# Constitutional Norms And Law's Rule: Responding To The Subversion Of Democracy

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Gerald J. Postema, *Constitutional Norms—Erosion, Sabotage and Response*, __ **Ratio Juris**__ (forthcoming, 2021), available at SSRN.

How should we respond to the different challenges that threaten democracy and the rule of law today? To talk of *we* here, to state that a response is *our* response, is to understand that while "[t]he claim of an inclusive 'ours' may look like a pious fiction, . . . well-functioning democratic polities work to make it credible." (P. 4.) This is part of what Gerald Postema takes a healthy constitutional democracy to be, in his discussion on *Constitutional Norms—Erosion, Sabotage and Response.* This is not rhetoric, but part of the argument itself: the very acknowledgment of new challenges to democracy and the rule of law *as challenges* is something that depends on what we what we take *democracy* and *the rule of law* to mean. After all, "unlike their predecessors, contemporary aspiring authoritarians pay striking attention to the forms of law." (P. 1.) To be sure, strictly formal conceptions of democracy and legality do not necessarily entail approval of regimes that take the forms of law as mere tools for political power; but since our real-world classifications and labels ultimately hinge on the way we interpret these concepts, these thin conceptions can easily lead us to conclude that "illiberal democracies" are democracies nonetheless; that while we may dislike it, the striking attention of contemporary aspiring authoritarians to the forms of law suffice to show that the rule of law is morally neutral.

Professor Postema does not take the rule of law to be just a framework of general, public norms, nor does he take democracy to be a mode of delegating power to whoever wins more votes. His account of democracy is that of a *constitution* — a set of institutions by which power is constituted, exercised, constrained, and *tempered*, as Martin Krygier would put it — to be valued — and recognised as such — for its respect for deeper principles of political morality (not just instrumentally) and for the environment it upholds: an environment of *reciprocity* between citizens as co-members of a polity. In that sense, democracy properly so called is not only government through law; it is also government subject to *law's rule*. This is why Professor Postema's account of the rule of law is directly related. While the ideals of the rule of law and democracy are "conceptually distinct", they are "functionally intertwined" — democracy so defined depends on the rule of law, on *a conception of the rule of law* by which it is, more than government through a system of rules derived from a rule of recognition, an ideal that promises "protection and recourse against the arbitrary exercise of power through the distinct instrumentalities of the law." (P. 5.)

These conceptions show that the realm of constitutional norms is larger than formal constitutions and their formal norms that can easily be subverted. A robust, well-functioning democracy depends on a combination of commitment, conventions, unwritten norms and informal practices that together constitute and are constituted by a democratic *ethos*. Formal, written rules are underwritten by deeper commitments — they are the surface of a whole array of implicit norms and conventions that are part of *a normative practice.* These norms, because of their social nature, are *discursive* — "[n]orm responsive conduct is not merely applauded or resisted; it is assessed, challenged, criticized or justified" (P. 13) — and they entail *mutual accountability*: for they can only survive as norms "if the members of the norm community — violators, critics and those who observe their interaction — all recognize the authority of fellow members to hold each other accountable." (P. 14.)

Because formal institutions of law and democracy are only the surface of a robust democratic polity, and because they are weaker without these implicit norms and conventions, Professor Postema suggests we need to look more carefully into norm departures. He identifies three types of deliberate departures: there are *norms infringers* — those who depart from the norm but do not challenge it, appealing instead to another norm as overriding — *norm entrepreneurs* — those who challenge the norm and seek to reform or replace it — and *norm saboteurs* — those who either *break* the norms or try to *game* them.

Norm saboteurs obviously represent the most difficult, threatening challenge. "How is a defender of democratic institutions to respond to the saboteur's challenge?" (P. 19.) Professor Postema recognises that it is tempting to respond in the same spirit, to play "reactive hardball" — after all, as it usually goes, "*they did it first*". Tempting as it may be, is it really fruitful to enter a game that nobody can win? Rather than asking who started, who attempted to game the system first, the more appropriate inquiry should be about *why these norms actually matter.* This is not naïveté: a hardball response may even seem to make sense at first, but it will only contribute to democratic degradation in the long term. Tit-for-tat hardball is not a good strategy *even as strategy* for someone who actually endorses the constitution of democracy. "The guiding star must be fidelity to underlying democratic and rule-of-law values, especially the commitment to constituting and nurturing a community of equals." (P. 19.)

To illustrate, Professor Postema proposes a case study: the debates over court reform as a means to restore American democracy after the defeat of a former president who definitely had no respect for democratic and rule-of-law principles under the conceptions here articulated.

Throughout the case study, Professor Postema discusses some proposals — particularly the court packing suggestion, along with its arguments (that range from the claim that this would be merely *unpacking* to the claim that "they started!") — and underscores that to focus on (immediate) outcomes only, and not on the integrity of the Court (and the system itself), might lead to retaliation and might, even more than that, damage the very idea of democracy — democracy understood as a community of equals, equally accountable to the same array of norms that constitute government under law's rule.

To be sure, Professor Postema joins in the debates over a principled, more nuanced proposal — the "Supreme Court Lottery" scheme, advanced by Ganesh Sitaraman and Daniel Epps,[1] under which the SCOTUS would sit in panels of nine justices selected at random among the 179 active circuit judges plus the nine current justices. Professor Postema claims that this proposal could be combined with other *equally constitutional* proposals: he suggests, for instance, that legislation could be passed in order to require (1) full treatment for most of the cases that come before the Court and (2) full public reasons for each decision. But the idea is this: norm violations should be responded by those who seek to uphold these norms not with *more violations*, "but with a reform that obviates the norm." (P. 26.)

The more specific debate on the American case is extremely important, surely, but I believe the underlying principles and ideas advanced by the author in his suggestions are the most fundamental lesson. There is a clear connection here with Professor Postema's whole work overall: a connection with *fidelity* as basis to the rule of law properly so-called, to *law's rule* — rule of those who rule with law and in its name. In highlighting both the nature and the importance of the constitutional norms informing a somewhat thick conception of democracy,[2] Professor Postema goes well beyond jurisdiction-specific suggestions of Court reform: he also highlights at the same time how and why the way we respond to norm sabotage cannot lose sight of these very norms — if this "*we*" is indeed to make any sense.

1. See Ganesh Sitaraman and Daniel Epps, How to Save the Supreme Court, 129 Yale L.J. 148 (2019).

2. I say “somewhat” because the author navigates very well between the Scylla of strictly formal, procedural conceptions, and the Charybdis of some substantive conceptions guilty of conceptual overreach.

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