

THE CAUSES AND CONSEQUENCES OF CONSTITUTIONAL FORM

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I

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The Constitution of the United States contains about 8000 words, and its seven articles and twenty-seven amendments can fit easily into eight printed pages. By contrast, the current (interim) Constitution of the Republic of South Africa contains almost 100,000 words in 251 sections distributed among fifteen chapters, is supplemented by an additional seven schedules, and in its official version occupies 114 pages in English, as well as another 114 in the equally authoritative Afrikaans.² And although each of these constitutions deals with topics that the other ignores - the designation of multiple official languages in South Africa, for example, and in the United States the allocation of the power to issue letters of marque and reprisal - the disparity in length and style is reflected even in the textual treatment of rights that the two documents both recognize. The protections of freedom of speech, press, assembly, and petition, for example, are disposed of in the brief phrases of part of the First Amendment to the Constitution of the United States, but occupy a full nineteen clauses in eight different articles in the Constitution of South Africa. Moreover, the sketchy provisions of the Fourth, Fifth, and Sixth Amendments (e.g., “No person . . . shall be compelled in any criminal case to be a witness against himself”) to the United States Constitution have as their South African counterpart the highly detailed provisions of section 25, among those being Section 25(2)(b), which provides:

Every person arrested for the alleged commission of an offense shall . . . have the right as soon as it is reasonably possible, but not later than 48 hours after the arrest, or, if the said period of 48 hours expires outside ordinary court hours or on a day which is not a court day, the first court day after such expiry, to be brought before an ordinary court of law and to be charged or to be informed of the reason for his or her further detention, failing which he or she shall be entitled to be released.

The contrast between the two constitutions is thus as much, or even more, a matter of form than of substance. And such dramatic differences in form are seen throughout much of the rest of the world as well, where the period of wholesale constitutional transformation that has been witnessed in the last ten years has had as its output a diversity of constitutional styles that

²The final constitution, which will take effect in 1999, is authoritative only in English, but is otherwise quite similar in length, form, and content to the interim constitution.

cast some doubt on standard understandings of just what it is that a constitution is in the first place.

This paper takes this diversity of constitutional form as an important research topic in its own right. After all, nations expend a great deal of time and enormous resources on the process of producing a constitution, and this suggests that people believe that form matters. Moreover, the form that is produced, as the contrast between South Africa and the United States exemplifies, varies substantially among nations. As a result, two important research questions surface for closer inspection. First, if we see constitutional form as a dependent variable, then what are the conditions in various nations that have caused these differences? Why does the Constitution of South Africa look so different from the Constitution of the United States, even for the substantive provisions they share in common? And, second, if we see constitutional form as an independent variable, then what differences, if any, do differences in form make? For roughly equivalent substantive provisions, what can we expect as the consequences of significant differences in the form in which those provisions are drafted?

In this paper I will introduce the research agenda, offer some hypotheses about both the causes and consequences of constitutional form, and throw out some anecdotal evidence suggesting that the hypotheses might be true. Testing the hypotheses in a more systematic fashion remains for future work.

II

Turning first to the possible causes of differences in constitutional form, we can begin by taking the differences between the United States and South African constitutions as possibly reflecting a dramatic difference in the way in which the two documents were drafted. Indeed, the two countries may represent the opposite poles of a scale between the public and the secret in constitution-making. In 1787, as is well-known, the 55 men who convened at the Constitutional Convention in Philadelphia to draft the Constitution of the United States met from May to September under a rule of secrecy. Under this rule, not only were delegates sworn not to disclose the proceedings outside of the chamber, but there were sentries at the door, and

delegates could not even copy the daily journal for their own use without express permission. The delegates took their commitment to secrecy seriously, for it was widely believed, as Francis Hopkinson of Philadelphia put it, that the “deliberations are kept inviolably secret, so that they set without censure or remark, but no sooner will the chicken be hatch’d but that every one will be for plucking a feather.”³

By contrast, the drafting of the Constitution of South Africa was a thoroughly public event. The Constitutional Assembly consisted of more than 400 elected members, which then delegated the bulk of their work to a committee of 60 and various “theme” subcommittees to work on particular topics. Each of these bodies - the Assembly, the committee, and the theme subcommittees - met in public, took testimony, and deliberated and voted in public. And while all of this was taking place, actively covered in detail in the press, there were weekly (and sometimes bi-weekly) television programs and newspaper supplements called “Constitutional Talk,” in which the important substantive issues became as much the stuff of public discussion as the Lewinsky matter has been in the United States for the past year.

³See Catherine Drinker Bowen, Miracle at Philadelphia: The Story of the Constitutional Convention, May to September 1787 (Boston: Little, Brown, 1966).

One hypothesis, therefore, is that publicity makes it more difficult to make difficult choices and accordingly more difficult to eliminate, or to decide not to include, provisions. Under conditions of wide publicity, and under conditions in which various interest groups are likely to embody their interests in particular constitutional clauses (the Constitution of South Africa, for example, contains some protection for the environment, some protection for academic freedom, and includes discrimination on the grounds of sexual orientation in its list of constitutionally prohibited inequalities), it is highly plausible to suppose that the political path of least resistance is to include a provision, producing the situation in which virtually any right or interest that has some political constituency finds itself embodied in the document, with the courts left to sort things out in the future.⁴ Similarly, publicity may make vagueness (what Justice Jackson called the “majestic generalities” of the Constitution of the United States) more difficult, because the perpetual “What if?” forces may produce increased pressure towards specificity.⁵ Although we typically associate the Constitution of the United States with broad phrases such as “commerce among the several states,” “freedom of speech,” “free exercise of religion,” “unreasonable searches and seizures,” “due process of law,” “cruel and unusual punishment,” and “equal protection of the laws,” it is noteworthy that not a single constitutional amendment since 1868 has contained equivalently open-ended language.

⁴Implicit in the sentence in the text is the hypothesis that interests groups are far more likely to mobilize around support for a position than around opposition to a position. With the significant exception of recent referendums on issues of gay rights, the American experience tends to support this hypothesis.

⁵They may also, under procedures specifying stringent supermajorities for amendment, make adding broad and open-ended clauses virtually impossible, as the history of the equal Rights Amendment in the United States may suggest.

Publicity, or lack thereof, may thus be one possible determinant of constitutional form. And publicity may itself be only one among numerous differences in what we might call the conditions of constitution-making. Others might include time (some are rushed through for political reasons, while others are the product of years of deliberation); the degree of involvement, or lack thereof, of lawyers in the drafting process; the reputation of the previous constitution (if good, it might be important for a new constitution to bear some resemblance to the old one; if bad, it might be just as important for a new constitution to bear no resemblance to the old one); and the process of final adoption (by an assembly, by the parliament, or by the people in a referendum). Other causes can be hypothesized as well, but all of the ones just mentioned can be combined under the general hypothesis that the conditions under which a constitution is made might influence what the constitution that is made looks like, with various sub-hypotheses building on specific variables in the constitution-making process.

There are, however, variables other than the conditions of constitution-making, and an important one might well be the legal tradition against or within which the constitution is created. Open-endedness, for example, is nowadays associated with the power of judges to make law, and one way of understanding a vague or open-ended constitutional provision is as a mandate for judicial law-making. Just as the Sherman Antitrust Act of 1890 used the terms “contracts, combinations, and conspiracies in restraint of trade” as the vehicle for empowering judges to create a body of anti-competition law, and just as the phrase “device or artifice to defraud” in Rule 10b-5 adopted under the Securities and Exchange Act of 1934 empowers the courts to do the same for the law regulating securities trading, so too do the above-quoted phrases, phrases like “freedom of speech” and “equal protection of laws,” place the courts, by virtue of the necessity of putting some content-laden flesh on these skeletal phrases, at the center of the process of creating and not just interpreting constitutional rights.

Such a role for the courts is of course more compatible with some legal systems than others. More specifically, therefore, seeing judges as law-makers is more a part of common law than of civil law legal systems, the latter, in their reliance on seemingly comprehensive codes,

typically likely to view judges and their decisions as aberrational and epiphenomenal rather than as central and routine. Consequently, we might hypothesize that countries with a civil law tradition, typically countries owing their legal model to Roman Law and thereafter to the French, German, Dutch, Spanish, Portuguese, and Belgian legal traditions, would have more code-like constitutions, while countries with a common law tradition, owing their legal model to English law and to the ensuing Anglo-American tradition, would be more comfortable with open-ended constitutional provisions and the judicial power that comes naturally from them. This again is a hypothesis and not a conclusion, but given the number of new constitutions in a post-colonial world, it is a hypothesis that seems plausibly to be testable.⁶

The difference between the common and civil law traditions is the macro version of the phenomenon of legal transplantation, whereby legal (and constitutional) rules, styles, structures, institutions, and traditions migrate from one country to another by virtue of various social,

⁶An important issue of substance, rather than form, appears also to vary with legal and political tradition. As a matter of Marxist theory, those within the socialist tradition tended to believe that the Western preoccupation with rights and negative liberty (see Isaiah Berlin, “Two Concepts of Liberty”), to the exclusion of a concern for positive liberty and the material conditions for the exercise of those rights, was a product of a capitalist and anti-state worldview. In light of this, it is noteworthy that the new constitutions of Eastern Europe and the republics of the former Soviet Union, with their socialist traditions, and of South Africa, with the socialist tradition of the African National Congress, all contain some form of positive rights, something rarely seen in other “western” constitutions.

cultural, political, and economic forces in both the donor country and the host country.⁷ In the more micro version, it is not so much that entire traditions are transplanted, although of course they frequently are, but that specific components of those traditions may be transplanted. And in this micro version of the phenomenon of transplantation, constitutions are among the most commonly transplanted of legal items. Considering the forces influencing such transplantation may help in formulating some further hypotheses about the causes of variations in constitutional form.

At the most extreme, of course, constitutional transplantation may occur simply as a matter of donor coercion. The 1946 Constitution of Japan is the clearest example, for the degree with which that constitution resembled the Constitution of the United States is almost entirely a function of post-war arrangements in which the wishes of the vanquished were taken to be largely irrelevant. Similarly, the constitutions of many of the American Indian tribes (almost all of which have constitutions) are similar to the Constitution of the United States in both form and substance because in many instances those constitutions were drafted in Washington by the Bureau of Indian Affairs and then injected into a community regardless of whether the community wanted that constitution or not.

⁷See generally Markku Suksi, ed., Law Under Exogenous Influences (Turku, Finland: Turku Law School, 1994).

Such examples are historically important, but in contemporary constitutional transformations the ultimate choice is more likely to reside with the host country rather than with an overtly coercive donor country. Still, many of the same forces are likely to exist. For example, it is widely believed in the Baltic countries and in parts of Eastern Europe that joining Europe, both literally (the EC) and figuratively (various cultural, political, and economic associations) is desirable, and that legal and constitutional harmonization with Europe increases the probability of acceptance by Europe. Moreover, it is widely believed in the Baltics and in Eastern Europe that Germany is the most important of the European countries. As a consequence of all of this, it should come as no surprise that in numerous aspects of both substance and structure the newer (post-1990) constitutions of the Baltics and Eastern Europe resemble the constitution of Germany more than they resemble any of the other constitutions of western Europe⁸ or of the world as a whole.

⁸It is noteworthy that in none of the constitutional transformations of the last two decades has the transforming country adopted the British model of parliamentary supremacy coupled with the absence of a single written constitutional document. This model, also represented in New Zealand and Israel but nowhere else among developed countries, has plainly fallen into some disrepute, but the reasons for this are unclear. One possibility is that the American model has won the day in the court of world constitutional opinion. Another is that a functioning government in the absence of a written constitution requires a degree of antecedent political stability that few, if any, transforming societies are likely to have. And still another is that transforming societies believe, perhaps correctly, that the very process of constitution-making serves important political functions independent of the product of that process.

Implicit in the foregoing paragraph is a hypothesis about the desire for harmonization as a causal factor, but there are other hypotheses as well. Even if it is descriptively accurate to say that the set of Baltic and Eastern European constitutions resembles the German constitution, one cause of this may be the efforts of the donor country as much as the desires of the host country. Thus, although German efforts at constitutional propagation pale in the face of American efforts,⁹ they have been far from insignificant, and the ready availability of free advisors may be a factor in explaining why the models promoted by the advisors have taken root.

At times, of course, it is difficult to disaggregate potential multiple causal factors. In Estonia, for example, we see a country whose pre-Soviet legal tradition relied heavily on the Swedish, which was in turn heavily based on the German. We also see a country with a strong desire to harmonize its legal tradition with Europe in the hope of joining the EC. And we see a country whose pre-Soviet professional language was German, as well as a country that has seen the visits of a large number of German legal advisors in the last eight years. The country has also seen the visits of a large number of American legal advisors (including the author), but identification of the various other possible causal factors points the way to explaining why Estonian law in general, and constitutional law in particular, looks far more German than it does American.

⁹Intriguingly, the American efforts have been largely unsuccessful in terms of constitutional form, where far greater specificity than the American constitution is plainly the norm, and largely unsuccessful in terms of constitutional structure, where, for example, the German model of a constitutional court is far more common in new constitutions than is the American model of constitutional decisions being made by courts of general jurisdiction, including the Supreme Court. On the other hand, the American model of what might, oversimplifyingly, be called judicial activism, has been widely adopted, with Hungary being perhaps the most extreme example.

In this brief survey of possible causal influences on constitutional form, I hope I have pointed the way towards a larger question as well. Although constitutional transplants do exist, constitutional transplantation is especially difficult because of the particular symbolic and political functions that constitutions serve.¹⁰ With respect to legal transplants in general, however, some of them take and some of them do not. By identifying the variables that may determine the extent to which host legal documents do or do not resemble donor legal documents, we may also be able to determine why some legal transplants succeed and some do not, which may in turn either help to focus the efforts towards transplantation, or locate the factors that may help to make it more effective.

III

I have thus far focused on the causes of constitutional form, but there remains the question of the consequences, if any, of differences in constitutional form.¹¹ At the most extreme, perhaps differences in constitutional form are inconsequential. Perhaps both the American and South African constitutions do or will, for their common topics and controlling for political and social differences, generate the same outcomes and foster the same processes of constitutional reasoning. But perhaps not. Perhaps texts and textual styles make a difference, in

¹⁰Jaan-Erik Truuvali, one of the central figures in drafting the Estonian constitution, was a prominent legal theorist within Estonia, and thus recognized many of the technical problems in the document. In explaining these problems to me, and in explaining why Estonia took less outside advice in constitution-drafting than it did in other areas, he said something to the effect of “It may not be a great constitution, but it’s our constitution.”

¹¹See “On Whether Constitutions Matter,” in S.E. Finer, Vernon Bogdanor, & Bernard Rudden, Comparing Constitutions (Oxford: Clarendon Press, 1995), pp. 1-5.

which case we ought to expect, again controlling for substantive differences between the countries, substantially different constitutional methodologies and substantially different constitutional outcomes, such differences being, in part, the textually-caused consequence of the obvious differences in textual styles.

The former hypothesis, that variations of textual style or structure or degree of detail are largely inconsequential, has a distinguished pedigree. Most obviously, it links closely with many of the central claims of what in legal theory is called Legal Realism,¹² and what political scientists who study courts call the Attitudinal (as opposed to Legal) Model of judicial decision-making,¹³ for it is an important tenet of each that the formal manifestations of law, of which a constitutional text is a prime example, have less outcome-generating influence than the standard picture of legal decision-making would have people believe. Under this view, formal texts (including the texts of previous judicial decisions as well as the texts of constitutions and codes) explain only a small part of differences among legal outcomes, and thus differences in textual style are likely less important in generating divergent outcomes than are differences in background political culture, judicial and legal acculturation, and the moral dispositions and policy preferences of individual judges and other legal and constitutional decision-makers. Conversely, similarities in political culture, judicial and legal acculturation, and the moral dispositions and policy preferences of legal decision-makers would be expected to produce

¹²See generally Wilfred E. Rumble, American Legal Realism (1968); William Twining, Karl Llewellyn and the Realist Movement (London: Rowman & Littlefield, 1973).

¹³See Saul Brenner and Harold J. Spaeth, Stare Indecisis: The Alteration of Precedent on the Supreme Court, 1946-1992 (Cambridge: Cambridge University Press, 1995); Jeffrey A. Segal, "Separation of Powers Games in the Positive Theory of Congress and Courts," American Political Science review, vol. 91, 1 (1997), pp. 26-44.

substantial similarities in outcome even in the face of substantial differences in the formal law.

The hypothesis that variances among constitutional texts, either as a matter of form or of substance, are of comparatively little moment is by no means limited to the Legal Realists and their successors. Supporters of the right to privacy in the United States, for example, rarely view its omission from the text of the Constitution as a major obstacle to its recognition, nor has the lack of anything resembling a free speech or free press clause in the Australian Constitution prevented the recognition of free speech rights in that country.¹⁴ Indeed, it is intriguing that many of the rights that are set forth explicitly in the Constitution of South Africa - for example, the right to privacy, the freedom of association, academic freedom, and the right to travel - are ones that exist in American constitutional doctrine but are not to be found in the express words of the text of the Constitution of the United States.

Against this Realist view is a contrasting hypothesis, one often couched (or excoriated) in terms of “formalism” or “textualism.”¹⁵ This position hypothesizes that differences in textual content and style can, and often do, produce differences in outcome. If this view is sound, then the content and style of constitutional texts really does matter, and the efforts of constitutional drafters, such as those in South Africa, may have been less in vain than they would have been if it turns out that the specific styles and products of constitutional drafting makes little difference. Perhaps South Africa’s substantially different approach to constitutional drafting will yield quite different outcomes than those that would have been reached had South Africa’s drafters written

¹⁴See Deborah H. Cass, “Through the Looking Glass: The High Court and the Right to Free Speech,” Public Law Review, vol. 4 (1993), pp. 229-47; Arthur Glass, “Australian Capital Television and the Application of Constitutional Rights,” Sydney Law Review, vol. 17 (1995), pp. 29-53; Gerald N. Rosenberg and John M. Williams, “Do Not Go Gently into that Good Right: The First Amendment in the High Court of Australia,” The Supreme Court Review 1997 (1998), pp. 439-95.

¹⁵For unconventionally sympathetic treatments, see Frederick Schauer, Playing By the Rules: A Philosophical Examination of Rule-Based Decision-making in Law and in Life (Oxford: Clarendon Press, 1991); Frederick Schauer, “Formalism,” Yale Law Journal, vol. 97 (1988), pp. 509-42.

down their ideas and principles in the persistently abstract style of the Constitution of the United States.

These opposing hypotheses about the consequences of differences in constitutional form suggest a research program that would treat constitutional text as the independent variable, and either judicial decisions or genuine end-states¹⁶ as the dependent variable. Obviously the large number of political and social variables will ensure that the products of such research will never be more than suggestive, but much of modern legal theory is useful in suggesting some possible hypotheses, and the proliferation of contemporary constitution-making is equally useful in producing a large enough sample that testing the hypotheses at least does not appear to be totally pointless.

¹⁶By end-states I mean states of the world, as opposed to states of legal doctrine. A good example of the distinction comes from the law of libel. Among countries with common law traditions and legal structures, the United States, because of the influence of the First Amendment, has by far the most press-protective libel laws. Australia, among common law countries, has the most press-restrictive, or at least did until recently. Yet despite the differences in legal doctrine, the frequency and vigor of criticism of policy and policy-makers in the press (one possible measure of end-states, if certain constitutional goals are taken to be paramount) was roughly the same in the two countries.

A number of recent comparative studies have suggested that countries may vary in where they are located along this Realism-formalism spectrum.¹⁷ And if there are differences among nations and among legal traditions in what is thought to be the roughly desirable degree of legal formality, the degree to which what legal decision-makers think are desirable outcomes should be constrained by text and precedent, then the gravitational force of this background view may at times be quite strong. In the United States, for example, we have seen some remarkable examples of the phenomenon of convergence towards a norm of moderate anti-formalism regardless of the starting point. When statutes are written with great precision, as with section 16(b) of the Securities Exchange Act of 1934, whose prohibitions on “short-swing trading” are couched in exact numbers of days and exact percentages of stock held,¹⁸ the courts have been moderately aggressive in crafting various judicially-invented exceptions, caveats, and qualifications, all of which serve to ameliorate the rigidity of the rule. But when statutes are written in very open-ended terms, as with the Sherman Antitrust Act, the courts have been equally aggressive in creating various “per se rules”¹⁹ that add an element of formality and rigidity to an otherwise extraordinarily loose set of prohibitions. As a consequence of judicial imposition of background norms of legal understanding, therefore, there is a convergence in fact around a degree of rule-based constraint, regardless of whether the legislature started with something very rule-based or, by contrast, something not rule-based at all.

In the context of constitutional form, therefore, it is possible that there are limits to the extent to which the form of a document could change general understandings about the comparative fixity or flexibility of law. Yet it is also possible that the very institution of the

¹⁷D. Neil MacCormick and Robert S. Summers, Interpreting Statutes: A Comparative Study (Aldershot, UK: Dartmouth Publishing 1991); P.S. Atiyah & R.S. Summers, Form and Substance in Anglo-American Law: A Comparative Study in Legal Theory, Legal Reasoning and Legal Institutions (Oxford: Clarendon Press, 1987).

¹⁸The restrictions only apply to officers, directors, and holders of (exactly) 10% or more of the stock of a registered company, and restrict buying and selling or selling and buying only when the two transactions take place within (exactly) six months.

¹⁹The most prominent of which the is the flat prohibition on price-fixing.

constitutional court is designed, in part, to produce some discontinuity between the principles applied to constitutional interpretation and the principles applied to other forms of legal decision-making. Where there is no constitutional court, it can be hypothesized, constitutional decisions resemble the style of judicial decisions generally, but where there is a constitutional court, that court's understanding of its own processes and authority is more likely to diverge from the patterns seen in the judicial system generally. This has plainly been the case in Hungary and South Africa, and a more systematic study might attempt with rigor to examine whether the hypotheses suggested here is in fact true.

If it turns out that countries with constitutional courts depart more from their background legal traditions than countries without constitutional courts, then this itself may be caused, in part, by the extent to which constitutional court judges increasingly see themselves as part of an international community including not only judges from many nations, but parts of the international human rights community, and a transnational culture of constitutional academics and high-visibility practitioners. A further hypothesis, therefore, is that the relevant reference group, or peer group, or reputation-creating community, for many constitutional court judges is a certain transnational community, rather than, or at least in addition to, some number of more domestic communities. If constitutional court judges see themselves as advocates for taking constitutionalism and judicial review seriously, and if they desire to have their counterparts in other countries see them as successful in this venture, then the desire for harmonization with a certain transnational norm of judicial activism may be an important factor in explaining judicial behavior and constitutional outcomes in various countries.²⁰

IV

All of the foregoing is largely speculation, and indeed only preliminary speculation at that. Yet the process of making, re-making, interpreting, and re-interpreting constitutions is a

²⁰Indeed, the phenomenon may exist even absent a written constitution, since some would find the description in the text especially applicable to Justice Aharon Barak of the Supreme Court of Israel.

significant part of legal development throughout the world. Despite this, we know quite little about whether any of this makes a difference, and not much more about what forces influence constitutions and constitutional cultures to turn out in one way rather than another. To the extent that these speculations turn into or inspire a research agenda, what we learn may help us not only better to understand constitutions, but also to understand better the forces that influence legal development generally in a rapidly transforming world.