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FREEDOM, ELECTION AND MORALITY AS A BASIS OF CONSTITUTIONAL ECONOMICS¹

***Abstract:** The aim of this paper is to demonstrate the bases of the constitutional economy. Freedom, free will, morality are the resources of each social-economic system. The morality and the ethics should be superior to the legislation. The written laws should be made for the society, common people, not for the thin group of politicians, businessmen or lobby. The constitutional economy is part of the theory of public choice. Its main representatives are G. Tullock and J. M. Buchanan. The message of the constitutional economy is to encourage exchange and dialogue extending across a range of social sciences, including law, philosophy, political science and sociology. It explains the choice of the alternative sets of legal, institutional and constitutional rules that constrain the choices and activities of economic and political agents.*

***Keywords:** Buchanan, constitution, constitutional economics, constitutionalism, ethics, government authority, morality, public choice theory, freedom, elections*

JEL: B 50, H 70, K 40

1 Introduction

Evolution as an aspect of theoretical analysis as well as observed reality, leads economists to admitting mutual addiction among economic, ethic and political environment where people are dealing with each other. (J. M. Buchanan)

Civil freedom and the economic and political freedom, which is derived from it, should be the fundamental prerequisite of each individual, so that they could meaningfully exist in society. Freedom necessitates rights and duties (responsibilities), it is impossible to exchange it for arbitrariness. There are certain barriers in our actions, which should not be exceeded by any individual (in relation towards others), and thus not to cause a pressure or even a brisk disruption in interpersonal and social relations.

In each society, regardless of its cultural background is, there exists a certain code of “what should be.” The purpose and “what should be“ are inseparably coupled and

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each effort to separate them ends in individual anxiety and social subversion, the result of which is anarchy.

Constitutional economy tries to explain advantages and disadvantages (qualities) of alternative legal, institutional and constitutional rules, which considerably limit the choice and activity of economic and political subjects. It points out that as a consequence of an imperfect functioning of democracies the executive power is separated from citizens. The task of constitution and the whole legislative ambit is to prevent the executive power from misusing its powers.

Constitutionalism (constitutionality) represents the right to Constitution and expresses the principle of inner incongruity of body of laws including the rights of control of this incongruity. The guaranties of constitutionality are the process of adopting constitution and its changes regulated by law and changes of constitution as well as the existence of constitution in itself and its application.

Constitution is the basic law of the state, which has the highest legal force; it is at the top of legal regulation hierarchy, or at the top of the state's body of laws. It is a social contract, whereby people express their consent with a provision of the state and commit themselves to carry out its power according to the principles of separated power and protect non-alienation of human rights and liberties. The constitution should assure the restriction of sovereign's absolute power by means of legal regulations.

Firstly, we would like to describe premises for healthy political, economic and cultural functioning of society. We will reflect on the area of a person's freedom and moral limitations in the activities of each economic subject.

2 Freedom and Choice of Possibility of Economic Subjects, Relevance of Respecting Rights

To be, that is to live or have and possess, regardless numerous qualitative inborn features (intellect), acting without responsibility is unthinkable. Responsibility must be defined or must be delimited. Otherwise it is not possible to evaluate or judge anybody on its basis.

In our lives significant roles are played by the situations which start by how we make our decisions at a certain moment. There are moments when someone else has made a decision for us, and we have to take serious consequences of that decision. Our decisions are often made only in a short while, just a moment, but they bring long-term consequences or changes. These decisions confirm responsibility and chance of free act. Man can decide in certain situations or decide for certain possibilities. Man will take responsibility for their size and consequences. The keystone of responsibility is in bearing consequences for free acting, no matter whether our act was a conscious one or not.

Freedom without the ability of choice, without thinking, reflection and personal responsibility is unthinkable². Many people are trying to avoid their liabilities, and they

² Ubi libertas, ibi iudicium – Where is freedom, there must be responsibility, too. [(13, p. 59)].

replace freedom with arbitrary behaviour or even independence. There is no liberty which would not require restrictions.

Let's consider some examples.

In the same way as there are various road signals, which denote the admissible direction, speed or stopping of a means of transport, also as the acting of human being must be restricted by (morals and legislative) barriers. Success of the ride (journey) depends on how respected all traffic rules are.

Let's think of mankind as a fleet of boats, which is sailing in a certain grouping to some place of destination. The cruise will be successful when each boat has engines and sails in good order, if there is no hole in the under-deck; then no collision will happen and the target of cruise will be known.

Many times we can hear the opinion that there is nothing bad in doing something as long as our acts do not harm others. One can think it is does not matter how one's boat looks from the inside, until one's boat hits another one. What is the use of "teaching" boats how they should be steered so that they can avoid clashes, if, actually their compasses do not work, if their rudders, engines are broken, sails are torn, if there is chaos on the deck, and water is leaking into the under-deck? A vessel without control can easily crash into another one, and so there arises a conflict. (We can see this situation, e.g. in mutual relationship between drug addiction and its relation to e.g. property crime rate.) We will not make people good just by writing a decree on polite behaviour. Each person must understand and accept "good order on their own boat".

According to A. Etzioni [10], peoples' "choices are not easy, one-dimensional and immediate or of single-state events, but are many-sided". Their consequences can reach the future and can affect our physical and mental behaviour. Our decisions are not always based on fixed standards; each new situation asks for new, special judging and subsequent acting. Man with a free will is not a doll without free thinking but a unique personality with a decision-making capability. The neoclassic-minded man thinks that "people themselves know what is good for them, and that is why government should not interfere. Nonetheless the fact that preferences of people are partly socially restricted is not an argument for the government to make all decision making instead of them but it confirms the need for reflecting significant historical theories, cultural and social forces." [(10, p. 18)]

One's position depends on their own preferences, abilities and environment, where one is. Although not all the individuals are in the same environment nor have the same preferences or abilities.

We can use Buchanans' example [2] of two individuals (A, B) who live isolated, each e.g. on a different island, without any social contact. It is hard to judge, which of these two "Robinsons" is better off, or which of them has assured greater "welfare". Neither of them has any right (human or proprietary) and because they live in isolation, in this case we cannot speak about society at all – both of them act in an environment which may be ascribed the traits of anarchy (lawlessness). And despite that, this situation provides a suitable starting-point for reflections about the world

where personal conflicts can arise, if both persons are set in one environment, e.g. a common island.

This new change can (but also need not) in both of them modify their personal preferences. The presence of person B provides person A with a new chance, e.g. to obtain goods from person B, which was not available in previous conditions. If person B produces and stores goods, which person A is interested in, then subject A can think that e.g. theft of these goods is more effective for him and requires less costs (hardship) than he/she would have if he were to produce them himself/herself. In this situation every individual can expend some part of their efforts to defend their own stores before the other one, another part to steal some supplies from the other person and effort to produce goods. To avoid conflict situations there have to be rights, liberties, contracts, and agreements.

Each contract is a two-way act. Individual A agrees to give up some part of his/her own effort dedicated to defence and theft, in exchange for the same kind change in person's behaviour. Neither of them tends to change his behaviour unilaterally. Consequently, each part has certain option how to act. See Table 1 for better illustration.

If each of them holds the agreement, then they will both respect definite rights of the other one. On the other hand, there is an option that neither of the parties holds the agreement and will act on the basis of their personal, selfish interest.

In case that both individuals reject abiding by the contract, the result is equal to what we have tagged as the state of anarchy. But if both respect conditions agreed under the contract, the result will be more favourable for both of them.

Table 1

Impact of respecting or disregarding rights of both persons

		B	
		respecting rights	disregarding rights
A	respecting rights	19; 7	3; 11
	disregarding rights	22; 1	9; 2

Source: [10, p. 37]

Numbers in cells indicate the volume of benefit of both persons, while numbers on the left show the level of benefit of person A, and numbers on the right indicate the level of individual B benefit. This situation is analogical to prisoners' dilemma, known from game theory.

In this simplified example of two persons we can rightly assume, that principles of rationality will lead each of them to adhering to the contract terms and conditions. Each of them can realize that in the case of unilateral non-fulfilment of the contract

they will not be able to succeed in the end due to long-term time horizon; and in the case of both parties' non-fulfilment of the agreement the resulting state will most likely lead to mutual self-destruction.

It is important to realize the motivations of behaviour that leads to peace and stability. Each individual can respect agreed rights because they expect that their breach of the contract would lead to similar behaviour of the opposite side. Each of them has to realise that his own behaviour directly influences consequent behaviour of the person.

The example of individuals A and B shows that each contract system starts first in a small group of people (married couple, family.) However, with a rising number persons within a close proximity there arises a potential problem. In large groups every law system is more inclined to its breaching. Despite this fact, the law system made under conditions of presence of a smaller number of people should operate also under conditions of a wide social group. As long as single parties of original contract admit that all (or some of them) involved tend to breach agreements, then, in making whatever new contract, they are forced to admit certain mechanism, which would assure adherence of agreements. For making the forcing system effective, it must contain physical limitation of those who breach or are trying to breach system of agreed rights, so contraveners of law. Another problem may arise when contracting parties realise that there do not exist any clear and effective means that could be used to restrict dealings of forcing institution itself. And that is why individuals, who are closing the contract about services of forcer, necessarily waive their own independence.

We can imagine that in a social group of one thousand people the forcing institution does not operate, individual A somehow brakes property rights (or some other rights) of person B. That person with the highest probability will react reciprocally in the same way or similar way towards subject A. If, however, this procedure becomes a general form of mutual dealing, socio-economic system will turn into the state of anarchy. This problem could be solved as a general agreement about buying services of some external forcing institution, which would make in particular cases the necessary forcing sanction or operation. In this case it would be general assurance of rights or claims rather than particular forcing act which leads to what would stand for "social good" or righteousness. The forcing institution which would be agreed by all parties, should have an external character and be non-participating party.

The best way to approach this is to use the example of game.

Each of the players knows that his opponent will strongly tend to cheat, until somebody watches over him. That is why they choose an (unbiased) arbiter (judge) in advance, and who will be subsequently apprised of rules which they agreed on for the game.

According to Buchanan this should be a functional role of the state in law enforcement. The state should become an institutional arbiter whereby its role would be in assuring and respecting conditions of the contract agreed by all players.

It also should operate as a forcing agency or institution and from theoretical point of view it is external towards contractual parties. Its only responsibility is to enforce agreed rights, demands or contracts. Every individual is interested in assuring agreed rights and that is why a “protectionist” state has to be typically neutral. Players would not consciously admit an arbitrator who is known for enforcing game rules in an unfair way and who would care only about his own interests, or possibly interests of one or few (for some reasons preferred by the state) players. In the worst case, it would be also possible not to agree on “arbitrator /referee” who would exert social pressure. This opinion contradicts the generally accepted function of the state – determine rights (legislative). This example means that the referee decides about game rules not about players.

F. A. Hayek (1899-1992), the representative of the Austrian School thinks very similarly. As a well-known representative of liberalism, he admits the role of government as a forcing agent and repressive educator under conditions of breaching personal freedom of people, because free society has to have laws and rules. In case of breaking these socio-economic rules the given subject has to bear the consequences. In many cases of real life it is really hard to differentiate the boundaries and influences of “referee” reaches. Hayek claims that in a free society, the rules are made gradually rather than by their sudden determination by the ruling party.

Contractual terms and conditions have to contain mainly restrictions of behaviour of each individual in regard of their position in society.

While changing from anarchy to real society, people “leave off weapons” and accept rules which control their own behaviour in return for accepting and respecting the rules – just like the others. It is not always possible to determine the boundary as a “division line” between private, public or governmental sector of economics.

3 Constitution and Constitutionalism

For better understanding the coherence of constitutional economy, let us briefly concentrate on the characteristics of the constitution and constitutionalism.

3.1 Constitution

We can understand from the previous text that the written (legislation) and non-written (morality) rules and their practical use by every individual are meaningful for a reasonable performance of society.

The laws and institutions which define the economic order often become variables, which leads to their reforming. Thus a set of optimum rules for a given society can be subject to changes simultaneously with the changes in the society. However, the question is: how often should the rules (reforms) be changed? The more often the legislative changes are amended, the less credible the government agencies are becoming.

Therefore there is a stable legal and societal (institutional) element in society –

constitution. Constitution is usually defined as the legal act of the highest force and the supreme or fundamental law of the state. It is not only one or several principles but a set of fundamental principles or established precedents according to which a state or other organization is governed.

The constitutions are connected with the existence of states which came into being for example after the wars, revolutions or public riots.

The origin of the term *constitution* has the same meaning root as the term *state*. Their common mode is Latin word *stato*, which means something stable, firm, static in case of changes. Therefore the basic sense of constitution is its stabilising role in the society and in maintaining personal freedom. The democratic constitution creates an environment in which political battle is waged, rules are established enabling a peaceful change of government. The constitution also recognises a set of values which guarantee free life for an individual. The compact constitution is an assumption of a stable political system and therefore the constitution defines the conditions of its change. As mentioned before, it is inappropriate to change the constitution in case of the change of the government after elections.

3.2 Constitutionalism

A doctrine of isolated influence (force) of government has its origin in the ideas of Aristotle (384-322 B.C.) *Politics* or in the works of John Locke (1632-1704) *Two Treatises of Government* and Charles Montesquieu (1689-1755) *The Spirit of the Laws*.

Aristotle used the term *politeia*, which meant a form of a state (polis), its organization including laws related to an accomplishment of authority.

The Roman statesman, rhetorician and philosopher Marcus Tullius Cicero (106-43 B.C.) tried to describe the fundamental acts of equal substance (entity) by the expression *constitutio*.

These works and representatives generate a starting point for a constitutional conception of a limited government, called constitutionalism. The opposite of constitutionalism is a despotic reign (anarchy, arbitrary behaviour).

Consequently, constitutionalism is the idea that government can and should be legally limited in its powers, and that its authority depends on its observing these limitations. This idea brings with it a host of vexing questions of interest not only to legal scholars, but to anyone keen to explore the legal and philosophical foundations of the state.

The historical origin of (classic) constitutionalism comes out with the rise and development of liberalism during the 17th to 19th centuries. Its representatives were the thinkers, for example J. Locke, Ch. Montesquieu, Immanuel Kant (1724-1804) or John Stuart Mill (1806-1873). These authors tried to constrain the political frame on behalf of individual freedom. In public they spoke against the principles that ascribed the government (king or church) the decision-making role in socio-economic matters in relation to the people. According to them, the statutory power should take the

responsibility as a public peace and discipline guardian.

Since the 20th century there has been forming a modern constitutionalism which deals with the dispute over scope of power, especially parliamentary and judicial ones. Current constitutionalism is characteristic of a strong drive for the full application of political, juridical and ethic principles in democracy, human rights and civil liberty in the context of internationalisation and integration.

4 Constitutional Economy

Liberty, responsibility, respect for human rights, functional legislation with the constitution and morality are obvious conditions for valid economic-political system. It is important to realise that politics and political acts cannot be fully understood without their relationship to ethics and economics. It is constitutional economy as a specific part of the theory of public choice that deals with the understanding and application of these attributes.

The constitutional economy is a normative part of public choice theory, which came into being in the 1970's.³ The area of interest of constitutional economy is a comparison and evaluation of alternative complex of rules in society, their concept of identification and choice. These (political) rules concern voting system or the pattern of voting in legislative organs. They define public, economic and political performance, in which there are involved all people in a certain society. It examines the rules influencing the behaviour of politicians and voters, their mutual interaction, and their action in society.

Constitutional economy starts from the assumption of methodological individualism and rational choice postulates. Human beings have a potential for mutual cooperation with other members of their society. Specimen of methodological individualism comes from neoclassical model of *homo economicus* which we sometimes refer to as *homo Robinson*. This kind of model represents man's isolation from other people and examines human behaviour in out-of-society conditions.

On the example of Robinson and his companion "Friday", we can see how mutual relationship works between totally unknown and different subjects. Besides considerable racial, cultural, religious, intellectual or lingual differences, it is possible to enter into relationships that may not be strictly economic. Acceptance of the other reciprocal person can lead to mutual respect, which creates good cultural and economic surroundings.

On the other hand, constitutional economy can be examined for the whole complex of persons or a state. For this reason, constitutional economy deals with the rules that concern individual and multiple dealings.

³ Besides J. M. Buchanan, Gordon Tullock (1922) is another significant representative of the thoughts of constitutional economy. Tullock's collaboration with Buchanan produced *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (1962), which quickly became a seminal work in the new field of public choice. For four years Buchanan and Tullock continued in their research programme, even founding a new journal for their field (1966), first called *Papers in Non-Market Economics* and eventually titled *Public Choice*, where they invited articles applying economic theory to all sorts of non-market phenomena, especially in the realm of government and politics.

The importance of methodological individualism lies in the fact that an autonomous individual is one of the conditions for starting any research. However, the individual autonomy does not result in the individuals' decision making in the way as if they existed in isolation from the community. The individuals can accomplish their own independent preferences also in their social circle.

We can also suppose that an autonomous individual is capable of choosing options from among alternatives in a rational way. In the case of constitutional economy, the capability of rational choice includes individual and collective options. The postulate of individualism acknowledges the variety of interests and preferences among people. Therefore, constitutional economy consists of democratic values, and it tries to use human cooperative potential. Human beings are not animals without a well-formed free will, driven by instincts and impulses, instead they represent independent free elements of conscience and are able to ascribe values to options, conduct choices and act or behave in accordance with values. However, so that this may happen, people have to live by defined rules.

5 What are the Appropriate Solutions?

James Buchanan thinks it is impossible to change the manners of people within the performance rules; we need to change the rules themselves.

The changes in the rules need to have a long-term character. It is not appropriate to change the rules by regularly changing the rules after the change in government, which wants to adjust the conditions of governing (however, it is necessary to consider the influence of lobby groups).

The unilateral authority of government should be restricted by certain measures. The first condition may be to adjust (reform) limitations of government authority. Alvin Toffler (born 1923) perceives a big problem in malfunctioning of political government. According to him, by a modernisation of voting system via semi-direct democracy, the roles of minorities and diversion decision making would be strengthened. Citizens should be allowed to perform a more direct role in decision making. By the existence of semi-direct democracy, the statesmen and legislators would be more forced to devote themselves to citizens' problems. Petitions seem to be a good instrument, which would represent a bigger strength of enforcing the public interests. The current problem in many countries is that the petitions do not constitute a barrier to achieving the political and business interests. In this case of "diversion-decision" or the division of decision making, citizens could play more direct role in their own government.

The second measure is closely connected with Toffler's thoughts. It is focused on the division of competence (authority) and on systemisation among different executive bodies, for example by disjunction of legislative, executive and juridical competences. The cognizances of each organ need to be limited by some other segment of power. However, these kinds of reform impact on interventions of business and lobby interest groups.

Constitution can be reformed only by constitutional laws which necessitate a more complex process of changes than by other (common) laws. An alert of constitution can be for example achieved by referendum, which, on the other hand, brings high transaction costs. Therefore this role belongs in the hands of the parliament.

An efficient operation of market mechanism and the whole society is seen by J. Buchanan not only in formally enacted rules (which do not refrain from deceptions), but especially in actually observed and respected unwritten rules, which have an ethical character. Since the laws without morality are useless, it is the very unwritten laws that should exceed the “frontiers of justice”. According to Buchanan, practical usage of morality increases the effectiveness of free market mechanism. J. Buchanan perceives the ethics as a public good and we should invest in the ethics not by the monetary approach, but by fidelity and honesty in mutual proceedings. This agenda should reach over the justice frontiers. In this ethical good J. Buchanan sees a crucial role of the politicians’ behaviour. Buchanan thinks that the behaviour in politics is reciprocally reflected in the behaviour inside the market mechanism (rather than vice versa).

So that citizens may see a kind of pattern of behaviour they should be able to see from the side of politicians efforts to give up “intangibility and primacy” and try to solve public problems. In order to realize this kind of political behaviour, it is not enough to perform the formal legislative rules. As it should be in the case of market, in political area there should operate an ethical culture that extends beyond the constitutional laws. It is because the whole human behaviour cannot be squeezed in the written standards, theorems. And it is also for this reason that moral unwritten norms are superior to the paragraphs.

Conclusion

In this paper we tried to draw attention to responsibility of every human and to underscore the threat of exchanging freedom for anarchy. In the changeover from the arbitrariness to real free society, people “cast off” the weapons and accept reciprocal rules which protect them from mutual destruction.

Constitutional economy represents a normative form of public choice theory. The interest area of the constitutional economy is a comparison and evaluation of alternative files of societal rules and the concept of their determination and choice. These standards deal with political rules and they define socio-economic and political performance of the society, including guidelines of the voters and statesmen, their mutual interaction and the effect on the society.

A big problem of political culture is often unenforceability of promises given before elections. Politicians tend to behave in a different way before and after the elections. It seems that the politicians do not bear appropriate responsibility for their promises and the service towards the citizens is melting in the shadow of self-interests. One of the solutions can be a reformation of voting system and principles. In case of non-fulfilment of promises, the people should be allowed to outvote the

politician. The appropriate steps toward the public wealth can apparently take place under the public pressure of the voters.

If there is any confessed perfect legislative system, there is always a gap, which is known to the lobby groups and the lawmakers. Not every law is morally correct; the laws themselves are created the way to be suitable for the “chosen” political, business and lobby groups.

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