Prologue

Many prologues start off with an account of the special moment when the author came by the idea for the book. Often, during a sublime event like a gondola ride through Venice, a flash of inspiration when listening to Béla Bartók's *Bluebeard's Castle* at the Royal Albert Hall or some other momentous occasion that appeals to the imagination. In this sense, this book is bound to disappoint. I always get ideas – probably like most other people – at the most inconvenient moments, usually when I have been running for about two kilometres and have another ten to go. By the time I finally get home, I have often forgotten what the big idea was all about. I do not recall exactly when I distilled the plan for this enterprise, but it must have been a long time ago. For quite some time, I have had the feeling that something was not quite right – something in my field of study kept eluding me; things just did not add up. An uneasy – even unsettling – feeling because confronting your ignorance is quite uncomfortable if you have, like me, been working in academia for more than 30 years. Admitting: 'I just don't get it' is hard and makes you vulnerable. Still …

Law is ubiquitous; there are contracts, governments, sanctions and constitutions, and we behave as though it is the most natural thing in the world. But where does it all come from? During my studies, my professors gave a raft of explanations reminiscent of church sermons. Judging from their lectures and talks, it seemed history apparently had a design for humanity and – as we became wiser and more civilised over the course of the ages – we had increased our understanding of how to organise and behave ourselves. Law, democracy and constitutions were all products of a linear history (of ideas and civilisation) that had brought us *now* to the zenith of human development. Study and better understanding might even bring us further. This mantra was repeated time and again, until after several years I, too, started to half believe it. Were it not that as a student I happened to mix mostly with economists and students of literature, sociology and history. They had pertinent questions about these explanations of legal phenomena. However hard I tried, I could

not begin giving them an answer as to why it was good to have a constitution or a legal system; why nearly the whole world had these institutions; what the economic, political or social consequences of constitutional systems were; whether it mattered which kind of systems were in place and so on. Fundamental, academic questions to which my discipline, constitutional law, seemed shy of an answer. What kind of academic discipline is unable to answer such simple questions and does not seem to be interested in them?

I later found solace with professional academic lawyers. They convinced me that it was all due to the ignominious underestimation of our discipline. The academic world has great difficulty understanding the true contribution of legal scholars and the significant and venerable interest they represent; legal scholars have an affinity with the greater dimensions of many issues – justice, legal principles and the like; we legal scholars are in close contact with a very broad constellation of principles and values that underpin our way of life. Who would not like to think this of themselves?

After my studies, I felt like an ugly duckling being warmly welcomed into the ranks of these majestic judicial swans. But after years in their midst and a career in constitutional law, the simple fundamental questions came back to haunt me. Basic questions, like, how did we end up in a world of constitutions, a world aspiring to be ruled by law? Where does this all come from? What consequences does this have?

A few years ago, I felt I finally needed to do something, whatever the risk or reputational damage. You cannot spend your entire life applying yourself to your academic comfort zone of safe research bets and innumerable meetings. Which is why I started writing this book exactly a year ago, with not much more than a hunch and a title to go on. It was to become one of the most enjoyable projects I have ever embarked upon. Not so much because I found all the answers to the fundamental questions about constitutions – I might have found a few – but because I encountered other questions and insights, both novel and familiar. Many of these were issues, themes and overall cheerful chatter with which my fellow students Els, Gosuin, Patricia, Wim, Rob, Ed, Monica, Jan, the 'Hanses', Margreet, Michel, Franke, Marco, Marinus and I enjoyed our 'fantabulous' adolescence almost forty years ago. For which I am grateful to them, besides everything else.

I am deeply indebted to the University of Leiden's wonderful Department of Constitutional and Administrative Law, which exempted me from teaching in a hectic academic year, so that I could write a book, which may not be of any use for teaching anyhow. But everyone did their bit without complaint; it is this kind of solidarity that makes our talented young group so special. I would particularly like to thank my colleagues Patricia Popelier (Professor of Public Law at the University of Antwerp), Olaf van Vliet (Professor of Social Welfare and Labour Market Policy in an International Perspective at the University of Leiden), Henk te Velde (Professor of Dutch History at the University of Leiden), Willem van Boom (Professor of Civil law at the University of Leiden at the time), Geerten Boogaard and Jerfi Uzman (professors of Constitutional Law at the University of Amsterdam and Leiden respectively),

Geerten Waling (postdoctoral researcher of Political History and Constitutional Law at the University of Leiden) and Ali Mohammad (PhD student in Constitutional and Administrative Law at the University of Leiden) for their hard work on the rough manuscript of this book at a time when it was far from finished. Seeing things through different lenses was very important. Georgina Kuipers (PhD student in Constitutional and Administrative Law) and Hugo de Vos (PhD student in Public Administration) assisted my research into the convergence of constitutions across the world. It was an immense job that had to be conducted in a limited period of time and produced interesting preliminary results. Thank you. I would also like to extend my gratitude to the Political Legitimacy Profiling Area – a collaboration between the University of Leiden's faculties of Humanities, Social Sciences, Law and Governance and Global Affairs. Its assistance and general environment both greatly supported me in recent years. Also, a *grand merci* to the Dutch Ministry of the Interior and Kingdom Relations which, like the Leiden University Profiling Area, made a financial contribution towards conducting the data analysis and the English translation. This book is the work of many people; I had the privilege of compiling it. As it is the product of the labour of so many people, I cannot thank everyone, but I must mention Wim Greijskamp, Roel Becker, Jelmer Maarsen, Rani Badloe and Abram Klop, whose indispensable services as student assistants and uncomplaining execution of all my impossible requests is much appreciated. Last but not least, I would like to thank my family. My wonderful sons Nathan and David who helped me out with economic puzzles and conundrums in the book and their patient, listening ears I filled over and over again with plans, plots and pieces of this book for more than a year at the breakfast, lunch and dinner table. And, finally, I want to thank the love of my life, Angèle. Love is all.

Leiden, September 2019

P.S. *On the translation*. The book was originally written in Dutch (*Het verhaal van de grondwet; zoeken naar wij*) and translated into English by Brendan Monaghan in 2020. Thank you, Brendan, for the splendid job you did. You were so much more than a mere translator: a co-researcher, a skilled political scientist and scholarly sparring partner to boot. The research was concluded in September 2019, even though parts of the original book were revised in order to better accommodate an international audience. This means that some wonderful new works in the field, like Linda Colley's, *The Gun, the Ship and the Pen; Warfare, Constitutions, and the Making of the Modern World* (New York/London: Liveright Publishing Corporation 2021) could not be taken on board, even though her thesis on the relationship between wars and constitutional diffusion is very thought provoking and differs from the explanation for constitutional genesis and generations given in this book.

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.

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

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.

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).

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.

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.

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.