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Constitutionalism and rolling roads; errors in over-prescription.

Chapter 7, pages 105-120 in Responsibility and its Avoidance.

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7. Constitutionalism and Rolling Roads; errors in over-prescription

There is, amongst the English, an aversion to straightforwardness. G. K. Chesterton, in his hymn in praise of "a reeling road, a rolling road that rambles round the shire",¹ captured this aversion. By implication it can be applied to a present issue in UK public management, namely 'should we have a written constitution?' If this discussion rambles a little it is because the answer, or at least an attempt at an answer, requires a short tour through some rather abstract ideas in institutional analysis.

Just to know where we are going; I intend to illustrate the following. Constitutionalism is about defining responsibilities; powers, entitlements, obligations and their limitations. But to define a power, an entitlement or an obligation is (a) to immediately delimit it in ways that may turn out, in the course of events, to be inadequate and (b) to set innumerable minds about the task of opposing it. So, my argument will run, it is much better to keep alive a struggle for definition; a constant contested discourse, as it might now be said in social science speak. Such contest has been plentiful through the ages in England and there is still a dire need for it today. Is English non-straightforwardness a consequence of this discourse, a contributor to it, or simply a convenient coincidence?

How to describe this English aversion to straight thinking: a starting point may be found in our use of language. Non-English speakers, particularly Germans apparently, find many English social niceties completely unintelligible. Why, when you want salt, should you say 'would you mind passing me the salt' – what possible objection could there be to the more economical and functional 'salt please'? Or, to take an example that might be closer to the constitutional issue, why not, in academic discourse, say 'You are wrong about that' instead of saying something like 'That is a point of view, but on the other hand it could be argued, equally, if not more persuasively, that'. In neither putative case must we

1 Before the Roman came to Rye or out to Severn strode
The rolling English drunkard made the rolling English road.
A reeling road, a rolling road, that rambles round the shire,
And after him the parson ran, the sexton and the squire;
A merry road, a mazy road, and such as we did tread
The night we went to Birmingham by way of Beachy Head.



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suppose that the English person does not have a position; is not convinced of his/her correctness, may even be holding back a feeling of superiority.² Many Non-English people certainly suspect that an assumption of superiority lurks about the English. In academic conferences, despite circumlocution, claims of superiority of argument are but thinly disguised. No, it must be something deeper that drives this Chestertonian aversion.

Aversion to straight thinking has deeper consequences for the English political domain than mere circumlocution; it includes aversion to statements or manifestations of political principle. The UK Labour Party, for instance, found that a clause had somehow slipped into its constitution committing the Party to the nationalisation of the means of production. Clause 4 did not fit well with other clauses but they struggled mightily to get rid of it. Nationalisation could only be done under dire emergency as in the Second World War, when miraculously, it had worked rather well. The Conservative Party could also come up with surprises. The nation moved into a condition of deep shock when UK Prime Minister Margaret Thatcher (1979-90) not only came out with a free market doctrine but also apparently believed in it. Her principal mentor and cabinet colleague, Sir Keith Joseph, was so committed that he was known as the 'mad monk'. By contrast it was quite un-troubling to public opinion that an Archbishop could voice doubts about the existence of God.

Without being able to explain the general aversion to straightforwardness and principle, in relation to governance ideas there is a clearer history. It may go back to sketchy awareness of the collapse of the English Republic. Oliver Cromwell (1599-1658) could have been remembered for introducing 'warts and all realism' into public affairs – which would fit quite well with pragmatist leanings – but school book history probably encourages us to focus instead upon the babble of contradictory idealisms – The Godly, The Levellers, The Independents, The Diggers – that made Parliament quite unable to give direction to the revolution. What we are encouraged to remember is the way the Republic petered out, allowing the exiled monarch – no, he had lost his head; it was his son, Charles 2nd – to wander back and take charge.

Contemporary reactions to the French Revolution are a much more certain influence upon English ideas of politics and governance. The French Revolution, following the American, enunciated some clear constitutional principles, claiming for individual citizens, 'liberty, equality and brotherhood'. When the Americans had claimed the same sort of thing, the English ruling class no doubt smarted a bit, but more from the loss of property and tax revenues than from

² I am indebted to my ex-wife, Susheela, a TEFL teacher, for this observation.



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the realisation that these principles were counter to the way they viewed their status in life. Edmund Burke (1729-1797), an early political commentator rather than philosopher, actually supported the right of the Americans to set up their own government, urged reconciliation and the reestablishment of trade and other relations between the new America and the English Crown. When the French followed the Americans some English free thinkers initially saw this as the opening of a new era. "Bliss was it in that dawn to be alive/To be young was very heaven" announced a young poet, William Wordsworth (1770-1850). But he and others became quickly disillusioned. As the heads began to roll and simple principles found no simple expression, a new pessimism overtook the country. Burke, a member of a House of Commons assembled in thoroughly unprincipled ways, used that bloody backdrop to enunciate a pragmatic conservative philosophy that several commentators see as the origin of various trends in present day conservatism. Both pragmatism and pessimism seem to have attached themselves to the management of UK public affairs ever since.

Every now and then politicians and political commentators in England argue that Britain is urgently in need of a written constitution. Usually however, their efforts peter out in the face of a task that would apparently be enormous and, worse still, would have to appeal to principle to sort out obvious anomalies; the position of the head of state, the role of the church, the composition of the upper house, or how to define Britishness; other than an ability to understand cricket of course.

The first and second periods of government by New Labour under Tony Blair (1997-2007) were perhaps unchallenging from a constitutionalist perspective. 'Third Way' ideas were sufficiently vague to be not really appeals to principle at all – just slightly dressed up 'muddling through'. However, a large parliamentary majority coupled with a very informal, sofa based, style of political leadership soon led to a number of tensions within the political elite and a call for a constitutional fix. The prevalence, youthfulness and assertive role of political advisers upset the civil service. 'Kitchen cabinet' got in the way of the formal cabinet of ministers. Parliament objected to the tendency of ministers or civil servants to leak policy to the press before informing the House. The problem appeared to be that 'proper procedure' in these matters was not rule based but a matter of precedent and how 'good chaps' had heretofore been expected to behave.

The call for constitutional reform was not however based upon a radical agenda. The proponents would probably argue that relationships between the main constitutional actors had been in better balance at some earlier date, but things have changed; instant communication for instance, news coverage '24/7'

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as the phrase goes and something needed to be done to right the balance. Although the language is about constitutions, pragmatic tinkering is what they really wanted to achieve. That the constitutional movement ran into the ground is probably because the word itself suggests fundamentals - A Bill of Rights, principles of citizenship; all sorts of French sounding things. But how would we write logically about a Queen who has no powers but must sign everything as if she did; a state religion that owes its institutional origins to the misdemeanours of a monarch, and a system of law that finds greater security and stability in the sense or nonsense of precedent than in any appeal to fundamentals?

French legal principles and constitutions, once they had been stabilised and written into codes by Napoleon 1st or his advisors, have had a far greater impact world-wide than has English pragmatics, but still find voices of disapproval on this side of the Channel. Most European countries have constitutions that conceptually at least owe their origins to the Napoleonic code. The Communist countries, for all their radicalism – or perhaps because of it - all adopted organisational structures that fitted within a basically Napoleonic constitutional framework. Now the European Union has a constitution in all but name and would have a real one were it not for an obstinate objection from the British. Britain still wants to muddle through. Without wanting to go quite as far as Chesterton ³ in antipathy to French orderliness, an argument can be found for exercising suspicion in relation to enunciated governance principles. It boils down to an inescapable law of institutional perversity – however well constituted a set of rules, people will contrive to corrupt them. This law is well known but seldom documented in discussions of governance. I had better go cautiously but since it is essential to my reservations about constitutionalism I must try to explain.

Social order, it seems, is based upon the interplay of three contradictory means of coordination in human affairs; hierarchy, mutuality and individualism. The constitutional project in any country will always be about defining the relationship between these coordination principles. It will be about establishing the legitimate hierarchy of the state – and its limitations, including some role for collective representation. It will be about social inclusion and boundaries – and

3 I knew no harm of Bonaparte and plenty of the Squire,
And for to fight the Frenchman I did not much desire;
But I did bash their baggonets* because they came arrayed
To straighten out the crooked road an English drunkard made,
Where you and I went down the lane with ale-mugs in our hands,
The night we went to Glastonbury by way of Goodwin Sands.

* old English usage for French originated word bayonet



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how they are policed by the state. It will define rights and entitlements of the individual citizen, to property and liberty of person, and how these may be socially constrained. In other words, there will be attention to balance and an acknowledgement that each element may go wrong.

Historically, in the cases so far mentioned, the constitutional project has started as a reaction to the perversities of hierarchy; the absolutist claims and actions of kings. Hierarchical perversity - absolute power corrupting absolutely - has had its 20th Century moments and we should not expect it to go away entirely in the 21st, but the more common complaint in present day discussion of governance is that hierarchical systems don't do justice to the diverse needs or interests of the citizenry. They tend toward machine like characteristics. Machine style bureaucracy may have done well in the last Century – delivering war time ration cards or the post war dole – but fits badly with the more plural and organic concepts of civil society that today prevail. How do the French manage this trend? By maintaining a sharp dividing line between the state, represented in the Prefecture and local society represented by Mayor and Commune. The former delivers roads – indeed comparatively straight - pensions, uniform schooling and other citizen entitlements; the latter petanque pitches, café licences, street markets, the obligatory roundabouts for village roads and a local arena for political contestation about these and diverse other comfort-giving things. The dividing line may change, but only as a result of major reform efforts and constitutional changes.

French claims to 'Liberty, Equality and Fraternity' can all be seen as appeals to individualism and mutuality of interests as against hierarchical entitlements. Edmund Burke was horrified by these claims and their immediate outcomes. He was particularly exercised about the French mob's use of the idea of liberty and the support that certain English libertarian preachers gave to them. Freedom to choose your own ruler was going altogether too far; without boundaries liberty is freedom to destroy.

Writing to a young Frenchman - who had assumed that Burke, having supported American Independence, would be enthusiastic about transformations in France - Burke approached his subject cautiously. Using a brewing metaphor, he wrote:

"When I see the spirit of liberty in action, I see a strong principle at work; and this, for a while, is all I can possibly know of it. The wild gas, the fixed air, is plainly broke loose; but we ought to suspend our judgment until the first effervescence is a little subsided, till the liquor is cleared, and until we see something deeper than the agitation of a troubled and frothy surface. I must be tolerably sure, before I venture publicly to congratulate

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men upon a blessing, that they have really received one." (*Reflections on the Revolution in France*, 1790)

This is very much in the oratorical tradition of "I come to bury Caesar, not to praise him" (W.S., *Julius Caesar*, Act 3 Scene 2). We guess that congratulation will not, at the end of so many pages, be forthcoming:

"Flattery corrupts both the receiver and the giver, and adulation is not of more service to the people than to kings. I should, therefore, suspend my congratulations on the new liberty of France until I was informed how it had been combined with government, with public force, with the discipline and obedience of armies, with the collection of an effective and well-distributed revenue, with morality and religion, with the solidity of property, with peace and order, with civil and social manners. All these (in their way) are good things, too, and without them liberty is not a benefit whilst it lasts, and is not likely to continue long" (*ibid*).

We do not write in such style and our lists of the requirements of good governance may have changed slightly over the intervening two hundred years but we are still on about the same things.⁴ Burke also anticipated today's Political Scientists in recognising the significance of power [and of conspiracy]:

"The effect of liberty to individuals is that they may do what they please; we ought to see what it will please them to do, before we risk congratulations which may be soon turned into complaints. Prudence would dictate this in the case of separate, insulated, private men, but liberty, when men act in bodies, is power. Considerate people, before they declare themselves, will observe the use which is made of power and particularly of so trying a thing as new power in new persons of whose principles, tempers, and dispositions they have little or no experience, and in situations where those who appear the most stirring in the scene may possibly not be the real movers" (*ibid*).

In his long discourse – disguised monologue in actuality – Burke seemed to recognise as a reality what we would now discuss as the agency of the individual. There is nothing in his text that denies that individuals should exercise choice, simply that their freedom should be exercised within bounds; bounds set by experience, tradition and 'consideration' – according to the

4 And are often much more blunt in our assertions; as when telling developing countries what they must do to receive our aid.



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paragraph above – which all sounds like a reasonable, conservative [with a small c] stance.

But even the pragmatist in Burke could hanker after authoritative principle. His argumentation becomes doubtful, even inconsistent, when much of the tract is devoted to a rather tortuous defence of monarchy, with unbroken succession, as a necessary pinnacle to social order. His problem is that English monarchic succession isn't unbroken. To cover his tracks, he introduces a couple of syllogisms that, apart from their eloquence might have been drawn from a present day management textbook:

"A state without the means of some change is without the means of its conservation"

He goes even bolder:

"An irregular, convulsive movement may be necessary to throw off an irregular, convulsive disease".

Extracted from the text these statements might be assumed to be justifying the contemporary convulsions in France, but no, what he is actually attempting to explain away is the succession of William of Orange to the English Crown, whose Protestantism and willingness to sign a deal with Parliament in 1688 was the sole justification for his usurpation of the Stewart line.

For Burke, William's deal with Parliament justified an English claim to the idea of liberty – if we have it already why should we fight for it - but it was, for him, irrevocably bound up with legitimate monarchy:

"This Declaration of Right (the Act of the 1st of William and Mary, sess. 2, ch. 2) is the cornerstone of our constitution as reinforced, explained, improved, and in its fundamental principles for ever settled. It is called, "An Act for declaring the rights and liberties of the subject, and for settling the succession of the crown". You will observe that these rights and this succession are declared in one body and bound indissolubly together" (*ibid*).

Burke is here using all sorts of metaphor - of building, binding, indissolubility, timelessness – to reinforce the idea of 'constitution'. So perhaps he is a subscriber to principle after all? But the fact is that he has to recognise compromise: William's opportunist succession illustrated ... "how totally adverse



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the wisdom of the nation was from turning a case of necessity into a rule of law" (ibid). [How many appeals to necessity have we experienced since]

What about Equality and Brotherhood; how did Burke manage these other assertions of principle? The answer is 'rather badly'. Equality he was simply against;⁵ and many of his followers have been equally simple in its rejection. 'Unnatural' and 'unachievable' have been Right and Left wing assertions when there has been a need for justification. About Brotherhood he was more ambiguous, recognising a kinship with his fellow Irish, rich and poor, a sympathy for American ambitions, but some followers have found in him grounds to justify an inward looking mutuality; a lowest common understanding of the mutual interest, appealing to the priority of family and kin; a crude nationalism, opening the door to a hatred of 'outsiders'.⁶ Regrettably, a strain of xenophobia persists in UK politics to this day.

Where does this leave the discussion of the written constitution? If high social principle is not enshrined in a constitution, how can citizens have any expectation that values they hold to be important are expressed or able to be expressed in society? Liberty, Equality and Fraternity are not enshrined in a UK national constitution, though we have a variety of laws on the statute books under which some such values can be championed: championed being the important word in that statement. Nothing good can be achieved unless someone is prepared to strive for it.

It is of course an illusion for constitutionalists to think that, simply by having a good thing built in to a super-law that it will thereby be automatically protected. Freedom of speech in America is a constitutional entitlement, set out in the First Amendment. But no sooner enacted than great effort has to be expended in defining its limitations. It is not a surprise that certain forms of pornography are exempted.⁷ It is only to be expected that someone should be restricted from

5 BELIEVE ME, SIR, those who attempt to level, never equalize. In all societies, consisting of various descriptions of citizens, some description must be uppermost. The levelers, therefore, only change and pervert the natural order of things; they load the edifice of society by setting up in the air what the solidity of the structure requires to be on the ground. The association of tailors and carpenters, of which the republic (of Paris, for instance) is composed, cannot be equal to the situation into which by the worst of usurpations — an usurpation on the prerogatives of nature — you attempt to force them. (ibid)

6 See Andrew Webster's commentary at; <http://www.bigeye.com/burke1.htm>

7 Henry Cohen, 'Freedom of Speech and Press; exceptions to the First Amendment' <http://www.fas.org/sgp/crs/misc/95-815.pdf>



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shouting 'fire!' without cause in a crowded theatre. Defamation of character is likewise constrained. In all cases the restraint recognises that what is a freedom for one may be a harmful constraint upon the liberties of another. Defining such limitations becomes a matter of law; in the Anglo Saxon tradition a matter of precedent. But note that in America with a constitution as in Britain without; nothing happens unless someone has been prepared to take action to achieve it.

The American constitution is also designed by its authors to put limits upon the power of the state. The American government may therefore expect to face challenges from its citizens if it attempts to transgress these constraints. The UK has no one document with the same intention. So is the British citizen then powerless against tendencies towards the arbitrary exercise of power by our government?

In both countries government strategies in relation to Iraq and the so-called 'war on terror' have led to protests from some elements within the public. It is not the question as to whether one or other position is right or wrong that should concern us here but the narrower question as to how free or otherwise these citizens have found themselves in their desire to exercise 'voice'. In both countries protest has posed a major challenge to relationships between citizen and state. In America the Bush Administration has used a real or supposed fear of terrorist attack to set additional limits on the citizen's right to free speech, protecting the President from exposure to protesters by removing them to 'free speech zones', well away from the President's path. The Administration had a clear target in the First Amendment.

On Dec. 6, 2001, Attorney General John Ashcroft informed the Senate Judiciary Committee, "To those who scare peace-loving people with phantoms of lost liberty ... your tactics only aid terrorists, for they erode our national unity and ... give ammunition to America's enemies." Some commentators feared that Ashcroft's statement, which was vetted beforehand by top lawyers at the Justice Department, signalled that this White House would take a far more hostile view towards opponents than did recent presidents. And indeed, some Bush administration policies indicate that Ashcroft's comment was not a mere throwaway line'.⁸

In Britain protests have been numerous and, although the police have adopted some tactics from their American counterparts, such as penning protesters into

8 James Bovard, 'The Administration Quarantines Dissent', The American Conservative http://www.amconmag.com/12_15_03/feature.html



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a limited space and preventing their movement for hours, the government has been sensitive to criticism that it is in any way curtailing civil liberties.

The longest running British protest was established in Parliament Square by lone activist Brian Haw who began camping out there in 2001 and gradually built up a display of anti-war plaques and images that ran the length of the Square. He was undisturbed before Parliament enacted constraining legislation in 2006. Police moved in to remove most of the display in May 2006.⁹ But that was not the end of the story. Artist Mark Wallinger then reproduced Mr Haw's display as an exhibit in the Tate Britain galleries, where it stood in stark contrast to the painterly elegance of most of the other art items on display. It is not that art always avoids critical engagement. Indeed, London's galleries hang several critical social statements of William Hogarth (1697-1764), such as The Rakes Progress series (Sloane Museum). Along with writers such as John Gray (1685-1732), Henry Fielding (1707-1754), and Jonathan Swift (1667-1745), Hogarth evidenced the willingness of what we would now see as free-thinking intellectuals to use social satire to express views that were critical of the establishment – if not directly of the government of the day or the crown. Edmund Burke would have been very much aware of this tradition, assuming it to be evidence of the pragmatic English approach to liberty that he contrasted so emphatically with French idealism.

'The greatest threat to freedom is the absence of criticism'; this the heading of an American blog. Some citizens, here, in America and elsewhere do seem in one way or another to be willing to exercise their critical faculties in relation to the behaviour of other citizens or of their governments. In some countries, such as today's Zimbabwe or yesteryear's South Africa they can only do so at grave personal risk to their wellbeing – but still do so. The sad thing is that, once freedom of voice is achieved politically, the alertness of citizens to 'things going wrong' in the public sphere seems to decline. An undertone of disappointment is evident in South African political commentary today. The effort required to be politically active; to articulate a view, to gain support for a cause, to be willing to champion that cause in the face of indifference or derision seems to be too much for too many persons and in consequence, governments seem all too often to be able to get away with quite mediocre policies. I would like to go further and hazard a guess that the more apparently certain are the constitutional entitlements of the citizen, the more the citizen is prepared to assume that ignorance of the public weal is bliss.

9 Guardian Unlimited: <http://politics.guardian.co.uk/iraq/story/0,,1781182,00.html>



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Nevertheless, criticism is not dead anywhere. Sometimes, as in the old Warsaw Pact countries, it consisted in political jokes. Sometimes stand-up comics have colonised the space. Now the net has opened up a near infinite number of opportunities for informed or ignorant exchange of views. If plural views can find expression somehow this in itself is a constraint upon the attempts of governments – inevitably imperfect governments – to define the world in ways that enhance their power. This may sound a little anarchic. Mr Chesterton was clearly anarchically inclined¹⁰ but did not claim much for the outcome of anti-conformist views. Today, much of our Web-based commentary is rubbish. Bremner, Bird and Fortune may not change the fate of the nation when they give us a good laugh at the expense of our leaders and of ourselves. But it all keeps us on our political toes.

Henry Porter, complaining about some New Labour attempts to speed up the legislative process which, he claimed, allowed ministers to usurp the authority of parliament, used the press to object and to criticise:

"If Mr Blair were more interested in history he would realise that the present, while certainly unique, is certainly not uniquely awful. But more important, he [Tony Blair] would see the great damage his laws are doing to the institutions we have inherited - to the constitution, to the tradition of parliamentary sovereignty, to the independence of the judiciary, to individual rights and to the delicate relationship between the individual and the state. All of them are products of British history. They are not perfect, but they make up a fairly large part of the body politic. This is who we are". (The Observer, Sunday March 6th, 2006).

His appeal was none the less powerful for the acknowledged intangibility of UK's unwritten constitution.

So I think that, at the end of all this, I come out in favour of constant struggle and mildly against setting up an edifice of constitutional principles against which the ranters in society may rant. This places considerable responsibility upon the citizen to find ways down the crooked paths of political discourse.

10 His sins they were forgiven him; or why do flowers run
Behind him; and the hedges all strengthening in the sun?
The wild thing went from left to right and knew not which was which,
But the wild rose was above him when they found him in the ditch.
God pardon us, nor harden us; we did not see so clear
The night we went to Bannockburn by way of Brighton Pier.



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It also entails living with an inconsistency that is not always comfortable. When the drums roll and the National Anthem rings out, I do not object to invoking the blessings of God upon the Queen, a decent enough lady, no doubt in as much need of blessing as anyone else. 'Long to reign over us' takes a bit more explaining away to myself. I imagine myself putting it to a foreign visitor; "She doesn't really 'reign over us'. That is just a figure of speech. If I am caught driving without a licence my offence is deemed to be against the crown and I will be prosecuted and sent to jail by policemen and magistrates acting in name of the Queen". How will my imagined foreign visitor see this? Just as another instance of English non-straightforwardness I guess.

By the way: Chesterton ultimately takes a very High Church way out. Like Edmund Burke he has to find ultimate authority somewhere. Oh dear, it is the usual poetic assertion that - as an economist put it - 'In the long run we are all dead.'¹¹

¹¹ My friends, we will not go again or ape an ancient rage,
Or stretch the folly of our youth to be the shame of age,
But walk with clearer eyes and ears this path that wandereth,
And see undrugged in evening light the decent inn of death;
For there is good news yet to hear and fine things to be seen,
Before we go to Paradise by way of Kensal Green.