1

Introduction

The Century of Constitutions

Was there ever a century of constitutions? Ask Americans and most of them will undoubtedly dub the eighteenth century as such. That was the era, the golden age, of civil revolutions in which the United States Constitution was conceived.[1] Many Americans, therefore, consider their constitution even to be the gold standard; it was certainly the world's first modern constitution. Many continental Europeans and South Americans would, for sure, opt for the nineteenth century as *the* century of constitutions[2] as it was the time in their national historical development when constitutions were put into place as instruments for affecting political and social change. Constitutional rules themselves were the object of political strife and constitutions were, at the time, vehicles for political and social change. Many other European and Latin American countries cemented their budding nation by enshrining parliamentary systems of government and legal systems based on the rule of law in newly adopted constitutions. In my home country, the Netherlands, for instance, the Constitution of 1814 transformed the old order of the Dutch Republic (1581–1795) into a constitutional monarchy and laid the foundations of the constitutional state the country is today. Amendments to this constitution in 1848 instituted a system of parliamentary democracy, and again in 1917, constitutional law was used to end four decades of emancipatory struggles between confessionals, liberals and socialists by introducing universal suffrage as well as equal rights for confessional education. In a host of European and American countries, constitutions were in vogue in that epoch.

However, in all fairness, only one century can be rightfully called 'the' century of constitutions, and that is the previous century. The number of constitutions increased exponentially over the last hundred years. Figures from the

[1] It was ratified on 21 June 1788 and entered into force on 4 March 1789.
[2] Sabato 2018, chapter 1 (*New Republics at Play*); Te Velde 2010, chapter 2 (*De Grondwet* – The Constitution), p. 53–73.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

American *Constitute* database – which contains almost all of the world's national constitutions in force – show that at least 189[3] out of 193 official (UN recognised) national states currently have a written constitution, except for the United Kingdom and, arguably, New Zealand too, which have 'unwritten' ones.[4] And, almost all of

[3] Only 190 of them are recorded in the Constitute database. We have added UN member state San Marino, which is not included in the Constitute database, to the total.

[4] Data from *Constitute* www.constituteproject.org/?lang=en. The *Constitute* database is a wonderful collection of all the national state constitutions in the world, all recorded in certified English versions and very well organised and indexed indeed. But for all its width and comprehensiveness, it is not entirely complete. It, for example, omits UN member states San Marino (which does have a collection of constitutional documents dating back to 1600), Mali and Guinea (which have suspended their constitutions after recent regime changes). These countries do have written constitutions of some sort. *Constitute*, furthermore, includes countries which are not (recognised) national states, that is, members of the United Nations (UN) (like Taiwan, Palestine and Kosovo). Furthermore the 202 states with written constitutions recorded in *Constitute* also include Israel, Sweden, New Zealand (partially or not) and the United Kingdom. These countries do not consider themselves to have a written constitution, or at least not a constitution codified in a single constitutional document. *Constitute* lists, for example, the Magna Carta (1215) and later Parliamentary Acts with a constitutional character as the United Kingdom's constitution. In terms of intent, character and content, it is difficult to compare this thirteenth-century document and pursuant Parliament Acts over the centuries with modern constitutions, which all stem from the eighteenth, nineteenth, twentieth and twenty-first centuries. Perhaps including the Magna Carta was intended tongue-in-cheek as the British are proud that they lack a written constitution. For a clear comparison, it is maybe better to exclude the Magna Carta and the later Parliamentary Acts with constitutional characteristics. Looking at the data held in Constitute, this would then add up to 192 sovereign national states (if we include San Marino and exclude the United Kingdom) out of 193 UN member states having a written constitution – a staggering total of 99.5% of all countries in the world. Even if we were to exclude New Zealand – which we will discuss in a moment – due to the 'unwritten-ness' of its constitution the percentage would still remain at 99%. Even though the bulk of all the countries in the world have written constitutions, not all national states have codified them in a single constitutional document (or a collection of documents jointly) designated as 'the constitution'. Israel, for instance, currently has basic laws resembling a constitution which have been passed by the Knesset – the Israeli parliament – pending compilation into a constitution (Cf. Goldfeder 2013). The status of the 'constitution', 'basic laws' or 'constitutional acts' in New Zealand and Sweden is less clear. New Zealand, like the United Kingdom, always prided itself on having an unwritten constitution, but has had a Constitution Act since 1986, codifying part of its previously unwritten constitutional law and the 'semi-entrenched' New Zealand Bill of Rights Act 1990. One can argue (as does Grau 2002, notably p. 365) that these acts and the changed status of Treaty of Waitangi (the political constitution of New Zealand signed in 1840 between the British Crown and the Māori chiefs) meant that New Zealand has joined the group of countries with a written constitution. Others argue to the contrary – the Act of 1986 is a mere instrument of government, the Bill of Rights can be amended at will by parliament (even though the New Zealand judiciary considers it entrenched); New Zealand's constitution still remains largely unwritten – there is no real constitution with superior status from a constitutional convention or moment, even though New Zealanders have been debating whether to replace their current constitutional arrangement with a formal, written constitution (Cf. O'Scannlain 2005, p. 793–794.) Shades of grey, maybe. Many other countries have, like New Zealand, only partly codified their constitutional law while other parts have remained uncodified, in case law and conventions (unwritten as some would have it), but that does not mean that thereby the constitution on record is no longer a

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

these countries have enshrined their written constitution into a single document, with a few exceptions, like Israel and Sweden. If we were to add Guinea and Mali – which are not listed in *Constitute* due to recent regime changes, but still have a (suspended) constitution on record – to the total, this adds up to 98% of the countries in the world today having a set of written constitutional rules commonly referred to as their 'constitution'. The total would even rise to 99%, if were to include countries that have written constitutional rules – written codes establishing a legal order and political system – but that did not codify these rules into a single document.[5] The proportion would rise to 100% if the British (and New Zealanders in their wake) would finally pluck up the courage to admit that nowadays, like other countries, their most important constitutional rules are also embodied in – admittedly many different – written documents, as laws, rules and court rulings. This, of course, they are not about to do. They cherish their exceptional position, the splendid isolation of not having a *written* constitution, even though they essentially do have one. The British constitution is most certainly not an *oral* one.[6]

THE PROLIFERATION OF CONSTITUTIONS

The most striking thing about *Constitute*'s overview is that most national constitutions were enacted relatively recently.[7] Eighty-seven percent were drafted after

written constitution. Because New Zealand does have a *Constitution Act*, and did codify part of its constitutional law, one may count it as a country with a written constitution laid down in a 'core' document. We do understand this may be a bit controversial, but even then, whatever side of the argument one would choose to favour, it does have little effect on the total count – still 99% of all countries would still have a written constitution, even if we were to exclude New Zealand. Sweden, like Israel, did not enshrine its constitutional law in a single document but dispersed it over various documents or acts. The country has four constitutional laws, namely the Act of Succession (1810), the Freedom of the Press Act (1949), the Instrument of Government (1974) and the Fundamental Law on Freedom of Expression (1991). Of course, we did count Sweden as a country with a written constitution albeit for the mere reason that it has designated its most important constitutional document, the *Regeringsformen* (Instrument of Government), as the core of its constitution since 1975. But even when we were to discard Sweden and Israel as countries with 'a' (as in *one* single document) constitution from the total, and exclude the countries with an unwritten one as well, still 98% of all countries in the world could be listed as countries that have a written constitution.

[5] This is essentially about two countries: San Marino and Israel. Or three, if we include the other in-between case: Sweden (cf. previous note).

[6] Lijphart correctly put this into perspective: 'the distinction between written and unwritten constitutions appears to be relatively unimportant [...]' Lijphart 1999, p. 217. Cf. McLean 2018, p. 395.

[7] Data from *Constitute* were also used to determine the year constitutions were adopted. Even though these dates are sometimes open to question. *Constitute* has adopted the principle of relying on countries' self-reporting: the year of adoption as stated by the country concerned is recorded in the database. This approach has limitations. Norway claims its constitution dates back to 1814, while it has only been an independent state since 1905 – since the dissolution of its union with Sweden (making its claim more flattering than factual). Following this line of reasoning, you could argue that the Polish constitution was adopted in 1791. *Constitute* until recently recorded 1815 as the year the Netherlands adopted its constitution.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

1950; as many as 74% were put in place after 1975.[8] That is just the national constitutions included in this count. There are many other documents similar to national constitutions that also regulate leadership systems (political systems) and set up (parts of) legal systems. Treaties, constitutions of federated states, or fundamental rules of other regional organisations – such as the European Union (EU) – do likewise. There is much disagreement about whether these latter forms actually can rightfully be called constitutions. But even if we disregard all of these subnational and supranational basic rules, we can still conclude from what countries call their official 'national constitution'[9] that the phenomenon is found everywhere. More people currently have a constitution than a smartphone, a religion, a daily meal or a house – constitutions span the entire globe.

This is remarkable because they are a fairly modern innovation. The national constitutions we are familiar with are only about two-and-a-half-centuries old. They are relatively new compared to other political institutions, such as states and parliaments, which can trace their roots back to the Middle Ages.

Why did constitutions proliferate in such a short time? You would expect legal scholars or constitutional specialists to have a convincing explanation for that, or at least – if not – to be assiduously looking for one. But surprisingly, few explanations come from these academic quarters – and not many quests seem underway. If, for example, you were to refer to the almost fourteen-hundred-page *Oxford Handbook of Comparative Constitutional Law* (2012), currently the most comprehensive constitutional encyclopaedia, you would find almost nothing about this rapid growth[10] and little in the way of explanation. Perhaps this is because the book's mostly American constitutional experts consider this proliferation quite natural and a good development. It seems, according to many of these Handbook authors, to be more or less a consequence of the inevitable triumph of the Enlightenment, the more or less automatic course of history towards ever greater civilisation and freedom, as the German philosopher Hegel (1770–1831) had predicted more than 175 years ago.[11] As good news is no news, this proliferation seems to have remained below the radar and has gone largely unnoticed. There is possibly another, more invidious reason for

It actually dates from 29 March 1814 (the second oldest constitution in the world), but as the Kingdom of the Netherlands and the full-fledged monarchy first came into being in 1815, this is considered by some – incorrectly – the year of the constitution's adoption (see, for more details on this point, Chapter 11). The birth date was accordingly and duly corrected to 1814 in *Constitute* a few years ago. Other reported years of adoption raise questions too. There are at least three disputable cases of national constitutions' birth dates in the database: Latvia (1920 or 1991), the Netherlands (1814 or 1815) and Norway (1814 or 1905).

[8] Cf. Elkins, Ginsburg & Melton 2009, p. 41–42.

[9] Only national constitutions are included in the *Constitute* database.

[10] Stephen Holmes is a partial exception to this rule with his search for the history of ideas and development of the ideology that we refer to as 'constitutionalism': the ideal of limited government laid down in a legal constitutional document. It does not really provide an explanation for the rapid spread of constitutions. Cf. Holmes 2012, p. 189–216.

[11] Cf. Hegel 1892 (orig. 1840).

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

the silence: embarrassment about countries' copycat behaviour. Constitutions have come to resemble each other a great deal lately.[12] They are no longer unique products of a country's culture, history and exceptional national characteristics – as we like to think – and instead increasingly bear more resemblance to off-the-peg fashion than *haute couture*. Many hand-me-downs or constitutional transplants are uncomfortable reminders of colonialism and Western domination. Speaking of 'constitutional transplants' – which you see everywhere – seems to be considered politically incorrect in some quarters. It is true that over the past forty years, scores of Western experts and organisations have travelled to countries around the world which want to use their constitutions as tools to make the transition to liberal democracy (or the democratic rule of law[13]). They have given these countries advice but would rather not be told that their well-meaning activities have effectively exported *their* ideas and stimulated copycat behaviour. They, too, are sometimes appalled by the consequences of their efforts, especially when Western ideas and advice make their way into a constitution, but the resulting constitutional provisions are not observed or – worse still – are merely used as a fig leaf to conceal an oppressive regime's atrocities. You may wonder whether this really is due to these exported ideas, but nobody, of course, wants to be accused of latter-day constitutional colonialism.

No matter how we put it, countries around the world have been copying and pasting each other's constitutions, borrowing and transplanting stuff, or – to put it more positively – have been inspiring each other. It has certainly been a factor in the constitutional craze that has gripped the world in recent decades. Perhaps it is not such a bad thing. Drinking Coca-Cola does not automatically make you a fan of baseball, make you crave for Thanksgiving turkey or inspire the inclination to elect a president, any more than eating Gouda cheese gives you a passion for windmills or the desire to be ruled by a constitutional monarch.

The American constitutional expert Mark Tushnet, a professor at the Harvard Law School, tries to put the objections to copying into perspective:

> […] some degree of scepticism about constitutional transplants seems to be justified. Constitutional ideas and structures might migrate, but in the process they might well be transformed to conform to the local spirit of the laws.[14]

Even something you have copied can eventually become your own. A country can assimilate constitutional ideas and structures (the separation of powers, rule of law, freedom, democratic government), with ideas and structures of this kind gradually becoming part of a country's legal and political system, and eventually its culture and identity. This does not happen automatically, as sixty years of European integration, scores of failed states, or – going farther back in time – the American Civil War

[12] Cf. Versteeg 2014.
[13] Even though there are certainly identifiable differences, the notion of liberal democracy is used here as a synonym for the democratic rule of law – democratic *Rechtsstaat*.
[14] Tushnet 2012, p. 211–222.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

attest. It takes much time, many attempts and quite some habituation. But in this process constitutions, which are now so widespread, do have the capacity to produce *constitutional man*. 'Homo constitutionalis' – the sort of human being for whom the liberal democratic values and principles, expressed in most modern constitutions, are self-evident and incontrovertible. Beings that no longer need the norms of the constitution pointed or spelled out to them, having internalised the constitutional values in their upbringing, education and the example of others' behaviour. Nowadays, this includes many people in the west and beyond.

Why All These Constitutions?

The scant regard for this global explosion in constitutions is remarkable. Ran Hirschl, a legal scholar and political scientist, is one of the few scholars in the field who is puzzled by the lack of attention to this recent global surge.

> Although this trend is arguably one of the most important phenomena in late twentieth- and early-twenty-first-century government, the diffusion of constitutions remains largely under-explored and under-theorised.[15]

What has caused this disregard? Could it have to do with the subject? It would be unsurprising – who on earth is interested in constitutional news? Certainly not many people in Western Europe. Far from a big thrill or appealing idea, especially for young people. Constitutions rather feature as a killjoy of sorts in popular culture.

The first time I heard about constitutions, I was sitting on an uncomfortable folding seat in a huge lecture hall, with 500 other young law students. It was 1981, and the lecturer's point came across dismally in this cavernous space with cold neon lighting. It did not help that he stood glued to the lectern, head bowed, droning a prepared text. Regardless of whether it was because of this bumbling professor or the Dutch Constitution itself, it was simply and incredibly … and mind-numbingly *boring*! At secondary school we had discussed, ever so superficially, the Enlightenment thinkers, as well as some political philosophy and constitutional theory. It did not seem terribly relevant, but it was tolerable and – at times – even interesting. But *this*, this 1981 lecture, was a miserable slog through dry-as-dust concepts and ideas filled to the brim with tangles of jargon. As if that were not enough, we also had to come to terms with the inaccessible, and sometimes downright unreadable, constitutional provisions.

'No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law', according to the antiquated language of the Dutch version of article 7, paragraph 1

[15] Hirschl 2013, p. 157.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

of the Dutch Constitution. Who says 'prior permission' these days? And what on earth is 'without prejudice to the responsibility'? This is, as it turns out, legalese referring to the system of constitutional limitations, which is virtually invisible to the broader public: only laws passed by parliament can set these limits. Even a well-informed lawyer will have some difficulty understanding the precise meaning of this unwieldy text, let alone laymen. This text is utterly unintelligible to them, as it was for me as a freshman in law. You need to have a lot of extra information to understand that this Dutch provision is about something as central and fundamental as the freedom of expression; the text is the product of the constitution's historical development which explains its garbled formulation. It is no wonder that studying the constitution is not a popular pastime in the Netherlands or many other countries, even those with long-standing constitutional traditions. The older constitutions, like those of the United States,[16] Argentina or Canada[17] are not all that easy to read. The text does not readily speak to the hearts and minds of modern readers, even though the ideas and concepts may.

This might account for the fact that the wider public in many countries is largely indifferent to constitutional texts, but it does not explain the want of academic attention. Constitutions today are studied and compared with each other more and more. There are academic series published by posh publishing houses such as Cambridge University Press, Edgard Elgar and others. There are prestigious academic journals like *The International Journal of Constitutional Law* (I-Con)[18] that has been published since 2003 with many comparative contributions. Numerous international, regional (European) and national journals and constitutional series search for patterns, theories, explanations based on constitutional comparisons and there are hosts of (international) conferences on the subject. Yet, from what I know, most of these journals, books and conferences say relatively little about how and why so many constitutions have come into being in recent decades. Is this because constitutional experts – mostly legal scholars – are not used to asking questions of this kind, or lack the skills to find deeper explanations? Or are these explanations simply lacking? That is unlikely: it cannot be down to pure coincidence that there has been an almost 75% increase in constitutions in the world over recent decades. Or is the

[16] Section 3 of Article III of the United States Constitution is difficult to understand without knowledge of its context. It reads: 'The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.' Even for the most ardent originalist would have to concede that some knowledge of eighteenth century English and the meaning of the concepts expressed is needed to get what this paragraph expresses.

[17] Article 23, Section 3 of the Canadian Constitution expresses as a qualification for a senator: 'He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in Free and Common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (…)'. Quite hard to read or understand for anyone, even if you are not aspiring to be a Canadian senator.

[18] Published by Oxford University Press.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

astute Anglo-American political philosopher Larry Siedentop right in saying of the importance of constitutions in his book *Democracy in Europe* that we tend to be blind to the obvious?

> Few societies are good at identifying the things they take for granted. These are the things that structure their vision of the world, providing them with categories which shape their experience of fact and underpin their judgement of what is valuable. The result is that, when trying to understand ourselves, we often miss the obvious.[19]

Looking Over the Horizon

The multitalented scholar and jack-of-all-trades Ran Hirschl is one of these rare exceptions. He is not only a legal scholar, but also someone who likes to look beyond the seemingly obvious. He sees three possible explanations for the growth and increasing similarity of constitutions. Three kinds of 'stories' as he calls them.[20] The first story gives an *ideational* explanation. That is, an account which considers the meaning and quality of ideas key factors for the growth and demise of constitutions.[21] The rise and dominance of written liberal-democratic constitutions are, according to this interpretation, the result of the power of the constitutional ideas and the ideal we call *constitutionalism*.[22] Constitutionalism is the now widespread belief that it is *good and proper* for a nation to have legal rules which establish and organise a legal and a leadership system, ruled by law with government for (and ideally by) the people; for many, even amounting to the idea that nations *ought* to have constitutions. The modern version of this constitutional belief system is mainly based on the intrinsic good of individual freedom and limited government, preferably combined with (popular) elected leadership: liberal democracy. Constitutionalism as a belief[23] is closely connected to the Enlightenment's (Christian-Messianic) faith in liberation and progress; reason makes us understand our historical destiny, and (partly because of this) history is progressive, with human destiny gradually improving. The potency

[19] Siedentop 2001, p. 81.

[20] Hirschl 2013, p. 157–170.

[21] *Ibid.*, p. 158.

[22] *Constitutionalism* is the ideology of and faith in the functioning of constitutions. *Liberal constitutionalism* – a sub-variant – is the belief in a particular kind of constitution: those with a combination of constitutional instruments such as the division of powers, checks and balances, civil and political rights and freedoms, which offer protection against unlawful repression and warrant influence of citizens on government policy and political decision-making. The ideological aspect, according to Mark Warren, is that constitutionalism assumes 'that laws can effectively establish institutions only if they are accepted as legitimate according to widely held norms and beliefs. Constitutional protections and guarantees are ideological in this sense.' Warren 1989, especially p. 511.

[23] Brennan & Buchanan speak of (and hope for) a 'civic religion'. Cf. Brennan & Buchanan 1985, p. 150.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

of this constitutional 'religion' ensures that we believers hardly question the popularity of democratic liberal constitutions because of their self-evidence.[24] Just as Christians and Muslims usually do not wonder why there are so many believers. Their belief is their truth and hence self-evident. This is why they seldom ponder why there are so many believers, and seem more preoccupied with why not *everyone* has yet seen the light. According to constitutionalism, the rise of modern constitutions is a nearly inevitable consequence of the course of history which has made us realise that freedom, rule of law, equality and fraternity are the goal of all human cooperation and society. Seen from the vantage point of this constitutional ideological account,[25] it is not at all strange that many countries have seen the light in recent years and that constitutions also increasingly resemble one another. Constitutionalism-thinkers are more interested in societies that still lack a constitution, or states that have a constitution deviating from the standard liberal-democratic arrangement.

A second explanation for the recent growth in constitutions can be found in what you could call the 'functional' stories. Our world is comprised of markets; regardless of your ideological perspective, it is evident that human society in the twenty first century is dominated by transactions and economic relations. Constitutions play an ever-greater role in this, either as a condition or as a 'tool'.[26] They resolve a number of informational and coordination problems which can impede economic growth. These include uncertainty about market development caused by unexpected nationalisations, high inflation, or sudden currency devaluations, doubts about contract enforcement and the protection of property in the absence of an efficient legal system or the unpredictability of government behaviour (things like coups, arbitrary prosecution, violence, a lack of effective, central government authority, etcetera). Uncertainties of this kind can cause producers, consumers and investors to have less confidence in a country's economic development and, consequently, to be less disposed to invest in it. Economic growth hinges on the optimist: it requires confidence in the future. Without it, economic stability can be undermined by unconstrained political and economic competition, both domestic and foreign. Constitutions function as *credible commitments* by putting in place institutions (rule of law, political accountability, enforceability of contracts, etcetera) which increase

[24] This Evangelical inspiration is palpable in contemporary American constitutional discussions and American constitutionalism (the ideology of constitutional governance). Cf. Compton 2014, especially p. 1–2.

[25] Fear of loss of freedom is, according to Hirschl, the main motive for constitutionalisation in this 'story': 'Even according to this prevalent narrative – resplendent as it is with myths about the liberalising power of rights, the Herculean capacities of judges, and a supposedly authentic, "we the people" quest for constitutional protection – *fear* [my italics] is a main driving force of constitutionalisation. The ineffectiveness of the Weimar Republic constitution and horrors of the Third Reich and the Nazi era are commonly invoked as a stark illustration of why strong constitutions are necessary.' Hirschl 2013, p. 158.

[26] Cf. Persson & Tabellini 2003 and Hirschl 2004, p. 82.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

the predictability of market participants' behaviour, raise certainty and trust, as well as reduce arbitrary governmental behaviour; these, in turn, increase economic performance and growth. It might be a slightly dispassionate and detached account explaining the worldwide constitutional increase, lacking accolades to human elevation, culture and Enlightenment, but it is credible one in the context of a globalised economy.

Hirschl's third explanation for the proliferation of constitutions is 'politico-strategic'.[27] According to this account, constitutions are strategic instruments with which we mobilise and channel large-scale human cooperation in political communities (i.e., communities with more or less fixed leadership or authority structures). A constitution, as a 'fundamental' and written collection of politico-organisational rules, is nowadays a generally accepted normative ('legal')[28] reference point which political actors are committed to in their struggle for leadership: a document that defines the playing field, sets the rules of the game and also designates the referees and umpires. Constitutions try to provide the most acceptable (legitimate) mix of concepts (sovereignty, popular sovereignty, political identity, democracy, etcetera) rules and institutions (allocating 'remits', such as judiciary, government, legislator, voter, policeman, tax inspector) to institute sustainable political 'peace', thus enabling large-scale social coordination and cooperation.[29] The strategic aspect of it is the balancing act of reconciling and organising human collaboration as efficiently as possible – doing this better increases the competitiveness of your group – and channels the continuous struggle over interests and leadership within the group. Constitutions offer a variety of ways of achieving this balance, and several formulae (especially liberal democracy) are extremely popular – because countries have had good experiences with them.

[27] Or a 'realist' account, as he calls it. Hirschl 2013, p. 163 ff.

[28] 'Legal' is understood as: the rules and norms that express an expectation of *proper* behaviour ultimately enforceable by mediation of a public authority.

[29] Usually summarised as 'collective intentionality'. Searle 2004, p. 85. According to Searle, a human society's political reality is formed by adding functions and constitutive rules to collective intentionality (collective beliefs, shared attitudes etcetera within a social group). *Collective intentionality* is the energy of a society and the *functions* and *collective rules* are the direction and channels along which this energy flows. Searle 2004, p. 85–86. Incidentally, Dave Elder-Vass demonstrates that this is not unidirectional process. Collective intentionality and constitutional rules work like cyclical norm circles. He defines them as '[groups of] people who are committed to endorsing and enforcing a specific norm. As a result of sharing this commitment, each member of the group has a higher tendency to endorse and enforce the norm than they would if they had no sense (however subtle) of being part of a wider group that is committed to the norm. The consequence of their behaviour in support of the norm is to create a sense in others (and to strengthen the sense within the group) that they face a normative environment that will sanction their behaviour (positively or negatively) depending on the extent to which they conform to the norm. Through this mechanism, the norm circle has the causal power to increase the tendency of those people to conform to the norm.' Elder-Vass 2012, p. 254.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

THE IMAGINED WORLD OF LAW

Hirschl's accounts provide relatively logical explanations, but they are not completely conclusive. After thousands of years of human civilisation, could the entire world have been enticed in a matter of decades by an ideologically tinted Western narrative? Are market discipline and hunger for power so great that the entire world yields to their every enticement and caprice? And, are political relations really almost inconceivable without some such legal testimonial? Probably not. Or are there, borrowing from *Hamlet*, perhaps more things at play in heaven and earth *than are dreamt in your philosophy*? Could other dimensions or causes that go beyond the exogenous factors of ideology, market or political strategy at least partially explain why the whole world has adopted constitutions?

Could it be that every human being has an intuition or sense that renders us susceptible to constitutional music? Do we have some innate instrument that enables us to play along with the music? Modern legal philosophers like John Rawls[30] and Joseph Raz,[31] as well as neurobiologists, assume that we all have an 'inner constitution', that is, a shared morality that functions as some kind of foundation based on a set of grammatical rules that enable us to rapidly learn a moral language, such as that of a constitutional system.[32] Constitutions appeal to our moral basic instincts, especially our sense of justice, and shape them in a manner that is both attractive and allows us to share them. The ideas, institutions and norms of constitutions form a language that literally speaks to the imagination. This is, maybe, the overarching, meta-story about the ins and outs of a political society, collective action and socio-economic organisation. About the *how* (how do we organise authority?, Who does what, for and with whom?) as well about the *why* (why do we consider it legitimate, why are we willing to pay the price of this kind of constitutional cooperation).[33] It is the story that tries to offer each and everyone one their due, their place in and a convincing reason for the constitutional cooperation; the grand story of who we are, what we want and where we belong.

It may be rather tenuous to conceive of constitutions as no more than a story or siren call that reels you in and gets you to take part. Something as significant and manifest as constitutional law is surely more than just a 'story' or a fairy tale? One would think so. Looking around, constitutions and their substantial impact can be seen everywhere. Imposing parliaments; judges in togas; elections; laws being made, supervised and upheld; voluminous legal codes; venerable constitutional texts in showcases. There is, of course, a big difference between the tangible reality of such things as houses of parliament and voting booths, and the imagined reality of

[30] Rawls 1999 (orig. 1971).
[31] Raz 1982, p. 307–330, especially p. 316 where he says: 'I attribute to Rawls is that morality is the internal constitution of the moral sense […]'.
[32] Mikhail 2017.
[33] Hensel 2012, p. 5.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

constitutional institutions such as parliaments, judges and elections. You cannot put something like an election on a table. The latter are institutional realities created by people;[34] they are abstractions and imagined representations with which we coordinate and direct our actions – forms of *collective intentionality*.[35] This fascinating phenomenon enables us as human beings to create, share and experience imagined realities, and coordinate our actions and collaborate on a large scale through them. Property, law, the state, value and money are all examples of this kind of man-made reality – institutional facts which deceptively resemble the reality of plain, empirical facts.[36] But these imagined worlds cease to exist without people, leaving only the things, the bare facts.

> Imagine there's no heaven, It's easy if you try, No hell below us, Above us, only sky [...] (John Lennon, *Imagine*, 1971)

Constitutions evoke the imagined reality of a constitutional order: a community that is committed as a political society to some kind of legal and leadership system.

This sort of imagined reality is difficult to study because its structure is complex, largely invisible and fluid, as it is made, adjusted and confirmed interactively by sharing conceptions. John Searle, the inventor of the concept of institutional facts and the way in which they shape the imagined reality of social reality, puts it thus: 'the invisibility of the structure of social reality [...] creates a problem for the analyst.'[37] You can only properly understand and describe these imagined realities from an *internal* perspective, in which you try to see everyone's experiences through their eyes – which is almost impossible and does not yield much more than an aggregate sum and snapshot of subjective observations. Conversely, an *external* perspective – examining the empirical evidence of institutional behaviour – reveals very little about the ideas and conceptions driving this behaviour – it cannot apprehend the intentionality or essence.

EMPIRICISM OF IMAGINATION

What could you do best to really understand the significance and rapid spread of constitutions or test the veracity of Hirschl's assertions? This would at the very least require delving into underlying ideas, imaged realities and conceptions. And you cannot do that without looking into the origins and meaning of the phenomenon constitution as a product of the human mind, imagination and history.[38] That is precisely what I intend to do. This book examines the story and the imagined reality of constitutions from different perspectives – through the eyes of the law, history,

[34] Searle 1995, p. 27–29.
[35] *Ibid.*, p. 23–26.
[36] *Ibid.*, p. 2–3.
[37] *Ibid.*, p. 5.
[38] Cf. Niezen 2010 especially Chapter 1 (*The Imagined Order*), p. 1–26.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

as well as economics, political science, cognitive biology and other fields. I did not study most of these disciplines, but their insights are quite accessible nowadays.

This book attempts to 'empirically' look into the common imaginaries – the imagined worlds – of and created by constitutions[39] to uncover why we humans have adopted them *en masse*.[40] I suspect that the reason for the surge is related to the significance of constitutions for mass cooperation in societies and ensuing social necessities, as well as the way in which constitutions combine this with the idea of autonomous individuality and equality[41] to give members an acceptable place conducive of enduring mobilisation and collaboration. Constitutions are not so much an answer to ideological discussions and globalised world markets, as to the social organisation issues entailed by a rapidly expanding global population. The importance of constitutions extends much farther than their operational or functional significance (issues such as the effects of constitutions on political, legal, social or economic organisation, and who or what benefits from this) and has changed throughout history. Understanding constitutions is impossible without knowing their history. But studying their annuls is not a simple, straightforward matter. The historical development of constitutions consists of various layers of sediment which have deposited various meanings – at times on the surface, at other times hidden beneath, but always relevant.

What Kind of Imagined Worlds Are We Talking About?

That is all well and good, you will say, but the phenomenon of constitutions has been discussed very casually thus far. Before we can discover the reasons for constitutions' apparent popularity, we need at least a clear definition of the phenomenon. What do we actually mean by 'constitution'? Does this conception encompass all fundamental legal practices and norms for organising political societies' legal and leadership systems – commonly denoted as 'small c constitutions'? Or are we only referring to the so-called large C constitutions: the official, formal legally binding document that countries proclaim as 'Constitution',[42] as in the case of the 189 constitutions included in the *Constitute* database we used as a source above? Most debates on the subject indeed feature this latter category of 'formal' constitutions. One can, of course, contend whether all of these 'formal' constitutions are, in fact, real constitutions. Are they, for instance, actually observed, do they meet minimum standards, and so on. Because even though formal documents may have been proclaimed 'the Constitution' by their countries, this label says little about the practice. This kind of formal definition is unhelpful if we want to learn about the history of the

[39] 'Constitutional imaginaries' as Torres & Guinier label them. Torres & Guinier 2012.

[40] Or in Niezen's words: 'The ethnography of the Unknowable'. Niezen 2010, p. 1.

[41] Siedentop 2014, especially p. 349–363.

[42] Law 2010, p. 376–395, especially p. 376.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

phenomenon. The tradition of solemnly enshrining legal rules about leadership and legal order of a state-based society in a single document and calling it a 'Constitution' is at most a few hundred years old. Organisational rules of this kind (small c constitutions)[43] not embedded in states, or laid down in single documents are far older.

It is no simple matter understanding what constitutions are and what they actually do. Their prescripts and rules create their own worlds. Take, for example, the legal domain: constitutional norms forge the imagined world of the law, govern the way law is made or 'found' and determine its effects. Constitutions breathe life into law and regulate it at the same time. A stunning Baron Von Munchausen performance – the braggart German soldier who claimed to have pulled himself out of a swamp by pulling his hair. Or as Mark Graber, of the Maryland School of Law, puts it:

> Constitutions provide the legal foundations for ordinary law making by establishing the rules for determining who makes the law, setting out the processes by which those governing officials make laws, and limiting the laws those governing officials enact.[44]

But the significance of constitutions extends much farther than the legal aspects. Constitutions define 'the we' of a community[45] and by this proclaim a society, its identity and regulate its rule, law and leadership.[46] The rules and norms of 'the we' usually have two dimensions: an external one (who are 'we' in relation to other people or communities – who is a member of our group and who is not?) and an internal one (how do 'we' relate to each other?). That is why we often say that constitutional rules are fundamental: they underpin our way of life in state-based societies and coordinate our complex cooperation. And they do so by appealing to our imagination. Constitutional rules and ideas literally capture the imagination: they create it. Their fundamental norms create an imagined world of a legal and a political system – an arrangement for leadership and social organisation – which enables mass cooperation in groups.

THE PERSPECTIVES AND WORLDS IN THIS BOOK

Why would you want to know more about such technical, unexciting or even boring subject? Perhaps the lack of thrill is merely a question of perspective. It may not be more than a reflection of incomprehension of one of the most important social phenomena of recent history: our unprecedented ability for mass cooperation

[43] *Ibid*.

[44] Graber 2013, p. 25.

[45] A constitution makes – constitutes – 'the we' of a constitutional community. The Australian philosopher Yarrah Hominh asks why Australians speak of 'our Constitution'. She argues, it is because 'it constitutes us rhetorically; it constitutes us ('the people') as itself an act of the people.' Hominh 2014, especially p. 42 and p. 64.

[46] Thornhill 2011, p. 8–19.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

based on our common imagination that allows us to put faith in abstractions like 'law', 'authority', 'rules', 'constitutions' etcetera. Abstractions we commit to writing, imagined worlds we can share with each other in an instant (contracts, rights, rule of law) which we can employ to coordinate our efforts, channel our conflicts – with oracular linguistic concepts such as state, sovereignty, laws and authority – and mobilise us as individuals for goals which often do not even serve our individual interest. Constitutions, the system they bring into being and the law they express are fascinating phenomena, whose functioning and dynamics are poorly understood. Libraries are crammed with books on democracy and on the development of social and political systems; scores of conferences are organised on the interactions between politics and economic growth; and popular media are packed with blogs, articles and talk shows on political leaders and our political culture. We talk endlessly about the furniture, but rarely discuss the layout of the whole house.

Making Facts: Performative Expressions

Yet, it is in the layout of the house where the silent revolution is taking place: constitutions proclaiming communities around the world, defining 'the we',[47] and organising these societies' leadership and legal systems.[48] This is done in a fashion and language that the world's nations can mutually identify and recognise – and this with little more than words on paper. Constitutions might be underpinned by real military or political power, as 'realists' hasten to note, but they often overlook the fact that fundamental rules such as constitutional rules, also make this power. The constitution's voice breathes life into the society it proclaims. In this sense, constitutions are the ultimate performative expressions, as the British philosopher of language John Langshaw Austin (1911–1960)[49] termed it.[50] Constitutional texts are more than hollow proclamations; they are words that really do something – they actually create something.

Critics are bound to respond that this way of thinking is all too easy: you are trying to underscore the importance of constitutions by using rhetorical inversion. Such a distorted, artificial representation of things makes it appear as though everything begins and ends with constitutions, or in any case the fundamental rules they represent. But this is not so. Without a constitution, however ubiquitous and prominent nowadays, the sun shall rise and set and people shall get on with their lives and simply do the things that people do: get up in the morning, walk on the streets, work, start families, meet for drinks, play football on Saturdays and so forth.

[47] Cf. note 48 and the quote from Hominh 2014 referred to there.
[48] Thornhill 2011, p. 8–19.
[49] Not to be confused with the English legal philosopher John Austin (1790–1859).
[50] Austin 1962. Cf. Austin's follower Searle 1995, p. 34, Section 2 (*The Use of Performative Utterances in the Creation of Institutional Facts*) and more generally Chapter 3 (*Language and Social Reality*), p. 59–78.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

And they would be right, if I would claim that the fundamental rules of constitutions govern our entire existence. I do not. But, on the other hand, there is no denying the fact that constitutional rules are essential to the way modern people organise their political lives, their societies. Social relations, positions, law and leadership are regulated by them. These ubiquitous constitutional rules cover large parts of our way of life nowadays and extend much farther than we normally care to think about. Take getting up in the morning, for instance. We do not usually do so of our own free will – we do so in an organised fashion, according to rules related to labour relations and the regulation of our social relationships in our market-based society. 'Well, obviously so, but surely you do not need a constitution to start a family?', one could argue. Of course not, at least not in a simple, straightforward way. But many people do make this choice dependent on first securing employment, a house and a partner. You cannot just start a family aged twelve: that is mostly prohibited by rules emanating from a legal system underpinned by a constitution. The same goes for many other social activities. Many apparently spontaneous processes in our societies are, in fact, regulated and spurred on by legal rules and norms, and, one of the central theses of this book is that law always originates from some source or form of constitutional law (i.e., the set of fundamental rules that breathes life into the very concept of law and the legal system itself). Ok. That is all well and good for legal behaviour. But surely constitutions cannot ordain the natural world? Getting up in the morning? Constitutions cannot command the sun to rise, can they? Nor can they direct the rivers to flow or the wind to blow? Of course not, but then again, on closer inspection, the pervasive constitutional rules seem to extend even here; they are ultimately the basis for commonly upheld standards of 'time', rules on time indications and time zones, not to mention daylight saving.

Without trying to sing its praises, studying the unpopular popularity of constitutions is well worth exploring. What is it that we are so partial to? Why do even inveterate dictatorships and unpleasant regimes want one? More importantly, why do authoritarian leaders nowadays mostly keep constitutions on record when they come to power? It is, at the very least, quite a risk – a collection of rules like this, pervaded with elevated ideals and lofty ambitions can come back to haunt you; like a scaffold in time it patiently awaits the demise of a tyrant. You need a wide scope to understand this. The significance of constitutions is complex; understanding this requires a clear insight into the many different aspects and meanings of constitutions, as well as a broad overview of them including their history. There are few panoptic bodies of work. Even though scores of legal scholars, political scientists, economists, historians, psychologists, sociologists and many others conduct research into our social and political lives and the role (constitutional) law, leadership arrangements, status and traditions play in this, there are few studies which synthesise these various insights. If you truly want to get to the heart of the significance of constitutions for societies, if you want a panoramic view, you will have to

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

resort to the great works of classical antiquity, such as Aristotle (384–322 BCE), to the Enlightenment thinkers, or the eighteenth-century *Federalist Papers* – the revered series of 85 newspaper articles with which James Madison, Alexander Hamilton and John Jay attempted to persuade the American colonists to endorse their recently adopted constitution: the 'Bible' of modern constitutionalism. There are several reasons for this paucity of overviews. The first has to do with academic *specialisation*. Scholars build on each other's work and specialise, essentially resulting in them learning more and more about less and less. There are few overviews linking insights from various disciplines: writing overviews is simply not very beneficial to advancing an academic career. That does not mean we do not need them. The success of authors of wide-ranging popular science books linking such insights (Fukuyama, Pinker, Diamond, Beard and others) proves that there is broad public demand for work of this kind. And rivers of academic handbooks seem to prove an academic craving for oversight as well.

THE PECULIARITIES OF LEGAL SCHOLARSHIP

The second factor inhibiting a more fundamental examination of constitutions and their proliferation has to do with academic *traditions*. Specialisation has resulted in academic disciplines becoming ever more isolated from one another, focusing as they do on small circles of fellow specialists. Years of lectures, exams, congresses, dinners, meetings and receptions have moulded them into small introverted academic coteries and families with their own customs and language. As much as scholars and university policy makers like to talk of the great blessings of interdisciplinary and multidisciplinary collaboration, in practice this is extremely difficult to achieve. It is not so much because scholars from different disciplines are reluctant to leave their comfort zones but rather because increasing specialisation makes it more and more difficult to understand each other's language.

Legal scholars, in particular, are attached to the traditions of their discipline. Like their colleagues in other disciplines, they live in their own world, with a distinct language and scholarly ways which make it very difficult for others to understand them. An example of the kind of academic questions my colleagues and I formulate might read as follows: 'is the legal protection of citizens in small claims cases sufficient in the light of the relevant legal principles and international human rights?' It is difficult to make head or tail of at first glance and the problem is difficult to observe in the real world. At the very least, you need legal 'augmented reality' glasses to understand what it is all about. Legal scholars are usually not chiefly interested in facts and figures about the adequacy of legal protection when answering esoteric questions of this kind. Assessing adequacy is not considered the most important goal. They are far more likely to examine – often exclusively – *legal* arguments (legal rules, court rulings, 'intangible' matters such as legal principles and other legal scholars' 'authoritative' opinions) considered relevant (in the

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

estimation of their fellow specialists) to arrive at a conclusion. This makes the study of law a very unusual discipline.[51] It is not primarily focused on the core tenets of other academic disciplines – numbers and effects, theories about relationships, like cause and effect, or patterns in processes and relationships between actors and factors. Instead, the legal discipline seems much more interested in the history of ideas, the moral quality of solutions and institutions that arbitrate between groups and individuals (political society and citizens).[52] Legal scholarship is largely inward-looking. The discipline's self-referential nature is as difficult for outsiders to grasp as it is to overcome. Legal scholarship, for instance, still largely dismisses empirical questions (like, how does the 'real' world work, what data are relevant to know about this, where to find and how to measure them?) as '*non-legal*' questions, and therefore 'irrelevant'. Empiricism, or 'real world' questions are mostly not overtly brushed aside: my colleagues and I use clever and elegant detours. Skilled legal scholars, for instance, usually insist on clear conceptions or precise *legal* definitions in discussions. This is an efficient, indirect way of excluding all manner of things not considered relevant – things beyond the legal sphere – from the exchange of ideas. Why are there so many constitutions in the world? 'You first have to have a very precise definition of "constitutions" before you can say anything about that'. Or: 'there are many different kinds of legal classification. It is all a matter of what you call "constitutions"'. Or (typically): 'Ah, the fallacy of figures! Numbers say little…' And so on and so forth. A way of ducking questions by trying to exclude them by definition or delineate them as off bounds. A side effect of this tradition is that legal scholars have become increasingly unintelligible to others and only really understand each other well. Consequently, they often only trust one other and flock together. A group with a distinct style, codes and language – prone to the formal, incomprehensible legal jargon lawyers use, known as *legalese*.[53] As a discipline,

[51] Andrew Coan, a professor at the University of Arizona, pulls no punches in his assessment of constitutional legal scholarship. A great deal of its discourse is not above the level of an amateur debate society, he claims: 'much of normative constitutional theory as it is presently practiced resembles a recreational debating society more than a serious effort to improve the functioning of a massively complex modern society.' He continues: 'If this seems too harsh, consider: who but an academic constitutional theorist would believe that abstractions like writtenness or binding law or popular sovereignty could shed meaningful light on how we should structure our constitutional system, without a rigorous examination of how that system functions in practice? The answer is almost certainly no one, or at least no reasonably informed person with even a modest inkling of the complexity of American government and the society it governs.' Coan 2011, p. 276.

[52] Cf. in the same vein: Law & Versteeg 2011, especially p. 1167.

[53] In his book on legalese, Adam Freedman gives many examples and points out that most of the complexity of legal text is unnecessary and the use of Latin, antiquated words and repetitions are generally superfluous. The use of legalese serves a different goal than conveying meaning or providing clarity: it tries to impose the authority of the law and the magisterial dignity of the author on you. However understanding Freedman is of the cause, his appraisal of its use is merciless: 'What distinguishes legal boilerplate is its combination of archaic terminology and frenzied verbosity, as though it were written by a medieval scribe on crack.' Freedman 2007, p. 22.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

legal scholarship was until recently rather cloistered, with little interest in what outsiders had to say. Non-legal scholars are very aware of this seclusion – and often irritated by it – which legal scholars often fail to understand, as with accusations that their research is unacademic.[54]

Constitutional research is still mainly regarded as something in and of the *legal* sphere, a theme which should chiefly be researched by legal scholars. And because the academic inquiry into constitutions is still predominantly the reserve of legal scholarship, it inherits its characteristics, its preoccupations and traditions.

These peculiarities extend far beyond legal scholars' language and methods. There is also something singular about their experience of reality. Their academic education and association with other legal scholars make many of them identify themselves with the imagined world of law. Quite a few legal scholars regard the world of law as *real*. They seem no longer capable of grasping its constructed and imagined essence. In fact, rather a number of legal scholars find the metaphysical world of law *more real* than physical reality – they believe in it. One of the greatest modern legal philosophers, Ronald Dworkin, impressed many legal scholars around the world with his classic work *Law's Empire*. In the opening of the book, he loftily elucidates what he and many classically trained legal scholars make of reality:

> We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things [...] We are the subjects of law's empire, liegeman to its methods and ideals, bound in spirit while we debate what we must therefore do.[55]

Both the physical and legal world are 'real' – to Dworkin's mind – but the legal world is actually *more* important. It more or less precedes reality, it determines who we are, how we are connected, and thus what we *have* to do. This is, at the very least, a curious reversal of reality and fiction, but one that many legal scholars barely notice – in fact, most of them will feel quite at home with it. It is probably the reason why legal scholars hold so little brief for empiricism. Reality is hardly an interesting object of study because it is merely a subject of legal reality in the *realm of law*. In the eyes of many legal scholars, posing questions about real world effects

[54] Stolker gives an illustrating overview of the characteristics of academic legal scholarship interspersed with the often witty criticism of other academic disciplines on law as a 'non-science', cf. Stolker 2014, Section 3.2 (p. 89–101 and Chapter 6 [p. 200–230]). Stolker, for instance, cites Paul Samuelson, who believes that faculties of law do not really belong at universities, because they are not academic. The relation between universities and their law school, according to Samuelson, often amounts to little more than a shared address. The ever-astute American sociologist and economist Thorstein Veblen (1857–1929) is even more scathing, saying that 'in point of substantial merit the law school belongs in the modern university no more than a school of fencing or dancing.' Veblen 2000, p. 155 cited by Stolker 2014, p. 93.

[55] Dworkin 1998 (orig. 1986), p. VII.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

of the law, as legal sociologists or legal anthropologists sometimes do, is to turn the matter on its head.[56] *That* is the wrong question; reality cannot instruct the law, let alone tell you anything about how the law works and the way the real world *ought* to conform to its standards.

The insularity of legal scholarship means that constitutional scholarship, which is currently still largely the domain of legal scholars, is still a relatively closed and self-contained world, with its own language and realities, which other people and other realities, approaches or (academic) perspectives do not have quick or easy access to. This detachment is sometimes due to a lack of interest and sometimes to a fear of the unfamiliar. Whatever the motive, it obviously does not further our understanding of constitutions as a contemporary phenomenon.

THE POWER OF EVIDENCE

Limited interest and tunnel vision are not the only constraints. For a great many people, there is a clear-cut reason for the existence of so many constitutions. You do not have to spend ages studying the phenomenon as it is the simple consequence of the laws of nature. The laws of our existence impel us to follow this 'constitutional' course, which we have only really come to understand in the last couple of hundred years since the Enlightenment. As is the case with other scientific discoveries, such as the law of gravity or relativity theory, we have increasingly come to understand which principles govern human societies. Constitutions are no more and no less than the outcome of natural laws governing human relationships – they express universally applicable principles. At least, in the opinion of many legal scholars. The idea of natural law as some universally applicable higher and better law, begotten by nature and rooted in the 'natural order' of things, is widespread nowadays. It is not all that surprising: its universality resonates and appeals to our shared morality. From a natural law perspective, constitutional proliferation is self-evident: it is evidence of the laws of nature at work.

In the aftermath of the Second World War, a period in which appalling human rights violations were perpetrated on an immense scale, natural rights thinking – which has been around since the Enlightenment – has assumed great importance. As states had proven unable to protect their citizens' human rights, natural law thinking took on a new dimension. What had failed after the First World War was achieved after the Second World War – global recognition of human rights was affected in the form of the Universal Declaration of Human Rights. The Declaration's significance is often downplayed by pointing out that it is not legally binding. You cannot take a case based on it to court in most countries and neither do citizens have recourse to

[56] Stolker even observes a certain disdain among legal scholars for legal sociologists and the like, certainly when it comes to whether the sociology of law should play a role in law school curricula. Stolker 2014, p. 271–272.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

some world court. Yet this qualification fails to recognise the Declaration's special character. It was a unique event: in 1948 the *entire* world signed up to a particular portrayal of humankind and an associated articulation of the role of law and organisation of government. There is a worldwide embrace and recognition of the dictates of 'natural law' expressed as the *universal truth* that every human has inherent dignity and inalienable rights.

> Preamble
>
> Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, [...]
>
> Article 1
>
> All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

You would have to be quite hard-hearted not to be touched by a text like this. The meaning conveyed by the words is, of course, not correct in any empirical sense. Looking at the real world, it is clear to see that not everyone is born free, equal, endowed with an equal amount of reason and conscience, or with the ability to behave fraternally towards their fellow human beings. But that is not the point; the text is not about objective facts, but about *truths*. It is a modern version of the preamble to the American Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed [...].

This world view, instantly recognisable to Westerners because of the Christian[57] and historical echo of their own constitutional and political development, has come to dominate the world over the past seventy years. It has been so successful that we have taken the idea of natural inalienable rights and governments requiring the consent of the ruled as really being *true* and consider it as the truth and part of reality. Even if it does not correspond to reality. Modern natural law thinking considers the rapid proliferation of constitutions, as vehicles of these values and truths, as no more than a logical and evident outcome. The only thing worth studying is the countries, groups and individuals who do *not* yet understand human history's intentions and biddings revealed to them.

[57] Siedentop 2014, in particular Chapter 16 (*Natural Law and Natural Rights*) and the final chapter (*Epilogue: Christianity and Secularism*).

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

THE STORY OF CONSTITUTIONS

In accounts of the popularity of constitutions we are not only confronted with 'stories', but with many different kinds of creeds and perceptions of the world, ideas on the ends of history as well as humankind. Ideas about living together, the goal of human cooperation, society and the organisation of leadership all have roots extending far beyond the Second World War. Bequeathed over the centuries, ideas and ideologies of this kind have become an increasingly fixed part of our collective consciousness.[58] A contingent historical development that has made us increasingly amenable to the story of constitutions. That is probably where we must look to really understand why almost the entire world has adopted constitutions. Economic, politico-strategic or ideological explanations for growth – as given by Hirschl – provide a theoretical answer to *how* the constitutional explosion could have taken place but does not conclusively account for *why* this is so. For that we do not need to consult stories about the constitution (Hirschl), but rather make an inquiry into the story of constitutions themselves. Where does the story come from, why is it such a strong story, why is it so convincing?

That requires looking beyond the commonly held view that puts the horizon of constitutionally relevant ideas in the age of Enlightenment and that traces the roots of constitutions and their conception to the end of the Middle Ages, the eve of the emergence of modern states. If we really want to know where constitutions stem from, we need to delve much deeper, and start our search – in accordance with a time-honoured tradition in constitutional theory – by looking at human nature and an inquiry into human beings as social animals.[59] Were the sixteenth and seventeenth century contract philosophers correct in surmising that over the course of our evolution we developed characteristics and properties which make us humans amenable to abstract notions like public morality, law, social classes, religion and – in a broader context – something like constitutions? Do mechanisms like constitutions, as sets of fundamental rules instituting leadership and social organisation, perhaps help us overcome inherent limitations to human cooperation? Constitutional rules do indeed seem to contain elements that enable us to cooperate on a large-scale far exceeding our neurobiological limits. Constitutions largely consist of clever mixes of elements that facilitate the two pillars of social cooperation: trust[60] and recognition.[61] They facilitate trust by making strangers' behaviour more predictable.

[58] Alford, Funk and Hibbing demonstrated in 2005 that ideologies are even partially genetically transferable. Alford, Funk & Hibbing 2005, especially p. 158–161 and p. 163.

[59] 'Everyone has a theory of human nature', as Steven Pinker observes in his book *The Blank Slate*. Pinker 2003, p. 1.

[60] Trust here is simply understood as what Frans de Waal defines as 'reliance on the other's truthfulness or cooperation, or at least the expectation that the other won't dupe you.' De Waal 2019, p. 167.

[61] Recognition denotes the process of a group assigning a role or identity to a group member. People are social beings and recognition is fundamental to human cooperation, and even

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

Abstract institutions such as law decrease uncertainty, anxiety and distrust – all of which stand in the way of large-scale human cooperation. Constitutional rules also grease the wheels of human cooperation by providing convincing common narratives about the reason for cooperation, ('good') leadership and the acceptance of authority. On top of that, constitutions confer *recognition* by defining a community – establishing the 'we':[62] the story of the group's raison d'être in relation to other groups as well as group members' roles, standing and claims within the group. Most constitutions are at heart, compelling narratives that use the elixirs of trust and recognition to enable efficient and sustainable mass cooperation; in many ways this is a kind of holy grail for human societies in a complex, globalised world; social mobilisation on the cheap. Seen in this light, it is quite understandable that just about every country in the world has started using this magic potion.

It is one thing knowing that constitutions are attractive and therefore often used, and it is quite another knowing whether they 'work' or are 'effective'. Is the constitutional magic potion a drug, a homoeopathic concoction or a real medicine? Nowadays much attention is rightly paid to the question as to whether constitutions really work. Many of the 189 (or 192) constitutions known to us are nominal or 'sham constitutions'.[63] Documents such as these are not much more than a fig leaf for regimes that fail to respect the letter and spirit of their constitutions. It is difficult to say how many sham constitutions there are, just as it is difficult to determine whether a democracy is 'genuine' or merely democratic in name. Recent research by Law and Versteeg, however, shows that there are quite a few of these sham constitutions around.[64]

A constitution that does not function, which is not 'lived', is, of course, mere fiction, no more than a tall tale. That is not how it is supposed to be. But, how do you ensure that the text of a constitution is observed? Many constitutional colleagues, including myself, tend to rush headlong into technocratic solutions. Which instrument or mechanism can we use to enforce and secure compliance? The solutions proffered to tackle non-compliance with constitutional norms are often along the lines of transnational constitutions or constitutional (supervisory) mechanisms. It is questionable whether this really helps. In a world in which we attach great importance to states' sovereignty, including peoples' right to self-determination and non-intervention in other states' affairs, solutions entailing any kind of intervention by other states hold

to human life. In Charles Taylor's words: 'our identity is partly shaped by recognition or its absence, often by the misrecognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.' Taylor 1994, especially p. 25.

[62] A constant element of all constitutional imagination is the story of the 'we'. Cf. Torres and Guinier under the heading of section II: *'The Constitutional Imaginary: The Constitution As The Story Of Us'*. Torres & Guinier 2012, notably p. 1057.

[63] Law & Versteeg 2013.

[64] *Ibid.*, 2013.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

little promise. Yet, there is more. This 'mechanical' kind of solution also partially fails to recognise how constitutions work. I hope to demonstrate that a constitutional story works not merely because it is legally anchored with checks and balances, but because it 'connects' with a society as a source of meaning and as an organisational mechanism. The why and how of the functioning of constitutional norms can be found largely in the story. A good constitution works by persuasion: by winning the hearts and minds of the community it creates and regulates. But how do you achieve a 'good' constitution which functions well, is persuasive and hence complied with? This is not a question of constitutional nuts and bolts, techniques or institutions. According to the former British judge and Cambridge professor Sir John Laws:

> The "good Constitution" in a democratic country seeks to balance the morality of law and the morality of government. The good Constitution can be considered at the levels of abstraction of the relationship to human rights or of the progression from parliamentary to constitutional supremacy. But [perhaps] the level of the balance between the two moralities is more fruitful. The morality of law focuses on individual rights, the morality of government on the public interest. The constant task of the Constitution is to achieve an accommodation by restraint on the part of both the judges and the executive.[65]

A *good* constitution is primarily an appeal – a story we must experience and tell each other time and again, as well as a call that we confirm with our (institutional) behaviour. Judges, laws, principles and institutions are *part* of this story, but they are not the story itself. And it is this story, the whole of it, we are going to explore in this book.

WHO IS THIS BOOK FOR?

The aim of this book is an exploration that everyone can join without much prior knowledge or legal expertise. A voyage of discovery written in a way that allows many to jump aboard, I hope. The book itself is a story. Not only to entice the reader and share my fascination with the phenomenon, but also to elucidate something: how we deal with stories, not only in a literary context, but also in law, politics, history and other contexts. For this reason, I have also tried to put the story of constitutions in a narrative form in several places. It is a narrative about a journey and at the same time an experiment in making the medium (this book) part of the message (the story of constitutions). There are perils to this endeavour: taking this path risks making the content unrecognisable both to specialists and perhaps to general interested readers. Insisting on the narrative character of constitutions and a taste for belles-lettres may put off the more traditional specialists in the field. The style of the book may easily be mistaken for frivolousness, nonchalance or theatricality. It is certainly not my intention.

This book was written in the first place for students. Not necessarily as terrifying mandatory reading material for law students, but for curious people who want to

[65] Laws 2012, p. 567.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

learn something or know more. Someone like myself at the age of nineteen in that cavernous lecture hall at my university; the person who I still am. I know that this book is difficult to fit into current legal curricula, which pay more attention to legal aspects of constitutions. What is the legal effect of their provisions, how are they applied, how do courts treat them, etc.? Wide-ranging exploits like this one do not help aspiring lawyers win cases or become top dog in the firm. Legal curricula are already brim-full as they are, leaving little space for broad reflections on theories, the history of ideas or results of recent research on constitutional activities from other fields of academic inquiry. But perhaps we ought to re-evaluate these curricula – is this how we want academic legal studies to be? I for one believe that there is plenty of room for improvement. Academic legal research has developed in interesting ways over recent decades bringing many new insights: law students should hear of this. This would require my colleagues' assistance at home and abroad, even though this will not come easily. They, like me, are products of their classical education in the law and their law schools' traditional curricula that have a more or less fixed setup worldwide. Undoubtedly this book's approach will rub some of them up the wrong way because it is so explicitly unconventional. It contains few legal definitions and traditional constitutional debates but takes many excursions to various exotic non-legal disciplines and contains next to nothing about the role of judges, constitutional review, constitutional interpretation or the principle of legality. I do hope they will not take offence, and – most of all – not take it personally.

René Margritte (1898–1967), *Ceci n'est pas une pipe* ('La trahison des images' 1928–1929)

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

'Ceci, n'est pas une pipe', wrote the Belgian painter René Margritte in the subtitle to his painting. 'This is not a pipe' under a picture of a pipe in his painting 'La trahison des images' (The Treachery of Images). True to this confusing motto, this book is not a 'legal' book even though it deals with law and constitutional law. It is about the phenomenon we call constitutions and law, about the worlds they evoke and express, but it is not of that world or that world itself – not in a legal way anyway. This makes it, I believe, also accessible for students and scholars from other academic disciplines. I have tried to turn myself (and my colleagues) minds inside out in order for other to understand what goes on in lawyers' minds when they study or apply the law. How their world view relates to the real world, and how real-world views and real-world actions are shaped or affected by constitutional law and law in return.

This book might strive to be highly accessible, with an easy-going style in an attempt to appeal to a broad audience, yet its claims must still be substantiated. The price of a broad perspective is a deluge of sources. Most of them have been demoted and relegated to the endnotes, but I could not avoid including some substantiation in the main text. I have usually presented them as relatively short quotations. This enables the readers to assess the credibility of the argument or analysis for themselves with more ease than from a general reference to a book or article mired somewhere deep in the appendices.

I spent a great deal of time agonising over whether to banish the many quotes to the recesses of the endnotes altogether. In the end, I decided to do so only partially. The quotes in the text are not only substantiation, but also expressive voices, views with timbres revealing something of an author's character, stylistic enticements, clever and well-crafted arguments which win the reader over – precisely because of their wording. They are also part of this story, with their own role.

The book's setup is straightforward. It simply follows the trail of basic questions on where, whence, why, what and how, as they appear in our exploration. We shall look at the proliferation of constitutions in Part I, the history of constitutions in Part II, the concept and typology of constitutions in Part III, their effects in Part IV and finally, at *how* the imagined reality of constitutions works in Part V.

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press

https://doi.org/10.1017/9781009385084.002 Published online by Cambridge University Press