Formal Characteristics of National Constitutions: A Cross-National Historical Dataset

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Note to Schmooze participants: I have taken advantage of Mark's invitation to present informal work by presenting a modified version of a grant proposal for a database project. I appreciate your understanding and feedback at this early stage of the project. The project relates to the theme of "Juristocracy" in two ways: first it will provide systematic data on the constitutional status of the judiciary over time and space; and second it will catalog trends in rights provisions that are so often the fulcrum for judicialization efforts. TG

Overview

Waves of national independence and democratization have deposited a varying set of political and legal institutions across the world in the last fifty years. For the most part, these institutions are set out formally in national constitutions. However, no systematic dataset exists that records the characteristics and provisions of national constitutions. Such a basic set of data is indispensable for the simple, but important, goal of describing and comparing constitutions. It is also indispensable, as we submit below, for testing theoretical predictions about the origins and consequences of various constitutional provisions. As such, we propose to construct a comprehensive dataset of the form and content of national constitutions, past and present.

Theoretical Motivations

While these data will likely have general applicability to a broad range of research questions (see the next section), a motivating question for the principal investigators concerns the historical roots of certain institutions. In particular, the investigators intend to use the data to test predictions regarding the diffusion of constitutional design elements. Our basic expectation, stated quite generally, is that the constitutional provisions of peer countries have a decisive impact on the decisions of constitutional engineers regardless of a state's particular institutional needs and constraints. Constitutions are influenced not just by domestic political bargains, but by trends, ideas and models adopted from other constitutions. These ideas and models *diffuse* across space and time. Our intention is to test diffusion hypotheses with a comprehensive set of cross-national, historical data. We will determine (i) whether diffusion theories explain

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constitutional change, and (ii) which aspects of constitutional design are most susceptible to diffusion.

The investigators' diffusion framework, although complementary to traditional approaches to constitutional design, departs from these approaches. Traditional explanations of constitutional design focus on interests, passions, and the public good (Elster 1996). Interest-based accounts (e.g. Mueller 2000; Cooter 2003) focus on rational choice of self-interested designers. Other scholars, however, emphasize emotions and constraints on rational choice (e.g., Elster et al., 1997). A third school of thought, captured in most normative legal scholarship, suggests that constitutional drafters are motivated by a higher purpose and that constitutions are designed with the best interests of the public in mind.

Our diffusion perspective does not contradict these causal stories. However, it does introduce an altogether different set of factors. Diffusion, which we define as a general set of processes by which one government's adoption of a constitutional element affects the probability that another actor adopt the same element (Elkins 2003; Simmons and Elkins 2004), emphasizes the influence of factors external to the state. Context and fashion, in this line of reasoning, matter as much as a government's particular propensity for a given institution. Exactly when and how context matters, of course, is the critical theoretical question of interest to the investigators. The investigators have identified various plausible diffusion processes with respect to institutional development (Elkins 2003; Elkins and Simmons 2005), each of which implies an hypothesis testable with the dataset the investigators propose to construct. For example, the investigators expect that the cognitive and research capabilities of constitutional designers are constrained in predictable patterns. One pattern is that designers pay disproportionate attention to the constitutions of states that are highly "available," in the sense of Kahneman and Tversky (1982). So, we should expect that the constitutions of countries with high levels of interaction and communication (measured by levels of trade, linguistic similarity, telephone flows, or mail flows) will be more accessible and, so, more similar. For similar reasons, we should expect the constitutions of geographically proximate states to show marked similarities. On the other hand, it might be the case that constitutional learning follows a different pattern. It might be that constitutional framers model their institutions after countries that are similar to theirs in important ways, reasoning that what is good for an analogous state will be good for them. In a similar vein, it might be that a state's success – measured by political stability or wealth – inspires imitators.

Diffusion explanations are intriguing because they imply that governments are making choices that they would not make if left to their own devices (if such a thing were possible in constitution-writing). These "detours" in the policy process are indeed interesting from an historical or political development perspective. However, they also portend important consequences for the quality of government policies. We see two interesting possibilities. Diffusion may imply that governments adopt sub-optimal or inappropriate policies designed for the needs of others. Alternatively, diffusion may imply that governments adopt policies superior to those they have the resources or knowledge to engineer for themselves. The question, then, is whether diffusion is responsible for a nation's squeezing into ill-fitting, but fashionable institutions or whether it leads them to the most functional and efficient ones available? We might lean towards

the first conclusion, if only for a cultural preference for creativity and originality over imitation and conformity. However, the second conclusion appears equally plausible, especially after a number of scholars have begun to burnish the image of imitation, emphasizing its utility as a cognitive shortcut for problems whose answers are not always obvious (Lupia and McCubbins 1998). Imitation, in this light, is not slavish. It is an efficient and effective mode of behavior for policy makers. We aspire to draw conclusions regarding the social welfare implications of diffusion processes. The first step, however, is to specify the causal sequence of events.

The proper testing of the hypotheses we suggest above requires data on a country's basic political and economic attributes as well as its relationship with other countries (Simmons and Elkins 2004). Most importantly, however, the analysis requires systematic measurement of similarity across national constitutions. It is these measures of similarity that we expect to construct from the dataset we describe below.

A Resource for other Scholars

We expect that the dataset we describe will be useful to a large number of social scientists concerned with the origins and impacts of political and legal institutions. Most obviously, a formal accounting of institutional elements of constitutions makes for a ready set of independent and dependent variables that allow political scientists, economists, and public law scholars to test many of the institutional arguments popular in these disciplines. Crucially, a measure of particular components of constitutions allows scholars to analyze and describe discrete elements of important constructs such as presidentialism, parliamentarism, federalism, judicial review, and electoral systems. Amendment processes will also be documented (Lutz 1994). The dataset, as we envision it, also makes for a useful resource to study institutional evolution and adaptation within states across time. How resistant to change are institutional designs? Under what conditions do institutions change?

Another research program might use the data to compare the match between a state's formal institutional framework and its actual conduct. Some scholars have suggested that the dictates of a constitution are sometimes at odds with actual behavior. In order to test these claims, one needs a systematic accounting of constitutional elements. The dataset will allow scholars to evaluate different configurations of institutions and their effect on, for example, democratic performance, economic growth, and other dependent variables of interest (e.g., Persson and Tabellini, 2003).

We should emphasize that the dataset will include variables pertaining to the form and style of the written document, not just its institutional provisions. As we describe below, we intend to code characteristics of the structure, organization, length, and style of the documents. This may provide tools for innovative research programs on the specificity of constitutions.

Constitutional scholars are paying increasing attention to the global aspects of constitutionalism, including both the spread of particular human rights provisions and an increasing transnational "conversation" of judges in interpreting the constitution (Slaughter 2003).The database will provide a resource to document the spread of particular rights and linguistic features in a systermatic fashion. Finally, explanatory

power notwithstanding, we suspect that describing the way in which states have chosen to craft constitutions, and how these choices have varied over time, will be interesting in its own right. Such a descriptive resource can be of great value in both research and teaching.

Proposed Indicators

An important and delicate task in this project is the selection of those attributes of constitutions that we wish to record. At this point we have identified approximately 200 aspects -- of both *form* and *content* – of written constitutions that we believe are worth measuring. In constructing this list we have reviewed works from the literature on comparative constitutions as well as the limited number of data projects. In this regard, the Maarseveen and van der Tang (1978) volume has served a particularly useful foundation from which to build, as has the key system that was developed by Tschentscher (2004). However, neither of these earlier efforts is sufficient in our view.

We have adopted several major categories of variables.

I. Amendment processes

II. Rights

III. Duties (e.g. military service, obedience)

IV. Elections (includes political party regulation, suffrage, referenda)

V. Government Structure: Executive

VI. Government Structure: Legislature

VII. Judiciary

VIII. Constitutional court

IX. Other constitutional institutions (ombudsmen, human rights commission)

X. Federalism/Local government

XI. International Law

XII. Other Characteristics

One issue is the proper level of detail we ought include in the coding. Our current list of "rights," for example, included some 200 different variables. This may be beyond the scope of our effort to achieve.

As an example of the kinds of questions we seek to code for, the following list is a provisional set of questions in the "Judiciary" section.

A. Administrative Law

Does the constitution provide for a administrative court? (1/0)
How appointed?
Nomination by: 1-presdient, executive; 2-judiciary; 3- legislative majority; 4-legislative supermajority; 5-judicial council
Approval by: 1-presdient, executive; 2-judiciary; 3- legislative majority; 4-legislative supermajority; 5-judicial council
Term length? (ordinal)
Does the constitution contain provisions protecting the individual against illegal/ultra vires administrative actions?(1/0)

B. Constitutional Court

Does the constitution contain provisions concerning a special constitutional court(1/0)
Does the Constitutional court have powers besides reviewing legislation and treaties for constitutionality? (1/0)
What are the powers?
1-supervisiong elections; 2-supervising political parties; 3-impeachment
4-states of emergency; 5-reviewing organic statutes of local government; 6-other
What is the term of justices? (ordinal)
How are justices appointed?
Nomination by: 1-presdient, executive; 2-judiciary; 3- legislative majority; 4-legislative supermajority; 5-judicial council
Approval by: 1-presdient, executive; 2-judiciary; 3- legislative majority; 4-legislative supermajority; 5-judicial council
Who has standing to refer a question? 1-presdient, executive organs; 2-judiciary; 3- legislative majority; 4-legislative minority; 5-public
What is the effect of a determination of unconstitutionality?

What is timing of review? 1-post-promulgation; 2-pre-promulgation; 3-either

C. Judicial Independence

Does the constitution contain an explicit declaration regarding the independence of the central judicial organ(s)? (1/0)
Does the constitution stipulate that judges can be impeached? (1/0)
Is a majority or supermajority required for impeachment? 1-majority; 2-supermajority
Who is involved in the impeachment of judges? 1-legislature, 2-executive, 3-judiciary; 4-judicial council
Does the constitution stipulate that courts have to take into account decisions of higher courts? (1/0)

D. Judicial Appointment
Does the constitution stipulate in what way people become members of ordinary courts
Nomination by: 1-presdient, executive; 2-judiciary; 3- legislative majority; 4-legislative supermajority; 5-judicial council
Approval by: 1-presdient, executive; 2-judiciary; 3- legislative majority; 4-legislative supermajority; 5-judicial council
Are judicial terms specified for ordinary judges? (1/0) How long? (ordinal)
Does the constitution stipulate in what way people become members of the highest ordinary court

Nomination by: 1-presdient, executive; 2-judiciary; 3- legislative majority; 4-legislative supermajority; 5-judicial council
Approval by: 1-presdient, executive; 2-judiciary; 3- legislative majority; 4-legislative supermajority; 5-judicial council
Are judicial terms specified for the supreme court? (1/0) How long? (ordinal)

E. Powers

Does the constitution contain provisions with regard to advisory opinions of ordinary judicial organs? (1/0)
Does the constitution contain provisions allowing review of ordinary legislation by judicial and/or other state-organs(1/0)
Does the constitution stipulate whether decisions of the highest ordinary court are final (in general) (1/0)

Sampling Considerations

The proposed unit of analysis in this study is the country-year. The resulting dataset will, therefore, report characteristics of constitutions in force for each year. The alternative, and perhaps more intuitive, approach would be to treat each constitution as a unit. However, distinguishing discrete constitutions within a country's history is sometimes problematic. Some countries *do* have constitutions that are clearly distinct documents and are recorded as such (e.g., the Brazilian constitutions of 1988, 1968, 1945, and 1889). Other countries, however, make substantial modifications to a constitution without renaming the document (e.g. South Korea's six republics since independence have each been created through what are technically constitutional amendments). Some countries may make only modest modifications but celebrate a "new" constitution. As such, dividing documents into discrete drafts or versions invokes a set of unnecessary judgments in our view. Our preference is to document modifications in constitutions as they occur. Under this process, "new" constitutions will be obvious to the extent that they exhibit form and content that is distinct from those in the document of the prior year. While the country-year approach appears daunting, we believe it will be manageable. For each constitution, we will obtain information on constitutional amendments and use these to describe the shifts over time within each country. As a practical matter, the dataset would include only those country years for which a change occurs. For analytical purposes, of course, older values can be carried over to intervening years in which no change occurs in order to construct an uninterrupted time series.

In terms of coverage across time and space, our goal is to be comprehensive. The advantage of this sort of dataset, we believe, is to cover a large set of countries and time periods in a systematic way. Furthermore, the availability of national constitutions encourages us to be expansive. Texts of worldwide constitutions (at least current versions) are available for most independent states, great and small (e.g., Flanz and Blaustein 2004; Tschentscher 2004)

Dissemination of Results

The investigators will design a web site to disseminate the dataset and any publications related to it. The dataset will also be archived at the University of Michigan's ICPSR data archive.

Conclusion

The database project described herein will allow us to systematically analyze the diffusion of constitutional ideas and institutions, and to test whether and when similar countries adopt similar constitutions. Beyond our immediate research concerns, however, we believe the database will provide a useful resource for a broader research program on formal aspects of constitutions. This is an area of growing research interest in law and the social sciences, and informs issues of continuing importance to policy-makers involved in legal and constitutional reform efforts.

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