.
Legislature	Bicameral Parliament: lower National Assembly (400 members) elected for renewable five-year terms and upper National Council of Provinces with 90 members, one appointed from each of the nine provinces.
Judiciary	The legal system mixes common and civil law. The Constitutional Court decides constitutional matters and can strike down legislation. It has 11 members appointed by the president for terms of 12 years.
Electoral system	The National Assembly is elected by proportional representation using closed party lists, half are elected from a national list and half from provincial lists.
Parties	Dominant party The African National Congress (ANC) has dominated since the first full democratic and multi-racial election in 1994. The more liberal Democratic Alliance, now the leading party in the Western Cape, forms the official opposition.



59m
Population



\$351bn
Gross Domestic Product



\$6,001
Per capita GDP

Democracy Index rating	Freedom House rating	Human Development Index rating
<ul style="list-style-type: none"> ✓ Full Democracy ✗ Flawed Democracy ✗ Hybrid Regime ✗ Authoritarian ✗ Not Rated 	<ul style="list-style-type: none"> ✓ Free ✗ Partly Free ✗ Not Free ✗ Not Rated 	<ul style="list-style-type: none"> ✗ Very High ✓ High ✗ Medium ✗ Low ✗ Not Rated


THE CONSTITUTION OF SOUTH AFRICA

South Africa's transformation from a state based on apartheid to a more egalitarian and democratic order was one of the most remarkable political transitions of the late twentieth century. In 1996, after two years of hard bargaining between the African National Congress (ANC) and the white National Party (NP), agreement was reached on a new 109-page constitution to take effect in February 1997. For a contextual analysis, see Fig. 20(10).

The preamble begins with a recognition of the injustices of our past, emphasizes the importance of healing, divisions and asserts that South Africa is 'one, sovereign, democratic state' based on the value of human dignity, the achievement of equality ... non-racialism and non-sexism. It then ... before describing the system of government – includes a lengthy bill of rights, including support for privacy, the right to peacefully demonstrate, freedom of movement and the right to free and fair elections.

Although the new political system was built on the foundations of the old, it also involved several key changes, including an upper chamber of Parliament designed to represent the country's nine provinces; a president elected by Parliament from among its members and an expansion of human rights. South Africa has since had five rounds of parliamentary elections and five presidents, but the initial optimism for South Africa's new democracy, has been tarnished by the dominance of the ANC and by corruption that has become institutionalized in the sense that the abuse of public office for private gain has become a routine part of political life.

Some have argued that the constitution should be replaced with a document that is more reflective of the needs and realities of African society, replacing the compromises that were made at the end of the apartheid era. Others argue that it is a landmark attempt to create a society based on social, economic and political rights for all citizens and that its true implementation has yet to be achieved (Dixon and Roux, 2018). The effects of the constitution, more than most, should be judged by what preceded it, and in that sense the achievements of the new South Africa are remarkable indeed.



Further reading

Butler, Anthony (2017) *Contemporary South Africa, 3rd edn* (Palgrave).

Dixon, Ronald, and Thavis Roux (eds) (2018) *Constitutional Triumph, Constitutional Disappointment: A Critical Assessment of the 1996 South African Constitution's Lead and International Influence* (Cambridge University Press).

Du Plessis, Carlos, and Martin Plaut (2018) *Understanding South Africa* (Routledge and Company).

These focus on the 18 country cases from which examples are most often quoted in the body of the text. They include a brief profile of each country (or regional organization, in the case of the European Union), brief descriptions of their political features, some key demographic and economic data and a short case study of each country in the context of the topic of the chapter in which the Spotlight appears.

Topic	Features and sources
Form of government	A general description of the form of a government, including dates on state formation and the adoption of the most recent constitution.
Executive	Form and structure of the executive.
Legislature	Form and structure of the legislature.
Judiciary	Form and structure of the judicial system.
Electoral system	Form and structure of the electoral system.
Parties	Outline of the party system and the major parties at work in the country.
Population	Data for 2020 from World Bank (2021a).
Gross Domestic Product	Total value of goods and services produced by a country, in US dollars. Data for 2019–20 from World Bank (2021a).
Per capita Gross Domestic Product	Total value of goods and services produced per head by a country, in US dollars. Data for 2019–20 from World Bank (2021a).
Democracy Index rating	From the Economist Intelligence Unit (2021), which divides states into full democracies, flawed democracies, hybrid regimes and authoritarian regimes.
Freedom House rating	From Freedom House (2020a), which divides states into groups rated Free, Partly Free or Not Free.
Human Development Index rating	From the United Nations Development Programme (2021), which divides states into groups rated Very High, High, Medium and Low.