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# The typology of constitutions and the Imposed constitution

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**ABSTRACT**

One of the main challenges that faces any scholar or researcher after defining any legal term is how and why to organise them in different categories. Imposed constitutions as a new term which has lately attracted many researchers tends to be shown as an alien to the classic and traditional types of known constitutions. The main challenge which prompts quickly after hearing this term is if there are imposed constitutions, so what are the un-imposed ones? In This article focuses on finding a place for the imposed constitutions by clarifying that the imposed constitution is a stand-alone type that does not have a counterpart as its name may suggest.

## Introduction

There are many types and classifications of constitutions[1]. Although most of these classifications focus on a particular aspect of the constrictions functions or a characteristic side, in our article, we will be looking at two different typologies of the

[1] ID Cheremnov, 'CLASSIFICATION OF CONSTITUTIONS' Рекомендовано до друку рішенням Вченої ради Харківського національного університету імені ВН Каразіна (протокол № 2 від 24 лютого 2014р.) 27.

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constitutions. The aim of studying these types of constitutions is to explore the nature of the imposed constitutions in depth. Imposed constitutions can come and be seen in the form of codified or non-codified documents. However, a clear sign that could be instantly noticed in an imposed constitution is the constitution's rigidity and flexibility.

Hence this article will highlight these four types of the constitution, the written and unwritten and for the imposed constitutions the external and internal imposed types. as follows:

Written and Unwritten Constitutions:

Constitutions can be written or unwritten. Some countries with a written form also operate through verbal other countries. The distinction between these two types varies on how scholars study it, and some argue that distinguishing between both terms needs to go back and learn the difference between “Written and Unwritten Law.”[2]

It is common to speak of customary constitutions (as opposed to the so-called written ones) to refer to those not compiled as such in one or several documents of constitutional rank but "that are made up of unwritten norms, such as customs and constitutional conventions.", together with jurisprudential decisions, general principles applied by jurists, etc.” Taking into account that "no modern State is absolute without written regulations on its political regime," it is preferred to speak of predominantly customary constitutions or, also, traditional or historical constitutions, understanding as such "those that have been built over centuries" and they have been formed according to specific historical needs,” instead of being born in a single founding political act. These historical constitutions would have "the guarantee of having been effectively lived by previous generations" and are, therefore, likely to generate greater adherence and enjoy, in that sense, more excellent stability. However, "their degree of fixation from the legal view" would be more imperfect. A paradigmatic and current example of this (disregarding the

[2] Zachary Elkins and Tom Ginsburg, ‘What Can We Learn from Written Constitutions?’ (2021) 24 Annual Review of Political Science 321.

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constitutions before the beginning of modern constitutionalism at the end of the 18th century) would be the English constitution[3].

In short, British constitutional law, predominantly customary in the field of common law and not directly affected by the revolutionary processes of the 18th century, has gradually been specified, through successive historical events, from which they have derived, intervals, or at specific times, some isolated normative texts18. The fact that the United Kingdom lacks a written Constitution has been pointed out as an explanation for "the continuity that has characterized its political evolution throughout history: there have been no moments of rupture with tradition that forced politicians to write explicitly how the country should be governed. In this sense, it is also added that the British Constitution is flexible since "laws with constitutional content follow the same drafting procedure as ordinary laws," with the consequent role of Parliament. In any case, integration into the European Communities since 1973, and the ratification of the successive Treaties that have shaped the European Union up to now (Maastricht, Amsterdam, Nice), have meant a qualitative change under which «in In recent times, voices have been raised demanding a written Constitution. The written nature of community law makes the pressures in favour of constitutional codification more intense every day». The case of Israel can also be cited in this same section, which in addition to inheriting norms from previous stages, also lacks a supreme norm with the name of the Constitution, its primary source of Law being the so-called "primary legislation" (Jakiká Rashit) dictated by the Parliament, integrated with turn by different normative types.

These two constitutions vary in some aspects, each having a different character. We can group these differences into the following:

The Form:

By form, we address the codifications of the constitution texts; thus, written constitutions are usually codified in one single document series of documents[4], called the constitution or any other analogue name, while unwritten constitutions are made of different types of legal documents in different times and not collected in one single

[3]Donald S Lutz, *Principles of Constitutional Design* (Cambridge university press 2006)., p. 6)
[4] ibid. P 8.

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document. Also, in the case of written constitutions, the writing process is usually done through systematic methods of drafting and ratifications, while in written instances, it is generally not organized.

The content of unwritten constitutions can, in principle, vary significantly. There is, moreover, no a priori reason why a state might not choose to stick with an unwritten constitution for an admixture of historical, social, and economic circumstances and yet still replicate, in unwritten form, many features commonly found in a written constitution. It might limit the remit of the ordinary statute in accord with constraints typically found in written constitutions, and these rules might be accepted as obligations by the critical political and legal players. The net effect might be a constitutional order similar to, and equally efficacious as, its written constitutional cousin.

**The superiority:**

In the presence of a written constitution, all other institutions and legal acts fall below the constitution. Thus the constitution has superiority over the parliament[5]. It sets the limits for the parliament, and it can nullify any actions by the parliament if it does not come following constitutional texts. Two aspects of supremacy are at play:

**First,** constitutional law is final, trumping all other sources of law in society; America prides itself on a written Constitution that lays down the supreme law of the land. The scope and limits of federal authority; the division of labour between the legislative, executive, and judicial branches; the powers and duties of state governments; the privileges and immunities of citizens; the rights of aliens-all these are covered in a single and remarkably concise multigenerational document distilling enduring lessons of the national experience from the Founding to the present[6].

[5] Or may be not, for more read: Peter L Lindseth, 'The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s' (2003) 113 Yale LJ 1341.

[6] Andrei Marmor, 'Are Constitutions Legitimate?' (2007) 20 Canadian Journal of Law & Jurisprudence 69.

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**Second,** constitutional law is entrenched, being more resistant to change than other sources of law. A written Constitution is adopted and amendable by some expression of popular sovereignty above and beyond an ordinary legislative majority enactment**.** Many people revere the U.S. Constitution. Allegiance to the Constitution, and a certain kind of respect for the founding and crucial episodes in our history, seem, to many people, central to what it is to be an American[7].

The changing nature:

The written constitutions come into existence in a specific time and manner, it is usually designed for long-term periods, and it contains some rules in their amendments, while unwritten constitutions are more of evolving nature, which means that they grew from some different document and continues to develop the same way it has started. The constitution is the main codified legal document that describes government structure and civil rights preservation. A written constitution is becoming so essential to the establishment of a modern state that it could even be said that "if there is no constitution, then there is no modern state."[8]

The imposed constitution

The expression imposed constitutions can refer to those that "arise as a consequence of a foreign political demand on the nation, normally in a period of military occupation or after defeat in a military conflict." Naturally, therefore, they would be imposed, either those that are elaborated without the intervention of the occupied people or –in a broader sense– those in which the State that manages to prevail in the armed conflict limits in some way the sovereignty of the defeated State[9]. By extension, we believe that all those constitutions that do not have a democratic origin, that have been elaborated "from the top down" and not "from the bottom up," that is, with the participation of the people at some point in the founding process, can be considered

[7] Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press 2009) P38.

[8] For more on this subject: Paul P Craig, 'Written and Unwritten Constitutions: The Modality of Change' [2021] Pragmatism, Principle, and Power in Common Law Constitutional Systems: Essays in Honour of Bruce Harris, Forthcoming.

[9] Michele Brandt, 'Constitutional Assistance in Post-Conflict Countries: The UN Experience: Cambodia, East Timor and Afghanistan' [2005] United Nations Development Programme.

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imposed constitutions of the political regime (election of the Constituent Assembly and ratification by referendum of the text already prepared)[10].

Welcoming the institutional concept (and even the substance or material) of the Constitution, as we presented it in the previous section, we could consider that the seven Fundamental Laws in force in Spain during the political regime established in Spain after the civil confrontation of 1936-1939. This regime was not constitutional in the historical-political sense of the term (there were no effective mechanisms for the protection of rights, and the principle of separation of powers was replaced by that of "unity of power and coordination of functions" in Article II of the Organic Law of the State of 1967). Consequently, the term constitution was avoided, and fundamental laws were preferred to refer to the legal provisions that included the material constitution applicable in Spain at that time[11]. Decree 138 of September 29, 1936, which named Francisco Franco «Head of the Government of the Spanish State,» who would «assume all the powers of the new State,» would become the actual supreme norm in force in Spain until 1975, leaving the Fundamental Laws as a kind of "granted letters" (that is, those originated by an act of self-limitation of a monarch or absolute ruler).

Imposed constitutions can be found in two different types, as follows:

Externally imposed constitutions:

For our research purposes, “imposed” in this context indicates different circumstances and cases; one example would be that “constitutionalism” is imposed either by a nation on another nation by or without some degree of the consent of the country that is being under to control or invitation, not even the elite class of the conquered nation, as we see this case when the imperialist nations tended to draft the after independence constitutions of their former colonies as a decolonization requirement.

Constitutions under the occupier's influence are not expected to develop into self-enforcing ones, as the consequences will be based on the occupier's will to enforce

[10] Russell Hardin, ‘Why a Constitution’ [2013] Social and political foundations of constitutions 51.
[11] Dieter Grimm, *Constitutionalism: Past, Present, and Future* (oxford university press 2016) P4.

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it, even in the short run. This external enforcement leads the citizen not to comply in two different ways. Firstly, if the citizens think that the foreign power will punish their violation of the constitution, in this case, they will have little motivation to care about organizing and challenging the ruling elite. Secondly, citizens may show more carelessness in challenging the biloation. These habits will lead them to ignore the constitutional boundaries, and citizens will not see themselves as responsible for monitoring the ruling elite. Constitutions were written under occupation, aiming to establish a culture of accepting responsibility for enforcement.

A second example would be the case of international or multilateral organizations imposing their "constitutionalism" on a nation with or without the consent of the conquered nation or its representatives. The United Nations exercised this right of imposing constitutionalism in many documents. For instance, the General Assembly Resolution 390 decided on the political status of Eritrea by selecting the type of its government and constitution without taking into consideration the will of its people. Another example is the Venice Commission in the Council of Europe which advises all 47 members on how their local constitutional laws, such as; amendments, emergency powers, rights, and freedoms, must meet its expectations. This measure might be considered a soft tool for enforcement. Still, it forms some pressure to confirm what is becoming regional, if not a global, constitutional law standard. In the case of Iraq, The United States, via the Coalition Provisional Authority (CPA), played a direct role in drafting the 'Law of Administration for the State of Iraq for the Transitional Period' as it served as a transitional constitution for the new Iraq. Concerning the permanent constitution of 2005, however, the United States did not play a direct role, but it affected the time and some concepts of the constitution[12].

Internally imposed constitutions:

Despite the external forms of imposed constitutions, there are also some examples of internally imposed constitutions: the majority imposition over the minority and the elite imposition over the commons. In addition to these two traditional types, two

[12] Mark V Tushnet, Thomas Fleiner and Cheryl Saunders, *Routledge Handbook of Constitutional Law* (Routledge USA 2013).p.9

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different styles can be added, and they are: generational and judicial forms of imposition, as follows:

**A Generational imposition**

This type of internally imposed constitution focuses on the famous difficulty in a constitutional theory called the theory of 'dead hand of the past. According to this theory, constitutional fortification affects the present and future generations to be ruled by the 'dead hand' of their ancestors. The 'dead hand' difficulty primarily refers to constitutional rigidity in the form of specific requirements of a more significant majority for any future constitutional amendments but also originalism as a theory of constitutional interpretation, according to which the constitution should be interpreted in keeping with the original intent or meaning of those who are often long dead. This difficulty is, of course, aggravated the older a constitution gets[13]. The troubling nature of this concept of imposed constitutionalism is, in particular accurate. At the same time, the charter fixes and establishes non-impartial principles and protects values and hobbies of the day, including nation faith or unique repute to the winning hobby groups.

**Majoritarian imposition**

Constitutions are made through a few decision-making methods wherein selections are made amongst diverse options and preferences in the long run. Whether constitutional conventions, constituent assemblies, everyday legislatures, or the executive, there are always winners and losers. It is challenging to assume a charter. An entire consensus constitutes this. Those who lose the constitutional struggle continue to be sure of the winner's decision. And in a democracy, the winner is, naturally, the bulk or a super-majority. Indeed, democracy gives the 'everlasting loser' problem –often, the minority will lose the constitutional-political battles. One Majority rule may also produce what is called 'the tyranny of the bulk' – the oppression of minority groups. The danger in phrases of imposition regarding the want to protect 'towards the tendency of society to impose. It is very own thoughts

[13] Nicolo Machiavelli, 'The Prince' (2004) 1 YOUTH 1.p.1

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and practices as behaviour regulations on folks that dissent from them. Of course, the bulk precept acts as a precept of legitimation to impose conformity. Yet, the vital element, for our matter, is that of imposition. A complex sample of the internally imposed constitution would be the 're-imposition' of the United States federal constitution on the southern Confederate States after the end of the Civil War. However, in this case, victorious and defeated parties are also seen, yet it is considered an internal imposition. Most internally imposed constitutions by dictators share some similarities, such as the Pinochet Constitution of 1980 and the constitution of the military coup in Turkey of 1982. They all tend to constitutionalize considerable parts of the government powers. Still, they leave some other significant forces outside the rule of the constitution.

In this case, the imposition occurs when the majority of a nation imposes its constitutionalism on the minority of the same country or perhaps by the ruling elite within a particular nation on the rest of their people.

**Elite impositions**

In recent times, much of the constitutional literature on charter-making and constitutional alternatives specializes in public or elite participation. But elites take a critical position in charter-making. Indeed, one of the charter-making functions is elites because the humans themselves can't well buy over a charter and have to pick a consultant elite to draft the brand new constitutional document.

**Judicial imposition**

Either the judiciary is independent, or it is subordinate. If it is the first, it is the judiciary of a Rule of Law. Yes, it is second; there is no rule of law.

It is independent if it is enabled to make unenforceable the public power. It means that it participates in the system of checks and balances. It is positioned on a par with the executive and legislative branches. In the Anglo-American constitutional tradition, the judiciary occupies this place in its own right. The rules allow (Rule of Law) was a historical creation of the courts[14].

[14] Mark Tushnet, 'Constitution-Making: An Introduction' (2012) 91 Tex. L. Rev. 1983.p.9

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It meant its link to the common law (common law) and its independence from the orders of the monarch or those delegated by him. This was rooted in the English doctrines of the supremacy of the common law and due process. Both are due to Justice Coke (1552-1634). First, he put the common law as the foundation of the British legal system. He applied it in the Bonham case (1610), which reversed a decision of an administrative nature because it violated the common law principle that no man should be the judge of his cause. In the second, he equated due process and the expression of the law of the land that came from the Magna Carta (1215) as a limitation to the king's power to imprison or dispossess a person of his property, "unless it is by a legal judgment of his peers and by the law of the country" (paragraph). From this, he concluded that due process included procedural guarantees against the arbitrary exercise of power (procedural due process) and the substantive limitation of government power (substantive due process). He applied it in the Prohibitions case (1607), which denied that the king could judge directly. He could only do it through the courts. "According to the law and custom of England"; and in the little Proclamations, which denied that it could create new crimes: that was a monopoly of the legislative power and an act of usurpation.

So far, English law, the independent American colonies (1776) gave their courts the same jurisdiction as their English counterparts to impose on the administration the fulfilment of a due act (writ of mandamus) and question the legality of their accomplishments (quo warranto) It was about vindicating the right of the colonists to exercise the same degree of freedom that the English enjoyed The control of constitutionality was ad ports. It first appeared as a party argument in the Rhode Island State Courts ( Trevett v. Weeden. 1786) and North Carolina (Bayard v. Sing/eton, 1787), Then as a Supreme Court mandate (Hyton v. the United States, 1796) And finally it was applied in Marbury v. the United States. Madison (1803) when William Marbury petitioned the Court for a mandamus for the Secretary of State to hand over his appointment as justice of the peace.

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3. The judicial power conceived by the French Revolution could not oppose the exercise of power. He was born historically and ideologically subordinate[15].

The courts were identified with the nobility, defeated in 1789 in the last times of the Ancient Regime, and they had prosecuted the acts of the royal administration, opposing them. The revolutionaries did not want their actions to suffer the same fate. So his prosecution was assimilated to prevaricator, prohibiting him. This position came from a schematic reading of the ideology of the division of powers. Montesquieu applied the system of checks and balances to the legislative and executive management. Since the former divided it into two bodies (the nobles and the people), the two powers added up to three. The courts were responsible for the execution of the laws. They were the "executive power of those who depend on civil law" They were subordinated to the power that authorized them to execute them4. This position could not be sustained. It violated the Declaration of the Rights of Man and the Citizen of 1789.

The Napoleonic Constitution dei a No VIII (1799) created the Council of State. He would deal with the patrimonial claims against the administration and the contra of the legality of their acts (excess of power). Soon it took judicial characteristics. It was the modern cause that in the continental system, the actions against the administration were reserved for specialized courts, different from the civil courts. The judicial contra of the acts of the administration had been imposed in Europe by the 19th century. But the contra of constitutionality took longer to arrive. As in the continental tradition, it was not used to respect the binding nature of precedents[16].

On the contrary, they were entrusting the task to the ordinary jurisdiction endangered the unity of the legal system8. The creation of a court specialized in protecting the constitution occurred in Austria and Czechoslovakia in 1920 and Spain in 193/. None of them resisted the liberal crisis that ended with the post-war period.

[15] Thomas Hobbes and Richard Tuck, 'Leviathan (Rev. Ed.)' (1996) 433 Cambridge: Cambridge University Press (First published 1651). Lieberman, E., Hauert, C., & Nowak, MA (2005). Evolutionary dynamics on graphs. Nature 7023.p.9

[16] Anthony King, *The British Constitution* (OUP Oxford 2007).3

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The judicial application of the constitution matured in the Roman-German court systems only after the examples of the Italian Constitutional Court (1947) and the German Federal Constitutional Court (1949).

To base the priority of the constitution on its supremacy clause is to engage in circular reasoning: to affirm that the constitution is supreme because it says it is. Second, the trail is older. In 1831 the contentious administrative was in the Constitution (Article I 13.3). And the previous Constitution expressly referred to it as a specialized jurisdiction (article 116.111), as an appeal (article I 18.3), and as a process (article 118.7). Except for what refers to the agri-environmental jurisdiction (article 189.3), none of this is today. The wording says nothing, but the standard says it all. The constitutional rule is that administrative actions are prosecutable judicially. Here the republican heritage defines everything [17].

Only in the Rule of Law is it considered that a decision is not sufficiently justified by the mere fact of having been issued by a competent authority (methodological determinism). Here the formal stability of decisions must be added to the rational correctness of its justification. There is rational correction when the decisions are justifiable by their universality. Its coherence and its consequence with the values of the system (MacCormick)/J. The judicial decision must demonstrate that the reason is objectified in law if this is a sub lege government. The judicial decision must justify that their voice comes from the law (good or bad), not arbitrariness. This is how the legal system gives the courts to position themselves on a par with the executive and legislative powers with the sole authority of their decisions[18].

Justification means democratic control for two reasons.

First: It is the precondition of every second instance and every recursive path. Here those affected act based on the justification of the contested decision. They request that a body authorized to prosecute the actions of another rule on the matter. It is about the system of checks and balances applied intra organum and promoted as the content of a procedural claim. It constitutes the right to obtain a well-founded

[17] Denis J Galligan and Mila Versteeg, 'Theoretical Perspectives on the Social and Political Foundations of Constitutions' [2013] Social and Political Foundations of Constitutions 3., p. 6)
[18] Lutz (n 5)..P17

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sentence, which arises from adequate judicial protection and due process (article I 15 of the Constitution, STC 937/2006-RAC, September 25, paragraph 111.3.1/5, and STC I I63 /2006-RAc' November 20, paragraph 111.2/6).

Second: Because it is the precondition for the judicial creation of law. The force of its justification affirms a precedent. And it is changed when another justification's power is articulated better in the legal system. Here the justification of judicial decisions is a requirement that comes from the right to equality before the law (articles 811 and 14,111) and the guarantee of legal certainty (article 178.1).

Democratic control is not social control; the first is exercised by exporting individuals. The second is exercised by organized civil society (article 241.1)_ And it is not a democratic control. It is in itself a contradiction. It is about exercising freedom of association by force. Any attempt to institutionalize civil society distorts it as a source of democratic legitimacy. The greater its institutionality, the less civil society it is and, therefore, the less genuinely civil representation. When officially organized, it is assimilated into the public apparatus and becomes political power. Whenever it is from the State that it is collected, it would strengthen it, weaken it, and affirm, deny it[19].

## Conclusion:

The typology of constitutions paves the way for admitting a room for the imposed constitution type. This article attempted to show that with the most basic classification of the modern constitutions which is the written and unwritten constitution, the imposed constitution exists and could be in the form of any one of them. In addition to that, The imposed constitutions term also can be divided into different types. In this paper we highlighted the main two categories of the imposed constitutions, the externally and the internally types, focusing more on the internally types, because we think that it needs more attention, specially the judiciary imposition.

[19] Hardin (n 12).

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## پوختە

یەکێک لە ئاڵنگارییە سەرەکییەکان کە ڕووبەڕووی هەر توێژەرێک دەبێتەوە دوای پێناسەکردنی هەر زاراوەیەکی یاسایی ئەوەیە کە چۆن و بۆچی لە پۆلە جیاوازەکاندا ڕێکبخرێت. دەستوورە سەپێنراوەکان وەک زاراوەیەکی نوێ کە لەم دواییانەدا سەرنجی زۆرێک لە توێژەرانی بۆ خۆی ڕاکێشاوە، بەشێوەیەك کە دەیانەوێت وەک نامۆیەک بە جۆرە کلاسیک و نەریتییەکانی دەستوورە ناسراوەکان نیشانی بدەن.

ئاڵنگاری سەرەکی کە بە خێرایی دوای بیستنی ئەم زاراوەیە ڕووبەڕووت دەبێتەوە ئەوەیە کە ئەگەر دەستووری سەپێنراو هەبن، کەواتە ئەوانەی سەپێنراو نین چین؟

ئەم بابەتە سەرنج دەخاتە سەر دۆزینەوەی پێگەیەك بۆ دەستوورە سەپێنراوەکان بە ڕوونکردنەوەی ئەوەی کە دەستووری سەپێنراو جۆرێکی سەربەخۆیە و هاوتای نییە هەروەک ئەوەی ناوەکەی ئاماژەی پێدەکات.

## الملخص

من أهم التحديات التي تواجه أي باحث بعد تحديد أي مصطلح قانوني كيف ولماذا يتم تنظيمه في فئات مختلفة.
دساتير مفروضة كمصطلح جديد جذب مؤخرًا انتباه العديد من الباحثين الذين يريدون تصويره على أنه غريب عن الأنواع التقليدية للدساتير المعروفة.
التحدي الرئيسي الذي يطرح بسرعة بعد سماع هذا المصطلح هو إذا كانت هناك دساتير مفروضة فما هي غير المفروضة؟
يركز هذا المقال على إيجاد مكان للدساتير المفروضة من خلال توضيح أن الدستور المفروض هو نوع قائم بذاته وليس له نظير كما قد يوحي اسمه.