

The Eighth Generation

Liberal-Democratic Constitutions

Fast forward to 1989. At 6:57 pm on 9 November of that year, the Berlin Wall fell. All it took was a simple announcement by an East German government spokesperson, Günter Schabowski, that every East German citizen could henceforth travel freely to the West. With that message he had unwittingly triggered a chain reaction that ended the Cold War within a few days, bringing down the Iron Curtain and doing away with almost all communist regimes in Europe (and well beyond) within a year. This relatively non-violent revolution spread like wildfire across the communist world. Its similarity to the 1848 revolutions is often remarked upon: it was a ‘critical juncture’¹ at which the whole of history – suddenly – veered in a new direction.² It also appeared to mark the end of the titanic struggle between the humanist ideologies that so profoundly shaped political developments in the nineteenth and twentieth centuries. Of the three humanist ideologies – social, evolutionary and liberal humanism³ – only liberal humanism seemed to survive intact.

In his famous essay *The End of History?* (1989) Francis Fukuyama writes on this turn of events:

What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of post-war history, but the end of history as such: that is, the end point of mankind’s ideological evolution and the universalisation of Western liberal democracy as the final form of human government.⁴

¹ This refers to the phenomenon of ‘brief phases of institutional flux – referred to as critical junctions – during which more dramatic change is possible.’ Cf. Capoccia & Keleman 2007, especially p. 341.

² More technically, the concept of critical juncture refers to ‘situations of uncertainty in which decisions of important actors are causally decisive for the selection of one path of institutional development over other possible paths.’ (...) ‘A sort of “distal historical causation”: events and developments in the distant past, generally concentrated in a relatively short period, that have a crucial impact on outcomes later in time.’ Cf. Capoccia 2016, chapter 5 *Critical Junctures*, p. 89–90.

³ Harari 2016, p. 246–257.

⁴ Fukuyama 1989, p. 4. Elaborated in Fukuyama 2012, particularly p. XI and XII and part V.

Western liberal democracy as the ultimate concept of governance and political ideology to end all others?⁵ A provocative thought.⁶ On whichever side of the debate one stands, the fall of the Berlin Wall did indeed spell the end of many communist regimes in Central and Eastern Europe, spawning many new states and ultimately about twenty new constitutions. Almost all of them were in the liberal-democratic mould: parliamentary democracies combined with the rule of law, constitutionally guaranteed separation of powers and individual fundamental freedoms.

Not everywhere was change unleashed precipitously on 9 November 1989. In Poland, change to the communist (Leninist) constitution of 1952 (personally approved by Stalin) was already initiated by amendments in 1970 mandating the Polish Council of State to oversee the constitutionality of laws. It was the prelude to a separate Constitutional Tribunal in 1982 and later a full constitutional review of legislative and administrative acts in which individual (human) rights played an increasingly important role. And forms of independent (constitutional) review had also already enabled the judiciaries of Yugoslavia and Hungary to break free of the party-dominated complex of legislative and executive even before 1989.

Yet, the fall of the Berlin Wall was still a shock. The sudden collapse of the old regimes sometimes created a political vacuum. A multitude of longstanding national and regional aspirations and claims was ignited more or less overnight. Old states like the Soviet Union and Yugoslavia fragmented, and new states were formed from their remnants. The process was peaceful in most cases, but Yugoslavia's disintegration into six or seven new states incited bitter civil wars. All these new states, of course, promulgated their own, usually new, constitutions. These constitutions were designed as a kind of bulwark to prevent any repetition of the past, which is reflected in the Romanian Constitution (1991):

⁵ Liberal democracy is a paradoxical concept. It is a political system in which protecting (individual) freedom is paramount and is combined with a system of decision-making based on the consent of each individual. Individual freedoms and claims are inevitably not entirely compatible with political (majority) decision-making exigencies in most cases. There is a continual need to try and reach a balance. Fierbeck and many others point out that liberalism and democracy are quite distinct concepts. Liberalism is a substantive category which assumes as its starting point the freedom and equality of people (at least before the law); its most important value is coexistence in a society. Conversely, liberalism is 'a procedural system constructed to recognise formally the principle that political legitimacy was grounded upon the consent of each citizen.' Fierbeck 2008, p. 77.

⁶ Fukuyama's idea is often misunderstood. 'End' in his 'End of history' is a sort of a pun on words. He uses the word in a double sense: 'the End' as something coming to an end, and 'the End' as the goal of something – for instance, history. Mueller in 2014, explains that Fukuyama's end 'formulation was derived from Hegel, and it has generally been misinterpreted. He did not mean that things would stop happening – obviously a preposterous proposal. Rather, he contended that there had been a profound ideological development. With the demise of communism, its chief remaining challenger after the extinguishment earlier in the century of monarchy and Fascism, liberalism – democracy and market capitalism – had triumphed over all other governmental and economic systems or sets of ordering principles.' Mueller 2014, p. 35 ff.

Romania is a democratic and social state, [...] and the ideals of the Revolution of December 1989, [...] shall be guaranteed.⁷

As well as in the Bulgarian constitution (1991):

No part of the people, no political party nor any other organization, state institution or individual shall usurp the expression of the popular sovereignty.⁸

Formulae intended to exorcise the spirits of the past. The newly formed states are almost all democracies, at least this aspiration is written in their constitutions. But constitutions are, of course, not magic wands. Establishing the principle of democratic government in a constitutional regulation does not make it a fact.⁹ The journey towards democracy and democratic governance has been a process of trial and error in many new states, sometimes failing or simply not occurring, as in Belarus¹⁰ or Azerbaijan.¹¹

Years of dictatorial rule often entail these countries lacking relevant experience in democratic governance and elections. They have few political parties, and these parties are young. There is little trust in government and governmental institutions – or fellow citizens and the law. Individual freedom and a free market economy are also brand new and untested. The new constitutions are vehicles for change, as is association with other, more mature free democracies in Europe. Thirteen former Warsaw Pact countries have acceded to the European Union (EU) since 2004. This ‘deal’ seemed to be to everyone’s benefit at the outset: it enlarged the internal market, strengthened the EU (also politically) and the accession countries have been able to consolidate their liberal democracies and increase their economic prosperity. Accession was also intended to prevent relapse. EU membership is, as it happens, conditional. Membership candidates are required to meet the Copenhagen criteria,¹² requiring prospective countries to have stable institutions guaranteeing democracy, the rule of law, respect for human rights and minorities and a well-functioning free-market economy able to cope with free competition. These requirements are permanent and apply after accession too. For most of the newcomers, their new liberal-democratic constitutions were the keys that unlocked the EU gates. Constitutions that were not up to scratch were swiftly adapted to EU requirements.

Thirty years after the fall of the Berlin Wall, many of the ‘liberated’ countries still have a multitude of political and administrative problems, and the relationship between the new and older EU members is not always simple or harmonious.

⁷ Article 1, third paragraph.

⁸ Article 1, third paragraph.

⁹ As Ernest Gellner demonstrates in his book *Conditions of Liberty*. Gellner 1994.

¹⁰ 1994 constitution.

¹¹ 1995 constitution (revised 2016).

¹² Adopted by the European Council in Copenhagen in 1993 and the European Council in Madrid in 1995.

Despite the ensuing disenchantment, much has been achieved. Most of these new states have grown into stable liberal democracies, with reasonably functioning free markets that have brought significant economic prosperity. It was not written in the stars and this outcome was hardly inevitable in 1990. It certainly cannot be attributed solely to the (new) liberal and democratic constitutions of the 1990s. As noted, constitutions are not magic wands. Yet, these constitutions have played an indirect and intermediary role in establishing and maintaining mutual trust, as well as (political) trust in institutions. And, we know that trust in institutions is important for market opportunities and market growth in a free market economy.¹³

THE FALL OF THE BERLIN WALL: CONSTITUTIONS 1989–2018

The events of 1989 certainly did not hail the end of history (as Fukuyama's *End of History* is often misapprehended),¹⁴ nor the end of constitutional history for that matter. The 'Berlin Wall wave' of liberal-democratic constitutions¹⁵ appears to be predominantly a regional phenomenon, mainly limited to Central and Eastern Europe. It chimes with the other – often silent – constitutional revolutions taking place around the world at this time, although these often seemed to have been triggered by other causes, contexts and reasons. More than half of all the constitutions in the world – 102 in total – were promulgated over the past thirty years,¹⁶ and only the birth of about a quarter of these new constitutions can be directly attributed to the desire for 'liberation' through a new political system.

Over the course of recent decades, the desire for a liberal democracy has by no means always been the motivation for a new system, nor was its adoption the only principal choice. A small study we conducted in 2018 at Leiden University revealed that this was – as indicated – only so in a quarter of the cases. Even though the motives for amendments or new constitutions are notoriously ambiguous and difficult to uncover, we were able to demonstrate that new constitutions since 1989 seem more often to be impelled by external factors, rather than internal (i.e., principled, ideological) ones. These external factors include events like the fall of dictatorships (19%), the end of civil wars or internal conflicts (21%), and the proclamation of new states or (regained) independence (14%). Many of these factors, of course, overlap, but the study shows that the reasons for promulgating constitutions – which are largely liberal-democratic in nature these days (see Chapter 19 Convergence) – are diverse, and certainly not always the result of any widespread, shared or deep-rooted belief in the desirability of liberal democracy.

¹³ Cf. McAllister 1999.

¹⁴ Fukuyama's 'end' did, as explained above, not merely refer to the 'conclusion' but – in a Hegelian/Marxist sense – to the *goal* of history. Cf. Fukuyama 2018, p. XII.

¹⁵ A third wave according to Thornhill. Cf. Thornhill 2011, p. 355 ff.

¹⁶ Total in June 2018.

DEMOCRACY WITHOUT FREEDOM:
THE RISE OF ILLIBERAL DEMOCRACY

In 1997, the American journalist Fareed Zakaria wrote an oft-quoted article ‘The Rise of Illiberal Democracy’ in the magazine *Foreign Affairs*. Written ten years after the fall of the Berlin Wall, he exposed the Achilles heel of constitutional liberal democracies. Using examples from Africa and Latin America, he illustrated that countries have made the transition to democracy but have certainly not always become true liberal democracies. Zakaria concluded that for a number of these new democracies:

Constitutional liberalism has led to democracy, but democracy does not seem to bring constitutional liberalism.¹⁷

Zakaria coined the term *illiberal democracies* for these countries where democracy is not accompanied by constitutionally guaranteed freedom. He considers illiberal democracies lacking the rule of law the worst of two worlds:

Democracy without constitutional liberalism is not simply inadequate, but dangerous, bringing with it the erosion of liberty, the abuse of power, ethnic divisions, and even war.¹⁸

As early as 1997, Zakaria noted that they were growing alarmingly in number.¹⁹ They were mainly concentrated in Africa, the Middle East, Central Asia and parts of Latin America at the time.²⁰ This is still the case twenty years later,²¹ although many more regions are now facing declining freedom and democracy. Freedom watchdog Freedom House’s reports show that the trend is expanding, intensifying and accelerating.²²

¹⁷ Cf. Zakaria 1997, especially p. 28; and more recently (Larry) Diamond 2015a.

¹⁸ Zakaria 1997, p. 42–43.

¹⁹ ‘Illiberal democracy is a growth industry’ Zakaria argued. Zakaria 1997, p. 24.

²⁰ Even in the past ten years there has been a liberal-democratic recession, a relapse into illiberalism and a decline in democracy, as Larry Diamond has shown in a recent article. This has mainly been caused by inequality (in rights, opportunities and income), diversity, corruption and abuse of power. (Larry) Diamond 2015b, p. 142–155. Cf. Puddington 2015 for a similar analysis.

²¹ Cf. Zakaria 2007. Rocha Menocal, Fritz & Rakner 2008. Cheeseman 2015. Cf. Freedom House watcher Erik Meyersson’s blog ‘Which country has the most illiberal democracy in the world?’ 2015 (based on Freedom House analyses and measurements) <https://erikmeyersson.com/2015/06/18/which-country-has-the-most-illiberal-democracy-in-the-world/> (Consulted on 9 June 2018).

²² Freedom House has been tracking the state of freedom and freedoms in the world for more than a quarter of a century and publishes annual reports on the subject (*Freedom in the World*). In 2017, for the twelfth consecutive year, the annual report recorded a decline in freedom and democracy on all fronts. Freedom House also noted an acceleration in the recession. According to Freedom House’s criteria, 45% of the countries in the world in 2017 were completely free, 30% were partially free and 25% were unfree. The figures look less flattering when seen in terms of population. Thirty-nine percent of the world’s population live

Much constitutional promulgation in the years 1989–2018 occurred in countries now experiencing declines in liberal-democratic political systems (including the problems of illiberal democracy). To understand this development, we have to look at where the 102 constitutions promulgated in this period come from. Figures from the past thirty years show that forty-five countries on the African continent passed new constitutions, twenty-five in Europe, twenty-four in Asia, seven in Latin America, and one in Oceania. Most of the constitutions in Europe from this period are directly related to the fall of the Berlin Wall and new state formation. But where do all the new constitutions in Africa,²³ Asia, Latin America, and Oceania come from?

Unlike in Europe, there is no single cause. Various reasons have played a role, often in conjunction with each other. Looking, for example, at the reasons in Africa – where most of the recent constitutions have been promulgated – gives a varied impression (Figure 3).

Dictatorships, Islam, the Arab Spring,²⁴ the desire for liberal democracy, but also the establishment or consolidation of authoritarian regimes all have played a part – in short, everything.²⁵ The same goes for Asia. Anyone trying to make sense of this will observe a fitful pattern of growth spurts, with an oscillating process drifting towards liberal democracy – this can also be seen in some Latin American countries²⁶ over the past 75 years. Large parts of Western Europe have followed a similarly winding path over the past 150 years. A country or region does not usually convert all at once to democracy or respect for human dignity and protection of fundamental freedoms. It is usually a long and painful process involving much trial and error.

The above assumes – with some facileness – that liberal democracy, embedded in a constitution, is or should be the ultimate goal of a country or nation's political development. This is philosophically untenable because history simply has no 'objective' goal or point on the horizon we are all working our way towards.²⁷ But it is undeniable that increasing numbers of countries, for whatever reason, are saying that they want to be a liberal democracy – certainly since the Second World War. And the number of countries actually succeeding in this goal, even bearing liberal democratic recession in mind, is growing.²⁸

in freedom, 24% live in partial freedom and 37% are not free – they live in an unfree country. Freedom House, *Freedom in the World* <https://freedomhouse.org/report/freedom-world/freedom-world-2018> (Consulted 10 June 2018). Cf. Puddington 2015, p. 122 for the situation in 2014.

²³ Cheeseman 2015.

²⁴ A series of uprisings, protests and revolutions against autocratic regimes in the Arab world that began in Tunisia on 18 December 2010.

²⁵ Of Freedom House's twelve 'Worst of the Worst Regimes' in 2018, seven were on the African continent. Freedom House 2018.

²⁶ Cf. Picado 2004, p. 28–31 and Nogales & Zelaya-Fenner 2013.

²⁷ Li-Ann Thio claims that this model does not fit some countries, as they are more inclined towards forms of 'mixed constitutionalism'. Thio 2012, p. 137–138.

²⁸ Pinker 2018, especially p. 418–420.

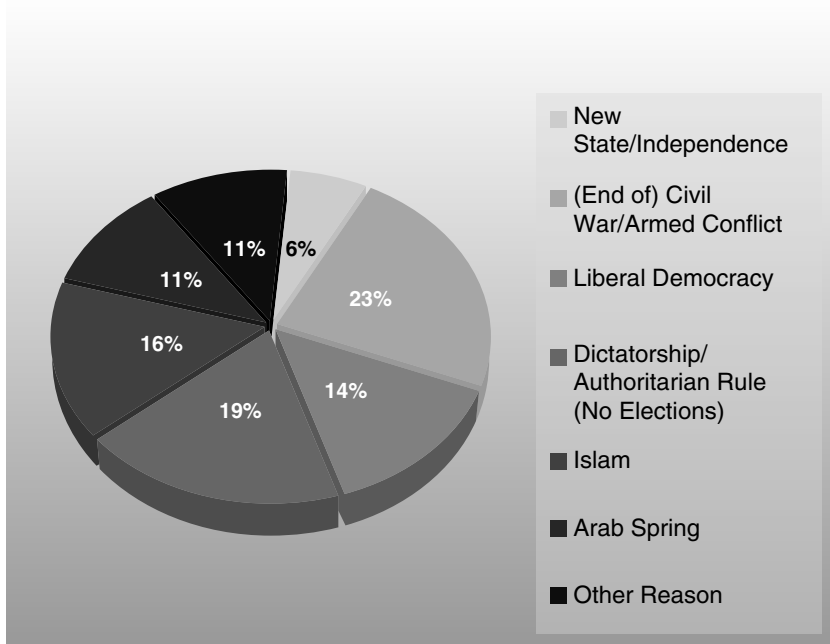


FIGURE 3 Constitutions in Africa 1989–2018

It is particularly notable that almost all countries that nowadays aspire to or want (variants of) liberal democracy embed their intention in a legal document: a constitution. Ever greater numbers of formal constitutional liberal democracies are emerging. Although liberal democracy, as a political system that combines periodically elected leadership with guaranteed individual freedom, is certainly not practised everywhere, it seems to have become at the very least a common, global frame of reference. It is almost a global public belief²⁹ as to how and according to which values and conditions government power can be exercised. For this reason, it might be better to see most constitutions as articles of faith committed to writing rather than as achieved or unachieved political practices. Constitutional, liberal-democratic developments in Africa and Asia started later and with shorter transitions than, say, Latin America and Europe. Moreover, external factors and actors have perhaps played a greater role in Africa and Asia than in transitional processes in Latin America and Europe, where an analysis by the researchers Rocha Menocal, Fritz and Rakner in 2008 shows that it was primarily internal political actors which incited the transition.³⁰ To this day, the role of the global community and major

²⁹ Cf. Law & Versteeg 2011.

³⁰ Their research shows that: '[...] in the Eastern European and Latin American experiences, where democratisation transitions were driven mostly from within. In contrast, in Asia and especially in Africa (and possibly low-income and aid-dependent countries elsewhere),

powers in liberal-democratic transitions in African and Asian countries has been considerable. It is therefore unsurprising that such a rapid transition, sometimes involving external pressure, has not directly led to the peaceful, inclusive and prosperous societies promised by the ideal of constitutionally embedded, liberal democracy. Democracy, freedom and inclusiveness have a complex relationship, and their forces are difficult to balance durably. Zakaria shows how democracy can quickly degenerate into uncontrollable, freedom-sapping political competition when a culture of trust, solidarity and tolerance is lacking.³¹

A constitution is only able to do so much, and certainly cannot dictate the culture within which it is situated. Constitutional norms and institutions can act as catalysts or stabilisers because their norms are adopted as the common reference points required to build a liberal-democratic constitutional culture in a country. Gradual development – sometimes via ‘hybrid’ regimes³² – and consolidation are the instruments which moderate downward spirals and create courses down which the constitutionally-embedded ideals of liberal democracy can be achieved.³³ Countries use different and often constitutional forms to achieve this. Over the last thirty years, constitutions have tried to promote public mutual trust through various inclusivity mechanisms (recognising minorities, ethnicity and religion, as well as increasing participation and emancipation of groups).³⁴ Attempts have also been made to develop a constitutional identity.³⁵

Ethnically diverse countries in particular often have emancipatory constitutions. Another way to try to steer the forces of young, constitutionally embedded liberal democracies is by giving them ‘flexible constitutions’. Constitutions must be able to be adapted to new circumstances more often and faster than in the past³⁶ as things are changing faster. Although one of the core functions of constitutions is to accord sustainability and structure to a political system,³⁷ rigidity can have a conflict-generating effect. A firm constitutional structure that is also adaptable can cushion growth spurts and introduce a learning element into a constitutional-political system.³⁸ The large number of constitutions that have been promulgated around the world in recent years indicates that countries and states have great confidence in the

external actors played a much stronger role in these political transformations. [...] Rocha Menocal, Fritz & Rakner 2008, p. 30.

³¹ ‘Political competition that is so divisive can rapidly degenerate into violence. Opposition movements, armed rebellions, and coups in Africa have often been directed against ethnically based regimes, many of which came to power through elections.’ Zakaria 1997, p. 35–36. Cf. Snyder 2000.

³² Rocha Menocal, Fritz & Rakner 2008, p. 29.

³³ Zakaria 1997, p. 40–43 and Rocha Menocal, Fritz & Rakner 2008, p. 29–40.

³⁴ Budryté 2011.

³⁵ Cf. Jacobsohn 2012.

³⁶ Cf. Ginsburg 2011, p. 117–120.

³⁷ Ginsburg 2011, p. 112–114 and Elkins, Ginsburg & Melton 2009, p. 12–19 and p. 33–34.

³⁸ Passchier 2017.

capacity of constitutions. Yet, this power is questionable. Constitutional norms have a limited capacity to make political and social reality and bring about transitions, certainly over a short time span. It is noteworthy that constitutions are nowadays invariably involved in processes of this kind. Their norms articulate and reconfirm the values and principles of the system they are trying to establish. They do little more at times, but certainly no less.

ISLAMIC CONSTITUTIONS

Liberal democracy and state religion³⁹ are uneasy bedfellows. Until recently, religion played a role in all aspects of life in many countries. Only a few centuries ago, many countries had a state religion.⁴⁰ From North (Sweden) to South (Greece), and East (Russia) to West (Ireland), most countries in Europe had state churches by the nineteenth century.

Most countries in Europe and the Americas have gradually disestablished official state religions over the past 200 years. They were incompatible with the widespread principle of religious freedom and even less so with emerging humanist liberal ideas and concomitant secularisation. Spain was one of the last countries in the EU where the state religion, introduced under Franco, was disestablished in 1978.

State religions do still exist, mostly in Islamic countries in the Middle East, North Africa and Southeast Asia. The constitutions of 23 countries proclaim Islam as the state religion:⁴¹ Afghanistan, Algeria, Bahrain, Bangladesh, Brunei, Egypt, Iran, Iraq, Jordan, Kuwait, Libya, Malaysia, the Maldives, Mauritania, Morocco, Oman, Pakistan, Qatar, Saudi Arabia, Somalia, Tunisia, the United Arab Emirates and Yemen.⁴² Constitutions of this kind can therefore be considered 'Islamic constitutions', although this does not mean that all Islamic laws, in particular the Islamic legal system (sharia), are fully applicable in all these countries.⁴³

The past century has brought great changes in most Islamic countries. Many were once part of large empires (including the Ottoman Empire) or were colonised or

³⁹ Also referred to as 'established religion'.

⁴⁰ There were exceptions to this rule, like the Netherlands, where the Dutch Reformed Church, whilst certainly privileged, never became the state religion over the course of more than 400 years.

⁴¹ Which does not imply that Islam is only the state religion in these countries. Islam is the *de facto* state religion in Sudan, for example, but it is not designated as such in the constitution. It is an important element in seventeen of the world's newest constitutions (1989–2018), mostly in Africa and the Middle East.

⁴² United States Commission on International Religious Freedom www.uscifr.gov/reports-briefs/spotlight/did-you-knowmuslim-constitutions (Consulted 1 June 2018).

⁴³ Several countries still include sharia protection clauses in the constitution, although this phenomenon seems to be declining; it is certainly more controversial nowadays than before. Cf. Lombardi 2013. Cf. Vikør 2016 for the situation in Egypt and a discussion of its 2012 constitution (p. 219–220).

dominated by Western imperial powers; and when these empires collapsed, they were caught in the midst of turbulent processes of nation and state formation and were coveted by rival superpowers.⁴⁴ Finding a balance in relations that have often been imposed by foreign powers and dealing with democracy and liberalism, whose values have sometimes clashed with existing or traditional structures, has proved difficult. It has been particularly challenging to accord (religious) minorities a place in the constitutional framework and adequately protect them, even where a modern constitutional organisation of the political system has been pursued.⁴⁵ Finding a workable relationship between state and religion has also been challenging. How should secular leaders relate to faith, Islamic law, and their 'subjects'?⁴⁶ How free are the state and its subjects in relation to religious rules and principles? What kind of leadership is needed, what are the guiding values?⁴⁷ These have become major, controversial issues in the context of advancing secularisation and the rise of liberal-democratic ideas.⁴⁸ The American Islam researcher Clark Lombardi says in a recent article:

During the pre-modern era, many Muslims embraced a principle that state law is legitimate only if it is consistent with Islamic legal principles. Whatever consensus existed in the pre-modern era about Islamic legal authority has collapsed. Muslims in every country today are contesting basic questions of Islamic law—questions of Islamic authority, questions of interpretive method, and questions about what types of law a state can legitimately enact without violating the fundamental principles of *sharia*.⁴⁹

This contest has resulted in various outcomes: An Islamic Revolution in Iran (1979); civil wars in Afghanistan, Yemen and Sudan; and paroxysms of political unrest in Pakistan and other countries. A striking number of Islamic countries in the Middle East and Africa have recently tried to use new constitutions to find a new balance. This has certainly not been a panacea. As expounded above, and regardless of the promises of travelling constitutional miracle doctors and foreign advisers, constitutional liberalism and democracy do not always bring about peaceful relations and political stability.⁵⁰ Liberal-democratic constitutions are usually not the reward, but rather the investment. They give a society an appetite for more. Perhaps the seven

⁴⁴ Cf. Frankopan 2015, chapter 23 (*The Road of Superpower Rivalry*).

⁴⁵ *Ibid.*, chapters 24 (*The Road to Catastrophe*) and 25 (*The Road to Tragedy*).

⁴⁶ Vikør 2016, p. 219–220.

⁴⁷ Zakaria 2004, especially p. 7–9.

⁴⁸ Cf. Mallat 2012. Mallat discerns three arcs of crisis. The first is the region covering Afghanistan, Pakistan, India and surrounding countries; the second is Iran (in relation to Saudi Arabia and Iraq); and the third is Israel and its environs. The issues are different in each of the 'arcs'. Mallat 2012, p. 1287–1290. Samuel Huntington argues that these crises are not accidental hot spots, but front lines of a clash of civilisations that has been taking place in the aftermath of the struggle between the great ideologies of the Cold War. Cf. Huntington 2011 (orig. 1996).

⁴⁹ Lombardi 2013, p. 644.

⁵⁰ Cf. Emon 2010.

new constitutions emanating from the Arab Spring, which spread across the Arab world in the early 2010s, should be seen in this light.⁵¹

CONSTITUTIONS THAT ARE NOT STATE-BASED?

Constitutions currently correspond almost invariably with national states. Almost every state has one and nowadays state formation is always accompanied by constitutional formation, as the historical overview has demonstrated. But, how about the converse; can entities other than states also have constitutions? Most certainly. Federated states and regions often have constitutions, although we do not call them national constitutions. Private organisations also sometimes call their basic rules constitutions,⁵² even if they are of a very different nature to their public namesakes. Can international organisations, such as the European Union, have a constitution like a state? European constitutionalists like German Dieter Grimm argue that they can in theory.⁵³ Others, like Grimm's originally South African colleague Joseph Weiler, beg to differ; he is horrified by the idea of a constitution as no more than a technocratic project, lacking a people, popular will, nation or state. A constitution without a people, without a 'we', is a project with a gaping void at its heart.⁵⁴ Frenchman Olivier Beaud tried to contextualise the intellectual posturing that reached a crescendo in the run-up to the plan for a 'stateless' European constitution around 2004:

The continental European tradition is distinctive in that it considers the concept of state itself as being presupposed by the concept of constitution. [...] According to this tradition, then, the state has in some sense become a sort of second nature of modern constitutional law.⁵⁵

That did not stop the Europeans from trying at the dawn of the new millennium. The plan for a constitution for the European Union was brought about by the many enlargements (a club of six Western European countries has grown into a continent-wide union of nearly thirty states) and the expanding reach of European Union policy. The mass of treaties had become labyrinthine and decision-making

⁵¹ Although its effects are certainly not always easy to understand from a Western perspective. Fadel 2016. Fadel argues that we try to understand developments in the Arab world too much from a liberal world view and against the background of Western developments in the relationship between church and state – that is, through the lens of Western political history. This does not help to elucidate what is happening, say, in Egypt at the moment. Cf. p. 505–506.

⁵² Cf., for example, the Constitution for Buddhist Brotherhood Society University of Colombo (USA).

⁵³ Grimm 2011.

⁵⁴ Weiler 1999.

⁵⁵ Beaud 2012, p. 271–272. In that sense, for the difference between 'rule of law' and 'Rechtsstaat' (as it is called in German and Dutch speaking countries), cf. Barber 2003. These two concepts differ again from the French concept of 'l'État de droit' – which basically conveys the same notion (government rule bound by law – rule by law and not by men).

procedures an inscrutable morass which only specialists could navigate. The EU was criticised for its lack of democracy, transparency and efficiency. In reaction to this, the European Council adopted the ‘Laeken Declaration’ in 2001, also with a view to the forthcoming accession of ten new member states. Part of this plan was to arrive at a single systematically ordered treaty for the EU. The document was to be called a ‘constitution’ and would be drafted by a constitutional convention (following the example of the American Philadelphia Convention of 1787),⁵⁶ in the hope of giving the treaty and the EU some kudos. The appellation ‘constitution’ was controversial from the outset because the ‘Treaty establishing a Constitution for Europe’ – as the document was ultimately called – was, of course, not a constitution in the classical sense. The EU is not a state and there is no ‘European people’ with an independent claim to sovereignty. The decision to call the document a constitution was interpreted in the feverish debate leading up to the adoption and ratification of the treaty as a political preference, a devious prelude to transforming the EU into a superstate which would quash member states’ hard-fought national sovereignty and independence. Most member states and European citizens were opposed to any such development: they did not want to live in a single European state as a single European people under a – democratically elected – EU administration. After the European Constitution was rejected referendums in two (founding) member states (France and the Netherlands) in 2005, an interim solution was engineered after an interval of several years: the rejected draft constitution was recast in the classic form of a treaty that – as the preamble says – was not drawn up ‘by’ the European people but on behalf of the citizens and states of Europe.⁵⁷ This Lisbon Treaty (2007) has largely the same content as the rejected European Constitution, but anything too reminiscent of a traditional constitution was quietly discarded. To exorcise any residual memories of the rejected document, everything was well-mixed resulting in a circumlocutory treaty text packed with unintelligible compromises. Joseph Weiler lampooned it in the following terms:

No convention, no European Philadelphia, no Constitutionspeak. At best, a good old treaty, masquerading as a constitution.⁵⁸

⁵⁶ The European Convention – chaired by the former president of France, Valéry Giscard d’Estaing – met between February 2002 and July 2003. The 217 delegates represented member states, accession states, national parliaments, the European Parliament and the European Commission. The final document was a concept for a new treaty for the European Union. This document was the basis of a subsequent intergovernmental conference, which sat from 4 October 2003 to 18 June 2004. It produced the draft *Constitutional Treaty* which was approved by the European Council and the Foreign Ministers in Rome later that year, and finally submitted to the member states for ratification.

⁵⁷ The ‘EU people’ do not exist under the EU treaties. The EU Treaty itself only mentions ‘the peoples of Europe’ (Article 1, Treaty on European Union).

⁵⁸ Weiler 2005, quote from p. 176.

The institutional reforms of the EU that had been deemed necessary in 2001 – democratisation, increased transparency and a separate catalogue of fundamental rights and political freedoms – were implemented in the Lisbon Treaty,⁵⁹ which was constitutional in all respects except its name.

MULTI-LAYERED LEGAL ORDERS

The debacle of the European constitution shows something else too. Nowadays, we live in multi-layered legal orders in which law is no longer only formed and determined by national states, but to a considerable extent also transnationally and internationally. There has, of course, always been international treaty law, but it has undergone an immense increase in scale in recent decades. International law is becoming more and more important. In many parts of the world, modern citizens largely rely on international human rights treaties, such as the International Covenant on Civil and Political Rights (1966), and (in Europe) the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR, 1950), for the protection of their individual fundamental freedoms. Human rights cases can be brought before international tribunals and courts, such as the European Court of Human Rights in Strasbourg. Constitutions are no longer the only source of protection of individual freedom or unique pillars in a legal system. Constitutional orders seem to be slipping their state moorings – legal systems are no longer confined to states. We will return to this in Chapter 19.

⁵⁹ Entered into force in 2009.