

Constitutional Adjudication and Democracy

Judicial Review of Constitutional Change: Defending Constitutions with Constitutionalism

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May courts review and strike down constitutional amendments that undermine constitutionalism? In the last two decades scholars have been constructing the theoretical base for this proposition by building upon arguments that there are substantive limitations to formal constitutional change. I suggest here that courts may already be implementing this view.

Unconstitutional Constitutional Amendments

There are many who support the view that there are substantive limits to constitutional amendments. Murphy supports the view that amendments that destroy or cripple the values of constitutional democracy would be invalid. He added that there are also limitations imposed by natural law, justice and right on the power to amend constitutions (Murphy 1995). Rawls opposed amendments that repeal core constitutional freedoms or violate core human rights and deny the basis of equality that he saw as the foundation of equal liberties (Kelbley 2004). Others have suggested that proposals that would deny legal protections or equal status to some class of people are impermissible (Mazzone 2005)² or that the right to even-handed treatment and to privacy cannot be repealed or weakened by amendment (Graber 1995). Courts may be asked to intervene if amendment procedures violate constitutionally protected individual rights (Hajdu and Rosenblum 1979).

Substantive limits on the power to amend constitutions expanded to include limitations implied by “universal” agreements or *jus cogens* principles under international law, the evolving understanding of human rights (Samar 2008), and emerging international legal norms that address matters such as the separation of powers and constitutional amendment (Schnably 2008).³ It has even been argued that the initiative systems (which can be used to amend

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² Mazzone refers to these as “unamendments” and examples would include outlawing Islam, denying schooling to girls, preventing Catholics from running for office, segregating neighborhoods, limiting access to courts to the wealthy, and denying voting rights to the elderly. Mazzone, Jason. 2005. “Unamendments.” *Iowa Law Review* 90:1747-1855.

³ Others claim that the proponent of the amendments is material and that constitutional provisions emanating from the people are superior and should always trump “irreconcilably conflicting constitutional provisions created by government institutions which, in his view, are an inferior source. Only a constitutional amendment emanating from “We the People” ought to trump an “irreconcilably conflicting popular sovereign-generated constitutional

constitutions) especially insofar as it can disadvantage minorities are unconstitutional (Chemmerinsky 2007).

Constitutionalism and Constitutions

The modern concept of constitutionalism has two themes. The first is the existence of limitations imposed on the state particularly in its relations with citizens, based on a clearly defined set of core values. The second is the existence of a mechanism to enforce these limitations. The government that exceeds its limitations should be held accountable (Fombad 2007). Under constitutionalism, citizens must have a right to political participation and their government must be controlled by substantive limits on what it can do (Murphy 1993).

Still others are willing to go beyond this definition. Professor Vicki Jackson's definition introduces new elements into the mix. Constitutionalism in her view is

a sufficiently shared willingness to use law rather than force to resolve disagreements; to limit government power and to protect human rights through law and defined processes; to provide a reasonable degree of predictability and stability of law that people may rely on as they structure their lives; and to maintain a government that is legitimate and effective enough to maintain order, promote the public good, and control private violence and exploitation (Jackson 2008).

Recently, the definition of constitutionalism has been woven into constitutions. In Fombad's view, the philosophy behind constitutionalism is the need to design constitutions that are not merely programmatic, shams or ornamental documents that could be easily manipulated by politicians but rather documents that can promote respect for the rule of law and democracy (Fombad 2007). The goal of constitution-making should be understood, not as producing a written constitution, but as promoting constitutionalism (Jackson 2008). There is a new emphasis on democratizing the environment in which constitutions are adopted before constitutions can have value and legitimacy. Constitutionalism implies that the constitution cannot be suspended, circumvented or disregarded by political organs of government. It can be amended only by procedures appropriate to change of constitutional character and that give effect to the will of the people acting in a constitutional mode (Ihonvbere 2000).

The following have been identified as the core elements of constitutionalism and in my view may never be weakened or removed by amendments:

1. the recognition and protection of fundamental rights and freedoms,
2. the separation of powers,
3. an independent judiciary,
4. the review of the constitutionality of laws, and

provision." González, Carlos E. 2002. "Popular Sovereign Generated Versus Government Institution Generated Constitutional Norms: When Does a Constitutional Amendment not Amend the Constitution?" *Washington University Law Quarterly* 80:127-242.

5. the control of the amendment of the constitution (Fombad 2007).

Constitutionalism and Judicial Review

The mechanism for protecting constitutions through constitutionalism is already in place as constitutionalism and judicial review take root in many countries.

New nations freeing themselves from colonialism, reorganizing after the fall of communism, and emerging as part of the new democratization in Latin America (as well as authoritarian regimes and illiberal democracies) (Halliday, Karpik, and Feeley 2007).

For its part, judicial review has become a fixture in emerging democracies and is increasingly viewed as a prerequisite of healthy democratic development (Brown 1998). Reeling from the experience with fascism and communism many states now embrace the ideas of constitutional government and the limited state. Many countries adopted bills of rights that provided protections of individual rights, limited governmental powers, and established judicial review.

Courts have played a larger role in the democratization of states. Political scientists now recognize that an independent judiciary can bolster both political and economic development (Chavez 2008), and scholars have stressed that a healthy judiciary is also crucial to building popular support for the rule of law and the democratic regime (Prillaman 2000). In post-communist regimes constitutional courts enforce post-communist constitutions, uphold democratic values, protect individual rights, and serve as a safeguard against the return to the totalitarian past (Trochev 2004). Where they are allowed to function, courts seem to be viewed as bastions of human freedom and democratic values. They can force politicians to implement human rights and freedoms, thus serving as an important check and balance to post-communist governments that might adopt different policies (Richardson 2006). Courts are “veto-players” that protect democracy from the excesses of executive power, majority tyranny, corruption, and other social and political ills (Gibson and Caldeira 2003). Courts have also proven to be effective in guiding democratization in South Korea (Yang 1993), Mexico and Colombia (Schor 2009).

The prominence and independence of courts makes them an ideal forum for defending constitutions. They are already enforcing constitutions and checking the excesses of the political branches of government. They can easily step up and defend constitutionalism especially because amendments could make courts weaker or subservient to the other branches of government.

Addressing Regressive Amendments

What amendments may courts strike down on the theory that they undermine constitutionalism? These amendments would be those that impair the abovementioned core elements of constitutionalism. They are sometimes referred to as regressive amendments—those that enhanced executive power and curtailed the enjoyment of fundamental rights (Hatchard 1998).

Examples of these amendments abound. African leaders attempted or succeeded in removing term limits from their constitutions (Posner and Young 2007). Amendments to the Constitution of Zimbabwe have sought to oust the jurisdiction of the courts, to prevent the Supreme Court from hearing cases relating to the scope of the fundamental rights provisions, and to overturn its decisions in the same case (Hatchard 1998).

These amendments are also referred to as usurpations of constitutionalism. Usurpation takes place when groups use constitutional ideas and processes for partisan political ends or to prevent progressive reform inherent in the spirit of the constitution. Sri Lanka is an example of a country where amendments were used by the party in power to gain tactical advantage over other parties. In Sri Lanka, amendments deprived an opposition leader of civic liberties, expelled members of a political party (that subsequently led to the loss of seats in parliament), empowered the President to determine the time of the presidential elections, and extended the life of parliament, depriving citizens of the choice of their local representatives. Other amendments ousted representatives of the Tamil-speaking regions from parliament and removed the safeguards for the extension of emergency powers. Courts have the power to require a referendum when the basic structure of the Constitution is amended but they have been reluctant to interfere with the decisions of the executive. The experience in Sri Lanka has led to a great deal of disillusionment with the democratic process and with the ideology of constitutionalism (Coomaraswamy 1993).

Other courts are not as reluctant to act. The Central American Court of Justice (CCJ), the judicial arm of the Central American Integration System (SICA)⁴ ruled against amendments along the lines that I suggest here.

On December 2004 Nicaraguan President Enrique Bolaños filed petitions with the CCJ challenging a round of constitutional amendments that would have constricted his powers. He alleged that the amendments upset the balance of powers among the branches of government which was an essential requirement of democracy. He also claimed that the Assembly had acted in contravention of the constitution's amending procedures. The reforms the amendments sought, he said, were not mere partial revisions or amendments—which the Assembly's could accomplish alone. He maintained that the amendments constituted total reform because it sought to change the form of government from a presidential to a parliamentary form of government, which may be done only by means of national elections for a constituent assembly (Schnably 2008).

On March 29, 2005, the CCJ ruled that the Assembly had violated the constitution, and that the amendments would undermine the independence of the executive. The CCJ assumed jurisdiction over the case because stability and peace in the region—one of the aims of the creation of the court—depended on the maintenance of the rule of law in member countries. Because the transformation from a presidential to a parliamentary regime could be

⁴ SICA is a regional organization dedicated to integration of Central American states, adopted a Treaty Framework for Democratic Security in Central America.

accomplished only through the process prescribed for total revision of the constitution, the CCJ concluded that the amendments were invalid (Schnably 2008).⁵

Conclusion

Constitutions are too easily amended and often times these exercises are carried out only to serve the interests of parties in power. Fortunately, there is a growing understanding that constitutionalism is a function of a constitution. We should further explore the idea that changes to the constitution should always preserve the elements of constitutionalism. Courts have assumed an important role in government of late—serving as guardians of the constitution against the excesses of the other branches of government. The next logical step would be to invoke the power of judicial review to protect constitutions from regressive amendments. As I suggest here, the theoretical and institutional infrastructure for defending constitutions along these lines are already in place.

⁵ Bolaños also filed a similar case with the Nicaraguan Supreme Court which ruled that Article 22(f) of the CCJ statute was unconstitutional to the extent that it purported to vest in the CCJ the power to determine disputes among the different branches of Nicaragua's government. It ruled that the CCJ's rulings were without legal effect. In the end, the president and the Assembly reached an agreement on a "framework law" providing that the amendments would not become effective until after the next election, at which point the government would have the opportunity to reconsider them. The Sandinista candidate and former President Daniel Ortega subsequently won office by a plurality. Early on, the new government exercised its power to suspend implementation of the amendments pending further study. Schnably, Stephen J. 2008. "Emerging International Law Constraints on Constitutional Structure and Revision: A Preliminary Appraisal." *University of Miami Law Review* 62:417-489.

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