Do Constitutions Constrain?

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THE QUESTION BEFORE US IS "DO CONSTITUTIONS CONSTRAIN?". MY ANSWER COMES IN TWO PARTS: (1) IT IS OBVIOUS THAT AT TIMES THEY DO NOT. (2) IT IS VERY HARD TO TELL WHEN THEY DO.

I DO NOT KNOW WHETHER THE QUESTION HAD AN IMMEDIATE POLITICAL INSPIRATION, BUT IT IS APPARENT THAT THE BUSH ADMINISTRATION IS DOING THINGS THAT, REGARDLESS OF WHAT THE COURTS SAY NOW, WOULD HAVE BEEN WIDELY REGARDED AS UNCONSTITUTIONAL BEFORE SEPTEMBER 11.

IN GENERAL, CONSTITUTIONS ARE DOCUMENTS WRITTEN UNDER SOME HISTORICAL CONDITIONS TO REGULATE ACTIONS OF
GOVERNMENTS UNDER FUTURE CONDITIONS. WHEN THE FUTURE DEPARTS TOO FAR FROM THE ANTICIPATIONS, CONSTITUTIONS EITHER BEND OR BREAK. BUT SINCE THIS WILL BE THE TOPIC THIS AFTERNOON, I WILL SAY NO MORE ABOUT CONDITIONS UNDER WHICH CONSTITUTIONS DO NOT CONSTRAIN.

I WILL FOCUS ON THE OTHER ASPECT OF THIS QUESTION: HOW TO TELL THAT THEY DO CONSTRAIN? LET ME RUSH TO ADMIT THAT OUR INTUITIONS TELL US THAT SOMETIMES THEY DO, THAT CONSTITUTIONS PREVENT GOVERNMENTS FROM DOING WHAT THEY WOULD HAVE OTHERWISE DONE OR INDUCE THEM TO DO WHAT THEY OTHERWISE WOULD NOT HAVE DONE. BUT HOW CAN WE KNOW WHAT GOVERNMENTS WOULD OR WOULD NOT HAVE DONE, IF NOT FOR THE CONSTITUTION? THE QUESTION ENTAILS COUNTERFACTUALS AND COUNTERFACTUALS, AS THE LOGICIAN QUINE ONCE REMARKED, ARE 'DUBIOUS DEVICES.'

AS YOU SEE, I FOUND A WAY TO EVADE THE QUESTION, BY TURNING IT INTO A METHODOLOGICAL ONE. BUT THIS IS AN ISSUE THAT HAS PRACTICAL, POLICY, CONSEQUENCES, ONE WHERE ACTIONS BASED ON UNFOUNDED BELIEFS MAY HAVE DISASTROUS RESULTS. PARTICULARLY NOW, WHEN THE US GOVERNMENT IS ENGAGED IN WHOLESALE INSTITUTIONAL ENGINEERING IN FAR AWAY LANDS, SKEPTICISM AND PRUDENCE ARE IN ORDER.

TO SHAKE SOMEWHAT YOUR FAITH IN INSTITUTIONS, IMAGINE THE TALK THAT YOU WOULD HAVE HEARD IF WE WERE CELEBRATING ONLY THE 225TH, RATHER THAN THE 250TH, BIRTHDAY OF THIS AUGUST UNIVERSITY, TWENTY FIVE YEARS AGO.

"INSTITUTIONS ARE EPITHENOMENAL," WE WOULD HAVE BEEN TOLD, THEY ARE A PHENOMENON THAT, IN A DICTIONARY (WEBSTER) DEFINITION, "OCCURS WITH AND SEEMS TO RESULT FROM ANOTHER." POLITICAL INSTITUTIONS CAN AT MOST ORGANIZE POWER THAT LIES ELSEWHERE: IN THE RELATIONS OF MILITARY FORCE, IN
THE ECONOMY, IN CONTROL OF MASS MEDIA. "ONE CANNOT STOP A COUP D'ETAT BY AN ARTICLE IN THE CONSTITUTION," ANY ARTICLE IN THE CONSTITUTION, GUILLERMO O'DONNELL ONCE REMARKED TO ME.

SUPPOSE WE ARE PLAYING BASKETBALL. THERE ARE TWO TEAMS, SOME PERFECTLY UNIVERSALISTIC RULES, AND AN IMPARTIAL REFEREE TO ADMINISTER THEM. BUT ONE TEAM CONSISTS OF PLAYERS OF WHO ARE SEVEN FEET TALL AND THE OTHER OF PEOPLE LIKE ME, FIVE FEET FOUR INCHES. THE OUTCOME OF THE GAME WILL BE PREDETERMINED: THE RULES OF THE GAME ARE UNIVERSALISTIC: THEY TREAT EVERYONE EQUALLY. BUT THIS ONLY MEANS THAT THE OUTCOME DEPENDS ON THE RESOURCES PEOPLE BRING TO IT, "BRUTE, PRE-INSTITUTIONAL POWER." IF THE RICH CAN BUY ELECTIONS, DEMOCRACY WILL SERVE THE RICH, YOU WOULD HAVE BEEN TOLD.

Established in a society that has some power relations and they must reflect the distribution of this power. Otherwise, they will not be respected; in the political science jargon, they will not be "self-enforcing."

But this is a speech you would have heard twenty five years ago. Let me now give a speech you hear over and over today. "Institutions matter," we are told today. The problem with Ecuador is that it does not have independent judiciary. Install independent judiciary, establish clear property rights, instigate the rule of law, create independent central banks, reduce regulation, and manna will fall from heaven. In the language of Washington consensus, this is the "third stage of reforms." The new passion of the US government and many intergovernmental organizations is institutional engineering. Everyone wants to condition aid on "good governance": either you do with your political institutions what we tell you to do or else you will get no assistance. Moneys given to countries with bad governance is wasted, the argument goes. Hence, countries should first reform their institutions and then they may get financial support for their development.
BUT SOMEWHERE IN THIS PAEAN TO INSTITUTIONS, YOU WILL STILL HEAR THAT INSTITUTIONS ARE ENDOGENOUS, MEANING THAT EACH INSTITUTIONAL ARRANGEMENT CAN FUNCTION ONLY UNDER SOME CONDITIONS. AND HERE LIES THE CRUX OF THE DIFFICULTY: IF DIFFERENT INSTITUTIONS ARE POSSIBLE ONLY UNDER DIFFERENT CONDITIONS, HOW CAN WE TELL WHETHER WHAT MATTERS ARE INSTITUTIONS OR THE CONDITIONS UNDER WHICH THEY FUNCTION? I AM ALWAYS SUSPICIOUS OF THE BOXES IN WHICH THE WORLD BANK OR THE UNDP HIGHLIGHT THE EXCEPTIONAL SUCCESSES OF THE POLICIES THEY ADVOCATE. I SUSPECT THAT THESE SUCCESSES WERE EXCEPTIONAL BECAUSE THE CIRCUMSTANCES WERE UNUSUAL: OTHERWISE WE WOULD SEE TABLES OR GRAPHS, NOT BOXES.

TO GIVE YOU THE FLAVOR OF WHAT IS INVOLVED, LET ME PLUNGE INTO SOME EXAMPLES. I WILL FOCUS ON ONE PARTICULAR INSTITUTION: CHOOSING THE GOVERNMENT BY ELECTIONS. THE QUESTION I WANT TO ANALYZE AS AN ILLUSTRATION OF THE GENERAL THEME IS "WHEN DO POLITICAL PARTIES OBEY THE RESULTS OF ELECTIONS?"

THE STORY GOES BACK TO HERODOTUS. IF ALL MEN ARE EQUALLY STRONG AND EQUALLY ARMED, HE THOUGHT, THEN THE READING OF VOTES TELLS EVERYONE WHAT WOULD HAPPEN IF THINGS
CAME TO BLOWS. A GROUP OF MEN GATHERED ON TOP OF THE HILL SHOUTS APPROVAL OF PARTICULAR CANDIDATES (OR POLICIES) AND EVERYONE CAN HEAR WHICH GROUP IS LARGER AND THEREFORE STRONGER. OR, IF YOU WISH, WE COUNT SECRET BALLOTS, CHADS AND ALL, AND ONE PARTY OBTAINS A MAJORITY OF VOTES. THE WINNERS MOVE INTO THE WHITE, PINK, OR BLUE HOUSE, PERHAPS EVEN A PALAIS, AND THE LOSERS GO HOME.

NOW, WHY DO THE LOSERS GO HOME? WHY DON’T THEY STORM THE PALACE? IS IT BECAUSE THE CONSTITUTION SAYS THAT WHOEVER OBTAINS THE MAJORITY SHOULD MOVE IN AND WHOEVER DOES NOT SHOULD GO HOME? OR IS IT BECAUSE THE LOSERS KNOW THAT THEY WOULD BE BEATEN HAD THEY TRIED TO MOVE IN? DOES THE CONSTITUTION CONSTRAIN THE LOSERS OR DO THEY ACCEPT THE VERDICT OF THE POLLS ONLY BECAUSE THEY ARE WEAKER?

CENTURIES LATER CONDORCET, WHILE INTERPRETING VOTING IN MODERN TIMES AS A READING OF REASON, OBSERVED THAT "WHEN THE PRACTICE OF SUBMITTING ALL INDIVIDUALS TO THE WILL OF THE GREATEST NUMBER INTRODUCED ITSELF INTO SOCIETIES AND WHEN PEOPLE ACCEPTED TO REGARD THE DECISION OF THE PLURALITY AS THE WILL OF ALL, THEY DID NOT ADOPT THIS METHOD AS MEANS TO AVOID ERRORS AND TO CON-
DUCT THEMSELVES ON THE BASIS OF DECISIONS BASED ON TRUTH, BUT THEY FOUND THAT, FOR THE GOOD OF PEACE AND GENERAL WELFARE, IT WAS NECESSARY TO PLACE AUTHORITY WHERE THE FORCE WAS."

BUT IS VOTING TODAY A READING OF REASON? MEN ARE NO LONGER EQUALLY ARMED; ARMS ARE CONTROLLED BY SPECIALIZED BUREAUCRACIES HENCE, VOTES NO LONGER PROVIDE A READING OF WHAT WOULD HAPPEN IF A VIOLENT CONFLICT WERE TO ERUPT. BUT THINK GENERICALLY WHAT HAPPENS IN ELECTIONS.

THERE ARE PARTIES, PEOPLE VOTE, SOMEONE IS DECLARED THE WINNER ACCORDING TO THE RULES, AND THE WINNER(S) AND THE LOSER(S) ARE INSTRUCTED WHAT TO DO AND NOT TO DO BY SOME OTHER RULES. THIS IS WHAT A CONSTITUTION IS: A BUNCH OF SUCH RULES.

THE WINNERS AND THE LOSERS ARE INSTRUCTED BY SUCH RULES. BUT THE LOSERS MAY STILL THINK THAT THEY WOULD SUCCEED IN STORMING THE PALACE. IN TURN, THE WINNERS MAY THINK THAT THEY COULD RESIDE IN IT FOREVER, WITHOUT SUBMITTING THEMSELVES TO THE RISKY VENTURE OF ELECTIONS. HENCE, OUR QUESTION STANDS: WHY DO THE WINNERS AND THE LOSERS BEHAVE IN A WAY THAT IS CONSISTENT WITH THE RULES? ARE THEY OBEYING THE RULES OR ARE THEY DOING WHAT THEY WOULD
HAVE DONE EVEN IF THERE WERE NO SUCH RULES?

LET ME BRING IN A PIECE OF HISTORICAL INFORMATION. IN RICH COUNTRIES, BOTH THE WINNERS AND THE LOSERS ALWAYS OBEY THE RESULTS OF ELECTIONS. NO DEMOCRACY EVER FELL IN A COUNTRY WITH A PER CAPITA INCOME HIGHER THAN THAT OF ARGENTINA IN 1975. THIS IS A STARTLING FACT, GIVEN THAT THIRTY-FIVE DEMOCRACIES SPENT MORE THAN 1000 YEARS UNDER MORE AFFLUENT CONDITIONS AND NOT ONE DIED. THEY SURVIVED WARS, RIOTS, SCANDALS, ECONOMIC AND GOVERNMENTAL CRISES, HELL OR HIGH WATER. YET AT THE SAME TIME ABOUT SEVENTY DEMOCRACIES COLLAPSED IN POORER COUNTRIES. MOREOVER, THE POORER THE COUNTRY, THE LESS LIKELY IT IS THAT THE LOSERS OR THE WINNER WOULD RESPECT THE RESULTS OF ELECTIONS.

HERE ARE SOME STORIES. THERE WAS AN ELECTION IN COSTA RICA IN 1948, WHEN THAT COUNTRY HAD PER CAPITA INCOME OF ABOUT $1,500. THE ELECTION WAS TECHNICALLY TIED: THE TWO CANDIDATES RECEIVED ALMOST THE SAME NUMBER OF VOTES AND THERE WERE WIDESPREAD ALLEGATIONS OF FRAUD, SO THAT IT WAS IMPOSSIBLE TO DETERMINE WHO IN FACT DID WIN. IT WAS NOT CLEAR WHO SHOULD DECIDE, BUT THE CONGRESS TOOK IT UPON ITSELF TO DECLARE AS THE WINNER THE CANDIDATE WHO
OFFICIALLY RECEIVED SOMEWHAT FEWER VOTES. A CIVIL WAR ENSUED, ABOUT 3000 PEOPLE WERE KILLED, AND THE FORCES OPPOSED TO THE DECLARED WINNER PREVAILED.

AT ANOTHER TIME, THERE WAS AN ELECTION IN ANOTHER COUNTRY. THE ELECTION WAS TECHNICALLY TIED: THE TWO CANDIDATES RECEIVED ALMOST THE SAME NUMBER OF VOTES AND THERE WERE WIDESPREAD ALLEGATIONS OF FRAUD, SO THAT IT WAS IMPOSSIBLE TO DETERMINE WHO IN FACT DID WIN. IT WAS NOT CLEAR WHO SHOULD DECIDE, A COURT APPOINTED IN PART BY ONE OF THE CANDIDATES FATHER TOOK IT UPON ITSELF TO DECLARE AS THE WINNER THE CANDIDATE WHO OFFICIALLY RECEIVED SOMEWHAT FEWER VOTES. THEN EVERYONE WENT HOME IN THEIR SUV'S TO CULTIVATE THEIR GARDENS. THEY HAD SUV'S AND GARDENS BECAUSE THIS COUNTRY HAD PER CAPITA INCOME OF ABOUT $20,000.

WHATEVER THE REASON FOR COMPLIANCE, THESE FACTS TELL US IS THAT POLITICAL PARTIES OBEY IF THE COUNTRY IS RICH WHILE THEY MAY OR MAY NOT IF IT IS POOR. NOTE THAT THE INSTITUTIONS, AT LEAST AT SOME LEVEL OF ABSTRACTION, WAS THE SAME IN THE TWO COUNTRIES: THERE WERE ELECTIONS, WINNERS WERE SUPPOSED TO BE THOSE WHO WON A MAJORITY OF VOTES, THERE WAS A CONGRESS AND A COURT EITHER OF WHICH
COULD HAVE PICKED THE WINNER IN CASE OF A DRAW. WHAT WAS DIFFERENT WERE THE CONDITIONS: $1,500 IN ONE COUNTRY, $20,000 IN THE OTHER. I AM LED TO CONCLUDE, THEREFORE, THAT WHAT MATTERED WERE THE CONDITIONS, NOT THE INSTITUTIONS.

IF A COUNTRY IS WEALTHIER THAN ARGENTINA WAS IN 1975, ALL KINDS OF CONSTITUTIONS WILL BE OB EyED; IF IT IS POORER THEY MAY OR MAY NOT BE. WHETHER THE SYSTEM IS PRESIDENTIAL OR PARLIAMENTARY, FEDERAL OR UNITARY, UNI- OR BI-CAMERAL, WITH PROPORTIONAL REPRESENTATION OR FIRST-PAST-THE-POST, IN WEALTHY COUNTRIES WINNERS AND LOSERS BEHAVE AS IF THEY WERE OB eyING THEIR INSTRUCTIONS. AND IF WE OBSERVE THAT PEOPLE BEHAVE IN WAYS CONSISTENT WITH THE INSTRUCTIONS INHERENT IN THE CONSTITUTION, WE JUST CANNOT TELL WHETHER THEY ARE DOING IT BECAUSE THEY ARE OB eyING THE RULES OR BECAUSE THEY WOULD BE DOING IT WHATEVER THE RULES. WE HAVE ONLY ONE OBSERVATIONS AND TWO RIVAL STORIES TO EXPLAIN IT.

BUT, AS I ANNOUNCED, I DO NOT WANT TO ARGUE THAT CONSTITUTIONS DO NOT MATTER: ONLY THAT SOMETIMES IT IS HARD TO TELL WHETHER THEY DO. SO LET ME FOCUS ON THE POORER COUNTRIES, WHERE POLITICAL PARTIES SOMETIMES OB ey THE RESULTS OF ELECTIONS AND AT TIMES DO NOT. BY FOCUSING ON
THESE SITUATIONS I HOPE TO HIGHLIGHT WHAT I THINK IS THE ESSENTIAL ROLE OF DEMOCRATIC INSTITUTIONS.

SUPPOSE A PARTY LOST AN ELECTION AND IT NOW CONTEMPLATES WHETHER TO OBEY THE VERDICT OF THE POLLS OR TO STORM THE PALACE. SUPPOSE FURTHER THAT THE LOSER SEES ALMOST NO CHANCE OF WINNING IN THE FUTURE. UNDER DEMOCRACY, THE LOSERS ARE CONDEMNED FOR EVER TO REMAIN LOSERS, WHATEVER THIS DESIGNATION ENTAILS. THEN THEY MAY BE TEMPTED TO SAY "IF WE CAN NEVER WIN UNDER THESE RULES, THESE RULES ARE BAD, AND WE WILL NOT OBEY THEM." IN TURN, SUPPOSE THAT THE LOSERS THINK THAT EVEN THOUGH THEY LOST THIS TIME, THEY ARE QUITE LIKELY TO WIN THE NEXT TIME AROUND. THEN THEY WILL CONCLUDE THAT EVEN IF THEY HAVE TO WAIT FOR A FEW YEARS, FIGHTING, WITH ALL ITS RISKS, IS NOT WORTH IT, AND THAT WAIT THEY SHOULD. THIS IS WHAT DEMOCRACY CAN DO: IT CAN ENABLE THE LOSERS TO WAIT, OPEN AN INTERTEMPORAL PERSPECTIVE TO POLITICAL CONFLICTS.

IT IS NOT VOTING, OR PARTICIPATING OTHERWISE, THAT MATTERS BUT THE SHEER POSSIBILITY THAT YOU MAY BE AMONG THE WINNERS NEXT TIME AROUND. TO STRESS THE POINT, LET ME DRAW A CARICATURE. SUPPOSE THAT INSTEAD OF VOTING WE WOULD DECIDE WHO WILL GOVERN BY FLIPPING A, NOT NECES-
SARILY FAIR, COIN. THIS IS ENOUGH. NOTE THAT WHEN WE FLIP COINS WE SEVER THE RELATION OF ACCOUNTABILITY BETWEEN GOVERNMENTS AND VOTERS: WHETHER THE INCUMBENTS GET REELECTED DOES NOT DEPEND ON THEIR PERFORMANCE. YET THE VERY PROSPECT OF ALTERNATION IN OFFICE MAY BE SUFFICIENT TO INDUCE THE CURRENT LOSERS TO WAIT FOR THEIR TURN.

NOW, YOU MAY SAY THAT THE CHANCES OF WINNING DEPEND ON CONDITIONS, SAY ON THE STRUCTURE OF ETHNIC CLEAVAGES. AN ETHNIC MINORITY, AS J.S. MILL OBSERVED, WILL ALWAYS HAVE A LOW CHANCE TO WIN UNDER THE MAJORITY RULE. HENCE, AGAIN, IN THE END IT IS CONDITIONS RATHER THAN INSTITUTIONS THAT MATTER. **AND YOU WOULD BE RIGHT**: DEMOCRACY IS LESS LIKELY TO SURVIVE IN POORER SOCIETIES IF THEY ARE ETHNICALLY DIVIDED. BUT WE CAN TWEAK THE ELECTORAL SYSTEM IN SUCH A WAY AS TO MAKE ETHNIC MINORITIES TO BE ON THE WINNING SIDE FROM TIME TO TIME. LANI GUENIER TELLS A STORY IN WHICH HER YOUNG SON REPORTED THAT THREE KIDS ON THE PLAYGROUND WANTED TO PLAY BASEBALL WHILE TWO WANTED TO PLAY BASKETBALL. "SO YOU PLAYED BASEBALL?" SHE SURMISED. "NO, FIRST WE PLAYED BASEBALL AND THEN BASKETBALL," HER SON REPLIED.
WHEN PEOPLE BEHAVE ACCORDING TO RULES, THEY BEHAVE ACCORDING TO PARTICULAR RULES. IN SOME COUNTRIES THEY VOTE FOR ONE CANDIDATE, IN ANOTHER COUNTRY THEY MAY VOTE FOR FIVE. IT WOULD MAKE NO SENSE TO VOTE FOR FIVE CANDIDATES IN A SINGLE-MEMBER DISTRICT: THE PHYSICAL ACT OF PUTTING AN X NEXT TO THE NAMES OF FIVE CANDIDATES IN A SINGLE-MEMBER DISTRICT COULD NOT BE INTERPRETED AS A VOTE. THIS IS WHAT SEARLE CALLED "CONSTITUTIVE RULES," RULES THAT MAKE OUR ACTS INTERPRETABLE IN TERMS OF OUR COMMON UNDERSTANDING.

NOW IT MAY BE THAT AN ETHNIC MINORITY WOULD OBEY IF IT HAS A CHANCE TO VOTE FOR MULTIPLE CANDIDATES, UNDER A PROPORTIONAL SYSTEM, BUT IT WOULD NOT OBEY IF IT COULD VOTE ONLY FOR ONE, FIRST-PAST-THE-POST. THIS IS AT LEAST WHAT SOME POLITICAL SCIENTISTS THINK. THE POINT IS THAT IF, BUT ONLY IF, WE CAN HAVE DIFFERENT INSTITUTIONS UNDER CETERIS PARIBUS CONDITIONS, INSTITUTIONS CAN POSSIBLY MATTER.

SINCE I AM AFRAID THAT YOU MAY THINK THAT I AM SPLITTING HAIRS, LET ME CONCLUDE. THIRTY YEARS AGO, A BRITISH PHILOSOPHER, ALASDAIR MACINTYRE, PUBLISHED AN ESSAY ENTITLED "IS THE SCIENCE OF COMPARATIVE POLITICS POSSIBLE?"
A question to which, for some of the reasons I outlined today, he responded with a resounding "no". I must admit that when I read it the first time, I treated this essay as yet another obscurantist salvo. But in the past few years, I was invited by some intergovernmental organizations and some NGO's to assist them in their efforts at institutional engineering. And as I read about the impact of political institutions, I was struck by how little robust, reliable knowledge we have. I was forced to ask MacIntyre's question: Is it that we do not know yet, just because our knowledge is fragmentary and our methods imperfect, or is it because some answers are unknowable: unknowable because it is impossible to sort out the impact of institutions from the impact of the conditions under which we observe them. My answer is hesitant: I am willing to believe that where history was kind enough to have generated different institutions under the same conditions we will know more and know better. But history may deviously generate different institutions under different conditions and this would make our task next to impossible.

Hence, to go back to where we began, we need to be skeptical about our belief in the power of institutions
AND WE NEED TO BE PRUDENT IN OUR ACTIONS. PROJECTS OF INSTITUTIONAL REFORM MUST TAKE AS THEIR POINT OF DEPARTURE THE ACTUAL CONDITIONS, NOT BLUEPRINTS BASED ON INSTITUTIONS THAT HAVE BEEN SUCCESSFUL ELSEWHERE. AS A FORMER BRAZILIAN MINISTER OF STATE REFORM, LUIZ CARLOS BRESSER PEREIRA, REMARKED “INSTITUTIONS CAN BE AT MOST IMPORTED, NEVER EXPORTED.”