



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

CVE 9020: LEGAL EDUCATION AND PUBLIC POLICY

Topic 5: Lecture Notes

TOPIC: Development of Constitutionalism

5.1 Topic Content

- 1 Greek Constitutionalism
- 2 Roman Constitutionalism
- 3 Medieval Constitutionalism
- 4 Renaissance Period Constitutionalism
- 5 Constitutionalism in Britain
- 6 Constitutionalism in America
- 7 Constitutionalism after the First World War.
- 8 Constitutionalism after the Second World War

5.2 Aim: To give an account of the development of constitutionalism.

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

1. Give an account of the historical background of the development of Constitutionalism.
2. Compare and contrast constitutionalism in Britain with that of USA.
3. Compare and contrast constitutionalism in Zambia with that Britain and USA.
4. Compare and contrast constitutionalism in Nigeria with that Britain and USA
5. Identify and explain the various problems associated with constitutionalism in both developing and developed countries.

5.4 Introduction

The historical process of the rise and development of a constitutional state can be traced from ancient to modern times. The history of the development of constitutionalism is hence a history of the growth of political institutions that had their first manifestation in ancient Greece and Rome and thereafter whose growth spilled into the middle and modern ages. Credit here should be made to the ideas of great political thinkers who drew inspiration from the development of political institutions, or who thought in terms of having a particular form of polity under the ideal obtainable conditions. The movement is still going on with a view to seek the improvement of political institutions in the direction of having a legitimate constitutional order (Johari, 1989 b).

In this unit you will study the history of the development of constitutionalism starting from ancient Greece to the present day, when we are in the era of globalisation and national constitutions are being shaped in line with global governance trends.

5.5 Greek Constitutionalism:

The Greek philosophers like Plato and Aristotle, studies present the case of works on early political constitutionalism. Ancient Greece was characterized by existence of city states in which the following were the salient feature of their governance system:

- The Greeks city states had ‘political separatism’ as a marked characteristic of their life.
- The city-state system had an arrangement in which the benefits of citizenship were open to the freemen only.
- Most of the city-states had a direct democratic system, except Sparta which was under the rule of military junta.
- The notion about the state and the role of the people citizens was that a Greek citizen was actually and in person a soldier, a judge and a member of the governing assembly.
- The city state was a citizen’s whole scheme of association in which all his needs, material and spiritual, were satisfied

Greek constitutionalism failed to move with the pace of the changing conditions of history. Neither the enlightened monarchy which Plato had suggested, nor Aristotle's mediating middle-class on which set his hopes could sustain the city-state; and so it had to lose its cherished independence. The political philosophy guiding constitutionalism which was Plato's ideal state was an 'utopia', and the best practicable state of Aristotle, both failed to look beyond the horizon of a city-state with the result that the city state had to go. It was eclipsed by the establishment of the Roman empire.

5.6 Roman Constitutionalism:

After the eclipse of the city-state system and the establishment of a great empire under the Romans great change occurred in constitutionalism and it took up the following characteristics:

- The intellectual life became more diffuse and driven into different channels.
- ethics became independent of politics;
- society and state ceased to be equivalent terms
- The individual, apart from the state, became the chief object of contemplation.
- Gradually emerging an individual who was something more than a citizen,
- a society that was wider than any possible political unit and a humanity more extended than any single race.
- Individualism and cosmopolitanism become the most marked of the newer aspects of political philosophy.

The imperial rulers of Rome evolved their constitution as a determinate instrument of government – “a mass of precedents, carried in men's memories or recorded in writing, or dicta of lawyers or statesmen, of customs, of usages, understandings and beliefs, upon the methods of government, together with a number of statues.” With the termination of monarchy about 500 B.C., there emerged the Republic that had a mixed constitution. The offices of the Consuls (of whom two were elected annually each with a right to veto another) represented the monarchical element of the terminated system; the Senate (a small body with vast legislative powers) represented the aristocratic element; the democratic element existed in the meetings of the people in three sorts of

conventions according to the division of land or people (curies, centuries or tribes). It is a different thing that, in course of time, the era of irresponsible autocracy came to prevail in Rome when the office of the Emperor was revived. Despite this, Roman constitutionalism made certain important contributions to the development of this concept. They codified their law and laid down the principle of representative government that came to be the most celebrated principles of constitutionalism. The two-pronged conception of the legal sovereignty of the Emperor – that his pleasure had the force of law and that his powers were ultimately derived from the people – persisted for many centuries and influenced throughout the medieval period the views on the relations between the rulers and the ruled. (Johari, 1989c: 261).

5.7 Medieval Constitutionalism

A great change took place after disintegration of the Roman Empire in the 6th century A.D. and its substitution by the establishment of a number of feudal states. This occurred when the Teutons, often called barbarians, who invaded the Roman empire brought with them certain new ideas based on the force of folk customs and thus caused the emergence of a haphazard political and economic set up in which the old nomadic relationship shaped the formation and character of the society and political institutions. As a consequence the following developments ensued:

- The state of incessant warfare finally gave way to innumerable scattered political and economic ‘sovereignties’ not on a national and territorial but on local levels due to which Europe became an area of individual feudal allegiances.
- The era feudalism represented a phase of transition, decentralization, and disintegration.
- From the political point of view, it exhibited an age of ‘statelessness’ since every lord could conduct warfares or regulate commerce, or coin currency, or discharge judicial responsibilities.
- From an economic point of view, it “meant a state of society in which all or a great part of public rights and duties are inextricably interwoven with the tenure of land, in which

the whole governmental system – financial, military, and judicial – is a part of the law of private property.

- Curiously, universalism came to be the keynote of this era of transition, decentralization and disintegration as a result of the spread of the religion of Christianity.
- A happy synthesis occurred between the Roman and Teutonic ideas and practices. For instance, the Roman conception that the people were the ultimate source of the royal authority and the practice of the barbarian tribes that the king was under the law of the folk happily coincided.
- The coronation ceremony in the presence of the chiefs and nobles coupled with the swearing in ceremony of the king became a clear indication of the fact that the monarchy was the holder of temporal powers in the name of the ultimate authority of his people.

The foregoing events led to the growth of democratic constitutionalism. However, what retarded the pace was the domination of the church. Political thinkers followed the trend set by St. Augustine and St. Thomas in making secular authority subservient to the authority of the church that signified the rule of the bishop over the authority of the monarch and of the Pope over all secular and religious heads of the Christian world. This baleful state of affairs could not be remedied until, after a period of about 800 years the national monarchs stood up to overthrow the discredited hold of the Papacy. The trend of nationalism emerged, particularly in France, England and Spain that witnessed the emergence of the actual germs of the modern constitutional state.

5.8 Constitutionalism during Renaissance Period

The renaissance (rebirth) marked the re-emergence of a humanistic and scientific outlook. It indicated that the European people had developed a new consciousness of life and a new sense of liberty. Achievements in the fields of arts, literature and science threw off medieval forms and looked for new values. Inspiration was derived from the models of the classical world. Along with the renaissance, another movement that brought the Middle-ages to an end was the Reformation that destroyed the medieval concept of universalism and scholasticism and supplemented national states. However, one thing that still retarded the pace of a constitutional state was the emergence

of absolute monarchy. The unassailable position of a single Pope was taken over by a number of despotic rulers that forced the people to take the matter to the revolution for a final settlement. The result was that after the decline of the papacy, absolute monarchical rules were established in England, France, Italy and Prussia. For this reason, it is commented that the Renaissance state “was not truly a constitutional, much less a democratic, state.” (Johari, 1989d: 262).

5.9 Constitutionalism in England:

Britain occupies the most significant place in the development of constitutionalism. The age of Tudor Despotism ended with the ‘golden age’ of Queen Elizabeth. The monarchs had to face the opposition of the people. The civil war of 1640-48 was conducted on the issue as to who was supreme – the law (lex) or the king (rex). The defeat of the king and the victory of the people confirmed the sovereignty of the people. Further, the Revolution of 1688 laid the foundations of the sovereignty of the Parliament. The movement for the democratization of the system continued with the result that the great Reform Acts were passed in 1832, 1867 and 1884 that enfranchised more and more people. The Parliament Act of 1911 crippled the House of Lords and its amendment of 1949 further reduced the area of authority of the house in matters of passing a non-money bill. The rise of two political parties had its own contribution to the development of constitutionalism in this country. It made the functioning of the parliamentary government a possibility. As a result of all these developments, the sovereign stands removed from the area of political authority; the power is exercised by the ministers accountable to the parliament; and that all citizens of the country, irrespective of their social and political position, enjoy the boons of liberty and equality, what Dicey calls the ‘rule of law’. What is of special importance in this regard is that English constitutionalism has supplied a continuity of life to liberal institutions through many centuries when elsewhere they were dead or had never lived, permitted the growth of its own institutions among those communities in all parts of the world of which England herself was the mother and supplied the pattern of a constitution when the moment came for any newly liberated community to found one (Johari, 1989e: 262)..

An appraisal of the nature and sources of the English constitution and its gradual evolution enables us to derive the following important salient features of the British Constitution.

- **Partly written and partly unwritten** - By unwritten we mean that none of its principles are written. There are several written parts of the British constitution such as the Magna Carta (1215), Bill of Rights (1689), Reforms Acts, Parliamentary Act (1911) and many more. But the unwritten part is more conspicuous and impressive than the written one.
- **Evolutionary** – it is a child of wisdom and chance it has evolved itself gradually, expressing itself in different charters, statutes, precedents, usages and traditions.
- **Difference between theory and practice** – one of the unique features of the British constitution is the gap that exists between constitutional theory and governmental practices between the monarchy and the state.
- **Parliamentary sovereignty** – there is no law which the British parliament cannot make or unmake. No court can question the legality of its Acts. There is no legal difference between the constituent authority and law-making authority in England.
- **A unitary constitution** – it is a unitary and not a federal one. The entire power is concentrated in a single government of centre in London. The local areas derive their powers from London government.
- **A flexible constitution** – there is no difference between the procedure for the passage of a constitutional law and that of an ordinary law in England.
- **Rule of law** – it has never been expressly enacted as a statute, but is implicit in the various acts of parliament, judicial decisions and in the common law.
- **A parliamentary form of government** – has parliamentary form of government distinct from presidential form of government. Queen is head of state. People who function are ministers from the majority and led by the prime minister.
- **Bicameral legislature** – There exist two chambers, the House of Commons which is the lower house directly elected chamber and has 650 members and the House of Lords the hereditary chamber has 746 members (Vishnoo and Vidya, 2009).

Therefore, it can be argued that the British parliament is made up of two chambers as already been alluded to. The House of Commons has 650 members of parliament who represent a particular part of the country, a constituency. The House of Lords has around 1,200 members made up of two archbishops and 24 bishops, hereditary peers and peeresses who have inherited their title and life peers whose title is only for a life time and will not be passed to their children.

The British monarchy stands for the continuity of British history going back to the Anglo-Saxon times and even today serves as a figureland for the state. In theory it has enormous powers but in reality those powers are limited and the crown follow the dictates and advice of the ministers in parliament (Johari, 2011). The monarchy assumes the powers of head of state of which it is ceremonial. The chief executive of the government is the prime minister who is the leader of the party that holds the most seats in the House of Commons. He presides over the cabinet and selects the other cabinet members, who join him/her to form government that is part of the functioning executive. Acting through the cabinet and in the name of the monarch, the prime minister exercises all of the theoretical powers of the crown, including making appointments

5.10 Constitutionalism in America

American Constitutionalism is derived from the spirit of the Social Contract of Rousseau. The United States Declaration of Independence of 1776 categorically stated that:

- All men are created equal
- All men are endowed by their creators with certain unalienable rights.
- To secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed;
- Whenever any form or government becomes destructive of these ends, it is right of the people to alter or abolish it, and to institute a new government,

These are the principles and ideals, which guided the Founding Fathers of the American republic who established a form of federal government based on the principles of separation of powers and that of checks and balances (Gordon, 1998:56). As a result America came to have a government with the executive, legislative and judicial powers vested respectively in the President, the Congress and the Supreme Court.

The three organs of American government are separated from each other and, at the same time, they check each other so as to maintain the balance and therefore it follows that:

- All appointments and foreign treaties made by the President must be ratified by the Senate;

- The Congress may remove the President by the process of impeachment; and the Courts can invalidate any order or decree issued by the President in case it goes beyond the constitution or as against the due process of law.
- The Congress cannot make a law that violates the Constitution.
- A bill passed by the Congress requires the assent of the President and the Courts may invalidate it if they find that the law is against the constitution or the due process of law.
- The Courts are checked by the authority of the President and the Congress. The Congress may pass a law to enhance the jurisdiction of the courts, or the number of the judges and their emoluments and may also remove a judge by the process of impeachment. The judges of the Supreme Court and other federal courts are nominated by the President and the Chief Justice acts under an oath of office that is administered to him by the President.

In this way, the American constitution has materialized the maxim that ‘power cuts power’ or that ‘power checks power’. The result of all these constitutional arrangements has come to be that democracy in America “rests upon the expectation that lawful conduct is the standard to which both governments and men will conform. The most outstanding feature of the development of constitutionalism is that herein we find the “true beginning of modern documentary constitutionalism.” (Johari, 2011 a).

5.11 Constitutionalism after the First World War

After First World War the termination of hostilities in a world was expected to give way to establishment of representative and responsible government. To the contrary, there came up serious authoritarian reactions against the process of constitutionalism. Instead there emerged communism in Russia, Fascism in Italy and Nazism in Germany, among others, as concrete example in this respect. The elements in the new constitutional devices adopted in these countries distinguished their governance from that of democratic constitutional states. Their political systems were characterised by:

- Political dictatorship through the dominance of a single party to the exclusion of all others
- A totalitarian system that used the political machine to control and direct every aspect of economic, social and even religious life:

However, one remarkable aspect of the post-first War period was the establishment of the first international organisation called the League of Nations that aimed, by constitutional means, at preventing or peacefully settling conflicts between the sovereign states. It marked a new and unprecedented stage in the development of constitutionalism. Constitutionalism, thus, came to have one more attribute called internationalism (Johari, 2011 b).

5.12 Constitutionalism after the Second World War:

After the dictatorships of Italy, Germany and Japan were destroyed in the second Great War, there remained two constitutionalism models, namely that of the Soviet Union (communist or socialist model) and that of America and Western Europe (the capitalist models). This era witnessed the competition between these models and saw their aggressive proliferation in other countries of the world. This was the beginning of the cold war. The Cold War, often dated from 1947–1991, was a sustained state of political and military tension between the powers of the Western world, led by the United States and its NATO allies, and the communist world, led by the Soviet Union, its satellite states and allies. This began after the success of their temporary wartime alliance against Nazi Germany, leaving the USSR and the US as two superpowers with profound economic and political differences. The Soviet Union created the Eastern Bloc with the eastern European countries it occupied, maintaining these as satellite states. The post-war recovery of Western Europe was facilitated by the United States' Marshall Plan, while the Soviet Union, wary of the conditions attached, declined and set up COMECON with its Eastern allies. The United States forged NATO, a military alliance using containment of communism as a main strategy through the Truman Doctrine, in 1949, while the Soviet bloc formed the Warsaw Pact in 1955. Some countries aligned with either of the two powers, whilst others chose to remain neutral with the Non-Aligned Movement. (Winkpedia free encyclopaedia, 12. 11. 2012 at 04:32.)

The Cold War was so named as it never featured direct military action, since both sides possessed nuclear weapons, and because their use would probably guarantee their mutual assured destruction. Cycles of relative calm would be followed by high tension which could have led to war. The most

tense involved the Berlin Blockade (1948–1949), the Korean War (1950–1953), the Suez Crisis (1956), the Berlin Crisis of 1961, the Cuban Missile Crisis (1962), the Vietnam War (1959–1975), the Yom Kippur War (1973), the Soviet war in Afghanistan (1979–1989), the Soviet downing of Korean Air Lines Flight 007 (1983), and the “Able Archer” NATO military exercises (1983). The conflict was instead expressed through military coalitions, strategic conventional force deployments, extensive aid to client states, espionage, massive propaganda campaigns, conventional and nuclear arms races, appeals to neutral nations, rivalry at sports events, and technological competitions such as the Space Race. The US and USSR fought proxy wars of various types: in Latin America and Southeast Asia, the USSR assisted and helped foster communist revolutions, opposed by several Western countries and their regional allies; some the US attempted to roll back through subversion and warfare, with mixed results. To alleviate the risk of a potential nuclear war, both sides sought détente in the 1970s to relieve political tensions.

In the 1980s, the United States increased diplomatic, military, and economic pressures on the Soviet Union, at a time when the communist state was already suffering from economic stagnation. In the mid-1980s, the new Soviet President Mikhail Gorbachev introduced the liberalizing reforms of perestroika ("reconstruction", "reorganization", 1987) and glasnost ("openness", ca. 1985). This opened the country and its satellite states to a mostly peaceful wave_of revolutions which culminated in the collapse of the Soviet Union in 1991, leaving the United States as the dominant military power. The Cold War and its events have left a significant legacy, and it is often referred to in popular culture, especially in media featuring themes of espionage and the threat of nuclear warfare. (Winkpeadia free encyclopaedia, 12. 11. 2012 at 04:32.)

The aftermath of the Second world War saw a good number of countries from colonial governance and they became free to adopt the eastern or western models or a peculiar combination of the two. This is the time when the poor and backward countries(developing countries) made several interesting experiments with constitution-making in order to have a constitutional states This is also then period which saw the establishment of the United Nations after the demise of the League of Nations cemented the fact that constitutionalism not only stands for nationalism. The United Nations has since operate

by the principle that the State shall strive for a peaceful and secure international order, promote international law and justice and seek pacific settlement of international disputes. (Winkpeadia free encyclopaedia, 12. 11. 2012 at 04:32.)

5.13 Unit Summary

In this unit you have explored the evolution of constitutionalism. I am sure you have gained much knowledge about the development of constitutionalism. With this knowledge you should be able to trace the origin of the various constitutions existing worldwide. Given this knowledge , in the next unit, you will learn more about the constitutionalism . But this time it will be in terms of western versus eastern approaches as well as the case of developing countries.

5.14 Activity

1. Compare the British constitution with that of the United States of America. In your view which one of these constitutions would your recommend for Zambia to adopt ?
2. Discuss Roman constitutionalism
- 4: Compare and contrast Renaissance Period constitutionalism with Mediaeval Constitutionalism.
- 5: Explore constitutionalism in America (USA)
- 6: Describe and discuss constitutionalism in England
- 7: Compare constitutionalism in Zambia with constitutionalism in America
- 9: Compare constitutionalism in Zambia with constitutionalism in England