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Edited by Denis J. Galligan and Mila Versteeg

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PART I

Introduction

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Theoretical Perspectives on the Social and Political
Foundations of Constitutions*Denis J. Galligan and Mila Versteeg*

1.1 INTRODUCTION

The last half-century has been a period of unprecedented constitution-making. New constitutions arose from the ashes of World War II, some freely, others – such as West Germany and Japan – under the direction of the Allies. A second wave of constitutions followed the decolonization of Africa, Asia, the Pacific, and the Middle East, where in countries like Nigeria and Micronesia the colonial powers presided over the drafting process. The collapse of communism in Central and Eastern Europe in 1989 allowed more than twenty nations to rediscover their constitutional past, or, where there was little past to rediscover, to take the first steps toward entering the international community. These were the main constitutional developments in recent years, but not the only ones: South Africa led the way in the 1990s for a further round of constitutional revision in southern and central Africa, followed by various nations in South America and Asia. Most recently, new constitutions are being written in the wake of popular uprisings in North Africa and the Middle East and following foreign invasion in the cases of Iraq and Afghanistan.

These developments have been accompanied by a new generation of constitutional law scholarship dedicated to studying constitutions in their social and political context from the perspective of the social sciences. Traditional approaches have tended to follow one or other of two courses, sometimes analyzing constitutional doctrines either of particular constitutions or comparatively, at other times taking a philosophical approach to constitutional ideas and concepts. Without wishing to draw too sharp a line between the different approaches, because doctrinal and

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philosophical aspects of constitutions are also relevant to a social science analysis, our purpose in this collection of essays is to contribute to the third approach: the social and political understanding of constitutions. In doing so, we have been guided by several questions: (1) what is the character of constitutions as social phenomena and what functions and purposes do they serve; (2) how are constitutions made; (3) what are the contents of constitutions and what are the main influences on content; and (4) what is meant by success and under what conditions are constitutions successful? Complete answers to each of these questions would fill a volume or more, so the analysis here is bound to be partial and contingent on the conditions of particular nations, but nevertheless of utility in advancing our understanding of constitutions.

Interest in the social and political foundations of constitutions can be traced back to the classic texts of David Hume, Adam Smith, Thomas Hobbes, and Jeremy Bentham, and even earlier to John of Salisbury, to name merely a few within the English and Scottish tradition, to which may be added names such as Montesquieu and de Tocqueville, James Madison, and Thomas Jefferson, without mentioning numerous other traditions in Europe and beyond. The present volume continues the tradition of studying constitutions as social and political phenomena, as part of the fabric of nations, and applies it to a range of issues of contemporary interest. The disciplinary approaches are those of the social sciences, including law, political science, sociology, history, and economics. The methods of research are several and diverse: comparative across constitutions, quantitative, case studies of specific issues, or historical accounts of ideas and concepts. While the contributions employ a variety of methods, reflecting their authors' backgrounds, disciplines, and interests, the common purpose is to identify different types of constitutional systems and to show, through empirical study, aspects of their social and political foundations. This volume is just a first step in such an undertaking. Considering there are more than two hundred national constitutions, not to mention the numerous state constitutions in federal systems, or the emerging regional constitutional orders such as the European Union, the scope for research has no bounds and many questions remain unanswered.

Aside from this Introduction, the volume consists of two parts. Essays in the first part offer a variety of theoretical perspectives on the social and political foundations of constitutions, which include constitutions as coordination devices, as mission statements, as social contracts, and as transnational documents, among other things. The second part consists of sixteen case studies of particular constitutions. The purpose of the case studies is to bring to life the theoretical perspectives discussed in the first part of the collection, while also opening up new ideas and providing fresh insights.

We have selected the case studies so that they represent a range of different conditions under which constitutions are written. Constitutions are often written in the wake of crisis or under an exceptional circumstance of some sort (Elster 1995, 370; Sajo 1999). Among such crises are revolutions, decolonization, regime change, war,

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TABLE 1.1 *Selection of Case Studies*

| Constitution | Region | Legal System | Circumstances |
|------------------|---------------------------------|--------------|----------------------------------|
| Japan 1947 | Asia | Civil law | Postwar occupation |
| Portugal 1976 | Western Europe | Civil law | Democratic transition |
| Ireland 1922 | Western Europe | Common law | Independence |
| Bulgaria | Eastern Europe | Civil law | Postcommunist transition |
| Micronesia | Pacific | Common law | Postcolonial |
| New Zealand 1993 | Oceania | Common law | No apparent transition |
| Nigeria 1960 | Africa | Common law | Postcolonial transition |
| Egypt 1972 | North Africa and Middle East | Civil law | Overthrow of autocratic order |
| Argentina | Latin America | Civil law | Democratic transition |
| European Union | Europe | n/a | n/a |
| Israel | Middle East | Common law | Democratic transition |
| Iceland 2011 | Western Europe | Civil law | Economic crisis |
| South Sudan 2011 | Africa | Common law | Independence |
| Iran 1979 | North Africa and Middle East | Civil Law | Post-revolution |
| Romania | Eastern Europe | Civil law | Postcommunist transition |
| Venezuela 1999 | Latin America | Civil law | Political transition |
| Ecuador 2008 | Latin America | Civil law | Political transition |
| Bolivia 2009 | Latin America | Civil law | Political transition |

and economic downturns. Many of the constitutions studied in this volume are written in times of major transition, such as: independence, often from a colonial power, such as in Micronesia, Nigeria, and South Sudan; democratic transitions, as in Argentina and Portugal; and drastic transition from a communist system to a democracy, as in Bulgaria and Romania. Other constitutions, especially those not confined to one document, such as New Zealand, Israel, and the United Kingdom, change as ideas and circumstances change rather than in reaction to a momentous event. The conditions under which the constitution is written represent one of the variables in selecting the sixteen case studies in this collection. The case studies are also geographically diverse, exemplify different legal traditions, and apply to countries of varied size and significance, ranging from tiny Micronesia to populous Nigeria. The time scale runs from the early twentieth century in the case of Ireland (1922), through the era of colonial independence as in Nigeria (1960) and Micronesia (1986), to some of the most recent constitutional experiments, of which South Sudan (2011) and Iceland (2011) are examples. Some of the constitutions considered here, such as those of Ireland, Nigeria, and Egypt have since been replaced, although their legacy in setting the foundation for later constitutions is plain (Brady 2013). We have tried to identify constitutions that exemplify a pattern or wider set of circumstances. The constitution of Nigeria (1960) is fairly typical of the British postcolonial model (Parkinson

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2013). Others, such as the constitutions of Bulgaria and Romania, display the context of constitution-making after the collapse of Soviet domination, while the constitution of Iceland (2011) reflects an unusual determination for popular involvement in constitution-making. Finally, we exclude those constitutions that have received disproportionate attention in the comparative constitutional law literature in recent years, such as the constitutions of the United States, Canada, South Africa, Germany, and India. Table 1.1 lists the different constitutions studied in this volume, as well as the circumstances under which they were made, the legal system they represent, and the geographic region to which they belong.

In the remainder of this chapter, the editors provide an overview and analysis of the theoretical issues discussed in the following chapters. We have endeavored wherever possible to integrate the findings from the case studies and to show how they confirm, illuminate, or question our understanding of these issues.

1.2 WHAT IS A CONSTITUTION?

A constitution establishes a system of government, defines the powers and functions of its institutions, provides substantive limits on its operation, and regulates relations between institutions and the people.¹ In doing so, constitutions *constrain* government: they generate a set of inviolable principles to which future lawmaking and government activity must conform. But constitutions also *enable* government, by empowering institutions and, in some cases, by mandating them to promote social welfare. Although use of the term “constitution” in this way is relatively recent, the very idea of government has always included some notion, elementary though it may be, of a constitution – that is, of rules creating, empowering, and limiting government institutions (Stourzh 1988; Sartori 1962). Constitutions are now expected to be in written form and usually contained in a single document, although even today they are not always written and not necessarily contained in one document. Nevertheless, the standard practice across the nations of the world, with just a few exceptions, is to have a single written constitutional document that sets out these basic functions.

This does not mean that the document includes all matters of constitutional concern, or that all constitutional matters can be resolved by reference only to the document. A brief encounter with any constitution will soon reveal that around the formal document arise other ideas, conventions, and practices, which influence its interpretation or even augment, modify, or render obsolete some of its provisions.²

¹ For other definitions of what is a constitution, see, for example, Dicey (1915: 22); King (2007: 3), Llewellyn (1934: 3), Palmer (2006: 592–593), Young (2007: 411); Erdos (2013); Elkins et al. (2009: 36–40).

² For the idea that conventions emerge around the written document, see also Llewellyn 1934: 3; Strauss 1996).

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The success and endurance of Japan's constitution might be partly attributable to the ability of institutions, in this case the Supreme Court in its restrained approach to judicial review of legislation, to marginalize certain of the written provisions (Law 2013). The need to take account of informal constitutional features is the first indication that, while constitutions are distinct and separate social institutions in stating the rules of government, at the same time they interact with the social and political context around them. They present to the world two faces, one independent and autonomous, the other interdependent and interlocking with the social and political context. The interplay of the two aspects is the key to understanding constitutions as social institutions.

Independent and autonomous constitutions are characterized as a set of rules and principles on the basis of which government is conducted and its actions explained and justified or criticized and condemned. Administrative, executive, and legislative officials derive their powers from the constitution and, when challenged, have to justify their actions in accordance with it. Citizens, groups, and associations use the constitution to make claims against government bodies and officials, sometimes restraining action, at other times demanding it. Lawyers spend time advising on and arguing about what the constitution means, while the judges of constitutional courts enjoy high prestige for having the last say on constitutional questions, which for the nation are often questions of great moment. Once constitutions are viewed as interdependent and interlocking with the social and political context, they become both more complex and more interesting. On one approach constitutions are reasonably self-contained and self-referential, where the task of lawyers and judges is to interpret them according to legal doctrine and precedent. It soon becomes plain, however, that arguing over, interpreting, and ruling authoritatively on constitutions involves complex social processes that unavoidably spill over into the wider social and political context, raising questions about relations between that context and the written text. The work of lawyers and judges in interpreting the rules and principles of the constitution has long attracted the interest of social scientists, so that there is now available an extensive body of both quantitative and qualitative research.³ From there it is a short step to wider and deeper questions about the very nature of constitutions, their purposes, their contents, how they come about, and their effectiveness. These are the questions with which many scholars and researchers are now preoccupied; they are also the questions with which several of our contributors grapple.

To summarize, it soon becomes clear from the study of constitutions in their social context that they are more than just written documents declaring the framework of government; they are also social institutions interacting with society in complex ways. In the remainder of this chapter, we examine further this interaction

³ See, for example, Martin and Quinn (2002); Ginsburg and Moustafa (2008); Garoupa (2011).

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and highlight the nature and function of constitutions as social institutions, deeply rooted in, and intertwined with, particular societies. Our examination is centered on the following issues: (1) constitutions as expressions of values; (2) constitutions as manifestations of power; (3) constitutions as coordinating devices; and (4) constitutions as contracts. We show how these themes relate to each other, how they illuminate the case studies, and how the case studies in turn often provide an empirical grounding for the various theories.

1.3 CONSTITUTIONS AS EXPRESSIONS OF VALUES

A cursory reading of constitutions shows they are steeped in values. The values are many and various: some reflect a nation's "core, constitutive political commitments" and identity (J. King 2013); some reflect international or transnational norms and standards (Goderis and Versteeg 2013); and others express shared notions, such as liberty and democracy (Galligan 2013b). Values appear throughout the text, defining the content and distinguishing one nation from another. However, constitutions are not only declarations of values, and as we shall see in the following discussion, there may be tensions between aspirations and ideals, and other goals. The successful coordination of society and politics, which is or ought to be a major goal of any constitution, may require an adjustment or even compromise of aspirations and ideals. Some constitutions are the outcome of power struggles among the nation's elites, thus reflecting interests and positions that defeat or diminish idealistic goals and values (Hirschl 2013). Constitutions plainly serve diverse ends and perform various functions, yet they are invariably also a declaration of values and aspirations – an aspect we shall now consider in more detail.

1.3.1 *National Values, Identity, and Mission Statements*

National values are brought out in a constitution's dealing with the nation's past, as well as its hopes and aspirations for the future. Constitutions often look back to past events and aim to resolve past problems (Sajo 1999). They are likely to reflect shared experiences, such as Ireland's history of oppression by England (Brady 2013), Japan's subjection to a militarist government and devastation by war (Law 2013), and Hungary's liberation from the Soviet Union's domination (Arato and Miklosi 2010). How a constitution presents the ideals and aspirations of a society matters, as became evident in the depth of feeling shown and the level of controversy aroused over the wording of the preamble to the proposed 2004 constitution of the European Union (EU). At stake are not just the values of the EU but also its identity. National identity as well as national values were on the mind of the Hungarian government when, with the support of the parliament, it felt the need to rewrite the preamble

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to the Hungarian constitution, which was transformed into the Fundamental Law. The battle over whether the postrevolutionary Iranian Constitution should declare a “Republic,” an “Islamic Republic,” or a “Democratic Islamic Republic” reflects a similar search for national identity (Hass 2013).

A nation’s history can feature in constitutions as a source of inspiration; it can also be something to overcome and avoid in the future. Several nations of Central and Eastern Europe, upon liberation from the Soviet yoke in 1989, were able to hark back to, and find guidance in, older constitutional traditions and the ideas and ideals informing them. Something similar is happening in the context of the Arab Spring, where constitution-makers are drawing on their own constitutional history in an attempt to design a new future (Brown 2012). But, as the study of New Zealand highlights, constitutional choices are often directed at remedying the past or escaping from its legacy. In this case, the reforms of the early 1990s “had their roots in an aversive reaction against the activities and outlook of” the prime minister, who had displayed “woeful disregard for traditional conventional understandings of how public power should be exercised” (Erdos 2013: 334). Likewise, the 1853 Argentine constitution was preoccupied with creating order and stability because of its previous experience with excessive disorder and instability (Schor 2013), while the Romanian postcommunist constitution was aimed at overcoming the communist past (Parau 2013). Other examples are the 1996 South African Constitution, which aims to overcome its apartheid past by emphasizing international rights and authorizing its constitutional court to take account of foreign and international law (Klug 2000), and the 1949 German Constitution, which, in the wake of a totalitarian regime and the dark shadow of the Holocaust, proclaims “human dignity” as one of its basic principles.⁴ Whether or not a constitution cherishes the past or abhors it, there is no escape, to paraphrase Justice Oliver Wendell Holmes, from “the stories of the nation’s development through many centuries” (Holmes 1881: 1–2).

In creating a system of government and dictating its powers and responsibilities, constitutions are also forward-looking, stating ideas and ideals and articulating commitments as to how government will be conducted in the future (Elster 1993, Holmes 1995, Sadurski 2009). By the very process of empowering government and defining its limits, constitutions inherently rely on ideals, principles, and values meant to guide and contain the conduct of government not just today but into the future. Features such as the sovereignty of the people, representative government, and civil, political, and socioeconomic rights are statements about the values of the nation for the future.

“Core, constitutive political commitments of the community” (J. King 2013: 73) are also commonly stated explicitly in constitutions. According to Jeff King, constitutions

⁴ The Basic Law of the Federal Government of Germany, 1949, art. 1.

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are like “mission statements,” although the notion is more at home in a business context and novel to constitutions. He continues: “A constitution that exemplifies such a function will express the political ideas that animate the constitution and polity more broadly, including the type of government it represents, the rights of citizens and people, and its conception of citizenship and the values it seeks to respect in its state planning” (J. King 2013: 81). While we should urge caution against sharp distinctions between constitutions that contain mission statements and those that do not, many constitutions do explicitly set out goals and aspirations, with the preamble serving as a useful vehicle for the purpose.

The EU’s *Consolidated Version of the Treaty on European Union* 2011, although not strictly a constitution, is typical of numerous constitutions: it draws inspiration from the cultural, religious, and humanist inheritance of Europe, the inviolable and inalienable rights of the human person, freedom, democracy, equality, and the rule of law; it confirms attachment to those values and to fundamental social rights; and it expresses the desire to deepen the solidarity between the peoples of Europe while respecting their history, culture, and traditions (Walker 2013). Similarly, the 2011 interim constitution of South Sudan reflects the nation’s Christian heritage by paying tribute to the “[a]lmighty God for giving the people of South Sudan the wisdom and courage to determine their destiny and future through a free, transparent, and peaceful referendum in accordance with the provisions of the Comprehensive Peace Agreement” (Cope 2013: 315).

The idea that constitutions contain the “core, constitutive political commitments of the community,” whether as an explicit mission statement or as implicit in the substantive provisions, fits best in the context of democratic and liberal nations, where it may be presumed that the founders intend the constitution to be taken seriously and implemented by suitable institutions of government. But mission statements are not confined to constitutions of liberal and democratic nations and often appear in those of anocratic and autocratic nations. The 1978 constitution of the People’s Republic of China contains a six-page preamble that celebrates the achievements of the glorious leader Mao Zedong, the “proletarian revolution,” and “socialism.”⁵ Although this seems an accurate reflection of Mao’s mission, it is an open question whether mission statements in authoritarian constitutions are seriously intended, or whether there is a disparity between sentiment and reality (Law and Versteeg 2013).

In focusing on the expressive and aspirational aspects of constitutions, King adds a dimension to the study of constitutions that has largely escaped attention and research.⁶ However, we should be careful to distinguish between the fact that mission statements are commonly included in constitutions and the claim that they

⁵ Constitution of the People’s Republic of China 1978, Preamble.

⁶ For studies that highlight this perspective, see Jacobssohn (2010) and Breslin (2007).