

Constitutional Principles

“Constitutional principles” (sometimes called “guiding principles”) refer to documented principles or concepts that are intended to provide substantive and/or procedural guidance to a constitutional process. Constitutional principles have been used in only a few cases – the best-known example is in South Africa. Constitutional principles tend to reflect key aspects of the historical context in which the particular constitution-making process is taking place and also broader international norms, standards and precedents.

This paper discusses the following topics:

1. Why Constitutional Principles are Formulated
2. What Constitutional Principles Cover
3. How and Where Constitutional Principles are Formulated
4. Oversight or Enforcement of Constitutional Principles
5. Challenges/Considerations when Using Constitutional Principles

1. WHY CONSTITUTIONAL PRINCIPLES ARE FORMULATED

Constitutional principles can be useful at an early stage of a process where competing political factions do not trust each other enough to move directly into constitutional drafting. They can provide assurances to parties undertaking the constitution-making process, particularly minority groups, that the end-result, while unknown, will at least meet certain minimum standards and not run afoul of “red lines” that have been pre-agreed. In this way, constitutional principles can help bring to the negotiating table multiple competing factions which are nevertheless committed to bringing about a new constitution and political system.

In post-conflict or democratic transition contexts, principles can provide a means of transforming seemingly intractable conflicts into ongoing but manageable constitutional struggles - incrementally moving the parties towards the desired democratic transition. The use of broadly-worded principles as a framework for the substantive negotiations can thus facilitate dialogue and constitutional drafting and help to maintain a degree of consensus.

Constitutional Principles in South Africa's 1994 Interim Constitution

South Africa's use of constitutional principles is the most robust example of how such principles can be used to bring distrustful parties to the constitutional negotiating table. During South Africa's democratic transition, the ANC insisted on a democratically-elected Constituent Assembly to draft the constitution. The National Party recognized that this would allow the ANC to effectively adopt any constitution it wished without regard for white South Africans' minimal demands. The 1994 Interim Constitution, which was negotiated in "round tables" and agreed to by both the ANC and National Party, included 34 Constitutional Principles (in Schedule 4) against which the substance of the permanent constitution would be evaluated by the Constitutional Court. Among other things, the inclusion of these principles guaranteed that a minimum set of democratic and human rights norms and a system of multi-level government would be reflected in the final constitutional draft. It also secured a government of national unity for a period of five years. The inclusion of principles gave the minority National Party sufficient assurances to turn the task of drafting and approving the final constitution to a democratically elected body based on proportional representation.

Constitutional principles can also be useful for permitting political parties and possibly other participants/stakeholders to publicly declare and commit themselves to a particular vision for the final constitution and the future of the country (based on the documented principles) at an early stage of the process. This can potentially facilitate later phases of the process, notably negotiation and drafting of the actual constitution. Moreover, to the extent that discussions and decisions on principles makes the process longer and more iterative, the process of adopting principles can enable national actors to better digest the fundamental issues before moving into details.

Constitutional principles relating to the process itself can enshrine the basic requirements that the process is participatory, inclusive and transparent and thus has legitimacy in the eyes of the public, particularly in a situation of conflict or transition. For example, the guiding principles contained in the legislation that provided for Kenya's two constitutional processes (eg, [2008](#)) required the process to be accountable, accommodative of diverse groups and participatory. Process principles can enable all groups with interests in the process to be better prepared and more aware of how they can participate in and monitor the progress of the process. However, since such principles are typically broadly worded, they usually do not specify how specific different actors will be engaged in the process.

2. WHAT CONSTITUTIONAL PRINCIPLES COVER

Broadly, constitutional principles might address:

- (i) the *content* of the constitution that it is expected to result (typically focused on the most divisive and/or fundamental issues, such as orders/systems of government, power-sharing, sources of law, fundamental rights, etc.); and/or

- (ii) how the *process* is to be conducted (to ensure participation, inclusiveness, transparency, timeliness, etc.).

Constitutional principles are typically intended to provide guidance for the process without being unduly restrictive, thereby granting flexibility to the drafters in constructing constitutional provisions within the broader guiding principle/framework. Accordingly, constitutional principles are rarely definitive and contain, in most cases, a degree of flexibility that enables all parties to feel that they might be able to live with the outcome of the process.

For example, in response to a desire for local autonomy, the [1982 Namibian constitutional principles](#) vaguely required elected councils on the local and/or regional level, without specifying how this was to be achieved. In contrast, the constitutional principles contained in [Burundi's 2000 Arusha Peace Agreement](#) specified in great detail (with over 120 provisions) the required substance of the post-transition constitution, with subjects ranging from fundamental values to the peace and security forces. Another example of a peace agreement provided a detailed framework for a constitution is the 2005 [Comprehensive Peace Agreement](#) ending the Second Sudanese Civil War. Principles agreed to by the main political parties in Argentina (1993) covered aspects relating to separation of powers and the electoral system, among others. In Yemen, the Constitution Drafting Commission is required, by the 2014 Yemen CDC [Presidential Decree](#), to produce a constitution that responds to and is aligned with the numerous recommendations and decisions of the National Dialogue Conference included in the final Yemen National Dialogue Conference (NDC) outcomes document. The main Bolivian political parties (2004) agreed on procedural principles that would bind a newly elected Constituent Assembly – most notably that the Assembly would adopt the constitutional draft by a two-thirds majority – which were then incorporated into a constitutional amendment that governed the forthcoming constitution making

3. HOW AND WHERE CONSTITUTIONAL PRINCIPLES ARE FORMULATED

In many post-conflict situations, constitutional principles will be negotiated among the parties to the conflict and will be included in resulting peace agreements and/or interim arrangements (eg, Cambodia, South Africa, Burundi). Where the international community is involved in the political/peace process, key international players may play a role in the negotiation and possibly even the formulation of the principles (eg, Namibia, Cambodia, Afghanistan). In other cases, the legislation establishing the process may include principles.

For example, the Kenyan legislation (2000 and 2008) required that the institutions established to undertake the processes gave effect to principles (such as accountability, accommodation of diversity, and respect for universal principles of human rights) while also ensuring “that the final outcome of the review process faithfully reflects the wishes of the people of Kenya.” This was the result of much negotiation by the government, opposition parties and civil society. As with peace agreements and constitution-making bodies, inclusion of non-state non-violent actors (including civil society organizations, women and minorities) in the negotiation of principles can be beneficial and important. Further, constitutional principles may be established by a constitution-making body itself. In Somalia, for example, the [IFCC](#) extracted and compiled a set of principles to frame the new

constitution, based on the 1960, the 1990 Somali constitutions and the Transitional Federal Charter of 2004, and additional sources. Constitutional principles are increasingly influenced, and even determined, by a wide range of norms, standards and precedents, including precedents provided by other constitution-making processes. International human rights norms have an increasing influence on the design of processes. For example, the [Bonn Agreement](#) for Afghanistan provides (at Article V(2)) that the “Interim Authority and the Emergency Loya Jirga shall act in accordance with basic principles and provisions contained in international instruments on human rights and international humanitarian law to which Afghanistan is a party.”

4. OVERSIGHT OR ENFORCEMENT OF CONSTITUTIONAL PRINCIPLES

Constitutional principles might be regarded as political obligations (in the event they are agreed to by political elites prior to the constitutional process – eg, Burundi, Cambodia) or legally binding (if they are put into the legal mandate or other legal framework for the constitutional process – eg, Bolivia, South Africa, Kenya, Yemen).

The Colombian constitutional court declared unconstitutional principles agreed to by the main political parties prior to the Constituent Assembly’s election that sought to limit the themes and issues the Constituent Assembly could address, while similarly agreed upon principles in Argentina survived because the parties felt politically (but not necessarily legally) obligated to adhere to them.

South African constitutional principles were not only enforceable, but built in a mechanism to enforce them; the agreed principles gave authority to the South African Constitutional Court to determine whether they had been properly implemented. The certification process, under which a newly-established constitution court was to certify that the draft indeed respected the principles, provided an additional check on the political process of drafting the constitution, to assure that it met with the original basic parameters that the opposing sides had agreed to, before beginning the more specific constitutional negotiations. In fact, the Constitutional Court sent back the first draft to the Constituent Assembly for failing to comply with the constitutional principles in nine respects (see [Ebrahim/Miller](#) at footnote 127 for a summary of these conflicts).

Providing an institutional mechanism to certify that the final product adopted by a constitution-making body complies with the principles (as in South Africa) may provide an additional level of comfort for parties that do not fully trust the constitution-making body alone (and would be more trustful of a constitutional court or other similar body). It should be noted, however, that this practice is exceptional, and in many post-conflict or transition countries, the courts are no more or no less trusted (or capacitated) than the other branches of government.

5. CHALLENGES/CONSIDERATIONS WHEN USING CONSTITUTIONAL PRINCIPLES

Constitution-makers should be mindful of the potential drawbacks to using constitutional principles. For instance, the process of negotiating constitutional principles may add another round of costly, time-consuming and potentially divisive proceedings at the front-end. In addition, by definition they will limit certain constitutional options and/or create parameters for possible outcomes (though this may be necessary to bring the parties to the table). The principles, likely negotiated between competing elites, will constrain the options of the people later in the process. In extreme examples, constitutional principles may hold back a genuinely democratic process of reform, especially if they are imposed by an outgoing regime or an external actor. Finally, there is the risk that previously agreed upon principles might be unenforceable, as in Colombia (1990).

Disclaimer: This document was created as content for constitutionmaker.un.org. It does not necessarily reflect official UN policy or guidance.