

THE CONSTITUTION AS SYMBOL AND AS INSTRUMENT

Prof. Alvydas Pumputis

Law University of Lithuania, Law Faculty, Department of Constitutional Law
Ateities st. 20, 2057 Vilnius
Tel. 2714640
E-mail: roffice@ltu.lt

Submitted on October 25, 2003

Prepared for print on December 9, 2003

S u m m a r y

Constitution most often is interpreted as a summation of regulations concerning governmental institutions. However, what a constitution reveals about the nature of the political society it came from, cannot be demonstrated by the collection of standards or rules of law only. This is achieved by the contents of a constitution as a symbol.

No contemporary form of law can cover all the information a constitution contains. Thus the role of a constitution as a symbol is expressed.

It is very important to perceive a constitution as a symbol and as an instrument. Those features of a constitution complement each other but sometimes they contradict.

Constitutions define the authority of the principal organs of the government. This is considered to be the prime reason of their existence [1, p. 6-7]. When comparisons are made between constitutions, several factors are taken into account: their form, which expresses their authority, allocation of powers, and legal limits imposed on the powers of the government. Besides “constructing” national institutional structures and governing a relationship between them, the constitutions also define special powers, responsibility and limits of institutional jurisdiction. Constitutions contribute to the establishment of the governed society itself, and this is an aspect not to be ignored.

The constitutional thought strengthens or simply epitomizes the cultural characteristics of the society which, in principle, is the basis of the system of the political authority. In particular, constitutional thought helps to affirm the identity of the political society, from which the constitution demands allegiance [2, p.12]. The authority of the constitution also reaffirms the general nature of this society.

How is this image of the society evoked? An evident appeal to the national symbols is observed in the so-called “programmatically” constitutions. Descriptions of the symbolical meaning of the colors of the national flag, description of aspects of political history, national values and aspirations, specification of the national language or the particular features of the language, or description of the national anthem in the constitutional provisions – all these elements appeal to the collective conscience of the people or are included for the said purpose [3, p.68]. The symbolical aspects of the constitutional communication do not end with these easily recognizable forms. Constitutional symbols include all features or objects of the constitutional practice, which due to the assumed fundamental characteristics of the political society as a whole evoke powerful, often ambiguous emotions.

A symbolical aspect of constitutions is espoused by a number of constitutional texts. Constitution is mostly understood as a set of legal rules, establishing the organization of government, which by its form is comparable to an act of legislation.

Nevertheless, understanding of the constitution as a set of rules or legal principles may not be of much assistance in disclosing the nature of the political society which has adopted the constitution. The nature of the political society may be conveyed only through the content of the constitution as a symbol.

This observation follows, for example, from the comparative analysis of the constitutional structure of Great Britain and the United States of America. A distinct legal form as well as the mode and extent of expression of the constitutional ideas may be less important than the expressed ideas themselves. The substance of the constitutional ideas often lies in deep ambiguities; they lack clear expression, whereas clarity is a quality that lawyers expect from legislation. No contemporary legal instrument might encompass all information that is conveyed by the constitutions.

This is where the role of the constitution as a symbol manifests itself.

Applying constitutions, it is highly important to understand them both as symbols and as instruments. Although these qualities are complementary, occasionally contradictions occur between them.

Accordingly, several stages of constitutional development might be distinguished.

It is well established that the first constitution appeared as a means to defend the rights of people from an arbitrary exercise of power by the government.

After it was realized that the model of constitutional regulation succeeded, the constitution gained prominent importance, which occasionally was excessively overemphasized – the constitution had turned into a symbol.

Sometimes it is apparent how much the people need a symbol and the very fact of knowing that the government is effective. The adoption of the Constitution of the United States of America may serve as an example. The outbreak of the wars of the French Revolution, by enlarging British and continental demand for American products, brought a hazardous prosperity to the Americans. Without much consideration minds unaccustomed to looking far for reasons of certain phenomena attributed this change to the Constitution. Speaking in Congress in 1794 Richard Bland Lee declared:

“I will only mention the stimulus which agriculture has received. In traveling through various parts of the United States I find fields a few years ago waste and uncultivated filled with inhabitants and covered with harvests, new habitations reared, contentment in every face, plenty on every board; confidence is restored and every man is safe under his own vine and fig tree, and there is none to make him afraid. To produce this effect was the intention of the Constitution and it has succeeded”.

Of course, there were skeptics: “It has been usual with declamatory gentlemen in their praises of the present government, by way of contrast, to paint the state of the country under the old Congress as if neither wood grew nor water ran in America before the happy adoption of the new Constitution” [4, p.707] Such disparagement, discreetly confided to the pages of a private journal, did not stem the course of opinion. Hardly has the Bible been more eulogized than the constitutional symbol.

William Johnson wrote: “In the Constitution of the United States - the most wonderful instrument ever drawn by the hand of man - there is a comprehension and precision that is unparalleled; and I can truly say that after spending my life studying it, I still daily find in it some new excellence” [4, p.804].

Interpreters of the Constitution of the United States of America see it as a “constituent agent” of the American identity, representing the “lifeblood of the American nation, its supreme symbol and manifestation [...] so intimately welded with the national existence itself that the two have become inseparable” [5]. An American legal scholar Sanford Levinson believes that “to be an American means to be a member of a ‘covenanting

community', a community, in which the commitment to freedom under law, having transcended the "natural" bonds of race, religion and class, itself takes on transcendent importance". Levinson considers that the central 'covenant' of the community is the Constitution [6, p.5].

One of the main modern works on the Constitution of the United States of America begins with a statement: "Americans revere their Constitution" [7, p.2] often treating it as sacred [8, p.2]. Statements to the effect that the Constitution has "made" the Americans and that the Constitution has created their identity as members of political society are frequent. They recognize themselves as citizens, seeing their image as members of society through a kind of double mirror effect [9, p.54] reflecting the image of the society which the constitution and associated instruments of symbolic power – such as the flag and the Declaration of Independence – help to shape and sustain. [6, p.11].

The history of certain states has seen priorities of the constitution as symbol and as instrument interchanging.

In the aftermath of the Second World War attempts of recovery from the post war ravage were reflected with the growth of universal goals that society found attractive. A number of countries introduced referendums, expanded application of their election laws, etc. At this stage the understanding of the constitution as symbol had become prominent.

In the sixties and the seventies of the 20th century constitution had turned to be realized as an instrument. During this period the system of group interests had clearly taken shape in all countries. These group interests varied from idealistic to criminal. Seeking to achieve their aspirations, groups employed constitutions as instruments. Several aspects here are worth emphasizing. One of them is the interpretation of the constitution via laws and by-laws in force. This aspect has been thoroughly analyzed by Egidijus Kuris [10]. Being quite common, this practice undermines the understanding of a constitution as a symbol. Thus in order to safeguard the constitution it is not sufficient to analyze the practice of the Constitutional Court – the level of the legal culture and education needs to be improved.

By nature, constitutions demand authority also for themselves. This is manifested in two ways: 1) through cultural sources, which present to them moral and political authority and stability and which they symbolically represent; 2) through agencies of government, for which they grant legal authority. A constitution could hardly provide authority for a government unless it enjoyed authority and respect itself.

It follows that the symbolical aspect of a constitution plays an important role in facilitating transformation of ideas into reality.

A quest for a deeper analysis of this question requires acquaintance with aspects of the analysis of constitutional symbolism. Law functions not only through a concrete aim (e.g. adoption of laws, promulgation of findings or judgments of the courts etc.), but also through an endless system of ambiguities, which are open to multiple interpretation [11, p.493]. Due to its symbolical aspects law becomes ambiguous, i.e. uncertain or inexact in its meaning.

Consequently most scholarly writings accept as a given the equivocal variety of symbolical meanings and emphasize the infinite number of sources that symbols derive from [12]. Symbolic meanings in the legal texts are abundant, and this opens wider venues for interpretation. The plenitude of symbols covers those dwelling in it, thus it becomes difficult to understand the whole symbolic information. This in turn discourages from further attempts to systemize that information. Interpretation of symbolical meaning does not improve clarity and constantly remains controversial [12, p.64]

Any attempt to penetrate deeper into the plenitude of symbols might require resort to the system of concepts of the theory of law. E.g. it might be beneficial to acquaint oneself with established ways of interpretation of equivocal legal symbols, and simultaneously might strengthen the already well-established facts of theoretical thought. Symbolical institutions,

elements of rituals or certain ideas and indications found in the constitutional doctrine or related with it might be analyzed through the concepts understood by citizens, in this way strengthening and finally describing the symbols or ideological images of the “fundamental” nature of the political society. Symbols are analyzed with particular aims in mind, understanding sociologically the reality described and with a choice of those symbolical meanings that are found to be important.

The problem of interpretation of symbols is similar to the problem of interpretation of the legal nature of the constitution. It has been said, “the defining feature of legal modernity lies in the attempt to make law self-founding. [13, p.116]. According to Hans Kelsen, peculiarity of law is that it regulates its own growth and its own making [14, p.71, 221], i.e. law can be shown as a self-contained system.

Disregarding problems of understanding law in general, real difficulties appear with the first attempt to apply this understanding to the constitutional law. Constitutions may indeed govern their own making by establishing particular procedures, which allow amending their provisions or even the whole written constitution.

Kelsen considers that the basis of the legal system as a whole was founded by historically first constitution. In accordance with the analysis of Kelsen, the norms of the historically first constitution are not derived from other legal norms; they are derived from the public culture, which is an original idea of the basic norm [15, p.62].

Having legal, moral and political meaning at the same time, constitutions play a role of a link or a channel, with cultural circumstances of the existence of society on the one side, and a positive norm on the other. This shows that the content of constitution is never as narrow as the text of a constitutional document. A part of constitution is expressed by acceptable forms of positive law, e.g. statements in one or two documents, determining rules, rights, duties, norms, procedures, formal definitions and obligations to the government. The other part of the meaning of constitution cannot be expressed through traditional legal means. This applies to the symbolical representation of the society, to the extent to which the culture reflects the society, appealed by constitution as a foundation of the governmental authority from which it derives its own authority.

The meaning of constitution as a symbol can be revealed by numerous phenomena, e.g. the very documents of constitution, decisions of courts and other professional and non-professional commentaries of some aspects of constitution, consistent practice, traditions of management of state and public affairs, scholarly writings on the theory and history of constitution, also popular writings and opinions on the constitution and government and universal rituals, procedures, ceremonies and celebrations related with the fulfillment of the governmental functions. Constitutional symbolical elements may be both written and unwritten.

Already in 1928 Edward Corwin wrote in his classical essay: “It is customary nowadays to ascribe the *legality* as well as the *supremacy* of the Constitution – the one is, in truth, but the obverse of the other – exclusively to the fact that, in its own phraseology, it was “ordained” by “the people of the United States.” Corwin brings out two important ideas. The first is the so-called concept of “positive” conception of law, i.e. a general expression merely for the particular commands of a human lawgiver. The other is that the highest possible source of such commands because the highest possible embodiment of human will, is “the people” [16, p.151].

Corwin is correct to note that it is an intellectual thought which is the main factor allowing the constitutional document or a small number of documents to attain the level of a fundamental law of a superior nature. According to the modern positivistic theory, which became dominant in the common law in the end of the 18th century and in the 19th century, the legislator must take the constitution as a given and it would be difficult to find a legislator having a higher authority to adopt laws than “the people” as a political unit. The theory of constitution as a supreme positive legal creation of “the people” consolidated the idea of the

superior importance of the universally adopted constitutional document; so the constitution began to take precedence over the other adopted laws. The above-mentioned “people” is an image of the controlled population; it supports the lawful authority and is itself supported by it.

For example, some authors derive the constitutional thought from the natural law and from the idea of natural rights, common traditions, principles related to the common law and the documentary sources like the Magna Charta of liberties. It is often claimed that apart from a written constitution a state also has an unwritten one [17, p.19]. It is also considered that the founding generation did not intend their new Constitution to be the sole source of paramount or higher law, but instead envisioned multiple sources of fundamental law [18, p.1127] and that a part of the constitutional thought and tradition will always remain unwritten. It is further argued that they foresaw that the written constitution would encompass also unwritten elements, which are necessary in order to understand the meaning of the constitution. Accordingly, universal sovereignty was not the only source of the constitutional authority. But it is absolutely clear that the unwritten elements of the constitution exist, they obtain meaning and status only together with the written constitution, the authority of which is the creation of the whole “people”. And all this strengthens the meaning of a constitution as a symbol.

Having acknowledged the unwritten elements of the constitution, which lie in ideology, inherited values, legal and cultural traditions, an interesting question arises how is a universal interpretation of the constitution possible. One approach is that the wording of the constitutional document cannot be understood without reference to the tradition of values and construction, which fall outside the text of a document, so the function of interpretation of the constitution should be monopolized by experts (e.g. judges of the Constitutional Court) who have a special training. However, this view is not the only one. For instance, Ronald Dworkin fails to see any persuasive reason why the values underlying the constitution cannot be interpreted by ordinary citizens. However, judges create monopoly of interpretation of the constitution for practical considerations. The idea of the universal sovereignty in this situation adapts to this situation only to the extent that the courts are understood as guardians and representatives of values and traditions of a “nation”, which unify the “nation” as a political community and finalize the meaning of the written constitution enacted by all people.

It follows that the symbol of the Constitution has been saved by the constitutional review, and the constitutional review had been saved by the symbol of the Constitution. The idea of law as self-contained and self-legitimizing system of rules finds support even in the contemporary society [18, p.8]

British constitution pictures the society in which it exists in a completely different manner than is common for the American Constitution.

A number of researchers emphasize the “*ad hoc* feature of the British Constitution and observe the shortage of the interest in common constitutional aspects” [19, p.97]. British Constitution, contrary to the Constitution of the United States, has not been enshrined in the universal consciousness. Such a strange and ironic passivity awakens the thought that Britain, not having a uniform enacted constitution, does not have a constitution at all. Foreign observers are stunned by “the inability of politicians and state officials to think constitutionally” [19, p.126].

Finally this constitutional passivity is rooted in the cultural acknowledgement of the legislative supremacy, related to the sovereignty of the Parliament. If the parliamentary sovereignty means what it means, then, according to Terence Daintith, “there is no place for any constitutional principles, because establishment of any government, principle or the way of action is absolutely dependent on the Parliament” [20, p.46]. In accordance with this view, the basis of the constitution is the sovereignty of the Parliament and the supremacy of laws enacted by the legislative power. The majority of constitutional law scholars consider

this as the main theoretical problem interpreting the powers of the British Government. This problem usually is solved through the formulation of principles, either through adoption of special laws, or through the court decisions, which limit or amend the sovereignty of the Parliament. The attempts are made to find means, entitling to control volatile aspirations of the political majority.

The British Constitution is deeply rooted in the common law thought. One of the most astonishing results is that the constitutional documents, otherwise capable of establishing themselves as main laws, now are considered as already existing expression of common law principles. In England the common law thought has shaped both the national and professional philosophy of law, which finally established itself as the only, the fundamental and potential source of the main law [21, p.23].

The doctrine of "the old constitution" submitted common law to the English legal and political thought as a law existing from the times immemorial, not subject to amendment except for amendments after thorough considerations. Such process discloses the wisdom of the community which is entrusted to the professional common law lawyers and necessarily must be expressed as the contractual foundation of law. The doctrine of the old constitution was a powerful means in the fight against the power of kings, because, according to Pocock, it enabled representatives of common law to demonstrate that all the political authority of the kingdom came from the inconceivably old cultural sources, still existent in the successive legal tradition [21, p.186].

On an early page of his famous work "Constitutional limitations" Cooley shortly defines the constitution as "that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised". Returning later to the same subject he presents a more elaborate explanation:

"What is a constitution and what are its objects? It is easier to tell what it is not than what it is. It is not the beginning of a community nor the origin of private rights; it is not the fountain of law nor the incipient state of government; it is not the cause, but consequence of personal and political freedom, it grants no rights to the people, but is the creature of their power, the instrument for their convenience. Designed for their protection in the enjoyment of the rights and powers which they possessed before the constitution was made, it is but the framework of the political government, and necessarily based upon the pre-existing condition of laws, rights, habits, and modes of thought. There is nothing primitive in it; it is all derived from a known source. It presupposes an organized society, law, order, property, personal freedom, a love of political liberty, and enough of cultivated intelligence to know how to guard it against the encroachments of tyranny. A written constitution is in every instance a limitation upon the powers of government in the hands of agents; for there never was a written republican constitution which delegated to functionaries all the latent powers which lie dormant in every nation, and are boundless in extent, and incapable of definition." [22, p.186].

This definition of the concept of constitution is illustrative of the meaning of the term of "constitutional instrument" and a "constitutional symbol".

To the modern mind, developed on scientific achievements, the word "instrument" signifies future and things needing to be done in the future. This term assumes that a man is a master of his fate, able to impart a desired shape to things and events. From this point of view, a constitution is an instrument of popular power - sovereignty, established for the purpose of achievement of progress.

However, the constitutional symbolism often looks back to the past and links hands with concepts antedating the rise of science and its belief in a predictable, manageable causation. Its consecration of the already established order of things harks back to primitive man's terror of a chaotic universe, and his struggle towards the security and significance behind a slowly erected barrier of custom, magic, fetish and taboo. Constitution as an instrument grants authority to the official government and directs it to some determined

purpose. The function of a constitutional symbol is to protect and tranquilize private interest or advantage against the public power, which is envisaged as inherently suspect, however necessary it may be.

The aspect of a constitution as an instrument of popular government for the achievement of the great ends of government is disclosed in the opening statements of constitutions. The Constitution of the United States proclaims: "We, the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America".

A similar idea finds reflection in the preamble of the Constitution of Lithuania of October 25, 1992, which proclaims:

"The Lithuanian nation

- having established the Lithuanian State many centuries ago,
- having based its legal foundations on the Lithuanian Statutes and the Constitutions of the Republic of Lithuania,
- having for centuries defended its freedom and independence,
- having preserved its spirit, native language, writing and customs,
- embodying the inborn right of each person and the People to live and create freely in the land of their fathers and forefathers – in the independent State of Lithuania,
- fostering national concord in the land of Lithuania,
- striving for an open, just and harmonious civil society and law-governed State, by the will of the citizens of the reborn State of Lithuania approves and declares this Constitution."

"The written constitutions establish the main principles, however the principles have taken shape well before the written constitutions, and a constitution is not created for the purpose of giving us everything – it is meant to defend our natural rights" [23, p.29].

Constitution as a symbol was the result of the popular mind. Anticipation that the Constitution would have a symbolical meaning is older than the constitution itself.

But when one says that the Constitution has become "a symbol" a question follows "a symbol of what"? Initially the symbol was hardly more than a decoration: it was a tribute to political sagacity for ordaining such a marvelous Constitution. But in the course of time the symbol of high political achievement became a symbol of distrust of the political process – a symbol of democracy's fear of democracy.

Constitutional symbol differs radically from the constitutional instruments. "What is a symbol for the majority becomes an instrument for the minority and this serves as even a better embodiment of such a symbol" [24, p.175].

From the point of view of the legislative power the constitution has experienced such stages of development: 1) an instrument of the government of the nation, a source of national authority; 2) an object of veneration, valued mostly for the restrictions on the powers of the government; 3) protection of the interests of minorities from the powers of national government. In other words, from constitutional instrument to the constitutional fetish, to constitutional taboo and back to the constitutional instrument, even though it was an instrument of certain special negative interests but not the positive instrument of national government [24, p.177].

It is necessary to understand the constitution as a symbol and to balance it with the understanding of the constitution as an instrument.

Conclusions

1. A constitution needs to be interpreted conceiving it both as an instrument and as a symbol. These features of the constitution complement each other but are sometimes contradictory.

2. What constitution discloses about the origin of a political society that has adopted it cannot be disclosed by the collection of standards or rules of law only. It is achieved through the contents of the constitution as a symbol.

3. The role of the constitution as a symbol is highly important for transposing ideas into reality.

4. Different periods of development of certain countries have been marked with interchanging priorities of the constitutions as symbols and as instruments. This depends on the peculiarities and general aspirations of a relevant period.



LIST OF SOURCES

1. **Smith S., Brazier R.** Constitutional and Administrative Law. – London, 1989.
2. **Thompson B.** Textbook on Constitutional and Administrative Law. – London, 1993.
3. **Cerullo R. A.** Sociopolitical Control and the structure of National Symbols: the Empirical Analysis of National Anthems. – London, 1989.
4. **Schechter F. I.** "The Early history of the tradition of the constitution" *American Political Science Review*, IX (1915) 720.
5. **Corwin E. S.** The Constitution as Instrument and as Symbol. 1976. P. 24–28, **Foley M.** The silence of constitutions: gaps, "abeyances," and political temperament in the maintenance of government – London, 1989. P. 37.
6. **Levinson S.** Constitutional Faith, Princeton. – New York, 1988.
7. **Sunstein C.** The Partial Constitution. – Cambridge: Mass, 1993.
8. **Grey T.C.,** *The Constitution as Scripture*, 37 Stan. L. Rev. 1, 22-25 (1984).
9. **Althusser L.** Ideology and Ideological State Apparatuses, in *Essays in Ideology*. – London, 1984.
10. **Kūris E.** Konstitucinių principų plėtojimas konstitucinėje jurisprudencijoje. – Vilnius, 2002. P. 28–29; **Kūris E.** Lietuvos Respublikos Konstitucijos principai „Lietuvos Konstitucinė teisė“. – Vilnius, 2001. P. 285.
11. **Sapir E.** „Symbols“ in *Encyclopedia of the Social Sciences*. – New York, 1954.
12. **Fitzpatrick P.,** *The Mythology of Modern Law* (London: Routledge, 1992).
13. **Goodrich P.** „Fate as Seduction: The Other Scene of Legal Judgment“, in A. Norrie (ed) *Closure or Critique: New Directions in Legal Theory* (Edinburgh UP, 1993).
14. **Kelsen H.** *The Pure Theory of Law*. – Berkeley: Col, 1967.
15. **Kelsen H.** *The Functions of a Constitution*; **Tur R. and Twining W.** *Essays on Kelsen*. – Oxford, 1986.
16. **Corwin E. S.** „The Higher Law“ Background of American Constitutional Law // *Harvard Law Review*. 1928.
17. **Grey C.** *The Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought* // *Stanford Law Review*. 1978. Vol. 843.
18. **Sherry S.,** *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1132-33 (1987).
19. **Foley M.** The silence of constitutions : gaps, "abeyances," and political temperament in the maintenance of government – London, 1989.
20. **Daintith T. C.** *Political Programmes and the Content of the Constitution*. – London, 1989.
21. **Pocock G. A.** *The Ancient Constitution and the Feudal Law*. – Cambridge, 1987.
22. **Cooley C.** *Constitutional Limitations*. – New York, 1971.
23. **London A. M.** *Speech at Topeka*. – New York, 1936.
24. **Loss R.** (ed.) *Corwin on the Constitution*. Vol.1 – London, 1982.