written constitutions

A COMPUTERIZED COMPARATIVE STUDY

by Henc van Maarseveen and Ger van der Tang

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Henc van Maarseveen

Professor of Constitutional Law
Erasmus University, Rotterdam

and

Ger van der Tang

Assistant Professor of Constitutional Law
Erasmus University, Rotterdam

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ABOUT THE AUTHORS

Henc van Maarseveen was born in 1926 and studied law at the University of Utrecht in the Netherlands. After three years at the bar, he was appointed head of the constitutional law department of the Dutch Ministry of Home Affairs. Since 1968 he has been Professor of Constitutional Law at the Erasmus University, Rotterdam. He has written a number of books and articles in Dutch on constitutional and administrative law. Besides being a member of A.P.S.A., E.C.P.R. and many Dutch political and legal associations, he is one of the editors of the 'Nederlands Juristenblad', a weekly journal for Dutch lawyers.

Ger van der Tang was born in 1943 and studied history at the University of Leiden. After working for a time in journalism and later as a government information officer, he joined the staff of the Department of Constitutional Law of the Faculty of Social Sciences at the Erasmus University in 1969. He was appointed an Assistant Professor in 1973. He has been co-author of a number of books on comparative constitutional law and has also had articles on this and other subjects published in Dutch and German legal and political journals.

PREFACE

When a newcomer to the Kingdom of Heaven inquired of St. Peter whether he could be supplied with a copy of the local constitution, he was astonished to be told that this was not possible as no such thing existed, the inhabitants of that celestial region preferring to do without. Bearing this in mind, one may well ask oneself whether constitutions are at all important. Having wrestled with the problem for five years, we have come to the conclusion that constitutions indeed merit all the attention they receive, despite the weighty precedent set by Heaven and England!

Constitutions serve to convey the opinions and ideals of people living in all sorts of political settings and they prove that all states - despite conflicts and ideological differences among themselves - adhere to a number of common politico-legal principles. This book contains the results of a comparative study of 142 constitutional texts; in addition, it includes a number of chapters of a theoretical nature.

Almost any constitutional lawyer hearing the names Blaustein and Flanz will think immediately of a row of fourteen books with black bindings containing all the world's constitutions. These two writers laid the documentary foundation of comparative constitutional science. Without their work, this book would never have been written.

That the book has appeared, however, is also due in no small part to the efforts of Hilde Schonk and Liesbeth Nuyten, both of whom are attached to the Social Sciences Faculty at the Erasmus University, Rotterdam. Besides supervising the tempo of the work and the progress made with the manuscript, Hilde typed more than 5,000 pages, and was responsible for laying-out and compiling the whole book. Liesbeth provided us with the research techniques which we ourselves did not possess and as a specialist in research methods contributed to the parts of the book dealing with methodology. We wish to express our gratitude to them both.

Many other people helped us in our work. Willem Weerdesteyn produced the research design, Nico van Bergeijk assisted in the collection of the research data, Topy Fiorani managed the computer, and Peter Kell translated the manuscript. In addition we had the help of the Erasmus University, Rotterdam whose Faculty of Social Sciences provided the funds and technical assistance that were indispensable to us.

Research in the field of constitutional science depends therefore on the collaboration of many people, the cooperation provided by other institutes

and the availability of funds. While this makes it much more difficult to carry out research, in our view it also means that the results are more rewarding. We have also borrowed from the thoughts and ideas of many of the writers who have concerned themselves with constitutions. This dependence on the work and efforts of others is not in any way unusual, though, since to advance nearly all sciences it is necessary to stand on the shoulders of those who have gone before. We too have been prepared to do this.

And you, the reader? We hope that you find the book interesting and practical. If you do, then we shall consider our efforts to have been worthwhile.

Rotterdam,
December 1977

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1. Terminology

Since the words 'constitution' and 'constitutional' are used many hundreds of times in the following pages, it is as well that they be defined at the outset. In the scope of this book, constitution means a written constitution. According to the context, it may refer to the written constitution of a particular state or to written constitutions in general. Constitutional is the corresponding adjective.

2. Contents

This book is about constitutions and it approaches the subject from two angles: empirically and theoretically. Part 1 contains the empirical data. These were collected in order to ascertain the extent to which constitutions manifest common characteristics and the extent to which such characteristics can be found and described. All the constitutions were analysed on the basis of a list of questions which related exclusively to the constitutional texts and thus not to the application or actual validity of constitutional law. The data obtained were then used in the study of a number of matters, for instance similarities between constitutions, the length of constitutions, the relationship between constitutions and the Universal Declaration of Human Rights, and constitutions as instruments of state- and nation-building.
Part 2 contains some theoretical reflections; the authors were not concerned to develop a comprehensive theory, but rather to throw more light on to some particular aspects of constitutional theory. Their observations are based at least partly on the results of the research set out in Part 1.
The Appendix contains a selected bibliography.

3. Research motives

What was the aim of this research? The short answer is that is was to gather together a body of empirical knowledge and to advance certain theoretical ideas about constitutions, with the aim of learning more about constitutions in general. In attempting this, the authors asked themselves what their motives were in beginning the research. What were the considerations that prompted them to start on such a project? There were, in fact, three sets of reasons which can be broadly classified as follows:
a. public interest;
b. professional interest;
c. personal interest.

Although largely distinct from one another, these three sets of reasons do to

some extent overlap. Personal choice plays a decisive role in all research work and the present case proved no exception. The justification of this research on grounds (a) and (b) rests ultimately on the authors' own interpretation of those grounds. Since the authors apply these yardsticks in their own way and are swayed by personal motives, the reader has the right to be told more about these reasons so that he can make his own assessment.

4. Public interest

The political and legal systems which make use of constitutions are as diverse as can be imagined. In some cases the constitution occupies an important position in the state system, in others it is only of secondary importance. It cannot be said, however, that the constitution forms an essential characteristic of a state. There are states that can manage without. Indeed, it is impossible to argue either logically or dogmatically that constitutions are an inescapable element of a state system. There is something very puzzling about this. Historically, constitutions derive their form and their most striking characteristics from the same period that witnessed the birth of the political and legal culture of the capitalist bourgeois era. The extent to which recognition of the need for a constitution can be directly attributed to that culture is unclear. In any case, the idea of the constitution appears to have gained acceptance in completely different cultures in the 20th century. It may then be asked whether this involves the reception of a political and legal construction in a way analogous to that in which Western Europe absorbed figures and constructions from Roman Law. Are constitutions in fact a relic from the period when Western government and culture were in the ascendency? These are problems which need to be solved in a scientific manner. Whether it will be possible to achieve this in any way other than by subjective interpretation and selection is doubtful.
There are other questions, however, which can be answered. All sorts of states possess documents which they term constitutions, but on what grounds do they use this appellation? The question can be turned around and approached empirically. What sort of documents are called constitutions? Do they have anything more in common than a name or a form? It was curiosity about the answers to these questions which led the authors to carry out this research. Underlying their curiosity was the suspicion that the word constitution was not only the name for a document, but also the embodiment of an idea accepted the world over.

In the second half of the twentieth century, states attach greater importance to having a constitution to show to the outside world. In the majority of cases, the constitution's working in the state and national sphere is the most important factor. To this extent, constitutions can be said to be 'national' documents.
But, in addition, more emphasis is being placed on the document's importance in the international sphere. Often, a newly formed state uses its constitution more or less as a birth certificate. To possess a constitution is regarded as a sign of adulthood and independence. It is as it were the letter of credence which a country presents to the international community as a

token of its independence and sovereignty. This is a transitional situation, however. Once a state has been admitted to the community of states and confirmed in its position, the constitution takes on a somewhat different significance vis-à-vis the outside world. Its principal function is no longer to underscore the state's newly acquired sovereignty, but rather to emphasize the state's own identity. Presumably, this is one of the reasons that what are termed 'independence constitutions' are sometimes replaced after a very short while by new documents whose principal aim is to give expression to the state's own identity.

This gives rise to another interesting question. Why should a state be anxious to display its constitution to the international community and what does the document in fact contain? Besides being a means of forming the state's own political and legal system, a constitution can also be a means of expressing solidarity in the international political sphere. On the one hand a constitution can serve to show that a state is guided by or conforms to generally accepted concepts and ideas, in particular those accepted within the U.N.O., and on the other hand, it can be used to show that a state adheres to political ideologies as manifested within a particular political bloc.

Another motive for undertaking the research was supplied by the fact that, judging by the coverage given by the daily press and other news media, the public appears to be interested in what takes place with regard to constitutions. At least once a week, the international press agencies transmit a news report relating something which has happened in connection with a constitution. It may be that a constitution has been replaced, or that some act by a government has been declared unconstitutional by the courts. A promise may have been made of constitutional reform, or a political conflict have arisen in connection with a constitution or the interpretation of a constitution. Equally there may be talk of suspending a constitution, or declaring a suspended constitution to come in force again.

The criteria for determining the news value of events involving constitutions are not defined, or at any rate, are not known publicly. The political importance of the event is presumably the decisive factor. But it is possible that those events derive their political importance from the very fact that they are connected with the constitution. For instance, an amendment to a constitution which is held to be the expression of a particular political system is very likely to be interpreted as amending the political system itself. Obviously, any intended amendment to the constitution of the USSR, the USA or the People's Republic of China will, as a general rule, very quickly reach the press. Another factor which counts is the extent to which the events can be considered exceptional in the political sense. All this serves to underline the fact that the reporting of events connected with constitutions is political reporting.

What then is the connection between politics and the constitution? Are constitutions a focal point for political strife? Why should what takes place with regard to constitutions, both nationally and internationally, be considered so

important that it merits being brought to the attention of the public? To answer any of these questions, it is first necessary to know more about the contents and functions of constitutions, both in general and specifically.

5. Reasons of professional interest

According to East and West European conceptions, constitutional law and administrative law are part of legal science. In the USA, however, they are commonly classified as political sciences. This difference with regard to classification is not just of academic significance. It is also apparent in the manner the subject is approached. In Europe, much emphasis is laid on the juridical aspects such as legal norms, the rule of law, legality, competences and judicial review. In the USA, however, the emphasis is more on the politicological aspects such as the actual course of events, statistics, political theories, political history and judicial practice.

Each of these approaches has its merits, but at the same time each rather characteristically places exaggerated importance on certain aspects. While the European conception often attaches too great a significance to the legal system and overlooks the political and social ambience of the law, the American conception often places too much weight on political factors and takes too little account of the normative working which a legal system exercises.

Constitutions, in particular, provide an ideal meeting point for the legal and political science approaches. Constitutions - as legal documents - have been linked with political development in a great many ways. By way of example, one can cite the effect which a political revolution can have upon a constitution so that the latter becomes the expression of that revolution; another example is the use of the constitution as an anti-revolutionary instrument, so that the maintenance and protection of the constitution becomes the motive for combatting revolutionary movements and political parties; finally, the constitution may act as the focal point of political strife, in situations in which opposing political factions assume the guise of movements having particular views and demands with regard to constitutional interpretation and revision.
It is not sufficient, therefore, to define a constitution as a legal document. It is more: it is a politico-legal document; that is to say, it is an instrument in which political and legal elements are laid down, even though the form, phraseology and presentation are of a predominantly legal nature. Probably no constitution could be described or explained satisfactorily, except in the light of political and legal theories together. Indeed, other institutions such as the state, the legislatures and public administration also require a combined political and legal approach. None of them, however, can match the constitution for ease of reference and as a basis for comparison.

Another consideration plays a role here, too. All over the world, lawyers are occupied with problems involving constitutions. They may be working on a review of or a replacement of a constitution and therefore are participating

in the process of constitution-making. On the other hand, they may be involved in the interpretation of constitutions, either as a judge or as a civil servant drafting and implementing legislation and legal decisions.
Finally, they may be engaged in teaching constitutional law at university or school or in writing about constitutional law.
The number of lawyers involved in all these different ways with constitutions is unknown. In the Netherlands, which is after all a comparatively small country, at least fifty lawyers are working daily, either as civil servants at a ministry or as university professors, on matters concerned directly with the Dutch constitution. Although this may in no way be representative of the situation in other countries, it does not seem exaggerated to suggest that the number throughout the world must run into the thousands.
These lawyers do not constitute a world-wide professional brotherhood. Far from it; their political ideologies and the political systems and socio-political environments in their various home countries are far too divergent to permit of any such connection. Besides, there is not even an informal organization, let aside a formal one. Nevertheless, they do have a number of things in common.

In the first place, they are all members of the legal profession. This means that they can communicate with and understand one another on the professional level. The legal profession the world over faces a number of technical problems in the constitutional field concerning such matters as the hierarchy of norms, interpretation and phraseology; although the solutions may not always be the identical, the problems are often formulated in much the same way. Technical concepts can also be defined in a uniform manner. Numerous legal institutions such as legislation, human rights, and the judiciary are common to all countries and as such can be said to be of a global nature. In short, therefore, however much their views may be governed by their legal backgrounds, lawyers have a good many matters of a technical nature in common and in a certain sense these give the profession a supra-national character.

In the second place, they have the subject of their work in common, namely the constitution. Whatever may be the contents of a constitution and whatever may be its political character or political intentions, it remains a body of statements. Not only the legal contents of these statements but also the nature of the phraseology, the concepts used and the choice of words constitute means of identification which enable lawyers of different nationalities to carry on a meaningful dialogue on the professional level.

In the third place they can no longer do without a certain international orientation. Theoretical and legal developments within the United Nations and in academic circles may not exercise direct influence on the national political systems, but as a result of increasing internationalisation and international communication, they are of growing importance for national political concepts and thus for constitutions.

It is becoming more and more of a necessity for constitutional lawyers to