International Law & National Security

The Inspirational Power of American Constitutionalism

*By Vojtech Cepl**

It is my belief that the normative order of society, that is, its system of rules of human conduct, is a crucial characteristic of any community of humans. A well-established institutional framework for the creation or modification of that system, one based on the accepted values of the society, is the greatest treasure any society can have. It is therefore hardly a surprise that I consider America's greatest contribution to the world to be its development of constitutionalism. Don't misunderstand my point. The idea of constitutionalism was by no means new; it is as old as Western Civilization, and had been floating around in the minds of theorists for millennia. It was the American innovation to give it concrete existence by creating a living and functioning institution, and to demonstrate that it works in practice and is a superior system.

I understand constitutionalism as the aggregate of two sets of principles fixed into a written document. The first set of principles comprises basic human rights, which is a synonym for the basic rules of natural law. They are what Hans Kelsen called the Gruendnorm, and the related principles of higher law and the hierarchy of norms provides that all other norms must be in harmony with them. The second set defines the main pillars of government, their powers, and mutual relations, based on the old idea of the separation of powers. Federalism, which is in fact the vertical separation of powers, belongs in this second group. It also includes judicial review, America's original contribution to the separation of powers, in the sense that courts work to ensure that the other powers act in conformity with the constitutional order.

It is important to distinguish constitutionalism from parliamentarism. The conflict between these two concepts has played out throughout modern Western history. The latter concept considers the sovereignty of parliament to be the highest aspiration of democracy. The American Founding Fathers were well aware of the genuine danger of placing excessive reliance on majority rule. They understood that it is impotent to prevent the tyranny of the majority and the consequent abuse of minorities (see, for example, Madison's views in *Federalist No. 10*). They understood that it does not always result in the best leaders or best decisions. They viewed constitutionalism as the necessary corrective to majoritarianism: there must be both operating in balance. One can see a clear metamorphosis starting with the British Parliament's assertion of the power to make any law it wishes, through the French Revolution's cry of all power to the Commune, leading finally to the slogan from the Bolshevik revolution: "All power to the Soviets!" Total faith in majority rule is seriously misguided, because as Fareed Zakaria rightly pointed out in *The Future of Freedom*, even in a free and genuine election, such leaders as Belarus's Alexander Lukashenko and Slovakia's Vladimir Meciar can emerge victorious.

In the following description of the historical development of American constitutionalism into a working form of government, I will draw extensively upon the thoughts of Friedrich Hayek—especially *The Constitution of Liberty*.

Despite many drawbacks, the American colonies had certain advantages that allowed the seed of genuine constitutionalism to be planted and to sprout there. Although they were inhabited by disparate and divisive peoples, they were in one respect united: they fervently believed in, and were devoted to, a set of principles about government and its relationship to the people, and they were determined that they should live according to those principles. In this they were favored by a unique combination of circumstances—institutions, benign neglect, and ferment about political ideas. Although the Americans were far behind the more advanced Europeans in culture, manners, etc., and were looked down upon by the latter for that reason, in fact they surpassed the Europeans and were in the first rank in one crucial area—political science. By Lord Acton's estimate they had several thinkers (such as John Adams, Thomas Jefferson, James Madison, Alexander Hamilton, and Ben Franklin) that were the equal of any in Europe (Adam Smith, A.R.J. Turgot, John Stuart Mill, and Wilhelm von Humboldt), and among the general population most people thought about and concerned themselves about, as if it were their business, the basic ordering of society.

The cause of the American Revolution was not higher taxes on tea or even lack of representation, rather, by propounding the theory of the sovereignty of Parliament, the British Parliament's failure to respect limits upon its absolute power. The sovereignty of Parliament appears to embody democracy, so it has always been the rallying cry of the advocates of pure democracy. The Americans considered that, in accepting the doctrine of the sovereignty of Parliament, Britain had betrayed this heritage. The heritage was not one of absolute popular control of government, but of limitation upon the arbitrary exercise of power, by whoever controlled it, by subjecting it to higher law. In sharp contrast to the French Revolution, the American Revolution has always been considered a conservative one. They were fighting to retain their rights as Englishmen. By rejecting the sovereignty of Parliament (of an unlimited and unlimitable law-making body) and applying the conception of limitation of all powers to Parliament, the Americans took up the torch of liberty laid down by the English.

In their conflict with the mother country, the Americans gradually came to see that their conception of proper government diverged considerably from that of the English. For them true representative government did not mean merely the right to elect representatives to a legislative body, which was then entirely free from control; rather true representative govern-

*Vojtěch Cepl is a professor of law at Charles University in Prague. From 1993-2003, he served as a Justice of the Constitutional Court of the Czech Republic. This address was given to the European Association for American Studies at their Biennial Conference in 2004. Professor Cepl is a partner in efforts by the Federalist Society's International Law Project to establish a presence in Central and Eastern Europe.

ment requires a "fixed constitution" which introduces limited government. This is done by a constitution that does not merely designate the source of power (the people as voting in elections), but also the manner of its exercise; that is *limited* exercise. Two crucial concepts mark the distinction—separation of powers and hierarchy of norms (neither of which was genuine in UK at that time). A constitution allocating and distributing powers among the state authorities necessarily limits the power of any of them. The hierarchy of norms requires the constitution to have substantive rules that govern the acts of authorities: the more general norms of higher authority govern the content of those more specific norms of lower authority. In this way, the actions of authorities are controlled.

Hayek explains the higher law concept in a way that reconciles it with the natural growth and evolution of society and with the democratic system. While the idea itself is very old, he emphasized that the American innovation was to put it on paper and then into practice:

> But the idea of making this higher law explicit and enforceable by putting it on paper, though not entirely new, was for the first time put into practice by the Revolutionary colonists. The individual colonies, in fact, made the first experiments in codifying this higher law with a wider popular basis than ordinary legislation. *But the model that was profoundly to influence the rest of the world was the federal Constitution*.

Hayek sees higher law not as incompatible with, or even inimical to, democracy, but rather as a necessary component of it, even as the natural complement and perfection of democracy. Far from allowing unlimited exercise of power according to the majority will (the Hobbesian conception of sovereignty), it is a necessary limitation upon such arbitrary use of power, without which a people would never consent to being governed by majority rule.

The true nature of social institutions and of human reason explains why higher law is a necessary restraint upon the majority: accumulated wisdom of many decades or centuries of development is necessarily better than short-term, *ad hoc* solutions to particular problems. With his concept of "deliberative democracy", Cass Sunstein in *Designing Democracy: What Constitutions Do* refers to the defects of human reason in devising solutions to political and social problems. On the whole, human intellect (whether because it is limited or because distorted by the pull of personal interest) is unable to see that what it desires now is entirely inconsistent with general principles to which essentially all wish to be governed. Hayek concludes from this that "we can therefore approach a measure of rationality or consistency in making particular decisions only by submitting to general principles, irrespective of momentary needs". Thus the power of a temporary majority is subordinate to general principles laid down in advance by a broader majority. Hence, the broader principles can be changed as society gains experience, but not by the arbitrary and ill-conceived *ad hoc* decision of a temporary majority, whose reason is clouded by the pursuit of its short-term aim.

The subordination of short-term aims to general principles is a necessary pre-requisite to democratic decision-making. In a free, democratic society, "power is ultimately not a physical fact but a state of opinion which makes people obey." In this respect, a constitution functions as something of a background agreement, a general understanding anterior to particular exercises of power by constitutionally empowered institutions. It is crucial that "the agreement to submit to the will of the temporary majority on particular issues is based on the understanding that this majority will abide by more general principles laid down beforehand by a more comprehensive body."

The U.S. Federal Constitution was in fact the second U.S. constitution, replacing the defective Articles of Confederation. But the decade of the Confederation was an important period of experimentation in constitutionalism by the newly independent individual states. As an example can be cited John Adam's contribution to the Massachusetts Constitution, "The Encouragement of Literature, Etc.":

> Wisdom and knowledge, as well as virtue, diffused generally among the body of the people being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates in all future periods of this commonwealth to cherish the interests of literature and the sciences, and all seminaries of them, especially the university at Cambridge, public schools, and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affectations, and generous sentiments among the people.

They laid down in great detail the principles concerning limitation of power, the creation of a "government of laws, not of men", particularly in the quite extensive bills of rights that were written. Apart from elaborating key principles, however, the state constitutions also contributed to later developments because of their failings. Despite the excellent principles written down in them, the legislatures tended to become dominant. From this the Americans learned that "the mere writing down on paper of a constitution changed little unless explicit machinery was provided to enforce it".

In American constitutionalism the most vital "machinery" for this purpose was the institute of judicial review (the American term for what in Europe is also referred to as constitutional review); that is the power of the courts to decline to apply legislation which they conclude is in conflict with the Constitution. In the American conception, the relation of the Constitution to ordinary laws corresponds to that between ordinary laws and their application to particular disputes. It follows naturally therefrom that courts have the competence to apply the general principles of the Constitution to the particular instances of ordinary legislation, thus acting as a restraint, or check, upon the legislature. As is clear in *Marbury v. Madison*, the courts are merely applying the law to a case before them, albeit constitutional law to particular legislation. Much has been made of the fact that the power of judicial review is nowhere explicitly mentioned in the Constitution, but for those advancing the American type of constitutionalism, it was self-evident that this was a necessary part of a constitution.

In closing I would like to make some observations about how the idea of constitutionalism is quite significant for certain contemporary problems of international law and geopolitics. We just went through a fascinating period of social experimentation with the rebuilding of democracy in Central and Eastern Europe. Of course, we made no new discoveries, as all principles of a free, democratic political system, market economy, and rule of law were known before and well-established in the West. But we did acquire some wisdom, and that is the importance of the sequence of steps in which the transformation should take place. I would like to exploit the *bon mot* of Lord Ralph Dahrendorf to the effect that the East European countries would need six months to change the political system, six years to change the economic system, and sixty years to change the normative system. First and foremost, immediately following the basic changes in the political system, a robust legal framework must be built and only then can one make the change in the economic system. You cannot have a successful privatization process before you have, for example, laws governing bankruptcy, competition, and the stock exchange. We made the basic mistake that the economic transformation preceded the building of a robust legal framework. The core of that framework is, of course, the constitution and it should have been adopted as soon as possible.

The second lesson we learned was that, without the stabilizing anchor of fixed rules in a constitution (which can even be imported, as is shown by the Czech Charter of Fundamental Rights and Basic Freedoms, which draws heavily upon the European Convention, itself based on early documents from the United States), free and fair elections are not a panacea for the ills of society. Let's take as an example respect for private property, which is a long-established part of the culture of countries with a common law tradition. In post-communist countries, where private property was for decades considered immoral, it should be strongly protected by the enforcement of constitutional rules.

The lessons learned concerning American constitutionalism can still be of benefit today when we consider the adoption of the European Constitution or the process for drafting the definitive Iraqi Constitution. First and foremost it is necessary to proceed on the basis of the American tradition of constitutionalism as the corrective of parliamentarism. These contemplations, however, exceed the bounds of this paper.