Constitutions, Democracy, and the Rule of Law

Do Constitutions Constrain?
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Balancing Hard and Soft Constraints

Michel Rocard: Mr. President, Mr. Moderator, ladies and gentlemen, dear friends: I have not completely explored the difficult question to know why on such theoretical and legal difficult question the board of Columbia University has had the strange idea to call a politician to speak about. Politicians are supposed to be superficial, and I had a second surprise, which was this strange question, because in a way at first sight it is a strange question. Any constitution will be evidently useless if it did not constrain seriously, under the threat of sanctions, at least the ways and means in which access to power is gained, and the limits of the authority of the principle power holder. Any violation of such provisions is usually called a coup d'état and as such is considered evil, so far at least. And when possible, punished. This is supposed to correspond to the definition of constraint.

My worry does not arise from this point, as you know and as Jon Elster just said, I have had to govern my country, and I perceived our constitution as highly constraining for all of our sakes. The constitution did constrain me, but partly for my own protection, too, as it protects our friend, the mayor of Bogotá. My worry arises from the fact that a body as serious as Columbia University, in spite of this evidence, considers such a question as open and deserving answer. Evidently there must be more to this question than meets the eye.

The preoccupation probably comes from current fashion. In the present state of world governance, and in spite of our growing difficulties concerning civil violence, criminality, delinquency, the concept of legal constraint has lost a large part of its respectability. These new paradigms most likely come from the field of economic theory. I propose to you this hypothesis. Market decisions, which contribute to the economic optimum, are more appropriate when they are so spontaneous than when they consist in obedience to orders, naturally. It is this
kind of reflection which has underlined the distinction between hard power and soft power.

I suspect, Mr. Elster, that the authors of the question, "Do constitutions constrain?" are looking less for a yes or no answer than for an exploration of the conditions in which the various elements of all constitutions produce a certain degree of constraint. What kind of constraint? What are the limits of that constraint? What is the balance between hard and soft constraint?

The most significant part of the answer comes from the nature of constitutions themselves, but another part of the answer comes from the nature of what we call constraint, and the rest of the subject has to be studied in the light of questions coming from outside the legal order. Can we really dream of a social system without constraint? Can the market, which is the real competitor to constitutions as a basis for social order, fulfill this role? Is this global philosophical process toward the limitation or the elimination of constraint in our collective life in accordance with the contemporary evolution of humanity?

The Nature of Constitutions

Concerning the nature of constitutions, I must begin by reminding you of a well-known pleonasm: a constitution is democratic by definition, and there is neither use nor meaning in joining the two words. The need for a constitution arises as soon as a source of power is no longer God, but the people. God's appointee has no separate, no specific, rule to follow. But the people need to formalize its social contract and to define the rules and procedure that regulate the society and the power system in it. While any dictatorship or power system based on force may decorate its internal regulations with a beautiful name of constitution, this doesn't change the substance of the situation. As we say in French, the habit doesn't make the monk. The name is not sufficient to transform police regulations into a constitution.

May I recall here Article 16 of the French Declaration des Droits de l'Homme et du Citoyen: "toute société dans laquelle la garantie des droits n'est pas assurée ni la séparation de pouvoirs determinée n'a point de constitution." [Any society in which the rights are not guaranteed, and the separation of power is not ensured, has no constitution.]

This being clear, it is clear as well that the nature and the degree of constraint inherent to a constitution varies according to its different elements.

One, when an element sometimes is taking the form of preamble, defines the values or principles which a given human community consider its own, and as the basis of its social life. Apparently, so far as I know, there is no innate constitution court specifically in charge of enforcing such values. But such constitutional provisions, even in preambles, are everywhere in democracies
references for the judicial institutions and the courts, arguments for the judgments. This produces undoubtedly some sort of an indirect soft constraint.

The second section in most constitutions describes the rights that the people should enjoy. Here the meaning of the constraint is much stronger. It absolutely forbids the executive authorities to limit or to violate these rights. And on this point, any court-competent constitutional matters would vigorously punish any violation in this field of the rights.

The third section of the constitutional substance, this describes frequently with great precision the procedures that have to be followed in the competition for access to power. It is particularly in this creed that any violation is considered a coup d'état and that the competence of the specialized constitution court, if there is one, or of the highest court of justice in the other case, is clearly defined. It is only in the case of ambiguities or uncertainties in the constitution writing, in the constitutional text that the executive authorities find some margin of choice, and the court may then accept to give advice. We have then left hard constraint toward soft constraint.

The fourth section of a constitution generally describes the distribution of power, for instance, between the executive and the legislative branches, or between the chief of state and his government. According to the nature of what is power, and what are political competences, such a description cannot be rigid and may not even be very precise. Provisions have to be respected, under the risk of political conflicts, which opens up competence for the courts. But frequently, and we shall see that further, modifications of these arrangements between blocks of power will result from political negotiations, and express the changing balance of influences between forces, between persons in the legislative as well as in the executive body. If constraint then is here, it is evidently of the soft kind.

The Legitimacy of Constitutions

This inventory of the calls for constraint that comes out of the different types of constitutional provisions has to be completed by two other considerations, each of these being capable to modify largely, very largely, the weight and the significance of the constraint involved as I analyze their sources.

The first is roughly the legitimacy of constitutions. Largely influenced by their age, by the conditions—consensual or conflictual of their adoption, by the spirit which has presided over the writing—they can be rigid or flexible, long or short, mostly limited to procedure or embracing most of the substance of social life. By the accidents of history with which they have been confronted, constitutions in fact do create around themselves a very variable climate of what I should call propensity to respect. Thinking about the United States, writing about his own country, Germany, with a great hope to see this country contribute to the development of a strong and powerful Europe, a great philosophical writer
Jurgen Habermas has defined the concept, you know, the concept of constitutional patriotism. In the case of the American Constitution, the oldest in the world today, unchanged for two centuries, its majesty is linked to the fact that it has greatly contributed to the making of the United States and its history. The respect for the Constitution has reached there probably deeper than in any other country. To tell you the truth, I am jealous. It is not only an affair of time and history. The substance of the Constitution counts for much in the respect it deserves.

Brazil, after its period of military dictatorship, spent an enormous and admirable quantity of brains and of subtlety in organizing the transition from military power toward civil power. This process being military or civilian, every political group, every institution involved in the process wanted its own guarantees in terms of political orientations as well as in terms of procedure. The result has been a constitution with several hundred articles. My friend President Ferdinando Henrique Cardoso in his eight years of mandate could enforce practically no significant reform touching either public services or taxation or local authorities without modifying the constitution. This constitution appeared therefore as an obstacle to any form of political progress and in no way the democratic monument it should be, as it has been, during its first two or three years of existence. It is clear that in these conditions, the constitution of Brazil has not generated respect and that the idea of changing it may appear evident to anyone, all this diminishing largely the force of any reluctance to violate it.

**Constitutional Courts**

Apart from this variable degree of legitimacy, another substantial difference and a more concrete one may characterize the constitutions. It is existence or nonexistence and the nature of a constitutional court.

In some cases there is no such institution. Great Britain is the best example there, you all know that. The French Third Republic approaches this solution, since Article 9 of the law of 24 of February, 1875, concerning the organization of the senate states, I quote, "The senate may be transformed into court of justice, in order to judge the president of the republic or the ministers, and to deliberate about attacks against the security of the state." End of quotation. The consequences are simple: it is only inside the political institutions that an explicit violation of constitution provisions can be sanctioned. Practically, it implies that parliament is the only authority capable of punishing an executive authority, head of state, prime minister, or minister in the case of a constitutionally improper behavior. The German Weimar Republic had a constitution of the same kind, giving more or less explicitly to political authorities the mandate to judge their peers.

In all those cases, the dominant interpretation will be that legal criteria are of a very weak importance and that any procedure against an executive authority will
resolve in a political conflicts and be treated in terms of balance of strength rather than in legal terms you had all understood. There was no legal recourse when Chancellor Adolph Hitler, legally appointed—*legally appointed*—began to violate the constitution; nor in France, again, the parliamentary act that transferred in 1940 all powers to Marshall Pétain. It is no surprise to discover that military force belongs to the order of house constraint, and not to, nor to surmise that if Britain had not known any event of the kind for several centuries, it is more because of geographical—what a pleasure to be an island—or military reasons than because of the quality of her legal culture.

Most constitutions today include some provision concerning the constitutional judge. It can belong to two categories, either it is a specialized college limited to constitutional matters, or it is the major or highest court of the judicial institution which has received this capacity. The United States and many Latin American countries have chosen the second solution. France and Germany have chosen the first. I don't think it is possible, nor pertinent, to express here a preference for any of these solutions. Both methods respond to the need to have a practical, modest but efficient and current control on the legislative proposals. Both types of courts permit the prosaic and de-dramatized exercise of hard power, which after all is necessary, according to the importance of constitutional matters. One can say, maybe, that any supreme court uniting the functions of head of the judicial order and constitutional judge might gain in importance and dignity what it loses in excessive workloads, and in time to deal with the minor aspects of its constitutional duty.

On the contrary, a specialized organ ordinarily has time to deal with issues of secondary importance. Often, provisions of limited significance happen in certain historical situations to become the symbols of unacceptable rigidities or blockages, or, on the contrary, of terrible laxness. Thus, for instance, the French Conseil Constitutionnel has eroded some blocking temptations, and in this way undoubtedly made our constitutional life easier. On the contrary, it is absolutely obvious that enforcing legislation is unusually difficult in the United States, but it doesn't appear—to my eye, anyway—it doesn't appear that the Supreme Court is worried about this at all. A balance has to be found between the solemn Raman adage, "De minimis non curat praetor" [A magistrate does not deal with the details], and the popular answer, "The devil is in the details."

**The Physiology of Constitutions**

This gives us some overall vision of the anatomy of constitutions from the point of view of constraint. Let us now look at the physiology. How does all this work?

It is the nature of constraints, which is the key of the development, the key of the developments we can observe, and the main point to make is probably that hard constraint is only effective within an area of general consensus for the current life of constitutional activities. But on the whole, significant changes, those that really
alter the principle character of the constitution, do not occur generally thanks to the provision it includes concerning conflicts. On the one hand, no constitution has ever resisted force. We've seen it in the case of Germany in 1933 or in France in June 1940. It is clear for all the constitutions of the Eastern European countries in 1947–48, you will remember. It was clear too of most of the Latin American constitutions in the period of the epidemic of military dictatorships with a special mention for Chile thirty years ago, in 1973. On the other hand, what is essential for our subject is the discovery that the main changes in the way a constitution steers and canalizes the political life of a given country generally finds their origin in the field of soft constraint.

The American constitution has evidently, I may be a bit partial here, you tell me if you disagree, to my view, the American constitution has evidently been written in order to impeach, if possible, and anyway to limit the emergence of a strong central power at the federal level. President Bush most likely thanks God every day for the continuous changes his numerous predecessors have promoted in the system to make it more powerful than it was designed to be. This happened with anything, anything at all, which could be characterized as violation of any constitutional provision, the nature of which would have called for hard constraint to be implemented.

Europe is full of other examples: The Third Republic in France was extremely weakened and finally disappeared mostly because the executive branch lacked any means to bring pressure to bear on the legislature. But the constitutional laws included the right for the government to disown the assembly. And it is only the total absence of any consensus on the significance of the first use of that right in 1877, which made it impossible to use it again. The nonuse of a constitutional right, the use to, the right to dissolution, the nonuse of this right became an element of some constraint. In this matter, the absence of a constitution gives more rigidity to traditions and precedents because there is no procedure to modify them, thus in Britain the King's or the Queen's veto of legislation disappeared as soon as 1706. Thank God, what a happy parliament! And no one can imagine any way, system, or procedure to reintroduce it, naturally.

The Importance of Political Personalities

For the practical management of our countries, constitutions are not the only conditioning instruments. In fact, electoral laws and the number of political parties are parameters of equivalent importance, even though they have much weaker symbolic value. And this explains how and why there is room under the same constitutions for very different practices. This is even more true if we look at the importance of political personalities of great capacity.

Think one minute. Chancellor Konrad Adenauer was approaching 75 years of age when appointed to this function, roughly that of a prime minister. The Federal
Republic's constitution was a classical parliamentary one and still is. But Adenauer lived long enough to organize the absorption of quite a lot of small political parties into the Christian Democratic Union. Ladies and gentlemen, had Adenauer died much earlier, German political life would appear more like that of Belgium or France of the Fourth Republic than what it is.

The same observation can be made the other way around. Had de Gasperi—Alcide de Gasperi, great Italian—survived a long time instead of dying in 1954, I am sure that the Italian constitution would have evidently permitted a much more stable political life with long-living governments.

In 1951, a sniper shot at Charles de Gaulle and missed him by ten centimeters. Ballistic observers are sure. Had he succeeded, France would almost certainly have fallen again into the facilities and poisons of an assembly regime and paralyzed short-lived governments. We knew that, it's our national characteristic. Alas. Thank you for your smile.

The importance of tradition and precedents in the creation of what soft constraint protects later appears in many fields. Another example is as follows: The European Union before the coming enlargement unites 15 countries, 17 kingdoms, and 8 republics. All these republics are of the parliamentary type, with governments accountable to the assembly. We are supposed to be civilized. Among these republics, no fewer than five have presidents elected by universal suffrage. Constitutional texts do not differ much. These presidents are guarantors of national independence, of territorial integrity, and of the respect of international treaties.

Other constitutional statements appear modest. The president accredits ambassadors. It's in the French constitution; I suppose the same thing in the others. The president is commander and chief in the army, and I think this position is general, even if decorated. Then it is only the tradition. Without significant constitutional provision, it's only the tradition created by de Gaulle, which explains the enormous difference of the powers of the French president compared with those of his Austrian, Finnish, Irish, and Portuguese colleagues. But this difference is not protected by the soft power of tradition and would probably be defended by the constitutional counsel if another case comes. Sometimes coming from the past, constraint, sorry, something coming from the past constrains present and future, but is not only made of the written elements of our constitution. Furthermore, any British citizen could probably admit that it is much more difficult to introduce change in political practices in the absence of any constitution than it is when there is one.

**The Quality of Constitutions**

This leads us to another remark. The reflections on this subject are not only of analytical interest. They should contribute to our capacity to facilitate political life...
in the future in the light of the judgment we can make on the constraint we live with. Are they beneficial, those constraints, or are they evil? Thus is opened a debate on the quality of constitutions. Why is a constitution good or bad? How can a constitution be improved? Here, again, it is clear that hard writing leading to hard constraint is more rigid and less capable of evolution than less-demanding provisions.

Napoléon, pardon me on my set of quotations. Napoléon, who, however cultured he was, was a dictator, once voiced this remarkable dictum, "A good constitution must be short and obscure." End of quotation. Doubt is not permitted. Napoleon expressed clearly that in his view, the practicability and the changes of long life for a constitution rely much more on soft constraint than on rigidity.

The flexibility, the adaptability without which constitutions die, can be measured in other ways, such as the number of articles, or the number of modifications. Having no constitution, the United Kingdom counts 0 articles as fundamental law. The United States, not quite 30 (but we have there a difficulty, those 30 are rather sections more than articles when compared to the others; still, it is 30 sections); France, 89 (we are becoming reasonable, which is a new thing in French history, as you know); Spain, 169; Germany, around 141 (I had doubt in my sources); Poland, 243; and Portugal, possible as a military balance precaution, 288.

The greater the number of articles, the greater the number of fields in which constitutional provisions must face technological, scientific, social, cultural, or legal changes, the greater the demand for amendments or modifications.

The excessive difficulty of amending a constitution can constitute a blockage, continuing to call for hard constraint when a provision appears obsolete. Now, 45 years old, the French constitution has been modified nine times. Some people consider it has been modified a bit too often. Modification is an attempt to get to majesty of the constitution. Anyway, at least it has shown a great flexibility. In Spain, it has been absolutely impossible in some thirty years to modify the constitution, which probably, ladies and gentlemen, is dangerous for the future.

The American situation is a very interesting case. Any revision of the constitution needs two-thirds of the votes in both federal assemblies, plus the majority in three-quarters of the chambers of all fifty states. In practice, these conditions are now very difficult, if not quasi-impossible, to be fulfilled. But in truth, the number of states has increased; the complexity has increased. But in two centuries, 27 amendments have been adopted, many in the first thirty years. In the future, some blockages could occur, especially in the field of territorial administration, territorial authorities. But fortunately, let us rejoice, the American constitution is short and obscure!
At this stage, things are clear. No constitutional system can be implemented without some elements of hard constraint around its most decisive provisions. But on the whole, in the aim of protecting the general spirit of a democratic political system in a given society with history, conflicts, and divisions, it is the flexibility, the adaptability, and the soft character of the constraint that characterizes it, which permits a constitution to last a long time. Inside the socially endorsed limits of constitutional authority, hard constraint is accepted and sometime needed. Outside, it brooks outside its limits, only consensus or force. Only consensus permits change, and consensus can emerge only thanks to soft constraint.

**Contemporary Developments**

Contemporary developments, though contradictory in many ways, show a diminishing confidence in constraining law and a growing demand for contracts, self-fulfilling obligations, and nonconstraining agreements. It is particularly visible in the international negotiations and world governance, but this kind of preoccupation appears here or there in matters such as road safety, [where there is] more prevention and information and less controls and sanctions; or public medical insurance, [where there is] more responsibility for the doctors and fewer financial controls. We all discuss these balances. There are, in state-management doctrines, a growing interest in incentives and deterrents rather than orders and prohibitions. In the matter of constitutions, the fact of soft constraint is a better instrument for evolution than hard constraint, prompts reflection on how to diminish still further the degree of hard constraint that remains.

The fact is, remember that people like Jean-Jacques Rousseau or Karl Marx both have described in detail their conception of humanity, according to which violence is of artificial, social origin. Thinkers for whom the human person is good by nature—are you, am I?—and transformed into a violent being by social and economic institutions and practices, those persons are in fact very numerous. And this was one of the dreams of a social organization without hard constraint of any sort.

Monetarist economists generally lend their support to this conception. If one concedes that economic principles are the dominating paradigms about which modern societies can be built—which I do not concede, but if one concedes—then market behaviors have to be encouraged not only for reasons of efficiency, which are true reasons, but also because they yield the straight, the best possible social attitude. And we undoubtedly observe in world economic and financial governance, a very strong and still-growing tendency to solve problems through the negotiation of nonconstraining agreements. Contracts, more and more, are considered as substitutes for norms.
In a way, this development can be considered a philosophical step forward. Humanity becoming more and more cultured, educated, and responsible can more and more rely on its own moral resources to regulate collective life without a permanent big stick. I shall not even try to deny that something of the kind can be observed in the most advanced developed countries. Social life, it is true, is most likely much less cruel in present North America and Europe than it was two centuries ago, we all agree. But I think it necessary to conclude with a strong expression of my disagreement with all this vision for two reasons.

The first is philosophical and concerns human nature. I do not know if the Creator underestimated or misconceived his product. I don't know. But I am sure that the capacity for evil is a constitutive part of any human being and will remain so. Social institutions have among their tasks to protect humanity against these defects, and this needs a significant use of hard constraints.

My second reason has its roots in the major changes that mankind has witnessed since the middle of the twentieth century. Before this period, resources seemed to be unlimited, nature seemed to be untouchable in its eternal purity, and every human community, call it national community, could organize its own internal peace and security while rejecting outside the borders the other, the enemy, the barbarian.

And suddenly, because in historical terms this is awfully fast, we discover that we now have to take care of limited resources, that we can pollute dangerously for our grandchildren, and that we have to look after our ecological home. Furthermore, since the end of the Cold War, nations have no more national enemies. There is, ladies and gentlemen, no exterior in which we can reject the enemy, the other, the strange, the barbarian. Mankind has now no greater enemy than its own internal barbarism. I don't think these new challenges will be managed peacefully.

And then my question is, in this situation, does mankind not need a larger measure of hard constraint included in the constitution than is generally accepted, subject naturally, to the conditions of a real collective management of our world destiny? Thank you very much.