

Comparative Study of Constitutions and Constitutionalism ※

by

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Constitution

The word constitution in its Latin form is of considerable antiquity but it had meanings different from the one we associate with it today. What is meant by a constitution today is a body of fundamental principles that are to govern the exercise of political power. All constitutions in the western tradition have placed great emphasis on the organization of the powers of government and the methods of maintaining effective control.

A classical definition was provided more than two centuries ago by an influential British politician and political theorist. Here is what Bolingbroke wrote in 1733: "By constitution we mean, whenever we speak with propriety and exactness, that assemblage of laws, institutions, and customs, derived from certain fixed principles of reason, directed to certain fixed objects of public good, that compose the general system, according to which the community has agreed to be governed."

Except for the idea of popular consent, similar passages occur in Aristotle's *Politics*. But Bolingbroke's reference to certain "fixed principles of reason" as the source of constitution is hardly typical of the British, who have usually placed less emphasis on "fixed principles" than on custom and tradition, or "prescription." The classical statement of this "prescriptive" constitution was penned by Edmund Burke near the end of the 18th century in his *Reflections on the Revolution in France*, but the idea may be readily traced to classical antiquity. Cicero, for example, in his *DE REPUBLICA*(II, 21) refers to Cato's view that the republican Constitution of Rome was not the work of a single period or one particular man but of many. The concept of a prescriptive constitution refers to political and social order that owes its existence to customs and tradition, but has demonstrated its usefulness and validity over a considerable period of time. England is one of the few countries that have had such a past.

In France an entirely different development took place. The long period of rule by absolute monarchs was terminated by the French Revolution. Absolutism was replaced by a some-

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what synthetic constitutional framework based upon rational notions. This contrast between prescriptive constitutions and synthetic constitutions as exemplified by England and France is very useful for the comparative study of constitutions. We shall have occasion to return to it for further analysis.

In the late 18th and 19th centuries, the word "constitution" had a special appeal as a written guarantee against arbitrariness in government. Later as the forces of liberalism and nationalism combined, a constitution came to be regarded as a symbol as well as a guarantee of national independence and sovereignty. Similar attitudes have been manifested in recent years in the newly emerging states of Asia and Africa.

The procedures that are to govern changes in most constitutions are fairly complex. It is considerably more difficult to amend constitutions than to change ordinary laws and statutes. This is so, because a constitution is to be regarded as the supreme law of the land and no easy tempering is to be allowed.

A drastically different concept prevails in the Communist dominated countries, where constitutions are not clearly differentiated from laws and decrees. They may be amended or replaced at will by the group in power. Communist theorists have often insisted that constitutions record the achievement of certain stages of social, political and economic development, and that each stage requires a different kind of constitution. Thus far there have been three constitutions since the Communists seized power. A fourth one is supposedly being readied.

Constitutionalism

So far I have been discussing different kinds of constitutions but no explanation has been given of the other term I used in the title of my lecture: Constitutionalism. This term, as many of the -isms, dates from the early 19th century. It was then used by the proponents of written constitutions and constitutional government to refer to the underlying philosophy of their credo. Constitutionalism meant the sum total of legal and political restraints that were to safeguard the exercise of power and protect certain fundamental rights. Most proponents of constitutionalism believed in the necessity of written constitutions. But written documents would not satisfy them unless they fulfilled two basic requirements as set forth in Art. 16 of the French Constitution of 1791. This article asserted categorically, that any society in which the guarantee of fundamental rights was not assured and the separation of powers not determined had no constitutions at all. If one applies these standards today, it will be clear to anyone, who is acquainted with the Communist regimes, that they do not meet the requirements as formulated in 1791. Therefore, many political scientists point out that although the Communist countries have proclaimed constitutions, they have not accepted the precepts of constitutionalism.

Because the Communists publicists and propagandists have appropriated and twisted many of our fundamental political terms, we find it useful to draw a distinction between constitu-

tions and constitutionalism. We have come to recognize that the mere enactment of a constitution cannot be an absolute guarantee that constitutionalism will prevail.

However, it should be pointed out that there are many different approaches to constitutionalism. The contrast that I indicated earlier between the British and the France constitutional development may help to clarify this contention. If constitutionalism is conceived in very broad terms as a process of reconciling stability with liberty, some important differences may be noted in the development of Britain and France.

British political theorists of the 17th cent. placed great emphasis upon the concept of mixed government as key to constitutional and political stability. They contended, as had been done by their precursors in Venice and Rome, that stability is derived from the blending of the different elements: Monarchic, aristocratic and democratic. The differences between King, Lords and Commons were gradually accommodated within the framework of the British Constitution. By 1688 the most important elements of a dynamic system of checks and balances had been established. The British were able to develop an approach to stability which was built upon an adaptation of traditional elements.

In France, as already noted, absolutism had destroyed the traditional elements that could have limited the powers of the King. There could be no organic balance and it was therefore necessary to create a mechanical kind of equilibrium based not upon social classes but upon governmental functions. Impressed by the success of American constitutional experiments, the French revolutionary leaders insisted upon the principle of the so-called "separation of powers."

Equally clearcut is the contrast in the conceptions of "liberty" and "liberties." Even since the Magna Carta(1215), the British have traditionally placed greater emphasis upon safeguarding specific liberties rather than an abstract conception of liberty. Although a number of documents, similar to the Magna Carta were formed around the same time in Hungary, Poland and Sweden, to protect the rights of the feudal nobility, two important characteristics set the Magna Carta apart from all others. First, the documents in other countries were quickly brushed aside or repudiated by absolute rulers. Even though the rights may have been reasserted, there was no continuity in their development. In England, on the other hand, the feudal liberties were preserved. Furthermore, they were gradually transformed into modern civil rights and obligations.

In France, absolutism had obliterated traditional liberties. When the Revolution came, the vindication of fundamental rights had to be based upon abstract conceptions of natural law and natural rights.

Comparative Constitutional Systems and the Development of Constitutionalism

The age of written constitutions began in the last quarter of the 18th century. The pioneer

documents, inspired by the theories of Locke and Montesquieu, were the early State Constitutions and the Constitution of the United States. They were followed on the European continent by the Polish Constitution of 1791, the French Constitutions of 1791, 1793 and 1795, the Spanish Constitution of 1812 and the Norwegian Constitution of 1814. The latter is one of the few documents along with the Swedish Constitution of 1809, that are still in force.

Since 1791 many hundreds of constitutions have been enacted and the student of comparative institutions finds it usually difficult to remember the overall development. It is therefore necessary to develop a grouping constitutional patterns that would make it easier to remember the details. A number of scholars in the field of comparative constitutional law and related fields, have attempted to develop an overall classification of constitutions past and present on the basis of historical and analytical studies. Not all constitutions can be fitted into this kind of genealogical and typological framework but the great majority can be so classified.

Borrowing freely from the studies of Conrad Bornhak, John A. Hawgood and Karl Loewenstein, I would suggest the following classification:

- (1) Revolutionary Constitutions
- (2) Bonapartist Constitutions
- (3) Legitimist Charters
- (4) Bourgeois Constitutions
- (5) Bourgeois-democratic Constitutions
- (6) Democratic Constitutions
- (7) Soviet Constitutions

Practically every category can be explained by outlining the characteristic features of its model or its most representative samples. The characteristic features can be clearly exposed by analyzing their attitude toward the principle of separation of powers and the concept of fundamental rights.

The first three just enumerated types follow French models either directly or indirectly but they differ greatly in their characteristic features.

(1) Revolutionary Constitutions:

We call them Revolutionary Constitutions because they were either promulgated during the revolutionary period or carried over into a subsequent period some of the revolutionary ideas or ideals. Into this category belong the already mentioned Polish Constitution of 1791, the French Constitutions of 1791, 1793, and 1795, the Spanish Constitution of 1812 and the Norwegian Constitution of 1814. They were revolutionary in different degrees depending on how sharply they broke with the traditional institutions and principles. The French Constitutions went further in their bold assertions of popular sovereignty and fundamental rights. They

also tended to carry Montesquieu's so-called doctrine of the separation of powers to extreme and unworkable conclusions. In order to satisfy the ardent demands of the followers of Rousseau's doctrine of the general will, they placed the legislative in the dominant position. This combination proved largely unworkable. As the historical record shows, they could not cope in an effective manner with the prevailing conditions. With the exception of the Norwegian Constitution, these revolutionary documents tended toward anarchy.

(2) Bonapartist Constitutions

With the emergence of Napoleon the tendency toward anarchy was stopped. The Bonapartist Constitutions, based on Napoleon's French Constitution of 1799, were those imposed upon the territories conquered by Napoleon's armies. These constitutions failed to confirm popular sovereignty and placed the executive in the dominant position. Furthermore civil and military powers were concentrated in the hands of Napoleon and his commanders. Considerable attention was given to civil and personal rights but this was no clear guarantee of political rights.

(3) Legitimist Charters

Based on the French Charter of 1814, these documents were enacted during the period following the Congress of Vienna in a number of countries including Switzerland (1815), Holland(1815), Poland(1815), Bavaria(1818), Portugal(1826) and Spain(1834). They were called Charters because they were granted by the Sovereign rather than ordained by the people. In all of them provisions were inserted that enabled the kings to control legislative as well as executive powers. The royal power was further strengthened by attributing to him the so-called "moderating" or "neutral" power, which enabled him to control the entire governmental machinery. The privileges of the nobility were confirmed and the concept of fundamental rights was repudiated along with the doctrine of popular sovereignty. These documents reflected an attempt at partial reconstruction of the pre-revolutionary regimes. They were doomed to failure wherever the forces of liberalism were strong enough to repudiate antiquated institutions.

(4) Bourgeois Constitutions

The model for these was the Belgian Constitution of 1831, which in turn owed many of its principles to the Constitution of the July Monarchy in France(1830). Actually, both Constitutions were derived largely from the then prevailing practices of the British parliamentary system. The Belgian Constitution also has historical and theological connections with the previously described revolutionary Constitutions. This can easily be seen in the fact that it proclaimed that all power emanates from the people and contained a long catalogue of funda-

mental rights.

These constitutions were useful instruments for constitutional monarchies in the process of liberalization. They worked well in the advanced countries (Luxembourg 1848—, Netherland 1848, Denmark 1849—) but they were not successful in Southeastern Europe and in the Near East, where popular control was often rendered ineffectual by sweeping emergency powers rested in the executive.

(5) Bourgeois-democratic Constitutions

During the Inter War period(1918~1939) a considerable number of constitutions were enacted in Central and Eastern Europe and the ones that were enacted during the first decade usually embodied the bourgeois-democratic pattern. Into this category one can place the German (Weimar) Constitution of 1919, the Czechoslovak Constitution of 1920, the Austrian Constitution of 1920 and many others.

Essentially, they represented democratized versions of the Belgian Constitution and the French Constitution of the Third Republic. The powers of the legislative bodies were further extended at the expense of the executive. In several instances, fundamental rights were extended to include economic and social rights, thus breaking away from the bourgeois pattern. In many instances too much power vested in the legislative bodies and the multitude of political parties. Considerable political instability resulted from irresponsible challenges of governments in power. Several constitutions, especially the Weimar Constitution, included sweeping emergency provisions. The only reasonably successful records were provided by Czechoslovakia and Finland.

(6) The Democratic Constitutions

This category is made up of certain constitutions enacted after World War II. The French Constitution of the Fourth Republic(1946), the Italian Republican Constitution (1948), the Constitution of the Federal Republic of Germany(1949) may be listed here as embodying still more democratized versions of the bourgeois-democratic pattern. An interesting recent example of constitutional reform along more democratic lines was provided by Turkey in 1961.

Most of the democratic constitutions extend their guarantees of fundamental rights to include economic and social rights. On the other hand some of the Constitutions in this category, contain definite elements designed to strengthen the stability of the government. The Constitution of the Federal Republic of Germany went furthest in this direction until the French Constitution of the Fifth Republic was enacted in 1958. While this constitution has been criticized as too authoritarian by some western scholars. Some of the newly emerging states have found it a useful pattern during the initial period.

(7) The Soviet Constitutions

Until recently almost all the Communist Constitutions were based on what was formerly known as the "Stalin Constitution" of 1936. Now Communist China has also emerged as a model for certain communist regimes of the Far East.

Yugoslavia presents another variation on the Communist theme. All these Constitutions have this in common that they do not provide for any effective limitation of governmental power, which is concentrated in the Central Committee of the Communist Party. While there are strong claims for economic and social rights, there are no effective guarantees of civil and political rights. Therefore these documents are often referred to as "paper Constitutions" or products of "pseudo-Constitutionalism."

Constitutions in the Newer States

A note should be added here on the constitutions of the newly emerging states and their relationship to the previously discussed constitutional patterns.

In the States that once were British colonies, the influence of British institutions is naturally quite apparent, but this influence could easily be exaggerated. Such countries as Pakistan have embarked a new approach toward the building of democratic institutions. Ghana, on the other hand, has departed from its earlier course to develop its own form of authoritarian rule.

As already suggested, the Constitution of the French Fifth Republic has exerted a definite influence, especially in the French speaking countries of Africa and Asia. Where Western models were used as starting points, subsequent modifications have often drastically changed the original patterns.

New states with Marxist or Communist governments, such as the Mongolian Republic, often tend to waver between the Chinese and Soviet models. In the Constitution of North Vietnam, the Chinese pattern dominates over the Soviet, but these are also elements that were borrowed from the present French Constitution.

In fact, it is doubtful whether any particular constitutional model, British, French, or Soviet, indirectly applicable in any of the newly independent states. The new leaders may find it expedient to borrow freely certain features, but they want to be their own constitutional architects.