CHAPTER 8

Key Elements of the State: Laws, Constitutions, and Federalism

CHAPTER OVERVIEW

In some respects states are like a building: Without a solid framework to hold them together, they can prove to be shaky and vulnerable to weakness and even collapse. By contrast, a well-framed building, with its beams, joists, and studs in the proper alignment, can prove to be durable and strong. In this chapter we will

▲ The Pillars of the Constitution, located near the Apartheid Museum, Johannesburg, South Africa (© Greatstock/ Alamy Stock Photo).

begin by discussing the role that constitutions play in determining the basic structure of the state and in laying out the fundamental rights of its citizens. Since the rule of law is not always interpreted the same way everywhere, it's also useful to explore different ways in which states apply the law, focusing in particular on differences between Islamic and Western practices. After a look at the importance of constitutional courts we will turn to federalism, a system of government that, in addition to accommodating diversity, offers a way of containing the powers of the state. Then we explore consociationalism as an alternative approach to managing diversity. We conclude with a brief discussion of the increasing legalization of political life.

Law and Politics

In Chapter 7 we focused on the power of the modern state. We also underlined the importance of controlling that power according to laws. According to Samuel Finer (1997), one of the main Western innovations in the theory of the state was the concept of "law-boundedness." In other words, the decisions of the ruler(s) had to be codified and published to limit the exercise of arbitrary power and provide predictability in public affairs. Fareed Zakaria (1997), a former editor of *Foreign Affairs* and CNN commentator, concurs:

> For much of modern history, what characterized governments in Europe and North America and differentiated them from those around the world, was not democracy but constitutional liberalism. The "Western model" is best symbolized not by the mass plebiscite but the impartial judge. (p. 27)

The spread of Western conceptions of law around the world is a consequence of the spread of Western ideas of the state. This spread was hardly benign, and this state model often took over other forms or governance through colonization, where lands, resources, and peoples were exploited. In traditional societies in other parts of the world, rule making had not been the exclusive domain of political rulers: Binding rules on human conduct could also be imposed by other sources of authority, such as tribal or religious leaders, or through some form of group agreement. Although these rules may not have been called "laws," they had the same force. Moreover, traditional societies in Africa and Asia tended to rely on self-regulation and internalized norms of harmony to achieve order, rather than formal legal adjudication (Menski, 2006, p. 547). The same is true of decision making in Indigenous North America (see Box 8.1).

Gradually, however, Western state governments arrogated to themselves the exclusive responsibility for issuing such rules in the form of laws, and codified them for the sake of consistency of application. Then, as legislatures became more common, law making became their primary function. Gradually, as Western states spread around the world, often through processes of colonization, so did these practices. Law making was associated with the "civilizing mission" that Western states set for themselves, and as Alfred's analysis shows, it was radically contrary to some Indigenous conceptions of governance. This monopoly on legislative activity is another essential feature of modern states, which often claim that the legitimacy of binding rules for society depends on approval by the legislature. Sometimes this position is described as **legal positivism**, which means that law is what the state says it is. It has become widely accepted in Western states that because other types of rule lack this legitimacy, they also lack the authority of state laws.

KEY QUOTE BOX 8.1

Indigenous Governance Models in Canada

Does the spread and domination of the European state model mean that Indigenous ways were somehow less effective or backward? Was this a matter of the survival of the fittest and the best? For many people, this is not the case at all and Indigenous forms of governance were equal to and in many ways better than the colonial systems imposed later on. Mohawk political theorist and professor Gerald Taiaiake Alfred has argued that "Traditional government is the antidote to the colonial disease and its corruptions and abuses of power, and to the disempowerment of our people and communities." Alfred defines the Indigenous concept of governance in this way:

> There is no central or coercive authority, and decision-making is collective. Leaders rely on their persuasive abilities to achieve a consensus that respects the autonomy of individuals, each of whom is free to dissent from, and remain unaffected by, the collective decision. The clan or family is the basic unit of social organization, and larger forms of organization, from tribe through nation to confederacy, are still predicated on the political autonomy and economic independence of clan units through family-based control of lands and resources.
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> A crucial feature of the indigenous concept of governance is its respect for individual autonomy. This respect precludes the notion of "sovereignty"—the idea that there can be a permanent transference of power or authority from the individual to an abstraction of the collective called "government." The indigenous tradition sees government as the collective power of the individual members of the nation; there is no separation between society and state. Leadership is exercised by persuading individuals to pool their self-power in the interest of the collective good.
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> Governance in an indigenist sense can be practised only in a decentralized, small-scale environment among people who share a culture. It centres on the achievement of consensus and the creation of collective power, bounded by six principles:
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> 1. Governance depends on the active participation of individuals.
> 2. Governance balances many layers of equal power.
> 3. Governance is dispersed.

Legal positivism is perhaps best exemplified in the principle of **secularism** embraced by France. Here civil state authorities assert their precedence over all competing sources of rule-making authority, especially religious ones. Mustafa Kemal Atatürk was heavily influenced by this example: The reforms that he introduced in the 1920s asserted the supremacy of the Turkish state over Islamic religious authorities. The Turkish state's Directorate of Religious Affairs controls the mosques by employing all Muslim clerics on salaries and subjecting them to an administrative hierarchy that supervises their pronouncements.

4. Governance is situational.
5. Governance is non-coercive.
6. Governance respects diversity. (Alfred, 2009, pp. 49–51)

In Alfred's view, Indigenous governance can best be practised in small, relatively homogeneous communities with a sufficient land base. What do you think would happen if a country with millions of people were to adopt this form of governance? What principles and practices could be transferred to much larger population bases? What would have to be discarded because of population size? What elements of Indigenous governance could be implemented now within a Western settler state?

Chris Cheadle/Getty Images

PHOTO 8.1 | Mungo Martin House, outside the Royal British Columbia Museum in Victoria, was built by the Kwakwaka'wakw carver Mungo Martin in 1953 on the model of a traditional "big house." The potlatch that marked its opening was the first to be held in public after the ban on the practice was lifted in 1951. The house is still used today for First Nations gatherings.

The extent to which this claim to legal **monism** has been accepted as legitimate can be seen in the United Kingdom. There was heated opposition to the archbishop of Canterbury's suggestion, in 2008, that British Muslims should have access to sharia law in matters regarding family life. A number of states in other parts of the world permit greater legal pluralism than the UK. India, Pakistan, and Bangladesh, for example, allow different religious communities the right to establish their own rules to regulate matters of faith and family. (India has a significant Muslim minority, while Pakistan and Bangladesh are majority Muslim.)

There is a close connection between legal and political systems. To ensure that citizens accept laws as legitimate, they must be established according to rules of procedure that are themselves legitimate and must be approved by the legislature (a subject to which we shall return in Chapter 9). Almost all states have legislatures, although their powers and procedures may vary widely.

Key functions performed by law include determining criminal behaviour, prescribing punishments for criminals, and providing impartial rules for binding adjudication in disputes. These functions are encapsulated, especially in the West, in the concept of the **rule of law**: the principle that everyone in a society, whether ruler, minister, or ordinary citizen, is expected to obey the law and (at least in theory) everyone is equal before it. For such a system to enjoy legitimacy, Lon Fuller laid down eight conditions that must prevail for laws to be just; see Box 8.2. These conditions have been widely understood to make up the necessary basis for the rule of law.

KEY CONCEPT BOX 8.2

Eight Requirements for Just Laws

To be just, a law must be (1) general in scope, (2) public, (3) prospective rather than retroactive, (4) clear, (5) consistent, (6) relatively constant, (7) capable of being obeyed, and (8) enforced as written (Fuller, 1969, pp. 33–94).

PHOTO 8.2 | East meets West: Young Turkish women in Istanbul smoke both traditional water pipes and American cigarettes. Although its population is 99 per cent Muslim and the country could have adopted Islam as its official religion, Turkey has been a secular democracy since the days of Atatürk. While it remains secular, Turkey is now far less democratic than before.

The idea that the legal system can help prevent the abuse of power by the executive was enshrined in the American Constitution and has been included in other constitutions since then. In order for the courts to perform that function, they need some independence from the state; goverments must accept that judges are free to determine the merits of legal cases, no matter what the implications might be for the government. Although an impartial legal system is a check on legislators' freedom to manoeuvre, the rule of law is one of the essential elements of good governance. It is also an integral feature of liberal democracy. We will return to the adjudication function of legal systems and their relationship with political systems toward the end of this chapter.

See Chapter 10, p. 213, for a discussion of good governance.

Constitutions

The term **constitution** can be used in two ways, one general and one more narrow. In the broad sense it denotes the overall structure of a state's political system; see Box 8.3. In this broad sense, the term may also be understood to refer to a nation's political culture; thus a decision that is said to be contrary to the nation's "constitution" may infringe the "spirit" of the constitution rather than its precise terms.

The second, narrower sense of *constitution* refers to a specific document that lays down the basic institutions of state and the procedures for changing them, as well as the basic rights and obligations of the state's citizens. This is what we most often think of by *constitution*—a written document that hangs on the walls of schools and government buildings, like our 1982 Constitution. This document also serves as the basic source of national law, so that individual laws and legal codes are expected to conform to it. It is, or should be, the core of the legal system. Ensuring that this demanding requirement is met demands continual monitoring, and most states have a special constitutional court to adjudicate in cases of apparent conflict, although in Canada and the United States this role is fulfilled by the Supreme Court. This responsibility is quite difficult in Islamic states, where secular civil codes must be harmonized with divinely inspired, universal sharia law. For an example of one attempt to devise an Islamic constitution, see Moten (1996, Appendix B). For the more practical difficulties facing a constitutional court (in this case in Egypt), see Lombardi (1998).

In practice, the difference between the two senses of the term *constitution* is not as great as it used to be. Only three Western states—the United Kingdom, New Zealand, and Israel—do not have written constitutions. Recent decades have seen a surge of constitution writing around the world, including in Canada. With the patriation of the Canadian Constitution in 1982, Canada gained the right to make its own laws without the approval of the British sovereign. The Liberal government of Pierre Trudeau invited Queen Elizabeth II

KEY QUOTE BOX 8.3

Anthony King Defines *Constitution*

> [A constitution is] the set of the most important rules and common understandings in any given country that regulate the relations among that country's governing institutions and also the relations between that country's governing institutions and the people of that country. (King, 2007, p. 3)

The Canadian Press/Ron Poling

PHOTO 8.3 | Queen Elizabeth II signs the Canadian Constitution in 1982 as Prime Minister Pierre Trudeau looks on.

to sign the document, relinquishing what until then had been an important aspect of her formal power. New Zealand went through a constitutional review process in 2013, as part of an agreement between the National Party and the Indigenous-led Māori Party. Part of the process involved consultation about the role of the Treaty of Waitangi (1840), where Māori leaders and representatives of the British Crown agreed to a power-sharing arrangement. The Māori Party agreed to a coalition government with National if they would hold constitutional consultations. Finance Minister Bill English and Māori Affairs Minister Pita Sharples organized and chaired the consultations. The committee released its report in December 2013:

> The 12-member independent panel spent more than six months having a conversation with New Zealanders about our constitutional arrangements. These included the role of the Treaty of Waitangi, Maori representation in Parliament and local government, the Bill of Rights Act and other matters.
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> "Alongside meetings and hui [Māori meetings], the panel received 5,259 written submissions indicating interest in the nation's constitutional framework, although there is no sense of an urgent or widespread desire for change," Mr. English says. "The Government will now consider the CAP's report and recommendations, including how the conversation might continue."
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> Dr. Sharples said he was pleased the panel considered a range of fundamental elements of New Zealand's constitutional arrangements, including [the country's founding treaty] Te Tiriti o Waitangi. "The Treaty is fundamental to our sense of nationhood, and to who we are as New Zealanders.

> The question is how we translate that into increased participation and representation of Maori in our democracy. Those matters will be considered as part of the Government's response to this report." (English & Sharples, 2013)

New Zealand is unlikely to have a written constitution in the near future, but the constitution report lays out some ideas for what it would look like. Central to any future constitution will be full recognition of the rights of Indigenous Māori to self-determination.

In recent years, at least 81 states have adopted new constitutions, while a further 33 have carried out major constitutional reforms. In many countries, including the states that made up the former Soviet Union and Yugoslavia, constitution making was a consequence of the collapse of communism, but they were not the only ones to do this; Saudi Arabia adopted a constitution in 1992, Algeria in 1989 (amended in 1996), and Morocco in 1996. The most recent amended constitutions were in Haiti (2012) and Vietnam (2013).

A written constitution makes legitimate patterns of political behaviour both more transparent and more regularized. But as King (2007) reminds us, no single written document can cover all of even the most fundamental elements of the political system. For example, virtually no state establishes a particular electoral system in its constitution; yet the electoral system plays a vital role in determining how power can change hands. In addition, constitutions are not always a positive development. Vietnam's constitutional amendment, which came into force in January 2014, actually reduced the levels of democracy and personal freedom within the state while strengthening the ruling Communist Party's political power. This has been roundly criticized by Vietnam's aid donors and development partners:

> Article 4 makes the party the vanguard and representative not only of the Vietnamese working class, but of the whole Vietnamese people and nation, further narrowing the legal space to exercise the right to pluralistic and freely contested elections. Article 65 follows the government lead in enshrining a new legal requirement for Vietnam's armed forces to be absolutely loyal to the Communist Party. New clauses in articles 16, 31, 102, and 103 appear to allow freedom of expression and other basic rights and promise to end arbitrary arrests of critics and political trials on trumped-up charges. But these provisions have been effectively negated by loopholes and weak guarantees in other provisions. Article 14 states that the authorities can override human rights guarantees in other passages if they deem it necessary for national defence, national security, public order, the security of society, or social morality. (Human Rights Watch, 2013)

Note in this case how on the surface the constitution appears to be granting increased individual freedoms when in fact the reverse is true.

In addition to the details of specific constitutions is the related notion of **constitutionalism**. This term too can mean two things. It can refer to a normative outlook on the political values in a particular country's constitution (doing things according to its "spirit"); or it can refer to a broader normative view according to which the constitution is the most fundamental principle of political life. At its most extreme, this could mean that constitutions, once codified, should never change. In practice, no state makes this an absolute principle: Constitutions are amended or even replaced. However, states generally

make such change difficult by insisting on special procedures for changing them so that such change takes place without haste and after due reflection. The notion that the constitution has a special status is part of constitutionalism.

Respect for the primacy of the constitution remains a core element of North American political systems. Amending the Canadian Constitution was particularly difficult because, for political reasons, the government of Quebec refused to sign the Constitution on the grounds that the Canada Act, which created the Constitution, did not recognize Quebec's distinct society. This thorny issue still has not been resolved, despite many efforts (Laforest, 1995, pp. 161–4). Thus almost 8 million of Canada's roughly 35 million people have been excluded from the Constitution, although not the Charter of Rights and Freedoms (see Statistics Canada, 2011). Some Indigenous leaders also objected, based on the fact that their treaties were signed with the British Crown and not the Canadian government. A delegation of Indigenous leaders actually went to London to try to meet with the Queen in the early 1980s. They also sought political support from the British Labour Party.

Māori in New Zealand have also petitioned the Queen for alleged breaches of the Treaty of Waitangi. Constitutions are difficult to amend in continental Europe, where the memory of disastrous dictatorships has made a robust constitutional order look very positive. A great deal of the advice on good governance offered to developing countries by the West involves the rule of law, which provides greater governmental transparency and predictability for foreign investors as well as for local citizens.

KEY POINTS

- Common usage of the term *constitution* is ambiguous, sometimes referring to a legal document and sometimes a pattern of rule.
- Constitutions may embody aspirations for future patterns of rule in addition to regulating how governance is exercised now.
- Constitutionalism is a normative doctrine giving high priority to the observance of a constitution's provisions and efforts to ensure that it is effective.
- Even if a constitution excludes a large segment of the population, as in the case of Quebec, it is likely to be very difficult to change.

Fundamental Rights

A basic feature of most constitutions is a list of the fundamental rights of citizens. The first such lists were contained in the American Constitution and the French Declaration of the Rights of Man and of the Citizen. The Universal Declaration of Human Rights (UDHR), adopted by the UN in 1948, was based on a draft prepared by a commission whose chair was Eleanor Roosevelt, the widow of President Franklin D. Roosevelt.

Comparison of the two declarations shows an evolution in thinking about the range of rights to which citizens are entitled. The French document concentrates mainly on creating a legal basis for the relations between the citizen and the state, so most of the rights it specifies involve legal due process. But it does include more specific political rights vis-à-vis the state: freedom apart from what the law specifically forbids (Articles 4, 5), freedom of expression (Article 11), and citizens' rights, either personally or through their

representatives, both to determine the contributions that are made to the state and to expect an account from the state of how those resources have been used (Articles 14, 15).

In the twentieth century, citizens' rights extended beyond the purely "political" to include broader social rights. In constitutions, these additions usually relate to welfare provisions, but they may specify other conditions as well. For example, many states (especially in Catholic or Islamic societies) lay particular emphasis on the family as the basic unit of society and assign it a privileged position. The UDHR was one of the first documents to establish social rights. Everyone has the right to social security (Article 21), to work and equal pay for equal work (Article 23), to rest and leisure with reasonable limits on working hours (Article 24), to a standard of living "adequate for the health and well-being of himself and of his family" (Article 25), to education (Article 26), and to participation in the cultural life of the community (Article 27). The UDHR also includes a number of additional political rights that were not mentioned in the French declaration. Thus every individual has the right to freedom of thought, conscience, and religion, including the right to change them (Article 18); the right to freedom of opinion and expression, including the freedom to receive and impart information and ideas through any media and regardless of frontiers (Article 19); and the right to freedom of peaceful assembly and association (Article 20). In theory, all states that have accepted the UDHR have also committed themselves to observing it, whether or not its provisions are specifically incorporated in their constitutions.

In principle all these rights are *justiciable* within individual states. Thus citizens should be entitled to go to a court of law to seek redress if they feel that any of these rights are being infringed by their government. Of course, this depends on the willingness (and financial ability) of individual citizens to pursue their own claims in the courts.

Clearly, this extension of rights leaves a great deal of room for judicial interpretation. Welfare and cultural rights do not lend themselves to a simple "yes" or "no." They leave open the questions of amount or degree. Is a citizen of a developing country entitled to the same level of welfare as someone in Europe? The same level of healthcare? Of education? It all depends on the priorities of the sovereign government in question. Should the courts become involved in determining levels of welfare spending as opposed to other claims on the budget? This is a sensitive issue in democracies. In the United States, the Supreme Court simply refuses to hear cases it deems to be "political." Even in the case of explicitly political rights, such as freedom of expression and association, where a yes/no judgment by the courts is more likely, recent experience has shown that such rights are often balanced against other public priorities. For example, the right to freedom of expression may have to be weighed against the "right" to public safety from racial hatred or terrorism.

It can be a sluggish process to strike down laws deemed to be in violation of a constitution. In July 2015, the right of all Canadian citizens to vote was challenged when the Ontario Court of Appeal overturned a ruling that allowed Canadians living outside the country for more than five years to vote in federal elections. Under the Constitution, all Canadian citizens have the right to vote. Yet federal law says that all those who have lived outside Canada for more than five years are not entitled to cast a ballot. This amounts to 1.4 million Canadians (Murphy, 2015). Under Section 3 of the Constitution, which covers democratic rights, "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." This seems to be a clear violation of the Constitution, yet the courts can take months if not years to consider constitutional challenges. The October 2015 federal election excluded expatriate voters, despite the questionable nature of this particular law.

This confirms that although the twentieth century saw a dramatic expansion in the range of rights to which citizens are supposedly entitled, there is still scope for individual legal systems to come up with a great variety of interpretations. This explains why the court system is increasingly limiting elected governments' freedom of manoeuvre, in democracies perhaps even more than in authoritarian regimes.

Increasingly, alongside provisions regulating the operation of specific institutions, the constitutions of nation-states contain aspirations about the directions in which their political systems should develop. This has always been a feature of constitutions of states in Latin America, but it is increasingly prominent in Europe and also in Islamic societies. Insofar as they contain provisions for aspirations that are not yet realized, they also give the courts scope to contribute to the realization of those aspirations. In that sense they allow for greater legalization of the political process. In fact, they will contribute to it.

KEY POINTS

- Over the last two centuries the number of universal rights has increased.
- New rights include rights to welfare, cultural protection, and cultural respect.
- There is potential for conflict between the courts' duty to enforce rights and the sovereignty of parliament.

Constitutional Courts and Judicial Review

Because of the sensitivity of the issues they are called on to determine, all states have a constitutional court of some kind. As we shall see, this is particularly true of federal states where constitutional guarantees to subnational units such as provinces and states are a crucial reassurance that their interests will not be repressed. Some courts are actually designated constitutional courts, while others may assume that role as part of a wider range of judicial functions. Even Britain, which does not have a formal constitution, entrusted the function of interpreting the legality of laws to the Appellate Committee of the House of Lords. It did so until 2010, when a new Supreme Court was established.

In most countries the judges who serve on such courts are trained lawyers, either academic or professional. France is an exception, however. It does not require that a member of its Conseil constitutionnel be a lawyer; some of them have been distinguished politicians. In addition, the Conseil's powers are limited by the fact that, in France, a law that has been promulgated cannot be changed except by Parliament.

In Canada, the United States, and the United Kingdom, the courts have been willing to challenge government decisions through judicial review on the grounds that fundamental rights have been infringed on or that administrators have failed to observe due process. While this kind of intrusion has often been regarded as embarrassing or irritating for governments, the courts have justified it on the grounds that human rights must be respected, even those of condemned criminals. Although this tendency appears to be spreading to other countries, France again is an exception. There the state takes the view that challenges to the constitutionality of potential human rights abuses are better raised in Parliament, which has the duty of holding the government to account. British judges used to share this view until the 1970s, but no longer (King, 2007, pp. 115–49).

KEY POINTS

- States establish special courts or legal arrangements to safeguard constitutions.
- There is increasing pressure for executive policymaking to be subject to standards laid down by judicial review.

Legal Adjudication of Political Problems

Despite the increasing legalization of political life, there is still much scope for variation in the way the courts of different nations interpret and implement even universal human rights. This is not only because of the interests (or self-interest) of particular nation-states, but also because of different approaches to the ultimate objective of the justice that legal systems are expected to dispense. Approaches to the function and purpose of law also vary from one country to another. Four basic differences revolve around different interpretations of the meaning of "justice."

The first can be summarized as a kind of legal positivism. The law of a particular country is neither more nor less than the sum of the laws it has established. A phrase often used by French lawyers is "*La loi est la loi*." This means that the wording of every law approved by Parliament is almost sacred. It is inappropriate for judges to enquire whether any law is phrased inadequately; their task is simply to enforce it.

This approach to constitutional issues is replicated in France's former colonies, but it also resonates more widely. In premodern China there was a school of legal thinking called the Legalists. Their main concern was to ensure that the Chinese obeyed the law. As long as they did, this would ensure order and harmony in society and prevent anarchy. The Legalists were not especially interested in "justice" per se. For them, an orderly society was a just one. It was order and harmony that was just, not necessarily any particular law. They wanted to deter law-breaking, as that would be unjust. Therefore extreme punishment was "just," however brutal for the individual lawbreaker, as it would ensure justice for the rest of society. This was rule by law, but it was aimed at making people fear rulers and officials. It was law designed for deterrence.

A second approach to the social function of law was typified by communist states. Here the function of law was subordinated to a higher, nonlegal goal: communism itself. Universal human rights were of less concern, except in the indefinite future. Judges had to be members of the Communist Party, which meant that they had to defer to the party leadership. So appeals to the courts to defend the human rights of political dissenters were bound to fail. Even today officials of the Chinese Communist Party can be prosecuted for criminal offences only after the party leadership has agreed. As we discussed earlier, the 2014 constitution of Vietnam also reinforces the central role of the Communist Party.

A third approach to law and society can be seen in many Islamic states, where in general there is no doubt about the traditional importance of justice and the law. According to Rosen (1989, p. 74), "Everywhere one encounters in Islamic life the idea of justice." For Lewis (2005, p. 39), "the traditional Islamic ideal of good government is expressed in the term 'justice.'" And according to Hallaq (2005, p. 193), "if ever there was any pre-modern legal and political culture that maintained the principle of the rule of law so well, it was the culture of Islam." Of course, this rule of law had more to do with Islamic practice than

with any separation of the powers of rulers and judges, as in the West: It existed because both rulers and judges were supposed to defer to the revealed law of the sharia. In general, rulers appointed judges and could dismiss them. There was no notion of ordinary people having rights vis-à-vis their rulers, unless the rulers broke divine law.

On the other hand, an Islamic state would not claim the same monopoly over law making that Western states do. Islamic law is made by religious scholars, not rulers, and there is not the same insistence on consistency between the decisions of judges and on binding precedents. Judges try to do justice according to the particular circumstances of an individual case rather than forcing the facts to fit a set of orthodox decisions. There is no systematic codification of legal precedents. Traditionally in Islamic societies there was a tendency for political monism but legal pluralism. In the West we find the reverse: a greater tendency toward political pluralism and legal monism, with legal systems expected to deliver consistent authoritative verdicts.

By contrast, the fourth approach to legal justice—what we can loosely term the Western approach—emphasizes **procedural justice**. This means making sure that verdicts are similar and consistent in similar sets of circumstances. It requires a greater legal bureaucracy to ensure consistency of verdicts, with one or two higher layers of appeal courts as well as ministries of justice to administer them. It also risks delivering verdicts that are not well tailored to individual circumstances. Nevertheless, it does provide relatively high predictability about likely outcomes in court cases. The Western approach gradually spread more widely around the world in the nineteenth and twentieth centuries, partly a result of the spread of the Western state. However, it also took root in countries that had never been Western colonies.

One of the best examples is Japan. As the Japanese state sought to respond to challenges from the West in the second half of the nineteenth century, it sent scholars to Europe to study alternative national legal systems, particularly those of Britain, Germany, and France. The scholars assessed the merits of different legal codes and created a mixed system. Japan turned to the principles of German administrative law to provide the basis of its new code of administrative law, while it looked to Germany and France for its commercial law. Turkey responded in similar ways. From the 1870s onward, Turkey too began to produce legal codes that grafted Western legal principles and justice onto its own well-established forms of jurisprudence and courts, and these spread throughout its empire in the Middle East. Civil courts assumed greater authority over religious ones. Gradually, the state took control of the legal process as Turkey embarked on Western-style modernization.

See Chapter 7, p. 145, for a discussion of the rise of the Western state model.

We should also remember that other elements in the context of national legal systems may have a significant bearing on the way law is practised. Epp (1998) has shown how the pursuit of civil rights in a number of states with quite similar legal frameworks—the United States, India, the UK, and Canada—has varied considerably according to the legal infrastructure of individual countries. In particular, what matters is the availability of public resources to help poorer litigants pursue cases. Litigants in the United States and Canada find this easier than do those in the UK or India. In consequence, there has been a much stronger movement to pursue rights-related cases in North America, with Canada in particular undergoing what Epp describes as "a vibrant rights revolution" since 1960. He explains this in part by the 1982 Charter of Rights and Freedoms, but also in part by a growing support structure for legal mobilization (advocacy organizations, government aid for litigants, lawyers and legal scholars who changed the previous prevailing conservative

mindset of the legal system; Epp, 1998, pp. 156, 195–6). The availability of resources for litigation has an important impact on the pursuit of rights. What this shows is that there is a close connection between a country's legal system and the evolution of its political system—the two interact with and influence each other.

Even the number of lawyers in a country will have an impact on the place of law in a nation's public life and therefore on citizens' ability to access the law. The United States has almost 1.3 million qualified lawyers—about 0.3 per cent of the population. The UK has half that percentage, Germany a quarter, and France an eighth, while Japan and India have only roughly one-twenty-fifth. Canada in 2010 had roughly 83,000 lawyers of a population one-tenth that of the United States.

KEY POINTS

- Orientations on appropriate functions for legal systems have traditionally varied from country to country.
- This can lead to different interpretations of even universal rights.
- Western jurisprudence emphasizes procedural justice through greater consistency and bureaucratic organization.

Federalism, Consociational Democracy, and Asymmetrical Decentralization

The American Constitution was explicitly designed to restrain the power of the state. One way was through the establishment of checks and balances, with the threefold division of power between the executive, the legislature, and the judiciary. A second way was through the establishment of a federal system. The territorial decentralization of power was designed as a further check on any possible oppression. But federalism also recognized the reality that individual states saw themselves first as sovereign entities who entered the union in a "voluntary compact." Canada too was formed by representatives of individual provinces who agreed to cede some aspects of their sovereignty to a federal government. Clashes between member units and the centre are common, especially when the former feel that the federal government is intruding on their jurisdiction.

Ever since the nineteenth century, federalism has been touted as a solution to the risks of potential dictatorship. The importance of this idea can be seen in the federal constitution that was imposed on West Germany after World War II. It was intended to undermine the remaining roots of Nazi dictatorship, and it has worked. Once reunified in 1990, the new German state divided its federal power between 16 *Länder* (lands). These institutions have taken root in the German political system and have made Germany a reliable democratic partner in the heart of Europe.

In general, what is **federalism**? According to Robertson (1993, p. 184), it is a form of government in which power is constitutionally divided between different authorities in such a way that each exercises responsibility for a particular set of functions and maintains its own institutions to discharge those functions. In a federal system each authority, therefore, has sovereignty within its own sphere of responsibilities, because the powers that it exercises are not delegated to it by some other authority.

Anadolu Agency/Getty Images

PHOTO 8.4 | Leaders of four federal states attend a dinner at the 2015 G20 Summit in Turkey to discuss terrorism and the refugee crisis: (from left to right) Canadian Prime Minister Justin Trudeau, US President Barack Obama, British Prime Minister David Cameron, and Turkish President Recep Tayyip Erdoğan.

This definition emphasizes how a constitution safeguards equality between the national government and the member units and demarcates responsibility for performing particular functions. It reassures the provinces or states that their decisions cannot be overridden by some higher authority.

To provide substance for that protection, federal systems usually establish two institutions. First, there is normally a two-chamber parliament, with the upper chamber composed of representatives from the provinces or states. The latter are given specific powers to ensure that their constitutional prerogatives cannot be legislated away without their consent. Canada, Australia, and the United States all have Senates that perform this function. Second, there is usually a constitutional court to rule on the constitutionality of legislative proposals, again to reassure member units that they cannot be coerced into submission.

Generally, since the American Revolution, federalism has provided a constitutional framework for states facing two other challenges. One is simply territorial size. As Table 8.1 shows, eight of the ten largest states in the world by area are federations. Australia is a classic example. The federation was originally created in 1900 to allow significant devolution of power to individual states because of the difficulties of trying to run the whole country centrally, given the communications technologies that were available at the time. Of course many federations are also heterogeneous in terms of population. This was not a significant factor in Australia, but in Canada the French–English division, coupled with the vast size of the growing country, made federalism the obvious choice.

TABLE 8.1 | Federalism among the Ten Largest States in the World by Territory

State	Federal/Unitary
Russia	F
Canada	F
United States	F
China	U
Brazil	F
Australia	F
India	F
Argentina	F
Kazakhstan	U
Sudan	F

Federalism offers a way of accommodating some forms of diversity by guaranteeing minority communities—usually ethnically based—that there will be no political challenge to their particular way of life, culture, language, and religion. In fact, not all federations are large, and some are very small indeed (see Table 8.2).

The experience of federations is not always positive. Many have disintegrated, some disastrously, such as the USSR and former Yugoslavia (see the Case Study below). Even where federations have survived, some have still had to go through civil wars (Nigeria in the 1960s and the United States in the 1860s). The recent experience of Belgium, which in 2007 went for more than 150 days without a national government, also suggests that federations are not always capable of decisive national decision making. So federations are not automatically capable of preventing violent conflict or dissolution, or of providing effective government. Yet a prime cause of the collapse of the USSR and Yugoslavia was the lack of legal support and rule of law. Without these, constitutional provisions of any kind can do little. On the positive side, Stepan (2004, p. 441) has recently declared that "Every single long-standing democracy in a territorially based multi-lingual and multinational policy is a federal state." And Suberu (2004, p. 328) has maintained that, despite the civil war, "federalism has long been recognized as the indispensable basis for Nigeria's identity and survival."

Yet in the 1970s the idea that federalism was the naturally most appropriate solution to the problems of division in deeply divided societies was challenged by the theory of **consociationalism** (introduced in Chapter 3). This was based on the experience of a few

TABLE 8.2 | List of Federations

Argentina	Germany	Pakistan
Australia	India	Russia
Austria	Iraq	St. Kitts and Nevis
Belgium	Malaysia	Sudan
Bosnia and Herzegovina	Mexico	Switzerland
Brazil	Micronesia	United Arab Emirates
Canada	Nepal	United States
Comoros	Netherlands	Venezuela
Ethiopia	Nigeria	

CASE STUDY 8.4

Collapse of the Former Yugoslavia

Yugoslavia was created at the end of World War I as a state for the South Slavic peoples. It was designed to prevent the return of imperial powers in a region formerly ruled by the Ottoman and Hapsburg empires. However, between World Wars I and II it was threatened by hostility between the two largest ethnic communities, the Serbs and Croats. Before Yugoslavia was formed, the Serbs had their own independent kingdom. They wanted the continuation of their unitary state, in contrast to the Croats who, after centuries of colonial domination, wanted more autonomy. In 1941 Yugoslavia was dismembered under Axis control, and hundreds of thousands were killed in fratricidal conflict. Many allege that genocide was committed on Yugoslav soil during that period.

After liberation in 1945, largely by the communist partisans under Josip Broz Tito, the Yugoslav state was restored and a new federal system was created. Even the ruling Yugoslav Communist Party was divided into separate federal units. The six federal republics (Serbia, Croatia, Slovenia, Bosnia–Herzegovina, Macedonia, and Montenegro) had equal representation in the federal government, and after 1974 the two autonomous regions of Kosovo and Vojvodina in Serbia were granted only slightly less power. Yugoslavia was by far the most genuinely federal communist state. In 1963 it created the only constitutional court in the communist world. For many decades, the memory of the bloodletting during the war, a political culture that exalted the shared heroism of the partisan resistance, the pride in a Yugoslav road to socialism based on workers' self-management, the threat of foreign intervention, as well as Tito's own robust leadership all helped to preserve national unity until his death in 1980.

Afterwards, the state ran into increasing difficulties. There was no cohesion in the national leadership. Tito had avoided naming a successor. He created a federal system with a collective presidency, where the leader of each of the federal republics acted as head of state for just one year in rotation. He had emphasized the need for national decision making on the basis of "consensus," which meant unanimity. After he was gone, republic leaders put the interests of their own republics above those of the state as a whole. The national economy

small states with deep multiethnic and multiconfessional cleavages, largely in Europe, that had achieved intercommunal harmony and co-operation without a formal federal system. The first example was the Netherlands. Its success was attributed not to formal constitutional arrangements or legalism, but rather to co-operation in power sharing between elites, which generated and reinforced mutual trust. According to Arendt Lijphart (1977), there are four main characteristics of consociational democracies; see Box 8.5.

See Chapter 3, p. 67, for an introduction to consociational democracy.

In fact, some of the other states that were later cited as examples of the same practice ran into serious problems. Consociationalism, like federalism, cannot guarantee social harmony. Not all the difficulties were domestic in origin. Lebanon, for instance, was destabilized by conflict between the state of Israel and Palestinian refugees living in Lebanon; Cyprus was destabilized by Turkish invasion. Since this model was usually applied to small states, it made them more vulnerable in the case of outside intervention. In fact, most consociational arrangements have proved relatively short lived, and not just because of external intervention. Only the Netherlands has remained faithful to the model.

fragmented as inter-republic trade declined. Inflation continued to increase throughout the 1980s. The national leaders agreed on remedies in Belgrade but then refused to implement them when they returned to their respective capitals; no one was prepared to make sacrifices for the good of the country as a whole. Popular dissatisfaction grew. All the nationalities, even the Serbs (the largest), felt that they were the losers in the federation. Trust disintegrated across the country.

Then in 1986 the heir apparent to the Serbian leadership, Slobodan Milosevic, made a speech at an event commemorating the 600th anniversary of the defeat of the Serbs at the hands of the Ottoman Turks in Kosovo. He made an unexpected appeal for Serbs to stand up for their rights, and vowed that Belgrade would back them. Many Serbs feared that Kosovo, with its majority Albanian population, would demand autonomy or even independence. Milosevic's speech provoked an emotional response across Serbia, which he turned into a movement to restore decisive national government under his leadership. Large numbers of Serbs were mobilized to march on Montenegro and then Slovenia to bring them to heel. In turn this provoked apprehension in the other republics about resurgent Serbian chauvinism. The constitutional court proved ineffective.

Fearful of Milosevic, but also sensing the opportunity to create new, smaller states that they could control, the leaders of the Communist parties in Croatia and Slovenia called for referendums on independence for both countries. Croatia launched its own nationalist movement—which also had chauvinist features—under former Communist general and historian Franjo Tuđman. In turn this provoked Milosevic to send the federal army into Slovenia and Croatia. Within a short time a third of Croatia was occupied. When Bosnia–Herzegovina launched its referendum on independence, war spread further south. Milosevic, who died while on trial for his crimes, will be remembered for launching a civil war that became the biggest conflict in Europe since World War II and destroyed the state of Yugoslavia.

(For a discussion of various explanations for the collapse of the former Yugoslavia, as well as background history, see MacDonald, 2002 and Ramet, 2005.)

KEY CONCEPT BOX 8.5

Features of Consociationalism

- Government by grand coalition: Government includes deputies from the parties representing all the main communities, which usually meant that the government held far more than a bare majority of seats in parliament.
- Segmental or subcultural autonomy: Each ethnic or confessional community is responsible for administering policies in specific areas affecting them.
- Proportional representation: Simple majoritarian rule is very unlikely, and proportional representation in the distribution of posts in government bureaucracies, the distribution of public funds, and so on, is desirable.
- Agreement on minority vetoes for certain types of legislation.

This suggests that consociationalism may be most appropriate as a temporary solution to societies that have recently suffered from major division or conflict. It can help stabilize the state through increased trust between communities, before the transition is made to a more permanent set of arrangements.

Nevertheless, Lijphart (1999) extended his theory to other states, focusing particularly on the first point. He claimed that democracies regularly governed by coalitions achieved better political and economic results because their policies were "owned" by much broader sections of society. This ownership was then translated into a more active commitment on the part of citizens to carry them out. He claimed that consensual methods of government were more effective in improving living conditions for their citizens.

It is also interesting that in some developed states different levels of autonomy have been offered to regions that have traditionally sought autonomy or independence, sometimes using violent means. States no longer feel that they have to make an exclusive choice between a unitary and a federal system—they sometimes devise hybrid combinations. This can be called *asymmetric decentralization* or *asymmetric federalism*. A striking example is Spain, which has granted much more extensive self-governing powers to four of its regions or "autonomous communities"—Catalonia, the Basque country, Galicia, and Andalusia—than to the other 13, although the Catalan political scientist Colomer (2007, 80) still calls the Spanish state "the clearest case of failure . . . to build a large nation-state in Europe." The same principle has been applied in the UK, with varying powers granted to the Scottish, Welsh, and Northern Irish assemblies. In Canada too, the 10 provinces have more power vis-à-vis the federal government than do the 3 territories.

Pakistan allows greater self-rule to the northwest frontier region and the federally administered tribal areas than to Punjab or Sindh. This means that other states that have to deal with great ethnic or religious cleavages can draw on a much wider range of possible precedents to demonstrate flexibility. In many ways the old distinction between federal and unitary states is disappearing, as similar kinds of asymmetrical relationships are introduced into both of them.

KEY POINTS

- Federalism has a dual role: as a check on centralized government and as a way of managing profound social diversity.
- Federations may collapse without appropriate legal structures or widespread popular support.
- Consociationalism is an alternative approach to handling social diversity, relying on elite co-operation rather than legal formalism.
- Consociationalism may be understood as a more consensual form of rule than majoritarianism. However, it works best as a temporary rather than permanent solution.
- There is increasing reliance on asymmetric arrangements to handle diversity in both federal and unitary political systems, which erodes the differences between them.

Conclusion: The Legalization of Political Life

In this chapter we have highlighted four points. The first is the importance of constitutions as fundamental institutions that structure political systems. By establishing the

basic principles for political life, they channel political behaviour in various directions and, equally important, prevent some other forms of political behaviour. They also provide some transparency about the ways that public decisions are made.

Second, constitutions need a developed legal system to give life to their provisions. Without the rule of law, constitutions may be either flouted by government or undermined, as in Yugoslavia.

Third, different legal systems use different approaches to achieve justice. Emphases vary from one state to another, and thus interpretations of universal human rights to some extent vary from one country to another.

Fourth, federalism helps to prevent excessive concentration of powers in a nation's capital. It can also provide reassurance to some minorities that their interests will not be overridden by larger communities. It can promote harmony in heterogeneous states marked by deep cleavages. Consociationalism offers an alternative approach to the same challenge, although it has tended to succeed only in smaller states and over limited periods

PHOTO 8.5 | Park Güell, in Barcelona, Spain, was designed by the renowned Catalan modernist architect Antoni Gaudi. Since 1975, the Spanish state has recognized the distinctive language and culture of Catalonia.

of time. In recent years unitary states have shown greater flexibility in devising new forms of decentralization that take regional differences into account and vary the rights that they offer to particular communities. In this way the boundaries between federal and unitary states are becoming blurred.

Finally, you may have noticed a theme underlying our discussions in this chapter: the expanding role played by law in social and political life. How central that role is varies considerably from one state to another. It is certainly most pronounced in the developed world, especially in the United States. Yet the trend is clearly spreading. In Pakistan, for example, President Musharraf's attempt to curtail the independence of the Supreme Court in 2007 provoked concerted resistance from lawyers, who had wide popular support.

The growing salience of law is striking in the case of China. At the beginning of its reform process in the early 1980s, China had only 8,500 lawyers; now over 600 law schools graduate 150,000 law professionals annually. There are about 230,000 lawyers today. Chun Peng (2013) notes, "Today, 3,976 serve as deputies of the people's congresses or members of the people's political consultative conferences at varying levels. Among them, 16 are national deputies and 22 are national members." This certainly marks a change in the direction of the rule of law, even if China's legal system is very different from Western models. The growing legalization of politics increases the checks on the power of the state and the executive branch of government, but it also makes politics more difficult for nonlawyers to understand. What sort of changes can the rise of lawyers bring? Peng (2013) says "legal reform in today's China cannot be isolated from—and in fact requires—political reform in a broader and deeper sense." Dahl (2001, p. 115) has remarked that the American system "is among the most opaque, confusing, and difficult to understand" of all the Western democracies.

Is politics becoming more opaque and more esoteric, increasingly confined to a limited political "class"? This is an issue to which we will return in Chapter 9.

Key Questions

1. The United States has a formal constitution, but New Zealand does not. How is this difference reflected in the political arrangements and practices of these two states?
2. How prominently do treaties between the Crown and Indigenous peoples factor into the Canadian Constitution?
3. Have the French been right to resist the expansion of judicial review in political life and leave constitutional challenges largely to Parliament?
4. Have attempts at federalism and consociationalism worked to promote political harmony in Iraq?
5. To what extent was the bloody collapse of Yugoslavia a result of an overly decentralized constitution?
6. Does federalism in developing countries such as Nigeria, Brazil, and Pakistan make the central government too weak? If so what can be done about it?
7. Does the Islamic State have its own constitution? In what ways is it different from and similar to a Western constitution?
8. Do the autonomous communities of Catalonia and the Basque country in unitary Spain have greater powers for self-government than the federal Länder in Germany?