Principles of Constitutional Design

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a singular nation is a relatively recent invention grounded in Hegelian statism. It is time to at least think about the nature and extent to which nationality and political nationhood may be decoupled.

Socioeconomic versus Group Rights. Finally, it is now respectable to constitutionalize both socioeconomic and group rights, but to what extent is each helpful for the long-term health of constitutional democracies? The former implies that all citizens should be treated the same, and not in a minimal legalistic sense. The latter implies that citizens should be treated differently depending on group or ethnic membership. The theoretical and practical disjunction between the two is too often glossed over. In addition, constitutionalizing socioeconomic and group rights tends to emphasize the role of the state in guaranteeing rights, whereas rights were invented to protect citizens *from* the state. Aside from the possibility that such an emphasis undercuts the actual function of rights, it tends to undercut the ability and motivation of citizens to pursue political outcomes beyond or different from what a constitutionally oriented court might support. Such a tendency short-circuits the role of citizenship per se and seems to view constitutionalism as a set of objectively predetermined outcomes rather than as a process of citizens involved in the working out of mutual hopes and needs through the use of commonly accepted decision-making rules and processes.

The Three General Elements of Constitutionalism

All of the trends, problems, and considerations just outlined point toward the need for a recurrence to original principles – to a deeper and clearer understanding of what constitutionalism means and implies. For example, it is not helpful to confuse constitutionalism with legalism, although the former leads to the latter. Perhaps the place to begin is with the connection between constitutionalism and prepolitical cultural mores. Although constitutionalism necessarily includes the notion of culture, it also transcends culture. "Culture" has been variously used to refer to what others might term "ideology," "shared interests, preferences, or perspectives," "a common set of values," ethnicity," "shared mental states," and so on. The term is here used in a more formal, anthropological sense to refer to a shared set of symbols, used to

organize joint behavior for the solving of common problems, that is passed from generation to generation. Cultures are used to create and sustain societies and are historically prepolitical because they were used long before the creation of formalized political systems of any type. Constitutionalism, currently the most complex form of sociopolitical organization, recapitulates the history of human social organization and thus both assumes and uses culture. This recapitulation results in constitutions containing a cultural element, a power element, and a justice element.

The cultural element reflects residual human experience in a prepolitical condition. Humans (*Homo sapiens sapiens*) have for most of their existence evolved culturally rather than biologically. This has given humans a competitive advantage over other species and has led to their accelerating dominance over the rest of nature. Until finally brought under domination by political societies, these culturally organized societies continued until the nineteenth century on all continents as what are now termed aboriginal peoples. What we now term culture is thus so ingrained in the human psyche that it cannot be extirpated from human consciousness without our becoming something other than, or less than, human. Inevitably, constitutions embody, contain, or at least leave significant room for cultural mores and values that are still the fundamental grounding for human social organization.

The cultural element in constitutions has several components or is expressed in a variety of ways. Constitutions, as Aristotle famously told us, define a way of life in general terms by laying out and using as organizing principles the values, major assumptions, and definitions of justice toward which a people aspire. The cultural element is generally found in long preambles, opening declarations, and – more recently – bills of rights. The definition of citizenship or characterization of who belongs to the people or nation that is frequently found in constitutions is also a fundamental expression of the cultural element. In the Mexican Constitution of 1917, the definition of a Mexican is set out at great length along with detailed provisions on the duties of fathers, parents, and so on – a kind of primer on sociocultural mores. One can understand this concern if we remember that after the 1917 revolution that produced Mexico's current constitution there was a concerted effort to define the dominant *mestizo* culture as the basis of nationality in place of the colonially imposed Spanish culture. We also find a high level of

explicit cultural content in constitutions adopted by more traditional societies that are recent recruits to constitutional democracy, such as Kiribati, Western Samoa, and Papua New Guinea. As a general proposition one might posit that the stronger the aboriginal presence in a country, the more apparent the cultural content of the constitution will be.

The power element in a constitution is found in institutions for decision making. In a coherent constitution, these institutions for organizing power are rooted in and reflect the culture or cultures of a politically organized people and simultaneously accomplish several things. They identify the supreme power (sometimes called the sovereign), which is always finally determinative; they distribute power in a way that leads to effective decision making over the range of all possible issues; and they provide a framework for continuing political struggle. Significantly, the political struggle often involves competition between cultures that are linked together under a common constitution, whether it be Anglo-Saxon and aboriginal in the case of Canada and Australia or "ethnic" in the broad sense as in the Anglophone-Francophone division in Canada. In essence, the power element structures conflict so that it can be managed politically rather than through violence in the streets.

The justice element is the key ingredient for constitutionalism because most political systems in human history, even though by definition they represented organized power, did not have constitutions until very recently. Constitutionalism as a political technology attempts to marry power with justice. It attempts to do so in a variety of ways. A written constitution, available for reading by any citizen as well as by every political actor, creates a known and "predictable" process of decision making that serves to limit the use of power to settled, agreed-upon procedures. The separation of powers that constitutions often contain limits power by vesting the power to reach collective decisions in multiple hands to prevent arbitrary decisions that would tend to run counter to the prevailing sense of justice accepted by the people and embodied in the constitution.

Power is also limited through specific prohibitions on decision outcomes reached by those in power. These prohibitions are often but not always encoded in bills of rights. Sometimes they are scattered through the constitution proper, such as the prohibition on ex post facto laws in the U.S. Constitution. Because bills of rights often mix prohibitions with long-term aspirations that reflect cultural mores, bills

of rights create interesting and potentially troublesome opportunities. If a supreme or constitutional court has the ability to enforce rights, it also has the ability to interpret these rights; and because rights are to a significant degree artifacts of the underlying cultural element, this puts the court in the position of potentially defining or redefining the culture underlying the constitution. This is not perverse per se since the reality of constitutionalism is that political power trumps culture. A problem arises if and when a court is the body to exercise that trump.

Much of formal, legal constitutional law around the world involves courts in the struggle between competing cultures, subcultures, or the interpretation of a unified culture with multiple ideological constructions. Thus, judicial decisions can be deeply controversial in a way that impedes or prevents the implementation or enforcement of judicial decisions. This is a major reason why, as noted earlier, supreme and constitutional courts have not really been the major source of political change since 1945. Court members are almost certainly too embedded in the dominant culture to easily see their way to new and innovative decisions; and when they do, there are too many ways for their will to be thwarted through other political means. We have often seen the phenomenon of a national court enunciating a legal principle that is at odds with dominant cultural mores through the use of dissenting opinions or speculative internal reasoning, while at the same time reaching an overall decision that does not act on that new legal principle but instead affirms the dominant culture. The contracultural reasoning that accompanies the culturally expected decision is a way of floating trial balloons in order to encourage the broader political process to rethink the matter.

In conclusion, these three elements – culture, power, and justice – cohabit a constitution in its various parts and institutions. Any constitution worthy of the name includes all three. On the one hand, a good constitution provides a coherent package for all three. On the other hand, the three elements are inherently "at war" with each other. The cultural element is specific and particularistic, whereas the justice element works from the premise of universal applicability. That is, the rule of law inherent in constitutional processes requires that all citizens be affected alike and to the same degree, while the cultural component rests on distinctions and expectations that are not universal in their implications. The so-called majority-minority problem is one aspect of

this disjunction. The power element is restrained by the universalistic rule-of-law element. At the same time power is inclined to respond to popular and particularistic demands from various parts of the population, because future power rests on the distribution of governmental goods and services in a nonuniversal manner. We see this disjunction in, for example, the debate over affirmative action in the United States. The culture-power-justice nexus embodied in a constitution has been most famously examined by Montesquieu. His term "spirit of the laws" is an analytically useful approach to the overall problem, and we turn next to outlining his core contributions to comparative constitutional analysis.

Fundamental Principles and the Spirit of the Laws

As we recur to the fundamentals of constitutional democracy, analysis can develop from comparative empirical analysis, from careful analysis of texts that clarify language and thinking, from the logical analysis of models, and sometimes through simple deduction from prior principles. The incautious reader might conclude that the end product promises to provide a master plan or a set of blueprints that might be applied mechanically to the design of constitutional democracy. Such is not the intent of this study, even if the goal were reasonably possible. Understanding events post hoc, even the understanding of empirical relationships, does not translate in human affairs into highly predictable institutional outcomes. The many reasons for this do not bear lengthy reiteration. There are too many variables, most of which are not susceptible to human control; for the rest, the connections between independent and dependent variables are often so imperceptible and far removed that they cannot be effectively utilized; human attempts to control these variables elicit counter human attempts to thwart or slide past them; and the human ability to create and learn new responses can make formerly important variables irrelevant, and attempts at control counterproductive. The impossibility of the task defined by logical perfection, however, does not render the task unimportant or meaningless. On the contrary, the task is recommended by both its difficulty and its importance.

A pedigree for constitutional analysis, while involving many political philosophers, runs most directly from Aristotle through Montesquieu