

Wolfgang Babeck
Albrecht Weber

Writing Constitutions

Volume I: Institutions

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Preface

In recent times, the end of the democratic era¹ and a “cultural backlash”² has been predicted. However, we now increasingly observe a different phenomenon: decade-old and often century-old constitutions prove to be a fierce stronghold against autocratic rulers. Contraventions of constitutional provisions are tested in courts and the executive is often called to order. More so, many attempts likely do not see the light of day because constitutions have successfully enshrined checks and balances. The value of constitutions cannot, therefore, be underestimated: *constitutions are the unsung heroes of the early twenty-first century*. Whilst constitutions are always subject to change, fundamental and radical changes will not be unquestioned. International acceptance becomes more and more important in a globalised community and rulers are on the watch.

Against this backdrop, *Writing Constitutions* intends to serve as a manual for those writing constitutions or interested in their design. It is the first coherent, systematic and universal approach to capture concept and content of a modern constitution. Volume I breaks each constitutional mechanism down into components and offers various designs for the drafting of its clauses. This provides lawmakers with the necessary toolkit for writing constitutions and empowers them to strengthen democracies. This toolkit will particularly be needed as the world is entering fundamental transformations triggered by climate change.

¹E.g. Levitsky, S. & Ziblatt, D. 2018. *How democracies die: What history reveals about our future*. London: Viking or Buffin de Chosal, Chr. 2014. *La fin de la démocratie*, Paris: Groupe Saint-Rémi; Diamond, L. (2015). Facing Up to the Democratic Recession. *Journal of Democracy*, 26(1), 141–155.

²See Czada’s critical comment under Czada, R. From distributive to cultural struggle and back. Views on Norris’ and Inglehart’s theory of cultural modernization. *Z Vgl Polit Wiss* (2020) with respect to Inglehart, R. 2018. *Cultural evolution. People’s motivations are changing, and reshaping the world*. Cambridge: CUP and Inglehart, N. & P. & R. 2019. *Cultural backlash. Trump, Brexit, and authoritarian populism*. Cambridge, New York: CUP.

Comparability of Constitutions

While some scholars observe a recent revival of comparative constitutionalism, the question is, of course, whether constitutions are comparable at all.

The search for the best constitution is as old as political theory. In Plato's dialogue, "Protagoras" the "art of politics" (*politikê technê*) is proposed by Protagoras as a precondition for living together harmoniously.³ In "Nomoi", Plato links the quest for a desirable constitution with a fair and fixed distribution of lands and possessions.⁴ In Aristotle's "Politics", different forms of state "constitutions" (*politeiai*) are examined by referring to a collection of 158 examples of Greek "city-states" (*poleis*), an impressive early example of empirical constitutional comparison. Aristotle evaluates the advantages and disadvantages of the different forms of governance and their modifications and compares democracy, oligarchy, aristocracy and monarchy. For his time and the needs of political reform, even then a preference to the "polity" (*politeia*) as a moderate form of democracy (including a stable middle class) becomes apparent.⁵

By now, every country in this world has a unique constitution influenced by its history and culture and often its neighbours, conquerors and liberators. No country has simply adopted another country's constitution.⁶ Why then, would we dare to compare constitutions if they are so idiosyncratic? The authors of *Writing Constitutions* are in the tradition of many comparative constitutionalists when they conclude that constitutions are comparable to a significant degree as they contain many joint features. Almost all constitutions contain a similar structure and common core legal instruments even though the details of those differ from each other. Almost all constitutions contain a catalogue of human rights (to be covered in Volume II) and mechanisms such as elections, dismissals, impeachments, referendums, states of emergencies or constitutional amendment clauses. While it is a challenge to capture those mechanisms in their context, the authors believe it is important to systematically take account of and compare those solutions to create a repertoire for those who aim to change their constitution. *Writing Constitutions* is therefore firstly an empirical study of the essential elements that modern constitutions contain, before drawing any conclusions.

Any comparative study of empirical constitutional normativity is based on certain premises from which the authors start. The search for comparative models of normative statements on certain elements of a constitution is by itself already marked by methodological assumptions that implicitly assume comparability. The starting point is first of all the method of "functional comparativism", i.e. the legal comparator

³Plato, *Protagoras*, pp. 318ss, 323.

⁴The constitution of the *Nomoi* establishes unchangeable 5040 proprietary units; Book V 737e-738a, 740b-741c, 745c-e; Book VI 771b.

⁵Book IV, chapters 8–12; Book V, chapters 1, 4ss. We are grateful to Prof. Knoll (Istanbul/Munich) for these quotations.

⁶Unless it merged into another country, like the former German Democratic Republic in 1990.

searches for norms that reflect the respective functions attributed to them in essentially the same terms as derived from conceptual wording: the systematic, the contextual and the purpose-oriented (“teleological”) interpretation. This already opens ample scope for interpretation and assumptions which the comparator must be aware of.⁷

The “functional method” is strongly criticised for neglecting idiosyncrasies (“identity”) and the historical-cultural context of a constitution, for paying homage to legal ethnocentrism or postmodern hegemonialism.⁸ However, this is partly due to a misunderstanding of the functional method, especially if it is only focused on the function and disregards the cultural context. Functional comparative law should therefore be viewed against the background of the cultural context⁹ and it can then also be described as “contextual legal comparison” or “contextual functionalism”.¹⁰

As authors of this Volume I of *Writing Constitutions*, which is dedicated only to state institutions and competencies, the editors are well aware of this basic methodological requirement. The comparison in *Writing Constitutions* is based on textual similarities, which favour a functional equivalence and show a comparable cultural context. This today applies to almost all European constitutions, not only in the European Union, but also in the wider circle of the Council of Europe. The influence of the ideas of the Enlightenment on the French and American revolutions and their constitutionalisation in the eighteenth century also suggests a comparison of related institutions and principles. This becomes even more visible with regard to fundamental and human rights since the Declaration des Droits de l’Homme (1789) and the internationalisation of human rights through international and regional pacts and conventions (Volume II of *Writing Constitutions*).

An adequate comparison becomes more difficult for states with a post-colonial past, above all in Asia and Africa and partly in Latin America, which were institutionally particularly influenced by the USA, but have demonstrated independent constitutional developments.¹¹

⁷Rosenfeld, M. & Sajó, A. (2012), Introduction, in A. Sajó, M. Rosenfeld (Eds.), *The Oxford Handbook of Comparative Constitutional Law* (pp. 1–19), Oxford: Oxford University Press, at 17: “Comparison consists in sorting out and accounting for similarities and differences among units that figure as objects of comparison. What ought to count as relevant similarity or difference and the import of such similarity or difference are at the root of the most vexing methodological issues”.

⁸See Kischel, U. (2019), *Comparative Law*, Oxford: Oxford University Press, p. 102.

⁹See the deliberate cultural-contextual approach in Häberle, P. & Kotzur, M. (2016), *Europäische Verfassungslehre*, Baden-Baden: Nomos, pp. 59ss; for the historical-contextual approach in a functional interpretation see also de Vergottini, G. (2021). Constitutional Law and the Comparative Method. In: Cremades, J., Hermida, C. (eds) *Encyclopedia of Contemporary Constitutionalism*. Springer, Cham., pp. 11.

¹⁰Jackson, V. C. (2012), Comparative Constitutional Law: Methodologies, in Rosenfeld/Sajó (fn. 5), p. 72: “Contextualised functionalism requires a willingness to question whether functions, concepts or doctrines that appear similar may in fact be quite different in different societies; an attention to how seemingly separate institutions and legal practices are connected to, and influenced by, others; and a commitment to be open to noticing how legal rules or doctrines may be affected by the identitarian or expressivist aspects of the constitution”.

¹¹These systems are partly associated with “democratic non-liberal constitutionalism”, Grimm, D. (2012), Types of Constitutions, in Rosenfeld/Sajó (fn. 5), p. 123.

For Whom *Writing Constitutions* Is Written

The revision of a constitution and sometimes the mere amendment of only one important clause is a humongous undertaking. Many books have been written about designing this process including participatory elements to reach acceptance across an entire population. At the outset, however, stands the analysis of whether existing or missing constitutional provisions are appropriate, and then the crafting of new wording. This task is enormous because many aspects have to be considered, including: (1) the remaining unaltered parts of the constitution, (2) the history of the constitution, (3) the previous rulings of the constitutional or supreme courts, (4) the subconstitutional law already in place, (5) the unwritten law and practice already in existence, (6) the experience of neighbouring countries, (7) different mechanisms around the world and (8) the world's best practice.¹²

The work that is conducted by lawmakers around the world is impressive. In Volume I, *Writing Constitutions* intends to assist in identifying different mechanisms around the world and the world's best constitutional practice. It is written for deputies, ministers, prime ministers, presidents and legal practitioners around the world involved in constitutional debate and reforms. This includes members of ministries of justice or attorney general departments and experts working in parliament and judges and associates of constitutional courts. It is also written for law students and civil rights groups who monitor constitutional developments or strive for political change and are keen to be empowered and to make informed decisions.

What *Writing Constitutions* Does Not Do

Writing Constitutions aims to provide guidance on drafting constitutions, their correction and amendment under certain circumstances. It is not identical with "Comparing Constitutions" or "Comparative Constitutional Law".¹³ It aims to provide material for a comparatively oriented constitutional writing, which offers suggestions and possibilities for comparison to the legislator writing or amending the constitution.

Writing Constitutions does not value a constitution of a country as such. It does not claim to have reviewed all existing constitutions with respect to all provisions. It does not claim to have captured many of the cross references within a constitution which are important. It can only partly consider constitutional practice or the interpretation of constitutional clauses by the respective constitutional court of a

¹²Cf. for transition countries, W. Gaul (2002), Sinn und Unsinn internationaler Rechtsberatung, in C. Boulanger (Ed.), *Recht in der Transformation. Rechts- und Verfassungswandel in Mittel- und Osteuropa* (pp. 102–124), Berlin: Wissenschaftsverlag, at 109.

¹³Cp Rosenfeld, M. & Sajó, A. (Eds.) (2012), *The Oxford Handbook of Comparative Constitutional Law* (fn. 5); Ginsburg, T & Dixon, R. (Eds.) (2011), *Comparative Constitutional Law*, Cheltenham: Edward Elgar Publishing; Weber, A. (2019) *European Constitutions Compared*, München: C.H. Beck.

country. It does not claim to know the constitutional practice of provisions dealing with parliamentary procedures. It can, only to a certain extent, cover subconstitutional norms, which are of paramount importance to complete the picture of internal checks and balances and limitations imposed on the scope of the provisional norm.

Last but not least, *Writing Constitutions* cannot replace the application and adaptation of the analysis to the respective country's needs. In other words, it can make suggestions as to the components a clause may need but cannot determine an appropriate component design for the individual country. The constituent/amending power will need ample discretion with regard to the details of institutions and organs in the constitutional texts and the relevant regulation can either be embedded in the constitutional text itself or by a clear reference to legislative acts ("parliamentary reservation"). The choice will largely depend on the constitutional traditions, flexibility of the constitution, transparency and understandability, as well as trust in the ability of parliament to find adequate solutions for the implementation of paramount constitutional norms.¹⁴ The authors have therefore refrained from drafting a model constitution as this would collide with the necessary individual needs of a country's constitution. Rather, we encourage and aim to empower lawmakers to design their own constitutional model.

Sources and Examples Used in *Writing Constitutions*

The examples used throughout the *Writing Constitutions* are not meant to systematically cover all constitutions of the world. This would not only counteract the conciseness of this work but would also fail to fulfil its aim. The aim is not to provide an overview of all constitutions, but an overview of constitutional instruments and solutions. As outlined before, the constitutional history of the world encompassed some trend-setting constitutions, partly leaned upon because of their novel approach, partly spread because of colonialism. These constitutions are often discussed, then those of long-established democracies, but also those of new democracies in particular in Eastern Europe, as well as the South African constitution. Being relatively modern constitutions, they attempt to overcome difficulties that more established constitutions have already considered. Given that the authors of the first volume are a German and German-Australian, particular emphasis has been made to include many examples of Asian and African, Middle-Eastern and Latin American countries. Luckily, the authors could dwell on enormous research conducted on comparative constitutional law by the Constitute Project and authors such as Jackson/Tushnet (*Comparative Constitutional Law*, 1999), Rosenfeld/Sajó (*Oxford Handbook of Comparative Constitutional Law*, 2012), Ginsburg/Dixon (*Comparative Constitutional Law*, 2011), Ginsburg (*Comparative Constitutional Design*, 2012), Tushnet/Fleiner/Saunders (*Routledge Handbook of Constitutional Law*, 2015), Ginsburg/Simpser (*Constitutions in Authoritarian*

¹⁴Or as English poet Sir Alexander Pope (1688–1744) put it: "For forms of Government let fools contest. Whate'er is best administered is best".

Regimes, 2014), Fish/Kroenig (Handbook of National Legislatures, 2009), Fruhstorfer/Hein (Constitutional Politics in Central and Eastern Europe, 2016), research in Asian constitutional law (Wen-Chen Chang et al, Constitutionalism in Asia, 2014; Dixon/Ginsburg, Comparative Constitutional Law in Asia, 2014) and Latin American constitutional law (Negretto, Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America, 2014); Dixon/Ginsburg (Comparative Constitutional Law in Latin America, 2017); to hopefully avoid Eurocentrism.

However, the work of one particular European organisation has been considered and reflected throughout *Writing Constitutions: The Venice Commission of the Council of Europe* (The European Commission for Democracy through Law). The Venice Commission not only advises the countries of Eastern Europe, but also many Asian countries which have emerged from the former Soviet Union as well as some countries in North Africa and Latin American. The deliberations of the Venice Commission that both authors had the privilege of working with is utterly impressive as it systematically comments on constitutional drafts and revisions of many of its member countries and compiles topical comparisons by its distinguished members.

Where it was advisable, the authors have also identified similarities and differences between common and civil law approaches and constitutional design. For example, in topics such as parliamentary supremacy, immunity, impeachment, vote of no confidence, decentralised review of norms, independence of the public prosecution system or the review of a state of emergency.

Nominal Constitutions and Constitutional Reality

Constitutions must always be read in context. A single provision, for example, providing extraordinary powers to the President may appear suspicious when considered in isolation. Yet when the provision is read in its context with other limiting provisions, the initial presidential provision may not look as negative as originally thought. However, many countries in this world often contain old provisions in their constitutions or are not democracies at all. Some have deliberately included provisions that have no place in the constitution of a liberal, rule of law-based democracy. The term “nominal constitution” is occasionally used when normativity and constitutional reality diverge greatly due to political and socio-economic circumstances. The editors are aware of the danger of applying the western constitutional model as a benchmark for constitutional design, even if political-economic circumstances may not yet buttress this sufficiently. However, this does not exclude the normative comparability of similar institutions, rights and competences, especially since constitutions have an educational-evolutionary character in addition to their symbolic content. This partly overlaps with the question of the effectiveness and enforceability of a constitution (“law in action”) which often remains largely ignored in a normative legal comparison, even though the authors attempt to cover practical examples of constitutional reality in every chapter. The application and enforcement of constitutional norms—in addition to their normative consistency—depends on many extra-constitutional factors that primarily concern the historical-political, legal-cultural and socio-economic context.

A comparison of institutions and principles of constitutions is problematic if constitutions are not based on the liberal-democratic constitutional model and are instead “descriptive” or “semantic” in nature.¹⁵ Constitutional systems that understand governments as the mouthpiece of a socialist one-party government or a theocratic rule do not correspond with the liberal-democratic rule of law-oriented type¹⁶ as discussed in *Writing Constitutions*. While we regularly identify this in our remarks, we occasionally quote constitutional examples of this type as a valuable contrast to the overwhelming majority of constitutional designs to elucidate that those examples do not correspond with the basic assumptions of our work. These are the odd-ones-out that should not be copied or imitated.

Writing Constitutions Explained

Writing Constitutions uses colour coding throughout the book to allow readers to navigate through the chapters and to understand the underlying legal concept. Each chapter begins with *figures* containing the **guiding questions for drafting a constitutional clause** and are fully coloured. Solutions to almost all guiding question are then summarised in *tables* which are then reviewed and discussed. The *colour scheme* is also reflected in the headings of the tables and follows the below *classification*:

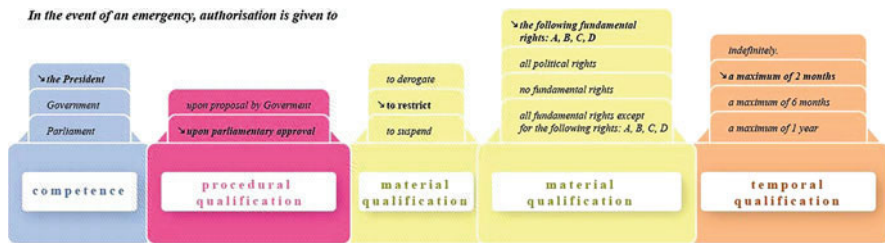
Competence/Scope of empowerment
Material qualification
Procedural qualification including the involvement of an additional power
Temporal qualification
Outcome
Judicial Review
Necessity and level of regulation

¹⁵Or “hollowed out” by authoritarian governments by leaving institutions in place, but fundamentally altering their functions, see Sadurski, W., Constitutional democracy in the time of elected authoritarians, *International Journal of Constitutional Law*, Volume 18, Issue 2, July 2020, Pages 324–333 (327); see also: Tushnet, & Bugarcic, B. (2022). *Power to the People: Constitutionalism in the Age of Populism*. Oxford University Press or very instructive: Sadurski, W. (2022). *A pandemic of populists*. Cambridge University Press.

¹⁶See Grimm (fn. 9), p. 129: “Basically the same is true for constitutions in every political regime that legitimizes itself by an absolute truth. It is particular true for theocratic regimes whose foundations is not a secular one, but a divine truth. The question is therefore whether it is justified to regard these constitutions as a type of constitutionalism”.

Writing Constitutions is presented in three volumes. *Volume I* is called *Institutions*, *Volume II Fundamental Rights* and *Volume III* covers *Constitutional Principles*.

Volume I is based on a *modular concept* which dissects constitutional clauses in components. Many of these components have been presented as tables that outline the design options constitutional drafters have at hand. The tables form a card index cabinet and each tray in the cabinet contains an important component enabling lawmakers to assemble and compose the constitutional clause as shown in the image below.



Example

In the event of an emergency, authorisation is given to the President upon parliamentary approval to restrict the following fundamental rights: A, B, C, D for a maximum of 2 months.

However, alternatively, the wording could also be

In the event of an emergency, authorisation is given to Parliament upon proposal by Government to suspend all fundamental rights except for the following rights: A, B, C, D for a maximum of 6 months.

Writing Constitutions (as many works in comparative law will always be) is a work in progress. For once, constitutions are evolving and constitutional crises are unfolding around the globe year by year. More importantly however, the constitutional practice around the world is too multi-faceted and voluminous to be captured in a single volume. Therefore, *Writing Constitutions* is a first attempt which will no doubt call for subsequent editions. Contributions from readers and practitioners around the world are welcomed—help us enhance *Writing Constitutions* by writing to: comments@writingconstitutions.com.

This book would not have been possible without the loving support of Wolfgang’s family members Dorothee, Alea and Oscar as well as dedicated research and contributions by the following colleagues: Christina Albath (presidential qualification and oath), Kirsten Ammon (non-confidence), Tobias Beck (referendum), Julia Boßlet (budget), Lisa Brentrup (deputy), Kevin Brühl (opposition), Dr Nicolai Culik (dismissal of government), Anna Gottesbühren (investigative committees), Leonid Guggenberger (presidential election), Stefanie Hees (countersigning), Jasmin Hertel (veto and dissolution), Vera Hürter (vote of confidence), Christina Koch (appointment of government), Conrad Knöchel (central bank), Sarah Kraft (immunity and indemnity and overall design), Annika Lindemann (presidential term), Stephan Labitzke (state of emergency), Leon Luserke (referendum), Jacqueline Metzger (election thresholds), Daniel Muth (non-confidence), Lilianna Ranody (political parties), Lena Reich (internal organisation of parliament), Isabell

Schmitter (taxes and control chamber), Shaya Stender (legislative initiative), Toni Stotz (impeachment), Dr Gerhard Wiebe (amendment and overall design), Moritz Wiechert (interpellation) as well as editorial support by Jessica Swane and illustrations as always by Kathleen Chew. Thank you all for your amazing contributions! In addition, we are particularly grateful to Dr Brigitte Reschke of Springer Nature who from the very beginning endorsed our plans and progress on *Writing Constitutions*.

An introductory video can be found on www.writingconstitutions.com and on https://doi.org/10.1007/978-3-030-94602-9_1.

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