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Constitutionalism

Jethro K. Lieberman

Constitutionalism is a central and protean political concept that for more than two millennia has never surrendered to a formal, fixed definition. In its earliest incarnation, constitutionalism was taken merely as descriptive fact. To the ancient Greeks, the constitution meant "the state as it actually is" (McIlwain 1966: 26). Today the idea of constitutionalism comprises a cluster of particular jurisprudential and sociological attributes, summed up as "limited government under a higher law" (Fellman 1973: 485). Manifestly, not every state claiming independent sovereignty can lay claim to the constitutional mantle.

Beginning in the Roman Republic, and wandering in and out of political and legal consciousness for a millennium and a half, the concept mutated: it came to be held that there was law antecedent to the state, that it came from the people, or custom, or God, or the natural order, and that even private citizens, as members of the public, may seek relief from the government's abuse of the citizenry's public rights. The idea was fitful and equivocal. Some kings acknowledged they were subject to the law; others, at different times and in different places, clung to a divine right to command at will. In England, from the twelfth century, the judges held that the king was obligated to follow the law, meaning, for example, that he could not imprison someone who had not been tried in court. By the sixteenth century, "a man's home is his castle" that not even the king could invade was an adage that expressed the deeply entrenched notion of rights superior to

the arbitrary will of the ruler. Through Magna Carta (1215), the Habeas Corpus Act (1614), the Bill of Rights (1689), the Act of Settlement (1701), and other parliamentary enactments, a British constitution was gradually assembled.

Modern constitutionalism in practice emerged with the American Revolution. For the drafters and ratifiers of the world's oldest continuing written constitution, a constitution was, as Thomas Paine put it, "the act of the ... people constituting a government," and, he might have added, with terms and conditions attached (Paine 1991: 82). As Walton H. Hamilton wryly observed: "Constitutionalism is the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order" (1937: 255). Constitutionalism is not just any government and not just any order. Constitutionalism rejects arbitrary government; it recognizes and respects people's rights despite the contrary will of officials or even popular majorities.

Different commentators have made these points in different ways: "Constitutionalism has one essential quality; it is a legal limitation on government" (McIlwain 1966: 21). Constitutionalism is "a determinate, stable legal order which prevents the arbitrary exercise of political power and subjects both the governed and the governors to 'one law for all' [people]" (Dunner 1964: 120). A "constitution is necessary in order to limit government and ... if there is to be government by consent" (Scruton 1984: 94). And, from the time of Montesquieu, constitutionalism absorbed the maxim, in James Madison's words, that the "accumulation of all powers ... in the same hands ... may justly be pronounced the very definition of tyranny" (Madison 1961: 301).

Modern constitutionalism, then, seems to consist of these ingredients: (1) a fixed and public constitution, (2) ratified by the people, (3) equally applicable to all, that restrains arbitrary decrees by (4) separating government powers and (5) mandating impartial and fair procedures, and (6) that permits the people through regular elections to select their leaders,

all in order (7) to preserve space in which at least some degree of individual autonomy may flourish.

Promulgation of a constitution does not guarantee constitutionalism. Sham constitutions, like the Soviet Union's, or illiberal constitutions, like Iran's, often prescribe restraints on government (for example, guarantees of freedom of speech, press, and assembly). But these are cosmetic dressing on an authoritarian skin, ignored when their exercise would "harm" the interests of the state or society or counter the interests of an entrenched ruling class. Nor do such constitutions provide people procedures to enforce their rights. In the Soviet Union, as in other nations that pretend to constitutionalism, the basic charter did not restrain the government; rather, the unelected Communist Party, which alone dictated the interests of state and society, emasculated the constitution. Likewise, in many illiberal states, as for example in theocratic Iran, the constitution may expressly restrain the government, but in favor not of individual rights-holders but of a clerical class who rule on theological principles that lie outside constitutional norms and procedures.

Despite the general agreement on the essential norms and practices of constitutionalism, there is no definitive model and some basic questions remain unsettled. Students of the subject point to a host of constitutional variables, no single one of which appears to be crucial to determining whether a people enjoy constitutionalism: must the constitution be written or unwritten, detailed or general, long or short, judicially enforceable or not, republican or monarchical, parliamentary or presidential, federal or unitary? So, for example, though constitutionalism is often said to require a written constitution, some practices are observed as constitutional norms despite the lack of text. Until Franklin D. Roosevelt violated it in 1940, an unwritten tradition dating back to Washington in 1796 kept US presidents from serving more than two terms; Roosevelt's disregard of it led to the 22nd Amendment, mandating the limit.

A central problem for constitutionalism is the enforcement of constitutional norms. In the USA, there is no effective dissent from the practice, established in 1803 by Chief Justice Marshall in *Marbury v. Madison*, that courts in appropriate cases may overturn statutes as unconstitutional. But the idea of a constitutional court, though gaining ground around the world, is not a necessary component of constitutionalism. Legislatures and executives may feel bound by constitutional norms, even though they have the formal power to disregard them. Not since 1707 have British monarchs vetoed legislation enacted by parliament, though they have the "legal" authority to do so. In the USA, decisions to impeach and convict federal officials, such as the president and judges, are wholly in the hands of Congress under the constitution itself, but the impeachment power has been used only sparingly and when, occasionally, it was misused, the Senate refused to convict. That said, it is also indisputable that constitutional norms can change so that what was once thought to be perfectly plain and acceptable to one generation becomes unthinkable, as a matter of constitutional law, to another. The most spectacular example in American history is the Supreme Court's change of mind on the question of racial segregation from its 1896 decision in *Plessy v. Ferguson* to its decision in 1954 in *Brown v. Board of Education*.

While far from universal – there remain many repressive governments with only farcical claims to constitutionalism – the idea of constitutionalism has spread throughout the world during the second half of the twentieth century and is continuing still. Human rights principles adopted at Nuremberg during the trial of Nazi war criminals, in the International Declaration of Human Rights, and in many other international treaties and instruments, and the establishment of such bodies as the International Criminal Court in The Hague, all point to an emerging consensus on the value and necessity of constitutional regimes that promote individual and human rights. Whether countries that have survived political

revolutions and the many new nations that wrested sovereignty from their colonial governors can construct a constitutional order depends more on their ability to develop and sustain adequate political cultures than on the promises and claims made in their new constitutions. Unless they commit to democratic principles and shun one-party and theological rule, no country can depend on bold or noble pronouncements in a paper charter to establish an enduring constitutionalism for its people.

SEE ALSO: Constitutional Democracy; Constitutional Law, United States; Human Rights; Liberal Democracy; Rule of Law; Separation of Powers

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Constructivism

Adam Cureton

The term "constructivism" names a family of political, moral and metaethical views that, in general terms, regard some or all normative claims as valid *in virtue of* being outcomes of a "procedure of construction" in which actual or hypothetical agents react to, choose, or otherwise settle on principles of justice, moral rules, values, etc. Traditionally, moral validity or justifiability was thought to depend on God, the Forms, or some other independent moral order. Various procedures of a different, epistemological, sort were then proposed to help us gain access to the moral facts, which were thought to exist independently of us (e.g., we might need to undergo physical and mental training of the sort described in Plato's *Republic* or learn how to reflect in a "calm, cool hour"). Constructivists, by contrast, think that there are certain procedures that are not designed to *discover* which normative claims are *already* valid. For them, the validity of some or all reasons, principles, values or other normative claims *consist in* being the result of a procedure of construction. For example, Rousseau (1997) held that states are legitimate *just in case* and *because* they would be agreed to by reasonable people who were concerned to advance their