RESTRAINING DEMOCRACIES, PROMOTING LIBERTIES:

CONSTITUTIONAL BLOCKS ON THE ROAD TO SERFDOM

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The Road To Serfdom was first published in 1944.[1] Dedicated to “the socialists of all parties” this extraordinarily influential book was Hayek’s first, preliminary warning against the way things were going. Of the two mottos on the title page one was from Hume: “It is seldom that liberty of any kind is lost all at once.” The other was Alexis de Tocqueville’s confession – made, remarkably, before anyone had had experience of totalitarian Leninist despotism – that “I should have loved freedom, I believe, at all times, but in the time in which we live I am ready to worship it.”

SPECTACULAR DEVELOPMENTS

All of us who share de Tocqueville’s fundamental commitment to increasing and spreading individual liberty must have been exhilarated by the events of the last five years; first among the self-styled People’s Democracies, and then within the former USSR itself. Certainly such exhilaration is well warranted. For there has indeed been an obvious and substantial increase and spread of individual freedom within most of these countries or future countries, although in few of them has much progress been made so far in the immensely difficult tasks of establishing firmly democratic political institutions and satisfactorily productive market economies – tasks which no country having previously suffered decades of “actually existing socialism” and totalitarian Leninist misrule has ever before been in a position even to attempt.

These spectacular developments within what was till only yesterday the Socialist Bloc came at the end of two decades during which, first in Greece and the Iberian peninsula, and later generally throughout Latin America, military dictatorships and other authoritarian but not totalitarian regimes were replaced by elected governments. All this, along with some signs of similar developments even in Africa, led Francis Fukuyama to ask in a much talked of article whether we are witness to ‘The End of History?’[2]

By this, of course, was not meant either an end of all historical events – such as the subsequent Gulf War – or that there will never again be any authoritarian or totalitarian regimes anywhere. It was, rather, that such regimes as do survive or emerge will never again be seen as elements in an irresistible wave of the future. And that, from now on, rulers who have not been elected, and – what should be seen as much more important – rulers who cannot in due course be removed through an equally free election, will everywhere be accounted aberrant and radically illegitimate.

Nevertheless, even if we were to allow that this optimistic suggestion is correct, it clearly does not be itself constitute a guarantee that such elected governments will both permit the free development of market economies in the countries which they govern and sustain the maximum of individual liberty for their citizens. Since sovereign majorities can and often do behave oppressively and tyrannically towards temporarily or permanently unpopular minorities, the crucial contrast for friends of individual freedom is not between democratic and undemocratic but between limited and unlimited government. Nor is such direct tyrannising over minorities by majorities the only or even the most important danger. At least equally important is the possibility that minorities whose support is needed in order to construct a majority will exploit their position. Anyone at all familiar with the politics of Israel will here think at once of the way in which the tiny orthodox and ultra-orthodox religious parties are able to insist upon the maintenance of various legal restrictions, against the wishes of the great majority of the population.

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THINGS WHICH GOVERNMENT IS NOT TO DO

But less peculiar to Israel is the phenomenon of rent-seeking: robustly defined as ‘the behaviour of pressure groups labouring to extract from the taxpaying majority by political means what they could not persuade members of that majority to pay freely as customers in a competitive market’. The most spectacular, yet enduring, achievement of rent-seeking in Western Europe is, of course, the Common Agricultural Policy. That is usually estimated to cost the average family in the UK twenty pounds a week. It was because the Founding Fathers of the American Republic were so aware of the dangers both of tyrannical majorities and of exploitative rent-seeking (‘faction’) that the Constitution specifies so many things which government is *not* to do; above all in the amendments known collectively as the Bill of Rights.

In his Preface to a new 1976 edition Hayek gave an “answer ... on the whole affirmative” to the question whether he was still “prepared to defend all the main conclusions of *The Road to Serfdom*”. There was, however, one qualification which he had to add: “At the time I wrote socialism meant unambiguously the nationalisation of the means of production and the central economic planning which this made possible and necessary.” (p. viii)

It was in precisely this understanding that in the UK the Labour Party opened its 1945 General Election manifesto with the boast: “The Labour Party is a socialist party, and proud of it”, proceeding at once to list all the basic industries which, if elected, it intended to nationalise; and which, when it was, it did. Nor has the commitment to total socialism in the Clause IV sense of “the public ownership of all the means of production, distribution and exchange” ever been expressly and categorically abandoned. When in 1959 Hugh Gaitskell as Leader, in an unacknowledged borrowing of words employed in 1921 by Lenin to introduce his own New Economic Policy, attempted to persuade the party to content itself with nationalising no more than “the commanding heights of the economy”, he succeeded in securing only an insubstantial, purely decorative amendment to that hallowed Statement of Aim. Gaitskell’s latest successor is apparently resolved not even to attempt to excise Clause IV as thus amended.

“In this sense”, Hayek continued, “Sweden ... is today very much less socialistically organised than Great Britain or Austria ...” Certainly this was true in 1976. For in that pre-Thatcher period far more of British than Swedish industry was nationalised. The next step was to claim “that socialism has come to mean chiefly the extensive redistribution of incomes through taxation and the institutions of the welfare state”. In that sense the effects discussed “in this book are brought about more slowly, indirectly and imperfectly”. (p. viii).

Today it might perhaps be somewhat less confusing to speak of the Swedish way as social democratic rather than as (in a second sense) socialistic, while mentally so revising *The Road to Serfdom* that it now becomes directed (not only to the socialists but) to the socialists and social democrats “of all parties”. But confusions of two kinds are relevant here. The first is purely verbal. This arises partly because the word ‘socialism’ – like such other political battle cries as ‘Tory!’ – is for some warmly commendatory but for others correspondingly comminatory, and partly because the label ‘Social democratic’ has over the years been employed by parties pursuing quite fundamentally different policies. For instance, all the originally Marxian socialist parties on the European continent were christened and still call themselves ‘Social Democratic’, whereas Lenin’s October coup itself was organised by the Bolshevik faction or fraction of the Russian Social Democratic Party!

OPTION RIGHTS NOT WELFARE RIGHTS

The more substantial confusion dates back to the 1936 publication by the award-winning US journalist Marquis Childs of his influential *Sweden: The Middle Way*. The mistake is to think that the way which was being taken by Sweden until the electoral upset of 1991 was a way more or less equidistant from each of the two extremes. Certainly the condition of Sweden always was and remains vastly different from that of any of the countries of ‘actually existing socialism’.[3] But what distinguishes Sweden from – say – Germany, Holland and the UK is not that it has been following an altogether different road but that it has followed the same road much further; namely the social-democratic road of an ever more extensive redistribution of incomes through taxation and the institutions of the welfare state.

Hayek himself saw *The Road to Serfdom* as at most an unusually lengthy pamphlet. So after its 1944 publication he went on to produce not one but two major treatises dealing with the problems of extending and preserving both individual liberties and free economies: *The Constitution of Liberty* (Routledge and Kegan Paul, London, 1960); and *Law, Legislation and Liberty* (3 Volumes, Routledge and Kegan Paul, London, 1973, 1976, and 1979). Both these two books are rich treasuries of political wisdom, and abundant experience since World War II has confirmed Hayek’s fundamental contention that those problems cannot be solved without the help of strong and widely respected constitutional limitations upon what even the largest and most impeccably democratic majorities may do. For that experience clearly shows that elected governments seeking re-election have a strong tendency to grow: to legislate or to regulate ever more abundantly; and to consume or otherwise dispose of an ever growing share of the total national income.

The first necessary but no means sufficient element in a constitution of liberty is a Bill of Rights. These, like those specified in the US Constitution, should be option rights not welfare rights. The former are rights to be allowed to do our own things, and the bearers of such rights are under a reciprocal obligation to respect the corresponding equal rights of everyone else. The latter are rights to be provided with some good, by some agency unspecified but presumably the state, and necessarily at the expense of somebody else, also unspecified, although in fact and with equal necessity taxpayers.

To say that welfare rights have no proper place in a constitution of liberty is not to deny that every state ought to make whatever longstop provision for the relief of non-voluntary absolute poverty is, in whatever are the prevailing local and temporal conditions, both possible and necessary.[4] The two qualifying adjectives are essential: the ‘non-voluntary’ has to be there in order to pre-empt the scandalous promotion of state-subsidised voluntary idleness; while without the ‘absolute’ the way is wide open to a definition of ‘poverty’ in terms of a falling short of the going average, and to consequent claims for ever larger tax-financed handouts to bring those who are under this conception poor nearer (if never perhaps right up to) that average.

Certainly the constitutional entrenchment of fundamental option rights is an indispensable beginning. But abundant experience shows the urgency of adding what might be called a fiscal constitution, providing for the similar entrenchment of tight restrictions upon the powers to tax and to inflate.

MORE TAXED MEANS LESS FREE

Taxation as a proportion of national income provides the best available measure of the relative size of the spheres of individual as opposed to collective choice in the disposition of goods and services. But it is important to recognise that, although surely the best available, it is by no means perfect. For to acquire an adequate appreciation of the actual situation in any particular country and at any particular time we need also to be able to estimate the quality, nature and burdensomeness of regulation in that country. Some regulation is of course needed to protect the equal liberties of all. This applies – to take a very modest and homely example – to regulations forbidding those abuses which reduce the amenity of public parks, spoiling things for everybody but the abusers themselves. (It is to cases of this kind that we might reasonably refer a remark allegedly made by – of all people – V. I. Lenin: "Yes, liberty is precious, so precious that it must be rationed.")

Most of the regulation which nowadays pours in ever increasing quantities from Washington, Brussels and other centres of ever bigger government is, however, of a very different kind. It restricts liberties in all sorts of ways and imposes all manner of costs; costs which, because they are not openly and explicitly argued for and imposed as the taxes which they are, get left out of most estimates of the total burden which the state is imposing upon the economy.

Everyone who is not 'Madly for Maastricht' will be able to cite favourite examples of often ruinous costs imposed by Brussels on British individuals, firms, and even whole industries. But by far the most spectacular example of a regulatory burden on an economy comes from the USA, where it has been conservatively estimated that, if all the regulations to restrict freedom of contract issued and enforced by the Equal Employment Opportunities Commission were to be scrapped, and "if every employer in the country were free to use tests and select on merit ... total US output would be about $150 billion higher ... That's about 2.5% of G.N.P."[5]

Failing any better measure, let us use taxation as a proportion of national income. This in all the established democracies has during the present century grown by factors of three or even more.[6] Nor are there many signs of this growth being checked, much less reversed. Even the three Thatcher administrations in the UK succeeded only in reducing "general government spending ... from 41% of national income in 1979 to 38% in 1989 on OECD definitions".[7]

Shortly after the first of those administrations took office David Marquand, sometime holder of an ultra-safe Labour seat, made the crucial point about the inverse relationship between taxation and individual freedom in an Encounter article entitled 'Inquest on a Movement' (July 1979): "... if the social wage bites into the individual wage", he wrote, "the individual wage earner will lose some of the freedom which he would otherwise have enjoyed". (The meaning of the expression 'the social wage' is best elucidated by saying that it embraces all the state-supplied benefits in cash and kind demanded by 'social policy' as conceived by Jacques Delors). Marquand continued: "A society in which 50 per cent of the gross domestic product is spent by the state may be healthier, better educated or more equal than a society in which the state spends only 30 per cent of GDP. But it will also be less free, and it is humbug to deny the fact."

Humbug indeed it is. For in so far as the state takes my money from me, and decides how that money is to be spent, I am not free to make my own choices between alternative possible expenditures. Furthermore, even when the state does choose to spend monies taken from me in order to provide some service of a kind which, even if I did have a choice, I would nevertheless choose to buy, the public provider will likely be a monopoly, not subject to the stimuli and disciplines of competition, and hence effectively charging more and providing worse than would be available in a free market.[8]

Before asking in what ways the powers of government to tax need to be constitutionally limited we have first to appreciate that taxing is taking justly acquired property under the threat of force. It is, therefore, taxing itself, rather than the constitutional limitation of the power to tax, which calls for justification. Were we still dealing with small governments, confining themselves for the most part to the maintenance of external national defence and internal law and order, then the obvious line would be to argue that taxing by such a government is the extraction under the threat of force of payments due for services rendered. But an argument of this sort cannot serve to justify the far heavier forced exactions of contemporary big government, especially those exactions required to finance payments by the state to various politically favoured sets of citizens or subjects.

THE RULES OF JUSTICE

It is important in this context to recognise and reject the radically socialist assumptions of those who denounce reductions of rates of taxation as gratuitous gifts from the Exchequer to those formerly forced to pay the previous higher rates, and who insist upon describing any particular reliefs from standard rates of taxation as 'tax subsidies' to those thus relieved. For these assertions obviously assume that all goods and services belong by right to the state, and are available for distribution or redistribution at the absolute discretion of government.

It is also important both here and elsewhere to recognise that the more or less egalitarian 'social justice' to which the socialists and social-democrats of all parties appeal as warranting every desired redistribution is no more a kind of justice than 'positive freedom' is a kind of freedom or imaginary dollars are a kind of dollars.[9] For the key phrase in every traditional definition of 'justice', from Book I of Plato's *Republic* through the *Institutes* of Justinian and up to but excluding John Rawls' mistitled *A Theory of Justice*, was *suum cuique tribuere:* understood as a matter of allowing to each their several (and in fact often extremely unequal) deserts and (not necessarily deserved) entitlements. The rules of justice however require: not that everyone be treated equally – the convicted in the same way as the acquitted; but only, like all other rules, that all relevantly like cases be treated alike.

If we are seeking to develop a fiscal constitution to serve as a block on *The Road to Serfdom*, then the first two clauses should probably be: one prescribing some fixed percentage of the national income as the maximum of which government may dispose; and the other prescribing that current government expenditure must be financed out of current taxation, and proscribing the alternative of government borrowing to finance such expenditure. Since the proportions of national income spent by Western European governments seem nowhere to be more than a point or two lower than 40%, and usually several points above, a figure of 35%, although ideally far and away too high, would seem to be the lowest which could realistically be put forward as an objective for the end of the century. But everyone younger than the present writer, which means almost everyone, ought to cherish as their ultimate ideal some far, far lower figure.

The most immediate justifications of this proscription of borrowing to finance current government expenditure are references, first, to the shortsighted imprudence of thus channelling the savings of private individuals into current government spending rather than into productive private investment and then, second, to the need to prevent majorities in democratic parliaments buying re-election with expenditures not paid for out of current taxation. (That, after all, is what deficits are for).

The importance of these two justifications comes out most clearly from considering National Insurance in the United Kingdom, Social Security in the United States and similar schemes in Germany and elsewhere. None of these schemes has been properly funded, with the inpayments invested to ensure that future outpayments can be met from the returns on that investment. Instead current inpayments are and always have been used to finance current outpayments. The original inpayments were of course spent as soon as they were made in order to provide benefits for people who had never had to make any contributions – so that the politicians could take credit for their caring generosity in providing these benefits without incurring unpopularity by raising the taxes needed to pay for them. All such schemes run into dreadful trouble just as soon as, long after those guilty politicians are safely dead, the population ceases to rise and begins to age. That is when fewer producers have to be taxed ever more heavily in order to provide benefits for more and more non-producers.

This whole business raises the usually neglected question of intergenerational equity, a question which ought to trouble all those who insist that it is their concern about equity rather than their envy or their desire to join a *nomenklatura* of equalisation which inspires their demands for the enforcement of all the compulsory redistributions supposedly mandated by 'social justice'. To the extent that it does not trouble them we are bound to suspect the motives of the Procrusteans.

IMPOSING A FINE FOR WORK

Less obvious, although certainly no less important than the call to proscribe borrowing to finance current state spending, is the need to proscribe taxes of certain kinds. Of these the most important are taxes on capital: death duties, inheritance taxes, wealth taxes, capital gains taxes, and capital transfer taxes. All these necessarily increase the wealth and power of the state relative to that of individuals, reducing the numbers of those with sufficient independent means to be able to afford either to start a new business themselves or to sponsor other people wanting to take such economic initiatives.[10] Inflation makes unindexed taxes on capital gains one more variety of tax on capital. All taxes on capital are in effect, as often in intention, taxes on capitalism; as are tax surcharges upon investment income, officially abused as unearned. (Unindexed in inflationary times such surcharges can well help to transform taxes on investment income into, in real terms, levies upon the capital invested.)

It is perhaps too much to hope for an outright ban on income taxes at progressive rates. But all direct taxes of income should recall one of the least quoted remarks in Rousseau's *Social Contract*: "Imposing a fine for work is a rather unusual way of abolishing idleness." They should also attend to evidence from the United States of America, Sweden and other countries showing that high marginal rates can be not only economically but even fiscally counterproductive.

It is, as was said earlier, comparatively easy to indicate the kinds of constitutional constraints which are needed. The much more difficult and perhaps insoluble problem is to discover how such constitutional constraints could in practice be first implemented and then indefinitely maintained. Here it must suffice, simply and boringly, to insist upon the truism that the price of liberty is eternal vigilance.

NOTES

1. *The Road to Serfdom*, Routledge and Kegan Paul, London, 1944.
2. Francis Fukuyama, 'The End of History', *The National Interest*, Summer 1989.
3. See, for instance, Peter Stein and Ingemar Dorfer, *The Death Knell of Social Democracy: Sweden's Dream Turns Sour*, Institute for European Defence and Strategic Studies, London, 1992; and Eric Brodin 'Collapse of the Swedish Myth', in *Economic Affairs*, February 1992; and compare, though it is now badly dated, Roland Huntford *The New Totalitarians*, Stein and Day, New York, 1975.
4. Consider here a statement from Selsdon Group Brief No. 18, *A Beginners Guide to Public Expenditure Cuts*, issued by a collective of the most hardline Hayekian British Conservatives: "Only by cutting out some state activities altogether can this or any government concentrate sufficiently on that very limited list – defence, preservation of the value of thc currency, maintenance of order, guaranteeing a minimum standard of life to the poorest – of activities which, arguably at least, the state and only the state can perform."
5. Peter Brimelow and Leslie Spencer, 'When quotas replace merit, everybody suffers', in *Forbes*, February 15th 1993, pp. 80-102; quotations taken from p. 99.
6. For instance, at pp. 99-100 of *An Economist's Protest*, Thomas Horton and Daughters, Glen Ridge, NJ, 1975. Milton Friedman tells us that before 1930, save during or just after major wars, spending by all levels of government in the United States of America amounted to roughly 15 per cent of national income. Since 1930 it has just about trebled.
7. Professor Patrick Minford, 'An economist's critique of the illusions of Social Democracy', in *Freedom Today*, April 1993, p. 16.
8. For a review of the abuses of the maintained schools monopoly in the United Kingdom, as well as for suggestions of possible remedies, see David Green, ed., *Empowering the Parents: How to Break the School Monopoly*, Institute for Economic Affairs, London, 1991, pp. 1-63.
9. For a defence of this thesis, see my *'Social Justice' Isn't Any Kind of Justice*, Libertarian Alliance, Philosophical Notes No. 27, London, 1993; and/or my *The Politics of Procrustes: Contradictions of Enforccd Equality*, Prometheus, Buffalo, New York, 1981, Chapters I-IV.
10. And/or to provide substantial assistance to all manner of good (or far from good) causes. In the dark days of the late seventies Sir Keith (now Lord) Joseph conducted an anti-socialist mission to the universities. In every one of his often interrupted speeches he made the telling point that Karl Marx could not have done his revolutionary and research work had he not been supported by Engels from the profits of a mini-multinational.