

Diminishing Constitutional Hyper-Rigidity by Means of Digital Technologies: A Case Study on E-Consultations in Canada

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Abstract : The purpose of this article is to assess the problem of constitutional hyper-rigidity to consider how it and the associated tensions with democratic constitutionalism can be diminished by means of using digital democratic technologies. In other words, this article examines how digital technologies can assist us in ensuring fidelity to the will of the constituent power without paying the price of hyper-rigidity. In doing so, it is impossible to ignore that digital strategies can also harm democracy through, for example, manipulation, hacking, 'fake news,' and the like. This article considers the tension between constitutional hyper-rigidity and democratic constitutionalism and the relevant strengths and weaknesses of digital democratic strategies before undertaking a case study on Canadian e-consultations and drawing its conclusions. This article observes democratic constitutionalism through the lens of the theory of deliberative democracy to suggest that the application of digital strategies can, notwithstanding their pitfalls, improve a constituency's amendment culture and, thus, diminish constitutional hyper-rigidity. Constitutional hyper-rigidity is not a new or underexplored concept. At a high level, a constitution can be said to be 'hyper-rigid' when its formal amendment procedure is so difficult to enact that it does not take place or is limited in its application. This article claims that hyper-rigidity is one problem with ordinary constitutionalism that fails to satisfy the principled requirements of democratic constitutionalism. Given the rise and development of technology that has taken place since the Digital Revolution, there has been a significant expansion in the possibility for digital democratic strategies to overcome the democratic constitutionalism failures resulting from constitutional hyper-rigidity. Typically, these strategies have included, inter alia, e-consultations, e-voting systems, and online polling forums, all of which significantly improve the ability of politicians and judges to directly obtain the opinion of constituents on any number of matters. This article expands on the application of these strategies through its Canadian e-consultation case study and presents them as a solution to poor amendment culture and, consequently, constitutional hyper-rigidity. Hyper-rigidity is a common descriptor of many written and unwritten constitutions, including the United States, Australian, and Canadian constitutions as just some examples. This article undertakes a case study on Canada, in particular, as it is a jurisdiction less commonly cited in academic literature generally concerned with hyper-rigidity and because Canada has to some extent, championed the use of e-consultations. In Part I of this article, I identify the problem, being that the consequence of constitutional hyper-rigidity is in tension with the principles of democratic constitutionalism. In Part II, I identify and explore a potential solution, the implementation of digital democratic strategies as a means of reducing constitutional hyper-rigidity. In Part III, I explore Canada's e-consultations as a case study for assessing whether digital democratic strategies do, in fact, improve a constituency's amendment culture thus reducing constitutional hyper-rigidity and the associated tension that arises with the principles of democratic constitutionalism. The idea is to run a case study and then assess whether I can generalise the conclusions.

Keywords : constitutional hyper-rigidity, digital democracy, deliberative democracy, democratic constitutionalism

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