Constitutions, Democracy, and the Rule of Law

Do Constitutions Constrain?
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Constitutions Regulate Future Conditions

Adam Przeworski: The question before us is, do constitutions constrain? And I will take this question very literally, as a question about facts. Do they? My answer will come in two parts: First, it's obvious that at some times, they do not. Two, it is very hard to tell whether and when they do. I don't know whether the question had an immediate political inspiration, but it's apparent that the Bush administration is doing today things that, regardless of what the courts may be saying currently, would have been widely considered as unconstitutional before September 11.

More generally, constitutions are documents that are written under some historical conditions to regulate actions of government under future conditions. When these future conditions depart far from anticipations, constitutions either bend or break. But this is going to be a topic of discussion this afternoon I know, and I will say nothing more about conditions under which constitutions do not constrain.

I will focus on the other aspect of the question: How to tell if they do and when they do? Let me rush to admit that our intuitions tell us that sometimes they do, that constitutions prevent governments from doing what they would have otherwise done or induce them to do what otherwise they would not have done. But how can we know what governments would or would not have done if not for the constitution? That question entails counterfactuals, and counterfactuals, as logicians tell us, are dubious devices.

As you see, I found a way to evade the question by turning it into a methodological one. But this is an issue that has practical, policy consequences. It's an issue where actions based on unfounded beliefs may have disastrous consequences. Particularly now, when the U.S. government is engaged in wholesale institutional engineering in faraway lands, skepticism and prudence are in order.
Constitutional Legacies

When the U.S. occupying forces left Japan and Germany after World War II, they left behind them democratic constitutions. These constitutions were somewhat adopted in both countries. They took roots, and until today, they continue to regulate the political life of these countries. When the U.S. occupying forces departed from Haiti in 1934, they left as their legacy a democratic constitution, authored by the U.S. assistant secretary of the Navy, who was none other than Franklin D. Roosevelt. Yet this constitution did not prevent President Vincent from becoming an absolute despot one year later.

One way to think of the question before us is thus, what kinds of constitutions constrain, by which I mean function, work, structure political life, under what conditions? To shake some of your faith in institutions, imagine the talk that you would have heard it we were celebrating only the 225th rather than the 250th of this august university, 25 years ago. Institutions are epiphenomenal you would have been told. They are a phenomenon that in the dictionary definition, quote, "occurs with and seems to result from another." Political institutions can, at most, organize power that lies elsewhere, in the relations of military force, in the economy, in the control of mass media. One cannot stop a coup d'état by an article in the constitution—any article in the constitution.

The Distribution of Power

Suppose we are playing basketball. There are two teams, perfectly universalistic rules, and an impartial referee to administer them. But one team consists of players the height of Jon Elster, and the other one of people like me. The outcome of the game will be determined. Note the rules of the game are universalistic, they treat everyone equally, but this only means that the outcome determines on the resources people bring to the game, brute, preinstitutional power. If the rich can buy elections, democracy will serve the rich, you will have been told. You may retort, we could change the rules. Say lower the height of one of the baskets and equalize chances. But if the Elsters are the ones who decide what the height of the basket should be, if the people who have brute power are the ones who mold the institutions, they will never agree to it. After all, we can go back to Rousseau for this observation: institutions are established in a society that has some power relations, and they must reflect the distribution of this power. Otherwise, they will not be respected. In the political science jargon, they will not be self-enforcing.

This is a speech you will have heard 25 years ago. Let me now give you a speech you hear over and over today.
Institutional Engineering

Institutions matter, we're told. Institutions shape incentive, buy us information, generate expectations, induce norms. This is what students read in textbooks. The problem with Ecuador is that it does not have independent judiciary. This is what you're going to read in documents of the World Bank or the United Nations Development Program. Install independent judiciary, establish clear property rights, instigate the rule of law, create independent central banks, reduce regulation, and manna will fall from heaven. In the language of Washington consensus, this is called the third stage of reforms.

Indeed, the new passion, not only of the U.S. government but also many intergovernmental organizations is institutional engineering. Everybody wants to condition aid overseas, assistance on "good" governance as it's called in the bureaucracies. Either you do as your political institutions book will tell you to do, or else you will get no assistance. Moneys given to countries with bad governance are wasted, the argument goes. Countries should first reform their institutions and then they may get financial support for their development.

But somewhere in this peon to institutions you will still hear that institutions are indulging us, meaning that only some institutional arrangements can function effectively under particular historical conditions. And here lies the crux of the difficulty. If different institutions are possible only under different conditions, how can we tell whether what matters are institutions or the conditions under which they function? I'm always suspicious of the boxes in which the World Bank or the UNDP highlight the exceptional successes of the policies they advocate.

I suspect that these successes were exceptional because the circumstances were exceptional. Otherwise we would not see boxes but tables or graphs.

Choosing the Government by Elections

To give you the flavor of what is involved, let me plunge into some examples. I will focus on one particular institution, choosing the government by elections. The question I want to analyze as an illustration of the general theme is, when do political parties obey the results of elections? The story goes back to Herodotus. If all men are equally strong and equally armed, Herodotus thought, then the reading of votes tells everyone what would happen if things came to blows. A group of men gathered on top of a hill shout approval of particular candidates or policies and everyone can hear which group is larger and therefore stronger. Or if you wish, we count secret ballots, chads and all, and one party obtains a majority of votes. The winners move into the White House, pink house, blue house, perhaps even a palace, and the losers go home. Now why do the losers go home? Why don't they storm the palace? Is it because the constitution says that
whoever obtains the majority should move in and whoever does not should go home? Or is it because the losers know that they will be beaten had they tried to move in? Does the constitution constrain the losers, or do they accept the verdict of the polls only because they are weaker?

Centuries later, after Herodotus, Condorcet, while interpreting voting in modern times as a reading of reason, observed that, quote, "When the practice of submitting all individuals to the will of the greatest number introduced itself into societies and when people accepted to regard the decision of the plurality as the will of all, they did not adopt this method as means to avoid errors and to conduct themselves on the basis of decisions based on truth, but they found that for the good of peace and general welfare, it was necessary to place authority where the force was."

But is voting today a reading of reason? Men are no longer equally armed as they were in Herodotus' time. Arms are controlled by specialized bureaucracies, hence votes no longer provide a reading of what would happen if a violent conflict were to erupt. But let's think generically. In general, what happens in elections? There are parties. People vote. Somebody is declared the winner according to rules. And the winners and the losers are instructed what to do and what not to do by some other rules. This is what a constitution is, a bunch of such rules.

The winners and the losers are instructed by such rules, but the losers we already know may still think that they would succeed in storming the palace. In turn, the winners may think that they could reside in it forever without submitting themselves to the risky venture of elections. Hence our question stands, why do the winners and the losers behave in a way that's consistent with the rules? Are they obeying the rules? Or are they doing what they would have done even if there were no such rules?

Compliance in Rich and Poor Countries

Let me bring a piece of historical information: In rich countries, both the winners and the losers always obey the results of elections. No democracy ever fell in a country with a per capita income higher than that of Argentina in 1975, which was about $6,000. This is a historical fact, given that 35 democracies spent more than one thousand years under more affluent conditions and not one died. Affluent democracies survived wars, riots, scandals, economic and governmental crises, hell or high water. Yet at the same time, about seventy democracies collapsed in poorer countries. Moreover the poorer the country, the less likely it is that the losers or the winners will obey the results of elections.

Let me give you some stories: There was an election in Costa Rica in 1848, when that country had per capita income of about $1,500. The election was technically tight. The two candidates received almost the same number of votes.
And there were widespread allegations of fraud, so that it was impossible to determine who in fact did win. It was not clear who should decide. But the congress took it upon itself to declare as the winner the candidate who officially received somewhat fewer votes. A civil war ensued. About three thousand people were killed, and the forces opposed to the declared winner prevailed.

At another time, there was an election in another country. The election was technically tied, the two candidates received almost the same number of votes, and there were widespread allegations of fraud, so it was impossible to determine who in fact did win. It was not clear who should decide, but a court appointed, in part by one of the candidate's father, took it upon itself to declare as the winner the candidate who officially received somewhat fewer votes. Then everybody went home in their SUVs to cultivate their gardens. They had SUVs and gardens, because this country had per capita income of about $20,000. Whatever the reason for compliance, these facts tell us that political parties obey if the country is rich, while they may or may not if it's poor.

Note that the institutions, at least at some level of abstraction, were the same in the two countries. There were elections, winners were supposed to be those who won a majority of votes, there was a congress and a court, either of which could have picked the winner in case of a draw. What was different were the conditions, $1,500 in one country, $20,000 in the other. I am led to conclude therefore, that what mattered here were conditions, not institutions.

If a country is wealthier than Argentina was in 1975, all kinds of constitutions will be obeyed, whether the system is presidential or parliamentary, federal or unitary, uni- or bicameral with proportional representation and first past the post. In wealthy countries, winners and losers behave as if they were behaving their instructions, and if we observe that people behave in ways consistent with the instructions inherent in the constitution, we just cannot tell whether they're doing it because they are obeying the rules, or because they would be doing it whatever the rules. We only have one observation, and two rival stories to explain it.

**The Role of Democratic Institutions**

But as I announced, I don't want to argue that constitutions do not matter, only that sometimes it's hard [to tell] whether they do. So let me focus on poorer countries, where political parties sometimes obey the results of elections, and at times, do not. By focusing on these situations I hope to highlight what I think is the essential role of democratic institutions.

Suppose a party lost an election and now it contemplates whether to obey the verdict or to storm the palace. Suppose further that the loser sees almost no chance of winning in the future. Under democracy, these losers are condemned forever to remain losers, whatever that designation entails. Then they may be
tempted to say if we can never win under these rules, these rules are bad and we will not obey them. In turn, suppose that the losers think that even though they lost this time, they are quite likely to win the next time around. Then they will conclude that even if they have to wait for a few years, and even if waiting is unpleasant, fighting with all its risks is not worth it, and that wait they should.

This is what democracy can do. It can enable losers to wait. Open intertemporal and intertemporal perspective to political conflict. It's not voting or participating otherwise that matters here, but the sheer possibility that you may be among the winners next time around. To stress the point, let me draw a caricature. Suppose that instead of voting we would decide who will govern by flipping a coin. Note that when we flip coins, we sever the relation of accountability between governments and voters. Whether the incumbents are reelected does not depend on their performance. Yet the very prospect of alternation in office may be sufficient to induce the current losers to wait for their turn.

Now, you may say that the chances of winning depend on conditions. Say on the structure of ethnic cleavages. An ethnic minority, as John Stewart Mill observed, will always have a low chance to win under the majority rule. Hence again, in the end, it's conditions rather than institutions that matter. And if you said that, you'd be right. Democracy is less likely to survive in poorer societies if they are ethnically divided. But we can tweak, we can manipulate the electoral system in such a way as to place ethnic minorities on the winning side from time to time.

Lani Guinier tells a story in which her, I think, 5-year-old son reported that three kids on the playground wanted to play baseball, while two wanted to play basketball. So he played baseball, she surmised. No, first we played baseball, and then basketball, her son replied. When people behave according to rules, they behave according to particular rules. In some countries, they may, they vote for one candidate. In another country, they may vote for five. Now it may be that an ethnic minority would obey if it has a chance to vote for multiple candidates under proportional representation system, but it would not obey if it could vote only for one, first past the post. This is at least what some political scientists think. My point is that if, but only if, different institutions can function under the same conditions, institutions can possibly matter.

**Conclusion**

Since I'm afraid that you may think that I'm splitting hairs, let me conclude. Thirty years ago, a British philosopher, Alasdair Maclntyre published an essay entitled “Is the Science of Comparative Politics Possible?” A question to which, for some of the reasons I outlined today, he responded with a resounding no! I must admit that when I read it for the first time, I treated this essay as an obscurantist salvo. But in the past few years, I was invited by some intergovernmental organizations and some nongovernmental organizations to assist them in their efforts at institutional engineering, and as I read about the impact of political institutions I
was struck by how little robust reliable knowledge we have. I was forced to ask MacIntyre’s question: Is it that we do not know yet, just because our knowledge is fragmentary, and our methods imperfect? Or is it because some answers are unknowable, unknowable because it’s impossible to sort out the impact of institutions from the impact of conditions under which we observe them?

My answer is hesitant. I’m willing to believe that where history was kind enough to have generated different institutions under the same conditions, we will know more and we will know better. But history may deviously generate different institutions under different conditions, and this would make our task next to impossible.

Hence, to go back to practical issues, with which I began, we need to be skeptical about our beliefs in the power of institutions, and we need to be prudent in our actions. Projects of institutional reform must take as their point of departure the actual conditions, not blueprints, based on institutions that have been successful elsewhere. As the former Brazilian Minister of Federal Administration and Reform of the State Luis Carlos Bresser Pereira remarked, institutions can at most be imported, but never exported.