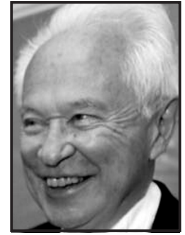


On the Matter of Constitutional and Institutional Choice



PROF. NIALL FERGUSON ARGUED IN HIS 2012 BBC Reith Lectures that institutions, rather than such matters as the ethnicity of the population, geography, or even natural wealth are the most crucial factors in the success or otherwise of nations.² A country's institutions are obviously important.

The question is: How important?

The argument for the importance of institutions is supported by the study undertaken by Acemoglu and Robinson, who provided a series of examples for the proposition that it is, above all, man-made political and economic institutions which underpin economic success or, indeed, the lack of it.³

The importance of political and economic institutions surely extends to the underlying civil society of the relevant country. This encompasses the non-state institutions, such as the family and the church. This is always changing, and such changes can frequently come from outside. An example is the export of the Wahhabi version of Islam, funded from Saudi Arabia. Some argue this promotes an extreme form of the Islamic religion which encourages terrorism; it seems to have weakened the moderate expression of the Muslim religion in several countries, such as the dress adopted by women in South-East Asia.⁴

As to choice, it is suggested that the Australian example is a useful and unique laboratory, not only of the way in which all the institutions — political, economic and civil — were chosen, and the meticulous information available to an unusual degree on that as

well as in assessing the country's subsequent successes and weaknesses. Modern Australia is also unusual in that its civil society emerged at the same time as most of its other foundation institutions.

Enjoying the leadership of the West, the United States can be expected to take an interest in major changes in institutions, not only among allies but across the world. Neither the US nor its allies should be embarrassed by this, nor by the fact that the US is the superpower or hegemon of the West. There are considerable benefits for countries in the Anglophone world in the fact that both the present hegemon and the immediate past one, the UK, share the same language and legal system.

In addition, both the US and the UK have had an unusually benign influence on world affairs, while being ready to resist evil as has been so cogently illustrated in the current film, *Darkest Hour*.⁵ Further, we should all be concerned when the alternatives to the hegemon neither govern their peoples according to acceptable constitutional principles nor do they always respect the rules-based international order.

One of the inevitable rôles of the great powers, and especially the hege-

mon, is to play, however reluctantly, a leading rôle in the exercise of constitutional choice in what can best be described as "troubled countries". These include those countries where civil war has raged, which have been occupied as a result of war, or which have experienced a period of serious instability.

It is important that, in exercising this rôle, the United States especially — as well as other leading Western powers — do so on the basis of the best information available on legal, constitutional and above all historical, and other alternative factors.

According to the adage repeated by Glubb Pasha in his essay, *The Fate of Empires*, the only thing we learn from history is that men never learn from history.⁶ Or as Santayana famously put it, those who cannot remember the past are condemned to repeat it.

While the hegemon will often exercise this rôle after military intervention, as in Iraq, this is not a call for rampant military intervention. It is clear from the long period of British leadership during the century following the Napoleonic wars down to the emergence of Malaysia, and under US leadership from her entry into World War II, that maintaining military strength while exercising restraint, with wise diplomacy, are attributes of the successful hegemon. As US Pres. Theodore Roosevelt said: "... speak softly, and carry a big stick."

Examples of this restraint included the long British attachment to the bal-

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2 Ferguson, Niall: "The Rule of Law and Its Enemies"; 2012, *The Reith Lectures*, 2012, <http://www.bbc.co.uk/programmes/b01jms03>.

3 Acemoglu, Daron; Robinson, James A.: *Why Nations Fail*. Crown Business, 2012. ISBN 0307719219.

4 Butt, Yousaf: "How Saudi Wahhabism Is the Fountainhead of Islamist Terrorism", *World Post*, https://www.huffingtonpost.com/dr-yousaf-butt/-saudi-wahhabism-islam-terrorism_b_6501916.html.

5 *Darkest Hour* was a 2017 British war drama film directed by Joe Wright, written by Anthony McCarten and starring Gary Oldman as Winston Churchill. It is an account of Churchill's appointment as Prime Minister of the United Kingdom, as nazi Germany swept across Western Europe, threatening to defeat the United Kingdom. The film is based on fact but employs fiction for artistic effect. See Lukacs, John: *Five Days in London*. May 1940, 1999, Yale University Press. ISBN: 978-0-300-08030-8.

6 Glubb, John, Sir: *The Fate of Empires and Search for Survival*. Edinburgh, 1978: Blackwood.

ance of power and what is now known as “offshore balancing” and US attachment to the latter, at least until 1991.

Military intervention involving large-scale use of military forces should always be a last resort for reasons which include the danger of falling into what can become a quagmire, one which can even be damaging to an authoritarian state as the USSR found in Afghanistan.

Even where there has been no significant military intervention, there will still be occasions when the hegemon and other great powers can significantly influence a constitutional choice. The result can be crucial not only for those governed but for international relations.⁷

While we cannot foretell the future, we should always reflect on the fact that it can be dangerous to replace institutions which, although imperfect, enjoy a substantial and wide level of support and are a significant part of the history of the country concerned. Consequently, it would be prudent for the hegemon to use its influence to maintain or restore institutions which are known to have worked the past and indeed worked well in the past, including monarchies and other traditional forms of government.

While change may seem more consistent with the modern world and current values, we need only go back to 1789 in France to see how the novel and ostensibly enlightened institutions adopted there first entranced even an observer as astute as Edmund Burke, before he realized the danger which had been unleashed.⁸

Churchill describes accurately as a “plague bacillus” the transport in a sealed train in April 1917 of Lenin from Switzerland into Russia by the German High Command.⁹ This was an extraordinary intervention by a great power in the affairs of another country, admittedly an enemy, to promote instability and thus to ensure a Russian withdrawal from the war. This had un-

intended consequences on a gruesome scale. It could be argued that as many as 100-million people died as a result of the injection of bolshevism into Russia, and then across the world.

Beside that heinous act, the transport by Air France of the *Ayatollah* Ruhollah Khomeini into Iran from the asylum which French Pres. Valéry Giscard d’Estaing had given him at Neauphle le Château (and from where he campaigned to establish a theocratic Islamic republic in Iran), as well as the US Carter Administration’s withdrawal of support from the Shah, seem almost venial sins.¹⁰

If the result of these acts were the installation by France and the US of the theocratic administration of Iran, then this was hardly in the interests of the two sponsoring powers.

The rôle and influence of the great powers, whether minimal or extensive, in influencing constitutional change following the dismantling of the Austro-Hungarian Empire, the revolutions in China and Cuba, the previously-mentioned fall of the Pahlavi Dynasty in Iran, the marxist coup in Ethiopia, and the fall of the Iraqi and Afghanistan governments cannot inspire great confidence in those great powers’ ability to deliver the desirable aim of ensuring the good governance of those states and also enhancing the peace and stability of the world.

It is, of course, vital to the interests of the hegemon that all is done to ensure that a friendly power does not radically change its institutions along with its foreign policy, becoming unstable or unfriendly, or worse, both.

The British had a long experience in this from 1815, culminating with their successful war against the communist insurrection in Malaysia. The US experience was originally concerned more with its own hemisphere and Asia, especially China, Japan, and the Philippines, but with World War II this became global, with great successes in constitutional change in Germany and

Japan. Several subsequent examples cannot be said to have been so successful; such as Iraq and Afghanistan.

Making the Choice

THE CHOICE OF institutions is usually made by the country concerned, although in some cases, the choice may be imposed by an imperial power.

This was standard practice in relation to territories occupied by the former USSR and the People’s Republic of China (PRC), where it was effected far more ruthlessly than that of at least some of the more benevolent European imperial powers. At the same time it was done under the cloak of a complete denial of colonialism.¹¹

When the United States, the UK, and France have occupied a territory as a result of a war, at least from World War I, the result has been more conciliatory and always with the end of leaving behind democratic institutions (although not necessarily institutions of the host country’s choosing).

The first step in choosing a nation’s institutions, whether the decision is taken internally or under external influence, must, ideally, be between freedom and dictatorship. Apart from the need to distinguish between different dictatorial brands, there is little point today, if indeed there ever was, in classifying dictatorships as left-wing or right-wing.¹²

Whatever difference there was between stalinist and fascist or nazi attitudes to an associated corporate crony class has disappeared, particularly in the latest version of Chinese communism under Xi Jinping who seems to be becoming the “emperor for life”.

More importantly, it is concerning that the PRC model is now being held out as a possible and even appropriate choice by those who, from a Western viewpoint, should either know better, or, worse, are themselves nursing auto-crat tendencies.¹³

7 For example: Egypt in 1952, Iran in 1979.

8 Edmund Burke, Edmund: *Reflections on the Revolution in France, 1790*. New York 2006: Dover Publications,

9 Churchill, Winston S.: *The World Crisis*, Volume Five.

10 Sale, Richard T.: “Did We Head Off a Bloodbath In Iran?”. *The Washington Post*, January 13, 1980.

11 Whether we have seen the end of colonialism cannot be answered definitively. Many observers would say that several countries today are actually large land empires, including Russia and the People’s Republic of China, consisting of a metropole surrounded by effective colonies.

12 Indeed, it may well be that some commentators find the left wing/right wing binary choice a useful shorthand in tainting politicians from one or other party as being close to or even in collusion with some foreign dictatorial brand.

13 In some ways this recalls the way in which absolute monarchy especially that of Louis XIV was seen across Europe as a superior alternative to the more limited monarchies on the British Isles, even under the Stuarts, the Dutch and Swiss models being beyond the pale.

Measuring and Assessing the Choice

IF THE CHOICE OF institutions is crucial in the success of a country, then it is convenient that for almost three decades, the United Nations has been measuring the success of countries through its imperfect, although useful, Human Development Index (HDI). This aggregates into one index various measures of national health, wealth, and education.

In making a choice, especially where countries are persuaded to significantly change some or other of their institutions, Western countries and those influenced by the United States and other Western powers are more likely to proceed on the basis of certain assumptions.

The first is that best expressed in the US Declaration of Independence, that “all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty and the pursuit of Happiness”.

The second assumption is that the fundamental institution of a civil society normally precedes the erection of other institutions, Australia excepted.

The third assumption is that the constitutional institutions should provide stability while at the same time ensuring that this does not lead to authoritarian control. Lord Acton will forever guide this balance, with his eternal warning that all power tends to corrupt and absolute power corrupts absolutely.

US Pres. (1809-17) James Madison Jr. put it more prosaically: “If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”

The Principal Choices

THERE ARE TWO principal models for a democracy in the modern world. The oldest is the Washington model, based on the Constitution of the United States of America which itself draws considerably from the models instituted in England’s Glorious Revolution of 1688 and from American colonial government.¹⁴

The Washington model is distinguished by the greater separation of powers not only from the judicial arm but between the legislature and the executive.

Then there is the Westminster model where the effective executive must have the confidence of the lower house of parliament, a system which was born, paradoxically, during and because of the American War of Independence.¹⁵

Because this system is foreign to the United States, but should be considered as a possible alternative when countries choose institutions, it is appropriate to make some comments on its working.

In this system today, the Crown, as the formal executive, is seen as providing *leadership beyond politics*, which is recognized both by the establishment and also by the people. The Crown may be seen as a unifying symbol while a political figure may be seen as divisive.

Apart from a symbolic or ceremonial rôle, the Crown remains a constitutional check and balance not only through its reserve powers but as a constitutional auditor.¹⁶ The latter is best described in the aphorism that the Crown is important not so much for the power it wields, but the power it denies others.

The essence of the system typically involves the Crown being advised by

the ministers to take a certain course of action. The Crown, normally the Sovereign or his or her viceroy, is entitled to enquire as to the authority to take that action and whether there are any preconditions imposed, as there so often are.

The actual government is a collective, a cabinet of ministers enjoying the confidence of the lower house. The prime minister is first among equals and, especially in Australia where the Senate is so powerful, must ensure that the government is funded to undertake its responsibilities.

In 15 Commonwealth Realms, including Canada, Australia, New Zealand and Jamaica, a Governor-General appointed by the Queen, acting on the advice of the relevant prime minister, exercises all of the powers of the Crown, apart from his or her own appointment or removal as Governor-General.¹⁷

In Canada, the Crown is represented in the Provinces by a Lieutenant-Governor, appointed by the Governor-General on the advice of the Prime Minister. Australia is different. Because of distrust of the Federal Government, a State Governor is appointed directly by the Queen on the advice of the State’s Premier.¹⁸ It is fair to say that when tested, as in Australia in 1975 and in the regular exercise of the reserve powers, the viceroy has not seen his allegiance as being to the politician who advised his appointment, but to the Crown.¹⁹

There are republican variations of the Westminster model, as seen in Ireland, Finland, Israel, and India. A president does not replace the crown, which, while personalized in a queen or king and to a lesser extent by the viceroys, which is a vast institution in the state, enjoying the allegiance of the judges, armed forces, and public service, and in the institution of criminal proceedings in its name. Instead, a

14 The Glorious Revolution produced the constitutional monarchy Mark 1 where the King legislated with the House of Lords and House of Commons but remained the Executive; this is mirrored in the Washington model where the President and the governors are the executive.
15 When a vote of no confidence in the government of Lord North in 1782, calling for an end to the war in America, was lost on the floor of the House of Commons, the cabinet accepted responsibility collectively and resigned. In due course this was to become a constitutional convention.
16 In some models this rôle has been removed, eg: Sweden, where the Speaker appoints the Prime Minister. This had the effect of making the Speakership a contested political position.
17 It is important to understand that, in these instances, the Sovereign acts as the Sovereign of the specific Realm and not of the UK. In the case of Australia, Canada, and New Zealand, for example, the Sovereign is constitutionally the Sovereign of that specific realm (ie: Australia, Canada, or New Zealand), and the rôle of the Sovereign as Queen (or King) of the United Kingdom, or, indeed, as Head of the Commonwealth, is not relevant.
18 *Australia Act*, 1986. Identical legislation was passed by the British and all Australian Parliaments.
19 A reserve power is a power exercisable by the head of state according to his or her discretion without, or contrary to the advice of the responsible ministers: Anne Twomey, *The Veiled Sceptre*, Cambridge University Press, 2018, p.6

president occupies his office just as defined under the constitution, no more.

Constitutional monarchists consequently argue that there are no advantages in a realm becoming a Westminster republic; indeed there can be disadvantages, apart from any problems moving to a republic can create in changing the constitutional balance, inadvertently or intentionally. Australians for Constitutional Monarchy (ACM), my own organization, has argued that the Indian experience provides an example.

In 1975, to stave off a conviction for corruption, Prime Minister Indira Gandhi advised Pres. Fakhruddin Ali Ahmed, a political ally, to declare what is generally agreed to have been an unjustified state of emergency.²⁰ When he hesitated, she reminded him who had appointed him and where his political loyalties should lie. This was precisely the time when the President should have acted independently as a check and balance against the abuse of power. But instead of rejecting the advice, as monarchists claim any governor-general should have, he signed the decree, allowing her to imprison the opposition and to rule as a dictator.

Both the Washington and the Westminster models have been shown to work, and work well, in their countries of origin. But only the Westminster model has been exported and worked for extended periods of time without collapsing into an authoritarian regime. That may have been because it was exported to countries with a civil society much like that of Britain. Even when the French imported the US system, their Second Republic was soon reconstituted as an authoritarian Second Empire.

The Westminster style of constitutional monarchy consistently performs well, and significantly better than other systems on every measure of success, including the HDI (Human Development Index), as well as other measures relating to freedom.

Only about 15 percent of nation-states are constitutional monarchies, but it is not unusual to find that they constitute 60 percent or so of the top five or 10 countries in the HDI and other measures of success, including

freedom. The model has performed well in the formerly settled colonies, notably Canada, Australia, and New Zealand, in the West Indies and in some of the most advanced European countries. Indeed, under British influence, constitutional monarchy was the default solution in 19th Century Europe, as countries were liberated from the Ottoman Empire or separated from larger states.

Outside of Europe, forms of constitutional monarchy have prevailed and been very successful in Ethiopia (especially when contrasted against the situation after the coup which toppled the Crown in 1974), Japan and, in a number of Arab states including Morocco, and earlier in Egypt, Iraq, and Libya until their Nasser-inspired military coups. They continue today in Jordan and Morocco. A unique rotating constitutional monarchy has been successful in Malaysia, a British creation following its successful suppression of the communist insurgency.

It is worth noting that many Afghans regard the reign of King Mohammed Zahir Shah as a golden age in their country's troubled history and were disappointed that he was not restored in 2002.

Given that the Hashemite Iraqi constitutional monarchy worked well, as does the Hashemite Jordanian monarchy, it is surprising that at least serious consideration was not given to its revival by the Coalition Provisional Authority in 2003. Instead, the Authority disbanded the Army and excluded members of the Ba'ath Party from political involvement — which many had been forced to join, including all school teachers — and any suggestion of the restoration of the monarchy under its pretender, *Sharif* Ali, was robustly resisted, particularly by the US.

In the meantime, the more authoritarian monarchies in the Gulf and Arabian Peninsula seem successful, as did the Iranian version until the theocratic rebellion of 1979.

One criticism which can be made of US diplomacy in the rôle of the hegemon is its frequent reluctance to take the option of constitutional monarchy seriously, as in Afghanistan and Iraq. This contrasts with the wisdom of the

proconsul US Gen. Douglas MacArthur and US strategist Dr Stefan Possony in Imperial Japan after World War II.

In the meantime, some former French colonies and Eastern European states have selected models based on the French Fifth Republic. It should be remembered that France has had more than a dozen forms of government since Louis XVI: constitutional monarchies, republics, empires, a reign of terror, and a fascist administration. None lasted long.

It is difficult to resist the conclusion that the Fifth Republic was only adopted because of France's failure with constitutional monarchy, Westminster style republics, and a US-style republic.

And what of Switzerland?

What is interesting are not so much the formal state institutions, but the significant direct involvement of the people in the governance of the nation through binding and regular Citizen Initiated Referenda for all levels of government. This was the reference point in Australia where the Federal Constitution, drafted by a mainly elected Constitutional Convention, was submitted to the people of the states for approval, a process known as the Corowa Plan.

Had this process not been adopted, it seemed unlikely that the parliaments of the Australian colonies would have been able to come to an agreement, and that federation might not have occurred. Australia also uses the Swiss-style referendum for the approval of any bill to change the Constitution.

Conclusion

OUR CONCLUSION THEN is that when a hegemon can be influential in relation to constitutional change in some country, it is important to carefully consider the history of that country and the institutions it has already developed, and which will be more likely to work than imported systems.

It is important that the hegemon not assume that what works well at home will work well everywhere. ★

20 "Emergency papers found", *The Times of India*, June 30, 2013. <https://timesofindia.indiatimes.com/home/sunday-times/deep-focus/Emergency-papers-found/articleshow/20839450.cms>.