

CHAPTER 4

TYPES OF CONSTITUTIONS

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I. THE PROBLEM WITH TYPOLOGIES

Typologies of constitutions are not at the centre of the rapidly growing literature on constitutionalism. If typological considerations appear at all, they form a by-product rather than the main concern of constitutional research. Moreover, the criteria for typifying constitutions vary from author to author. Although other criteria are easily conceivable, the question why some were chosen and others not remains mostly unanswered. But is this really surprising? The criteria according to which constitutions can be typified are innumerable. A choice has to be made and the choice is guided by the research interest that a scholar of constitutionalism pursues. Typologies are not ends in themselves. They help to answer other questions.

Someone who is interested in the legal and political relevance of constitutions may find a typology according to degrees of effectivity appropriate.¹ Someone who wants to understand the emergence of what has become 'constitutionalism' over time may distinguish between 'constitutionalism ancient and modern'.² For the purposes of comparative constitutionalism, a distinction on the basis of generic and particular or original and derivative constitutions comes to mind.³ If the inquiry is into the 'subject of constitutional identity', one may distinguish constitutions according to the source of constituent power.⁴ A scholar interested in the adaptation of constitutions to changing demands will emphasize the distinction between rigid and flexible constitutions.⁵

All these and many other typologies can be found in the legal literature. But law is not the only discipline interested in constitutions. A philosopher may distinguish between just and unjust constitutions,⁶ a political scientist between integrative and disintegrative constitutions.⁷ For economists, the emphasis will be on the choices that constitutions have made with regard to the economic system.⁸ A scholar in religious studies will perhaps classify constitutions according to whether and how they refer to God or incorporate divine (natural) law. An art historian might be interested in the iconography and typography of constitutional documents.⁹

These examples suffice to show that a search for one typology of constitutions would be in vain. There are but various kinds of typologies and each draws its plausibility from the purpose of the research project in which it is embedded. This describes, at the same time, the risk of a chapter on types of constitutions that stands for itself. A choice is inevitable, yet not linked to a special topic the choice may seem more or less arbitrary. With this risk in mind, I will concentrate on two aspects that hopefully serve the objective of this volume. One is more systematic, the other more historical.

The first aspect concerns the constitution as law; to be more precise, a law with a special function and object, and the typological consequences that follow from its peculiarity. The second aspect concerns questions of content, namely the leading ideas, the governing principles, or regime-defining character, which influence the way constitutions try to fulfil their function. This attempt should not, however, be confused with a classification according to various institutional arrangements like monarchy or republic, federal or unitary system, parliamentary or presidential government, unicameral or bicameral parliament, militant or acquiescent democracy etc. These are types of governmental systems established by constitutions rather than types of constitutions.

Neither is the difference between living and constant constitutions a suitable criterion to classify constitutions. David Strauss calls a living constitution 'one that evolves, changes over time, and adapts to new circumstances, without being formally amended'.¹⁰ But this language is not quite accurate. The change he speaks of is not brought about by the constitution itself.

¹ Karl Loewenstein, *Political Power and the Governmental Process* (1957), 147ff; Brun-Otto Bryde, *Verfassungsentwicklung* (1982), 27ff.

² Charles Howard McIlwain, *Constitutionalism, Ancient and Modern* (3rd edn, 1966).

³ Loewenstein (n 1), 140; David S. Law, 'Generic Constitutional Law' (2004–05) 89 *Minnesota Law Review* 652; Gary Jeffrey Jacobsohn, *Constitutional Identity* (2010), 112ff.

⁴ Michel Rosenfeld, *The Identity of the Constitutional Subject* (2010), 149ff. See also Chapter 35.

⁵ James Bryce, *Studies in History and Jurisprudence* (vol 1, 1901), 124ff.

⁶ John Rawls, *A Theory of Justice* (1971), 221ff.

⁷ Hans Vorländer (ed), *Integration durch Verfassung* (2002).

⁸ Thorsten Persson and Guido Tabellini, *The Economic Effects of Constitutions* (2003). Stefan Voigt and Hans-Jürgen Wagener (eds), *Constitutions, Markets and Law. Recent Experiences in Transition Economies* (2002).

⁹ Horst Bredekamp, 'Politische Ikonographie des Grundgesetzes' in Michael Stolleis (ed), *Herz-kammern der Republik* (2011), 9.

¹⁰ David A. Strauss, *The Living Constitution* (2010), 1.

There is not one group of constitutions with an inherent force to evolve and another group that lacks this force. Rather, the change is a result of interpretation. 'Living' or 'static' are not qualities of constitutions but different ways of expounding constitutions. They characterize types of constitutional interpretation, not types of constitutions.

II. IDENTIFYING THE OBJECT

Typologies presuppose clarity about their object. So, what is a constitution? Or what is constitutionalism? There are, of course, many answers to this question as well. The complexity can, however, be reduced if one recognizes the fundamental difference between ancient and modern constitutionalism.¹¹ This chapter will deal only with modern constitutions as they emerged in the late eighteenth century from the American and the French Revolutions, were subsequently adopted in other countries, and, after many struggles and backlashes, had gained almost universal recognition by the end of the twentieth century. Yet, the characteristics of modern constitutions appear more clearly if compared to what was understood by 'constitution' or is seen as having functioned as 'constitution' before those revolutions. Both levels have to be taken into account in order to mark the difference: the semantic level as well as the level of realities.

The term 'constitution', or its equivalent in other languages, existed long before modern constitutions emerged.¹² But it designated a different object. Originally used to describe the state of the human body, it was soon applied to the body politic, yet not in a normative sense but as a description of the situation of a country as determined by a number of factors such as its geography, its climate, its population, its laws etc. In the eighteenth century, the meaning was often narrowed to the state of a country as determined by its basic legal structure. But still the notion 'constitution' was not identified with those laws. Rather, the term continued to describe the state of a country insofar as it was shaped by its basic laws. The basic laws themselves were not the 'constitution' of the country. 'Constitution' remained a descriptive, not a prescriptive, term.

If the term was used in a legal sense, it usually meant a certain type of laws, usually enacted by the Emperor, and often criminal codes, such as the *Constitutio Criminalis Carolina* of 1532 or the *Constitutio Criminalis Theresiana* of 1768, hence, laws that regulated individual, not governmental, behaviour. Certainly, laws the object of which was the exercise of public power did exist, even in the absolutist period; but they were not perceived as 'constitution'. They were called 'fundamental laws', 'governmental compact', and the like.¹³ Some were relics of the medieval order in which the ruler had been submitted to a law that was believed to be of divine origin and therefore not at his disposition. Others had a contractual origin and emerged from negotiations between the monarch and influential groups in society, mostly the nobility.

It was characteristic of these laws that all of them presupposed the right of the ruler to rule. The fundamental laws only modified the right in this or that respect and, due to their contractual origins, only in favour of the privileged classes of society that were parties to the contract. They had neither constitutive force nor did they furnish a complete regulation of government.¹⁴ Only after the emergence of the modern constitution were they retroactively called a

¹¹ McIlwain (n 2); Dieter Grimm, *Deutsche Verfassungsgeschichte* (3rd edn, 1995), 10ff.

¹² Heinz Mohnhaupt and Dieter Grimm, *Verfassung. Zur Geschichte des Begriffs von der Antike bis zur Gegenwart* (2nd edn, 2002); Italian translation: *Costituzione. Storia di un concetto dall'Antichità a oggi* (2008).

¹³ Rudolf Vierhaus (ed), *Herrschaftsverträge, Wahlkapitulationen, Fundamentalgesetze* (1997); André Lemaire, *Les Lois fondamentales de la Monarchie française* (1907).

¹⁴ Grimm (n 11).

'constitution', first by the defenders of the old order who wanted to demonstrate that the country not only had a constitution but had a better one than the artificial product of a revolution, later by historians who got into the habit of describing the old political order in terms of a 'constitution'.

In England, which is often called the motherland of constitutionalism, things were slightly different.¹⁵ Also in England, 'constitution' initially meant a formal law enacted by the King. With the growing participation of Lords and Commons in legislation, it was replaced by the term 'statute'. Cromwell's written document that constituted a republican government after the revolutionary break with the House of Stuart, and is often regarded as the first modern constitution, was not called a 'constitution', but an 'Instrument of Government'. Laws that concerned the organization of public authority were called a 'form of government'. But the term 'constitution' began to appear, mostly in the plural, as an equivalent to '*leges fundamentales*' or 'fundamental laws'.

After the Glorious Revolution in 1688, 'constitution' in the singular gained ground and meant the basic rules concerning the government. Yet, since the revolution restored the monarchy, albeit with a power shift towards Parliament, these rules did not gain constituent force. What was now called the 'British Constitution' shared with its continental equivalents the characteristic that it did not establish a new, but only modified an existing, public authority. A constituent power was, and to a large extent still is, absent in Britain. It was absorbed by the principle of parliamentary sovereignty. The rules forming the 'British Constitution', including the 'rights of Englishmen', were fundamental, but not supreme. The 'constitution' lacked supremacy.¹⁶

What, then, was new about the modern constitution? Apparently neither the name nor the capacity to bind the ruler with the force of law. The connection between the birth of modern constitutionalism and the two revolutions offers a clue. These revolutions differed from the many upheavals and revolts against rulers in history, including the Glorious Revolution, in that the revolutionary forces did not content themselves with replacing an oppressive ruler with another one. Rather, they set out to establish a new political system that differed fundamentally from the one they had accused of being unjust. In order to achieve this, they devised a plan of legitimate rule and endowed it with legal force before rulers were called to power and authorized to rule according to the legal framework.

In order for this to work, the constitution had to be distinguished from ordinary law. As an act that constituted legitimate public power in the first place, the constitution could not emanate from the ruler himself. It needed a different source. In both countries, this source was found in the people who had decided to form a polity and to whom the constituent power was ascribed.¹⁷ The legitimating principle of the modern constitution was popular sovereignty instead of monarchical or parliamentary sovereignty. But unlike the sovereign monarch or the sovereign parliament the people were incapable of ruling themselves. They needed repre-

¹⁵ Besides Mohnhaupt and Grimm (n 12) see John W. Gough, *Fundamental Law in English Constitutional History* (1971); Gerald Stourzh, *Wege zur Grundrechtsdemokratie* (1989), 1ff, 75ff; Gerald Stourzh, *Fundamental Laws and Individual Rights in the 18th Century Constitution* (1984); Martin Loughlin, *The Idea of Public Law* (2003) and *Foundations of Public Law* (2010).

¹⁶ Stourzh, *Fundamental Laws* (n 15); Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism. Constituent Power and Constitutional Form* (2007), 27.

¹⁷ Loughlin and Walker (n 16); Egon Zweig, *Die Lehre vom Pouvoir constituant* (1909); Pasquale Pasquino, *Sieyes et l'invention de la constitution en France* (1998).

sentatives to govern in their name. Democratic government is government by mandate and as such stands in need of being organized.

In addition, the mandate was not conferred upon the representatives unconditionally. In contrast to the unlimited power of the British Parliament and the French King, the revolutionaries wanted to establish a limited government, limited in substance and limited in form. The first was a decision in favour of individual freedom that gained primacy over the *raison d'état* and found legal expression in catalogues of fundamental rights. The second followed from the conviction that freedom could best be secured if governmental power was not concentrated in one hand but distributed among various branches of government. The limits in scope and time as well as the separation of powers also required determination in the form of legal rules.

All this was by no means an original idea of the American and French revolutionaries. The idea that only the consent of the people could legitimize governmental power had older roots and gained widespread recognition when religion no longer served as the basis of the social order after the Reformation and gave rise to the construction of a social contract. The content of this contract varied over time and space. But more and more the conviction gained ground that the ruler's task was the protection of individual freedom. From the mid-eighteenth century, the treatises of natural law filled with growing catalogues of fundamental rights which the state was obliged to respect and to protect.

Although these theories contained all the ingredients that later appeared in the constitutions, they were not pushed forwards to the postulate of a constitution by the philosophers. For them, they functioned as a test of the legitimacy of the political system. A political system was deemed legitimate if it could be considered as if established by a consensus of the governed. With the sole exception of Emer de Vattel,¹⁸ no author required a written document or a popular decision. The social contract served as a regulative idea. It was not considered to be the result of a real process of consensus building. Its authority was based on argumentation, not on enactment. No pre-revolutionary ruler had been willing to adopt it, and most rulers had explicitly rejected it. Natural law and positive law contradicted each other.

Only after the revolutionary break with traditional rule were these ideas able to become a blueprint for the establishment of the new order which filled the vacuum of legitimate public power that the successful revolutions had left behind. The ideas migrated from the world of intellectual discourse into the world of political action. Hence the important contribution of the American and French revolutionaries was to turn the ideas from philosophy into law. Only law had the capacity to detach the consensus as to the purpose and form of government from the historical moment and the actual participants and transfer it into a binding rule for the future, so that it no longer rested on the power of persuasion but on the power of a commitment.

There was, however, the problem that, after the collapse of the divinely inspired medieval legal order, all law had become the product of political will. Law was irreducibly positive law. Nothing else could be true for the law the function of which was to regulate the establishment and exercise of political power. This gave rise to the question how a law that emanated from the political process could at the same time bind this process.¹⁹ The problem was solved by tak-

¹⁸ Emer de Vattel, *Le droit des gens* (1758), vol 1.3, §27; ed M. P. Pradier-Fodéré, vol 1 (1863), 153.

¹⁹ Regarding this basic problem of constitutionalism see eg Georg Jellinek, *Allgemeine Staatslehre* (repr of the 3rd edn, 1966), 337ff; Raymond Carré de Malberg, *Contribution à la Théorie générale de l'Etat* (vol II, 1922), 483ff; Carl Schmitt, *Verfassungslehre* (1928), 75ff; Loughlin and Walker (n 16); Ernst-Wolfgang Böckenförde, 'Die verfassungsgebende Gewalt des Volkes' in Ernst-Wolfgang Böckenförde, *Wissenschaft, Politik, Verfassungsgericht* (2011), 97.

ing up the old idea of a hierarchy of norms (divine and secular) and re-introducing it into positive law. This was done by a division of positive law into two different bodies: one that emanated from or was attributed to the people and bound the government, and one that emanated from government and bound the people. The first one regulated the production and application of the second. Law became reflexive.

This idea of a dualist democracy, as Bruce Ackerman calls it,²⁰ presupposed, however, that the first body of law took primacy over the second. The revolutionary thinkers had a clear notion of this consequence of constitution-making. The Americans expressed it in terms of 'paramount law' and deployed the distinction between master and servant or principal and agent, while Sieyes conceptualized it in the dichotomy of *pouvoir constituant* and *pouvoir constitué*, the former setting the terms for the latter.²¹ Without this distinction and the ensuing distinction between constitutional law and ordinary law and the subordination of the latter to the former, constitutionalism would have been unable to fulfil its function.²²

This legal framework was now called 'constitution'. Constitution thereby turned from a descriptive into a prescriptive notion. It differed from the older legal regulations of public authority in various respects. The most important one is that the constitution claims to *establish* legitimate government instead of only *modifying* the conditions for a pre-existing government that derives its legitimacy from sources other than the constitution. Moreover, it regulates the establishment and exercise of public power *systematically* and *comprehensively*. And it applies generally, not only in favour of some privileged groups. While every political entity had (or more precisely, was in) a constitution in the descriptive sense, a constitution in the prescriptive sense was a novelty that not every polity possessed.

Constitutionalism is therefore not identical with legalization of public power. Everyone who asserts that constitutionalism 'means little more than the limited state'²³ misses the point. It is a special and particularly ambitious form of legalization. There are, however, many ways to realize the project. Although the new instrument of legitimation and limitation of government was justified in universal terms by its founders, it had to be applied to a situation where political power was organized in the form of sovereign states with different traditions, conditions, and ideals. Therefore, it was realized in each state in a particular way. Constitutionalism originated in the form of national constitutions. For this reason, it seems more appropriate to describe it in functional rather than substantive terms.

These functional characteristics can now be summarized:²⁴

²⁰ Bruce Ackerman, *We the People. Volume 1: Foundations* (1991), 3ff.

²¹ James Madison, Alexander Hamilton, and John Jay, *Federalist Papers* (1788), no 78; Emanuel Sieyes, *Qu'est-ce que le Tiers Etat?* (1789).

²² Gerald Stourzh, 'Vom Widerstandsrecht zur Verfassungsgerichtsbarkeit. Zum Problem der Verfassungswidrigkeit im 18. Jahrhundert' in Stourzh, *Wege zur Grundrechtsdemokratie* (n 15), 37; Rainer Wahl, 'Der Vorrang der Verfassung' in Rainer Wahl, *Verfassungsstaat, Europäisierung, Internationalisierung* (2003), 121.

²³ Cf Daniel S. Lev, 'Social Movements, Constitutionalism and Human Rights' in Douglas Greenberg et al (eds), *Constitutionalism and Democracy. Transitions in the Contemporary World* (1993), 38.

²⁴ Dieter Grimm, 'The Achievement of Constitutionalism and its Prospects in a Changed World' in Petra Dobner and Martin Loughlin, *The Twilight of Constitutionalism* (2010), 3. There are other attempts to describe the constitution, eg Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Defects' in Michel Rosenfeld (ed), *Constitutionalism, Identity, Difference and Legitimacy* (1994), 41ff; Joseph Raz, 'On the Authority and Interpretation of Constitutions: Some Preliminaries' in Larry Alexander (ed), *Constitutionalism. Philosophical Foundations* (1998), 153f.

- (1) The constitution in the modern sense is a set of legal norms, not a philosophical construct. The norms emanate from a political decision rather than having their source in a pre-established truth.
- (2) The purpose of these norms is to regulate the establishment and the exercise of public power as opposed to a mere modification of a pre-existing public power. Regulation implies limitation.
- (3) The regulation is comprehensive in the sense that no pre- or extra-constitutional bearers of public power and no pre- or extra-constitutional means to exercise this power are recognized.
- (4) Constitutional law is higher law. It enjoys primacy of all other laws and legal acts emanating from government. Acts incompatible with the constitution cannot claim legal validity.
- (5) Constitutional law finds its origin with the people as the only legitimate source of power. The distinction between *pouvoir constituant* and *pouvoir constitué* is essential to the constitution.

If all these elements are present, we speak of the *achievement* of constitutionalism.²⁵ Constitutions with these characteristics rule out any absolute or arbitrary power of man over man. By submitting all government action to rules, a constitution makes the use of public power predictable and enables the governed to anticipate government behaviour vis-à-vis themselves and allows them to face government agents without fear. A constitution provides a consensual basis for persons and groups with different opinions and interests to resolve their disputes in a civilized manner and enables peaceful transition of power. Under favourable conditions the constitution can even contribute to the integration of society.

At the same time, it becomes clear that the achievement of constitutionalism rests on a number of preconditions, without which the constitution would not have emerged. The disappearance of these preconditions would not leave their functioning unaffected.²⁶ As a decision by a society on the purpose and form of its political unity, the constitution could not have emerged if questions of public order were not open to discussion. This facet was lacking wherever the public order was presumed to be given by God, for example in the Middle Ages. Under these circumstances, public authority had the duty to enforce the pre-established order, but had no right to change it or replace it by a different one.

Yet the medieval society did not have and could not have had a constitution for still another reason. It lacked an object capable of being regulated in the form of a constitution. No autonomous political sphere had yet developed and no public power specialized in governing a given territory existed. Only when, in an attempt to overcome the devastating religious wars and to pacify a rifted society, the princes started to concentrate the dispersed public powers in their hands, condensing them into a single, comprehensive public power and claiming the right to make law independent of the contested religious truth, did an object capable of being constitutionalized emerge. In continental Europe, this object was from the beginning in the sixteenth century perceived as the state, while in the Anglo-Saxon world it was long described as government and only in recent decades as the state.

²⁵ Grimm (n 24); Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft' (1990) 9 *Rechtshistorisches Journal* 176.

²⁶ Dieter Grimm, *Die Zukunft der Verfassung* (3rd edn, 2002), 31ff.

Historically, the emergence of the modern state, or its equivalent, was a necessary condition of the modern constitution. It was, however, not a sufficient condition. In order to fulfil its historic mission of pacifying a society divided by religious wars, the state claimed absolute power over society. Absolutism is the opposite of constitutionalism. Only when the mission had been fulfilled did absolute rule lose its plausibility. The demand for limited government based on the consent of the governed appeared as a further pre-condition for constitutionalism. The revolution was needed as a breakthrough for this idea, not as a pre-condition for the constitutions which followed.

The corollary of the gradual emergence of the modern state was the successive privatization of civil society. Public and private, still indistinguishable in the medieval world, became distinct spheres. The constitution did not question the concentration of public power in the hands of the state. Rather, it was this concentration that created the need for constitutionalism. The constitution's aim was to tame public power in the interest of individual freedom. The distinction between public and private was therefore constitutive for constitutionalism. If public power were in private hands the constitution could not fulfil its function. Conversely, if the state enjoyed the same freedom as private individuals it could not reach its aim.

Of equal importance is another borderline, that between outside and inside. As public power was organized in the form of states when the constitution emerged, the power of each state ended at its territorial borders. Beyond its borders there were other states with their public power. A constitution could fulfil its function only if the state held the monopoly of public power within its borders and was not submitted to any external power. Every submission to an external power would have meant a power that escaped the regulation of the constitution. The principle of territoriality was constitutive for the constitution.²⁷

III. THE CONSTITUTION AS LAW

The term 'achievement' should not be misunderstood as an ideal type of constitutionalism that in the real world can only be reached by way of approximation.²⁸ Constitutions that show all the characteristics of achievement did exist in history and do exist today. 'Achievement', however, also implies that there may be documents designated or understood as constitutions which lack some or most elements of a full-fledged constitutionalism. As a matter of fact, once invented the constitution could be instrumentalized for purposes other than the original ones, adopted only in part or even as a mere form. Nevertheless, achievement sets the standard for constitutionalism and just for this reason furnishes a basis for a typology.

1. The Legal Character of the Constitution

Written or unwritten—constitutions in the sense of achievement are enacted as law or even as 'hard law' as Van Alstyne insists, adding that 'nearly everything else depends on [this]'.²⁹ Enactment in the form of a law is nowadays the way in which new constitutions are set up everywhere, no matter who enacted them and which procedure preceded the enactment. Enactment

²⁷ Saskia Sassen, *Territory, Authority, Rights* (updated edn, 2008).

²⁸ Michel Rosenfeld 'What is a Constitution?' in Norman Dorsen et al (eds), *Comparative Constitutionalism* (2nd edn, 2010), 36.

²⁹ William W. Van Alstyne, 'The Idea of the Constitution as Hard Law' (1987) 37 *Journal of Legal Education* 174.

as law usually means that the constitution takes the form of a written document. When unwritten constitutions are mentioned, it is mostly in connection with the British Constitution. As a matter of fact, this Constitution consists to a large extent of conventions for which no authoritative textual source exists and which date back to the era of pre-modern constitutionalism.

But Eric Barendt reminds us that part of what is regarded as the British Constitution consists of statutes, some old like the Bill of Rights of 1689, some more recent like the Human Rights Act of 1998.³⁰ Barendt therefore introduces the distinction between *written* and *codified*. Most modern constitutions are indeed codified, that is, their norms are more or less coherently contained in a single document. But here again differences appear. Israel is often said to have no written constitution because the first Knesset, which was elected as a constituent assembly, did not discharge this task. Yet Israel has various Basic Laws that, according to a landmark decision of the Israeli Supreme Court, form the constitution of the country.³¹ But they leave open many questions that usually find an answer in a constitution. The constitution is fragmentary.

Yet, here again, the differences seem to be gradual rather than principal. Austria has a codified constitution, but this constitution is surrounded by a number of additional constitutional laws that formally have a separate existence. In many countries, not all the rules pertaining to the organization and exercise of public power are contained in the codification. Some remain outside. In France, the category of *lois organiques* exists. It describes laws that rank between the constitution and ordinary laws, regulate a constitutional matter, and are provided for in the constitution and enacted in a special procedure.³² Similar categories can be found in other countries (*ley organica*, *legge costituzionale*, *lois complementaires*, etc.).

However, sometimes the notion '*lois organiques*' is used for ordinary laws the content of which is of constitutional importance. In this sense, the notion corresponds with the distinction between the constitution in a *formal* and in a *substantive* sense.³³ The first one includes all norms that are part of the legal document called the 'constitution', regardless of whether they concern a matter of constitutional importance. The second includes norms which, although their object is constitutionally important, are not contained in the document called the 'constitution' but in a statute. In Germany, for instance, the election law is a constitutional law in the substantive, but not in the formal, sense.

These considerations show that the difference between written and unwritten constitutions should not be overestimated. For typological purposes the distinction between a modern legal (*prescriptive*) and a pre-modern non-legal (*descriptive*) constitution matters more. 'Law' and 'unwritten' are not mutually exclusive although the unwritten form of a 'constitution' is an indicator of a constitution in the older sense of the term, which could subsist along with the existence of laws that regulate government. Barendt himself admits this when he says that, under the British Constitution, it is difficult to determine whether government conduct is constitutional or not.³⁴

Effective or ineffective—what seems much more important is that enactment in the form of a law does not guarantee legal effectivity. If today only a handful of the nearly 200 states in the

³⁰ Eric Barendt, *An Introduction to Constitutional Law* (1998), 26ff.

³¹ *United Mizrahi Bank v Migdal Village* (1995), excerpts in English in (1997) 31 *Israel Law Review* 754.

³² Francis Hamon and Michel Troper, *Droit constitutionnel* (31st edn, 2009), 41f.

³³ For the first time in Carl von Rotteck, *Lehrbuch des Vernunftrechts und der Staatswissenschaften* (1840), vol 2, 172ff; today common in German constitutional theory, see Bryde (n 1), 59.

³⁴ Barendt (n 30).

world are still without a constitution we may conclude that the constitution is universally accepted as a pattern of legitimation and organization of public power, but not that all constitutions matter.³⁵ Many remain on paper. They are often called *symbolic* constitutions.³⁶ In some cases, constitutions may be intended as mere window-dressing from the very beginning. In other cases they are suspended soon after enactment. Many are routinely disregarded when their norms enter into conflict with political plans or measures.

Karl Loewenstein therefore deems a typology based on the legal impact as most important. He distinguishes between normative, nominal, and semantic constitutions.³⁷ The decisive criterion is the degree to which the political reality conforms to the norms of the constitution. *Normative* constitutions are effective constitutions in the sense that the political process takes place within the constitutional framework and political actors usually comply with constitutional requirements. According to Loewenstein, a constitution in this sense depends on a socio-political environment where the value of constitutionalism has been internalized by both governors and governed.

In a *nominal* constitution, the constitutional norms find their limits in the given power structure, political as well as economical. The existing socio-economic conditions prevent the constitution from being applied faithfully, regardless of the interests of the power-holders. Insofar as a conflict between these structures and the norms appears, the norms will remain ineffective. According to Loewenstein, former colonies or feudal-agrarian societies are particularly prone to nominal constitutions. However, he concedes an educational function to constitutions of this type: they may aim at becoming normative constitutions.

Semantic constitutions are constitutions that are in line with the political reality, but only reflect this reality without imposing binding rules on it. Loewenstein tends to include all constitutions of dictatorial or totalitarian regimes in this category. Henkin portrays them as merely describing the existing system of government.³⁸ The term 'descriptive' is here not meant in the sense used to characterize pre-modern constitutionalism. It refers to a document that has been enacted in the form of a law, but without the intent to bind political behaviour. Others characterize this type of constitutions as 'instrumentalistic' or 'ritualistic'.³⁹

³⁵ Fareed Zakaria, 'The Rise of Illiberal Democracy' (1977) 76 *Foreign Affairs* 22, and the interesting chart of Donald S. Lutz, *Principles of Constitutional Design* (2006), 4.

³⁶ Bryde (n 1), 27. 'Symbolic' is here understood as having no impact in the real world. It should be noted, however, that there is also an understanding of 'symbolic' as an additional, extra-legal effect that constitutions may develop when they succeed in symbolizing the aspirations, the unity of a polity, and thus contribute to the integration of societies. For a meaning of 'symbolic' in this sense see Dieter Grimm, 'Integration by Constitution' (2005) 3 *International Journal of Constitutional Law* 193; both meanings are used by Marcello Neves, *Symbolische Konstitutionalisierung* (1998), 79ff. For the US Constitution see Michael Kammen, *A Machine that Would Go of Itself: The Constitution in American Culture* (1986); Edward S. Corwin, 'The Constitution as Instrument and Symbol' (1936) 30 *American Political Science Review* 1071.

³⁷ Loewenstein (n 1), 147ff.

³⁸ Louis Henkin, 'A New Birth of Constitutionalism: Genetic Influences and Genetic Deficits' in Rosenfeld (n 24), 41. See also H.W.O. Okoth-Ogendo, 'Constitutions without Constitutionalism: Reflections on an African Political Paradox' in Douglas Greenberg et al (eds), *Constitutionalism and Democracy: Transitions in the Contemporary World* (1991), 65.

³⁹ 'Instrumentalistic' meaning that the constitution is exclusively used in the interest of the government or the power-holders, see Neves (n 36), 92f; 'ritualistic' meaning that the rules of the constitution are seemingly applied while the substantive processes take place elsewhere and are completed when the 'ritual' starts, see Bryde (n 1), 29ff.

2. Specialized in Regulating Public Power

Foundational or modifying—a constitution in the sense of ‘achievement’ is specialized in regulating the establishment and exercise of public power. ‘Establishment’ could be read as ‘organization’. Understood in this way, the criterion would have little capacity to distinguish between various types of constitutions. There are constitutions in the modern sense that confine themselves to determining the organizational structure of a state, naming its organs, laying down their powers, regulating the relation among them, and prescribing the procedure they have to follow in discharging their tasks. The constitution of the second German Empire of 1871 and Australia’s constitution are examples. But there is no constitution that refrains from regulating the organizational structure of the state.

‘Establishment’ as used here has a wider meaning. The constitution as an achievement is *foundational*. It constitutes a legitimate government rather than simply *modifying* a government that precedes the constitution and derives its legitimacy from elsewhere. Constitutions that follow a successful revolution are usually constitutive in this sense. But this does not mean that a revolutionary origin is a pre-condition of a full-fledged constitution. A new beginning, for instance after a lost war, can produce the same effect, as in Japan, Italy, and Germany after 1945. Radical shifts are also possible without a revolution, as in South Africa in 1994. The Swiss Constitution of 2000 owes its existence to the conviction that the constitution of 1874 no longer met the challenges of the twenty-first century.

Yet, although all constitutions regulate government, not all regulate its establishment. Still, a number of constitutions limit themselves to regulating the exercise of public power, not its creation. This was already the case shortly after modern constitutionalism emerged in the eighteenth century. As a matter of fact, once invented the modern constitution became immediately attractive outside the countries of origin. Constitutional movements emerged and requested constitutions without the ability to overthrow the existing political system and to establish a new one based on constitutional values. In that vein, a number of traditional rulers thought it wise to accommodate the popular wishes in order to prevent a revolutionary change.

Usually this meant the establishment of parliamentary representation based on elections by the people or its wealthy and educated classes. Often it also meant the introduction of a bill of rights. But it did not mean that the legitimation of public authority shifted from parliamentary sovereignty as in North America or from monarchical sovereignty as in France to popular sovereignty and thus to a system where the monarch no longer ruled by God’s grace but by the people’s grace. Hence, these constitutions, unilaterally granted by the ruler as they usually were, lacked the constitutive force of the prototypes. They merely modified the existing government, albeit in constitutional forms.

It was even possible that the rulers were not prepared to accept binding rules at all, but nevertheless found it advisable at least to purport that they ruled in accordance with a constitution. These constitutions can be understood as expressions of pseudo-constitutionalism. The history of the nineteenth century can be described as a struggle for constitutionalism in the sense of the achievement. It could well happen that a constitution that fell short of achievement developed into a full-fledged constitution over time, in the same way that full-fledged constitutions regressed to weaker forms of constitutionalism.

Formal and substantive—regulation always implies a certain degree of limitation. Unlimited government is the opposite of constitutionalism. Forms and degrees can vary. There are constitutions that confine themselves to formal and procedural limitations and constitutions that contain substantive limitations as well. The American Founding Fathers believed in the beginning

that organizational and procedural rules would suffice to limit government and protect the citizens efficiently. The French revolutionaries found substantive limits so important that they enacted the Declaration of Rights even before the constitution was drafted. The US Bill of Rights was added to the Constitution four years later.

Both countries of origin were convinced that only a limitation in the form of separation of powers is compatible with the idea of a constitution. Article 16 of the French Declaration reads: 'Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de constitution.' As a matter of fact, the idea of limited government tends towards some separation. A total lack of separation is an indicator of deficient constitutionalism. But one can imagine rather weak borderlines between the various powers as compensated for by strictly competent and substantive limitations.

3. Comprehensive Regulation

This element has nothing to do with the question of how short or how detailed the establishment and exercise of public power is regulated. Likewise, it is not about gaps in a constitution. Sometimes gaps are the price that has to be paid for a constitution to be ratified. The requirement rather concerns the degree to which public power is submitted to law. We can speak of a full-fledged constitution only if all public authority is derived from the constitution and has to be exercised within the framework of the constitution. But the framework may leave ample room for politics. It only excludes extra-constitutional power-holders and unconstitutional ways and means of exercising the power.

This is by no means always guaranteed. All political systems where the right to rule precedes the constitution and is only modified by it cannot be comprehensive in this sense. Wherever a constitutional regulation is missing it will be the ruler who, by virtue of his pre-constitutional legitimation, is competent to act according to will. Constitutions of this type can be called semi-constitutionalism. They were and are frequent in number. All German constitutions of the nineteenth century were semi-constitutions in this sense. Not gained after a revolutionary break with traditional rule, they did not touch the pre-existing right of the ruler to rule. Rather, the traditional rulers agreed to limit their hitherto absolute power voluntarily by a constitution.

4. Supremacy

Higher or ordinary law—the constitution can fulfil its promise only if it enjoys supremacy. This means that all acts of public authority have to conform to the provisions of the constitution. Although the importance of supremacy was fully understood in constitutional theory from the beginning, constitutional practice hesitated long before following.⁴⁰ Such practice did not deprive the constitution of its quality as law. If a constitution completely lacks legal effect, the question of its supremacy does not arise. Supremacy presupposes the legal validity of the constitution. The question is not whether it is law, but whether it is higher law. If not, the functioning of the constitution will be severely hampered. Recognition or negation of the higher law quality of the constitution is therefore a typological difference of highest importance.

As to the extent of the loss, various degrees are possible. Lacking supremacy of constitutional law will usually not affect the organizational structure of government. The organs of the

⁴⁰ Wahl (n 22).

state are likely to exist in the form prescribed by the constitution. However, constitutions not only claim to regulate the organization, but also the exercise of public authority. It is this exercise that can legally evade the control of the constitution if constitutional law is not supreme. Here, again, different degrees are possible. In the past, most European constitutions were understood in a way that the bills of rights did not bind the legislature. This meant that their impact was reduced to a prohibition of infringements by the executive without a basis in law. The law itself was not submitted to fundamental rights.

In reaction to this weakness of fundamental rights in the nineteenth and even the twentieth century, a number of younger constitutions explicitly declared fundamental rights to be directly applicable law and to bind all branches of government, explicitly so in Article 1(3) of the German Basic Law. Canada in its Charter of Rights and Freedoms of 1982 does not mention the judiciary among the powers bound by fundamental rights and thus causes difficulties when it comes to applying the Charter in private law litigation.⁴¹ A far-reaching provision is contained in the South African Constitution, according to section 8 of which the Bill of Rights 'applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'. Under certain conditions, fundamental rights even bind natural and juristic persons.

In the Weimar Republic, the rule that the constitution could be amended by way of a two-thirds majority in favour of such legislative amendment, was interpreted such that every ordinary law passed with a two-thirds majority could set aside the constitution. A prior amendment was not regarded as necessary. Hence, the higher law quality was acknowledged, but the threshold could easily be transgressed. After the Second World War the Basic Law explicitly excluded this possibility in Article 79(1). Setting aside the constitution was even easier in states where the constitution ranked on the same level with ordinary law. In this case the rule applies that the more recent law supersedes the older law.

This attitude towards the higher law element of constitutions was facilitated by the formalist understanding that became dominant in the course of the nineteenth century in Europe and continues to prevail in a number of countries today. From a formalistic perspective, the special quality of constitutional law as opposed to ordinary law lies not in its function or importance, but exclusively in the requirement of a super-majority for amendments.⁴² It was Carl Schmitt who tried to rectify this position. For him, the special quality of the constitution is not a consequence of the increased quorum for amendments. On the contrary, amendments are made more difficult because of the special quality of constitutional law.⁴³ It is the fundamental decision of a people as to the nature and form of its unity on which all further decisions are based, the law of the laws.

Rigid or flexible—as these observations show, there is a relation between the rank of constitutional law and the rules for constitutional amendment. If a constitution allows for amendments by way of ordinary legislation, that is, without requiring a super-majority, its quality as higher law is seriously hampered. The sense in requiring a super-majority is, inter alia, to furnish a consensus basis for political adversaries and a framework in which the political competition can take an orderly and peaceful route. If a simple majority can change this framework, the function of the constitution is put at risk. It becomes a tool in the hands of the majority and ceases effectively to protect the minority or the opposition.

⁴¹ *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573.

⁴² Paul Laband, *Das Staatsrecht des Deutschen Reiches* (4th edn, 1901), vol 2, 34; Jellinek (n 19), 534.

⁴³ Schmitt (n 19), 18.

This is less so when a super-majority is required for a constitutional amendment. However, if the constitution endows parliament with an amendment power it is relatively easy for the main political actors to shape the constitution according to their needs. This is why many constitutions remove the amendment power from actors in the routine political business and entrust it to other organs, or require a referendum or prescribe a procedure other than the procedure for ordinary lawmaking.⁴⁴ The frequency of amendments depends to a large extent on the difficulty of the procedure.⁴⁵

Some constitutions completely exclude certain provisions from abolition by way of amendment. The US Constitution exempts in Article V the equal suffrage of every state in the Senate from amendment without the consent of the affected state. In Italy and France, the republican form of the state is not subject to amendment. A far-reaching clause is contained in the German Basic Law. It is the post-war reaction to the experience that the democratic principle of the Weimar Constitution was abolished by democratic means after Hitler had taken power in 1933. Article 79(3) declares the principle of democracy, the rule of law, the principle of the social state, and the federal structure as well as the guarantee of human dignity as unalterable by amendment.

The same solution was introduced in India by a landmark decision of the Supreme Court without a textual basis in the constitution.⁴⁶ Behind this ruling one can discover Carl Schmitt's distinction between constitution and constitutional law.⁴⁷ According to Schmitt, the constitution is the decision of the constituent power, usually the people, about the nature and form of its polity. In Schmitt's view, this decision precedes the drafting of constitutional law and does not require or even allow a formal act. Constitutional law, in turn, concretizes the fundamental decision and may add to it provisions of a less fundamental character, even provisions of a non-constitutional character. As a consequence only constitutional law is open to amendment whereas the constitution can only be altered by the holder of the constituent power himself.

The rules on constitutional amendments vary greatly. Typologically one usually distinguishes rigid and flexible constitutions. Between these two poles many solutions are possible. The best-known example of a rigid constitution in this sense is the US Constitution (Art V). As a consequence formal amendments have been extremely rare in the United States.⁴⁸ On the other hand, the Japanese Constitution has never been amended although it is not rigid. Even more rigid than the US Constitution was the first French Constitution of 1791. A proposed amendment had to be voted on by three consecutive parliaments and affirmed by the fourth, which for that purpose was augmented by additional members. Since a parliamentary term was two years, an amendment could enter into force only seven years after the initiative (Title VII).

This inflexibility caused the early death of the constitution. Later constitutions made amendments easier; but the idea that the parliamentary assembly, which desires and votes for a constitutional amendment, should not have the final say, still characterizes a number of cur-

⁴⁴ See Chapter 24.

⁴⁵ Cf the statistical material in Donald S. Lutz, 'Toward a Theory of Constitutional Amendment' in Sanford Levinson (ed), *Responding to Imperfection. The Theory and Practice of Constitutional Amendment* (1995), 237.

⁴⁶ *Kesavananda Bharati v State of Kerala* [1973] Supp SCR 1. Cf Sudhir Krishnaswamy, *Democracy and Constitutionalism in India. A Study on the Basic Structure Doctrine* (2009).

⁴⁷ Schmitt (n 19), 20ff.

⁴⁸ Levinson (n 45).

rent constitutions. Often the consent of the next parliament is necessary so that an election lies between the preliminary and the final vote. This gives the sovereign an opportunity to express its will (eg Belgium, Denmark, the Netherlands). A number of countries allow constitutional amendments only by way of referendum (eg Ireland).

With or without judicial review—in spite of its higher rank, constitutional law is more vulnerable than ordinary law. While ordinary law emanates from the government and binds the people, constitutional law is attributed to the people and binds government. This fact entails a fundamental difference between the two types of law when it comes to enforcement. Law enforcement is one of the major tasks of government. If private persons violate the law the government has the duty as well as the coercive means to enforce the law. Since constitutional law binds the government, the addressee of the rules and the enforcer are here identical. This is one of the explanations for the rather small impact of constitutional law in the past and still today in many countries.

Many of the constitutions in the nineteenth century tried to solve the problem of non-compliance with the constitution by means of criminal law. Members of the government, but not the monarch, could be tried in court for an intentional violation of the constitution. In most countries special courts rather than the usual judiciary were competent to decide in cases of indictment of ministers. Since the procedural hurdles were usually very high and penal law principles required criminal intent, the number of cases in which members of government were eventually convicted remained small. Today criminal law is usually regarded as an inadequate means to solve this problem.

Only in the United States was constitutional law enforceable from the very beginning. But since the question whether the judiciary could declare acts of the legislature unconstitutional and therefore null and void had not been explicitly answered in the text of the constitution; it needed the landmark decision of the Supreme Court in *Marbury v Madison*, decided in 1803, and the acceptance of this decision in the United States to establish judicial review. This became a characteristic feature of American constitutionalism, although significant enforcement of fundamental rights only began in the twentieth century and the so-called counter-majoritarian difficulty still remains a concern in the political and legal discourse in the United States today.⁴⁹

Still, the American solution remained singular for a very long time. Meanwhile, the judiciary in almost all common law countries and some civil law countries (eg Brazil, Japan, the Nordic countries) has the power to review laws, although some courts, such as the Japanese Supreme Court, make little use of it. But there were and still are other countries that explicitly prohibit judicial review, as with all French constitutions before the present constitution of 1958. At present, courts are prevented from reviewing the constitutionality of laws in the Netherlands and of federal laws (not cantonal laws) in Switzerland. In the United Kingdom the Civil Rights Act of 1998 allowed for judicial review but decisions are not binding on parliament. Likewise, Canada's Charter contains an override clause (section 33).

A new and very influential element in judicial review came with the Austrian Constitution of 1920. It established a specialized constitutional court with the exclusive power to review laws as to their constitutionality. A similar regime was adopted in Czechoslovakia. After the Second World War, this model entered the new constitutions of Italy and Germany—two of the defeated parties in the war (while the third, Japan, under strong American influence adopted the US model)—and countries with a dictatorial past which were determined to

⁴⁹ Alexander M. Bickel, *The Least Dangerous Branch* (1962). See also Chapter 40.

prevent a repetition of the experience. In this context the idea of an independent guardian of the constitution played an important role.⁵⁰

Although first established in Austria (after an unsuccessful attempt in Germany during the revolution of 1848) judicial review by a specialized constitutional court is now widely known as the 'German Model'. The reason may be that the powers of the German court were far more numerous than those of the Austrian or the Italian court. In addition, the German court established itself as a very powerful court by developing a jurisprudence that gave high relevance to constitutional law, secured the court a strong backing in society, which, in turn, guaranteed an unusually high degree of compliance by the political branches of government.⁵¹

The last quarter of the twentieth century brought a breakthrough for constitutional adjudication.⁵² It was no longer an exception but the rule. The movement is so strong that the Israeli Supreme Court felt entitled to interpret the Basic Law: Human Dignity and Liberty of 1992 as having opened the door to judicial review although the text did not explicitly say so. It argued that, today, adopting fundamental rights means adopting judicial review as well. 'The Twentieth century is the century of judicial review.'⁵³

Although it is not generally true that constitutional adjudication is a necessary consequence of constitutionalism, as Hans Kelsen believed, or that constitutions whose rules cannot be invoked in court are not law, as Van Alstyne asserts,⁵⁴ history and contemporary experience show that in countries without a deeply rooted rule of law tradition constitutionalism is of little value in the absence of a special enforcement mechanism.⁵⁵ Especially when it comes to enforcing the primacy of constitutional law vis-à-vis politics, institutions matter. This does not mean that every newly established constitutional court is as influential as the German court. Just as there are weak constitutions, there are weak constitutional courts. Political attempts to discipline constitutional courts are numerous.⁵⁶ Yet, for typological purposes, the difference between constitutions with and without constitutional adjudication has become one of particular importance.

Inclusive or exclusive—without supremacy constitutional law has little relevance. But there is also an opposite danger. Constitutions can go too far in entrenching rules and thereby undermine the difference between constitutional and ordinary law from the opposite end of the spectrum. Everything that has been regulated in the constitution is no longer subject to

⁵⁰ See Chapter 39.

⁵¹ David Robertson, *The Judge as Political Theorist. Contemporary Constitutional Review* (2010) calls the German Constitutional Court 'the most important of all', 11, and affirms that 'so important is this court that any synoptic discussion [of various courts] will depend on frequent mentions of the German approach', 79. See also Georg Vanberg, *The Politics of Constitutional Review in Germany* (2005), 17, 61; Donald P. Kommers, 'The Federal Constitutional Court in the German Political System' (1994) 26 *Comparative Political Studies* 470; Oliver W. Lembcke, *Hüter der Verfassung* (2007).

⁵² C. Neal Tate and Torbjörn Vallinder, *The Global Expansion of Judicial Power* (1995); Jochen A. Frowein and Thilo Marauhn (eds), *Grundfragen der Verfassungsgerichtsbarkeit in Mittel- und Osteuropa* (1998); Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Courts in Asian Cases* (2003); Victor Ferreres Comella, *Constitutional Courts* (2009); Alec Stone Sweet, *Governing with Judges* (2000).

⁵³ *United Mizrahi Bank* (n 31).

⁵⁴ Hans Kelsen, 'Wesen und Entwicklung der Staatsgerichtsbarkeit' in *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (1929), vol 5, 78ff; Van Alstyne (n 29), 180.

⁵⁵ Dieter Grimm, 'Constitutional Adjudication and Democracy' in Mads Adenas (ed), *Judicial Review in International Perspective, Liber Amicorum in Honour of Gordon Slynn* (2000), vol 2, 103.

⁵⁶ See eg the Russian case: Herbert Hausmaninger, 'Towards a "New" Russian Constitutional Court' (1995) 28 *Cornell International Law Journal* 349, and the Korean case: Ginsberg (n 52), 211ff.

political decision. Yet, the task of the constitution is not to make politics superfluous but to regulate the political process procedurally as well as substantively. It must leave room for political decisions and political change. The more detailed a constitution, the more difficult political change will be and the less elections will matter.

This explains the typological difference between exclusive and inclusive constitutions. Certainly, every constitution is to a certain extent exclusive. The democratic constitution excludes a system without participation of the people. A constitution with fundamental rights excludes a totalitarian system. 'Anything goes' is no constitutional maxim. Some constitutions even exclude certain options absolutely. They are not open to constitutional amendment. But this must be distinguished from constitutions that entrench the ideology or the programme of one political competitor so that all other competitors have no chance to realize their programme even after winning an election.

A certain inclusiveness as to ideologies and interests, political parties and their various programmes is therefore a precondition of a functioning constitution. If, on the contrary, the constituent power is used in order to entrench the political programme of the majority and thus exclude the programmes of competing political forces, an important benefit of constitutionalism, namely the possibility of peaceful change, is put at risk. The excluded parties are forced to use revolutionary means to realize their plans or to write a completely new constitution after coming to power.⁵⁷ This is not only a theoretical danger, but an often occurring experience, and not only in countries with a one-party system.⁵⁸

5. Legitimizing Principle

Truth or consensus—whether and to what extent a constitution is normative, nominal, or semantic in Loewenstein's terminology and whether it is comprehensive or allows extra-constitutional powers and extra-constitutional acts of public authority depends to a large extent on the principle on which the legitimacy of a political system is based. The decisive line runs between systems based on a supra-individual absolute truth, on the one hand, and systems that give primacy to individual autonomy, regard pluralism as legitimate, and base their legitimacy on consensus, on the other.

The absolute truth can be a religious truth, a value that is believed to be God-given. It can also be a secular truth, a vision of the perfect society, the final goal of all historical development. Whatever this absolute truth is, it always entails subordination of the constitution to the truth. The truth precedes the constitution and prevents it from being a comprehensive regulation of public power. The person or group of persons who embody or represent the truth, be it a priest or a group of clerics, be it a monarch or an avant-garde or a single political party that claims superior insight in the common best, remains above the constitution.

The legal impact of a constitution is limited by the absolute truth and the pre-constitutional right of the rulers who regard themselves as the embodiment or the guardian of the truth. Their mission is the enforcement of the truth. Any constitutional limitation in fulfilling this mission would be regarded as a betrayal of the truth. Law, constitutional law included, is reduced to an instrumental role. It regulates, limits, and guides the behaviour of the individuals and the inferior agents of the political system, not its leadership.

⁵⁷ Pasquale Pasquino, *Majority Rules in Constitutional Democracies* (forthcoming), 17, distinguishes between 'consensual constitutions' and 'coup de constitution'-constitutions.

⁵⁸ See Chapter 41.

If political systems based on an absolute truth adopt constitutions, which most of them do, be it for pragmatic or for opportunistic reasons, they usually lack those institutions that a full-fledged constitution contains in order to limit governmental power. They do not recognize the separation of powers. If the constitution provides for a division among various branches of government, the division is levelled by a uniform party that appears behind the facade of every branch and dodges the dividing lines. The same is true for the rule of law. It may serve as an instrument in the hands of the leaders, but they are not willing to submit themselves to law.

If constitutions of such political systems contain a bill of rights, as they also often do, it has a meaning that differs from the meaning fundamental rights have in full-fledged constitutions. The rights do not establish a sphere where, in principle, individual will prevails over governmental interests and limitations of the rights require a specific justification. Freedom of this kind would always imply the possibility of evading the requirements of the truth, to place individual above collective interests. Vis-à-vis the truth, freedom of speech, to use this example, would mean a right to express and propagate falsehood and cannot therefore be tolerated.

This shows at the same time why democracy or popular sovereignty is a necessary element of the achievement of constitutionalism, not just one way among others to establish constitutional rule. While the choice between a federal and a unitary system or between a one-cameral or a bi-cameral parliamentarianism can be made without the achievement of constitutionalism being affected, a legitimating principle other than democracy endangers the achievement. The legitimating principle, whatever it may be, will prevail over the constitutional guarantees and thus devalue constitutionalism as such.

Reason or will—this distinction should not, however, be confused with the distinction between reason and will, justice, and legitimacy that is made by Paul Kahn and may sound similar at first glance.⁵⁹ The distinction between truth and consensus marks a difference between democratic and non-democratic constitutions, while Kahn's distinction is a distinction within democratic constitutionalism. Both elements are present in full-fledged democratic constitutions. They do not exclude each other, but they are in tension. For Kahn, 'the fundamental problem of constitutionalism is to negotiate the relationship between reason and will'.⁶⁰

Depending on how this tension is resolved in a particular constitution, the constitutional order favours democracy over rights or vice versa.⁶¹ This has a number of consequences. One of them is the different attitude towards universalistic claims. Another one is the role-perception of courts with constitutional jurisdiction. When a constitutional court speaks: 'Does it speak in the voice of the popular sovereign or in the voice of reason?'⁶² In this distinction, Kahn finds an explanation for the differences between US and European constitutionalism. The US Supreme Court, according to Kahn, is primarily concerned with legitimacy, not justice, while the courts in Europe expand along the dimension of reason.

IV. CONSTITUTIONS AS EXPRESSIONS OF POLITICAL IDEAS

Although inspired by theories of natural law, the modern constitution is positive law. It is the part of the law that regulates political decision-making. But this cannot save it from being a product of political will itself. As such, it is open to changing content. The content, in turn, is

⁵⁹ Paul Kahn, 'Comparative Constitutionalism in a New Key' (2003) 101 *Michigan Law Review* 2677.

⁶⁰ *Ibid* 2703.

⁶¹ Here similarities appear to Bruce Ackerman's distinction between dualist democracy and rights foundationalism, cf Ackerman (n 20), vol 1, 7ff, 10ff.

⁶² Kahn (n 59), 2703.

contingent on different conditions and different ideas of a just order. Competing ideas of justice may lead to different constitutions in different states or in one and the same state over time.⁶³ Social change may produce new challenges for constitutional law that provoke the enactment of new constitutions or the adaptation of old ones. In view of the fact that constitutionalism is now in its third century and has gained almost universal recognition it would be surprising if this had not led to different types of constitutions, according to the various principles to which they give legal expression. Since different principles can be combined or overlapping there is, however, little hope for clear-cut notions. The boundaries between the various types are fluid.

1. Liberal-Democratic Constitutions

Once again I start with the prototypes of modern constitutionalism. They can be characterized as liberal-democratic or democratic and rule of law-oriented (*rechtsstaatlich*). Both components had their roots in the theory of the social contract.⁶⁴ The idea of a social contract came to the fore when the transcendental legitimation of political power had been undermined by the Reformation of the sixteenth century. Yet, it did not come as a political postulate, but as an intellectual experiment. In search for a principle that could replace divine revelation as the legitimating ground for rulership, the contemporary philosophers placed themselves in a fictitious state of nature. In this state everyone was by definition equally free. The question, then, was what might cause reasonable people to leave this state and submit themselves to a government entitled to exercise power over them.

The answer was the fundamental insecurity of equal liberty in the absence of government. Entering into a state of rulership thus became a dictate of reason. Given everyone's equal freedom in the state of nature, this step presupposed a mutual agreement to form a government. Whatever the precise content of this agreement, the consent of the governed became the precondition of legitimate rule. The origin of government could be but democratic. The idea of an original contract raised the question under which conditions free individuals would be willing to form a government, or more precisely: which abandonment of natural freedom was deemed necessary in order to gain the security that was missing in the state of nature.

The answer to this question depended largely on the perception of a state without rule, and this perception was, in turn, influenced by the historical circumstances under which and for which the theory of the social contract was developed. In the period of the civil wars following the religious schism it might seem reasonable to exchange all natural liberties for the security of life, limb, and property that only an omnipotent ruler could guarantee. The monopoly of legitimated use of force was conceived and placed into the hands of a monarch who had the right to use it without limitation.

In this Hobbesian version only the original act of founding a body politic and establishing government was democratic. In a deeply rifted society with fundamental disagreement over absolute truths, the political system so established was not. The government had to be independent of societal consent and could not recognize any natural liberties without endangering its mission to re-establish internal peace. In its original version, the theory of a social contract justified the absolute state. A political system based on this theory was neither democratic nor liberal or *rechtsstaatlich*.

⁶³ See Chapter 16.

⁶⁴ John W. Gough, *The Social Contract* (2nd edn, 1957); Wolfgang Kersting, *Die politische Philosophie des Gesellschaftsvertrages* (1994). See Chapters 10 and 11.

However, the better the absolute ruler fulfilled his historical mission to restore internal peace, the less plausible was his claim to unlimited power. For Locke, writing 40 years after Hobbes, it seemed sufficient to relinquish the natural right to use force in order to defend one's rights, whereas all other liberties remained with the individual. The task of government could be reduced to protecting individual liberties against aggressors and perpetrators. This concept soon found support in the Kantian idea of the intrinsic value and autonomy of each individual that entitled him to self-determination, and the Smithian and physiocratic ideas that individual freedom and, as its consequence, an economy based on market mechanisms were a better guarantee of justice and welfare than feudal, corporate, and mercantile structures.

In this form, the theory became a guideline for revolutionary action in North America and France.⁶⁵ While in philosophy the social contract had been as fictitious as the state of nature, it now took the shape of a constitution understood no longer as a description of reality, but as distancing itself from reality and, instead, making normative demands on reality. Democracy was the legitimating principle of the state. The people not only held the constituent power. Democracy was also the principle for the organization of government. Those who governed received their mandate through the democratic act of popular election. The majority had the right to rule; but remained accountable to the electorate for the exercise of power.

The system was liberal insofar as majority rule did not apply absolutely. Rather, the natural rights were transformed into legal limitations of governmental power. Government did not lose the monopoly of legitimate force, but the purposes for which its power might be used were reduced to the protection of individual freedom and societal self-regulation in the form of market mechanisms and an analogy to market mechanisms in the political sphere where freedom of opinion and speech established a 'market place of ideas'⁶⁶ and different opinions and different interests could compete on the best way to pursue the common weal. Furthermore, the ruler was bound to rule by law and according to law.

The consequence was a transformation of the social order from duties to rights, or, as it has been famously described by Maine: from status to contract,⁶⁷ as well as a clear distinction between the spheres of state and society. The state no longer derived its legitimacy from the task of maintaining and enforcing a pre-established common weal against which no one could claim freedom. Rather, the state enjoyed freedom in fulfilling its task, while society was subject to bonds. Now the distribution of freedom and bonds changed. Free were the individuals and the limits of their freedom could be justified only in order to protect the freedom of others. Bound was government in order to prevent it from pursuing goals other than protecting individual freedom and societal self-regulation.

Yet, the system was also liberal in the sense that it favoured the propertied classes: indirectly, insofar as it placed special emphasis on the protection of property⁶⁸ ('*un droit inviolable et sacré*', as Article 17 of the French Declaration put it) and its corollary, freedom of contract; and directly, insofar as only proprietors enjoyed the right to vote and could thus promote their interests through legislation. Being a pre-industrial concept, liberalism in this understanding was based on the assumption that, in a system where all feudal bonds had been dissolved and all were equally free, everyone had the chance to acquire property and become a voter.

⁶⁵ Bernard Bailyn, *The Ideological Origins of the American Revolution* (1967); B. Groethuysen, *La philosophie de la Révolution française* (1956).

⁶⁶ *Abrams v United States* 249 US 211 (1919), Justice Holmes dissenting.

⁶⁷ Henry Sumner Maine, *Ancient Law* (1861), chapter V, end.

⁶⁸ C.B. MacPherson, *The Political Theory of Possessive Individualism* (1962).

The institutional arrangement corresponded with the leading ideas. A key role was given to the law and together with it to the rule of law. Limitations of individual liberties required a basis in law. Laws were made by the representation of the citizens. The executive was bound by the law. An independent judiciary had the power to control whether the executive complied with the law. The separation of powers that corresponded to these functions diminished the risk of abuses of public power. The rule of law guaranteed that the democratically formed public will prevailed in executive action and at the same time that the liberal limitations of government were respected so that altogether 'a government of laws and not of men'⁶⁹ was established.

Although not foreseen by the framers of the early constitutions, the liberal-democratic type of constitutions sooner or later led to the emergence of political parties which competed with and fought against each other. It also led to the creation of interest groups which try to influence government behaviour from outside, while political parties are the driving forces within government. Consequently, liberal-democratic constitutions are always constitutions of pluralism. Pluralism of individual opinions and interests is accepted as legitimate, and the organized representation of similar opinions and interest is also accepted as legitimate. If one group were successful in suppressing pluralism, the constitution would cease to belong to the liberal-democratic type.

The internal differentiation between constitutions of this type depends on how the tension between the democratic and the liberal or rule of law component is dissolved. Systems without judicial review develop a tendency towards the democratic pole of the scale. If fundamental rights cannot be enforced, the will of the democratically elected branches of government prevails. The reverse conclusion that systems with judicial review tend towards the liberal pole would not be correct. Judicial review can be exercised with this or that tendency. Here Kahn's differentiation between reason and will takes effect.⁷⁰ It is a differentiation between liberty and democracy.

The distinction is also helpful to explain certain difference between the United States and Europe. While the United States leans more towards the democratic pole of the scale, the European states have developed an inclination towards the liberal or rule of law pole.⁷¹ Certainly, there are European states such as the Netherlands whose constitution bars courts from checking the constitutionality of laws. But this prohibition has been undermined by the power of courts to review domestic laws as to their compatibility with the European Convention on Human Rights. These tendencies are, of course, to a large extent a matter of constitutional interpretation and of judicial activism or deference, but not only. They have roots in the constitutions themselves. Countries with the experience that democracy can fail are prepared to grant the judiciary more power than countries with an uninterrupted democratic record.

Moreover, the function of fundamental rights varied according to the circumstances. While the American colonists lived under English law, which was generally regarded as the most liberal law

⁶⁹ John Adams, *Thoughts on Government* (1776), Works, vol IV (1850), 106; Constitution of Massachusetts, Art 30; *Marbury v Madison* 1 Cranch 137 (1803).

⁷⁰ Kahn (n 59).

⁷¹ What is here called *the rule of law* differs in meaning from system to system, see Richard Fallon, 'The Rule of Law as a Concept in Constitutional Discourse' (1997) 97 *Columbia Law Review* 1; Ulrich Scheuner, 'Die neuere Entwicklung des Rechtsstaats in Deutschland' in Ulrich Scheuner, *Staatstheorie und Staatsrecht* (1978), 185; Michel Troper, *Pour une théorie juridique de l'Etat* (1994); Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *California Law Review* 1307 (2001).

of the time, France had preserved the feudal system and exercised rigid control over the economy. These differences could not remain without impact on the revolutions in the two countries and consequently on the constitutions that emerged from the revolutions.⁷² The revolutionary goal of the American colonists was external and political in nature. They fought for self-government after being treated unequally by the motherland, whereas the goal of the French revolutionaries was internal and social in nature. They wanted to liberalize the social and economic order, which, after many failed attempts to achieve this by reforms, presupposed a break with the political system.

This contextual difference found expression in the function of fundamental rights. *Vis-à-vis* an already liberal legal order, the US Bill of Rights could content itself with guaranteeing individual freedom against intrusion by the government including the legislature. This was the difference from England. Fundamental rights functioned as negative rights. In France, the Declaration was adopted in opposition to the existing legal order. This order had to be liberalized, and fundamental rights functioned as tasks and guidelines for the legislature in the complicated and long-lasting process of law reform. Before being able to function as negative rights they were positive rights. They had a programmatic function.

While the adoption of the US Constitution brought the revolutionary process to an end, the adoption of the French Constitution of 1791 set a revolutionary process in motion. It soon turned out that the constitution was not able to control this process. Rather, it became a victim of the process. With the expectations that the revolution had roused, every new wave of revolutionary activity carried the existing constitution away and replaced it by a new one. It was only Napoleon's rise to power that brought this process to a halt, albeit at the expense of the constitution. The various Napoleonic constitutions preserved the form of constitutional rule, but were not intended to limit the power of the ruler.

However, even when the monarchy was re-established in 1804 Napoleon did not touch upon the civil achievements of the revolution. An aristocracy was created, but the feudal order was not re-introduced. On the contrary, Napoleon consolidated the liberal order, and the most important instrument was the Civil Code which, other than the Constitution, remains in place today. A liberal private law regime coexisted with an authoritarian public law regime. Individual liberty was confined to the private sphere and found its field of activity in the economy while political liberties and participatory rights were curtailed. With the Napoleonic constitutions France departed from the liberal-democratic path.

2. Liberal Non-Democratic Constitutions

The rest of Europe became acquainted with constitutionalism through the Napoleonic conquests. Constitutions used to follow the French army. They served as an instrument to win over the population of the conquered territories where the desire for constitutions was greater than the power to gain them by one's own force. The constitutions enacted or demanded by Napoleon promised liberalizing reforms, economic freedom, elected representations of the people, and equal rights *vis-à-vis* the state. Although they marked progress compared to the traditional order, they did not live up to the standard set by the American and French Revolutions.

The possibility of semi-constitutions also guaranteed the survival of constitutionalism after the French hegemony in Europe had come to an end. The Napoleonic constitutions had con-

⁷² Hannah Arendt, *On Revolution* (1963); Jürgen Habermas, 'Naturrecht und Revolution' in Habermas, *Theorie und Praxis* (1963), 57; Dieter Grimm, *Recht und Staat der bürgerlichen Gesellschaft* (1987), 192; Grimm (n 26), 67.

vinced many European monarchs that it was possible to adopt a constitution without adhering to the full programme of constitutionalism. As a consequence, many constitutions came into being that did not affect the princes' right to rule but required only some limitations on their hitherto absolute power. The loss of power was reconciled with the principle of monarchical sovereignty by a distinction between possession and exercise of public power that appeared for the first time in the restorative French Constitution of 1814. According to this Constitution, the monarch remained the exclusive holder of public power whereas on the level of its exercise he limited himself to the consent of parliament in certain matters.

The typological characteristic of these constitutions is the separation of the democratic and the liberal or rule of law component. Since the pre-democratic legitimization of the ruler remained uncontested, the constitutions were not enacted by a vote, popular or parliamentary, but by a decision of the ruler, who 'granted' them to his people as the documents usually read. In a number of cases the text of the constitution was negotiated by the ruler and a representation of the people. But never were the people regarded as the origin or ultimate source of political power. On the other hand, although having freely decided to grant a constitution, the monarch was not entitled to repeal it unilaterally. Where this happened it was regarded as a breach of the constitution.

The constitutions were liberal insofar as they abolished the feudal system and the regulation of the economy or at least charged the state with the task of gradually altering the system. The recognition of fundamental rights was also liberal, albeit due to the origin of these constitutions not as human rights but as citizens' rights and, due to the non-democratic character of the constitution, sparing with political rights. Liberty was confined to the private sphere. The impact of these rights depended largely on the question whether they were endowed with derogatory effect vis-à-vis pre-constitutional law that was incompatible with the bill of rights. Most of them lacked this effect. Where they had derogatory effect the enforcement was weak as judicial review was usually regarded as incompatible with the monarchical principle.

The establishment of representations of the people was eventually liberal, usually based on census suffrage. In many cases, an unelected Upper House existed, designed to give the privileged classes of society additional political weight and to check the powers of the Lower House. Parliament always had a share in legislation and mostly the right to approve the budget, but rarely an influence on the formation of the cabinet. However, the executive was bound by the rule of law. The administration had to respect and enforce the statutes, and eventually the judiciary acquired the power to review the legality of administrative acts.

This type of constitution became the norm in Europe after 1815. The only democratic constitution that survived after that year was that of Norway. The leading constitution during the first, largely restorative, period was the French *Charte Constitutionnelle* of 1814. The greatest influence after 1830 is usually attributed to the Belgian Constitution of that year. This is true with regard to the formulation of the bill of rights and the organizational structure of the state. It is not true, however, with regard to the legitimating principle. The Belgian Constitution, the product of a successful revolution, was based on popular sovereignty for which most other European states were not yet prepared. The French Constitution of 1830, itself a product of a revolution, left the question open.

With reference to the discussion of a European Constitution, it has been suggested that there are two equally legitimate types of constitution, the democracy-oriented type and the rule of law-oriented type.⁷³ While it is true that these have coexisted in history, and to a certain extent still coexist today, it is, however, not the case that they are equally legitimate. While the

⁷³ Christoph Möllers, 'Verfassungsgebende Gewalt—Verfassung—Konstitutionalisierung' in Armin von Bogdandy and Jürgen Bast (eds), *Europäisches Verfassungsrecht* (2nd edn, 2009), 227.

democracy-oriented type included the rule of law, the rule of law-oriented type excluded democracy. Because of this difference, the liberal constitution was commonly regarded as a deficient type of constitutionalism. The achievement of constitutionalism rests on a combination of both. Democracy alone cannot even secure that part of individual freedom on which democracy depends. Liberalism alone cannot guarantee that all citizens get a fair chance to articulate their opinions and interests in the political process.⁷⁴

Much of the constitutional struggle in the nineteenth century and later was about full-fledged constitutions that recognized both components. Attempts to create them were undertaken almost everywhere in Europe in the revolutionary year of 1848. Democratic movements already went along with social demands of the so-called Fourth Estate, the class of manufacturing and industrial workers and peasants. The revolution failed in almost all countries, to a large extent because of the different revolutionary goals of the bourgeoisie and the working classes. However, a number of still absolutist monarchies were now turned into constitutional states. Yet far from being based on popular sovereignty, the constitutions were not constitutive in nature, but simply modified the pre-existing rule.

In this form, constitutionalism arrived in East Asia. Constitutions had been unheard of in this part of the world until the middle of the nineteenth century. But with the opening to the West in the 1860s, constitutionalism became a subject of interest. Japan adopted its first constitution in 1889. The Prussian Constitution of 1850 served as model.^{74a} As with the Korean Constitution of 1899, it was based on the principle of monarchical sovereignty. The motivation for both constitutions can be found more in foreign policy considerations than in internal needs. As a consequence, different from the European model, the liberal elements of these constitutions remained largely on paper.

Where a constitution was still absent, the political system could not be called democratic. But this is not equally true for liberalism. The democratic and the liberal component have a different relationship with constitutionalism. It is difficult to conceive of democracy without a constitution. The reason is that in a democracy 'the people' is regarded as the sovereign, but cannot govern itself. This is true for both representative and plebiscitarian democracy. Even in a plebiscitarian democracy, the people have the decision-making power only in certain but not all matters. Because of the inevitable difference between those who govern and those who are governed, democracy is in need of being organized. This is what constitutions do.

The liberal component is less dependent on a constitution. The government can respect individual freedom and obey the rule of law without being constitutionally obliged to do so. The United Kingdom before the Civil Rights Act is an example. In Germany the rule of law had already emerged in the period of enlightened absolutism in the second half of the eighteenth century, independently of the American and French Revolutions. In the nineteenth century, the modernization of societies in the spirit of liberalism was not necessarily combined with constitutionalism. It could rely on the state's interest in a strong national economy. As the Napoleonic experience shows the liberalization of social and economic life could develop within an illiberal political environment. To a certain extent, private law can substitute for constitutional law.⁷⁵

The difference between constitutional and non-constitutional liberalism lies not necessarily in the content of the law, but in the degree of the entrenchment. Self-limitations can be

⁷⁴ Frank Michelman, 'Law's Republic' (1988) 97 *Yale Law Journal* 1493; Jürgen Habermas, *Die Einbeziehung des Anderen* (1996) 154, 293.

^{74a} Takii Kazuchiro, *The Meiji Constitution* (2007).

⁷⁵ Grimm, *Recht und Staat* (n 72) 192, 212.

reversed at any time. Laws can be repealed or amended. It is the constitution, provided that it enjoys supremacy, that furnishes the degree of durability and certainty that is desirable for such fundamental elements as freedom, equality, rule of law etc. Entrenchment functions as a barrier against attempts to abolish or reduce these guarantees. The full benefits of liberal democracy can only be obtained through a constitution.

3. Non-Liberal Democratic Constitutions

Just as it is possible that a constitution is liberal without being democratic, it is likewise conceivable that a constitution is democratic without being liberal. This seems possible in two quite different forms. One form is radical democracy. Here only the majority principle counts, and the constitution is confined to rules that regulate the decision-making process. Fundamental rights are regarded as anti-democratic because they stand in the way of majority decisions and by the same token constitutional review comes under the verdict of being anti-majoritarian. The rule of law is reduced to the obligation of the executive branch of government to implement the law. But the rule of law does not have any influence on the formation of the law.

Radical democracy was already on the agenda when the first constitutions emerged. In the debate of the French National Assembly on the Declaration of Rights 1789, the representative Cr ni re argued in a Rousseauian manner that there is but one fundamental right, namely the right of every citizen to participate in the formation of the general will.⁷⁶ In the early years of North American constitutionalism, the parliaments of the former colonies claimed for themselves the same sovereign power that the British parliament enjoyed and did not feel bound by the Bills of Rights they had only recently adopted. It needed the Philadelphia Convention to clarify that sovereignty belonged to the people, not the people's representatives.⁷⁷

Radical democracies may seem particularly democratic. But they are not immune to majoritarian absolutism and they are threatened by an inherent tendency toward self-destruction. If the elected majority is omnipotent, it can use the majority vote to discriminate against the minority, tailor the rules of political competition in a way to prevent loss of power, restrict critical speech, and ultimately even abolish majority rule by a majority vote. This tendency remains latent as long as the system rests on a set of shared values which prevent the competitors from mutually regarding themselves as enemies and which function as non-legal limitation to majority decisions. When the moral basis erodes the constitution can, however, easily pervert.

For the latter, the Weimar Constitution of 1919 is often used as an example. And, indeed, what happened in 1933 in Germany was not a revolution against the democratic system but a self-destruction of democracy through democratic procedures. Afterwards no new National Socialist Constitution was adopted. Nazi rule was the opposite of constitutionalism. However, it would be incorrect to call the Weimar Constitution a constitution of the radically democratic type. It contained an elaborate bill of rights as well as a number of checks to parliamentary power and it provided for an, albeit rudimentary, constitutional court. Rather, it was a formalistic interpretation that regarded the events of 1933 as compatible with the Weimar Constitution.

⁷⁶ *Les d clarations des droits de l'homme de 1789. Textes r unis et pr sent s par Christine Faure* (1988), 127. Marat replied that without a limited power there would be no constitution, see 278, and Demeunier rejected the idea by calling it 'le syst me de Hobbes, rejet  de l'Europe enti re', see 331.

⁷⁷ Gordon Wood, *The Creation of the American Republic 1776-1787* (2nd edn, 1998), 391ff.

One might expect all democratic constitutions without a bill of rights to belong to the radical democratic type. But this is not necessarily the case if democracy is not reduced to mere majority rule. Australia, for example, has deliberately renounced a bill of rights because it deemed individuals best served by ensuring to each an equal share in political power.⁷⁸ Nevertheless, Australia still accepts that the decision in favour of democracy implies the recognition of some unwritten fundamental rights, such as freedom of speech, without which democracy would lose its sense. Consequently, the Australian High Court declared a law null and void on the ground that it violated freedom of expression, which it regarded as being implied in the notion of democracy.⁷⁹ In this context, it is not without interest that all other states of the old Commonwealth (Great Britain, Canada, and New Zealand) have recently adopted bills of rights.

The second form of democratic non-liberal constitutionalism consists of constitutions that are based on the principle of popular sovereignty, but give little weight to the people's interests and opinions in the course of day-to-day politics. They put the emphasis on executive power and have low regard for the separation of powers and fundamental rights of the citizens. They often go along with a strong affiliation of the ruling elites with a religious creed and give special protection to the Church that represents and propagates this creed. The distinction between general laws and religious norms is low, the degree of accepted pluralism small.

This type of constitution played a big role in the Latin American countries after they had freed themselves from Spanish or Portuguese rule.⁸⁰ These two colonial powers themselves had deviated from the mainstream constitutionalism in Europe in 1820 when the struggle for independence in Latin America began. Since the constitutions were exclusive in the above-mentioned sense,⁸¹ every power shift between the liberal and the restorative forces led to the abolition of the existing constitution and to the adoption of a new one. For the same reason, the frequent change of constitutions repeated itself in Latin America, although with a few exceptions: the third Chilean Constitution, for instance, was in force from 1833 to 1925.⁸² Altogether, this continent saw more than one hundred constitutions in the nineteenth century alone and nor was constitutional stability reached during most of the twentieth century.

The vast majority of these constitutions are described as democratic in origin, but autocratic in practice, defending political elitism and moral perfectionism under the guidance of the Catholic Church.⁸³ In opposition to this type of constitution, some radical democratic constitutions were drafted, albeit with little success, and the same is true for liberal constitutions. Only Brazil differs to a certain extent from countries in the Spanish tradition.⁸⁴ All constitutions after the Imperial Constitution of 1824, with the exception of two dictatorial constitutions (1937 and 1967/69), were enacted by an elected constitutional assembly and contained growing catalogues of fundamental rights—the current one beating all records with its almost 150 rights.

⁷⁸ Harrison Moore, *The Constitution of the Australian Commonwealth* (1902), 329.

⁷⁹ *Australian Capital Television v Australia* (1992) 177 CLR 106.

⁸⁰ José M. Portillo Valdés, 'Constitución' in Javier Fernández Sebastián (ed), *Diccionario político y social del mundo iberoamericano* (2009), vol I, 305; Jeremy Adelman, *Sovereignty and Revolution in the Iberian Atlantic* (2006); Jaime E. Rodríguez O., *The Independence of Spanish America* (1998), 192.

⁸¹ 'Inclusive or exclusive', above at 113.

⁸² D. García Belaunde, F. Fernández Segado, and R. Hernández-Volle (eds), *Los sistemas constitucionales iberoamericanos* (1992).

⁸³ Roberto Gargarella, 'Towards a Typology of Latin American Constitutionalism' (2004) 39 *Latin American Research Review* 141.

⁸⁴ Paulo Bonavides and Paes de Andrade, *Historia Constitucional do Brasil* (8th edn, 2006).

Constitutions that look like liberal-democratic ones but tend to be democratic-non-liberal are quite frequent throughout the world. This is not to say, however, that the democratic component is well developed. As a matter of fact, it often finds itself in a rudimentary stage, although more advanced than the institutions of legal control and adjudication whose failure is often evident. This situation should, therefore, not be confused with that in the United States where the democratic component enjoys a certain prevalence over the rule of law component. This statement concerns a constitutional order which not only belongs clearly to the liberal-democratic type but also possesses highly developed institutions of legal control.

4. The Social or Welfare State Constitution

Liberalism fulfilled its promise only in part. While the productivity of a liberalized economy, and with it the wealth in society, increased considerably, the societal self-regulation did not result in a just order. The wealth was distributed unequally, and instead of the old feudal structures a division according to classes spread out in society. The liberal constitution, whether democratic or not, contributed to this development, although the text does not always reveal this. The bills of rights were formulated in universal terms and even when they protected only citizens they applied to all of them equally. Yet, this did not prevent the United States and other countries such as Brazil from upholding slavery; and it did not prevent any liberal state in the nineteenth century and thereafter from treating men and women unequally.

The more general problem was, however, that the equal rights applied to unequal conditions. All enjoyed freedom of property, but this freedom was useful for proprietors only. All enjoyed freedom of contract. No one could be compelled to conclude a contract that he deemed onerous or unjust. But for those whose only property was their capacity to work, there remained little choice but to accept any condition set by employers, landlords, etc. Thus, equal freedom, applied to unequal factual conditions, did not lead to a balance of interest but to exploitation. In the societal sphere that had been freed from state regulation, private suppression developed. Formal equality applied to situations of substantive inequality cements the status quo.⁸⁵

This was the situation in many constitutional states, and it was aggravated by the Industrial Revolution. Political redress was less likely the more liberal the constitutions were. When it came to the right to vote the constitutions openly favoured bourgeois interests. The electoral system was based on census, and the census was even stricter with regard to eligibility. Thus, attempts to alleviate the situation of the working classes through legislation usually failed in the liberal parliaments. Disconnected from its original aim to secure justice, liberalism and its insistence on formal equality with the material pre-conditions of freedom left aside became doctrinal. A revision of liberal constitutionalism seemed necessary.

The year 1848 was a turning point in this respect. Marx and Engels published the Communist Manifesto. The French February Revolution was no longer a revolution of the middle classes against absolutism and feudalism as in 1789 or against the Bourbon restoration as in 1830, but a revolution of the working classes. The right to work was proclaimed. A new constitution, passed in November 1848 by a national convention emanating from general elections, promised in its preamble a more equitable distribution of burdens and advantages and in its bill of rights guaranteed free education, equality in labour relations, public work for the unemployed,

⁸⁵ See Chapter 47.

albeit no right to work, state aid for the sick and the elderly if they were unable to support themselves.

In spite of the short life of this constitution a new element was now on the constitutional agenda: the social. Put forward in reaction to the manifest deficits of liberalism, it came in two forms, a moderate and a radical one. In the first form, the social element was designed to complement, not to negate, the liberal element. The state should again assume responsibility for a just social order, guarantee a minimal standard of welfare, and prevent abuses of economic liberties. The constitutional devices were social and economic rights that the state had to implement. The second mode was anti-liberal and expected progress not from modifications, but from a replacement of liberalism. It ultimately led to socialist constitutions.

The route from the early attempts to infuse social elements into the constitutions to the realization of the project was long. In some countries nothing changed on the constitutional level. In others changes arrived late. The US Constitution is an example of the first alternative. After the Civil War, the Thirteenth and Fourteenth Amendments abolished slavery and guaranteed every person equal rights regardless of colour and race. But the Constitution did not react to the social problems of a rapidly industrializing society. The same is true for the European constitutions in the second half of the nineteenth century and for most constitutions in other parts of the world.

However, this did not necessarily mean that governments completely abstained from coping with the social problem. Although the French Constitution of 1848 was soon abolished, Napoleon III, the heir of the failed revolution, introduced a number of social programmes, but daily working hours did not fall below 12 and unions and strikes remained forbidden. Germany was the first country to introduce a comprehensive social security system in the 1880s that insured workers against illness, invalidity, and unemployment and provided old-age pensions. This shows that the welfare state, just like liberalism and the rule of law, does not depend on constitutional guarantees. These initiatives can be introduced on the legislative level.

Yet, even in the absence of explicit social provisions the constitutional setting is not irrelevant. Germany's backwardness in terms of constitutionalism facilitated its progressiveness in social matters.⁸⁶ The non-democratic monarchical state had never understood liberalism as an end in itself but as a means to promote economic growth. Likewise, it had never completely relinquished its responsibility for general welfare. Bismarck succeeded in getting support for his social security programme from a not fully liberal parliament whereas social measures were usually voted down in the parliaments of countries such as France.

The constitutional progressiveness of the United States, in turn, impeded measures of social policy for a certain time. While in Europe government measures that addressed the social problem could not be challenged in court, this was possible in the United States. The *Lochner* decision of 1905, which declared unconstitutional a law that limited the weekly working hours of labourers to 60, became characteristic for a whole period of dogmatic liberalism and stopped President Roosevelt's New Deal programme until he got the chance to appoint new justices to the Supreme Court who were willing to overrule *Lochner*.⁸⁷

Since the United States never added social elements to their liberal-democratic constitution, the admissibility of social policy measures always remained a question of constitutional interpretation. In a number of other constitutional systems, the turn towards welfare state

⁸⁶ Grimm (n 72), 138.

⁸⁷ *Lochner v New York* 198 US 45 (1905); *West Coast Hotel v Parrish* 300 US 379 (1937).

constitutions gained momentum after the First World War. The Weimar Constitution of 1919 added social and economic rights and directives regarding the economic order to the classical liberties. Dignity appeared as a constitutional notion in the sense of a right to lead a dignified life, secured by entitlements to shelter, food, and clothing, and in a similar sense dignity was mentioned in the Irish Constitution of 1934. A comprehensive chapter on the economic and social order characterizes the Brazilian Constitution of 1934.

While Germany in its current constitution replaced the Weimar catalogue of social and economic rights by a general clause that Germany is a social state, many constitutions of former socialist countries and a number of post-colonial constitutions in countries with severe social differences, based on caste as in India or on race as in South Africa, contain chapters with social and economic rights or directives for legislation with the goal of creating equal conditions for the population. Affirmative action, a constant problem under the liberal US Constitution, is admitted and even prescribed in these countries. The guarantees of the classical liberties often contain notwithstanding clauses in favour of affirmative action. India's constitution is full of them; and the Brazilian Constitution of 1988 comprises a veritable social policy programme.⁸⁸

Likewise, the social element is of great importance in the post-war constitutions of Japan (1946) and Korea (1949).⁸⁹ Both constitutions contain a right to work. According to Article 25, every Japanese citizen has the right to lead a life based on a minimum standard of health and culture. According to Article 34, all Korean citizens have the right to a dignified life. Both constitutions obligate the state to promote social welfare and social security. When these countries adopted those clauses they were under strong US influence, although it was not the US Constitution that could serve as a model in this respect. Japan and Korea constitutionalized Roosevelt's New Deal programme that had been implemented on the legislative level in the country of origin.

Just as a liberal-democratic constitution has to negotiate the relationship between democracy and liberty, social constitutions that attempt to correct the deficits of liberalism have to negotiate the relationship between liberty and equality. Constitutions belonging to this type can therefore be differentiated according to their preference for either liberty or equality. Generally speaking, countries with a discriminatory past (homemade as in India or externally imposed as in South Africa), which the constitution wants to overcome, tend to give considerable weight to equality. The same is true for countries without a strong liberal tradition and a culture not primarily based on values of individual autonomy as with the East Asian states.

On the contrary, countries in the Western tradition tend to subordinate equality to liberty. It is equal freedom that the various constitutions seek to achieve. Social and economic rights are primarily understood as guarantees of the material foundations of liberty. The social constitution thus breaks with a merely formal understanding of equality that prevailed under the liberal constitution, but in the interest of a deeper understanding and securing of liberty. Even in a constitution like the German one that does not contain social and economic rights, but the general principle of a social state, this principle is used to give the classical liberties a social content.⁹⁰

⁸⁸ On affirmative action, see Chapter 54.

⁸⁹ Sung-Soo Kim and Hiroshi Nishihara, *Vom paternalistischen zum partnerschaftlichen Rechtsstaat* (2000), 25, 36.

⁹⁰ Dieter Grimm, 'The Protective Function of the State' in Georg Nolte (ed), *European and US Constitutionalism* (2005), 137.

The impact of the social component would be misunderstood if seen only as an addition of a new content layer to the constitution. It entails a structural change. Social and economic rights are a consequence of waning confidence in the self-regulation capacity of society. Social justice becomes again a concern of the state. As in the pre-liberal era, it is a goal that has to be actively pursued, but in a different way from the earlier period and not through illiberal means. Social and economic rights as a way to pursue this aim therefore differ considerably from classical liberties. These are primarily negative rights limiting the government. They are fulfilled through non-action. Social and economic rights, on the contrary, are positive rights the fulfilment of which requires state action.⁹¹

This has a double consequence. While there is only one way to comply with negative rights, namely to omit certain actions, there are various ways to fulfil positive rights. The government has a choice. Because of this difference negative rights correspond with entitlements of the rights holder, positive rights do not. Secondly, while the duty to omit certain actions does not create a scarcity problem, the duty to render services or distribute benefits does. For both reasons, social and economic rights are in need of legislative concretization and specification before they can entitle their beneficiaries and be enforced by courts.

This difference gave rise to the assumption that, despite their name, social and economic rights are not rights, but merely expressions of political intent without legal relevance. This is particularly, but not only, the case in common law systems where it seems difficult to conceive of a right without a corresponding remedy. However, it would be a mistake to assume that these rights are not justiciable at all. Courts in countries with positive rights may obligate the legislator to enact laws that give a concrete meaning to these rights and create entitlements for the individual on the legislative level. In some cases the obligation of the state to distribute benefits has even been derived directly from the constitution if laws were missing.⁹²

Social and economic rights were a constitutional answer to the social problem that originated in the nineteenth century in the wake of industrialization. But this is no longer the only field where active state intervention in society takes place. Over time, the state again assumed comprehensive responsibility for the welfare and development of society. Government is, within the limits of its capacity, responsible for economic growth, infrastructural modernization, protection against the risks inherent in scientific and technological progress and its commercial use.

Not all of these tasks can be fulfilled by giving orders. The state is compelled to use indirect means like financial incentives to reach its aims. To the same extent that the state resorts to soft law instead of hard law it became dependent on the willingness of private actors to comply with demands. As a consequence, multilateral bargaining processes replace the traditional unilateral command. Private actors advance from societal forces that try to influence government decision to participants in decision-making. They gain an informal share in public power. The borderline between public and private is blurred.

All this is not without consequences for the constitution of welfare states. It finds expression in so-called third generation rights, such as the right to a healthy environment, clean air and water, etc. It is, however, difficult to individualize these collective goods and to formulate them in the language of rights. In many constitutions, therefore, they are not part of the bill of rights, but form a separate category, namely objectives of the state. As such, they claim binding force for government. Consequently, total neglect would amount to a violation of the consti-

⁹¹ See Chapter 49.

⁹² Superior Tribunal de Justiça of Brasil, SS 3751 of 20 April 2009; no 1.185.474-SC of 20 April 2010.

tution. But the measures to be taken in order to implement the objectives cannot be derived from the constitution. They are left to political will, according to the agenda of the ruling party and the financial capacity of the country.

Furthermore, the social type of constitution can no longer confine itself to limiting public power. It also adopts a programmatic function. Appellative and aspirational norms supplement the traditional prescriptive rules. The constitution expresses the values in which a society believes. They are not just solemn assertions, but they are understood as legally binding guidelines, for example for the interpretation of the bill of rights as section 9 of the South African Constitution requires. These constitutions are not limited to the sphere of the state, but formulate an overarching consensus for the political and the societal sphere. This goes along with more and more informal practices that replace or undermine the formal institutions and procedures. What is gained in range is lost in normativity.⁹³

5. Socialist Constitutions

Socialist constitutions equal the type of constitutions discussed above in that they are also a reaction to the deficits of liberalism. They differ from these constitutions in that they break with liberalism altogether. Their attitude is not illiberal but anti-liberal. Karl Marx taught that fundamental rights are an instrument of exploitation and Ferdinand Lassalle extended this to constitutions in general: they conceal power structures, and power always prevails over law.⁹⁴ As a consequence, the limitations that are part of the liberal project are rejected: fundamental rights, separation of powers, rule of law, judicial review. If provisions are found in socialist constitutions that look like these limitations they usually have a different meaning and fulfil different functions. This can be explained by a look to the second element of modern constitutions, democracy. Are the socialist constitutions democratic?

The self-description of most socialist countries, past and present, says so: the People's Republic of China, the German Democratic Republic. In the constitutional texts this is usually explained by attributing all public power to the people. But this power is exercised in the form of a dictatorship, 'the People's Democratic Dictatorship' (Art 1 of the Chinese Constitution). Subject to this dictatorial power is not the people as such, but one class of the people, the 'working class' of workers and peasants. This class acts through an avant-garde, the Communist Party. The Communist Party is usually the only party. If other parties exist they are not competitors but cooperators.

The party exercises the power in accordance with the principle of democratic centralism, that is to say, top-down. The leadership, usually the politburo, is the avant-garde within the avant-garde. Its position is legitimized by superior insight in the ultimate aim of history and the true interest of the people. The legitimization principle is not consensus of the people, but an absolute truth. Consequently socialist constitutions are not constitutions of pluralism. If we find mechanisms that resemble democratic mechanisms in democratic constitutions, such as elections, they again have a different meaning and a different function.⁹⁵

⁹³ Uwe Volkmann, 'Der Aufstieg der Verfassung. Beobachtungen zum grundlegenden Wandel des Verfassungsbegriffs' in Thomas Vesting and Stefan Koriath (eds), *Der Eigenwert des Verfassungsrechts* (2011), 23.

⁹⁴ Karl Marx, 'Zur Judenfrage' in Karl Marx and Friedrich Engels, *Werke* ([1843] 1970), vol I, 347; Ferdinand Lassalle, *Über Verfassungswesen* (1862 and 1907).

⁹⁵ See Chapter 25.

Since in socialist systems political power is legitimized by an absolute truth, everything that has been said about truth as legitimating principle applies to socialist constitutions. They are subordinated to this truth. Their function consists in serving this truth. This means that they cannot acquire primacy over governmental acts. A rule such as Article 5(1) of the Chinese Constitution must be read in light of the fact that the Communist Party is the sole authoritative interpreter of the Constitution and the laws. The Constitution rather assists the government in achieving the pre-existing purpose of political rule. Elections may offer a limited choice among candidates, but not among programmes or views of the common best.

The separation of powers does not acknowledge independency of state organs. It is a mere administrative utility principle, a division of labour, not of powers. The rule of law, understood as 'socialist legality', applies to the inferior agencies of the state, but does not bind the highest authorities.⁹⁶ Fundamental rights do not open spheres of self-determination of the individual. All rights are under the condition not to disrupt the truth. 'Disruption of the socialist system by any organization or individual is prohibited' (Art 1 of the Chinese Constitution).

Behind this perception lies the assumption that, with the abolition of capitalism, the antagonism between the individual and the state has disappeared. In the socialist system the interests of society and the interest of the individual are objectively in harmony, although not every member of society may subjectively be aware of this. In comparison with the objective situation, the subjective view of the individual deserves no legal protection. It can be disregarded and, if necessary, suppressed. The distinction between state and society, public and private is obsolete. The legal system is based on duties instead of rights. Fundamental rights no longer guarantee a private sphere free of state intervention, but guarantee the individual participation in the collective endeavour as well as the means necessary to render his or her service in the reproductive process of society.

Basically the same is true for constitutions in every political regime that legitimizes itself by an absolute truth. It is in particular true for theocratic regimes whose foundation is not a secular, but a divine, truth. The question is therefore whether it is justified to regard these constitutions as a type of constitutionalism. If the measure is what was called here the achievement of constitutionalism, all essential characteristics of constitutions are missing. The other types discussed may have been closer or farther away from the achievement, but they could all be accepted as species of the genus 'modern constitution'. Socialist constitutions are the anti-type to these.

V. A NEW DISTINCTION: NATIONAL AND INTERNATIONAL CONSTITUTIONS

The modern constitution is a particularly ambitious and a particularly successful means to submit public power to law. When it emerged, public power was in the hands of states. They held the monopoly of public power on their territory. As a matter of fact, only the concentration of the numerous dispersed powers that coexisted on a given territory made the constitution, understood as a law that comprehensively regulated the establishment and exercise of public power, possible. A polity where this concentration existed was regarded as a state. The constitutions were state or national constitutions. The modern state was the precondition of

⁹⁶ Gordon Chang, 'What Does the Rule of Law Mean in China?' (1999) 13 *China Law and Practice* 271; Randall Peerenboom, *China's Long March Toward Rule of Law* (2002).

the modern constitution. Earlier polities had laws and even fundamental laws that applied to power holders, but no constitution.

Beyond the state, no object capable of being constitutionalized existed. The only actors on the international scene were states. They were characterized by an attribute that no other entity had, namely sovereignty. Sovereignty meant that they held the supreme power within their territory and had no external powers above them. The law that regulated the relationship among sovereign states was international law. But because of the sovereignty of the states and the corresponding absence of an international public power, let alone an international legislation, legal bonds among states could only stem from voluntary agreements. International law was contractual law. It consisted of treaties. Treaties were not constitutions. In the absence of an international public power they could not be enforced if a party was in breach of a mutual agreement.

This situation lasted for almost 300 years, from the Westphalian Treaty of 1648 to the foundation of the United Nations after the Second World War in 1945. The United Nations differs from the many leagues and alliances that had existed before 1945, including the League of Nations, which had been founded after the First World War, in that the member states of the United Nations not only renounced the use of force in international relations (with the exception of self-defence), but that they transferred the power to enforce this commitment against aggressors, if necessary with military force, to the UN. After the founding of the United Nations no member state is as sovereign as states had been in the Westphalian order. There is now a public power above them.

In the meantime, other international organizations were created globally and regionally to which the member states transferred sovereign powers that are now exercised by these organization, potentially against the will of the member states. The most far-reaching organization of this type is, of course, the European Union. But other powerful international actors have also emerged: the European Council with the European Court of Human Rights; the International Criminal Court, whose legal basis is not a treaty but a legislative act of the UN Security Council and whose powers are not limited to signatory states; the World Trade Organization; to a certain extent also the International Monetary Fund, etc. In addition, public international law has brought forth a *ius cogens* that binds states independent of their consent. The borderline between inside and outside is blurred.

The erosion of traditional statehood that goes along with this development cannot leave the constitution unaffected.⁹⁷ If nation-states no longer hold the monopoly of public power, but share it with international organizations the national constitution loses the capacity of comprehensively legitimating and regulating all public power that claims validity within the national territory. The national constitution may still determine the transfer of powers to international organizations. But the use these organizations make of their powers is no longer subject to national constitutional law. The constitution is reduced to a partial order that regulates public power only insofar as it remains state power.

This gives rise to the question whether the decline of the national constitution can be compensated on the international level. After all, what is in need of being submitted to law is not the state, but public power, regardless of the entity through which it is exercised. The widely accepted answer to this question is constitutionalization. Unlike the making of a constitution, constitutionalization does not designate an act by which a constitution acquires legal force,

⁹⁷ Dieter Grimm, 'The Constitution in the Process of Denationalization' (2005) 12 *Constellations* 447. See also Chapter 56.

but a process that eventually leads to a constitution. The objects of this process are the treaties and charters of international organizations such as the United Nations, the European Union, the World Trade Organization, the various human rights pacts, sometimes public international law in general, and even self-organization and self-regulation processes of globally operating private actors,⁹⁸ all objects for which the term 'constitution' was not in use until recently.

If all this is correct, a new type of constitution is emerging: the international constitution as opposed to the national constitution. Whether or not it is indeed correct depends largely on the meaning of 'constitution'. If the term is understood in the sense of the achievement described earlier, the international world is relatively far from it. With the exception of the European Union, the international level still lacks an object capable of being constitutionalized in the sense of that achievement. International public power is fragmented; it lies in the hands of a few entities, most of which are specialized in exercising one singular function—such as regulation of commerce, protection of the environment, enforcement of human rights—and therefore endowed with one single public power, so far not integrated in a coherent system.

Undoubtedly, all these entities are submitted to law. But legalization and constitutionalization are not the same. Because of their legal nature the treaties, charters etc fulfil a number of functions that constitutions fulfil in states. However, they all lack the democratic element and are confined to the rule of law element of constitutionalism. In terms of the achievement of constitutionalism they lag quite far behind.⁹⁹ Yet, this was and is true for a number of national constitutions as well. For typological purposes it should not matter. Typologies help to distinguish between phenomena that are treated under the same name. This is their value also when it comes to national and international constitutionalism.

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⁹⁸ Among the rapidly growing literature see eg Dobner and Loughlin (n 24); Vicki C. Jackson, *Constitutional Engagement in a Transnational Era* (2010); Nico Krisch, *Beyond Constitutionalism* (2010); Jeffrey L. Dunoff and Joel P. Trachtman (eds), *Ruling the World? Constitutionalism, International Law and Global Governance* (2009); Jan Klabbers, Anne Peters, and Geir Ulfstein, *The Constitutionalization of International Law* (2009); R. St J. Macdonald and D.M. Johnston (eds), *Towards World Constitutionalism* (2005).

⁹⁹ Grimm (n 24).

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