DO CONSTITUTIONS CONSTRAIN?

At first sight, this is a strange question. Any constitution would evidently be 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 principal power holder. Any violation of such provisions is usually called a “coup d’état”, and, as such, is considered evil, and when possible punished. This is supposed to correspond to the definition of constraint.

My worry does not arise from this point: 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.

My worry arises from the fact that a body as serious as Columbia University Board, 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 a current fashion. In the present state of world governance, and in spite of our growing difficulties concerning civil violence, criminality and 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. Market decisions, which contribute to the economic optimum, are more appropriate when they are spontaneous than when they consist in obedience to orders. It is this kind of reflection which has underlined the distinction between hard power and soft power. I suspect that the authors of the question “Do constitutions constrain?” are looking less for a 'yes' or 'no' answer than 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 such 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 a social order, fulfil this role? Is this global philosophical progress towards the limitation or the elimination of constraint in our collective life in accordance with the contemporary evolution of humanity?

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 the source of power is no longer God, but the people. God's appointee has no separate rule to follow, but the people needs to formalize its social contract and to define the rules and procedures which regulate the society and the power system in it.

While any dictatorship or power system based on force may decorate its internal regulations with the beautiful name of constitution, this does not change the substance of the situation. As we say in French, the habit does not 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 des pouvoirs déterminée n’a point de constitution ».

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

One, sometimes taking the form of a preamble, defines the values or principles which a given human community considers as its own and as the basis of its social life. Apparently there is nowhere any Constitutional Court specifically in charge of enforcing such values. But such constitutional provisions are, everywhere in democracies, references for the judicial institutions and the courts. This produces, undoubtedly, some sort of an indirect soft constraint.

A 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 violate these rights. And, on this point, any court competent in constitutional matters would vigorously punish any violation.

The third section of the constitutional substance describes, generally with a great precision, the procedures which have to be followed in the competition for access to power. It is particularly in this field that any violation is considered a coup d’état, and that the competence of a specialised Constitutional 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 constitutional text, that the executive authorities find some margin of choice, and the court may accept to give advice: we have then left hard constraint towards soft constraint.

The fourth section of a constitution generally describes the distribution of power, for instance between the executive and legislative branches, or between the head of state and the head of government, etc… 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 modifications of these arrangements between blocks of power will result from political negotiations and express the changing balance of influences between forces and persons in the legislative as well as in the executive bodies. If constraint there is, there, it is evidently of the soft kind.

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

The first is, roughly, the legitimacy of the constitutions. Largely influenced by their age, by the conditions, consensual or conflictual of their adoption, by the spirit which has presided over their drafting – they can be rigid or flexible, long or short, mostly limited to procedures or embracing most of the substance of social life - by the accidents of history with which they have been confronted, constitutions do create around themselves a very variable climate of propensity to respect. Thinking about the United States, writing about his own country, Germany, with a great hope to see her contribute to the development of a strong and powerful Europe, Jurgen Habermas has defined 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 roots probably deeper than in any other country.

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 quantity of brains and subtlety in organizing the transition towards civilian power. Be it military or civilian, every political group or institution involved in the process wanted its own guarantees in terms of political orientations as well as in terms of procedures. The result has been a constitution with several hundred articles. President Fernando Enrique Cardoso, in his eight year mandate could enforce practically no important 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 as the democratic monument it should be, as it had 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.

Apart from this variable degree of legitimacy, another substantial difference, and a more concrete one, may characterize constitutions: it is the existence or non-existence, and the nature of a Constitutional Court.

In some cases, there is no such institution. Great Britain is a good example here. The French Third Republic approaches this solution, since article 9 of the law of 24 February 1875 concerning the organisation of the Senate states “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”. The consequences are simple: it is only inside the political institutions that an explicit violation of constitutional 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 constitutionally improper behaviour. 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 result in political conflicts and be treated in terms of balance of strength rather than in legal terms. There was no legal recourse when Chancellor Adolf Hitler, legally appointed, began to violate the constitution; nor in France against the Parliamentary Act which transferred all powers to Marshall Pétain. It is no surprise to discover that military force belongs to the order of hard constraint; nor to surmise that if Britain has not known any event of that kind for several centuries, it is more because of geographical and military reasons that 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 specialised 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 the first. I don’t think it is possible, nor pertinent, to express a preference for any of these solutions. Both methods respond to the need to have a practical, modest but efficient and current control of all 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 workload and in time to deal with the minor aspects of its constitutional duty. On the contrary, a specialised organ ordinarily has time to deal with issues of secondary importance. Often provisions of limited significance happen to become in certain historical situations or periods the symbols of unacceptable rigidities or blockages, or on the contrary of intolerable laxness. Thus the French Conseil Constitutionnel has eroded some blocking temptations, and in this way made constitutional life easier. On the contrary it is obvious that enforcing legislation is unusually difficult in the United States, but it does not appear that the Supreme Court is worried about this at all. A balance has to be found between the solemn Roman adage “De minimis non curat praetor” and the popular answer “The devil is in the detail”.

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 the constraint which is here 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 which really alter the principal characters of a constitution, do not occur thanks to the provisions it includes concerning conflicts.

On the one hand, no constitution has ever resisted force. We’ve seen it above in the case of Germany in 1933 or France in June 40, but it as clear for all the constitutions of the Republics of Eastern Europe in 1947-48, or of most of the Latin American constitutions in the period of the epidemic of military dictatorships, with a special mention of Chile forty 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 canalises the political life of a given country generally find their origin in soft constraint.

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 that it was designed to be. And this happened without anything which could be characterised 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 because the executive branch lacked the means to bring pressure to bear on the legislature. But the constitutional laws included the right for the Government to dissolve the Assembly. It is the total absence of consensus on the significance of the first use of this right in 1877, which made it impossible to use it again. The non-use of this dissolution right became an element of soft constraint.

In these matters, 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 on legislation disappeared as soon as 1706, and no one can imagine any way, system or procedure to reintroduce it.
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 constitution for very different practices. This is even more true if we look at the importance of political personalities of great capacity.

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 organise the absorption of quite a lot of small parties into the Christian Democrat Union. Had he died much earlier, German political life would appear more like that of Belgium or that of the French Fourth Republic.

The same observation can be made the other way round: had De Gasperi survived a long time instead of dying in 1954, the Italian constitution would have evidently permitted a much more stable political life with long living governments.

In 1961, a sniper shot at Charles De Gaulle and missed him by ten centimetres. Had he succeeded, France would almost certainly have fallen again into the facilities and poisons of an Assembly regime and paralysed short-lived governments.

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 seven kingdoms and eight Republics. All these Republics are of the parliamentary type with governments accountable to the Assembly. 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 respect of international treaties. Other constitutional statements appear modest (the President accredits Ambassadors. The President is the commander-in-chief of the army). It is 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 or Portuguese colleagues. But this difference is now protected by the soft power of tradition, and would probably be defended by the Constitutional Council if ever the case comes. Something coming from the past constrains present and future, but it is not only made of the written elements of our constitutions. Furthermore, any British citizen would probably admit that it is much more difficult to introduce change in political practices in the absence of any constitution that it is when there is one.

This leads us on 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 constraints we live with: are they beneficial, or 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, who, however cultured he was, was a dictator, once voiced this remarkable dictum: “A good constitution must be short and obscure”. Doubt is not permitted: Napoléon expressed clearly that in his view the practicability and the chances 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. Having no constitution, the United Kingdom counts 0 articles in its fundamental law. The United States, not quite 30, (but they are sections more than articles) France 89, Spain 169, Germany 146, Poland 243, and Portugal 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 the 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. At least has it shown a great flexibility. In Spain, it has been absolutely impossible in some thirty years to modify the constitution, which probably is dangerous for the future. On the reverse the German Constitution has been revised 52 times since 1949. The American situation is an interesting case. Any revision of the constitution needs 2/3 of the votes in both federal assemblies, and a majority in ¾ of the chambers of all 50 states. In practice, these conditions are now very difficult to be fulfilled. But in two centuries, twenty seven amendments have been adopted. In the future, some blockages could occur, especially in the field of territorial authorities. But fortunately 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 its history, conflicts and divisions, it is the flexibility, the adaptability, and the soft character of the constraint which characterise it which permit a constitution to last a long time. Inside the socially endorsed limits of constitutional authority, hard constraint is accepted, and sometimes needed. Outside these limits, only consensus permits change, and consensus can emerge only thanks to soft constraint.

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

The fact is that people like Jean-Jacques Rousseau or Karl Marx both 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, and transformed into a violent being by social and economic institutions and practices, are in fact very numerous. Thus was born the dream of a social organisation 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 around which modern societies can be built, then market behaviours have to be encouraged not only for reasons of efficiency, but also because they illustrate the best possible social attitudes. And we undoubtedly observe, in world economic and financial governance, a very strong and still growing tendency to solve problems through the negotiation of non-constraining agreements. Contracts are more and more 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 and qualities 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 of developed countries. Social life is most likely much less cruel in present Europe or North America that it was two centuries ago.

But I think it necessary to conclude with a strong expression of my disagreement with this vision for two reasons.

The first is philosophical and concerns human nature. I do not know if the Creator under-estimated or misconceived his product, 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 its own defects, and this needs a significant use of hard constraint.

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 seem to be unlimited, nature to be untouchable in its eternal purity, and every human community could organise its own internal peace and security while rejecting outside the other, the enemy, the barbarian.

And suddenly, because in historical terms this is awfully fast, we discover that we have to take care of limited resources, that we can pollute dangerously our ecological home. Furthermore, since the end of the Cold War, nations have no more national enemies. There is no 'exterior' in which to reject the enemy, the Other. Mankind has now no greater enemy than its own internal barbarism.

I don’t think these new challenges will be managed peacefully. My question is: In this situation does not mankind need a larger measure of hard constraint than is generally accepted, subject, naturally, to the condition of a collective management of our destiny?

Michel ROCARD