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Government

Some governments are dictatorships of a person or party; others are constitutional governments. Constitutional governments are not all democratic, but in all of them there are **some legal limits on the power of the rulers.** In practice these limits can only be imposed by law, backed by public opinion. Indeed one of the main, and one of the oldest, functions of law is to limit the power of governments. Democracy makes the restrictions more effective, because in a democracy the rulers know that they will have to stand for re-election.

It is true that, apart from legal limits on its powers, there are **practical limits** to what a government can do by way of oppressing its subjects. Some are technical. It is not easy even with modern devices to spy on people at home. Morality and self-interest also play a part: the scruples or calculations of rulers or those to whom they give orders. The rulers may feel that there are things, like imprisoning the opposition without trial, that they should not do even when they would find it convenient. Or the army and police may be reluctant to arrest and shoot the government's opponents.

But only law can give the limits on government power a settled form. **A law that forbids imprisonment without trial** for more than so many days is quite likely to be respected. It can be relied on with some confidence by the person arrested, his family and advisers. A **feeling that it is morally wrong or politically dangerous** to imprison an opponent without trial is much less reliable. How wrong or dangerous the rulers think it to be will vary from case to case. The disappearance of an opposition leader will be noticed. If a teenager from an obscure family vanishes, his fate will hardly stir the waters. If the teenager belongs to a subversive group, the case against killing him will seem to the rulers a weak one. They might as well have him arrested and shot.

Morality and self-interest, then, are not enough by themselves to ensure that rulers behave decently. But they are the foundation on which legal restraints on government have to build, because laws

limiting their power will not be effective unless the rulers themselves accept them.

THE RULE OF LAW

Most citizens, and nearly all lawyers, think that governments should be subject to the 'rule of law'. But what is the rule of law? It exists when a **government's powers are limited by law and citizens have a core of rights** that the rulers are bound to uphold, and actually do uphold.

A society may observe its own laws without observing the rule of law. Suppose it has a law that citizens can be detained indefinitely without trial. In that case, if a citizen is arrested and detained without trial, the laws of that society are respected, but the **rule of law is violated**. This is because, if citizens can be kept in prison for the rest of their life without being tried, any other rights they may in theory have are almost worthless. For the rule of law to prevail some laws, like the detention without trial law, are ruled out.

The rule of law is an attractive ideal. But to impose limits on government power is **expensive**. If the limits are to be effective, there must be independent bodies (generally courts) to see that they are respected. If the powers of government are curbed, it **takes longer to reach decisions**. Government becomes more complicated, and in an extreme case can grind to a halt. A poor country cannot afford all the limits on government that may be possible in a richer one.

The advantages of the rule of law are obvious, so long as it is not too expensive and does not paralyse government. But how far should the restraints on government go? Opinions differ. The **trustful school of thought** holds that the legal limits on government should be kept to a minimum. They favour strong, decisive government. This outlook has traditionally been dominant in Britain, though opinion is now changing.

The **sceptical school of thought** reckons that governments are not to be trusted. It sets out to multiply legal controls over them. These controls may take various forms: the separation of powers, federalism, bills of rights, judicial review (these will be explained). The sceptical view prevails in the USA, where all these controls exist. Most other countries fall somewhere between the two.

We shall be weighing up the argument between the trustful and

sceptical views. I take the British constitution as an example of the trustful and the American constitution as an example of the sceptical view. It is worth noting that the British constitution is largely unwritten while the American constitution is mainly to be found in a written document, the Constitution, that first came into force in 1789, though it has been amended since. The sceptical school mistrusts any undertaking that is not in writing.

The trustful school thinks that the limits on government power should be few. In a country like Britain a good way of making sure that the limits are few is to have a **sovereign legislature**. This is because in Britain the government has to resign if it loses the support of the legislature (the House of Commons in particular). So the government normally has to have and does in fact have the support of the legislature; and it can exercise any powers that it can persuade the legislature to give it.

Sovereignty

The British Parliament, consisting of the House of Commons, the House of Lords and the Queen, is an example of a sovereign legislature.

Sovereignty is a slippery idea. It can be external or internal or both. **External sovereignty** is independence in international law. A state that is recognized as independent is a sovereign member of the international community. Of course states, even the most powerful, are not free to do exactly as they choose. They lack the resources to do some things, and international law prevents them from doing others. For instance, a state is **not allowed to use force** against another state **except in self-defence** or with the authority of the Security Council of the United Nations.

Another limit on a state's freedom of action is that it is legally **bound by the treaties** it makes. For example the members of the European Union have a treaty with one another by which much of their economic life is governed by the Union. The **European Union** has it own system of law and its own court, the European Court of Justice. The European Court of Justice takes the view that, if the law of the Union conflicts with the law of a member state, such as Italy or Britain, the law of the Union prevails.

Despite this, the **members of the European Union remain sover-**eign states. It is merely that they have handed over a great deal of

power to bodies like the Brussels Commission and the Council of Ministers, on which they are represented. A private citizen can do the same. To get rich quick I can agree to work for a bullying tycoon who insists on impossible hours and ruins my private life. This temporarily limits my freedom (which is for me what sovereignty is to the state) but does not destroy it. I can, if I want, leave the tycoon's service — and no doubt pay a price.

In much the same way the states that are members of the European Union **could leave it**. This would be against the law of the Union, and sanctions might be imposed on them by the other states, but it could be done. The other states could not use force against the state that seceded. They would not have the right to do what the northern states of the USA did when the southern states seceded from the American Union in 1861. They could not use force to keep the seceding state in the European Union. The reason is that the states that belong to the European Union, like Britain, are independent states, internationally recognized. The states of the USA, like Virginia, though they claimed the right to secede, are not independent states in international law.

A sovereign state, though legally independent, may in practice be influenced or even dominated by another state. The government of Lesotho, which is entirely surrounded by South Africa, is forced to pay close attention to the views of the South African government, whether it likes them or not. But it is **not legally bound** to do what the South African government tells it to. It can and does negotiate treaties with South Africa, for instance about its water resources.

The external sovereignty of a state is its independence in international law.

THE TRUSTFUL VIEW: LEGISLATIVE SOVEREIGNTY

Internal sovereignty, on the other hand, consists in the right of the legislature of a state to make any law it pleases. Internal sovereignty is legislative sovereignty. In a country like Britain the sovereign legislature (the two Houses of Parliament plus the Queen) could make a law, for example, abolishing elections. It could even lay down that people who criticized the law abolishing elections should be detained without trial. That law would be an outrage, but it would be valid in Britain. British courts would have to apply it. Of course a conscientious judge might refuse to do so and resign.

Despite this, supporters of legislative sovereignty argue that in democratic countries the legislature can be relied on not to pass a law of this sort. If it did, there would be violent protests and perhaps revolution. And it is, they think, valuable for the legislature to have unlimited legal power. In time of crisis, such as war, it would be wise to pass a law postponing elections until the crisis was over, and to have people who were suspected of working for the enemy detained without trial (this happened in Britain in the war of 1939–45). If the law forbade the legislature to make laws of this sort, the country would be hamstrung in conducting the war, and might lose it.

Even if this argument is convincing, the idea of legislative sovereignty is not as simple as it looks at first sight. If the legislature consists of a single person, a dictator, the only question is whether, to be laws, his wishes must be expressed in a certain form, such as writing.

But if the legislature consists of two or more people or bodies an awkward problem arises. In many countries laws are made by a lower house (like the House of Commons), an upper house (like the House of Lords) and a head of state (the monarch or president). To make a law all three must agree on the same written text. But how do they have to agree? In what order? By what majority? What happens if they disagree?

It is not obvious how to answer these questions. There are two basic possibilities. One is that laws must provide the answer. The other is that the matter is to be settled by custom. Customs of this sort, which regulate the way in which government works, are called **conventions.** A convention is a **practice that people in political life think they are bound to respect though it is not laid down in any law.** The questions we have put can be settled either by convention or law or a mixture of the two.

In answering them the trustful school favours convention and the sceptical school law. Convention grows up more easily when, as in Britain, there has been a long period of development unbroken by revolution or foreign conquest. A supporter of convention will argue that each House of the legislature should decide for itself what procedure to follow when it considers whether to agree to a proposed law. It should decide how many times the proposal needs to be approved (how many 'readings' there should be) and what majority in favour is needed if it is to pass. If the parts of the legislature

disagree the trustful school would leave it to the good sense of each to decide whether to give way.

A good example of this approach is the convention in Britain that the **Queen should agree to a proposed law** if both Houses of Parliament have already agreed to it. This reflects the idea that Britain is a constitutional monarchy in which the Queen represents the people but does not personally exercise power. But then why should the monarch, if she has no political power, be part of the legislature? One explanation is that this makes for continuity (see Chapter 2).

A supporter of the convention about the Queen can also argue that it is a good thing to keep the head of state as part of the legislature because this helps to prevent laws being passed that violate the rule of law. It may be important for the members of Parliament to bear in mind that the head of state **could legally refuse to agree** to an outrageous law, like the one abolishing elections. The fact that there is a convention that she should agree, rather than a law by-passing the need for her to agree, helps to prevent an abuse by the legislature of its powers.

The other side of the coin is shown by the disagreements that took place in Britain early this century (1909–11) between the House of Commons and the House of Lords about whether the House of Lords had the **power to reject a budget** passed by the House of Commons. Here the problem **could not be solved by convention**, because the House of Lords did not admit that it ought, in a democratic society, to give way to the view of the House of Commons. Hence laws were passed in 1911 and again in 1949 to reduce the power of the Lords, so that it can only delay legislation for a shortish period. The House of Lords had of course to agree to these laws, which it did, under the threat that the existing members would be swamped by hundreds of new members who favoured the change.

Though conventions have the advantage of being flexible, so that they can change as conditions alter, this example shows that they are not viable when those who have to work them are pig-headed. So is it better to regulate the procedure for legislating by law than by convention?

It often is. Suppose that in a country like Britain with a sovereign legislature the opinion gained ground that **there should be a referendum** of all electors before any law was passed changing the constitution. If this was done by convention there would be a

temptation for the government, if it did not want to hold a referendum that it might lose, to pretend that the proposed law did not change the constitution. So, if the referendum idea is to be taken seriously, it would be better to make the change by law. If that is done the courts (or some other independent body) will decide whether the proposed law alters the constitution, and so whether a referendum is needed.

But there is another snag. If a sovereign legislature passed a referendum law of this sort, could it not repeal it later by passing another law, without holding a referendum on the repealing law?

It is not easy to say. Some think that a sovereign legislature can repeal any law it has made previously. But would this be true even if the referendum law laid down that it (the referendum law) could not be repealed without a referendum?

Others think that the old legislature (in Britain Parliament and the Queen) **could not repeal the referendum law**, because that law would have changed the body that makes laws about the constitution. The referendum law makes the electors part of the law-making body whenever the constitution is to be changed. If the old legislature tried to change the constitution without a referendum they would not be making a law at all. The supposed law would be so much waste paper.

THE SCEPTICAL VIEW: CHECKS AND BALANCES

In a cohesive society, whose members share a common moral and political outlook, there is much to be said for the trustful view of government. There is also something to be said for it in a poor society, because it is expensive to impose limits on state power. Limited government calls for able, independent people, generally judges, to monitor the limits imposed. In a poor society there may not be enough of these to go round.

But if the society is **fairly wealthy and is divided into rival groups**, ethnic, religious, or social, law can be used to see that the interests of each person and group are taken into account when laws are made. If there are disputes about the laws or the way in which they are applied the state can arrange for independent people (normally judges) to decide whether the laws agree with the constitution and whether they have been properly applied by the government. In that

case government has to be limited by law. Checks and balances are called for.

If there are to be effective checks and balances a written constitution is essential. Clearly conventions will not work, because the rival groups do not trust one another enough. A written constitution, like that of the USA, is needed if checks and balances are to work.

What sort of checks and balances are wanted? The most important are those that divide up state power. The **separation of powers** divides state power according to function. **Federalism** divides it according to geographical region. **Bills of rights** divide power between the state and ordinary citizens.

The separation of powers

The state has three main functions: legislative, executive and judicial. The **legislature** makes laws; the **executive** enforces the laws and governs the country; the **judges** decide disputes that come before them and in doing so interpret the law and apply it to the facts of the case they have to judge.

Two ideas underlie the separation of powers. The first is that, to avoid **too much concentration of power**, the same people should not legislate, govern and judge. Each branch of the state should be **independent** of the others. But if each branch is independent of the others, the danger is that they will each go their own way and abuse their powers. Each will be selfish and corrupt. To avoid this, a second idea comes into play. There should be some way in which **each branch can be kept in check by the others**.

The American constitution adopts both these ideas. The three branches of the state are separate. The legislature is the Congress, consisting of an upper house (Senate) and a lower house (House of Representatives). Executive power is in the hands of the President, who heads the government. Judicial power is in the Supreme Court. No one can be both a legislator and a member of the government, or a legislator and a judge, or a member of the government and a judge.

The three branches are separate in that no one can belong to two of them at a time. But each can be checked by the others if it abuses its powers. The President can veto legislation passed by Congress, though the Congress can then overrule him by a two-thirds majority. The President and judges of the Supreme Court can be charged by the Senate with various crimes (impeached) and if necessary removed

from office. The judges of the Supreme Court are chosen by the President but have to be confirmed by the Senate. To make sure that the legislature keeps within its powers the Supreme Court has decided that, if the point comes up in a case before it, it can decide whether a law passed by Congress is against the constitution. If it is, the Court can say so, and the supposed law is then not a valid law. The President and Congress have accepted that the Supreme Court possesses this power.

In contrast the **legislature and executive in Britain are not separate**. The executive government (cabinet and ministers), who govern the country and execute the laws, belong to the legislature. The government depends on the legislature, since by convention it must resign if it loses the confidence of the House of Commons. But the House of Commons also depends on the government, because if the government decides that the time has come to call a general election the members of the House will (almost certainly) have to face re-election and may lose their seats.

The judges in Britain are more independent, since a judge of the higher courts cannot be dismissed except when the legislature asks the Queen to dismiss him for misbehaviour. Even so, the highest judges are members of the House of Lords, which is part of the legislature. And their independence is less important than it is in the USA, since they cannot declare that a law made by the legislature is against the constitution and so invalid.

Federalism

State power can also be divided up on a **geographical basis**. The system for doing this is called federalism. In a federal state there is a **federal government**, legislature and courts. There are also **regional governments**, legislatures and courts. Both may get their powers from a **written constitution**. Powers to make laws, to govern and to judge are each divided between the federal state and the regions. The regions go by different names in different countries (states, provinces, lands, cantons, republics).

One reason for dividing power in this way is that the country is too **large** to be governed conveniently from a single centre (Australia, the USA). Another is that its **regions vary** in language or culture (Switzerland, India, Canada). A third is that a **central government**

might be too powerful if it was not balanced by regional governments with some independent powers (Germany, the USA).

In a typical federation defence and foreign policy belong to the federal government, education to the regions, and the power to tax is divided between the two. So the federation and the regions may both have power to make laws on similar subjects. Since each region has its own independent powers and courts, it has its own regional legal system, alongside the federal legal system.

This makes for complication in a country like the USA where there are fifty 'states' (i.e. regions) as well as the federation itself. There are bound to be demarcation disputes between the federation and the regions, which have to be settled by courts, normally the federal courts. So lawyers flourish. If the federation also separates the law-making, governing and judging functions the law becomes very complicated and expensive. But the **complication and expense may be worthwhile** if they allow a country to hold together when otherwise it would fall apart.

Bills of rights

Another way of dividing up powers is to divide them between the state and private citizens. This is done by **listing in a law certain basic rights of citizens**. If there is a written constitution the list will be part of the constitution. When a bill of rights is in force a citizen has some rights that **cannot be taken away** from him either by the legislature, or the government, or the courts. (Whether the bill of rights itself can be repealed depends on the constitution).

For instance, if a citizen has the right not to be imprisoned for more than so many days without trial the legislature cannot make a law that provides for imprisonment for a longer period without trial. Nor can the government disregard the law and imprison its opponents without trial. The difficulty is, of course, to ensure that the legislature and government respect the law.

There are several ways in which one can try to ensure that the rights of citizens listed in a bill of rights are respected. One is by **convention**. The earliest bill of rights was an English statute of 1689. Since in England (now Britain) the legislature is sovereign, it has the legal power to disregard the rights listed in the bill, such as the right to free speech in Parliament. But in practice the legislature and government have respected these rights.

Another way of enforcing rights is through an **international treaty**. A state may agree to a treaty that gives citizens certain rights and sets up a court to judge whether they have been respected by the government of the state, its legislature or its judges. This is what happened with the European Convention on Human Rights, which came into force in 1953. For instance, the European Convention gives a person charged with a crime the right to a fair trial. Anyone who objects that he has not had a fair trial in, say, Britain can complain to the European Court of Human Rights in Strasbourg. If the court thinks that he has not been fairly tried, the state in which the trial has taken place has a duty to put the matter right, if necessary by changing the law.

But the simplest way of protecting fundamental rights is to **give the courts** of the country in which the rights are to be respected **the power to enforce them**. That is what happens in the USA, where the written constitution itself lists the rights to be protected, for instance the right not to be deprived of property without due process of law (see Chapter 4). It is for the American courts to decide whether a law passed by Congress or a decision of the federal government has wrongly deprived someone of his property.

Supporters of legislative sovereignty object to this way of enforcing rights because it gives **too much power to judges**. If property rights are listed in the bill of rights judges have the last word on how far that protection should extend. They decide on what terms the state can expropriate private property. This, the trustful school argues, is a political question which, in a democratic society, should be left to the legislature.

But in most countries, even democratic countries, governments and legislatures cannot always be trusted to respect basic human rights. So the judges may be the lesser of two evils.

Judicial review

Judicial review is also a way of limiting the freedom of governments. Judges can be given power to **review acts of the government** (decisions by ministers, public bodies and officials) or **even acts of the legislature** (statutes) to see if they conform to law. As we have seen, the separation of powers, federalism and bills of rights can hardly work effectively unless some independent body has the power to declare laws invalid if they are against the constitution.

The judges are the obvious people to do this, if only because every

country needs a body of impartial and independent judges to decide ordinary disputes which do not turn on the limits of state power. But in a society where judges are mistrusted, or are not independent enough, a different body could be chosen. In France, a constitutional council decides whether proposed laws are against the constitution.

Even if nobody has the power to decide that a statute is against the constitution, the rule of law is more secure if citizens can **challenge the decisions of ministers, officials and public bodies** before the courts. For instance, it is important that citizens should be able to challenge a decision to give planning permission for a new road. In some countries the ordinary courts have the power to do this, but in others, such as France and Germany, special administrative courts hear these cases. Sometimes the proposed decision can be challenged in advance, sometimes only after the event.

The usual grounds of challenge are that the decision was **not authorised by any law**, or that the person who made it **abused his powers** in doing so. This may be because he was corrupt or biased, or because he took account of things that he should not have, or left out of account things that he should have considered. For example he approved of the road because he knew it would annoy a political enemy, or he failed to consider the effect the road would have on drainage in the area.

The trustful school of thought thinks that the government should be free, provided it does not break the law, to govern in whatever way it thinks best. It would prefer to keep judicial review to a minimum, since it is expensive and causes delay in reaching and carrying out decisions. The sceptical school thinks it more important that the government and public bodies should reach the right, or at any rate defensible, decisions even at the expense of cost and delay.

The argument between trust and scepticism runs through public law from beginning to end.