



THE UNIVERSITY OF ZAMBIA
School of Education
Department of Language and Social Sciences Education

CVE 9020: LEGAL EDUCATION AND PUBLIC POLICY

Topic 4: Lecture Notes

TOPIC: Constitutionalism and Constitutional Government

4.1 Topic Contents.

- 1 Constitution
- 2 Constitutionalism
- 3 Constitutional Government.
- 4 Types of Government systems

4.2 Aim: To introduce you to key concepts in government and the constitution

4.3 Objectives: By the end of this unit you should be able to:

1. Explain constitution and constitutionalism
2. List and explain the various government systems
3. Explain why the rule of law is the hallmark of constitutionalism.
4. Explain the meaning of constitutional state and constitutional government

4.4 Introduction

In this unit the discussion will be centred on the meaning of the terms constitution, constitutionalism and constitutional state. As is often said, there can be no state without a constitution of its own. Generally, the word constitution is used in many senses as that constituting a body such as a club, a trade union, a political party etc. However, here we are concerned with its use in a political sense alone signifying the body constituting a state. It follows, therefore, that every state has a constitution of its own and it is for this reason that it is called a constitutional state; signifying another term for a democratic political order. The term 'constitutionalism' is thus centred on the very idea that every state must have a constitution of its own and that its government must be organized and conducted according to the rules of the constitution.

4.5 The Constitution

The constitution of a state may be defined as a body of rules and regulations, written as well as unwritten, whereby the government is organized and it functions. It is another matter that in order to meet the requirements of a democratic order, a constitution embodies some more principles specifying relationships between the people and their state in the form of a specific charter of their fundamental rights and obligations. Thus, a constitution may be said to be a collection of principles according to which the powers of the government and the relations between the two are adjusted.” In other words, it may be described as a frame of political society organized through and by law, in which law has established permanent institutions with recognized functions and definite rights. By all means, it is a legal document known by different names like rules of the state, instrument of government, fundamental Law of the land, basic statute of the polity, cornerstone of a national-state and the like (Johari 2009: 407).

Further every state needs some kind of order, some system by which a reasonably orderly process of government may emerge. Without such an order there is anarchy. This order or system, in technical terms called constitution, must lay down certain rules which define the organs of government and how they originate, their mutual relationships, and the relationship between government and the people over whom its authority is exercised. A constitution is, therefore, the basic designs of the structure and powers of the government and the rights and duties of citizens. There can be no state without a constitution. Sometimes the constitution of a state is definitely formulated in a document or documents; sometimes it is found in an established body of rules, maxims, traditions and practices in accordance with which its government is organized and its powers are exercised(Kapur,. 1996:485. a).

A constitution therefore provides a collection of principles according to which the powers of the government, the rights of the governed, and the relations between the two are adjusted. It is used to describe the whole system of a government of a country, the collection of rules which establish and regulate or govern the government. As already alluded to this democratic political order is what signifies a constitutional state and hence a constitutional government. What then, is a constitutional government?

4.6 constitutional Government

A constitutional government means government limited by the terms set by the constitution; not government limited only by the desires and capacities of those who exercise power. It follows, therefore, that a constitutional government is one that operates within a universe of positive restraints; therefore, a state can be said to be 'unconstitutional' if it has no restraints. For this reason, it is only in a democratic country that constitutional government can be said to exist. However, it must be pointed out that the notion of constitutional government is essentially presents a continuum on which at one pole is located governments with very strong restraint and at the other pole you have governments with very weak restraint; and between these two poles, can be ranged all actual governments. This scenario is what makes it possible for one to identify the quality of governance for a given government.

4.7 Constitutionalism

Constitutionalism refers to the evolution of constitutional thinking through the ages. While theorizing on constitutions goes back to Aristotle, modern theory is based on the seventeenth century social contract theorists. The hallmark of modern thinking on constitutions is the notion of a limited government whose ultimate authority is the consent of the governed (Shafritz, 1988. 134).

Constitutionalism is a modern concept of that desires a political order governed by laws and regulations. It stands for the supremacy of law and not of the individuals; it imbibes the principles of nationalism, democracy, and limited government. Constitutionalism, by dividing powers, provides a system of effective restraints upon governmental action. It is a body of rules ensuring fair-play, thus rendering the government responsible. **Constitutionalism, thus, stands for the existence of a constitution in a state, since it is the instrument of government, or the fundamental Law of the Land, whose objects are to limit the arbitrary action of the government, to guarantee the rights of the governed and to define the operations of the sovereign power. It is another names for the concept of a limited, and for this reason, a 'civilised' government. Restraints are the core of constitutionalism and hence some systems of restraints is central to the constitution of any regime that aspires for constitutional**

government. Simply by establishing the framework of government, any constitution, in a measure, acts as a restraint on power. The rule of law is probably the deepest and strongest tradition of constitutionalism. (Kapur, 1996:592. b)

4.8 Systems of Governments.

The development of Democratic and Republican states has sparked off a debate on the which system of governance is appropriate for adoption to maximise democratic governance. In view of this you need to the differences between various types of governance systems. This unit tries to shed light on the unitary system, a confederal, system and a federal system. What are their advantages and disadvantages? In order for you to see the distinction between the three systems you need examine where ultimate sovereignty resides, and This may lead you to the Magna Carta or the Great Charter which is a founding step of the system of people's rule over a certain state or nation.

a). Unitary Government

A unitary government is often described as a centralized government. It is a government in which all powers held by the government belong to a single, central agency. The central government creates local units of government for its own convenience. Most government in the world are unitary. Great Britain is an illustration of the type. A single central organ – the Parliament- holds all the power of the British government. Local governments do exist but solely to relieve Parliament of burdens it could perform only with difficulty and inconvenience. a unitary state has a single ultimate sovereignty. a federal state has a dual location of sovereignty, with authority divided between government and regional governments. In a Unitary government, all sovereignty resides at the national level - thus, the national government is superior to, and controls all regional and local governments. In such a system, governments report in what looks like a military chain-of-command: local governments report to and are legally subservient to regional governments, which report to and are subservient to the national government. A unitary government has all power concentrated at the national government, which may delegate some of that power elsewhere, but which retains the ultimate say.

ADVANTAGES

1. Uniform policies, laws, political, enforcement, and administration throughout the country
2. Less duplication of services and fewer conflicts between national and local governments
3. Greater unity and stability

DISADVANTAGES

1. Central government out of touch with local concerns
2. Slow in meeting local problems
3. If the central government gets too involved in local problems it may not meet the needs of all its citizens

b). Confederate Government

A confederate government is an alliance of independent states. A central organ – the confederate government – has the power to handle only those matters that the member states have assigned to it. Typically, confederate governments have had limited powers and only in such fields as defence and foreign commerce. In our own history, the United States under the Articles of Confederation (1781 to 1789) and the Confederate States of America (1861-1865) are examples of the form. Confederations are very rare in today's world. The European Union is the closest approach to a confederation today. In a Confederate government, the nation is made up of constituent states, each state having ultimate sovereignty. This form results in a national government which is more of an association - the central national government has no legal authority over its constituent state (regional) governments, other than the authority those states voluntarily give it (and can withdraw at any time). Confederations are really government by voluntary-consensus, with power being retained at the regional (state) level.

ADVANTAGES

1. Keeps power at local levels preventing the growth of a large central government
2. Makes it possible for the several states to cooperate in matters of common concern and also retain their separate identities

DISADVANTAGES

1. Weakness of central government makes it unable to enforce laws or collect taxes
2. lack of unity and common laws

c). Federal Government-

A federal government is one in which the powers of government are divided between a central government and several local governments. An authority superior to both the central and local governments makes this division of powers on a geographic basis; and that division cannot be changed by either the local or national level acting alone. Both levels of government act directly on the people through their own sets of laws, officials, and agencies. In the United States, for example the National Government has certain powers and the 50 states have others. This division of powers is set out in the Constitution of the United States. Federal governments are a blend of the above two opposites. Most federal systems divide up various responsibilities (sovereignty) into categories, then decide that ONE of: the federal (national), the state (regional), or local (town/city) government should be the ultimate sovereign in that area. Generally speaking, this division is based upon the impact of the topic in question: for responsibilities which impact the nation as a whole, the federal government is usually assigned supreme power, while for activities that are regional or local in nature, the regional (or local) government is assigned sovereignty. In all cases, government levels (federal, state, and local) are ultimate responsible solely to their constituent citizens, and do NOT legally report to another government. Thus, under a federal system, a town mayor has no legal responsibility to follow instructions from a state governor or a national president. In terms of practical application, one obvious place that can be seen is the legal system in place: under a unitary system, there is but one set of courts, and those courts have jurisdiction over all legal cases. In a Confederate system, there tend to be many court systems, with each region/state's court system applying only to cases within that region/state. In a federal system, there tend to be a myriad of court systems, each having different responsibilities based on the type of infraction or case, with

different infractions being judged by different courts, and with multiple court systems having possible jurisdiction over a single geographic area.

ADVANTAGES

1. Federal unity but local governments handle local problems
2. Local government/officials have to be responsive to people who elect them
3. Central government can devote more time and energy to national and international problems
4. More opportunities for participation in making decisions – in influencing what is taught in the schools and in deciding where highways and government projects are to be built

DISADVANTAGES

1. Duplication of services
2. Citizens living in different parts of the country will be treated differently, not only in spending programs, such as welfare, but in legal systems that assign in different places different penalties to similar offenses or that differentially enforce civil rights laws
3. Disputes over power/national supremacy versus state's rights
4. International relations – states may pass laws that counter national policy

4.9 Presidential and Parliamentary forms of Government

Presidential and Parliamentary forms of government are two different systems of Government, which are available in all countries of the world. System of Government in every country is functioning with either Presidential or Parliamentary form of Govt. Historically these two systems of Government are available in United States of America and United Kingdom. Most countries, which were under the colonial system, had adopted the system left by their masters except of some, for example USA adopted Presidential form of Government after getting Independence from UK. Nigeria also adopted the Presidential form of Government after getting independence from Britain.

Pakistan and India had also adopted Parliamentary form of Government after getting independence from United Kingdom,

a).Presidential Form of Government

A presidential system is a system of government where an executive branch is led by a president who serves as both head of state and head of government. In such a system, this branch exists separately from the legislature, to which it is not responsible and which it cannot, in normal circumstances, dismiss. The title *president* has been carried over from a time when such person actually presided over (sat in front of) the government body, as with the US President of the Continental Congress, before the executive function was split into a separate branch of government. After this split, the President was no longer needed to sit in front of the legislative body, although the executive title remained in legacy. Although not exclusive to republics, and applied in the case of semi-constitutional monarchies where a monarch exercises power (both as head of state and chief of the executive branch of government) alongside a legislature, the term is often associated with republican systems in the Americas. Presidential systems are numerous and diverse, but the following are generally true of most such governments:

- The executive branch does not propose bills. However, they may have the power to veto acts of the legislature and, in turn, a supermajority of legislators may act to override the veto. This practice is generally derived from the British tradition of royal assent in which an act of parliament cannot come into effect without the assent of the monarch.
- In the case of presidential *republics*, the president has a fixed term of office. Elections are held at scheduled times and cannot be triggered by a vote of confidence or other such parliamentary procedures. Although in some countries, there is an exception to this rule, which provides for the removal of a president who is found to have broken a law.
- The executive branch is unipersonal. Members of the cabinet serve at the pleasure of the head of state and must carry out the policies of the executive and legislative branches. However, presidential systems frequently require legislative approval of executive nominations to the cabinet as well as various governmental posts such as judges. A presidential leader generally has power to direct members of the cabinet, military or any

officer or employee of the executive branch, but generally has no power to dismiss or give orders to judges.

- The power to pardon or commute sentences of convicted criminals is often in the hands of the head of state.

Countries that feature a presidential system of government are not the exclusive users of the title of *President* or the republican form of government. For example, a dictator, who may or may not have been popularly or legitimately elected may be and often is called a president. Likewise, many parliamentary democracies are republics and have presidents, but this position is largely ceremonial; notable examples include Germany, India, Ireland, Israel and Portugal (see Parliamentary republic).

Advantages of the Presidential Form of Government

Salient features of Presidential system of Government are as under:-

1. A strong and stable Government
2. An able and mature ministry through direct induction of top professionals and technocrats
3. Legislator's freedom from the fear or 'party whip' resulting separation of the Executive from the Legislature
4. Gradual emergency of the two party-systems as a result of pre-election coalition of like-minded parties, before the very eyes of the electorate
5. Bureaucracy remains under the mature surveillance of political leadership, and
6. Rampant defections and uneasy post-election coalitions tend to disappear.

Disadvantages of the Presidential Form of Government

1. By making the President and his colleagues independent of the Legislature, it makes the executive too powerful and this carries within it seeds of Dictatorship.
2. President considers himself always right because of absolute power, which causes danger to the integrity of country.
3. President selects always his closest friends even not intelligent and remote to their expertise and experience.
4. Sometimes President makes covenant against the country to save his regime.

b) Parliamentary Form of Government

Parliamentary form of Government is very historical and successful in United Kingdom. Many countries had adopted this form of Government because of its success in UK. In early days every word spoken by the King or Queen was the law and no one had power to contradict it. But gradually, a concept of personal freedom became popular and House of Common tried to become more powerful. Hence the doctrine of Supremacy of Parliament developed. The development of the supremacy of Parliament stemmed from the English Civil War and expanded over since and is now a dominant theme in British politics. Majesty of King or Queen is now ceremonial. All the functions of Government are being controlled by the UK Parliament. This is too much independent Parliament in the world; therefore, there is a saying that “Parliament of Britain can do everything except to change the sex of a person” In this system, members are chosen / elected directly by the people through plebiscite. These members represent their constituency at one floor. This system is also very popular in all the countries of the world. In every country, some are in favour of Presidential form of Government and some are in favour of Parliament form of Government.

Advantages of Parliamentary Form of Government

1. Selection of Prime Minister on the will of majority of members of the Parliament.
2. Chosen of members by the voting power of people.
3. Decisions on issues on the basis of consensus of majority.
4. Option of citizen to choose best one.
5. Interest of the people in the affairs of the country. Consequently, development of public opinion.
6. Manifesto of the parties for the general public to decide mandate.
7. Criticism by the opposition.
8. Equal representation of all constituencies either urban or rural.
9. Legislation according to the will of the people by the members representing them in the parliament.

Disadvantages of Parliamentary Form of Government

1. Ministers are selected by the Prime Minister on the basis of influence in the party.
2. Newly elected members sometimes neglected, even if competent in their fields.
3. Misuse of authority by the members of Parliamentary because of majority.
4. Members of Parliament cannot go against the party's policy. More often than not, they cannot vote according to their conscience.
5. Nomination of substandard members as ministers causing strongest bureaucracy.
6. Influence of small factions on the political parties.

4.10 Unity summary

In this unit you have learned about the meaning of the terms constitution and constitutionalism. I am sure by now you understand why a constitution is the pillar of democratic governance and why civilized society is organized on the basis of a constitutional government. You now know the basis on which government is organized and functions. You also have seen that governments can adopt either presidential or parliamentary systems or either unitary or federal systems of government depending on what their constitutions provide.

4.11 Activity

1. Explain what is meant by the term constitution. In your view can there be a state Without a constitution?
2. What is constitutionalism? In your view do you see constitutionalism to be of any Significance to democratic governance?
- 3 Explain the differences between a unitary and a federal system of government. In your view which one of them could be better for Zambia ?
4. Compare and contrast the presidential system with the parliamentary systems of Government. Which one would you recommend for Zambia to adopt?
5. Rule of law is the hallmark of constitutionalism. Discuss.
- 6 The terms constitutional government and constitutional state mean one and the same thing. Discuss.