SECURING CONSTITUTIONAL GOVERNMENT: THE PERPETUAL CHALLENGE

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INTRODUCTION

Let me begin this essay by noticing the fact that every country in the world claims to have a constitution but only some have constitutional government. In fact, the majority of the world's population does 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 authority of rulers, 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 most widely read encyclopaedia, the *Encyclopaedia Britannica* informs its readers that in its simplest and most neutral sense, every country has a constitution no matter how badly or erratically it may be governed. 1987: 16, 732)

Constitutional government is an ideal and like all ideals can only be achieved as an approximation. Even those 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. It remains under constant threat from power seekers, ideological opponents, ill-informed social engineers and manipulative special interests. It is also being eroded through the serious depletion of social capital in the post-industrial era that weakens the institutional foundations of constitutional government (Fukuyama, 1999). In other countries, economic circumstances, cultural constraints and entrenched ruling classes create seemingly

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intractable obstacles to the attainment of acceptable levels of constitutional government. It is a predicament that seriously harms not just the unfortunate peoples of these countries but, as I argue presently, also the industrialised democracies of the world. Hence deepening our understanding of the conditions that make constitutional government possible remains an intellectual task of the highest priority. In the past two decades, a tremendous amount of work has been done in this regard by scholars, many of who are associated with the Mont Pelerin Society. The aim of this essay is to make a modest further contribution to this end. Specifically, I will propose that nations achieve constitutional government in the sense used in this essay, to the extent that the following conditions are realised: (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 of this model are interdependent, each condition being a cause of the other. There is nothing unusual in nature or in culture about two-way causation. However, it raises important questions about prospects for breaking and reversing vicious circles that grip some countries whose economic conditions undermine institutions in ways that cause further economic decline. The essay will address some of these questions, and propose that the integration of these countries in the market economy and hence in the liberal constitutional order is an unqualified good for both the industrialised democracies and the Third World.

The ideal of constitutional government that is the subject of this essay is that which the founder of this distinguished society F A Hayek called the constitution of liberty. Its pedigree

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traces back to the evolutionist thought of the eighteenth century. In *The Constitution of Liberty* Hayek set out to present a restatement of the principles of a free society. This restatement was completed in the three volumes that constitute the monumental intellectual defence of the rule of law and individual freedom, *Law Legislation and Liberty*. 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 characterise 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 law making powers. The term 'constitutional government' as used in this essay refers to this set of principles. I shall not undertake the futile task of defining constitutional government or the constitution of liberty but its essential attributes will become clearer as this discussion proceeds. The terms 'constitutionalism' and 'the constitution of liberty' are used interchangeably with 'constitutional government'.

IMPORTANCE OF THE THIRD WORLD

There are those within libertarian circles who may question why we need concern ourselves with the destinies of other peoples who in some sense have brought their condition upon themselves and whose choices we have no right to interfere with. This view raises very interesting philosophical questions that I have no opportunity to address, at least in this paper. I also do not think that coercive interference in the affairs of these countries can be justified except on the grounds unequivocally and universally recognised by public international law, such as self-defence and the prevention of humanitarian catastrophe. However, it is important

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to inquire what, if any, can be done within liberal principles to encourage the economic and political transformation of these countries towards the liberal ideal and I believe there are compelling moral and economic reasons for doing so.

The countries that have the greatest institutional deficits are the ones least capable of coping with humanitarian catastrophes, whether man-made or naturally caused. (Sen: 1999) Democratically elected governments of the OECD countries cannot ignore these catastrophes, nor should they be. However, it means that the taxpayers of these countries continue to bear the cost of the follies of other national governments. Catastrophes aside, the economic and political inhospitability of these countries creates a welfare burden on the industrialised democracies in direct and indirect ways. This happens through large wealth transfers in the form of aid and concessionary loans granted directly by developed countries and indirectly through international agencies. It also happens through migration to industrialised democracies, of persons fleeing destitution and oppression at home. Although there are compelling arguments for accepting such immigrants, it is certainly much more desirable if they have no cause to flee their homes and that migration takes place voluntarily in an orderly and secure manner for mutual advantage. Migration is a critical element of the market order but it is important to reduce the distortions in this market caused by economic and political inhospitability in the home countries on the one hand and the generous welfare in the receiving countries on the other hand.

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 Qaida movement. The cost of terrorist actions on liberal democracies hardly needs itemising. It is worth noting though that the greatest cost inflicted by terrorism is

not in the lives and property lost (though this is horrendously unacceptable), nor in increased defence 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.

There is a deeper reason to encourage the liberalisation of the Third World that is grounded in the very nature of the market economy and hence also in liberal constitutionalism. The term 'globalisation' is the popular catchword suggesting a new phenomenon. Though recently discovered by the popular press and social commentators, it is a process that 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 generally, the extension of the protection of the law to all. Civilisation as we know it is a result of increasing exchanges between individuals that consolidated tribes into larger communities and thence to cities, nations and international community. Thus, trade has progressively brought peoples together and enriched them economically and culturally through specialisation and exchange, creating what Hayek termed the extended order of human interaction or civilisation. (Hayek, 1999: 39-47; Bauer 2000: 6). This civilisation 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 this civilisation, hence their integration must be an unqualified good.

Constitutional government cannot be legislated into existence nor thrust upon a community. Its attainment and maintenance even in approximate form requires appreciation of its nature, much hard work and a great deal of good fortune. As mentioned before, it requires intellectual

acceptance of a particular conception of constitutional government, official adoption in the form of the national constitution, of this conception, a supporting institutional substratum and a favourable 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, there is a continuing struggle over what it takes to have constitutional government. It is the contention of this essay, that only a particular notion of constitutional government is self-sustaining in the longer term and that other notions as are fashionable today will, inevitably result in conditions that even their present advocates will fail to recognise as constitutional government in any meaningful sense. They are, to borrow Hayek's words, 'roads to serfdom'. Constitutional government as understood in this essay requires its appreciation and acceptance by critical sections of the intellectual community. These are the people whose actions and decisions shape higher order institutions and others who influence them strongly. This community includes the ministers of government, legislators, judges, senior civil servants, statutory authorities, trade unions, NGOs, powerful business people, as well as opinion formers like 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. It is the faith that republicans and liberals, from Cicero to Machiavelli, Locke, Montesquieu, Hume, Smith, Madison, Menger, Von Mises and Hayek counselled against, the myth that we thought was clinically laid to rest by public choice analyses. The greater

obstacle to the commitment to constitutional government, however, is the continued dominance within the critical intellectual circles, of a conception of society that fails to recognise its complex, emergent and adaptive nature. The flip side of this misunderstanding is the belief that society may be radically redesigned or at least continually adjusted and micro-managed towards some optimal state that is pre-determinable through foresight and reason. This conception of the society relegates the constitution to a set of pliable rules to be observed to the extent and in a form that does not impede the prosecution 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 re-enthroning the classical idea of constitutional government, it is necessary to understand how it was disenthroned.

Rule of law: the 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 the choice of everyone. But we need to examine these examples carefully. Such laws are likely to be kept in place only by derogations from the rule of law in other respects. Typically, prohibition laws are maintained by privileging certain religious or moral opinions as against others. It is also claimed 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 discretions 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 rule of law's prescription against arbitrary determinations 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.) However, the rule of law does require a rational and non-arbitrary 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 commands were mainly administrative orders generalised for efficiency and directed to civil servants, what Hayek called *thesei*. The law itself was beyond the arbitrary power of the ruler and resided in the community to be changed only with their actual or putative consent. This was the power 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 that. The

so-called Henry III 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 Britain until the 20th 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 monarch to elected leaders who controlled parliament hence also public finance. Parliament and the electorate lost their traditional fear and mistrust of the executive for it now was removable at periodic elections. Executive power eventually became tradable through its capacity to create benefits that can be exchanged 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, generally, 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 conservationists. The demands of these constituencies are difficult to meet through general law. They require specific allocations and deprivations and 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 the economics of public choice. The ideal of the rule of law was too entrenched in the political culture to be explicitly repudiated. 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 essay is the rule of the 'law' as 'law' has been 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 authorised by law. Commands were not themselves law. This distinction dissolved in positivist thought. Any 'ought' proposition, provided the authorities effectively enforced it, came to be regarded as law. In Hans 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 (Grűndnorm).

The result of the positivist consensus was to regard as law all measures that were recognised and enforced by authorities including parliament and courts. (Hayek, 1976: vol 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 H L A Hart on the possibility of separating law and morals, Lon Fuller

observed that there were eight ways to fail to make law. They correspond to the failure to endow enactments with the following eight qualities: 1. Generality, 2. Prospectivity, 3. Promulgation 4. Clarity 5. Consistency (within and among laws), 6. Constancy (infrequency of rule changes) 7. Possibility of compliance, and 8. Congruence between proclamation and enforcement (Fuller, 1964:Ch.II). These are the qualities that 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 or impose deprivations on individuals and groups and generally make the law at the point of its enforcement. The theory rejected the classical constitutional model of the separation of powers in favour 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 maintained the British parliament was not absolved from the duty to maintain the rule of law. (Dicey, 1964) 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 that:

1. 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.
2. 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 above sense.

The two elements however are fundamentally linked and one cannot exist without the other. One of the great conceptual errors in constitutional theory resulted from the belief that the first element could be maintained while abrogating the second element. 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 licence 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 authorising 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 only possible under the

rule of law, namely: liberty and justice. Liberty and justice are indispensable requirements of civilisation 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. The redefinition of these two concepts 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 hence also structures our thought. Language is the product of convention, in evolutionary terms, the outcome of the convergence of understanding within a linguistic community. When we mention the word 'elephant' most people will have a pretty good idea of what we mean. Yet, when we mention the word 'justice' there is serious disagreement concerning its meaning. Some terms have more settled meanings than others. Meanings are more likely to be contested and more susceptible to manipulation when they are politically or economically significant. I have no great incentive to destabilise the meaning of the word 'elephant'. In contrast, there is a significant payoff if I can establish that my claim for a higher wage is a claim of 'justice'. The reason is that 'justice' is a universally held value and claims clothed in the rhetoric of justice are harder to resist. Hayek understood better than most liberals did, the susceptibility of liberal ideals to erosion through imprecise language. (Hayek, 1976: vol 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 arraigned 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 because I cannot defy 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 this 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 centre stage in political and philosophical debate. Freedom and the capacity to enjoy freedom became fused in left political thought. There are two aspects to the argument advanced by those who include within freedom, the positive capacity for its exercise. 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 legally available before anyone can exercise it but the argument was that it is of no avail if physical constraints prevent its exercise. This aspect by itself is weak as no law can remove physical constraints for which no other person is responsible. We cannot legislate away the law of gravity or the second law of thermodynamics. Hence the need for the second aspect. 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 that society as a whole is responsible for diminishing the freedom of some. The inference from these assertions is that the enhancement of freedom requires the coercive adjustment of social and economic relations. These adjustments are necessary infringements of some freedoms (such as the freedom to hold property and the freedom of contract). They are necessary in order to increase the overall level of freedom in society. It is a supposedly freedom-based argument against freedom. This argument and its variants resonated widely particularly among the less

endowed sections of society. Yet, wherever the argument succeeded, people got poorer. The proposition was falsified by the history of the twentieth century.

Redefinition of justice

Closely aligned to the revision of the concept of liberty was 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 a condition that was unjust, not merely unfortunate. 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 and from each according to his means'. Social democrats while subscribing to this ideal pursued it by piecemeal adjustments of economic relations aimed at moderating material inequalities. The goal of achieving just allocations acquired the term 'social justice'. Social justice created a major problem for the constitution of liberty.

Philosophers from antiquity have unsuccessfully sought the objective means of ascertaining the just material distribution. The principle: 'each according to need and from each according 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. Specific material conditions cannot be produced or maintained by general laws. Even if the law succeeded in equalising the wealth of all persons, such equality cannot be maintained except by continuous micro-adjustments 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 by inherently arbitrary impositions of authority in the particular case. It strikes at the heart of the constitution of liberty.

It needs to be emphasised that the ideal of social justice discussed here is not the same as social security. Social security may be provided by an income safety net, in the form minimum income 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 for all rather than a device for wealth redistribution. In fact most classical liberal thinkers see no harm but much merit in universal safety nets.

In the industrialised democracies, the first condition for constitutional government, the prevalence of the understanding of constitutionalism in the classical sense, within the community that is 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 corrections that the spontaneous order of civilisation has imposed on the constitutional systems of these countries and the heroic efforts of a minority of intellectuals like those present at this meeting.

An official constitution dedicated to constitutional government

The 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 can be construed to facilitate arbitrary rule or to restrain it.

The United States 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 power, 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 were intended to prevent, directly or indirectly, arbitrary government and to promote the rule of law in the classical sense. This 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 substantially blurred by legislative, executive and most importantly, judicial action. The rule against the delegation of excessive legislative power to the executive branch, though judicially recognised, is seldom enforced creating a rich source of arbitrary power for government. The Commerce Clause, meant to facilitate free trade among the states has, despite the 1995 *Lopez* ruling, become a general source of power not only to regulate 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 American 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 generally to regulate the labour market, tolerated gerrymander at State level, and weakened the federal structure through expansive interpretation of Commonwealth powers. (Cooray and Ratnapala 1986; Ratnapala 2002).

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 United Kingdom’s constitution is traditional and the limits of parliament’s power are never 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 is because the courts since the removal of Chief Justice Coke has never claimed the power to invalidate an Act of parliament although they often dilute the effect of oppressive Acts through interpretation. New Zealand has a Constitution Act that may be changed by a simple majority of its parliament. In many other countries, the constitution may be changed by the legislature by a special majority, the most common being the two-thirds majority. In Malaysia, Singapore and Zimbabwe, governments have enjoyed two-thirds majorities, and hence, the capacity to change the constitution 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 the constitution to extend their own hold on power. In contrast, in Britain and New Zealand, where parliaments have much greater constituent power, attempts of governments 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 partially offset by the heroic efforts of the courts in these countries to enforce 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.

It is not suggested 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, these countries are closer than most to the ideal of constitutionalism. We need to guard against over-pessimism. The basic structures of the constitutions of these nations have proved much too robust for radical change and they have enabled corrections to occur. Recent decisions of the Fifth and Eleventh 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, as further discussed presently, has much to do with the strength of their institutional underpinnings.

Institutional matrix of constitutional government

A constitution exists, in the final analysis, in the experience of the people. The most well 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 provide guidance to official action and hence are important determinants of the living constitution. However, the extent to which officials are in fact guided by constitutional norms depends on many more constraints and conditions than the

psychological effects that constitutional texts provide. Hence the lawyer's sole preoccupation with the constitutional law of the books is seriously misconceived and dangerous to constitutional government.

The concept of the institution has been likened to the constraints that make up the rules of the game as opposed to those who play the game. (North, 1990: 3) Institutions are distinguished from organisations that belong with the players. The term institutions is elastic enough to include constraints of all kinds that influence human behaviour 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 towards fellow beings.

There are, of course, more constraints upon political actors than those imposed by institutions in this sense. There are non-normative physical constraints of various kinds. Strong central government is more feasible in city-states like Singapore than in large states like the United States. Afghanistan is thought by some to be ungovernable from Kabul because of its terrain and 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 organisations and organisational alliances also provide powerful determinants of constitutional governments. These include a vocal and independent press, trade unions and 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 mobilise opinion and provided avenues of action. They are made possible by favourable institutions and in turn 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 the norms 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, is critically dependent 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 that has not received sufficient attention from lawyers and economists is that which arises from what Fukuyama describes as the Great Disruption. A majority of constitutional theorists of classical liberal disposition, including this writer, 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 neo-classical theory to connect what happens in households, class rooms, boardrooms, factory floors and street corners with constitutional government. But the connections are both real and substantial. Lawyers tend to think only in terms of norms that are enforceable in courts of law and so 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 generally, such as academics, judges, legislators and responsible public servants,

show greater appreciation of what it takes to realise the rule of law. Likewise, economists who limit themselves to what is quantifiable and 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'. (Bauer, 2000:20)

The interconnections of family break ups, single parent upbringing, drug abuse, street crime, truancy, falling life skills, decline in trust, rising 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 mono-causal explanations for why it is all happening. However, the coincidence of the rising statistics in these areas (Fukuyama, 2000: Chapter 2, Appendix) raises a very strong inference that they are parts of a broader phenomenon that swept the industrialised democracies in the second half of the twentieth century.

How does social disorder affect constitutional government? It does so in a number of different ways some more obvious than others. Crimes and civil wrongs against person and property and the dishonour of contracts, by definition, are inconsistent with the rule of law but are inevitable in societies of imperfect souls. Law governed societies cope with these problems through law enforcement resulting in punishment or reparation. However, in endemic proportions, they seriously threaten the existence of the rule of law, since legal systems are not designed and indeed cannot be designed to cope with widespread lawlessness. When offences are committed against person or property, the injury is apparent and the victim usually known. There is a category of delinquency that seem to be regarded as victimless or at

any rate not blameworthy in the sense of causing harm to others. This category includes drug abuse, abandoning families, and calculated welfare dependence. These delinquents are often thought of as victims rather than wrongdoers. The borderline between preventable and non-preventable dysfunctionality will be difficult to draw in some cases, but palpable in many others. The cost of this kind of delinquency is passed on by the welfare state to people who play by the rules. The property rights of the rule followers are thus subjected to vitiation by the arbitrary behaviour of others, 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 herein.

More importantly, social disorder is also disorder of the matrix of rules that support 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, most of the time, observe the rules of the social order, including important unwritten ones. It is not possible to destabilise some rules without affecting others in the system. As rules become frayed through non-observance, 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 off the public parks, abandon entire neighbourhoods (which then become more lawless), increase insurance cover and begin defensively stereotyping people. As standards fall, corruption spreads to government. The economic cost of this disorder is incalculable and as discussed in the next section, 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. Crime, divorce and illegitimacy rates seem to have slowed in the 1990s (Fukuyama, 2000: 271) and certainly it is noticeable that the importance of personal responsibility is now firmly in the arena of public debate, with increasing number of 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 populations that found themselves in the path of European colonisation and settlement, including dispossession, large scale extermination, loss of children through forced adoption, destruction of traditional habitats, cultural dislocation, discrimination and alienation from mainstream society. It appears that the rule of law has simply passed them by. The community leads the nation in every statistic on social disorder, including crime, family break up, single parenting, and drug abuse. There are, by the admission of aboriginal leaders themselves, huge problems of domestic violence against women and children. 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 at 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 rose above the

traditional chorus of blame and claim. Indigenous leaders like Noel Pearson, a hero of the left in the 1990s, asked their communities to look within themselves to identify their problems and to find their own solutions. Nothing can erase the past injustices inflicted on this people, but 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 oneself and one's family and respect for others' rights. They realise that the guilt ridden white governments cannot help them with their endless patronage. Their message is that indigenous people need to rebuild their own institutions and re-establish 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, 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 left argument is that social disorder is caused by poverty, or alternatively, income disparity. The obvious problem with this line of reasoning is that it disregards the causes of poverty and hence overlooks the problem of two-way causation. Others have pointed to causes such as lessening inter-dependence of individuals in consequence of growing wealth and welfare safety nets (Yankelovich, 1994) and the perverse incentives and moral hazard created by the welfare

state itself (Becker, 1981; Murray, 1984). Whatever may be the causes, the problem for liberal constitutionalism is that of repairing its institutional foundations without violating its own principles. I will return to this question in the concluding part of this essay.

Economic conditions and constitutional government

Whichever way we look at constitutional government, it is apparent that economic conditions form a major factor in its success. It is the emergence of the market economy that converts society from one where the benefits of the law are extended only to members of one's tribe or group to one where 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 really 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 strengthens such rules. Where markets shrink, for whatever cause, it is to be expected that the strength and reach of abstract law will weaken as exchange among strangers lessen and trust diminishes.

However, poverty by itself does not destroy the rule of law but only limits its strength and reach. 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 non-compliance. 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 hardest facts to establish in law is the level of a person's wealth and hence also income.) In contrast, a society where one's general well-being or survival in

catastrophic circumstances depends on the goodwill of others, there are powerful incentives for observing the rules of the game. The problem for the rule of law occurs when the state takes over as provider displacing markets with regulations and entitlements.

Let me illustrate the problem with an extreme example from the political history of Sri Lanka, a country I know well. Ceylon, as it was then known, gained independence in 1948 as a constitutional monarchy under a constitution that established a Westminster type parliamentary democracy that guaranteed 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 as a model of constitutional government, the living proof of the cross-cultural validity of the rule of law ideal. The country's constitutional decline began in 1956, with the election of its first socialist government. It introduced racially discriminatory laws and administrative practices to fulfil pledges to its electorate support base among the Sinhala peasantry and petit bourgeoisie. The 1972 Constitution authored by a leading Marxist lawyer dismantled many of the checks and balances in the name of the sovereignty of the people. The return of the right of centre in 1977 saw some reinstatement of constitutional checks, but the rot had well and truly set in and the rule of law situation in some respects worsened during its 16 years in office.

While the tampering with the constitution was a factor in the decline in constitutional government, it was in my view not the major cause. Even the 1972 constitution had more safeguards than the United Kingdom and New Zealand and many other functioning democracies enjoy. The institutional matrix of constitutional government in Sri Lanka, was destroyed by a catastrophic economic decline resulting from the conversion of the country's market economy to a socialist type command economy. Nationalisation of all key sectors of

the economy including the entire public transport system, banks, insurance industry, wholesale trade, and most damaging of all the backbone of the economy, the plantation industry 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 shares. Essential goods became scarcer and dearer and queues stretched longer. The Tamil youth copped it worst. Not only did private sector jobs dry up, they were also squeezed out of the public service through language policy. It is not hard 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 harder to rebuild them, as Sri Lanka has painfully learnt. The rebuilding process begun in the nineteen eighties have been dealt savage blows by the civil war and terrorism. At least there are signs that a national leadership is emerging that understands markets and their foundation in the rule of law and progress has been made towards peace and institutional rebuilding. They need all the encouragement and support to become again a living example of the resilience and power of liberalism.

REBUILDING CONSTITUTIONAL GOVERNMENT

Constitutional government has reasserted itself in strongly in some parts of the world while in others it continues to struggle against tremendous odds. 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 in terms of the percentage of GDP has not 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 and many other members of this Society. Importantly, Hayek and others broke up the intellectual consensus supporting the interventionist state, and provided the key economic arguments for the limited and law governed state. There is also a certain inevitability about these corrections that is explained by the positive analysis of social systems by Hayek, Fukuyama and other evolutionist thinkers.

As Hayek, and before him 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 area of basic goods and services that the state sought to monopolise. The economy did not behave in the manner planned and decreed, nor did the people as it turned out. Most importantly, information from the outside continued to be absorbed by the social system despite the state's best attempts to insulate it. The Stalinist state was undergoing endogenous re-ordering long before its dramatic final collapse. It was just that western intellectuals and media failed to notice it.

The corrections in the western democracies were less dramatic but as interesting. The welfare state produced the admirable outcomes of decolonisation and world trade liberalisation but could not cope with the resulting exposure to international competition from non-welfare states and from welfare states that shed its more intrusive and costly features. Countries that

built short-term prosperity behind walls of protection found themselves at serious disadvantage in competing for markets and investment. In the face of this feedback challenges, the stakes began to change in the electoral game. As the unsustainability of the over-regulated state became evident, politicians began to find votes in structural reform. The same democratic systems that produced the welfare state produced President Reagan and 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 Labor 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 this is precisely what happened. The lesson of all this is that in a dynamic spontaneous order we cannot foresee less control the outcome of our designs. While we can provide design inputs, the environment will select what is preserved and in what shape and form they are preserved.

The fact that societies are self-ordering systems does not mean at all that we should stand and watch its spontaneous readjustments. Waiting for society to self-correct is not an 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 in this essay. Firstly, the intellectual struggle over the meaning of the rule of law must be continued at all levels with a view to restoring the ascendancy of its classical understanding as the supremacy of general laws over public and private power. Secondly, the classical understanding of the rule of law needs to inform constitutional interpretation, legislative activity and public administration so that the official constitution is more aligned with the classical ideal. In this respect, lawyers have important roles to play, as advisers, advocates, legislative draftsmen, legislators, tribunal members and judges. Thirdly there is the need to address the problem of social disorder in ways that are consistent with the rule of law. This problem has to be addressed both legally and economically. It requires restoration of the integrity of the law in areas where it has been whittled away so that responsibility for personal conduct whether it be with respect to contracts, due diligence towards others or family relations, remains with the person and is not spread around the community. 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. It requires the progressive elimination of arbitrary powers over the economy accumulated over 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.

The phenomenon of globalisation has come to the aid of constitutional government in exposing constitutional systems to competition. The greatest payoff from globalisation, perhaps, is in 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 is not only an unqualified good in itself but is a necessary development for the long-term security of constitutional government in the developed parts of the world. Peter Bauer argued for decades 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 would enable internal trade to occur, namely constitutional government in the sense herein discussed are indispensable to address this problem. Finally, Bauer's vision is turning to reality as countries become inexorably exposed to the global marketplace and local elites as well as international agencies begin to understand what it takes to be a player in this market.

Yet, we need to ask whether globalisation poses its own threats 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 practicalities of cross-border law enforcement. To what extent is this a problem for the rule of law? Merchants for centuries have managed their own disputes with minimal assistance from state apparatuses. They did so through their own arbitrators who applied their own *lex mercatoria*. Their common interests in maintaining on-going trading relationships and their membership in a close knit trading community allowed this informal system to operate. In the ages past, there were few transnational consumer transactions as distinguished from merchant to merchant dealings. 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 policy makers for international consumer protection laws modeled on domestic versions. These may or may no eventuate and if they do, may have little impact. The optimistic view is that informal market

driven institutional mechanisms will grow to take care of such problems. These 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 think that similar patterns to trader-consumer relations will not occur in transnational trade.

There is also a fear in some circles that globalisation leads to increasing power of multinational corporations who may engage in unlawful activity with impunity by their capacity to relocate business. The argument is that governments may become beholden to mobile capital to the point of sacrificing the public interest and indeed the rule of law. These fears in the final analysis are fears about institutional failure. Capitalists are no angels and we do not expect them to behave like angels. Successful constitutions are based upon 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'. (Hume, 1964: I, 117-118) And, as the recent Asian financial crisis showed there is no substitute for stable, transparent and open institutions 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 non-interventionist tool at their disposal is trade. This essay has argued that constitutional government needs to be grounded in a supporting institutional substratum and that favorable institutions are promoted by positive economic conditions. The gradual emergence of constitutionalism in countries that have built prosperity based on markets (most notably the so-called 'Asian Tigers') offers 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 these barriers could 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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