

THE STORY OF CONSTITUTIONS

Today, 189 out of 193 officially recognised nation-states have a written constitution, and 75% of these have been ratified since 1975. How did this worldwide diffusion of constitutions come about? In this book, Wim Voermans traces the varied and surprising story of constitutions since the agricultural revolution of c.10,000 BCE. Adopting an interdisciplinary approach, Voermans shows how human evolution, human nature and the history of thought have all played their part in shaping modern constitutions. Constitutions, in turn, have shaped our societies, creating imagined communities of trust and recognition that allow us to successfully co-operate with one another. Engagingly and wittily told, the story of constitutions is vital to understanding our world, our civilisations and, most significantly, ourselves.

WIM VOERMANS is Professor of Constitutional Law at Leiden University. His research focuses on comparative constitutional law, the evolution of human groups into political societies and the genesis of constitutions, legitimacy and storytelling. Voermans has written widely on subjects related to constitutional law, including European Law, Administrative Law (and the dynamics of the Administrative State) and legislative issues. His last four books have become bestsellers in the Netherlands, selling thousands of copies over the last three years.



COMPARATIVE CONSTITUTIONAL LAW AND POLICY

Series Editors

Tom Ginsburg University of Chicago Zachary Elkins University of Texas at Austin Ran Hirschl University of Toronto

Comparative constitutional law is an intellectually vibrant field that encompasses an increasingly broad array of approaches and methodologies. This series collects analytically innovative and empirically grounded work from scholars of comparative constitutionalism across academic disciplines. Books in the series include theoretically informed studies of single constitutional jurisdictions, comparative studies of constitutional law and institutions, and edited collections of original essays that respond to challenging theoretical and empirical questions in the field.

Books in the Series

The Story of Constitutions: Discovering the We in Us

Wim Voermans

Democracy Under God: Constitutions, Islam and Human Rights in the Muslim World

Dawood Ahmed and Muhammad Zubair Abbasi

Buddhism and Comparative Constitutional Law

Edited by Tom Ginsburg and Ben Schonthal

Amending America's Unwritten Constitution

Edited by Richard Albert, Ryan C. Williams, and Yaniv Roznai

Constitutionalism and a Right to Effective Government?

Edited by Vicki C. Jackson and Yasmin Dawood

The Fall of the Arab Spring: Democracy's Challenges and Efforts to Reconstitute the Middle East Tofigh Maboudi

Filtering Populist Claims to Fight Populism: The Italian Case in a Comparative Perspective Giuseppe Martinico

Constitutionalism in Context

David S. Law

The New Fourth Branch: Institutions for Protecting Constitutional Democracy

Mark Tushnet

The Veil of Participation: Citizens and Political Parties in Constitution-Making Processes

Alexander Hudson

Towering Judges: A Comparative Study of Constitutional Judges

Edited by Rehan Abeyratne and Iddo Porat

The Constitution of Arbitration

Victor Ferreres Comella

Redrafting Constitutions in Democratic Orders: Theoretical and Comparative Perspectives

Edited by Gabriel L. Negretto



More Information

From Parchment to Practice: Implementing New Constitutions

Edited by Tom Ginsburg and Aziz Z. Huq

The Failure of Popular Constitution Making in Turkey: Regressing Towards Constitutional Autocracy Edited by Felix Petersen and Zeynep Yanaşmayan

A Qualified Hope: The Indian Supreme Court and Progressive Social Change Edited by Gerald N. Rosenberg, Sudhir Krishnaswamy, and Shishir Bail

Reconstructing Rights: Courts, Parties, and Equality Rights in India, South Africa, and the United States

Stephan Stohler

Constitutions in Times of Financial Crisis

Edited by Tom Ginsburg, Mark D. Rosen, and Georg Vanberg

Hybrid Constitutionalism: The Politics of Constitutional Review in the Chinese Special

Administrative Regions

Eric C. Ip

Constitution-Making and Transnational Legal Order

Edited by Tom Ginsburg, Terence C. Halliday, and Gregory Shaffer

 $The\ Invisible\ Constitution\ in\ Comparative\ Perspective$

Edited by Rosalind Dixon and Adrienne Stone

The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis

Theunis Roux

Constitutional Courts in Asia: A Comparative Perspective

Edited by Albert H. Y. Chen and Andrew Harding

Judicial Review in Norway: A Bicentennial Debate

Anine Kierulf

Constituent Assemblies

Edited by Jon Elster, Roberto Gargarella, Vatsal Naresh, and Bjorn Erik Rasch

The DNA of Constitutional Justice in Latin America: Politics, Governance, and Judicial Design Daniel M. Brinks and Abby Blass

The Adventures of the Constituent Power: Beyond Revolutions?

Andrew Arato

Canada in the World: Comparative Perspectives on the Canadian Constitution

Edited by Richard Albert and David R. Cameron

Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka

Dian A. H. Shah

Courts and Democracies in Asia

Po Jen Yap

Proportionality: New Frontiers, New Challenges

Edited by Vicki C. Jackson and Mark Tushnet

Constituents before Assembly: Participation, Deliberation, and Representation in the Crafting of

New Constitutions

Todd A. Eisenstadt, A. Carl LeVan, and Tofigh Maboudi



Assessing Constitutional Performance

Edited by Tom Ginsburg and Aziz Huq

Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka

Engaging with Social Rights: Procedure, Participation and Democracy

in South Africa's Second Wave

Brian Ray

Constitutional Courts as Mediators: Armed Conflict, Civil-Military Relations,

and the Rule of Law in Latin America

Julio Ríos-Figueroa

Perils of Judicial Self-Government in Transitional Societies

David Kosař

Making We the People: Democratic Constitutional Founding in Postwar Japan and South Korea

Chaihark Hahm and Sung Ho Kim

Radical Deprivation on Trial: The Impact of Judicial Activism on Socioeconomic Rights in the

Global South

César Rodríguez-Garavito and Diana Rodríguez-Franco

Unstable Constitutionalism: Law and Politics in South Asia

Edited by Mark Tushnet and Madhav Khosla

Magna Carta and Its Modern Legacy

Edited by Robert Hazell and James Melton

Constitutions and Religious Freedom

Frank B. Cross

International Courts and the Performance of International Agreements: A General Theory with

Evidence from the European Union

Clifford J. Carrubba and Matthew J. Gabel

Reputation and Judicial Tactics: A Theory of National and International Courts

Shai Dothan

Social Difference and Constitutionalism in Pan-Asia

Edited by Susan H. Williams

Constitutionalism in Asia in the Early Twenty-First Century

Edited by Albert H. Y. Chen

Constitutions in Authoritarian Regimes

Edited by Tom Ginsburg and Alberto Simpser

Presidential Legislation in India: The Law and Practice of Ordinances

Shubhankar Dam

Social and Political Foundations of Constitutions

Edited by Denis J. Galligan and Mila Versteeg

Consequential Courts: Judicial Roles in Global Perspective

Edited by Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan

Comparative Constitutional Design

Edited by Tom Ginsburg



The Story of Constitutions

DISCOVERING THE WE IN US

WIM VOERMANS

Leiden University







Shaftesbury Road, Cambridge CB2 8EA, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India
103 Penang Road, #05–06/07, Visioncrest Commercial, Singapore 238467

Cambridge University Press is part of Cambridge University Press & Assessment, a department of the University of Cambridge.

We share the University's mission to contribute to society through the pursuit of education, learning and research at the highest international levels of excellence.

www.cambridge.org Information on this title: www.cambridge.org/9781009385060

DOI: 10.1017/9781009385084

© Wim Voermans 2023

First published in Dutch by Prometheus, Amsterdam, the Netherlands 2019

Original title: Het verhaal van de grondwet. Zoeken naar wij

Translated by Brendan Monaghan

© Wim Voermans 2019, 2020

This publication is in copyright. Subject to statutory exception and to the provisions of relevant collective licensing agreements, no reproduction of any part may take place without the written permission of Cambridge University Press & Assessment.

First published 2023

A catalogue record for this publication is available from the British Library

Library of Congress Cataloging-in-Publication Data NAMES: Voermans, Wim, 1961– author.

TITLE: The story of constitutions: discovering the we in us / Wim Voermans.

DESCRIPTION: Cambridge, United Kingdom; New York, NY: Cambridge
University Press, 2023. | Includes bibliographical references and index.

IDENTIFIERS: LCCN 2023006702 (print) | LCCN 2023006703 (ebook) |

ISBN 9781009385060 (hardback) | ISBN 9781009385084 (ebook)

SUBJECTS: LCSH: Constitutional history. | Constitutions.

CLASSIFICATION: LCC K3161 .V64 2023 (print) | LCC K3161 (ebook) | DDC-dc23/eng/20230714 LC record available at https://lccn.loc.gov/2023006702 LC ebook record available at https://lccn.loc.gov/2023006703

ISBN 978-1-009-38506-0 Hardback ISBN 978-1-009-38504-6 Paperback

Cambridge University Press & Assessment has no responsibility for the persistence or accuracy of URLs for external or third-party internet websites referred to in this publication and does not guarantee that any content on such websites is, or will remain, accurate or appropriate.



To Angèle



Every self-respecting nation on the face of the earth wants to have a constitution if it does not already have one. And, with the notable exception of Great Britain, most states that have constitutions would not mind improving their existing ones. Constitutionalism in this sense is one of the dominant values of our time, all over the world. And no matter how often it seems to have been disproved by history, the belief persists that a deliberately constructed constitution is the best means available for assuring achievement of the common goals of a community.

Herbert Spiro, Government by Constitution; The Political System of Democracy 1959, p. 11–12



Contents

List of Figures	page xv
Prologue	1
1 Introduction: The Century of Constitutions	4
The Proliferation of Constitutions	6
Why All These Constitutions?	9
Looking Over the Horizon	11
The Imagined World of Law	14
Empiricism of Imagination	15
What Kind of Imagined Worlds Are We Talking Abou	t? 16
The Perspectives and Worlds in This Book	17
Making Facts: Performative Expressions	18
The Peculiarities of Legal Scholarship	20
The Power of Evidence	23
The Story of Constitutions	25
Who Is This Book For?	27
PART I CONSTITUTIONAL DIFFUSION	31
2 Constitutions Everywhere	33
A By-product of Waves of Democratisation?	34
Democratic Recession	36
Riding the High Billows of the World Market?	38
Nature or Nurture?	39
A Silent Legal Revolution?	41
Memes?	42
3 The Origin of Constitutions	44
Who Are 'We'?	45
The Leap over Dunbar's Number	49



x Contents

	Everything Is about Trust	51
	Increasing Scale	51
	How Does Trust Work?	53
	The Eternal Struggle for Recognition Ostracism	56
	Knowing Your Place	57 5 0
	Recognition and Value	59 59
	Recognition and Freedom	59 62
	From Recognition to Legitimacy	64
	The Invention of Mass Cooperation	65
	PART II THE HISTORY OF THE CONSTITUTION	69
4	Precursors	71
	Religion	71
	Prehistoric Constitutions	75
5	Etched into Collective Memory: Ancient Constitutions	82
	The Twelve Tables	83
	Greece	85
	Dreros and Draco	87
	The Solonian Constitution	88
	Aristotle Plato and Wisdom as a Source of Law and Government	91
	riato and wisdom as a Source of Law and Government	95
6	Roman Roots	98
	The Roman Legal Order	100
	The First Thousand Years of Roman Law	101
7	Mediaeval Constitutions	104
	The Virtual Empire	105
	Commentaries and the First Universities	107
	Grants of Authority: Magna Carta, Bulls, Charters and Joyous Entries	108
	Late Mediaeval Period and Early Modern Period Centralisation	114
	Legal Humanism	114 115
8	Early-Modern Constitutions	118
	The State as a By-product?	120
	The Enlightenment	121
	Sectoral Autonomy and Self-determination: The State	123
	Social Contract	123
	Individuality and Individual Freedom	126



	Contents	xi
	The Influence of the Philosophes Fundamental Orders and Government Instruments	128 129
	Generations: The First Generation of Monarchical	129
9	Constitutions	131
10	Second Generation: Revolutionary Constitutions Revolutionary Constitutions: A New Beginning	133 138
11	Third Generation: Restoration Constitutions A Series of Constitutional Monarchies Innovative Restoration	141 145 145
	Meanwhile in Norway	147
12	Fourth Generation: Liberal Constitutions 1848: A New Social Order. The Ascent of Parliaments Rise of Nations	150 150 152
13	Fifth Generation: Imperial Constitutions 1870–1914: Global Empires and Imperial Constitutions Italian Risorgimento German Unification The Spanish, French and Russian Global Empires	155 155 156 157 160
14	Sixth Generation: Leviathan Constitutions 1918–1939: The Democratic-Corporatist Constitutions of the Interwar Period 1917–1945: Socialist Influences	162 165 167
15	The Seventh Generation: Liberation Constitutions 1945–1950: Allied Gifts of Freedom 1950–1960: Communist Constitutions 1960–1970: Post-colonial Constitutions 1974–1978: Post-dictatorial Constitutions	169 171 174 175 177
16	The Eighth Generation: Liberal-Democratic Constitutions The Fall of the Berlin Wall: Constitutions 1989–2018 Democracy Without Freedom: The Rise of Illiberal Democracy Islamic Constitutions Constitutions That Are Not State-Based? Multi-layered Legal Orders	180 183 184 188
17	What Are the Lessons of History?	192
17	THAT INC THE LESSONS OF THISTORY:	193



xii Contents

	PART III CONCEPTS, SHAPES AND TYPES OF CONSTITUTIONS	201
18	What Is a Constitution?	203
	Constitution, Constitutional Rules: What Is in a Name?	204
	The Meaning of Constitution	205
	Rules with a Higher Status	205
	Constitutional Entrenchment by Way of Complex	
	Amendment Procedures	206
	The Constitution as a Legal Obligation	209
	The Constitution as a Creation	210
	Approaches to Constitutional Law	215
	The Belief in Constitutionalism	216
	Shapes, Sizes and Types	218
	Constitutional Archetypes and a Universalist International Constitution	219
19	Constitutional Kinship	221
	Coefficient of Relationship	223
	Which Topics Are Most Common?	225
	Convergence?	227
	Global Constitutions?	231
	Wishful Thinking?	233
	Constitutional Identity	² 34
	PART IV EFFECTS	237
20	What Does a Constitution Do?	239
21	The Legal Meaning of Constitutions	241
	Confusing Fields of Law	241
	Fruits of a Constitution: Creating a Legal System	2 44
	Effectiveness?	246
	Constitutional Performance	24 7
	Sham Constitutions	2 49
	Endurance	250
	The Dead Should Not Govern the Living	251
	Age Matters	252
	The Self-enforcing Constitution	254
22	Economic Aspects	258
	The Constitution as a Condition	260
	The Constitution as a Factor	263
	Transaction Costs	264
	Tiebreaker?	265



	Contents	xiii
	The Constitution as a Catalyst	266
	An Echo Chamber of Freedom?	267
23	Political Aspects	270
	Friends?	270
	Constitutional Game Theory	273
	The Minimax Constitution	274
	Constitutional Architecture for Divided Societies	278
	Bridging Differences	278
	Constitutional Formulae	280
	PART V THE IMAGINED ORDER OF THE CONSTITUTION	281
24	The Constitution's Beating Heart: Emotions	283
	A Late Session	287
	Cognitive Science and the Keys of Human Nature	290
	Emotional Rationality	293
	Imagined Reality – The Construction of Social Reality	294
25	The Roots of the Tree of Knowledge	296
	Via Emotions and Sentiments to Morality	296
	Rules of Recognition	300
	The Elegant Simplicity of Positive Law	300
	Does Natural Law Exist?	302
	Universal Morality?	306
	The Golden Rule	307
	Morality under Hume's Guillotine	308
	Are Constitutional Rules Reflections of Basic Morality?	310
26	Constitutions as Vehicles for Legitimacy	311
27	The Story of the Constitution	314
	Storytellers	314
	The Constitution: A Compelling Story	316
	Justice	318
	The Story of the Constitution	319
28	Appealing to the Imagination: Constitutional Experience	322
	Text	324
	Wordiness	326
	Preambles	327
	Happy and Sad Constitutions	329
	A Picture Is Worth a Thousand Words	330



XIV	Contents	
	Iconography	331
	Grand Oaths and Mutual Trust	334
	Constitutional Rituals and Constitutional Patriotism	336
29	Once upon a Time There Was the Constitution	34 ^C
	Why Are There So Many Constitutions?	342
Refe	erences	347
Name & Author Index Subject Index		375
		370



Figures

1	Waves of democratisation	page 35
2	The historical development of modern constitutions	37
3	Constitutions in Africa 1989–2018	186
4	Frequency analysis of constitutional topics	226
5	Countries whose constitutions share more than 87% of	
	the top seventy-five elements	226
6	Constitutional families	227
7	Mean select economic and political variables	253