Constitutions, Democracy, and the Rule of Law

Do Constitutions Constrain?
October 16, 2003

Panel Response and Discussion

Introduction by Jon Elster

Welcome back. We are ready for the second part of this session with comment by three discussants, a free-for-all among speakers and discussants, and if there is time, which I hope, questions from the audience. I received about a dozen, perhaps fifteen questions, I think some of them can be grouped together, and I'll just select those that seem to me to be the most focused, relative to the presentations of the speakers.

There has been a slight change in order of the discussants. The first discussant will be John Ferejohn, professor of political science and fellow of the Hoover Institution at Stanford University. The second will be Bernard Manin, professor at NYU in the politics department, and at the Coalition Politic in Paris, and the third will be my colleague from Columbia, Jeremy Waldron at the law school. John?

Comments by John Ferejohn

Thank you. I'm very happy to be here and I very much enjoyed the morning's presentations. If you weren't there, they were very stimulating papers. And it's unusual and a pleasure to have people who come at a topic like this from very different experiences and I think, to some extent, those experiences are reflected in what was spoken about. And I think it will help us think about, you know, why they're taking views, different views, on the question of whether constitutions constrain.

As you might expect, Adam Przeworski's perspective is at least partially a methodological perspective, how could we tell if they did or not? And it's motivated by doubts that they could be constraining in all circumstances and, of course, we're living through a period now when it's doubtful that at least some of the practices of the current administration are being very constrained by our constitution. Mayor Mockus' perspective seems to be more driven by sort of,
would say, the phenomenon of office, of leadership in some ways. That is, he's dealing with a constitutional system that has what I'll talk about later using Prime Minister Rocard's vocabulary—hard or soft constraints. So there's sometimes resources for achieving change that he wants, that he sees as a desirable thing, but they also pose constraints, and I think that's a different perspective, and it's one in which he can feel available to you in action, you know, what might be resisting or helping you in your project. And then, Prime Minister Rocard has not been prime minister for a while, so he takes the perspective of a constitutional designer, I would say. That is, one who is comparing broadly among different kinds of constitutions and their properties and so it's sort of an old, I would say, a scholarly view and a comparative view about constitutions, and it's a somewhat different perspective.

And I guess what I want to do is to really explore a couple of the issues that seem to me to come up across the papers even as they were discussing different vocabularies as a way to open up some issues for further discussion. And the first one that I wanted to talk about was this issue that Prime Minister Rocard talked about, about hard versus soft constraints. And I found this a very interesting way to think about constitutions and I think it's an interesting way more generally to think about law. I think what he means by hard is a constraint which is either enforced with punishments effectively, or threats of punishment. And that could happen through legal institutions or it could happen militarily through the application of force. And I think what he means by soft, is everything else that is nevertheless a constraint. So this seems like an interesting category, and I would say to begin with that. And it applies, I think, as well to ordinary law as it does to constitutions, and I think when you think about hard and soft with respect to ordinary law in addition to constitutions, it raises some issues that weren't addressed so much.

Second, there's a question of what actually counts as a soft constraint and how that bears on other issues that Prime Minister Rocard talked about, which is the issue of, for example, a written-ness of a constitution or non-written-ness. And he gave an example of Great Britain having an unwritten constitution and therefore having no sections I guess or articles, and contrasted it with the American constitution, the German constitution, and the French constitution, which had more than that. And I would say, but listening to the rest of his talk, there was reason to think that all of these constitutions, in addition to the British, have probably what are best understood as unwritten components that are at some points very important. An example of that might be to think about what it is that constitutes executive authority in the United States. I mean we have a very short article in the constitution, Article II, which says what the executive power is and who holds it. And it is exemplary in the sense that the prime minister gave of being short and obscure; that is, it invests the executive power in the president, and it says he should take care to execute the laws of the constitution, and a couple of others. He's commander in chief of the army, but none of these are very spelled out, so they're all quite vague. And, as he rightly pointed out, in the
history of American constitutional structure, the powers of the president in particular have grown enormously. And they've grown enormously in ways that are not defined or confined by the words in the constitution. They're confined or defined in some other unwritten way, I would say, so it raises a question for me about written-ness and unwritten-ness; I think is an interesting question. The prime minister said that unwritten constitutions are sort of more difficult to change than written constitutions. I think if you think about the history of the American presidency, you'd have to wonder if that's actually true about the powers of the presidency. After all, if you think as I do, that many of those powers are defined by unwritten ways, and that there's been enormous change over the two hundred years of the constitution, then they must be changeable, even though they're unwritten. So they must be changeable in enormous ways. And I think in the years since September 11, we can see pretty good evidence that the powers of the president have changed, even in a short period of time, even though they're unwritten. So what constitutes the power to take care that laws be faithfully executed, what constitutes the power, what is the power of the commander in chief? I think those things have changed and I think are in the process of changing.

So I think if you accept the idea that written-ness and unwritten-ness is sort of a different category and it's a complex issue. It's not obvious to me, for example, in Great Britain that the constitutional practices are hard to change or even as hard to change as they are in the United States. During the 1970s, the Callaghan administration did not resign after losing important votes, which in earlier years would have triggered a resignation, and the nonresignation was accepted for the most part. And then the Thatcher administration did the same thing, that is, failing to resign after votes that were thought to be of constitutional significance, and the nonresignation was accepted for the most part. And then the Thatcher administration did the same thing, that is, failing to resign after votes that were thought to be of constitutional significance, so it looks as though many observers say there was a change in the British constitution, in the unwritten British constitution, exactly this period. Whether it's permanent and whether it's real, that's another question. But it seems to me at least disputable that unwritten constitutions are as hard to change as written ones are, as a matter of category.

Now we go back to the hard and soft constraints. Let's speak at the constitutional level first. It seems to me that since World War II, in Europe especially, there has been a move toward adopting a mechanism of constitutional adjudication that could be capable of enforcing hard constraints on legal institutions, and this is the constitutional court. And as you know the constitutional courts were essentially devised after the war in Germany, in Italy, later on in Spain and Portugal, later on still after the collapse of the Soviet system in the ex-Soviet states or Eastern Europe and parts of the former Soviet Union. And these were, you know, institutions that for the first time in European history had this capacity to actually make what might have been previously soft constraints into hard constraints. That is, actually hold official decision-makers liable under law in some ways to obey legal norms and to hold them accountable if they failed to do so.
There are a couple of observations that we can make: First of all, the procedures of those courts differ quite a bit. And notice I didn't mention France, because in France there is something that's coming closer to being a constitutional court that's evolved over the last twenty or thirty years. First of all they didn't do it right after World War II, they did it much later in 1958, and when the body in question was created, it was not created as a court, it was created as a device by which the assembly might be managed. And it became later on more court-like in a sequence of activities that I'll talk about in a second.

But the point is that these institutions—constitutional courts—have different mechanisms. But it seems all the ones that I've talked about so far have one way of controlling existing legal decision-makers, be they courts, agencies, or legislatures in their ordinary activities, in a hard fashion. That is to say, make these people liable to sanction in some way. So one could say, possibly that in Europe since World War II, there's been a move in the direction of more hard constraints, precisely because there has been an institution which is capable of enforcing those hard constraints when there hadn't been one before. So that would be one. I mean, Prime Minister Rocard doesn't say that, but I'm wondering whether or not there's a tendency in this direction. It seems possible to me.

But the French case is different as I said because in France, the Constitutional Counsel was created as part of the 1958 constitution to essentially manage the assembly. And the only way to appeal to the Constitutional Counsel at that point was for the president of the senate or the president of the assembly, and I guess some other people could possibly appeal, but always essentially majoritarian interests could appeal to the Constitutional Counsel, and minorities couldn't do that. And that was true until 1974 when Giscard d'Estaing was at that time prime minister. I think although the prime minister might dispute this, was worried about the Right possibly losing the next election, and was worried about the socialists nationalizing various industries, and in light of those worries, induced a change in the constitution. He had the sufficient majorities to do that, to permit minorities, legislative minorities, to appeal directly to the Constitutional Counsel, which happened in 1974. That meant that whenever, that meant the Right, when they were out of power, would have the capacity to protest or introduce something before the Constitutional Counsel if they objected to a legislative program, for example to nationalization. And this of course happened later on in 1981, when finally the Right was defeated by the socialists and when the socialists began to push for nationalizing legislation, the Right did appeal to the Constitutional Counsel, and they were successful in the sense that the Constitutional Counsel blocked the legislative project to nationalize various industries and required that the legislature actually set up procedures and establish values in a way that effectively raised the cost of that legislation quite a bit. So it changed, in this respect, even in France the project, the legal projects that the socialists were intending to pursue. This is a good problem for Adam, incidentally—for Adam Przeworski—because this looks like a case in which the prime minister told me that had they been successful in pushing the nationalizations through without
blockage by the Constitutional Counsel. It would have, let’s see, it ended up costing, he said, something like 250 billion more francs because of this blockage, you know, essentially. So with that, to respond to Adam’s question, “Do institutions matter?” on this account here’s a case where they do matter, and we can put a price on how much they matter—250 billion francs is what the institutional effect was. So it seems like at least, you know, in this case, there is a reason to think that there may have been some tangible effect to a decision ruling.

The point is, though, that even in France there’s now this project in place, or this institution in place, the Constitutional Counsel, which can review and does in fact review virtually all controversial legislation and has done so since 1974. And while it has other peculiarities in terms of how you get onto its agenda, it is the case that it’s a significant, it seems to me, a significant constraint, a hard constraint, on what laws can be enacted, all right. And if that’s true, then it seems to be the case throughout Europe, including France, well, throughout the states of Europe that I mentioned, that is Germany and Italy, Spain and Portugal, the former Soviet-bloc states, that there are modes of hard control or hard constraint. Now one observation to make in addition is that this is not true of the old democracies. That is to say that it’s not the case that old democracies like the Netherlands or Norway or Sweden. Norway is a special case, but Sweden or Great Britain have adopted constitutional courts. By and large, old democracies didn’t do that in the same period and that’s why I think the French example is particularly interesting from the standpoint of an evolution toward hard constraints. Because France is an old democracy, and it somehow adopted a set of institutions of this complex political way, which has this capacity, and so this may be a way to think about possibilities for increasing hard constraints on old democracies, that is like Britain, like the Netherlands, like Denmark. I mean the ones that didn’t think they had a problem with their authoritarian background that was in need of a constitutional adjudication body, but nevertheless may benefit possibly from the imposition of such practices.

Now I have a question for Adam. There’s a lot of other questions that come about hard and soft constraints, let me just put this first to Mayor Mockus, which is the following: Listening to his talk in light of Prime Minister Rocard’s talk, it seemed to me that the constitution played two different roles in Colombia perhaps. You know one is in the early part of his talk, the constitution’s soft constraints seemed to be providing principles that he could build on as mayor and that could fuel is projects, the city culture project and other projects. Later on in the talk, I don’t know chronologically in Colombia, hard constraints in the constitution interfered with the carrying out of some projects. For example, the projects with respect to kidnapping or undermining violence in a way that might require handguns. That is to say the constitution, the hard constraints of the constitution got in the way, so it seems like the hard and soft constraint dichotomy that the prime minister introduced might be useful in actually thinking through what the opportunities and
constraints facing the mayor were. And it suggests also that maybe the language of constraint is a little, itself is a little limiting. Because the way in which the mayor is thinking about the constitution is, it seems to me, it could be talked about as constraints, but it's really in terms of principles that could be called upon in a positive way. Like in his dichotomy that's to whether you have bad sanctions or good inducements, many of the desirable features of the constitution you know are called upon not to constrain behavior but to get people to do more than would be required constitutionally, for example, the 110 percent for Bogotá initiative. That means to me not well described as a constraint, but rather as something else. So it seems like the hard and soft seems useful, but I'm not sure constraint really connotes the right category for you.

Now let me talk for a minute about Adam's paper. You remember Adam's question is basically, "How can we tell if constitutions matter?" And it's a good question. And I wish I had a general answer rather than sort of occasional stories. But I thought it might be useful to talk about American practices a little bit, about, in particular, coups. Adam suggests gently that we had a coup in 2000, that is to say there was an election and arguably the person who took power was not the person who actually won and the losers didn't go home but instead they fought and they won. And I would say that's one example possibly of a coup, but it's not the only one in American history, and it's sort of interesting to put on the table some other examples. So after the first real election that transferred power in the United States between one party and another in 1800, Thomas Jefferson campaigned against the incumbent Adams administration. And in those days, the election, I think it was probably over in November as I recall, but the president wasn't installed until March. And the votes at that time essentially put Adams' and Jefferson's vote in nearly a tie with Aaron Burr, who was ostensibly running for vice president. But as it turned out there was a little bit of weasel room there, and so there was a cabal among the Federalists in Congress about whether they were going to obey the results of the election and it was a big question about whether to obey it. That is, they thought Jefferson's administration would be a disaster—he didn't stand for Federalist principles, he was dangerous to all kinds of things that the Federalists thought were important to the American constitutional life—and there was an effort to see if they could organize a way to retain power in spite of the electoral results.

Now there were certainly Federalists in this who are in or out of this cabal that thought they shouldn't do it because it would be disobeying the constitution, and so it may be the reason they didn't go through with it was because they were obeying the rules. But there's another fact that occurred at the time, which is that Thomas Jefferson is from Virginia. The militia of Virginia was mobilized, and they're right next to Washington, and so it was pretty plain that there was a sensible military reason to obey the results of the election in addition to the institutional prescriptions of the constitution. So this is a case that counts one for Adam I think. But it's an interesting case that maybe he didn't know.
A second one is after Lincoln's election in 1861, Southern states decided before
the inauguration that they could not abide with the installation of this person as
president and so beginning with South Carolina they began a process of
seceding. This is a way of not obeying, in Adam's terms, the results of the
election. The losers essentially were trying to go home in a certain sense. It
wasn't quite the way Adam puts it, but I don't know how to interpret it. I mean you
could say that while they carried off the coup in the sense that they did secede,
or you know in a military sense, and waged a large battle, or you could say that
well, it's true the war was a long war, but in the end they were brought back in
and so effectively the rules were enforced. It was a little ugly, but the rules were
enforced. That's another possible coup. Shortly after that there is an election that
you could have described, Adam could have described it exactly the same way
as he described the Bush-Gore election, which is between Rutherford Hayes and
Samuel Tilden, which again, it was very close, pretty clear to almost everybody
who studied it, I think, that Tilden really was the winner.

But in any event there were allegations of corruption on both sides. And there
was a continuing fact that the military governance were still in the Southern
states, and so the southerners agreed to not stand in the way of the Rutherford
Hayes election, the Republican election, in exchange for withdrawal of Union
troops from the Southern states. And I'm not sure if that cuts for Adam. I mean I
would say that the Southern states were in a position to make that bargain meant
that the chips they had on the table, that is, their votes in the electoral college
were valuable, and that's an institutional fact. But I'm not sure that's the right
interpretation, but that seems like these cases of coups or near-coups in the
United States are worth thinking about.

Well, I guess the last question I have is, I'm going to return to this question of
hard and soft constraints and it's this issue that I don't know how to resolve
about, which I broached already, about whether or not there is a, not just a
tension but a contradiction between hard legal constraints and ordinary law and
hard constitutional constraints. And just as—I said this briefly, in respect to Mayor
Mockus' presentation, but I think it's a general question—it seems to me that as
the Europeans, for example, have embraced institutions of constitutional
adjudication that impose constitutional hard constraints, that this may have the
effect of limiting the capacity of governance to use law, to impose hard
constraints on behavior. That is to say that you know, projects they may have, to
impose constraints on behavior may turn out to be unconstitutional. So it seems
to me hardness may have a double effect. And if it's true that there is in the world
a tendency in the direction of having hard constraints operate constitutionally,
then does that not diminish the capacity of governance to use law to change
what goes on in society outside of law itself? I mean does it not diminish the
power of people like Mayor Mockus to use law, for example, to transform culture
or transform morality or to induce transformations because the fact is that insofar
as there are more constraints arising from the constitutional, at the constitutional
level, that ordinary laws that may be otherwise undefective, now become

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defective in a way that can become an issue of constitutional legality. So I'm not sure whether people think there is a long-term tendency in the direction of hardness. I think, at the constitutional level, I think there may be, and I'm not sure if people believe that that entails causally a diminishing of hardness at the level of ordinary legality, at least in those countries which have constitutional methods of adjudication. But it seems to me a topic worth pursuing.

**Jon Elster:** Thank you. Bernard Manin, next discussant.

**Comments by Bernard Manin**

I found particularly striking that two of our speakers this morning, Prime Minister Rocard and Adam Przeworski, said or claimed that never did a constitution prevent a coup. I thought it was an interesting overlap, and it struck me as one of these unassailable truths from which we should build, because that seems pretty, that's solid, almost self-evident. Then when I started thinking about it, I wondered how do we know this? How do we know that in fact never was a constitution able to prevent a coup?

And it seems that the reasoning that must be behind this is less solid than it might seem. The response I suppose must be as follows: We do observe attempted coups; that is, we observe here and there actions that constitute the beginnings of coups, such as storming the television and radio facilities, or sending tanks into the streets of the capital. Some of these incipient coups succeed. Others fail. But it's reasonable to say or to think that when we're at that point, the constitution doesn't matter much.

The problem, however, with this reasoning is its starting point, namely the observable actions by which a coup begins. I am thinking on reflection, I would contend that this is a starting point that's too late to support the inference. When the intention of staging a coup begins to materialize, the decision of violating the constitution has already been made. In order to claim that a constitution never prevented a coup, we would need to count the cases in which the intention of launching a coup did not begin to materialize. There may be an untold number of generals who contemplated seizing power illegally, but were kept from taking action by the prospect of violating the constitution and facing resistance.

So I thought that, after all, I could turn, you know, the notion of the weakness of counterfactuals against my friend Adam. This is not turning an argument. It strikes me that this notion of the weakness of constitution in the face of force is less robust than it might seem.

Now what results, what would follow from this? If we do not know, suppose that we do not know for a fact that the constitution cannot prevent a coup. That's uncertain, we cannot tell for sure, we would have to mine the memoirs and diaries, you know, of generals, of, you know, various—we cannot do that. Then, I
would think or I would claim, that we, for purposes of action, we need to presume that institutions can make a difference. We need to presume this as a way of choosing between various kinds of errors. For what would be the consequence of adopting or following the purely skeptical position? We would be left with the notion that in any case, we cannot know whether institutions matter, so what can we do? It's conditions, it is institutions, there's not much we can do, there's not much we know.

In cases where we do not know, we may have reasons—what I would call practical reasons—for choosing one kind of error over another. Why, suppose that we were to ask or we were to say here, in the absence of certainty, we need to make . . . not only do we need to make a decision, but we need to choose which kind of error we are more, we think, is preferable. And I say, it seems to me that in drafting a constitution, we should proceed as if the constitution could prevent a coup, even though we do not know for a fact that this is the case. And that would be I thought too, that would be a case of presumption, or an interesting case of a presumption, as presumption, as philosophers, you know have observed, presumption is not so much about truth as about the kind of error we find more desirable.Presumption is an instruction to proceed as if, you know, not the paradigmatic case, a defendant must be considered and treated as innocent unless and until, you know, proven guilty. This has nothing to do with the true value of the innocence of the defendant, but it's an instruction to proceed as if. And so it's only an instruction with regard to action that's entailed here, not the truth value of say, the innocents, nor even the probabilities. We're not, you know, making any statements about probabilities when we are saying such things. But we are certainly making a choice among kinds of errors, such that and we even formulate this, we say better that a thousand guilty people go free, rather than that an innocent be convicted. That is what is entailed by the mechanism of presumption. I think we may find ourselves here in the same kind of case; that is, we choose among the kinds of errors that we find on normative grounds to be more desirable.

Now this is not to say or I would, this is to open up discussion, of course presuming that human agency is involved and that we can do something about various situations, that is not a license for or to try to impose any kind of constitution regardless of the circumstances of the country, and there's obviously an old wisdom about reformers and we can find traces of this, you know, in various authors. That attention to the particulars of a situation, attention to the specific characters or characteristics of, you know, any given country, that is also a key element of practical, you know, prudence. So perhaps in designing institutions we ought to keep in mind that they must be suited to the particular circumstances in which they are going to operate. At the same time, we need, it seems to me, to proceed as if we could make a difference. There might be here a difference, it might be a difference between presumption and being, you know, presumptuous, that the efficacy of institutions and sometime it may be a sort of trivial point, but there is some optimal point that may be reached here.
The second point I wanted to raise or to discuss was in the same direction. It is probably true that a constitution will not survive long if the forces, that the real world forces, that support it are weaker than those opposing it. Ultimately, you know, as Karl Friedrich once observed, the survival of a constitution rests on the willingness of those who support it to stand up to would-be violators. In the final analysis it's the balance of forces as you know, Adam, you know, reiterated this morning, that determines the fate of a constitution. However, this may be unnecessary but not sufficient condition. We do know of countless situations in which people are willing to undertake a collective action and yet fail to take it. This is often the case when people are willing to take an action on the condition that others take the same action. Even suppose that a large majority is willing to stand up to the usurping generals or the transgressors. Resistance has to be coordinated in order to be effective. And in this way, the constitution may facilitate that coordination by signaling clearly when it gets violated. We would call this a sort of flag-raising probity of the constitution. That is it signals, it sends a, you know, a clear signal to, you know, the protagonists, various protagonists, that it's been, you know, transgressed.

No doubt, the coordination here lowers the costs to each individual. Obviously, standing up to the government, demonstrating, signing petitions, is enormously costly and doomed to fail if there's no mass movement. But we don't even need to think about this in apocalyptic terms. In apocalyptic terms, that structure doesn't hold only when it's a question of taking to the streets and facing repression. We can, might think, talk of milder cases that are nonetheless relevant. Defending a constitution that's transgressed by a government may take the form of just speaking out. Speaking out, say against the government or against the would-be, you know, transgressors. And speaking out alone may be a very bleak or grim prospect, not, you know, everyone, not all people are heroes, the fear of stigmatization here or being branded as say unpatriotic.

Now things are obviously different or can get very different if a vast number of people speak out against the transgressors simultaneously. I was noting this because the structure of resistance and taking to the streets is only a paradigmatic case and sort of magnifying glass but the structure may apply to other forms of coordination in support of a constitution, less again apocalyptic.

Now one implication of this, if this is one of the qualities that we're expecting of a constitution, that it sends clear signals, or it signals when it gets violated. I would go back here to the notion of a constitution must be short and obscure, that is certainly the dictum of dictators. And whether it's Talleyrand or Napoleon doesn't matter much, you know, it can be attributed to Napoleon, an obscure constitution is precisely what permits the violation and more important, the opaque and decentralized we may want to say, decentralized or piecemeal violation of a constitution.
So in a position, I would think that clarity is here of the essence. I thought that, you know, Prime Minister Rocard mentioned Article 48 of the Weimar Constitution, and I would perhaps dispute the claim that you made today in the morning, whether or not Article 48 . . . that I perhaps should state what Article 48 was. Article 48 of the Weimar Constitution authorized the president, in case the security of the state was in danger, to suspend various, you know, rights, which were enumerated in Article 48, and to use force. It was actually that article that was used from, in February 1933 and thereafter from the fall of the Nazi regime. The point of this is that the way in which Article 48 of the Weimar Constitution was used during those critical months beginning in January 1933 is precisely that it was unclear what the chance, whether what the chancellor was doing was illegal or not, unconstitutional or not. And one of the charges that we may have against that kind of provision is to leave it unclear whether or not the constitution is violated. I could get into specifics here, but essentially we know, and this we know, it's not a counterfactual, we know that the clear and self-conscious project of the Nazi Party was to use the constitution. They had tried the violent ways in the early or mid-1920s and they came to the conclusion that they had to use the constitution and precisely the obscurity or the murky character of the violation was key in their using or in their ability to use that, in their ability actually to overthrow the Weimar Constitution. So I would think that this is a case in which clarity, we suddenly, you know, need clarity.

Which brings me to, you know, some other point that I wanted to make, I'm not going to claim that this was raised in the morning. This was just not exactly true, so I'm just making, to make that point, why not, you know, why not admit it? That is, of course, in connection with Article 48.

Obviously provisions dealing with emergency powers or unanticipated, you know, events as one of the speakers today said, these provisions are particularly likely to be abused and all kinds of caveats and observations might be made about that. However, I think that when we hear today these parts about protracted emergency or revising the emergency clause of the constitution, I mean this constitution, that kind of talk about the constitution strikes me as either useless or essentially dangerous and misguided. And this is for the following reason: One can say that constitutions, perhaps, are not very good at handling unknown or unanticipated cases. But I propose the following distinctions: We need to distinguish between particular events that may be unexpected, but it may be the particular occurrence of an event that's unexpected. The phenomenon in question may be recurring, in which case it is the particular events that are unexpected, although the phenomenon in question is recurring. In that case, we can have or it could be framed as a distinction or distinguishing between unexpected and unprecedented. We may have unexpected events, which are instances of events of a recurring character, in which case we can have rules about such generic phenomena even though the particular events remain unexpected. And of course that's of the nature of the event. And of course
what I have in mind here is, you know, say terrorist attacks, but we can say the phenomenon that we are confronted with can have, and is very likely to have, a recurring character. If it has a recurring character then it can be subject to, I mean, we do have rules say for handling earthquakes. The phenomenon is unexpected, the event is unexpected in each case, but the phenomenon is recurring. So that's a false distinction. We need to distinguish between expected and unprecedented.

Now one needs to go, I would think, one step further. One can also argue that international terrorism was—and I’m speaking in the past tense—unprecedented. This is true. I mean it was unprecedented in the sense that there were antecedents of domestic terrorism but not of international terrorism. And so we could say that the existing body of, you know, either domestic criminal law or, and the combination of international law, the laws of war, did not apply or do not apply easily. International terrorists, as has been observed many times, were or are neither quite like criminals nor quite like soldiers of other sovereign states.

But what this unprecedented character calls for is not some kind of further reflection about emergency powers. What it calls for is work of legal reasoning or legal imagination. We certainly do need new evidentiary rules, we need new rules about detention, perhaps detention without trial, and we could here use again the mechanism of presumption applied at the middle level. We may want to say the default rule ought to be that defendants ought to be treated as innocent until, you know, proven guilty. But there might be some cases, there might be some reasons to do otherwise. So that may be the default rule. The default rule, unless there is good cause or good reason to do otherwise. But it, of course, it makes you know, a difference whether that good cause or reason has to be shown and is subject to some kind of review.

So let's say that we would need new rules, you know, about detention without trial in some cases, which certainly the European countries have, you know, authorized in the case of terrorism. But all of this likewise, we can say that we need with regard to international law, we need also new categories, but emphasize the, you know, the treatment of prisoners of war was designed in the context of war among you know sovereign entities and states. It becomes a different matter particularly when there's, about questions of, you know, interrogation.

But in any case, the point I wanted to make was that all of this is a call for legal imagination that may be consistent with principles and the principles of a constitution. So the talk about emergency powers is, here, I think, misguided. A, the phenomenon was unprecedented, but now there is a call for legal reasoning and imagination. And second, even if the particular events will be, as far as we can tell, will remain unexpected, the phenomenon in question might be recurring and therefore subject to rule. In that case, the notion of invoking the broad notion
of residual discretionary power is just another name for legal laziness. So I would stop here.

**Comments by Jeremy Waldron**

When we began the symposium this morning, Professor Elster mentioned that there were two questions we should be discussing. One was, "How do constitutions constrain?" which is a descriptive question about what Prime Minister Rocard called the physiology of constraint. The other question was a normative question, whether they constrain us too much, or whether they hobble us or handicap us too much, and I fear we're going to leave that second question mostly to the symposium that's addressing the issues of terrorism and security tomorrow. And most of my comments will be about the physiology of constitutional constraint, but I do want to end my comments, and I hope I get to this, by saying something about the physiology about the ways in which administrations facing security crises are able to evade constitutional constraint, because it seems to me that the physiology has to be able to explain the pathology in a certain sense as well.

Let me begin with some comments about this idea of hard constraint, because I want to question what all the panelists—not only this morning, but this afternoon—have in mind under the heading of hard constraint. Mssr. Rocard pointed out at the beginning of his comments this morning that in a way, the question, "Do constitutions constrain?" is an odd question to ask. A constitution is law; the notion of legal constraint is perfectly straightforward. If somebody plans to break the law they may not be completely deterred from doing so by the sanctions that will be applied to them, but it will have an effect on their calculations. And at the margin it may have a decisive effect, and since constitution is law, presumably there are some other deterrents to unconstitutional action.

Now it seems to me that we cannot be content with that as an account of how constitutions constrain. We can’t just answer that question by reference to legal sanctions, since the constitution is supposed to govern the conditions under which legal sanctions can be brought to bear. The constitution helps to constitute the police forces, the police power, the court—in the last resort, the armed forces of the country. The constitution is supposed to govern who has access to power, to govern the conditions under which the ability to use and deploy legal sanctions and other modes of coercion is permitted. So at least in the extreme case when we are talking about high-level unconstitutional action against the state. We are talking about people who are battling precisely for control of the means of legal coercion, and although they may be deterred by the prospect of failure, they will be punished only if they do fail. There is no sort of notion for punishing a successful criminal act in this area.
In other words, it may be in the extreme cases begging the question to say that unconstitutional or extra-constitutional action will be punished since it's often the behavior of those who have the power, or who have the assignment of the duty to punish that we are questioning under this heading. And so we cannot rest with the notion of hard constraint. It seems to me we are always driven to consider the soft constraints and the social, what Mayor Mockus called the cultural and the moral norms that supplement the constitutional norms, which may be in a way more resilient than legal sanctions, at least as a bulwark against unconstitutional action. Because the social norms, the moral norms, and the cultural norms are not necessarily themselves structured constitutionally, so there isn't the same question begging and assuming that they are there to be mobilized against unconstitutional action. An explanation which appeals to moral or cultural sanctions, then, is less question-begging than an explanation that appeals to legal sanctions. The appeal to legal sanctions presupposes that in some respects the constitution is still intact enough to be able to mobilize these.

Of course the price of this is that there is no guarantee that the moral and the cultural norms will be in harmony with the constitution that we want to protect. There may be what Mayor Mockus described as divorce between them, between the constitution and the law on the one hand, and morale and culture on the other hand. So this will be an imperfect bolster, not a perfect one.

All right, so we cannot assume that there is an ability to rely on preexisting power as a source of hard constraint. The other side of that coin, I think, is also more hopeful, because we can say, well, we can't simply assume that there is preexisting power that might threaten the constitution. That preexisting power itself has to constitute itself. That preexisting power itself has to build itself starting from a conspiracy, growing into the allocation of tasks among the various conspirators, mobilizing whatever resources of power they have at their commands. They too have to constitute themselves in order to pose an effective threat to the constituted powers that protect the constitution.

So we need to recognize, I think, in general in this discussion that political power does not necessarily exist apart from the constitution or apart from some other equivalent mechanisms. I'm drawing here I guess a little bit on Hannah Arendt's conception of power as not just sheer force or sheer violence, but the ability to act in concert, including the ability to act in concert in the exercise of violence or force.

And this brings me to some comments I would like to make about constitutions and the task of coordination. In many ways this will follow up on what my friend Bernard Manin said about the role of constitutions and relation to coordination. You remember that a few minutes ago, Bernard spoke about the constitution having the function, among other things, of helping to coordinate resistance to abuses of power. That if somebody simply has a private grievance or a private opinion about an abuse of power then he stands up as a solitary, opinionated
person and that may be a dangerous thing to do. But if he can point to his fellow citizens through some provision of the constitution that has been violated, there was, as it were, the prospect of a common point of orientation, some common point or reference that people can use in deciding to act together, taking the risk of acting together. That's a constitution as a coordinating device for resistance against the abusive power.

Now think also, this is a second, much more mundane notion of coordination, what constitutions do under the best circumstances is simply perform the task of coordinating the business of governance. The business of governing or ruling a country requires an immense amount of coordination among vast numbers of officials in various agencies and various branches of government. Resources have to be mobilized. Budgets have to be approved. Taxes have to be raised. Directives have to be issued, agencies set up and abolished, laws passed, litigation dealt with and so on and there is an immense amount of coordination just for the ordinary business of governing a society and that's primarily one of the things at a very high level that constitutions do or that constitutions orchestrate. They provide simply the fabric of social coordination. So those are two coordinating ideas.

I want to mention this third that I alluded to a few seconds ago. Those who challenge the constitution or who want to act against it, are going to have to presumably find some other basis on which they can coordinate the action of their fellow conspirators, and their supporters and whoever else they want to mobilize. The soldiers they want to mobilize if they're mobilizing soldiers, the officials they at least want to immobilize if they want to pacify and prevent resistance.

Here, what I have in mind, are some comments by Machiavelli in book 3 of *The Discourses*. Book 3, chapter 6 of *The Discourses*, the great chapter on conspiracies, where he talks about how dangerous and difficult it is to maintain a successful conspiracy or to maintain a successful coup as we talk about. I entirely want to agree with Professor Manin on what counts as beginning or initiating a coup. Machiavelli says there are dangers for conspirators in the very beginnings of a coup, in the actual act of beginning the conspiracy itself, there are dangers for them in the execution of the coup as they go about the business of seizing the sinews of power. And there are dangers for them in the consummation of the coup and in the transition from the coup if they succeed, in the transition from the coup to the business of having themselves perceived as a properly appointed rulers in the aftermath. So there are dangers at the beginning, there are dangers during the progress, and there are dangers in the consummation. And many of those dangers stem from this business of coordination, and reliance, particularly at the early stages, coordination and reliance and secrecy and confidence in conditions where the stakes are high, perhaps fatal for those who are involved.
Constitutions, Democracy, and the Rule of Law
Do Constitutions Constrain?

So what I have in mind here is that what the constitution of a country does is that it doesn't just coordinate resistance if there is to be a coup, and it doesn't just coordinate the ordinary business of governance. The constitution also tries to crowd out the available coordination space. The constitution tries to make it more and more difficult for the conspirators to coordinate themselves. It tries to present itself as the only game in town. So you are having to take a great risk with ragged and surreptitious and incomplete coordination, particularly as you move from the first initiation stage to the second execution stage, where you may need to rely on people's actions or inactions who are not initially among the parties of conspirators.

Now in relation to what Bernard said—do we ever know whether coups fail because of constitutions?—I would want to mention one particular case. It's lurid and it's controversial but it's the alleged case of the conspiracy in 1968 among certain generals and politicians and members of the royal family in Britain to have a coup against the government of Harold Wilson and perhaps to replace it with a government of national salvation headed, by of all people, Lord Mountbatten, and I believe the thing dissolved. It was the very early stage, when a number of people simply stormed from the room saying this is unconstitutional, this is treason, and I will have nothing to do with it, right? It didn't get as far as the stage of mobilizing resources. But when you do begin to mobilize resources, and when you do begin to move to seize the sinews of power, you are getting into a situation where you are having to deal with people and trying to organize the governance of the country involving people who have no initial commitment to the plot, but you still have to coordinate their action. You still have to somehow transmit orders to the provinces and immobilize various resources. So this business of the constitution trying to crowd out rival points of coordination, it does seem to me to be very interesting.

Now I believe that in this regard, the comments that Mayor Mockus made about the relation of constitutionalism to the rule of law is very important. I want to introduce an exasperatingly British take on this. One of the most ill-tempered pieces of Anglo-Saxon chauvinism was the discussion of the rule of law in Dicey’s great book, *The Introduction to the Law of the Constitution* from 1885. And Dicey set out three principles of the rule of law, two of which are not really relevant to us, but they were that the law should be the same for everybody, and to use this as a basis of an ill-tempered attack on French institutions, the law should be the same as everybody. He used this to attack the idea of droit administratif. Second, that nobody should be made to suffer any penalty except in accordance with a preexisting law. And third, this is the one I wanted to focus on, he said the rule of law is best exemplified in a system where constitutional constraints do not stand apart from the rest of the law, but are integrally related, embedded in the detail texture of the ordinary law. He thought this was a reason for favoring the unwritten British Constitution because the principals of liberty, the principals of protecting the rights of the subject were implicit and embedded and instinct in the ordinary functioning of the common law courts, rather than being
set aside on a separate declaration that could be suspended or abolished without affecting the ability of the ordinary legal system to operate. Now, Dicey was generous enough to say that if you blur your eyes sufficiently, the United States can be brought under this model as well, and it is partly, I think, dependent on the feature of the federal courts which uphold constitutional law, also being regular courts of law, not set aside from regular courts of law. But I wanted to drive this point again toward this issue of the constitution being the only game in town.

To the extent to which the constitution can integrate itself into the ordinary operation of law and the ordinary ethos of law-abiding us, then it seems to me, you have dense tissue connecting constitutional coordination with the ordinary way in which under governance and under the rule of law, commercial personal activities are coordinated. And again, you allow the constitution and the legal context into which it is integrated to become this overwhelmingly dominant, coordinating device. And the idea is then that the denser the tissue connecting constitutional protections to the rule of law, generally, the more pervasively the coordination afforded by the constitution extends. And the more difficult it is to organize extra-constitutionally because the extra-constitutional act is, find the legal difficulties popping up all over the place, particularly in the second and third phases of their conspiracy. They find legal difficulties popping up here and there and everywhere, at every turn, as everybody they need to deal with, every official they need to control or coordinate with starts asking embarrassing questions about the law and legality. Now you have to have an ethos that makes that possible, but I think that’s important.

Now I'm mindful of Adam Przeworski's point that we should not do too much of this thinking a priori and we should certainly not invest too much confidence in our a priori speculations about coordination games and this sort of effect. It does seem to me that we need to ask about other aspects of a social system that might enhance or sustain the sense in which the constitution properly established is the only coordinated game of governance in town, and again to the extent that you can bring moral or social devices to support this and to make this more transparent, that will certainly help. Whether the prospect of alternation in office is important here (I rather think it is), but perhaps not for exactly the reason that Adam cited. Adam's suggestion was, well, the losers in the election won't necessarily storm the palace because they have a chance of taking over next time, so they can afford to wait. But the other thing is that if you have regular alternation in office, you can also say that the losers in the election must have been prepared to win, they must have been prepared to begin to act in the context of constitutional coordination. And there's a sense in which opposition parties that have a reasonable prospect of success have to already prepare themselves to operate in a constitutional context. And even small parties that have a reasonable prospect of appearing in a coalition have to already prepare themselves and become responsible enough, not just in ethos, but in organization so that they can be prepared to act. So again, the coordination
effect of the constitution being the only game in town extends even to opposition groups in this way.

Finally, how far can this be taken? I go back to Machiavelli, who said, “There are interesting differences between conspiracies by outsiders, that is, people who are not within the ruling circle, and conspiracies by insiders, that is, by people who already have connections or tasks assigned to them under government.” There is a difference between a coup by a minister and a coup by an outsider.

And it does seem to me that we might want to notice here an interesting distinction between unconstitutional action by somebody who already has constitutionally conferred authority, this person is a judge or a president, and he has a task to perform. He has authority assigned already by legitimate procedure, but now that person is proposing to perform some action, say incarcerate some prisoners in an unconstitutional way. We must distinguish between that and the case of the pure outsider, the person who might be tempted to mobilize some coup or who is acting in a way that is plainly incompatible with the terms of his authority, like a general or a leader of our troops.

It seems to me that at this stage we need to consider how on earth do coup plotters plan to coordinate their action if the action is visibly and clearly unconstitutional? Presumably they would do so by reference to some alternative ethos or ideal that might allow them to appeal to the solidarity and to the support and to the coordinated action of other people. So occasionally you'll find when a general mobilizes for a coup he appeals to the goal of national salvation, which is seen as some sort of background device that ought to rivet the attention of all citizens, and rivet the attention even of all civil servants who are loyal to the principals of the state. Which will distract them from the coordination provided by the ruling government and rivet their attention on some background set of political values.

It seems to me that it is much, much easier for somebody to do this, and much, much easier for this claim to be accepted if it is done by somebody who already has a title of authority. Somebody like a president, for example, who often has, as Prime Minister Rocard reminds us, often has a job description that assigns him ultimate responsibility for the integrity of the state or ultimate responsibility for protecting national security. Under these circumstances, with already established authority, he might be able to appeal to that as the device that will stop these embarrassing questions popping up all over the place and enable the judges to coordinate with them, and the troops to coordinate with them, and the diplomats to coordinate with them in a way that they wouldn't be able to coordinate if we were doing business as usual in the area of constitutional action.

In this sense I think it is very important to distinguish two types of unconstitutional action. These are two types, two of the four types that Mssr. Rocard mentioned in
his comments this morning. Unconstitutional, or think of constitutional constraints which define who is entitled to occupy which office, constitutional constraints that determine the regularity of elections, and constitutional constraints which determine what those who occupy an office may do, like rights and restraints on power. It seems to me that it might be much harder to succeed in violating the first class of constitutional constraints about who is entitled to occupy which office under which procedures, because that goes to the very basis of your authority and your right to appeal to the nation in the name of the norm of national security. It may be much harder to do that than with an already secure job in government at the helm of the ship of state, to act unconstitutionally in violation of various rights constraints.

So all this is by way of trying to understand not only why constitutions constrain when they do constrain, but also what's at work, what explains the ability to coordinate when constitutions fail, and to try and understand some of the conditions under this.

Let me just add one last thing, and this is, those who know my views about constitutional review and constitutional courts will have been maybe expecting me to talk about little else. There are people in this room, there are people on this platform, who in times of peace, have defended the practice of constitutional courts, defended the existence of constitutional courts, and defended the practice of judicial review on the grounds that we need to have this institution in place. We need to have antimajoritarian institutions in place as precommitments or as restraints against the prospect of majoritarian panic in circumstances where the majority suddenly becomes terrified or irrational, or in the grip of some delirium. Now what it seems to me the last two years have shown us, is that when the majority is in the grip of some panic, or when the majority is terrified, that terror and panic tend to affect the courts as well, and so it is as even Ronald Dworkin has stated, a terrible mistake for us to think that we should rely on the courts to vindicate civil liberties in times of this sort of crisis.

Which leaves one wondering then, why on earth is it justified in peacetime if not for the prospect that it will work under conditions of insecurity. But I think it does illustrate the power of national security, or freedom from terror as an alternative coordinating device, there available, in extremis, whether to judges or to presidents as an alternative coordinating device for organizing government. I think it's the only one that really has a prayer of succeeding at least at the level of macro-challenges to the constitution. Thank you very much.

**Jon Elster:** Well, thank you all, I think I'll now give the microphone to the speakers of this morning, maybe, I don't know, in reverse order. For the time being, I'll not impose any time constraints, but I may do so at some point.
Response by Adam Przeworski

So here's where I stand: I think constitutions work when people who are supposed to follow them want to do so, given what other people do or want to do. Now, does that mean that one cannot alter behavior, one cannot alter the patterns in which people behave and governments behave by changing institutions? No, I don't think so. I think one can. I gave examples of electoral laws, which we tend to believe alter or would alter outcomes of conflict and viability of democracy in ethnically divided societies. Proportional representation systems, which people would give some role to the minorities maybe more conducive to stable democracies and ethnically divided societies than majoritarian systems. At least that's a widespread opinion among political scientists.

Let me give you another example, which is just an anecdote. When the communists in Poland were negotiating with the opposition in April of 1989, the communists could not afford electoral competition because they knew they would lose. On the other hand, dissidents, pro-democratic forces, could not agree to anything that would not involve electoral competition because they would completely lose credibility and this was their main, this was one of their chief values. And it seemed the situation was without a solution until actually the gentleman who is currently the president of Poland, invented an institution. He said, well, okay so let's invent an institution of a senate that would have practically no powers, and let's agree that we're going to have free elections to the senate, but not to the other institutions, and with this, indeed, the agreement was struck. Well, then it turned out that the senate usurped powers that originally were not planned for it, so now it's a full-fledged senate. But here you have an example of sort of institutional device, changing what people would want to do.

What I think is not possible, is to deviate too far from what people want to do, or, if you wish, from the existing conditions. And this was the ground for my skepticism. The Argentine Constitution guarantees everybody the right to employment and decent living. Well, some citizens went to court in Argentina suing the government because they were unemployed or arguing that the government is not providing conditions for decent living. The courts turned it down. I mean this way I was struck, Michel Rocard, that you said at one time that if the soft constraints, if the real practice went to court, the courts would have upheld the practice. In this case they did. They said no, even though the constitution says that the government cannot be held responsible to individuals for decent conditions of their life.

Let me give you a flagrant example, which is what happened in Indonesia right after independence. The constitution was purely presidential. It was almost like the United States' and at one time the president just didn't have enough power. There were political conflicts, a rival political party, and one of the leaders of the
rival political party called himself prime minister and formed a government. He formed a government and the president tolerated that. More than that, eventually the government lost a vote of nonconfidence in the congress and stepped down, and another prime minister was chosen and formed a government. So you had a constitution that was de jure presidential and de facto parliamentary. It's hard to tell what the real constitution was, but again, given the relations of political forces in Indonesia it seemed that a presidential system and a majoritarian electoral system just could not hold, that power had to be divided somewhere, I mean somehow, differently. So this is why I was trying to emphasize, one can change things by institutions, but one can't go too far. One has to start from actual conditions and sort of ask and that obviously requires ingenuity, perhaps brilliance. One has to ask, so how much can we change just by operating on institutions?

I also think it raises the question but which I'm really incompetent to speak about, but the question then at the end—so what is the constitution? John is emphasizing so much of it is unwritten. If we look at the Indonesian case, the written constitution says this is a presidential system. If we observe what's happening and describe it exposed, we would say no, this is a parliamentary system. And de facto that constitution is a parliamentary constitution. So there are sort of . . . eventually life takes revenge, and I think that real conditions assert themselves, hopefully some regular patterns of interaction emerge, hopefully they are not so bad. I am not sure that courts, you know, are the proper test of whether things are constitutional for reasons that Jeremy just mentioned. Namely that—or maybe that you mentioned Mssr. Rocard—namely, if this is the established political practice, and if public opinion supports it and perhaps, you know, with military forces supporting in some case, courts are not going to go against it. So ultimately we don't have a test for it.

Response by Antanas Mockus Sivickas

Well, one of the remarks that strikes me, it's constitutions are not suicide pacts. My strange intuition is that in countries like Colombia, you have to act as if it were a suicide pact. And that is very close to the idea of, proceed as if laws are effective because a lot of people proceed as it was an effect, even if we have statistics of strong impunity and so on.

That's one idea. The other thing is, for example, in the coup against Charras, my personal feeling, I'm not a researcher and lesson political science, but I feel that those that made the coup began to make not one but two, three, four decisions against the constitution and generally the idea is not only the level at which the ex-constitutional action takes place. Even if it takes place at the head. But if people in a few hours feel confident that all the other coordination will be respected, the coup has a lot of opportunities to maintain, but if the new government begins to change the court or the jurists, the known, the not knowledge of the constitutional frame is a strong handicap for these people.
There are very strong uncertainty costs. If there is uncertainty, the people that try to make the coup don't have success.

I think it's, yes the general idea in cases like in Colombia you feel is as long people can have trust in some people and have trust that these people will respect formal rules, this helps to build a nonlegal obligation. Trust obliges. If you have trust in someone, that person pays a bigger price in terms of social norms or respect and recognition from the society. But it's a strange way of looking at it. I think in other countries the same discussion takes places, when you have the explanation like sometimes criminologists do about the behavior of people. Some of these explanations reduce responsibility to follow rules, and a lot of the work is act as if you were free. Act as if you were responsible. That helps to have more social and more moral pressure on obeying laws.

But I was very struck by the idea that constitutions are not suicide pacts. It could have two senses. One is you have to change it if it goes to a very dangerous place, but the other idea is you can, for practical reasons, get out of the constitutional order. I think that people should imagine that a lot of people like me that are working in public places, we work completely committed to work, as if it is the only option. Getting out of the constitution is not allowed as a possibility. But is the force of frictions, perhaps, that, but myself in a country like Colombia, I feel that the faith that following constitution and following constitutional rules for change, the constitution is too constraining, it's part of a sort of performative condition of a democratic government.

Response by Michel Rocard

I began this morning, I have to finish this afternoon before your questions. I have had a great problem: English is not my native language, I'm not real bilingual, I am not very sure I got precisely all the points on which there is matter to discuss. Sorry, that's a fact of life.

What, in what I perceived, my feeling is that there is no major disagreement between all of us. But frequently some differences of emphasis or accent on such and such, parameter of our subject, and I feel it rather this way. For instance, when Manin says, “Let's get rid of Napoleon or Talleyrand, we need a clarity in constitutions,” he most likely is right, but it might change according to the points of interest we have. Same thing in a way for, I think it is Adam who said that the observation that new coup, constitution difficulty, finished in violence for those countries which are over a certain ratio of gross national product, etcetera. Which pushes me to conclude not to answer, because it would be useless. It's a problem of entering in some details of rhetoric.

But to propose you the fact that in reality, and it's part of ourselves, which probably a great responsibility on my side, we have in fact centered most of this discussion on developed countries. And I'm not sure we accepted the sufficient
difference between the fact that a country has some hundred or two hundred years of democratic practice and the long experience and the country we quoted this afternoon and this morning, as if they had the same condition. The country which has never known any democracy or begins, or has a constitution democracy for the first time since four or five years.

When listening this morning to Adam I agreed with what he said on force regarding rules, but I thought that this way of thinking, which is roughly true for a reverse, is not how do I say, is not pertinent, but I would say is not sufficient to treat with seriousness, subjectivity, and sympathy. The very difficult problem of how can democracy can emerge in Africa? There are in my life a few things I do know. Constitutional law is not in this category. Finance is, a bit. Africa is something, a continent I do know quite well, and most of our reflections here are made not pertinent by a cultural gap in a way, and this would send us to another subject. I feel a necessity in finishing all this to say that roughly we have spoken about developed countries, and then may I propose you all this vision that probably we have given too much, all of us, including me probably, too much attention to violence, constitutional shocks, and coup d'etat. Situations in which my neighbors are all right in what they say, and probably it's my fault not to have awakened enough sensitivity of another problem.

A great American, Benjamin Barber, has written a book which is called *Strong Democracy*, in which I leave you to wonder of the ideas suggested in recipes of the second part. But which is a masterpiece in the first part, in which he tries to describe why our parliamentary, representative democracies are weak. In Europe, look at Poland, which is the most splendid example. Now with France, is about the same thing, and military preoccupations. In terrifying situations you have thousands of people, not only youngsters, men and women, who have struggled with the risk of their lives for democracy. Democracy comes; less than two years after, the number of people who go and vote begins vertical diminution; apathy begins in all our countries. No American president has been elected with more than 25 percent of the American electorate since the nineteenth century, so far as I know. France is in a situation in which the sum, by now, the sum of people not written on the electoral lists, people who have stayed, and people who vote for extremist forces with not any hope of governing, be they extreme right or extreme left, this sum adds up to 60 percent of our adult population. Governing forces have to share the 40 percent remaining, which is not very significant. Anyway, if we would open a new seminar on the crisis on democracy it will take some more time. It's not really my subject.

Concerning institutions, and I have the feeling that I did not make it very clear this morning, but that is why I insisted so much on flexibility. I think the main demand on our constitutions now does not concern the protection against the coup and against your positions. It concerns the capacity for our governing groups or classes whenever they are intelligent in culture, which is not absolutely always and everywhere the case, to have the state administration evaluate, instruct us in
objectives, in methods according to this mutation—c'est en anglais? mutation?—structural changes, which our civilization lives. In fact, we have all kept a structure of governing authorities among the administration, which is vertical, including a strong feeling of hierarchy and sectorized, specialized. And we are facing massive problems, suburbs, difficulties, desert conversion of most rural territories, drug-consuming, youth problems, none of them being sectorial or vertical, all of them including criminality of delinquency, calling for nearly any structure of the administration.

It is clear that the dominating parameters now are well informed, and intelligent public action must have not specialization and division of tasks as the main paradigm, but relations. Network work. Not only for the Web, for administrative action. No government agency can seriously act alone, and isolating itself from a global system in which all parameters have to play. Three years as prime minister in a difficult country, because in charge of the weight of history and all this we have celebrated the millennium and half of the crowning of Clovis, the beginning of France. You happy people have less past to carry on your shoulders. Now, don't laugh, you have a fantastic benefit, which you cannot measure. Still, having such countries evaluating in this direction of synergetic administrative work, of a conceptive administrative action which would not be organized on specialization, sectorization, but on networks. The objectives being defined for quite an undetermined administrative population, etcetera. I won't insist.

Take just the problem of the school system and its efficiency, which is a budget problem, constitutionally unsolvable in the United States, plus a culture—you know that? Plus a huge cultural problem, plus a health problem, etcetera. And my fear on this twenty-first century in which we see all limits, resources are short, we're polluting our home dangerously and quickly. And we have nowhere to expulse outside barbarians, they're inside. This will call for very new types of action. And let me put it otherwise: A French general, not retired, he had problems because while writing a book in service he was sanctioned. He wrote three years ago a book called *The Violence That Comes*. I think we need a perspective on violence in our societies. Methods can be there, we're not used to that. We're all people of civil and quiet times. My prognosis on the twentieth century is not that calm is on the horizon. And the main service we could demand to our constitutions is not to oppose innovating changes of governing authorities whenever they are cultured, which is more and more rare. This job cannot be done now, but it's another subject. That is for all of you, and especially Bernard, the reasons for which I don't so much bother on the hard part to help constitutions to respond to coups. Coups are not the problem in our countries. Kalashnikovs are asymmetrically distributed. And this is convincing for the revolutionary population. I have spent 12 years of my life in the so-called revolutionary population in France, I know them. They are courageous, but not too much. Not dangerously.
So our problem is to have good state answers to our real difficulties. And they need such a degree of innovation in governing practice that this is my main worry on constitutions, which probably give to my opening of this morning and to my intellectual activity in general another type of approach, another angle of approach than those of my neighbors. But I don't think this is matter for disagreement or disapproval, this is matter for another seminar.

**Jon Elster:** Thank you very much, I'll now take a few questions from the floor and leave I think maybe 15 minutes at the end to final responses or second thoughts from the speakers and the panelists. I will first like to call upon the former president of Ecuador who is here. I'm afraid I cannot pronounce his name properly: Sixto Durán-Ballén, where are you? I cannot see you. The president has formulated a written question to Adam Przeworski, but I thought I would let you present it yourself.

**Question by President Sixto Durán-Ballén**

I'm a graduate of Columbia '45, that's a long time ago. Within four years of getting out of Avery, I started working in government as a city councilman in the city of Quito. So the affairs have been discussed this evening here are all familiar to me for more than half a century, so I think I might have something to add. And when I hope I pronounce your names—Przeworski, whatever it is, Adam, Adam is much better. A phrase that you said struck me. First let me say that when I read your topics of the 250th reunion, about the constitution, it was obvious at first that this has to do with the U.S. Constitution. But through this panel and through the fact that three of the speechmakers are all internationally related, would mean that you are not talking only of the U.S. Constitution but constitutions elsewhere as well. And the fact that through the discussion it got into other aspects, [gave me the] impulse me to talk now, if you will excuse me. And your phrase, I think I took it right, said democracy is not likely to survive in the poorer countries. More or less this was your phrase.

During all these years I've been attending a lot of meetings, worldwide, in United Nations in '62, well, heavens knows, a lot of places. During this time I found that the developing countries, those already in full force growing up such as the U.S., were on one side of a field. And the developing, these poorer nations, were on the other side. The gap between the two was getting bigger and bigger all the time. Because the developed countries impose on the underdeveloped countries, both the price of what you buy from us as well as the price of what you sell to us. And this condition is getting worse and worse. So I thought that in this panel, maybe this is an occasion where we can maybe, as one of the most outstanding world universities, my alma mater, Columbia, have some sort of pronouncement toward the future. Because this gap is getting bigger and bigger.

It was mentioned here the World Bank and other such institutions, as well as when you get missions from the developed countries, you go to the poorer
countries and you tell us don't keep on drilling for oil because it is spoils nature. Don't keep cutting roads in the beautiful mountains because you are ruining the country. Don't cut more trees because the ozone is getting shorter and shorter. And then you tell us as well that you have to do better in school and you have to do better in health, you have to incorporate people to go to better learning so they can be prepared for the future. And once when I was in the parliament in Holland, and I got this same type of message, the do's and the don'ts. I told them you have told me here, I have taken very, very full notice of what you have told me, what I should do as President of Ecuador, and the things that I shouldn't do as well. And I said—and please excuse my French—how the hell do you want me to do that if you don't allow me to get resources to do that, except loans? And what are the loans from the developing countries?

The loans are to all get additional sale of goods and services. But not really in terms of improving the countries. The loans, international loans, look at all the foreign debt our countries have, are all because we have been buying and buying things that we really don't need. Catch by the credit, and all with the idea that if we want to sell more, whether goods or services, well, the only way to sell more is giving them credit and this is as a result the tremendous foreign debt.

It's quite an elaboration I have done . . . the elaboration that you asked me on this, but because I feel so deeply that this is really the big problem of the twentieth century, the gap between the developed countries and the underdeveloped countries. Thank you.

**Jon Elster:** Several people in the audience have expressed a wish to hear Prime Minister Rocard say something about the European constitution that is in the process of being elaborated. If I may add just a personal wish, it is that it would say something about the constraints on making that constitution, and not only about how the constitution once made will constrain.

**Michel Rocard on the European Constitution**

Right now? That’s that trap. Europe is a very strange affair. Which—ah, you laugh there; the fact that you laugh is very worrying—in which we have . . . I am since 22 or 23 years an active European federalist. And I’m supposed to still be, though full of questions. We have reached an extraordinary level of edification of something in Europe, which curiously enough doesn’t correspond hardly to what we hoped.

The intentions of the founders was clearly to establish peace between ourselves, and that was not easy. In 1945 after three wars in 120 years, and many others just before. Go to Heidelberg, the place of the ruin of the castle destroyed by the French of Louis Quatorze. Our relations were roughly as good as between Hutus and Tutsis except that there was more civilization in the art of killing. And we
succeed. The unique experience of reconciliation. That was the first objective, which was completely fulfilled, to a level in which everyone has forgotten that war was dangerous and war was recent and everyone now in Europe judges on the sides and phantasms of local fears without forgetting this formidable achievement.

The second was to give a big, large market to our companies to make them profitable, which has succeeded, too. These are the only objectives that some day have been written collectively in the treaty and described as objectives. The founders had in mind to do much more than that, and to build an integration of countries which would play a role in world affairs. That means to put in synergy their strengths, not only economy, technology, and finance, but in diplomacy, military, peacekeeping, world defense, in general.

How did it begin? Many people had dreamt about Etats-Unis de l'Europe, the United States of Europe. This formula has been pronounced by Victor Hugo as a member of the National Assembly in 1861. It has been taken again by STressemann and Briand between the two wars, and put out by parliaments, all nationalists, and Hitler got up thanks to that. These lessons have paid and the founders, Jean Monnet, Konrad Adenauer, Robert Schumann, Paul-Henri Spaak, and de Gasperi agreed on a method which would not . . . no more to try to obtain from parliaments to withdraw the flag, transfer sovereignty, military terms to an anonymous committee in which you don’t know how people vote. That is the problem of foreign policy in Europe.

And in the currency, and avoiding that to create some technical interdependences between countries with the hope that they would grow and become more and more important, those interdependent, technical interdependences, and through this mechanism, call for power. The demonstration of Europe, of what Europe has made is a fantastic field of exploration for all of you politologists. Power is never located where you believe it is, and you build a new institution to control it, you discover your new institution doesn’t control anything, power has escaped somewhere. It’s very interesting.

Anyway, a way to do it has been to negotiate international treaties, with the extraordinary difficulty of ratification for all of them. At the beginning it was seriously done. The Traité de Rome, the biggest treaty, was negotiated in fact in six weeks in Messine under the Catholic technique of conclave. We have surrounded by walls and forbidden to get out, a good sixty people, half politicians and half good experts, diplomats, and economists, to try to write something and it produced the Traité de Rome, the most complicated in history, probably one of the longest, but very logical, you can read it, and you won’t fall asleep before the end. You can. Because of the technique. We have never dared, been able to reproduce this technique.
The edification of the economic part of Europe goes rather well until the period of [inaudible] 1982, I think, I don’t remember, where we finished the internal market and decided on the principle of a single currency. But at that moment the fact that the first economic power in the world, in fact, and by far the first trading power, had absolutely no common will to express in foreign affairs, in world affairs, was not only a dwarf, an absence, when the former Yugoslavia exploded. An absence in the decision which had been taken to create a new environment for the former Soviet Republics of Central Europe. The decision of their integration into NATO has been taken much longer for the decision than entry in the common market.

And we carry not far from home the Middle East problem, treated from 6,000 miles away by the Americans, and in our proximity with the danger in our communities, one million Jews, four million Muslims, live in France. Same thing in Germany. This became to be ridiculous and in a way, meaningless. And that is why after the negotiation of [inaudible] in 1982, it was decided to open the field of the European building to two new fields, justice—we could not extradite from the one country to another, a completely stupid[y], we had to internationalize the conditions of criminality naturally—and foreign policy. Then comes a terrible episode, which is a European summit in 1987 or 1988, I think, in which the Council of Ministers, very rare, invited the president of the European Commission, Jacques Delors and said, “We want to integrate in the European vision some foreign policy, some judicial policy without the technical method.” Delors answered, “It’s very simple, don’t complicate problems.” If we have imagine a community method, this community method is the commission has a proposal, a right of proposal, has the duty to implement decisions, but doesn’t take the decisions. The decisions are taken by the Council of Ministers. More and more the third organs of parliament has voice on the decisions, were and [inaudible] co-decisions. The present state of Europe is, you can read as the European Parliament as a low chamber, and the Council of Ministers as the upper chamber, with the difference that compared to it, no other democracy, when the European Council of Ministers deliberate on legislations, it is secret. It’s a great claim for us. Either we extend this procedure, which is efficient and has conducted us very far to foreign affairs, defense affairs, and judicial affairs, the reduction is simple. If you don’t want that, don’t take the illusion that [inaudible] system, it is intergovernment unanimity and you do it alone.

And then there was the roundtable and this story is very, not known. We were twelve at the time, before the arrival of Sweden, Finland, and Austria. Nine countries said okay, we have to put that in the community system. Two, naturally, always the same two, Britain and Denmark, say no, in no case in any way. And one abstained, France. Thanks to this situation, we were inspired by a fantastic sentence of an American president, which was the winner of the Civil War, Lincoln, who has said, remember this sentence it is written in a book, when four nine again, democracy has spoken . . . wherefore . . . that’s what happened. The two countries gained, and . . . and then we come to the precise problem of the present constitution, the Council of Ministers in Europe decided to stop asking
the commission its proposal in terms of reports. So the three following treaties, Maastricht, Amsterdam, and Nice are unreadable, don’t try, even myself, chairman committee in European Parliament, have not been able to understand it. When you hear an article of the treaties quoted, you do not know in which treaty it is. Impossible. The law is unreadable. Why?

The Council of Ministers works too fast, and works with thistles and sticking . . . scotch? But that’s all, and it’s . . . and a horrible mess. The quality of the European treaties have been declining from these three and the degree of progress on the content is decreasing too. With this horrible Nice treaty which is a catastrophe.

I belong to the people who advocated the ratification, which we did, for the principle of the bicycle. So long you go forward, you don’t fall. When you stop, you fall. That’s Europe, we cannot stop, whatever the quality of what we are doing. After the massacre of Nice, the European Parliament under many impulsions, not only social democratic, many were in the Christian Democrats too, the European Parliament engaged a campaign on the theme we cannot go on like that. First, the status quo of the Nice treaty cannot stand. It will explode, it doesn’t work, and second the method has to be changed.

Finally, after half of the governments of Europe say no in no case a convention, we won. First battle. A new organ, temporary, has been designed with 105 members, 2 of them being European commissioners, 16 of them being European members of the European Parliament, and the rest being shared between personal representatives of the government as such, that makes 50, and a certain number of representative, two per nation, I think, of the national parliaments. I hope I don’t forget anything. Plus observers of the candidate countries. The document we are discussing we shall submit to ratification soon, which is not finished. That has already received the approval or disapproval, then negotiation of the amendments of our ten new countries. So Europe is factually already working at 25 people.

This has been extraordinary because you had for 14 or 15 months 105 people who had no other obligation and right to devote their time to anything else than producing a constitution possibly readable. Difficulties on who will preside that. As usual, France has been arrogant, oppressive and didn’t listen much to smaller countries. My own candidate for this position would have been Wim Kok, a remarkable Dutch prime minister, after having been a remarkable general secretary of the big trade union in Holland. Holland is not France. I cannot imagine the secretary general of the union becoming prime minister in France.

Anyway, it was not Wim Kok, Jacques Chirac, our president, incumbent president, has a great need first to give his signature in all this, and second to get rid of Giscard d’Estaing in home-affairs politics. So he projected Giscard on the scenery, with the approval of the Social Democratic government which has at
that time... we had at that time, presided by good old friend Lionel Jospin who did not see the case, anyway. He could have proposed either Jacques Delors or myself if he really wanted the French. My own vision is that history being too heavy, we should have avoided the French. Anyway, but that's too subtle. Immediately the best, one of the best prime ministers in Europe who is tough and strong in conviction would be who is the Belgian one, Verhofstadt said this reactionary guy, authoritarian has... impossible. We need to control it with two vice presidents. That was accepted with great approval anyway and we have the former-mentioned prime minister Delors and the former Italian prime minister D’Amato as vice presidents.

A climate grew in this group. We can isolate, but I should finish in two minutes and not in three quarter... it's a fascinating subject. It was a rotating majority in which the working system was not vote, it was consensus. Terrible. So there has been a rotating majority in which European Parliament plus the commission tried to catch attention, approval among the members of the national parliaments to win against the governments, the governments that we defeated on the right in stories, in European affairs. I won’t tell this fascinating historical process, just a comment on the result.

The result is that the nominative refusal of the world by 15, by, sorry, five governments at the entering of the process, we have a project of the government which is called the constitution. Second, as a correction for the massacre of Nice, the charter of fundamental rights in Europe, which had been adopted at Nice, but under the explicit condition demanded by Britain that it would not be connected with the treaties and not have any symbolical... any legal value of any sort, is included in that treaty. The third, that’s from some 15 to 18 or even 20 different legislative procedures, we have a new treaty creating 4 or 5, we've gone down to 5. An enormous simplification. And another element in this project is the considerable extension of the majority vote in the council which calls for co-decision in parliament. Those competences on which there is majority vote in Europe are voted as even in a democracy, parliamentary, the Council of Ministers being the high chamber. But with the powers of the American Senate and not of the French Senate, naturally, yeah.

Unfortunately, this extension of majority votes doesn’t go through foreign affairs to defense and neither to taxation. So we are now in a great integrated market, which for two-thirds of the country, the fantastic power of a single currency, and no capacity to enforce a harmonization of economic, global, macro-policies, budget, taxation, etcetera, etcetera. So there remains something chaotic. In the decision-making protests... process in Europe, the convention proposed by Giscard has a president of the Council of Ministers, who is supposed to stay two and a half years, which means to escape this six-month period rotating, which forbids any long-term, midterm action. And this president of the European Council should be elected by the peers, but have no more executive job at home. Which means a full-time and fully-devoted-to-this-task person, which means
considerable reinforcement of the Council of Ministers. The commission on its side is reinforced by the fact that the authority of parliament to designate the commission even if the council proposes, and every one of the commissioners is a reinforcement too.

Clearly, we needed a restricted commission in order to have it working well. But no one has accepted to lose one commissioner. So what is proposed in Giscard’s and . . . it’s not Giscard’s constitution. Giscard had proposed his own text he had written himself, alone, a [indaudible] constitution which was demolished piece by piece by the assembly and the project on which we discuss is [indaudible] of the convention. Giscard endorsed it, did not wish it on certain issues. On this issue on the number of commissioners, the commission decided to limit the number to 15 to be implemented in 2009, but when the 10 new members come they should have every country should have one commissioner to complete the number. The new ones being with no competence, no administrative service to govern, just a voting right and the position of service.

My prognosis is that it won’t hold, and terribly enough we shall be obliged to save the whole thing to capitulate and accept the principle of a large commission having one commissioner with functions and services for every state. Which means that the opinion of the Luxembourgers or Slovenian commissioner will be as important and have the same weight as these of the German or French one. It will go this way, the fact that since a good ten years now Europe is paralyzed on many subjects, is linked to the disinvolvement of the great states, furious to be that they have . . . they are relatively paralyzed by the defiance and attitudes of the small states. I will not here insult any Luxembourgese, Belgian nor Dutch, they are all my friends, but it is true that most of this country, especially in the newcomers, but already . . . Greece, Sweden, Finland is complicated, but Austria. Most of these countries have joined Europe to make with Europe a great Switzerland. This system, which is horribly governed inside, in which we suffer conflicts, paralysis, stupidities, crisis, etcetera, etcetera, is a fantastic success in terms of peace consolidated at home. Suppose globally Tito’s former Yugoslavia had joined the community before? Half a million people would have survived. And look at Ireland, Greece, Portugal, the quickness with which those countries have . . . re . . . ratrappé? . . . catch up . . . they are retard, they are handicapped in development compared with the big ones. Well this needs . . . or this creates a demand, a fantastic demand. But as all these countries have first, less than two percent of their gross national product devoted to defense. They all know that if they are to touch to defense, it should increase. They don’t want it. Sorry, and that . . . well, to finish. On the last crisis, I’m finished with that.

Their language to me, for instance, after dinner and when wines were good, why do you embarrass us with Europe resource, Europe power? The Americans are pleased to be the gendarmes of the world. They pay for that. Why do you want to [indaudible] paying? Why do you want to expose our boys? And we discovered that in all countries, we have problems of identity cultural identity, and we thought
that human rights being born roughly on this territory, peace making, exchanges and the writers and musicians, etcetera, would make a cultural cement. This is wrong. We discovered that the main identical cement to make one country is the feeling it has of its security. The French have a feeling of security thanks to the originality of the armament, nuclear armament. The British have a strong feeling of their security through the industrial . . . the solidity of their links with you, Americans. Finland, Austria, Sweden have this feeling in neutrality. You cannot explain to a Finn nor to an Austrian that neutrality is useless in front of terrorism and furthermore in front of pollutants. Useless. It’s still supposed to work, which is tragically erroneous consent. All the rest, and especially the newcomers, have their feeling of security through their alliance with the United States. Which is true. No Polish citizen, no Czech citizen, can admit that his liberator is Europe. It has been the United States. So the idea that some people could have in their dreams that the European identification be a tool to compete or to alter the American diplomacy is a mistake.

The conclusion is that not necessarily that the United States are always right, and that all what they do is always perfectly right and should be followed, especially in this period. My knowledge of the Middle East and of Iraq and of Iran calls me to other visions. But that has been . . . has to be buried inside Europe. That is the mess in which we are presently, which is very, very exciting. It remains that we have peacefully the greatest economic power of all times in history, competing with yours, and it will not stop there. There will be some time, but probably half century, a European identity and European consciousness. The fact that in the present state the constitution is a project with no serious answer to the problem of foreign policy, hardly any on the judicial, it’s a bit better, in a Europe which only touches through economy, through unemployment, boring matters. Great matters of enthusiasm and youth, humanitarian, war and peace, are outside European competences now. Our voters are bothered, fed up, they don’t want it; we are in the fantastic risk of nonratification.

However, it finishes, and we are under the risk too, that the Council of Ministers will split the job because governance considered they have made too much sacrifices for you. There you are. At this very time, that’s all I can say.

**Jon Elster:** Well, thank you very much, we are running out of time, but that was worth it, I think. Let me just read maybe one or two questions and then go very quick around. There’s one rather provocative question here, to Adam Przeworski and Mayor Mockus. Professor Przeworski asserted that compliance at constitutional law in some circumstances, like close elections, is determined solely by economic considerations. Professor Mockus—he is a professor, too—stressed the role of ethical, cultural considerations in poor countries like Colombia. Couldn’t these contradictions be resolved by these two panelists? So that was one question.
Several questions reflect a frustration that this panel of specialists hasn’t said or maybe haven’t disclaimed that they could say anything constructive about what the Iraqi constitution should look like. It’s not exactly part of the topic of the session, but it’s clearly something that people would like to hear opinions about.

There is also a specific question for the Mayor of Bogotá, please explain specifically what in the constitution prevented the anti-kidnapping measures that were attempted.

Well, there are some very long questions for Adam Przeworski but I think I'll stop here to give the speakers and the discussants at least few minutes each, two minutes each to . . . to respond. Adam?

**Question to Adam Prezeworski**

Ten seconds and one minute and forty seconds. I think I said what the Iraqi constitution should look like: whatever the Iraqis decide.

I think it’s too late to start going into the problem of how do we decide whether it’s ethics or just you know economic incentives or other incentives. That’s a very difficult problem, and one of the things I was trying to say is that perhaps that’s just unknowable. Perhaps we don’t know. We observe people behaving in a regular way, and we can say that’s because they feel a sense of duty, that’s because they feel a sense of obligation to follow, to obey the results of a competition, the rules of which they have accepted, and perhaps it’s for other reasons. It’s just too hard to tell and it’s too late to get into that.

I do want to say something about what President Durán said and with apologies, we’re deviating a little bit again from our original topic, but I think it’s worth saying. It has something to do with Africa as well.

In 1950, the ratio of the per capita income of the wealthiest to the poorest country in the world was 42. By 1990 it was 75, and now it’s 83. So international income and equality across countries, not individuals, but countries, has certainly greatly increased. It probably increased for many reasons, but one of the main reasons are trade restrictions by developed countries and the policies of international organizations. The value of trade restrictions by the developed countries for the less developed countries now is greater than the total value of overseas assistance to the poorer countries. So they are just net losers.

The first culprit as far as Africa is concerned are agricultural subsidies. As long as developed countries subsidize their agriculture, production poor countries will never have a chance. But there are all kinds of barriers. The international organizations I think play a destructive role in this situation. Why IMF does what it does is I think incomprehensible. You can attribute to the IMF the worst motivation you might want to. You may think all the IMF cares is to just increase
the value of Manhattan banks, and you'll still not understand why they force
countries to follow the kind of policies, which are anti-gross, as they do.

The World Trade Organization is, I think, a pact by the developed countries to
exploit less-developed countries. This is supposed to be an organization which
facilitates free trade and it needs seven thousand pages to describe what free
trade should look like? So I think that it’s obvious that one international inequality
across countries is increasing. Two, I think that policies of developed countries
have a lot to do with it. The tie to democracy is that I think that the evidence is
overwhelming that democracies are more likely to survive in more developed
countries and wealthiest countries. It doesn’t mean that they can not survive in
poor countries for reasons that we didn’t discuss and that are complex and some
poorer countries they do, in some poorer countries they don’t, it may have
something to do with institutions, I am not certain. But one thing that is obvious is
that economic development is certainly the most important factors in solidifying
nascent democracies around the world.

**Question to Antanas Mockus Sivickas**

I mention it, Douglass North works about economical development. The first
interest in law, moral and culture, was about protection of life, reduction of
violence, but one of the very enthusiastic steps was looking at the Douglass
North version of why some countries develop more quickly than others. And
roughly speaking where law and culture are on the same line, or adjusted on the
same [indaudible], you can get more easily agreements and accomplishment of
agreements. It’s easier. There will be in that country less laws. In Colombia there
are very . . . too much laws. I’m not against laws, but the number of laws roughly
describes the cost of what is called a transaction cost. So I think that the same
path of obeying laws and social norms is also a path for peace, but also a path
for economic development. In the Colombian case, the powerful economical
class is very influential, of course. But it’s time is less organically expressed in
institutions. They like to have a good relationship with politicians but they do not
have politicians as they used to, twenty or thirty years ago from the families. It’s
like accepting professional politicians or outsiders getting in the institutions.
There are still manipulations, of course, influences, [indaudible], blackmailing in
some sense, but I think things are changing.

Things are also changing in two ways. I agree the international treaties of
commerce are complex, but the United States help for the military help for
Colombia now is very strongly conditioned to not acting the army or the armed
forces directly or indirectly in violations of human rights. So the standards are
changing. In ten or twenty years we have different changes, the armed forces of
our countries twenty or thirty years ago received an invitation, you have to win
anyway. But anyway, in this moment the invitation is you have to win, but you
have to win inside restrictions. So there is a strong change in that way.
In the same manner, four years ago European states have two kind of legislation about corruption. High standards inside, but very low standards when they made businesses in Africa or in Latin America. So in cases of business in Latin America or in Africa, they could put about 10 or 15 percent independent of the country of their costs without having to explain them, that were sort of nontransparent uses . . . not transparently used money.

So very shortly I think that when you have a pedagogy around constitution, and when you link moral feelings, moral experience, you have short examples of people that have their rights protected by the constitutional court, you can weld a sort of envelope of moral and cultural regulation around constitution, you can make an exercise of everybody being more consistent with these rules. Myself, I feel that something in that way is happening in our country.

In the anti-kidnapping law discussion, there was a law similar to that of Italy, saying that people who had parents kidnapped would have their propriety and their bank accounts immediately freezeed for not letting them to pay first. And second, in some extent consider paying ransoms as an illegality, a nonlegal act. You can be punished if you pay for rescuing someone. This law that proposed that was [indaudible] by the constitutional court because it endangered the life protection of the people kidnapped. And it impeded familial people, the family of the kidnapped, to act to protect this life. This . . . this theory of the constitutional court was completely logic, if you take the right of life one by one. So you have the right to rescue each life. But putting a temporary frame, you always . . . you can easily understand that you . . . with this law in conditions like Colombia, the number of kidnappings will as it happened will get upper and we have . . . well, this year it’s better and last year was better than the 2002, 2001, but we reached three thousand kidnappings by . . . a year and it became one of the reasons why the people that have properties in Colombia were leaving Colombia. Were putting part of their investments out, outside.

So in this moment we will perhaps, we are making a lot of constitutional amendments in these months, and there will be a referendum about it, and perhaps one of these amendments will search to change that restriction. It’s like saying the right to life, it’s not defended just on an individual basis. It’s a sort of calculation of what the rule can . . . what ethics can have the rule on . . . on the phenomenon aggregated not just case by case. And perhaps I should signal that in Colombia we have not had—as other countries in Latin America—populist governments. One of my friends says what will cost us that is very high price? But in this moment, constitutional court, time to time, makes in some sense demagogical pronouncements. One of them . . . it has interesting effects of popular support to constitution, or to constitutional court. But one of them, the last one, was banishing a tax reform that was extending the taxation to common life products. To basic products. It was a small tax that was agreed by the government and the congress for being made in place next year. And the constitutional court said it will effect the statement about the estado social de
derecho—the social state of right. So constitutional court has acted—and not only in this case but in three or four cases—in a rather demagogical way, but gaining a lot of legitimacy for constitutional court and for constitution, that is perhaps a strange feature of Colombian history and situation. Constitutional court acts in part as a sort of political subject.

Jon Elster: Thank you very much. Since our time is up and since all the three speakers this morning had their chance for summing up, I think I will not extend the same opportunity to the discussants, so we close the session and thank all of you very much.