

Chapter Eight

Constitutional Mania : A Preliminary Diagnosis

Kenneth Minogue

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For my money, the most interesting question in politics is: what is happening?--or more exactly: what is really happening? It is, of course, a doomed question, because we cannot really cheat the historian of his advantage of hindsight. We are at any given moment locked into our own point of view and dominated by our own preoccupations. Much is concealed from us, often deliberately, and it will emerge in future time. Consequences, of course, are crucial bits of evidence about the real character of actions, and some consequences take a long time to emerge. Indeed, it often takes time before they can be actually recognised as consequences.

So my question is: what is going on? And my answer is that we are increasingly falling into the grip of what I have called "constitutional mania." My next problem as a philosopher must be, if not to define this term, at least to make tolerably clear what I am talking about. Constitutional mania is the belief that society can be reformed by the agency of rules. Yet we already have an activity which orders and sometimes even reforms society: it is called politics. What is this new thing ?

Constitutional mania is the elevation of political issues to the constitutional sphere. It is the proposal to reform not merely society but politics itself by not merely passing but entrenching laws that will guarantee a good society.

There are many forms of constitutional mania, as we shall see, but before I discuss them, let me explain what a mania is. The term is a psychiatric technicality, and I am being rhetorical in appropriating it for polemic. A mania is an abnormal mood shift or excitement which afflicts people in the grip of an idea. You might compare it to the way in which eighteenth Century sceptics used the term "enthusiasm" (which means possessed by gods) to denigrate the religious fanatics of the previous Century. Constitutional mania is a similar type of unnatural excitement which characterises some people on the fringes of public life. They talk of a new Constitution the way speculators talk of new goldfields, or inventors promote the perpetual motion machine.

Their excitement results from the conviction that a new Constitution will solve a problem--indeed, all problems. Politics, for example, is an endless succession of unsatisfactory compromises negotiated by slightly dubious people acting on distinctly shaky principles. It has failed to deliver what we all know is possible, namely a decent, egalitarian, environment-protecting and compassionate society. If only we had a set of entrenched rules to exclude a schedule of admitted evils, then the business of public life would become mere detail, and could safely be left to the democratic representatives in our Parliaments.

Constitutional mania is to be found at all levels of contemporary life. In every profession, the discovery of any moral dereliction is followed by calls for a new code of ethics to guide practitioners. In New South Wales there was a recent call for a new code of ethics to guide even judges, and in Britain, the Nolan Committee has just been considering the issue of how Members of Parliament should disport themselves.

Then there is the mushroom growth of mission statements. How did we ever get on without them? They have spread from business to universities, which are now lumbered with banal declarations of commitment to scholarship, teaching and pushing back the frontiers of knowledge. Poor Trinity College, Cambridge! It has carried off more Nobel prizes than France. How, then, did it manage without having a mission? Now it will have to gird its loins: colleges all over the world have constitutionalised their purposes and will be in hot pursuit of its glory. Dons have been particular victims of this mania, because in the wake of mission statements come Teaching Audit committees and the equivalent of men in white coats with stop watches to control their teaching practices.

Which of us is now not subject to "guidelines"? These are codification in civvies. And most famous of all is political correctness, a heroic attempt to constitutionalise good manners, at least as they affect relations between the various "minorities" which alone are recognised in ideological discourse. Constitutional mania is one aspect of a drive deeply entrenched in our civilisation, and it is becoming increasingly visible.

The vanguard of the movement is, of course, in the realm of the Constitution itself. A Bill of Rights (so it is argued) would put our liberties beyond challenge, and guarantee equal rights for all. Oppressive majorities would be blocked from enacting the unenlightened prejudices of the moment. Sexism and racism, along with religious and ethnic intolerance, could be banished from public life. And judges would guard us against an overmighty executive on the basis of explicit rational principles (rather like natural law), instead of having to tease out the substance of political probity from formal principles of justice. And yet--as well as protection, there must be the power to achieve all good things: government must also be enabled to override obstructive special interests so that it could protect the environment and enforce our international obligations. This kind of Constitution is a way of having your cake and eating it too.

It might be thought that many of these objects might be achieved by the ordinary politics of the democratic process, but that thought would reveal a misunderstanding of what is at issue. Like revolutionaries, with whom they have much in common, constitutional maniacs (as we may conveniently call them) want comprehensive and irreversible reform. We now at last know what is right. The problem is merely to enact it.

Constitutional mania is thus a principle of salvation by fiat--let it be done! It is first cousin to New Year's resolutions, and these generally last about as long as Bosnian cease-fires used to. Salvation will follow from an act of collective will, henceforth backed by the majesty of law. And if you ask me who actually thinks in this way, I may cite those in Australia who see in the year 2000 an occasion for replacing the present "horse and buggy" Constitution by something more appropriate to the 21st Century. They are usually republicans, and their ambitions are combined with a conviction that a new Constitution will inaugurate a new era, a positive transvaluation of values, in Australia.

In Britain, Charter 88 and other organisations seek to sweep away the whole British ancien regime which has unaccountably stumbled from the thirteenth into the twentieth Century. The voting system, the House of Lords, the Monarchy, the Church of England and much else is up for grabs. In New Zealand, they have already been at it, and Canada has known little else for the last few decades. George Bush sought re-election in 1992 on the basis of no less than four proposals for constitutional reform. And to see the process at its most creative and ebullient, just focus on the European Community.

So, as with influenza, there's a lot of it about. Let me now make one or two observations which may help us in our diagnostic labours.

The first is that this line of thought responds to a widespread disillusion with politics in our time. It seeks to move the guarantees of our freedom away from democracy into the field of--law ! Law, of all things !

It is said that generals are always prepared for the last war, and it does not take a cynic to think that this is an untimely move. A couple of generations ago the ideas of law on the one hand, and justice on the other could be conjoined without obvious hilarity, but those days are gone. Instead, lawyers find themselves forever embroiled in political controversy, and suspected of covert legislative ambition. We haven't quite reached Jack Cade's position--"Let's kill all the lawyers !", but their popular status today is only marginally superior to that of astrologers and alchemists.

My second observation is that, in believing that agreement on hotly contested political issues would happen more easily in a constitutional convention than in the rough and tumble of politics itself, constitutional maniacs would seem to be showing themselves, as they say in the vernacular, several sandwiches short of a picnic.

Every day some new right is added to an endless schedule of desirabilities--desirable at least for some people. In Britain, the disabled recently complained that, while wheelchair facilities were provided at the Queen's Gallery, they had to be arranged in advance and were not always on tap, thus violating an important right: "the right to spontaneity." My favourite new right is called "top freedom" and originates in North America. It is the right of women to strip to the waist in public places on hot days just as men (or at least some men) do. Last year in Waterloo, Ontario, in what must have been incontestably the most popular protest movement in history, hundreds of topless ladies marched through the streets in support of this new right, and no constitutional maniac would regard the new Australian Constitution as satisfactory, we may guess, unless it were recognised in one form or other.

There are rights galore, then, and much disagreement about them--it is the substance of our politics. Surely what will happen in any constitutional convention is that such disagreement will re-surface. Worse, indeed: it will appear in even more violent forms, as has happened in Canada, because constitutionality raises the stakes. Lose a battle here, and you will be out in the cold for generations to come.

It is true indeed that constitutional maniacs are perhaps dotty in this way, but they are mad north-north-west, as Hamlet was. They can perhaps tell a hawk from a handsaw.¹ For they may well calculate that the populace at large will be confused about the impact of new laws, especially if these are packaged as motherhood propositions.

Those of us who have watched the European Community grow, or even reflected on the way international committees work, which are remote from the discipline of low level democratic repudiation, can be in no doubt that this new constitutionalism might well benefit from the confusing remoteness and technical obfuscation of abstract rules. Such has certainly been the European experience. Margaret Thatcher, with a good nose for these things and quite a lot of expert advice, has admitted that she did not understand what the treaty on the Single Market committed Britain to, and British politicians, from John Major down, have made statements about the Maastricht Treaty which directly contradict its actual effect. The current formula for political success is democratic talk and dictatorial practice. Bonapartism is alive and well, and set for a grand career in the next century.

A third observation: The flight from politics into constitutionalism parallels other powerful tendencies in our society.

Consider the welfare state. In giving expression to the idea of social justice, such a state creates a set of rights--to an income whether we work or not, to a pension, guaranteed medical help, the costs of schooling, sometimes even to an actual job.

The underlying principle to which a welfare state tends to move is that human needs are the domain of the state, while the individual is a creature free to indulge desires and whims to whatever extent the state, with its onerous responsibility for needs, thinks suitable. The individual steadily loses the basic human right to ruin his life by indulging in one or other of the seven deadly sins, because even as he falls, he will find himself being picked up, dusted off and saved by agents of the state. Most states these days have, after all, a policy on suicide.

With modern taxation policies, we are approaching the point where what a person earns is to be treated as pocket money, and is to be disposed of on hedonistic rather than on morally responsible principles, for consequences have been abolished as much as possible. Most recently, the key development has been state provision of compensation for victims of crime, with consequent disputes on such profound questions as whether parents should get the same compensation for a murdered child as children should for the loss of a parental breadwinner.

Constitutional mania works to produce the same effect in politics. A Constitution which spelled out everything important in the constitution of society would begin to reduce politics to the level of household or local government. It would merely be concerned with detail. National sovereignty would have disappeared into an apparatus of rules. (We might observe in passing that to destroy national sovereignty, with which democracy is inextricably linked, is a widespread ambition in modern public discussion.) What this point reveals is something obvious and fundamental about all constitutionalism: that it responds to mistrust. The reason rules have to be entrenched is that other people cannot be trusted not to change them, or misuse them.

Now where, previously, have we heard of this reduction of politics to administration? Where else but in Lenin's ambition of "every cook a politician." What else is it, indeed, but the withering away of the state? In this, as in other respects, constitutional mania reveals the same dynamics as those of revolution. As Burke remarked of the French:

"I confess to you, Sir, I never liked this continual talk of resistance, and revolution, or the practice of making the extreme medicine of the constitution its daily bread: it renders the habit of society dangerously valetudinary: ..."2

My discussion of constitutional mania is everywhere haunted by medical metaphors, and when I cite Burke using them, I ought to make the point even more explicit. Constitutional mania is a form of hypochondria, and constantly changing the rules, which amounts to becoming in the most literal sense rule-governed, is taking a kind of medicine every time we feel a draught.

We might, I suppose, take a more lenient view of constitutional mania, and regard it merely as an expression of contemporary hyperbole. As we know, today everything is hype, and every public sentence must be diluted by scepticism lest it poisons us. When we hear today of a "superstar", we know that it is probably someone we've never heard of, and who certainly has but a fraction of the talent we enjoyed in the mere stars of yesteryear. Growing up in an age of hyperbole, we reach for the most fundamental thing there is, and in politics, it's the Constitution--Superdocument, instead of Superman, the last appeal. And in this atmosphere, the solution to every problem consists less in playing the game better than in changing the rules. This is why the amount of regulation in our society--even as judged by the crude measure of pages generated by legislatures--keeps on increasing.

My view is that constitutional mania is profoundly reactionary, but before I come to consider this, let me ask: how did this thing come about ?

Any serious answer would take us deep into the realms of social inquiry, but for my purposes, we may simply suggest that as an idea, constitutional mania derives from a misplaced analogy between government and production. Making anything can be analysed into a series of steps leading to an outcome. In the area of production, this rationalist understanding of a practice has generated in our time the idea of quality control, which is now part of the environment of international trade.

If we transfer this idea to politics, we have an account of government as the practice of producing order by the use of rules. To every evil, there must correspond a rule to correct it. How do we "produce", as it were, safety ?--by rules of procedure. Efficiency can be seen as the result of rules which, if adhered to, would diminish or remove the random inattentions and contingencies of human actions. The idea irresistibly develops that even such elusive features of human life as moral probity can be "produced" if only we formulate the rules and enforce them. We see this in the area of road safety. Instead of relying upon personal responsibility as backed by the sanctions of law, we switch to enforcing rules to determine the conditions which are believed to determine death and injury on the roads--such as the amount of alcohol in the blood, or the use of seat belts.

Thinking along these lines, it becomes irresistible to regard the whole business of government as the production of desirable conditions of society, and this is understood most commonly in negative terms: that is, how do we prevent poverty, sexism, heteronormativity, racism, prejudice, smoking, dogs fouling the streets, and whatever else happens to rise to the top of the moral agenda? By constitutionalising it, of course! I have suggested that the explanation of this development lies in a misplaced analogy. Why is it misplaced? Again, the reason is complicated, but we may say several things.

Firstly: production of artefacts can be regular and reliable because nature has a uniformity that people don't. People are different. For one thing, they have variable impulses. For another, they have a kind of rat-like cunning which, if they choose, can defeat the best laid regulations of authority. As Walter Mattau once remarked in a Billy Wilder movie: "What they forget when they build a better mousetrap is that the mice get smarter too."

Perhaps we need a more high-toned example of the way in which rules may be defeated. Let us resort to Tacitus. He is dealing with the Romans, a notably legalistic people, even in their decadence. He tells us that under Tiberius, Libo was accused of treason on the basis of a paper containing mysterious signs attached to the names of Caesars and Senators. "...it was decided that his slaves who recognised the writing should be examined by torture. As an ancient statute of the Senate forbade such inquiry in a case affecting a master's life, Tiberius, with his cleverness in devising new law, ordered Libo's slaves to be sold to the State-agent, so that without an infringement of the Senate's decree, Libo might be tried on the evidence."³

Libo, we learn, committed suicide.

One is reminded of W.C Fields, who was once found reading a copy of the Bible. "Well, Fields, this is not the sort of thing I expected to find you doing", remarked his friend. "I'm looking for a loophole," replied Fields. There is no known technology for closing loopholes--except, of course, knives and guns.

I return to my fundamental question: What is going on in all this?

Remember Bacon. The project of the Organon was to put all mens' wits on a level. It was in other words to equalise talent. It was to break down the barrier by which some people are clever and successful, while others are not very clever and not very successful. More profoundly, the point is to introduce a new conception of a human being.

In the individualistic world in which we live, individuals of varying talents and desires associate with each other under rules, and society is the outcome, changing with each generation as people change. But here in Bacon, and in constitutional mania, we have a simpler conception of a human being as an embodied skill. It is a dualistic doctrine in which each of us is firstly a body, an organism, the mere raw material of what we do, on the one hand, and on the other hand as part of society (to which we owe everything), the carrier of a skill. The link between the body and the skill is called education, or more properly, training, one of the key concepts of this new conception of human life. And a skill is something that fits into some "national strategy", and it results from current forms of technology and social organisation.

The inhabitants of this new world resemble the young man who was persuaded by the arguments for philosophical determinism, and said :

"Damn !

To think that I am what I am,

A creature that moves

In predestinate grooves,

Not even a bus but a tram."

This is a conception of human life which is above all hostile to individual choice and responsibility, because it reflects a "top down" understanding of how society ought to be ordered. The contrast is with modern societies in which the shape of life responds to the changing skills and dispositions of the people themselves.

Ultimately it is logic which allows us to penetrate the real character of political enthusiasms. Revolution, for example, was a paradoxical idea because it claimed to represent change, but envisaged after its success an entirely changeless world. Its employment of the rhetoric of change and adventure turned out to be a sham. Revolution was essentially a concealed project of arresting change. Philosophers soon twigged this fact. Unfortunately, ordinary human beings had to live through several generations of death and misery before they found it out. Again, revolutionary doctrines attack the moral beliefs of existing societies in ways which assume that their own moral beliefs had escaped the relativism which they preached about the present. This logic of revolution applies no less to constitutional mania.

It assumes on the one hand that Constitutions must be changed in every generation in order to fit the society they govern--which subverts the whole idea of Constitutions. Or, it assumes that earlier Constitutions were based on false beliefs, but that now we have attained moral truth and can base our new Constitution on that. Either the incoherence of believing that Constitutions are both political, and yet also above the game of politics, or dogmatism: that is what the constitutional maniac offers us.

It is, perhaps, the change-fork which is more fundamental. For revolutions are in fact profoundly reactionary adventures in institution-creation which take for granted the beliefs and technology of the moment--as the unfortunate Russians and Chinese learned when they were subjected to the model of the conveyor belt production line, just about the moment when more advanced societies, where the dynamic of change remained alive, were abandoning it. In constitutional mania, we have son of revolution. It is profoundly dangerous for a civilisation such as our own, whose only chance of survival in a dangerous world consists in living on its wits.

Endnotes :

1. Hamlet, Act II, Scene 2.

2. Everyman edition of the Reflections, p.60.

3. Tacitus, *Annals*, 2. 32.
