

17 The rights of citizens

Constitutional law

The previous chapters we considered how the state regulates the behavior of individuals in society by providing rules to be obeyed (criminal law) and procedures for them to solve disputes among each other (civil law). There are also laws which enable citizens to take legal action against the state—against, for example, a public authority or even against the government itself. These actions are part of constitutional law.



Figure 17.1 The Yanomami Indians pursuing their claim.

As knowledge of the law has increased among the general public, so have the number and range of constitutional law cases. In 1991, an unmarried couple complained in the Tokyo District Court that it was unconstitutional for the local authority to register their daughter as illegitimate. They said this could lead to discrimination and was against the equality of individuals guaranteed in the Japanese Constitution. Yanomami Indians are pursuing a claim that it is unconstitutional for the Brazilian military to block a 1989 court ruling granting them autonomy over lands in the Amazon rainforest. The military has countered that border security questions must be given priority. In 1976, Gary Gilmore persuaded the U. S. Supreme Court that his death sentence should be carried out since he had been convicted and sentenced for murder according to due legal processes. This brought about a resumption of executions in the United States which continues today.

A **constitution** is the political and ideological structure within which

a system of laws operates. Most countries have a formal written Constitution describing how laws are to be made and enforced. The French Constitution, for example, sets a seven year term of office for the president; the U.S. constitution sets a four year term. In Switzerland, a **referendum** (national vote) must be held on any issue for which a petition signed by 10,000 people has been gathered; in Ireland, referenda are to be used only in the case of changes in the constitution itself. In Germany, a change in the constitution requires a special majority vote in parliament, not the simple majority necessary for other laws. Many other countries put the constitution above other laws by making it difficult to change.

Separation of powers

One of the reasons for having special constitutional laws is to prevent governments from becoming too powerful and from interfering too much in the lives of individuals. Whereas socialist legal systems have tended to try to define exactly what the state allowed citizens to do, Anglo-American law has been more concerned with defining what the state could do, arguing that citizens are entitled to do everything other than that which the state forbids. As a check upon overpowerful government, most modern constitutions have adopted the principle of separation of powers, developed in the 18th century by the French political philosopher Montesquieu.

Montesquieu argued that the functions of the state could be divided into policy formulation and direction (**executive**), lawmaking (**legislative**), and interpretation and application of the law (**judicial**). To stop governments from becoming too powerful these functions should be carried out by separate institutions, and there should be a balance between them. In the United States, for example, the president (executive) is elected by the people and attempts to carry out his policy promises through a presidential office of advisers. The Constitution gives him many important powers, such as control of the armed forces and appointment of Supreme Court justices, but many of his decisions and all new legislation must be approved by a majority in Congress (legislature), which is also elected by the people. Many presidents have had important policies blocked by Congress. The Supreme Court (judiciary) has the task of interpreting laws which have been disputed in lower courts, and of deciding whether a law passed by Congress or by one of the individual states is in keeping with the Constitution. Recently both pro-choice and anti-abortion groups have organized huge public demonstrations outside the Supreme Court building in the hope of influencing new deliberations about the 1973 abortion legislation.

Rights of citizens

As well as defining the powers of government, most constitutions describe the fundamental rights of citizens. These usually include general declarations about freedom and equality, but also some specific provisions—for instance, the Fifth Amendment of the American Constitution, which exempts a witness from answering a question in court if he states his answer might reveal his own criminal guilt.

Britain is unusual because its constitution is not found in a formal written document. Instead, the constitutional rights of citizens and the powers of government are found in various case-law rulings, statutes, and even in traditions. For example, the important constitutional principle that the king or queen must approve any legislation passed by parliament is simply an unwritten tradition that has gradually developed over the last three hundred years. There is a debate in Britain about whether citizens rights would be better guaranteed by a written constitution, or at least a bill of rights. Some people argue that the government has too much freedom and that it is too easy to change the constitution since all that is needed is a new statute or even a change in traditional procedure. They complain that recent governments have overused libel laws (Chapter 16) and the Official Secrets Act (to censor information in the interests of national security), and feel that citizens' rights have fallen behind those in neighboring European countries will bills of rights. Others argue that the flexibility of an unwritten constitution is a good thing, that the lack of a written constitution has not stood in the way of a long tradition of individual liberty in Britain, and that many countries with constitutions which look liberal on the surface suffer from oppressive governments which simply find ways to ignore constitutional rights.

It can be difficult to compare the legal freedoms of countries with different cultures and economic levels—a problem which will be discussed in the next chapter. But some comparison is possible since many countries have similar constitutional provisions and claim similar aims. We can, for example, consider how effective the provision of separation of powers is. Ferdinand Marcos provides a typical case of overcentralized power; he came to power with wide popular support and many reforming ideas but steadily reduced the rights of Filipino citizens and his family took over most of the executive, legislative and judicial functions of the state.

We can also consider the right of citizens to say and write what they want and to take part in public meetings and demonstrations. In the previous chapter, we compared countries where criticism of the government is

virtually forbidden with those where it is freely permitted. Even among the latter there are many differences. In Britain, the 1986 Public Order Act requires advance notice of peaceful protests, even if they do not obstruct other people in any way. In addition, the police may order the protesters to move or break up if they anticipate serious disruption of community life. These laws are more restrictive than those in most European countries, and they are stricter than the pre-1986 laws.

Another area to consider is the ease with which an individual may obtain restitution for a wrong a public body has committed against him. In English law, the principle of **judicial review** enables a court to overturn a decision made by government ministry that acted illegally or irrationally or beyond its authorized powers. In the 1976 case of *Congrieve vs. the Home Office*, the British Home Secretary cancelled the television licenses of people who had bought them early to avoid a price increase. Congrieve successfully argued that although the minister had very wide powers to cancel licenses, it was an abuse of his power to do this when nothing illegal had been done.

One important area to consider is the treatment of citizens suspected of crimes. Is innocence presumed unless guilt can be proven? (Yes in Japan and the Philippines, but sometimes no in Taiwan and Malaysia.) How long can the police hold a suspect before they must bring him before a court of law? (Twenty-four hours in Norway, three days and sometimes longer in Finland.) Is a suspect entitled to free legal aid and choice of lawyer if he has no money? (Both in New Zealand, only the first in Austria.) Can the police search a private house without first obtaining a court warrant? (Illegal in Argentina, Peru and Paraguay but occasionally done in the first two, and very regularly done in the third.) Are trials open to the public? (Yes in Tanzania and Botswana, often not in Nigeria and Zaire.) Many of these freedoms are so important that they may also be considered in the category of human rights.