

## What Does a Constitution Do?

Are you better off with a constitution? Heroic paintings, public holidays commemorating constitutions, statues, songs, hymns and even pop songs<sup>1</sup> suggest an affirmative. Perusing the countless preambles and reading the high hopes expressed in lofty language points to a similar conclusion too. The expectations of constitutions are usually high, which is probably why there are so many of them. But what can be said about the results? Are you really better off with a constitution? What happens when you have one? What does it do? As we know, they sometimes do nothing. ‘Sham constitutions’, whose norms are not complied with, were discussed briefly above. Naturally, this is never supposed to happen. Constitutions of this kind do not have any measurable effect, regardless of their pledges. But serious constitutions do; effectivity is the whole point of them. But what kind of consequences and effects do constitutions have; what is their consequence, meaning, their substance? And, how can we deduce and uncover them? These are the questions addressed in this chapter. It will follow a general approach as examining the effects and meanings of constitutions involves questions that are sometimes impossibly broad, nebulous and all-encompassing. This often involves questions that go beyond constitutions, even touching on issues about the effects of the entire phenomenon law.

In the face of it, constitutions are written texts expressing legal norms. These norms say something about how things ought to be. The first step in learning about their consequences and effects is examining whether the norms contained in constitutional provisions are complied with. Do government institutions, politicians, citizens and society do what the constitution requires? This is quite difficult to measure. Do you only look at violations? Or court cases? And if this is possible, what does it mean? For example, the Dutch Constitution regulates the freedom of the press (freedom of expression) with the following, somewhat antiquated text:

<sup>1</sup> Including The Who, ‘*Won’t Get Fooled Again*’ (no. 9) from the 1971 album *Who’s next*. ‘I’ll tip my hat for the new constitution; Take a bow for the new revolution, Smile and grin at the change all around [...]’. The song was banned in South Korea for being inflammatory.

No one shall require prior permission to publish thoughts or opinions through the press, without prejudice to the responsibility of every person under the law.

Compliance to this norm indicates little about the effect or meaning of freedom of expression in the Netherlands. The article is seldom used. Of the approximately 17 million court cases in the country over the past twenty years, twelve or so cases have involved this article. Experts know that this has to do with the European Convention on Human Rights, which has a provision on the freedom of expression which Dutch courts can apply directly.<sup>2</sup> This provision is invoked more than ten times as often in court cases.<sup>3</sup> What does this say about compliance with the freedom of the press in the Dutch Constitution? Is it no longer important? Or does it really still matter? I would think so. This example illustrates that constitutions are about more than just legal rules whether or not they are observed, as with many other laws. As well as their function as legal rules, constitutional rules have another, higher purpose: they are expressions of a larger idea. A constitution's legal norms and rules are linked with values, principles and ideas such as freedom, democracy, recognition of law and the rule of law, and individual recognition. Besides legal rules, a constitution also enshrines 'system rules' establishing a legal and/or political system. Constitutions protect citizens from their government, but at the same time their rules create the government. These rather quixotic dimensions of a constitutional order make delineating the consequences of constitutions an uphill task.<sup>4</sup> Constitutions are aggregations of various phenomena whose effects, let alone causal relationships, are very difficult to disentangle.<sup>5</sup>

Relatively little is known about whether constitutions matter, and their direct or indirect consequences. This is surprising to say the least, considering their long and deep historical roots and the unprecedented popularity of the instrument.<sup>6</sup> A dearth of data, interconnectedness of factors, complexity, invisible factors, path dependency, historical contingency and evidence pointing in all directions often conspire to make the subject slip like desert sand between researchers' fingers.

<sup>2</sup> Article 10 ECHR.

<sup>3</sup> Article 10 of the ECHR is mentioned 219 times in the content indication of the judgments in the Dutch *Rechtspraak.nl* database. Article 7 of the Dutch Constitution is mentioned a mere eleven times (consulted 8 January 2019).

<sup>4</sup> As is the case with the law in general. Cf. Bogart 2002, in particular chapter 3 (*The Complexities of Assessing Impact*).

<sup>5</sup> Law says: 'Constitutions are complex phenomena with a host of potential causes and effects that can interact or conflict with one another and evolve over time in ways that are difficult to predict. It is a daunting task to identify [...] the underlying causal mechanisms and chains of causation'. Law 2010, p. 388.

<sup>6</sup> More and more research has been conducted in recent decades, as we have seen above. Ginsburg and Huq recently published a book devoted entirely to constitutional achievements and consequences. Ginsburg & Huq 2016. They also concede that it is a broad and elusive subject which is difficult to research.