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# Securing Constitutional Government

## *The Perpetual Challenge*

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Every country in the world claims to have a constitution, but only some have constitutional government, and most of the world's people do not live under constitutional government. The term *constitution* once was synonymous with constitutional government that meant a particular type of political order in which the rulers' authority, including their legislative power, was limited through appropriate institutional devices, and both rulers and citizens were subject to the general law of the land. However, the term has been so debased that the *Encyclopaedia Britannica* (1987 edition), the most widely read encyclopedia, informs its readers that in the simplest and most neutral sense every country has a constitution no matter how badly or erratically it may be governed.

Constitutional government is an ideal, and like all ideals it can be achieved only as an approximation. Even the countries that appear to be near the ideal are revealed on examination to be not so near. Constitutional government, to the extent it is achieved, reflects a state of affairs that remains under constant threat from power seekers, ideological opponents, ill-informed social engineers, and manipulative special interests. It is also being eroded in the postindustrial era through a serious depletion of social capital, weakening the institutional foundations of constitutional government (Fukuyama 1999). In the more unfortunate countries, economic circumstances, cultural constraints, and entrenched ruling classes create seemingly intractable obstacles to the attainment of acceptable levels of constitutional government. This predicament

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*The Independent Review*, v. VIII, n.1, Summer 2003, ISSN 1086-1653, Copyright © 2003, pp. 5–26.

ment harms seriously not just the unfortunate people of these countries but also the industrialized democracies of the world.

Deepening our understanding of the conditions that make constitutional government possible thus remains an intellectual task of the highest priority. In the past two decades, scholars have done a tremendous amount of work in this regard. My aim in this article is to make a modest contribution along these lines. I argue specifically that nations achieve constitutional government in the sense used in this article to the extent that they realize the following conditions: (1) prevalence of this particular conception of constitutional government as a dominant ideology; (2) an official constitution in written or customary form that adopts this conception of constitutional government; (3) an institutional matrix that sustains the official constitution and translates it into the experience of the people; and (4) a healthy economy that supports the institutional foundation of constitutional government. It is immediately evident that the third and fourth conditions are interdependent, each being a cause of the other. There is nothing unusual in nature or in culture about reciprocal causation. However, it raises important questions about prospects for breaking and reversing vicious cycles that grip countries whose economic conditions undermine institutions in ways that cause further economic decline. I consider some of these questions and propose that the integration of these countries into the market economy and hence into the liberal constitutional order is an unqualified good for both the industrialized democracies and the Third World.

F. A. Hayek called the ideal of constitutional government under discussion here the *constitution of liberty*. Its pedigree traces back to the evolutionist thought of the eighteenth century. In *The Constitution of Liberty* (1978), Hayek presented a restatement of the principles of a free society. He completed this restatement in his monumental three-volume intellectual defense of the rule of law and individual freedom, *Law Legislation and Liberty* (1976–83). These treatises together explain the constitution of liberty: the logic and the institutional framework of the political order that sustains human freedom. The constitution of liberty is not a specific constitution but a coherent set of general principles that characterize a constitution capable of securing freedom. At the heart of the constitution of liberty is the supremacy of general laws over all authority, public or private. Its modalities include the rejection of sovereign authority, even of elected assemblies, and the effective separation of the executive and legislative powers. The term *constitutional government* as used in this article refers to this set of principles. I do not undertake the futile task of defining constitutional government or the constitution of liberty, but I try to make its essential attributes clearer as my discussion proceeds. I use the terms *constitutionalism* and the *constitution of liberty* interchangeably with *constitutional government*.

## Importance of the Third World

Some libertarians may question why we need to concern ourselves with the destinies of other peoples who in some sense have brought their condition on themselves and

whose choices we have no right to interfere with or question. This question raises interesting philosophical issues that I cannot deal with here. I do maintain that coercive interference in the affairs of other countries can be justified only on grounds unequivocally and universally recognized by public international law, such as self-defense and the prevention of humanitarian catastrophe. Still, it is important to inquire what, if anything, can be done within liberal principles to encourage the economic and political transformation of countries toward the liberal ideal and what compelling moral and economic reasons exist for doing so.

The countries with the greatest institutional deficits are also the ones least capable of coping with humanitarian catastrophes, whether manmade or natural (Sen 1999). Democratically elected governments of the Organization for Economic Cooperation and Development (OECD) countries cannot ignore such catastrophes, nor should they. However, the upshot is that the taxpayers of these countries continue to bear the cost of the follies of other national governments. Catastrophes aside, the economic and political inhospitableness of these countries creates a welfare burden on the industrialized democracies through large wealth transfers in the form of aid and concessionary loans granted directly by developed countries and indirectly through international agencies, as well as through migration of persons fleeing destitution and oppression at home. Although compelling arguments exist for accepting such refugees, it is certainly much more desirable if people have no cause to flee their homes and if migration takes place voluntarily in an orderly and secure manner for mutual advantage.

It is hardly disputable that illiberal regimes are breeding grounds of international terror. My liberal Muslim friends argue persuasively that a liberal Saudi Arabia would not have engendered the al Qaeda movement. The costs of terrorist actions for liberal democracies hardly need itemization. The greatest cost inflicted by terrorism, however, is not in the lives and property lost (though these costs are horrendously unacceptable), nor in increased defense spending, but in the jeopardy of the rule of law that results from the extraordinary powers that the state gains in times of national emergency. Terrorists cause more harm to free societies through the reactions they precipitate than by the physical destruction they wreak.

A deeper reason to encourage the liberalization of the Third World is grounded in the very nature of the market economy and hence also in liberal constitutionalism. The term *globalization* is the popular catchword to suggest a new phenomenon. Though only recently discovered by the popular press and social commentators, this process has been coextensive with the emergence of the market economy from its misty origins. The market economy emerged in consequence of the growth of trade among strangers that gave rise to the institutions of private property, the sanctity of contract, and in general the extension of the protection of the law to all. Civilization as we know it is a result of increasing exchanges between individuals that consolidated tribes into larger communities and thence into cities, nations, and the international community. Thus, trade has brought peoples together progressively and enriched

them economically and culturally through specialization and exchange, creating what Hayek termed the extended order of human interaction or civilization (1991, 39–47; see also Bauer 2000, 6). This civilization is an unfolding process that has bestowed great benefits, none so great as the rule of law providing security of life, liberty, and property. Yet more than half the world’s population remains unconnected or tenuously connected to it although their integration into it would be an unqualified good.

Constitutional government cannot be legislated into existence or thrust upon a community. Its attainment and maintenance even in approximate form require appreciation of its nature, much hard work, and a great deal of good fortune. As mentioned earlier, it requires intellectual acceptance of a particular conception of constitutional government, official adoption of this conception in the form of a national constitution, a supporting institutional substratum, and a favorable economic climate.

## **Prevalence of a Particular Conception of Constitutional Government**

The proposition that the achievement of constitutional government requires its proper understanding may seem self-evident and even faintly tautologous. The fact, though, is that even in countries where constitutional government is relatively strong, a continuing struggle rages over what it takes to have constitutional government. I maintain that only a particular notion of constitutional government is self-sustaining in the longer term and that other notions, however fashionable today, give rise inevitably to conditions that even their present advocates fail to recognize as constitutional government in any meaningful sense. These faulty conceptions are, to borrow Hayek’s expression, “roads to serfdom.” Constitutional government as understood here requires its appreciation and acceptance by critical sections of the intellectual community—persons whose actions and decisions shape higher-order institutions as well as others who influence them strongly. This community includes government ministers, legislators, judges, senior civil servants, statutory authorities, trade union heads, leaders of important nongovernmental organizations, and powerful business people, as well as opinion shapers such as university professors, clergy, journalists, authors, producers, directors, and entertainers of various kinds.

The faith in democracy as a sufficient condition for constitutional government is alive and well. Republicans and liberals from Cicero to Machiavelli, Locke, Montesquieu, Hume, Smith, Madison, Menger, Mises, and Hayek have counseled against this faith, however—this myth that we thought public-choice analysis had laid to rest. A greater obstacle to the commitment to constitutional government is the continued dominance within critical intellectual circles of a conception of society that fails to recognize its complex, emergent, and adaptive nature. The other side of this misunderstanding is the belief that society may be radically redesigned or at least continually adjusted and micromanaged toward some optimal state that is predeterminable through foresight and reason. This conception of society relegates a constitution to a

set of pliable rules to be observed to the extent and in a form that it does not impede the pursuit of preferred social and economic outcomes. The idea that ends justify unconstitutional means establishes itself in political and legal culture. The culture loses what James Buchanan terms the “constitutional way of thinking.” In order to appreciate the seriousness of the intellectual challenge of reenthroning the classical idea of constitutional government, we must understand how it was dethroned.

## **Rule of Law: Bedrock of Constitutional Government**

The bedrock of the classical ideal of constitutional government, and hence of freedom, is a particular conception of the rule of law—namely, the subordination of all public and private power to general norms of conduct. It is said that the rule of law is a necessary condition of freedom but not a sufficient one. This proposition sounds logical inasmuch as certain laws may diminish the liberty of all while ostensibly remaining faithful to the rule-of-law ideal. For example, prohibition of alcohol consumption in some countries limits everyone’s choice. We need to examine these examples carefully, however. Such laws are likely to be kept in place only by derogations from the rule of law in other respects. Prohibition laws typically are maintained by elevating certain religious or moral opinions above others. Some also claim that abhorrent institutions such as apartheid and slavery can be implemented consistently with the rule of law provided that the disabilities are imposed by laws that do not confer arbitrary discretion on authorities. This claim is much more problematic. In such cases, the legislators themselves are acting arbitrarily in both establishing and maintaining the institutions. The proscription of arbitrary determinations by the rule of law applies equally to the legislature. Such laws are general only in a very perverse sense.

The concept of generality implicit in the rule of law does not require that all laws have universal application. (It does not require children and adults to have the same contractual capacity or the same level of criminal responsibility, for instance.) However, the rule of law does require a rational and nonarbitrary basis for differential treatment of individuals or groups. Questions concerning the rationality and legitimacy of legislative classifications are often controversial. Hence, in some states constitutional bills of rights attempt with varying degrees of success to bar specific types of laws by placing certain civil liberties and in some cases property rights beyond the power of legislative derogation.

### *From the Rule of Law to the Rule by Law: The Public-Choice Perspective*

The clear distinction between law and royal command was the foundation of the ancient constitution of England from which modern constitutionalism was born. The power to give binding commands existed within the narrow province of matters concerning the government. It was the ancient power of *gubernaculum*. These com-

mands were mainly administrative orders generalized for efficiency and directed to civil servants—what Hayek called *thesesi*. The law itself lay beyond the arbitrary power of the ruler and resided in the community, to be changed only with their actual or putative consent. Such change was made by the exercise of *jurisdictio*, the power to alter the rights and duties under the common law (McIlwain 1947, 77). The critical point to observe is that the *jurisdictio* could not be constitutionally transferred or delegated to the monarch, though for a while Henry VIII managed to bully Parliament into doing so. The so-called Henry VIII clauses under which Parliament grants the executive the power to make laws, including laws that override Parliament's own acts, was never accepted as constitutionally proper.

It was obviously perilous to hand any part of the *jurisdictio* to the unelected monarch. Indeed, the constitutional history of England and Great Britain until the twentieth century in many ways was the story of the struggle by the coalition of the common-law courts and Parliament to keep the *jurisdictio* from the grasping hands of the Crown. Then came the Great Reforms and mass democracy. The source of executive power moved from the monarch to the electorate, from prerogative to parliamentary confidence. The repository of executive power shifted from the monarch to elected leaders who controlled Parliament, hence also public finance. Members of Parliament and the electorate lost their traditional fear and mistrust of the executive, for now it was removable at periodic elections. Executive power eventually became tradable through its capacity to create benefits in exchange for votes. However, before governments could start creating tradable goods on a significant scale, they had to overcome a central tenet of the rule of law—namely, that citizens should be subjected only to general and impersonal laws. It is possible to win votes by offering principled changes to the general law of the land, but it is much easier to win votes by offering benefits to particular constituencies, whether they are seekers of wealth transfers or pursuers of public causes such as conservation. The demands of these constituencies are difficult to meet through general law. They require specific allocations and deprivations as well as constant adjustment of entitlements in ways that defeat the rule of law.

### *Jurisprudential Errors Concerning the Rule of Law*

The decline of the rule of law in the classical sense cannot be explained solely through application of the economics of public choice. The ideal of the rule of law was too entrenched in the political culture to be repudiated explicitly. It needed to be maintained as an ideology but reformulated to accommodate the new state that was emerging through the electoral process.

Part of the means of this reformulation was already present in the form of the reductionist jurisprudence of legal positivists that sought to define all law in terms of the will of a legislator. Hobbes, Bentham, and Austin were the principal authors of this theory, but the twentieth century produced its own influential positivists in Hans Kelsen, H. L. A. Hart, Joseph Raz, and their numerous followers. The rule of law in

the sense used in this article is the rule of the *law* as understood from antiquity—namely, general norms of conduct as opposed to the rule of *commands*. According to this view of the law, commands are lawful only in the sense and to the extent that they are authorized by law. Commands themselves were not law. This distinction dissolved in positivist thought. Any “ought” proposition, provided the authorities effectively enforced it, came to be regarded as law. In Kelsen’s pure theory of law, even commands devoid of normative content were regarded as legal norms if they were validated by a hierarchy of norms ultimately grounded in political fact (*Grundnorm*).

The result of the positivist consensus was to regard as law all measures recognized and enforced by authorities, including Parliament and courts (Hayek 1976–83, 2: 50). The question “What qualities must an instrument possess to be regarded as law?” was answered by the tautology that a law is what is enforced as law by the authorities. In contrast, during his famous debates with Hart on the possibility of separating law and morals, Lon Fuller observed that there were eight ways to fail to make law, corresponding to the failure to endow enactments with the following eight qualities: generality, prospectivity, promulgation, clarity, consistency (within and among laws), constancy (infrequency of rule changes), possibility of compliance, and congruence between proclamation and enforcement (1964, chap. 2). These qualities traditionally gave law its status and the rule of law its meaning. The consequence of classifying all types of state interventions under the rubric of law was to destroy the basis of government under law—namely, the limitation of Parliament and courts to making or declaring general rules and the subordination of executive actions to such general rules. The new conception of law meant that whosoever has legislative power has authority not only to change the general laws of the land but also to determine the law for the particular case. According to this view, the legislator or its delegate could annul or modify contracts, expropriate property, confer special benefits, impose deprivations on individuals and groups, and generally make the law at the very point of its enforcement. The theory rejected the classical constitutional model of the separation of powers in favor of the model of sovereignty under which the effective will of the ruler is law. This construction was thought to accord with the British Constitution but was based on a misreading of its key features. The British Constitution is customary in nature, and the courts of England do not invalidate acts of Parliament for violating the indispensable principles of common law. Yet, as A. V. Dicey (1964) maintained, the British Parliament was not absolved from the duty to maintain the rule of law. The fact that no court would enforce this norm did not mean that it was not a constitutional rule.

The rule of law as classically understood requires (1) that all public and private actions are, in general, subject to law conceived as general and impersonal norms that are end independent in the sense that they are not directed to the achievement of specific outcomes; and (2) that citizens, in general, are not compelled to obey any dictate that does not take the form of a general, impersonal, and end-independent norm in the preceding sense.



These two elements are fundamentally linked; one cannot exist without the other. A great conceptual error in constitutional theory resulted from the belief that the first element could be maintained while the second was abrogated. An official who has power to coerce a citizen by arbitrary command cannot at the same time be subject to a general law with respect to the province of that power. The power of arbitrary command can be generated only by the displacement of a general law. An official who fixes the price of goods does so without the guidance of an impersonal norm, and his determinations displace the norm that contracts freely concluded must be observed. The official who prohibits trade by denial of a license displaces the freedom of contract that not so long ago was a common-law doctrine. Derogations from the second element are automatically derogations from the first element because the officials who have power of arbitrary command are placed above the law. It is wrong to say that such officials act under the law. They make law for the individual case in derogation of general law. It is not sufficient for the rule of law that officials always act under the authority of the legislature. It is necessary that the legislature be constrained from authorizing arbitrary action.

### Revision of the Ideas of Liberty and Justice

The reformulation of the rule of law was further driven by the revision of two other concepts embodying values that are inextricably associated with and indeed possible only under the rule of law: liberty and justice. These two concepts are indispensable requirements of civilization based on the market economy. Democracy is a means of securing liberty and justice. Ironically, the sheer power of these ideas over the human mind makes them prime targets of those who seek to reshape society and the redefinition of them has caused incalculable harm to the rule of law and hence to constitutional government.

Human thought is mediated by language. Even if we reject Derrida's contention that nothing exists outside texts, it is hardly disputable that language not only limits what we can express but also structures our thought. Language is the product of convention. In evolutionary terms, it is the outcome of the convergence of understanding within a linguistic community. When we say the word *elephant*, most English-speaking people will have a pretty good idea of what we mean. Yet when we mention the word *justice*, they seriously disagree concerning its meaning. Some terms have more settled meanings than others. Meanings are more likely to be contested and are more susceptible to manipulation when they are politically or economically significant. I have no great incentive to destabilize the meaning of the word *elephant*. In contrast, a significant payoff may accrue if I can establish that my claim for a higher wage is a claim of *justice* because justice is a universally held value and claims clothed in the rhetoric of justice are more difficult to resist. Hayek understood better than most liberals the susceptibility of liberal ideals to erosion through imprecise language (1976–83, 2: 12–15, 62–66). His efforts to restore conceptual clarity to the ideas of



liberty, justice, law, and democracy illuminated the constitution of liberty and helped others to perceive more clearly the new forces arrayed against it.

### *Redefinition of Liberty*

Liberty in the traditional sense meant the absence of arbitrary interference by human agents as distinguished from the physical constraints that limit choice. Thus, I do not consider myself unfree simply because I cannot evade the law of gravity. This distinction between freedom in the physical (alethic) sense and freedom in the human-relational (deontic) sense is of the highest importance in the constitution of liberty. However, in the twentieth century, the distinction faded in political discourse, with drastic consequences for liberty and for the rule of law. The question “How can one be free if one has no means to enjoy freedom?” took center stage in political and philosophical debate. Freedom and the capacity to enjoy freedom became fused in leftist political thought.

This argument, advanced by those who include within freedom the positive capacity for its exercise, has two aspects. The first is that freedom is diminished not only by the arbitrary coercion of others but also by a person’s lack of material resources to exercise the freedom. Freedom needs to be available legally before anyone can exercise it, but the argument is that if physical constraints prevent the exercise of freedom, it is of no avail. This aspect of the argument by itself is weak because no law can remove physical constraints for which no specific person is responsible. We cannot legislate away the law of gravity or the second law of thermodynamics. Hence, the need for the second aspect of the argument.

The revisionists assert that certain physical constraints, such as the lack of material resources, are not purely the results of chance, but are the cumulative effects of the actions of many. Hence, it is alleged, society as a whole bears responsibility for diminishing some people’s freedom. The inference from these assertions is that the enhancement of freedom requires the coercive adjustment of social and economic relations, which in turn entails necessary infringements of some freedoms, such as the freedom to hold property and the freedom of contract, in order to increase the overall level of freedom in society. This argument, represented as a freedom-based case against freedom, and its variants have resonated widely, particularly among the less-endowed sections of society. Yet wherever the argument has succeeded in influencing policy, people have become poorer. The proposition has been falsified by the history of the twentieth century.

### *Redefinition of Justice*

Closely linked to the revision of the concept of liberty has been the expansion of the concept of *justice*. The older idea of justice as the observance of the general rules of just conduct was extended to include the notion of just distribution of the social product. Poverty, even when no individual or group was responsible for its creation, came

to be regarded as an unjust condition, not merely an unfortunate one. In the Marxian socialist doctrine, just distribution was represented by the condition of material equality based on the principle “to each according to his need, from each according to his means.” Social democrats, though they subscribed to this ideal, pursued it by piecemeal adjustments of economic relations aimed at moderating material inequalities. The goal of achieving just allocations included use of the term *social justice*, which created a major problem for the constitution of liberty.

Philosophers from antiquity onward have sought unsuccessfully the objective means of ascertaining just material distribution. The principle “to each according to need, from each according to his means” requires highly subjective determinations of the needs and means of countless persons. Even the more modest social democratic goal of reducing economic inequalities requires a high degree of discretionary and hence arbitrary government. General laws cannot produce or maintain specific material conditions. Even if the law succeeded in equalizing the wealth of all persons, such equality could not be maintained except by continuous microadjustments of wealth distribution through discretionary power. The pursuit of the egalitarian ideal invariably subverts the rule of law by the displacement of general rules of conduct with inherently arbitrary impositions of authority in the particular case. It strikes at the heart of the constitution of liberty.

The ideal of social justice under discussion here is not the same as social security. The latter may be provided by an income safety net in the form of a minimum income guaranteed to all persons. Social security in this sense does not require discretionary income adjustment and hence is compatible with the rule of law in the classical sense, provided that it serves as a universal form of insurance rather than as a device for wealth redistribution. In fact, most classical liberal thinkers see no harm and much merit in universal safety nets.

In the industrialized democracies, the first condition for constitutional government—the prevalence of the understanding of constitutionalism in the classical sense within the community immediately responsible for the maintenance of constitutional government—has been severely eroded. The fact that constitutional government remains relatively healthy in these countries owes much to the corrections that the spontaneous order of civilization has imposed on the constitutional systems of these countries and to the heroic efforts of a minority of intellectuals.

## **An Official Constitution Dedicated to Constitutional Government**

An official constitution is not easy to ascertain, even in countries that possess written constitutional documents having paramount force over other law. A written constitution has no life of its own. Its words have no magical quality. It gains meaning from the way it is understood, construed, observed, and enforced by officials who form the

government in its many manifestations. The same text might be construed to facilitate arbitrary rule or to restrain it.

The U.S. Constitution was intended to set up a government of divided and limited powers functioning under law. The great panoply of devices—including the separation of legislative, executive, and judicial powers; the territorial dispersal of power among the states; the commerce clause; the bans on bills of attainder and takings without compensation; the due process and equal protection clauses; the entrenchment of the representative principle; and the independence of the judiciary—was intended to prevent, directly or indirectly, arbitrary government and to promote the rule of law in the classical sense. This intention is the clear and consistent message of the *Federalist Papers*. The words of the Constitution are perfectly capable of being understood as establishing just such a model of government. Yet its divisions and limitations have been blurred substantially by legislative, executive, and, most important, judicial action since its inception. The rule against the delegation of excessive legislative power to the executive branch, though judicially recognized, is seldom enforced, creating a rich source of arbitrary power for government. The commerce clause, meant to facilitate free trade among the states, has become, despite the 1995 *Lopez* ruling, a general source of power to regulate not only the economy but much else. The general-welfare clause, meant to impose a general-welfare test for taxation and spending, has been claimed as a charter for wealth redistribution.

The Australian Constitution, which was inspired by the U.S. model of limited and divided power, has suffered a similar fate at the hands of Parliament and the High Court. The Court has obliterated the rule against the delegation of legislative power, allowed ad hominem legislation, emasculated the free-trade clause, expanded the industrial relations clause to permit tribunals to determine “the just wage” and in general to regulate the labor market, tolerated gerrymander at state level, and weakened the federal structure through expansive interpretation of commonwealth powers (Ratnapala 2002; Ratnapala and Cooray 1986).

The countries with so-called flexible constitutions, where the supreme legislative bodies have both legislative and constituent power, such as the United Kingdom and New Zealand, are instructive with respect to the problem of ascertaining the official constitution. The U.K. constitution is traditional, and the limits of Parliament’s power are not clear. Hence, most British constitutional lawyers tend to consider its power to be (legally speaking) limitless, despite Britain’s treaty obligations to observe European Union law. This absence of limitation exists because the courts, ever since the removal of Chief Justice Coke, have never claimed the power to invalidate an act of Parliament, although they often dilute the effect of oppressive acts through interpretation. New Zealand’s Constitution Act may be changed by a simple majority of its Parliament. In many other countries, the legislature may change the constitution by a special majority, the most common being the two-thirds majority. In Malaysia, Singa-

pore, and Zimbabwe, governments have enjoyed two-thirds majorities and hence have had the capacity to change their constitutions at will.

In countries with flexible constitutions, the constitution is defined to a large extent by unwritten constraints that the political culture imposes. Governments in Singapore, Malaysia, and Zimbabwe have used their two-thirds majorities to make frequent changes to their constitutions to extend their own hold on power. In contrast, in Britain and New Zealand, where parliaments have much greater constituent power, individual governments' attempts to perpetuate their power are rendered impossible by the practical limits that the political culture imposes on government. Yet in the latter countries, people lack one of the more important safeguards of the rule of law—namely, the ability of an aggrieved individual citizen to challenge a law in a judicial forum on the ground of its inconsistency with a declared norm of the constitution. This constitutional deficiency has been offset in part by the heroic efforts of the courts in these countries to enforce both procedural due process and the standards of natural justice against administrative action. However, if the offending law does not affect the rights of a significant group, it is unlikely to trigger the kind of public reaction and media attention that can lead to its repeal through the force of public opinion.

I am not suggesting that countries such as the United States, Canada, the United Kingdom, Australia, and New Zealand have no constitutional government. On the contrary, on a scale of constitutional achievement, they are closer than most to the ideal of constitutionalism. We need to guard against excessive pessimism. The basic structures of the constitutions of these nations have proved much too robust for radical change, but they also have enabled corrections to occur. Recent decisions of the Fifth and Eleventh U.S. Circuit Courts of Appeal that reject the pursuit of cultural diversity in student populations as a legitimate aim of affirmative action provide a good example of such corrections. The stability of these constitutions has much to do with the strength of their institutional underpinnings.

## **The Institutional Matrix of Constitutional Government**

Ultimately, a constitution exists in the experience of the people. The best-intentioned constitutional instrument cannot deliver constitutional government if the patterns of official action do not correspond to its norms or if officials engage in patternless projections of authority. The constitutional text, together with interstitial legislation and judicial constructions, provides guidance to official action, and hence it is an important determinant of the living constitution. However, the extent to which officials in fact are guided by constitutional norms depends on many more constraints and conditions than the psychological effects that constitutional texts provide. Therefore, a lawyer's sole preoccupation with the constitutional law of the books is seriously misconceived and dangerous to constitutional government.

The concept of an institution has been likened to the constraints that make up the rules of the game, as opposed to the players who engage in the game (North 1990, 3). Institutions are distinct from organizations that belong with the players. The term *institutions* is elastic enough to include constraints of all kinds that influence human behavior, including legal and moral rules, etiquette, cultural constraints (such as those concerning reputation), superstition, other more-personal and less-understood values that guide action (such as parental and filial affection and compassion toward fellow beings).

There are, of course, more constraints on political actors than those imposed by institutions as defined here. Nonnormative physical constraints of various kinds exist. Strong central government is more feasible in city-states such as Singapore than in large states such as the United States of America. Afghanistan is thought by some to be ungovernable from one location because of its terrain and its diverse regional ethnicities. Montesquieu thought that climate had much to do with English liberty. Ethnic and religious diversity can necessitate forms of federalism, as in the Russian Federation, India, and Nigeria.

Some types of organizations and organizational alliances also provide powerful determinants of constitutional governments, including a vocal and independent press, trade unions, business associations, and various other interest groups. Their impact on constitutional government can be positive or negative, but on balance constitutional government owes much to their existence. They mobilize opinion and provide avenues of action. Favorable institutions make their activities possible, and in turn these organizations effect institutional change.

A norm has no independent existence. It can exist only as a part of an extended matrix of norms. The ancient legal norm *pacta sunt servanda* (contracts should be observed) is supported by many other norms, such as those concerning respect for person and property, truthfulness, the impartiality of third-party arbiters (in case of breach), and the integrity of law enforcement officials. The cardinal constitutional norm of independence and impartiality of the judiciary, so essential to the rule of law, depends critically not only on the norms of judicial ethics and responsibility but also on the acceptance of judicial decisions by officials and citizens adversely effected by them. Such acceptance is the outcome of numerous other norms that create the overall culture of “playing by the rules.”

One of the great dangers to constitutional government—a danger that has not received sufficient attention from lawyers and economists—arises from what Francis Fukuyama describes as the Great Disruption. A majority of classical liberal constitutional theorists (myself included), in their justifiable preoccupation with official threats to the rule of law, failed to hear conservative alarm bells about the corrosion of the social foundations of the free society. It is not easy for lawyers schooled in black-letter law and economists trained in neoclassical theory to connect constitutional government with what happens in households, classrooms, boardrooms, factories, and neighborhoods. Nevertheless, the connections are real and substantial. Lawyers tend

to think only in terms of norms enforceable in courts of law, as they should when they give professional advice to clients. Yet it is time that lawyers who set themselves the wider goal of understanding, advocating, and defending the rule of law in general—including lawyers who serve as academics, judges, legislators, and responsible public servants—show greater appreciation of what it takes to realize the rule of law. Likewise, economists who limit themselves to what is quantifiable and who distrust intuition and conventional knowledge should heed Peter Bauer’s advice to wake up from their disregard of the evidence of the senses and to return to “the traditional sequence of observation, reflection, inference, tentative conclusion, and reference to established propositions, and to findings of other fields of study” (2000, 20).

The interconnections between family breakups, single-parent upbringing, drug abuse, street crime, truancy, lack of essential life skills, decline in trust, more litigation, welfare dependence, and many other symptoms of social disorder cannot be established with the kind of empirical precision that some social scientists demand. Nor can we find monocausal explanations for why all these unhappy events are occurring. However, the coincidence of the rising statistics in these areas (Fukuyama 2000, chap. 2, appendix) raises a very strong suspicion that they are parts of a broader phenomenon that swept the industrialized democracies in the second half of the twentieth century.

Social disorder affects constitutional government in a number of different ways, some more obvious than others. The dishonor of contracts as well as crimes and civil wrongs against person and property are inconsistent, by definition, with the rule of law, but they are inevitable in societies of imperfect souls. Law-governed societies cope with these problems through law enforcement resulting in punishment or reparation. However, when such transgressions occur frequently, they seriously threaten the existence of the rule of law because legal systems are not designed and indeed cannot be designed to cope with widespread lawlessness. When offenses are committed against person or property, the injury is apparent and the victim usually known. Another category of delinquency seems to be regarded as victimless or at any rate not blameworthy in the sense of causing harm to others. This category includes drug abuse and calculated welfare dependence. These delinquents themselves are often thought of as victims rather than wrongdoers. The borderline between preventable and unpreventable dysfunctionality is difficult to draw in some cases, but palpable in many others. The welfare state passes on the cost of this kind of delinquency to people who play by the rules. The arbitrary behavior of others thus subjects to vitiation the rule followers’ property rights, a situation that directly contradicts the rule of law. Also, in the welfare state, social disorder, by increasing persons’ dependence on the state, generates more discretionary state activity. The greater the momentary adjustments of wealth, the greater the damage to the rule of law as conceived by classical liberals.

More important, social disorder is also disorder of the matrix of rules that supports constitutional government. Rules exist through observance. It is a fatal mistake to think that the rule of law and constitutional government could be legislated into existence and maintained solely through the coercive power of the courts and the

police. The conditions of the rule of law and constitutional government prevail because most people observe the rules of the social order most of the time, including important unwritten ones. It is not possible to destabilize some rules without affecting others in the system. As rules become frayed through nonobservance, people cease to count on them. Mistrust of people transfers to mistrust of institutions. People take other precautions. They fortify their homes, keep their children away from the public parks, abandon entire neighborhoods (which then become more lawless), increase insurance coverage, and begin to stereotype people defensively. As standards fall, corruption spreads to government. The economic cost of such disorder is incalculable and takes the ultimate toll on the institutional matrix of constitutional government.

We may be witnessing an institutional revival in the Western democracies through the self-correcting processes of open societies. The increases in crime, divorce, and illegitimacy rates seems to have decelerated in the 1990s (Fukuyama 2000, 271), and the importance of personal responsibility is now acknowledged frankly in public debates, with more voices from the left joining the traditional voices of the right in lamenting its decline.

One of the most remarkable developments in this regard in Australia concerns the changing complexion of the public debate about the plight of the country's indigenous population. The aboriginal people of Australia have suffered the fate of many other indigenous peoples who found themselves in the path of European colonization and settlement, a fate that included dispossession, large-scale extermination, loss of children through forced adoption, destruction of traditional habitats, cultural dislocation, discrimination, and alienation from mainstream society. The rule of law simply passed them by. The aborigines lead the nation in every statistic on social disorder, including crime, family breakup, and drug abuse. By the admission of aboriginal leaders themselves, domestic violence against women and children is a huge problem among aborigines. Education and health conditions in some communities are worse than in many parts of the Third World. These conditions persist despite enormous welfare spending and preferential arrangements by commonwealth and state governments.

Throughout the last three decades of the twentieth century, aboriginal leaders and the Australian left directed their efforts toward obtaining more government assistance and the reclamation of indigenous land rights, the latter supported correctly by many on the right. In the early 1990s, a combination of judicial rulings and consequential legislation brought about a settlement of the native title question, but the social problems remained intractable.

Then, in the past two years, a different set of voices has risen above the traditional chorus of blame and claim. Indigenous leaders such as Noel Pearson, a hero of the left in the 1990s, have asked their communities to look within themselves to identify their problems and to find their own solutions. His argument is that nothing can erase the past injustices inflicted on them, but that if they understand the present



causes of social decay in the context of current realities, they can revive their fortunes. Pearson and others are asking for no less than the restoration of the underpinnings of the rule of law—responsibility for one’s self and one’s family and respect for others’ rights. They realize that the guilt-ridden white governments cannot help native peoples with endless patronage. Their message is that the indigenous people need to rebuild their own institutions and reestablish the rule of law in order to become economically independent and to achieve equality with the rest of the nation.

At the Ben Chifley Memorial Lecture of 2000, a highlight of the left intellectual calendar in Australia, Pearson declared to the dismay of many left commentators:

The truth is that, at least in the communities that I know in Cape York Peninsula, the real need is for the restoration of social order and the enforcement of law. That is what is needed. You ask the grandmothers and the wives. What happens in communities when the only thing that happens when crimes are committed is the offenders are defended as victims? Is it any wonder that there will soon develop a sense that people should not take responsibility for their actions and social order must take second place to an apparent right to dissolution? Why is all of our progressive thinking ignoring these basic social requirements when it comes to black people? Is it any wonder the statistics have never improved? Would the number of people in prison decrease if we restored social order in our communities in Cape York Peninsula? What societies prosper in the absence of social order? (Pearson 2000)

There is no consensus about the causes of institutional decay. The standard leftist argument is that social disorder springs from poverty or, alternatively, from income inequality. The obvious problem with this line of reasoning is that it disregards the causes of poverty and hence overlooks the problem of reciprocal causation. Others have pointed to causes such as the lessening interdependence of individuals in consequence of growing wealth and welfare safety nets (Yankelovich 1994) and to the perverse incentives and moral hazard created by the welfare state itself (Becker 1981; Murray 1984). Whatever the causes may be, the problem for liberal constitutionalism is to repair its institutional foundations without violating its own principles.

## **Economic Conditions and Constitutional Government**

However we look at constitutional government, it is apparent that economic conditions form a major factor in its success. The emergence of the market economy converts society from one in which the benefits of the law are extended only to members of one’s tribe or group to one in which everyone has the protection of abstract and impersonal rules. The recognition of the benefits of trade, hence of the right to hold and dispose of several property, caused the emergence of the system of abstract rules

that secure freedom and order (Hayek 1991, 30). Markets based on the observance of such shared rules created a new form of trust among strangers. This is not trust of the individual stranger but trust of the rule system—a reliance on institutions more than reliance on individuals. Repeated transactions based on abstract rules strengthen such rules. Where markets shrink, for whatever reason, the strength and reach of abstract law will weaken as exchange among strangers lessens and trust diminishes.

Poverty by itself does not destroy the rule of law, but it limits the strength and reach of such rule. History shows that impoverished communities often have very stable general laws. In these communities, the gain from observing the law and the harm from violating the law are palpable. The rule of law breaks down when the real or perceived costs of compliance are greater than the costs of noncompliance. Social security laws, for example, are difficult to enforce because of the uncertainty of the eligibility criteria and the evidentiary problems of disputing a claim. (One of the most difficult facts to establish in law is the level of a person's wealth and hence his income.) In contrast, in a society in which one's general well-being or survival in catastrophic circumstances depends on the good will of others, powerful incentives exist for observing the rules of the game. The problem for the rule of law in this economic context occurs when the state takes over as provider, displacing markets with regulations and entitlements.

Consider an extreme example from the political history of Sri Lanka, a country I know well. In 1948, Ceylon, as it was then known, gained independence as a constitutional monarchy under a constitution that established a Westminster-type parliamentary democracy guaranteeing universal adult franchise, independence of the judiciary, and the public service and equal protection of the law to all communities. In its first decade, the country was held up as a model of constitutional government, the living proof of the cross-cultural validity of the rule-of-law ideal. Its constitutional decline began in 1956, however, with the election of its first socialist government. This government introduced racially discriminatory laws and administrative practices to fulfill pledges to its electoral support base among the Sinhala peasantry and petit bourgeoisie. The 1972 Constitution, authored by a leading Marxist lawyer, dismantled many of the existing checks and balances in the name of the sovereignty of the people. The return to power of the right of center in 1977 brought about some reinstatement of constitutional checks, but the rot had well and truly set in, and the situation for the rule of law in some respects worsened during that government's sixteen years in office.

Although tampering with the Constitution was a factor in the decline of constitutional government, it was not the major cause. Even the 1972 Constitution had more safeguards than the United Kingdom, New Zealand, and many other functioning democracies enjoy. In Sri Lanka, however, the institutional matrix of constitutional government was destroyed by a catastrophic economic decline resulting from the conversion of the country's market economy to a socialist-type command economy. Nationalization of all key sectors of the economy—including the public-

transport system, the banks, the insurance industry, wholesale trade, and, most damaging of all, the plantation industry, which was the backbone of the economy—converted the people into a population of public servants. Controls on prices, rents, house ownership, imports, and currency exchange drove foreign investors out and choked off local enterprise. As the universities and schools produced more and more unemployable general arts and science graduates, the government created more jobs to keep them off the streets. Armies of youth did little more than open doors, bring cups of tea for senior officials, and move documents from one office cubicle to the next. Real incomes declined as a shrinking economic pie was divided into ever-smaller slices. Essential goods became scarcer and dearer, and queues stretched longer. The Tamil youth suffered most. Not only did private-sector jobs dry up, but the young Tamils were also squeezed out of public-service employment through language policy. It is not difficult to imagine the impact on constitutional government of the efforts of a nation of public servants seeking to make a decent living off the government.

It is easy to destroy institutions, but much more difficult to rebuild them, as Sri Lanka has learned painfully. The rebuilding process begun in the 1980s has been dealt savage blows by the civil war and by terrorism. Now there are signs at least that an emerging national leadership understands markets and their foundation in the rule of law, and they have made progress toward establishing peace and rebuilding institutions. The Sri Lankans need all the encouragement and support they can get to become again a living example of the resilience and power of liberalism.

## **Rebuilding Constitutional Government**

Constitutional government has reasserted itself strongly in some parts of the world, but it continues to struggle against tremendous odds in other places. Dictatorships of various kinds have been replaced by democracies of various kinds. In democracies, the withdrawal of government from some areas of the economy has restored the general law with respect to contract, tort, and property in those areas. Although the size of government measured as a percentage of gross domestic product (GDP) has not been reduced significantly or at all, the nature of government has changed in many countries. These gains owe much to the work of liberal thinkers such as Hayek, who have broken up the intellectual consensus supporting the interventionist state and provided key economic arguments for the limited and law-governed state. A certain inevitability about these corrections can be explained by the positive analysis of social systems by Hayek, Fukuyama, and other evolutionist thinkers.

As Hayek (and before him Carl Menger and the Scottish evolutionists) pointed out, the self-ordering quality of society cannot be eliminated through engineering. Even the most-regulated societies, such as those under Stalinist-communist rule, could not escape the self-ordering process. New elites emerged to replace the old ones. Private exchange did not disappear even in the state-monopolized area of basic goods and services. The economy did not behave in the manner planned and decreed,

nor did the people in general. Most important, the social system continued to absorb information from the outside despite the state's best attempts to insulate it. The Stalinist state was undergoing endogenous reordering long before its dramatic final collapse. Western intellectuals and media simply failed to notice it.

The corrections in the Western democracies were less dramatic but just as interesting. The welfare state produced the admirable outcomes of decolonization and international trade liberalization but could not cope with the resulting exposure to international competition from nonwelfare states and from welfare states that shed their more intrusive and costly features. Countries that built short-term prosperity behind walls of protection found themselves at a serious disadvantage in competing for markets and investment. In the face of these feedback challenges, the stakes began to change in the electoral game. As the unsustainability of the overregulated state became evident, politicians began to find votes in structural reform. The same democratic systems that produced the welfare state produced President Reagan, Prime Minister Thatcher, and, later, the "Third Way" politicians. In Australia and New Zealand, the reform processes were launched not by conservatives or liberals but by labor governments, with the Labour treasurer Paul Keating famously warning the electorate that without reform Australia was heading for banana republic status. The welfare state in its more ambitious forms probably was unsustainable even without exposure to international competition, but that competition certainly made it so. When social democrats championed the Third World cause for market access to the West, they hardly meant to unleash forces that would destroy some of their cherished accomplishments. Yet such destruction is precisely what they brought about. The lesson of all this is that we cannot foresee, much less control, the outcome of our designs in a dynamic spontaneous order. Although we can provide design inputs, the environment will select what is preserved and determine the shape and form in which these elements are preserved.

The fact that societies are self-ordering systems does not suggest that we should stand by passively and watch its spontaneous readjustments. Waiting for society to correct itself is not a promising option. Eternal vigilance remains the price of freedom. It is a serious mistake to think that the politics of wealth distribution has gone away. Redistribution will always remain one of the keys to elective office. Hence, the containment of this electoral game remains an ongoing challenge for constitutional government.

Efforts to defend and foster constitutional government must focus on the four conditions discussed earlier. First, the intellectual struggle over the meaning of the rule of law must continue at all levels, with a view to restoring the ascendancy of the classical understanding of it as the supremacy of general laws over public and private power. Second, the classical understanding of the rule of law needs to inform constitutional interpretation, legislative activity, and public administration so that the official constitution conforms more closely to the classical ideal. In this respect, lawyers have important roles to play as advisers, advocates, legislative draftsmen, legislators, tribunal members, and judges. Third, social disorder must be dealt with both legally

and economically in ways that are consistent with the rule of law. A solution here requires restoration of the integrity of the law in areas where it has been whittled away, so that responsibility for personal conduct rests with the person and is not spread around the community, whether it be with respect to contracts, due diligence toward others, or family relations. It requires the gradual withdrawal of the welfare state to its essential role in providing a safety net to those who genuinely cannot look after themselves. Trust needs to be regenerated through the bonds of the market economy, which will require the progressive elimination of arbitrary powers over the economy that have accumulated over more than half a century. Restoration of the basic rules of the law, such as those ensuring the sanctity of contract and the fault basis of tort liability, is essential. Real tax reductions must follow the scaling back of the foster state, returning money to the people whose private transactions are the substratum of the market economy and hence also of constitutional government.

Globalization has come to the aid of constitutional government in exposing constitutional systems to competition. The greatest payoff from globalization, perhaps, takes the form of the enhanced prospects for extending constitutional government to people in parts of the world that hitherto have not enjoyed its benefits. As argued previously, this development is not only an unqualified good in itself but also a necessary step for maintaining the long-term security of constitutional government in the developed parts of the world. For decades, Peter Bauer argued without success that internal trade, not external aid, would deliver the Third World from abject poverty. The subtext of his argument was that the institutional settings that enable internal trade to occur—namely, constitutional government in the classical sense—are indispensable to solve this problem. Bauer's vision is finally becoming a reality as countries are inexorably exposed to the global marketplace and as both local elites and international agencies begin to understand what it takes to be a successful player in this market.

Still, we need to consider whether globalization might pose threats of its own to constitutionalism. Constitutional government subjects both public and private power to the general laws of the land. The question is whether the constitution of liberty can govern the conduct of the actors in global markets through the reach of its laws and institutions. This reach is limited both by jurisdictional boundaries and by the impracticalities of cross-border law enforcement. To what extent do these conditions constitute a challenge to the rule of law? For centuries, merchants have managed their own disputes with minimal assistance from state apparatuses, mainly through their own arbitrators who applied their own *lex mercatoria*. Their common interests in maintaining ongoing trading relationships and their membership in a close-knit trading community allowed this informal system to operate successfully. In the ages past, few transnational consumer transactions, as distinct from merchant-to-merchant dealings, took place. Today's global market is characterized by increasing numbers of consumer transactions across borders through the Internet and other means. There is a clamor among academics and policymakers for international consumer-protection laws modeled on domestic versions of such laws. These appeals may or may not eventuate in

new laws, and if they do, they may have little impact. The optimistic view is that informal market-driven institutional mechanisms will emerge to take care of the matter. The problems are not peculiar to transnational trade. Much consumer trade takes place on the basis of trade reputation anyway, and there is no reason to suppose that similar patterns of trader-consumer relations will not emerge in transnational trade.

Some observers also fear that globalization leads to the increasing power of multinational corporations, which may engage in unlawful activity with impunity because of their capacity to relocate business. Governments, the argument goes, may become so beholden to mobile capital that they will sacrifice the public interest and indeed the rule of law. These fears ultimately are fears of institutional failure. Capitalists are not angels, and we should not expect them to behave like angels. Successful constitutions rest on the conviction memorably expressed by Hume that “in contriving any system of government and fixing the several checks and controls of the constitution, every man ought to be supposed a knave, and to have no other end, in all his actions, than his private interest” (1964, 1: 117–18). As the recent Asian financial crisis showed, there is no good substitute for stable, transparent, and open institutions if a country is to attract and retain capital in the long term.

What can industrialized democracies do within liberal principles to encourage constitutional government elsewhere? The one great noninterventionist tool at their disposal is trade. I have argued here that constitutional government needs to be grounded in a supporting institutional substratum and that positive economic conditions will promote favorable institutions. The gradual emergence of constitutionalism in countries that have built prosperity based on markets (most notably the so-called Asian Tigers) lends credence to this argument. The industrialized democracies can provide a powerful impetus to constitutional government by removing the substantial remaining barriers to international trade. The World Bank estimates that the removal of such barriers will boost income in poor countries by \$1.5 trillion (Panitchpakdi 2002). These barriers not only deny people in poor countries the freedom to trade what they produce but also effect arbitrary wealth transfers among groups of citizens in rich countries. Hence, their elimination represents a major challenge in the perpetual struggle for constitutional government throughout the world.

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**Acknowledgments:** This article was researched and written at the International Center for Economic Research, Turin, whose generosity I gratefully acknowledge. I am pleased also to acknowledge the valuable research assistance of Stefano Chiado. An earlier version was presented in London at the 2002 General Meeting of the Mont Pelerin Society.



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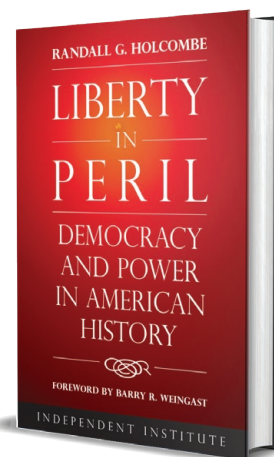
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