Constitutional Drafting and Distrust

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Abstract

Constitutions, it turns out, *do* permit of the prolixity of a legal code. The Indian Constitution is currently over 140,000 words long, compared to the roughly 8,000 words in the amended US Constitution. In between are democratic constitutions spanning the full range of long and detailed to short and abstract. The Brazilian Constitution, for instance, contains approximately 65,000 words, the South African Constitution 43,000 words, and the Canadian Constitution 20,000 words. This variation reflects more than mere differences in the scope, or coverage, of constitutions, or the time at which they were drafted.

In drafting any new constitution or constitutional provision, drafters face a choice between two broad approaches to constitutional drafting: a "framework-style" approach, which provides only quite general textual guidance as to the meaning or operation of particular constitutional norms; and a more "codified" approach, which provides far greater detail or specificity regarding the intended meaning and operation of relevant constitutional norms. The two models have different relevance in various constitutional settings, both within and across countries. Yet there is a clear trend worldwide toward longer or more codified constitutions, and thus an important question for drafters as to the merits of the two drafting styles.

In many contexts, the article suggests, the two styles represent two different approaches to the role of courts in the interpretation of a new constitution, or constitutional amendment. The codified approach attempts to use the formal process of constitutional design to constrain judges to consider the aims and understandings of drafters in resolving particular concrete constitutional controversies. The framework-style approach gives broad discretion to judges to shape constitutional meaning. In this sense, the article suggests, the two approaches represent quite different attitudes to trust on the part of constitutional drafters: one approach implicitly assumes at least some degree of *distrust* toward judges as constitutional interpreters, whereas the other is based on a high degree of faith, or *trust*, in judges as partners in the process of constitutional design. The article thus approaches the question of the "optimal" specificity of a constitution by examining the merits of these two different approaches to the question of constitutional trust.

A trust-based approach, the article suggests, carries obvious risks: it gives judges broad authority to shape the meaning of the constitution. If judges are hostile to the aims and understandings of drafters, this will also give them broad scope to defeat those aims and understandings. Any trust-based approach, the article therefore suggests, will necessarily depend on drafters having some confidence that the judges who interpret a new constitution, or provision, will share the same substantive aims or understandings as the drafters themselves, or alternatively, have a commitment to a distinctive interpretive approach – i.e., "originalism" – that requires them to give effect to the aims or understandings of the drafters in interpreting open-ended constitutional language. If they do not, at least in the early years of a constitution's operation, a framework-style approach will generally offer drafters little chance of constitutional design success, or influence over subsequent patterns of constitutional interpretation.[10]

A distrust-based approach, on the other hand, is often seen to carry fewer risks for drafters: it necessarily constrains judges to give at least some indirect attention to the aims and understandings of drafters in resolving concrete constitutional controversies. This will also be particularly valuable for drafters where judges are known to be hostile to drafters' aims or understandings, or to favor a distinctly non-originalist approach to interpretation. Yet text-based constraints of this kind, the article suggests, will also inevitably be incomplete: any attempt at constitutional codification will necessarily have gaps, or be incomplete in relation to some issues; and any constitutional text must be interpreted by a court, and practices of interpretation inevitably reflect extra-textual practices.[11] If judges are actively unsympathetic to drafters' aims and understandings, therefore, drafters will have little chance of successfully constraining judges to follow those aims or understandings.

Moreover, for some judges, the very attempt at constitutional codification may discourage resort to drafters' aims and understandings, as a guide to interpreting gaps or ambiguities in constitutional meaning. This may be because of orthodox legal principles, which hold that detailed language can be understood as a deliberate signal by drafters that they intend to exclude this kind of gap-filling role on the part of courts. Or it may be because, when faced with expressions of distrust from drafters, judges have a psychological response which involves showing less sympathy for the aims and understandings of drafters themselves.[12] Distrust, in this sense, may thus be a self-fulfilling prophecy for drafters: even where drafters have no reason to distrust particular judges, the very act of expressing distrust toward courts as interpreters may convert certain judges into interpreters who in fact merit distrust – i.e., who are opponents, rather than allies, in the process of constitutional design.

Wherever possible, the article therefore suggests, constitutional design should be based on a model of trust rather than distrust toward judges: drafters should both ensure that they have good reason to trust constitutional judges as partners in the process of constitutional design, *and* approach the task of drafting relevant provisions accordingly. In some cases, this model may simply not be an option for drafters: they may have good reason to distrust constitutional judges, based on past judicial decisions or practices, but no means of creating a new constitutional court or influencing the composition of an existing court, so as to make it more sympathetic to their aims and understandings. But drafters in such circumstances should also understand the nature of the task they are undertaking when opting for a highly codified approach to constitutional drafting – i.e., that the approach they are adopting is one based on necessity, rather than optimal principles of constitutional design; and one that, in many instances, will likely fail to achieve its full range of desired objectives.

The article makes these arguments by reference to case studies from India and South Africa on the right to property and freedom of expression – areas in which the two countries have significant similarities in terms of underlying political commitments, but significant historical differences in terms of the specificity of relevant constitutional provisions. The two countries also share a range of other historical and institutional similarities, which increase the reliability of direct comparison in this context: they have a shared history of political struggle for independence and democracy, dominant party democracy, race and caste-based discrimination, and severe economic inequality, as well common legal and political institutions, such as parliamentary democracy and the common law. Neither of the case studies, however, purports to provide a definitive account of what has actually driven drafters or judges/interpreters in each country in the relevant context. Indeed such an account is largely impossible in the context of any qualitative comparative constitutional study. Instead, the aim of the relevant case-studies is simply to illustrate the potential logic to both trust- and distrust-based approaches to constitutional design.

The article proceeds in five parts following this introduction. Part I examines the range of factors influencing drafters in processes of constitutional design, and the degree to which drafters have a shared concern to exert influence over subsequent practices of constitutional interpretation.
Part II sets out the basic distinction between more framework and codified approaches to constitutional drafting, and how they relate to other dimensions of constitutional design such as questions of scope, timing, audience and enforcement, and most important, questions of trust versus distrust in constitutional drafting.
Part III focuses on a framework or trust-based approach, and explores the necessary preconditions for the success of such an approach, or the risks of such an approach in cases where judges are not in fact sympathetic to the substantive aims or understandings of drafters, or self-consciously "originalist" in their

approach. Part IV focuses on a distrust-based approach, and its particular history in India, as a means of exploring both the potential advantages, and limits, of attempts to design constitutional provisions based on a spirit of distrust toward judges. Part V furthers this analysis, by considering the potential downsides to distrust-based approaches, in terms of their capacity to decrease sympathy or reciprocity from otherwise potentially sympathetic judges, for the aims and understandings of the framers. Part VI offers a brief conclusion about potential lessons for constitutional drafters.