Toward Restorative Constitutionalism?

Rosalind Dixon

How does one restore a democratic constitutional order that has been eroded through a process of “abusive” constitutional change? The same tools used to achieve abusive change can be used to reverse it. For example, just as formal constitutional amendment is one important way in which abusive constitutional projects are carried out, it is also an important pathway through which abusive change can be reversed. At least in certain conditions, where formal amendment is difficult to achieve, it can also provide a relatively enduring or stable mechanism for restoring prior democratic constitutional arrangements.¹ The alternative possibility, however, is a form of constitutional ‘tit for tat’ or ‘ping pong’ between abusive and pro-democratic amendment. Compare Dinesha Samararatne, ‘Sri Lanka’s constitutional ping pong’, Himal South Asian (25 September 2020) <https://www.himalmag.com/sri-lankas-constitutional-ping-pong-2020/>.

Consider the 1977 amendments to the Indian Constitution, passed by the Janata Party, that reversed some of the abusive constitution changes introduced by prime minister Indira Gandhi during her “Emergency” (1975-1977).² Minerva Mills v India, AIR 1980 SC 1789 (striking down parts of an amendment that immunized constitutional amendments from judicial review and to give directive principles priority over rights); Uttar Pradesh v Raj Narain, 1975 AIR 865 (striking down an amendment that removed jurisdiction over electoral disputes contests involving the prime minister and certain other high officials); Rosalind Dixon & David Landau, ‘Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment’ (2015) 13 Int’l J Const L 606. A more recent example in South Asia is the 19th amendment in Sri Lanka (2015), which restored presidential term limits and other constitutional democratic checks and balances by weakening the presidency.³ Samararatne (n 1). However, the 19th amendment ultimately proved less enduring, and the 20th amendment (2020) reversed most of its reforms.

Fights over presidential term limits have frequently involved this evolution between abuse and restoration. Consider two key contexts in the Andes region of Latin America. In Colombia, President Alvaro Uribe (2002-2010) amended the Colombian constitution to allow immediate presidential reelection. However, an effort for a further amendment to allow a third consecutive term was blocked by the Colombian Constitutional Court, amid significant concerns regarding the erosion of democracy. Uribe’s successor and ally turned rival, Juan Manuel Santos (2010-2018), led the effort to amend the constitution in order to reimpose a one-term limit. Something similar occurred in Ecuador, where Rafael Correa (2006-2017) removed all presidential term limits by amendment. Again, his hand-picked successor, Lenin Moreno, held a referendum that resulted in the restoration of a two-term limit on presidents.
A second important tool of restoration involves legislative change. Where organic or quasi-constitutional legislation has been amended or repealed, all that the legislature needs to do to restore the status quo ante is to re-enact those prior provisions or amend existing legislation to make it more democratic in nature. The only difficulty with this strategy is that, in some cases, what helped make legislation quasi-constitutional in nature was its subject-matter and longstanding status. See William Eskridge and John Ferejohn, ‘Super-statutes’ (2001) 50 Duke Law Journal 1215. Compare Rosalind Dixon & Eric A Posner, ‘The Limits of Constitutional Convergence’ (2010) 11 Chi J Int’l L 399. Legislative re-enactment will be sufficient to restore its ordinary legislative status, but not necessarily its quasi-constitutional or organic status – unless and until it remains on the books for an additional period of time and gains a greater degree of political and popular acceptance.

A third approach involves the use of executive orders or other forms of executive law-making to reaffirm and restore liberal democratic norms and practices. Some of these efforts are more likely to succeed than others. Rules and regulations can generally be changed in either an anti- or pro-democratic direction. But softer norms and conventions may be much harder to restore than to degrade. Constitutional conventions, by definition, depend on a longstanding (or perhaps even uninterrupted) period of settled practice, where they are viewed by participants as required rather than optional or useful only if in accord with self-interest. See convention symposia. Compare Posner and Goldsmith and A Roberts AJIL on customary international law. Once undermined, practices of this kind can be difficult to re-create. Conventions and other informal norms may therefore be the most difficult (and time-consuming) aspects of a constitutional order to rebuild.

The relative attractiveness of these different mechanisms will vary according to the context. Often, the way in which democracy has been abused or eroded will affect the way in which it is best restored – perhaps with a presumption in favor of rebuilding democracy through the same pathways by which it has been attacked. Another factor is the relevant distribution of political power. The stronger the new pro-democratic majority, the more feasible it will be to attempt to rebuild constitutional democratic norms via processes of formal constitutional amendment, whereas the weaker that majority, the more need there will be to rely on ordinary legislation, executive rule-making, or processes of judicial review. Finally, the relative attractiveness of these various “informal” mechanisms of change may depend on the prevailing system of judicial appointment, and the lag time between changes in the composition of the political and elected branches of government. The closer the alignment between the two, the greater the danger of abusive judicial review, but also the easier it will be for pro-democratic forces to use courts as a forum for democratic rebuilding.

Paradoxically, then, some of the same factors that make a constitutional order open for abuse may also ease the pathway of democratic restoration. This point has potential implications for design – a constitution that is in some respects more robust against democratic erosion may also, and unfortunately, slow or derail some efforts to restore democracy once authoritarians have left the scene. It may also have implications for the way domestic and international audiences respond to
problematic constitutional changes. The impact of these changes must be assessed by examining their impact on constitutional democracy in a particular context, rather than merely assigning a label to a particular maneuver (such as court-packing) and viewing it out of bounds in all circumstances.

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References

- Minerva Mills v India, AIR 1980 SC 1789 (striking down parts of an amendment that immunized constitutional amendments from judicial review and to give directive principles priority over rights); Uttar Pradesh v Raj Narain, 1975 AIR 865 (striking down an amendment that removed jurisdiction over electoral disputes contests involving the prime minister and certain other high officials); Rosalind Dixon & David Landau, ‘Transnational Constitutionalism and a Limited Doctrine of Unconstitutional Constitutional Amendment’ (2015) 13 Int’l J Const L 606.
- Samararatne (n 1).
- See convention symposia. Compare Posner and Goldsmith and A Roberts AJIL on customary international law.