The Rule of Law Revival Redux

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4/16/2014

Synopsis

This critical review assesses the argument of Thomas Carothers in his 1998 article, "The Rule of Law Revival."[1] It begins by outlining Carothers' argument, framing it as a response to Anne-Marie Slaughter's scholarship and highlighting some elective affinities between Carothers and Robert Cooter's work. It then forwards a critique of Carothers, referencing the works of Tom Ginsburg, James Melton, and Zachary Elkins, as well as Antony Anghie and James Tully. Specifically, I argue that Carothers (a) does not fully leverage the critical purchase of his argument, (b) fails to adequately specify the concept of "domestic will," (c) may be overly cynical in his appraisal of the possibilities for rule of law reforms, and (d) underemphasizes the importance and virtues of the constitution-writing process itself.

The Rule of Law Revival

Carothers' 1998 *Foreign Affairs* article was published during what may well be termed a world-historical critical juncture. On the one hand, the fashionability of the concept of "the rule of law" was at its peak: "One cannot get through a foreign policy debate these days," writes Carothers, "without someone proposing the rule of law as a solution to the world's troubles […] Indeed, whether it's Bosnia, Rwanda, Haiti, or elsewhere, the cure is the rule of law, of course" (pg. 95). Simultaneously, the third wave of democratization was in full swing, which provided fertile ground for rule-of-law advocates to pour "hundreds of millions of dollars into rule-of-law reform" (pg. 96). One might recall the fairly optimistic and functionalist work of Anne-Marie Slaughter, whose own *Foreign Affairs* column had been published the year before Carothers' piece. In it, Slaughter posits that states are disaggregating into their functionally-constitutive parts as global interdependence binds state and non-state actors together across national borders. Through this process, "new channels for spreading democratic accountability, governmental integrity, and the rule of law" have emerged (1997: 186).[2] Judges, regulators, and rights activists play a central role in Slaughter's narrative. In this light, Carothers' rather skeptical perspective may represent at least a partial response to Slaughter herself.[3]

[1] Carothers, Thomas. 1998. "The Rule of Law Revival." *Foreign Affairs* 77 (2): 95-106.
[2] Slaughter, Anne-Marie. 1997. "The Real New World Order." *Foreign Affairs* 76 (5): 183-197.
[3] Whose own views were later elaborated in a book: Slaughter, Anne-Marie. 2004. *A New World Order*. Princeton, NJ: Princeton University Press).

For Carothers, global networks of rule-of-law advocates cannot replace the domestic will to constitutionally entrench democracy, civic virtue, and government accountability: "[r]ewriting constitutions, laws, and regulations is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow. Judges, lawyers, and bureaucrats must be retrained, and fixtures like court systems, police forces, and prisons must be restructured. Citizens must be brought into the process if conceptions of law and justice are to be truly transformed" (pgs. 95-96). His survey of constitution-making and legal change across the world uncovers a wide range of successful and unsuccessful rule of law reforms, including (i) "rule by law" approaches in Asia, which fail to incorporate checks on executive power (pg. 97); (ii) a surge of domestic reforms in Latin America, counterbalanced by sluggish or non-existent change in Mexico and Argentina (pg. 101); (iii) substantial legal reforms in Eastern Europe seeking to "de-Sovietize" domestic political systems, though compliance with Constitutional court rulings and fundamental rights remains minimal in Croatia and Serbia (pgs. 100-101); (iv) promising reforms in sub-Saharan countries, particularly in South Africa, Tanzania, Bostwana, and Uganda, though elsewhere in the continent the "legal systems remain captive of the powers that be" (pg. 102); and (v) very little reform to speak of in the Middle East, though Jordan, Lebanon, and Kuwait are "at least attempting reform in the commercial domain" (pg. 102).

These mixed results, in spite of the "enormous amounts of aid" being "granted for writing or rewriting laws," denote the limits of letting donors "determine rule-of-law reform priorities" (pg. 104). The disproportionate focus on commercial and economic legal reform – on securing property rights, financial market regulations, and breaking down barriers to trade – reflects foreign interests more than domestic demands. Yet Carothers concludes that if a rule of law revival is to truly diffuse worldwide, it must emanate from the demands of patient domestic stakeholders: "Rule-of-law aid cannot substitute for the internal will to reform […] it calls for patient, sustained attention, as breaking down entrenched political interests, transforming values, and generating enlightened, consistent leadership will take generations" (pg. 105). Here, Carothers appears to align with Robert Cooter's prescriptions outlined in his 2000 article, "Do Good Laws Make Good Citizens?"[4] Specifically, Cooter argues that "the primary way to prompt people to instill civic virtue [i.e. compliance with the law] in each other is by aligning law with morality. When law aligns with morality, individuals who cultivate morality necessarily acquire civic virtue. Consequently, the law enlists the force of internalized morality to achieve the ends of the state" (2000: 1598). To be sure, Carothers does not use Cooter's language of "morality," but it is sufficient to note that morality is an inherently local and culture-specific phenomenon. When legal

[4] Cooter, Robert. 2000. "Do Good Laws Make Good Citizens? An Economic Analysis of Internalized Norms." *Virginia Law Review* 86 (8): 1577-1601.

reform is induced from abroad, its underlying values[5] may be incongruent with local mores. As such, the law is unlikely to be internalized by citizens and may even become a source of social frustration and alienation. The implication is that a process of constitutional self-authorship may better align legal reforms with salient social norms, thereby inducing compliance and gradually instilling civic virtue.

A Critical Appraisal

Carothers' skepticism must have been particularly refreshing at the time that it was written, and in addition it nobly promotes constructive self-criticism and soul-searching amongst rule-of-law advocates. Nevertheless, I argue that Carothers (a) does not fully leverage the critical purchase of his argument, (b) fails to adequately specify the concept of "domestic will," (c) may be overly cynical in his appraisal of the possibilities for rule of law reforms, and (d) underemphasizes the importance and virtues of the constitution-writing process itself.

First, the foreign-donor-funded approach to domestic legal reform criticized by Carothers is precisely the phenomena more forcefully decried by Antony Anghie in his 2005 book *Imperialism, Sovereignty, and the Making of International Law*.[6] It is similarly treated as an observable implication of what James Tully refers to as "informal imperialism" in his two-part work, *Public Philosophy in a New Key*.[7] National elites outside the West, writes Tully, have been "pressured to open their doors to a highly structured capitalist world economy over which they had no control […] at the expense of local control of their economic affairs, to subordinate their own legal and political sovereignty over their resources to international law, and to learn to call this imperial subalternisation 'freedom'" (2009: 139). In short, what both Anghie and Tully argue is that that foreign economic pressure for domestic constitutional reforms is not just misguided, as Carothers notes; it is also imbued with coercion, thereby reproducing structural inequalities inherited from the colonial era. Tully and Anghie may well take their point too far, but they constructively push us to consider the degree to which exogenously-induced constitutional change is in tension with the goal of promoting justice through the democratic promulgation of impartial law.

Second, Carothers' piece is surprisingly silent on what "domestic will," or an organic, endogenous process of reform, looks like. He implies that domestic will should take the form of a bottom-up, citizen-led constitutional awakening (perhaps along the lines of a stylized model of the

[5] Which, in the case of donor-sponsored legal reforms, may privilege neoliberal economic provisions and private property rights over, say, social and group rights.

[6] Anghie, Antony. 2005. *Imperialism, Sovereignty and the Making of International Law*. New York, NY: Cambridge University Press.

[7] Tully, James. 2009. *Public Philosophy in a New Key, Volume II: Imperialism and Civic Freedom*. New York, NY: Cambridge University Press.

American Founding, understood to be a populist and constitutive constitutional beginning). Yet one of the very examples he hails as successful – the South African case – suggests that domestic reform may be more elite-driven so long as elites are perceived to be credible representatives of their constituents and their interests. While South Africa does not exactly align with Arend Lijphart's model of consociationalism – whereby elites compromise over the heads of a polarized, fragmented electorate[8] – it does suggest that we need to disaggregate and specify more clearly what "domestic will" entails, particularly if it is so critical to the process of constitutional reform.

Third, Carothers may overstate the degree to which a "rule of law" culture, particularly vis-à-vis reforms seeking to increase "government's compliance with law" (pg. 100),[9] is lacking outside of Europe and North America. Ginsburg, Melton, and Elkins' recent article, "On the Evasion of Executive Term Limits,"[10] is suggestive in this regard. Using data from the Comparative Constitutions Project (CCP), the authors assess whether chief executives in presidential systems (particularly in Latin America) observe constitutionally-entrenched executive term limit (including fixed-term) provisions. They find that out of 352 cases where an executive remained in power through the end his/her constitutionally-permissible term(s), only 89 attempted to stay beyond their term, and only 71 were successful in doing so. Additionally, of those 71 leaders successfully overstaying their term(s), only 42 did so via extraconstitutional means (i.e. by either replacing or ignoring the constitution) (Ginsburg et al. 2011: 1848-1849).[11] In other words, "for democracies at least, constitutional crises induced through term limit violations are relatively rare. Constitutional enforcement of term limits appears to operate routinely in democracies, and even in many autocracies, such as Mexico before 1994. Term limits seem to "work" in the vast majority of cases, in that those who have the possibility of overstaying do not frequently seek to do so" (ibid: 1866). Although compliance with executive term limits is only one indicator of the domestic consolidation of the rule of law, it suggests that the ground for legal reform may be somewhat more fertile than Carothers leads us to believe.

Finally, Carothers underplays the degree to with the process of constitutional reform itself is often both crucial and far from the "easy part." The example of the South African constitution-making process, which took place over several painstaking years (including two years exclusively devoted to

[8] See: Lijphart, Arend. 1969. "Consociational Democracy." *World Politics* 21 (2): 107-225; Lijphart, Arend. 1977. *Democracy in Plural Societies: A Comparative Exploration.* New Haven, CT: Yale University Press.

[9] Carothers labels these types of reforms as "Type III" reforms, noting how, compared to other types of reforms (such as strengthening law-related institutions ("Type II") and or revising pre-existing laws ('Type I"), constitutional change to induce compliance with the law on the part of government is an inherently "deeper goal" (pgs. 99-100).

[10] Ginsburg, Tom, Melton, James, and Zachary Elkins. 2011. "On the Evasion of Executive Term Limits." *William & Mary Law Review* 52 (6): 1807-1872.

[11] The rest successfully promoted the promulgation of a constitutional amendment to extent the term limits or to remove the provision from the constitutional text.

constitution-writing), or even the American constitutional experience, which proved successful only after a year of constitution-writing followed by another year of political persuasion and popular ratification, may serve as examples. Indeed, the high sunk costs of constitution-writing is one of the mechanisms that can incentivize the parties to the constitutional bargain to honor their agreement following promulgation, thereby rendering the constitution self-enforcing. Christina Murray notes of the South African case that following the Constitutional Court's 1997 judgment requiring revision of a few of the document's 150 clauses, both the National Party and the African National Congress "were determined not to encumber the process [of revision] with discussions that might undermine delicate compromises reached in the preceding months of negotiations […when] patterns of behavior, modes of responding to problems, and relationships among participants" had been forged (2001: 837).[12] Here, a combination of high sunk costs and socialization/trust-building emerged amongst key stakeholders via the process of constitution-writing, facilitating downstream compliance with the document. This may be one way to entrench a constitution that, unlike Cooter's model, seeks to modify existing social norms instead of incorporating them.

[12] Murray, Christina. 2000. "A Constitutional Beginning: Making South Africa's Final Constitution." *University of Arkansas at Little Rock Law Review* 23: 809-838.