

THE CONSTITUTIONAL DOCUMENT AND  
CONSTITUTIONALISM

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A DISSERTATION SUBMITTED IN PARTIAL  
FULFILMENT OF THE REQUIREMENTS  
FOR THE LL.B. DEGREE UNIVERSITY  
OF NAIROBI.

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-BY-

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MARCH 1984.

DEDICATION

Dedicated to my dear mother MRS. MARGERY GICHANGI,  
and my beloved sister FLORAH GICHANGI with great  
love and appreciation for all they have done  
for me.

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## ACKNOWLEDGEMENTS

The production of this dissertation was a joint effort, and although I cannot name all the people to whom my gratitude is due, I must mention my supervisor Dr. J.B. Ojwang who was willing to sacrifice alot of his time to help me write this dissertation. His suggestions and criticisms were not only very helpful, but were also a source of encouragement.

My thanks are also due to my mother and my sister Flora, whose faith in me as well as moral and financial support have seen me through many things. They were a constant source of inspiration and encouragement while I was writing this dissertation.

I also express profound gratitude to Mrs. Joyce Nyaggah, who typed this dissertation, thus putting it in its present form.

I am ~~solely~~ responsible for any errors as well as imperfections in this work.

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## INTRODUCTION

Almost all independent countries in the world have adopted documentary constitutions. In each of these countries, the constitutional document has been adopted for various reasons, such as: (i) to establish the foundation of the machinery of government in a newly independent or reconstituted state; (ii) to rebuild the government machinery due to wreckage caused by defeat in war; (iii) to signify a change of ideological attitude; or just to make a fresh start.

In adopting the constitutional documents, most of these countries hoped that the document would help in the limitation of governmental powers, and thus serve in the advancement of constitutionalism.

The aim of this paper is to consider to what extent, if any, the constitutional document facilitates the course of constitutionalism. In my first chapter, I shall discuss the concept of constitutionalism. In the second chapter, I shall discuss the role of the constitution. Here, I shall be dealing with the documentary constitutions, as well as the constitutions that are not in a written form.

The third chapter deals with the concept of a constitutional document, with the principal object of showing the rationale for documentary constitutions. Here, attention shall be focussed on the U.S. experience with their documentary constitution, as



well as the experience of the African states. The fourth chapter will look at the effectiveness of a constitutional document. It will consider the extent to which documentary constitutions facilitate the course of constitutionalism. ] A limited comparative analysis of the U.K. versus the U.S. and the African countries will also be given. The dissertation will then be concluded with reflections on some of the main themes emerging from the study. Certain ideas will be put forward on prospects for constitutionalism.



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## CHAPTER ONE

### THE CONCEPT OF CONSTITUTIONALISM

#### (a) Definition of Constitutionalism

Constitutionalism today has been given divergent interpretations. According to De Smith, Constitutionalism

"means the principle that the exercise of political power shall be bounded by rules which determine the rules of legislature and executive action by prescribing the procedure according to which it must be performed, or by delimiting its permissible content."<sup>1</sup>

According to him, the rules may be mere conventional norms or prohibitions, set down in a basic constitutional instrument, the disregard of which may be pronounced ineffective by a court of law.

Constitutionalism therefore, is the conduct of government and the exercise of state power, limited according to certain established and enforceable rules. It deals therefore with the degree to which the constitution functions as a real limitation on the way governmental powers are exercised.

Under constitutionalism, two types of limitations impinge on the government. Power is prescribed and procedure is prescribed. In other words, these are libertarian and procedural aspects of constitutionalism. In the first instance, the state is forbidden to trespass in areas reserved for private activity. In the second instance, government institutions are established, and their functions, powers and interrelationships are defined.<sup>2</sup>

Constitutionalism then governs separate but related types of relationships, namely the relationship of government to citizen, and the relationship of one governmental authority to another.



Since a constitutional government is a government limited by the terms of a constitution as opposed to an arbitrary government, it may happen then that although it may be conducted according to the terms of a constitution, that the constitution only establishes the government institutions, leaving them free to act as they please. In such a case, the government is not constitutionalist. It cannot however be concluded that a country is <sup>not</sup> constitutionalist simply because the constitution does not seem to impose any limitations on the government, because it may be revealed that the ordinary law of the land combined with usage and conventions supply these checks that the constitution does not.

An enemy of the constitutional government is absolutism of any kind, whether totalitarianism or dictatorship. It is incompatible with constitutionalism since it claims to be unlimited and supreme.

(b) Constitutionalism and democracy

There has been a blurring of the boundaries between democracy and constitutionalism. Distinctions between the two however remains intellectually distinct, and the two remain virtually independent.

Democracy stresses equality and popular rule; to what extent the government is regularly, if indirectly accountable to the public at contested elections. The underlying idea is the popular basis of government. Government rests upon the consent of the governed. Constitutionalism on the other hand emphasises that certain rights of the individual citizen are protected against the government, even against popular government and majority rule<sup>3</sup>. There is a tension between the values of democracy and those of constitutionalism.

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Democracy pushes towards political communication that is completely unfettered, while constitutionalism urges the supremacy of other rights. The right to liberty forms the fusion between the democratic and constitutionalist models. Both theories are based on the notion that the political system should allow citizens to exercise free choices.

It is therefore important to note that while a democratic government may be constitutionalist, it is possible to find constitutionalist governments which are not democratic. A constitutionalist government is not synonymous with a democratic government. The crucial test for constitutionalism then is if the government is limited by pre-determined rules.

(c) Historical development of constitutionalism

The modern constitutional state at the time of its origin was justified, and to a large extent legitimised in terms of the natural law theory. Like natural law, constitutionalism claims for itself a sanctity of a higher law.

The ancient Greeks contributed much to the emergence and development of the doctrine of natural law. For Plato and the Greeks in general, the law of nature was "no more than a basis of comparison. . . an intellectual standard"<sup>4</sup>.

It remained for the Stoics in Greece after 300 B.C. and later in Rome to erect on this philosophical base an authentic natural law theory. The Stoics gave natural law persuasive authority, as well as sanctions. The Catholic schoolmen in the following years supplied



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it with a purpose and drew tighter its bond with God. For them, natural law was originally divine, yet rationally determined. Through this device of eternal reason, the schoolmen fused the element of God and reason. They argued that the purpose of all kinds of law is to provide God with a means to restrict us into being good people<sup>5</sup>. The schoolmen joined natural law to christian theology by giving it a basis in a divine will, and so implanted it firmly in medieval political thought.

The task accomplished by the early modernizers of natural law theory in the 16th Century and the 17th Century and especially Hugo Grotius and Samuel Pufendorf was almost the reverse. By extracting God from natural law, they made it the foundation of the modern, secular constitutional state. As the divine law element waned, the place of the individual human being waxed. Natural law became just a platform on which natural rights and ultimately the libertarian aspects of modern constitutionalism were rested.

Through the moulding of John Locke in the 17th Century, the natural law concept underwent almost complete dissolution, being replaced with the natural rights of the individual. In effecting this transformation, Locke defined in great detail the origin, nature and extent of the natural law limits on government in its relations with individuals. He also attached great importance to the observance of procedural regularity, which is the institutional side of constitutionalism. It is on these pillars of proscribed power and proscribed procedure, that the modern constitutional government has been built.



Constitutionalism was used as a weapon to fight absolutism. To place it on the modern footing, it took revolutions in Britain and France.

Constitutionalism had been established in the United States of America by the late 18th Century due to the revolutionary activities, spearheaded by the theory of natural rights. This was a result of the pervasive influence of John Locke, who argued that there were certain rights arising from the very nature of man which were beyond the assaults of positive law. He assented that the individual's paramount rights were those of life and liberty, and that the government was under an obligation to assure those rights. He thus advocated the limitation of governmental power through the creation of legislative, executive and federal powers. After the American war of Independence which ended with the Bill of Rights of the U.S. constitution which was promulgated in 1787 and came into operation in 1789, Locke's theories were incorporated in the constitution. It is this constitution which is responsible for carrying the heritage of natural law into the modern world, since the embodiment of the principles enunciated in the 1776 declaration of Independence into the constitution are the true beginning of modern documentary constitutionalism.

In France, before making the constitution, the National Assembly of 1789 drew up the declaration of the rights of man and of the citizen, containing dogmas of the contractual origin of the state, of popular sovereignty and of individual rights.



This was the second great stage in the development of constitutionalism. Though in the early years of the French revolution constitutionalism first gave way to the anarchy of the reign of terror, and then during the Napoleonic regime, to anarchy, The French revolution had lighted a fire of political liberty which was never again to be permanently smothered.

Constitutionalism spread in the third world in the 20th Century in the form of constitutional documents on the attainment of Independence and the right of self-determination. *Columia*

(d) Social and political context of Constitutionalism

Some of the fundamental tenets of constitutionalism are: that the constitution is supreme; that the constitution imposes enforceable limits on the powers of the government; that there is some degree of entrenchment of the provisions of the constitution, and that there is separation of powers<sup>6</sup>.

The minimum restraints necessary for constitutionalism as seen by Professor De Smith are that<sup>7</sup>

- (a) The government must genuinely be accountable to an organ distinct from itself. ✓
- (b) Elections should be free and held on a wide franchise at frequent intervals.
- (c) Political groups should be free to organise in opposition to the government in office.
- (d) There should be effective legal guarantees of fundamental civil liberties enforced by an independent judiciary.



The limitation by government of a constitutional guarantee of civil liberties enforceable by an independent tribunal is therefore the core of constitutionalism. The efficacy of restraints upon government is increased by the democratic control mechanism of popular representation and governmental responsibility to the governed. Among the factors informing the actions of the government should be political responsibility.

Another element of political responsibility is the accountability of the rulers to the governed. The government here is required to give an account of its actions to the people. There is a presupposition of freedom on the part of the people, to question or criticise the government's action, and a duty on the part of the government to explain and try to justify its conduct and availability of sanctions for unsatisfactory conduct.

The separation of powers as has already been seen, is a fundamental tenet of constitutionalism. The governmental functions are distinguished according to their distinctive features. Three categories are recognisable. These are the legislature, judiciary and the executive. The executive brings the government in closest contact with the individual, since it deals with the implementation of the law, and this relates directly to the ruled. It therefore creates room for arbitrariness, and so is an aspect of the government which stands in most need of restraint. The only way this restraint can be effected is by insulating the judiciary from the executive, by seeing that every executive action has legal authority, and also by there being a different procedure for law making.



Where there is an isolation of the judiciary from the executive, and where some prescribed procedure must be complied with for the government to secure the necessary authority for any measures it needs to take, regularity in the conduct of affairs is ensured.

Separation of powers limits and checks arbitrariness inherent in government. "It is this limiting of arbitrariness of political power that is expressed in the idea of constitutionalism"<sup>8</sup>.

The best guarantee of regularity, therefore, is the conduct of affairs according to pre-determined rules, and restraints only have value in constitutionalism when they are regularised. This regularisation enables one to be sure of one's standing with the government, and how the government can interfere with the course of one's life. Therefore, if constitutionalism is to be maintained, the separation of these agencies is essential. It may then be said that

"Constitutionalism requires for its efficacy a differentiation of governmental functions, and a separation of the agencies which exercise them"<sup>9</sup>

It should however be understood that a measure of overlapping in the functions of certain agencies is inevitable. This is however not a contradiction since, for instance, in the case of the executive making rules, this role in its ordinary application is subordinate to that of the legislature.

In view of some of the things<sup>s</sup> already discussed, it is evident that there is a necessity of the doctrine of separation of powers in relation to the judicial function.



For the limitations imposed by law upon the legislature and the executive to have meaning, there has to be a separate procedure comprising a separate agency and personnel for an authoritative interpretation and enforcement of them. This way (that is by having an independent judiciary) the courts will be able to apply the law with no interference from the other arms of government. The strength of an independent procedure of courts is that, being unaffected by the self-interest or bias of both the legislature and the executive with regard to their action, they (the courts), can be relied upon to interpret the constitution or statute impartially. This impartiality is a safeguard against arbitrariness on the part of the judge in interpretation.

Another way in which the evolution of judicial powers as a restraint upon the executive power has constituted to the development of constitutional government is through judicial review of administrative action.

Through court procedure, the rule of precedent ensures the stability and predictability of the rules because, by the courts applying these decisions which they (the courts) have handed down in earlier cases, the people are sure what laws are to be applied, and from this predictability comes stability of the rules. It is this stability and predictability of rules which is the core of constitutionalism. Therefore, the establishment of judicial restraint to check arbitrariness on the part of the executive, is the high-water mark of constitutionalism.

Relevant in this respect is the idea of check and balances, which, according to Nwabueze,



"Makes separation of powers more effective by balancing the powers of one agency against those of another, through a system of positive mutual checks, exercised by the governmental organs upon one another" 10.

There is, in this idea, a presupposition that a certain function is dealt with by a certain organ, subjected to a power of limited interference by another organ, so that each of the organs keeps within a certain sphere. There may also be a limitation of power through the division of that power.

(e) The value of constitutionalism

Constitutionalism is a concept which any government would be well advised to adopt, seeing that in it, there is a creation of a harmonious relationship between the government and the citizens.

→ The biggest attribute of constitutionalism is that it limits arbitrariness of political power. Arbitrariness should be seen as one of the worst enemies of the people in any nation. The checking of arbitrariness is ensured by the fact that there is an insistence on a limitation being placed upon governmental powers. This limitation of arbitrariness is enhanced by the democratic control mechanism of popular representation as well as governmental responsibility. Through political responsibility, the people are informed of the actions of the government, and they can therefore criticise or question these actions of the government.

→ Constitutionalism also spells out the relationship between the government and the governed, so that the governed is secure in that he is aware of most governmental actions, especially those



concerning him.

Constitutionalism also means that people have a say in the way they are governed. This is especially so, since the elections are supposed to be freely held on a wide franchise.

The very fact that the people are governed by predetermined rules means that there is predictability in the rules, so that the people generally know what to expect. It also means that there is regularity in the rules. Each of the citizens is sure of his standing with the government, and he is aware, how far the government can interfere with the course of his life.

Constitutionalism sets up against governmental interference some rights which some writers have defended as being essential to ordered liberty, to a fully human life, or to other values proceeding from moral judgements and beliefs.

The concept of constitutionalism ensures stability of the rules to be applied to the citizens. There is also an assurance of impartiality in the interpretation of the statutes and the constitution. This is as a result of the judiciary being independent of the other branches of the government. This assurance of impartiality is also a safeguard against arbitrariness.

By thus balancing the exercise of power, constitutionalism provides a system of effective restraints upon governmental action, so that there is an assurance of fair play<sup>11</sup>.

Constitutionalism also ensures that every citizen is protected under the constitution. Most constitutions include guarantees of the rights and freedom of the individuals, and since one



of the fundamental tenets of constitutionalism<sup>12</sup> is that there is some degree of entrenchment in the provisions of the constitution, it means then that the individual is assured of the protection of his rights.

Constitutionalism therefore is not only a concept which is ~~in~~valuable, but it is also one which can be seen as an assurance of stability, as well as a concept which brings out the best in any government.



CHAPTER TWO

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History  
Law

THE CONSTITUTION AND ITS ROLE

(a) The Definition of a constitution

The term "constitution" brings to mind for most people a document which has a special legal sanctity, which sets out the framework and the principle functions of the organs and government of a state, and declares the principles governing the operation of these organs. Nwabueze defines it as

"A formal document having the force of law, by which the society organises a government for itself, defines and limits its powers and prescribes the relations of its various organs inter-se and with the citizen."<sup>1</sup>

There is a supposition then, that a constitution is an identifiable document, or group of documents, embodying a selection of the most important rules about the government of a country. *D. S. M.*

A constitution, however is the principles and rules, whether written or unwritten, legal or non-legal, of any country. A constitution of any state consists of the basic and fundamental laws which the inhabitants of the state consider essential for their governance and well being.<sup>2</sup> The word "constitution" therefore, is a legal expression, identifying all the elements of how a country is organised and governed.

Today, the term "constitution" is used in two senses - the broad and the narrow sense. In the broad sense, it is used to describe the system of government in a country, that is, the rules establishing and regulating, or governing the government. These rules may be legal in that the courts will recognise and apply



them, and partly non-legal or extra-legal, taking the form of usages, understandings and customs or conventions which are not recognised by a court of law, but which are just as effective as the rules of law in regulating the government. The narrow sense is used to describe a selection of rules, embodied in one document or in a few closely related documents. This selection is almost only a selection of legal rules. The narrow sense of the constitution is the most common, whereas the wider meaning is the older meaning.

Among the various sources of municipal law, the constitution is the most important. In the words of Friedrich<sup>3</sup>, it is an experimental attempt of arriving at a viable legitimate government.

A constitution as a system of restraints upon a government, may originate as a matter of organic growth from immemorial customs, or as an act of conscious creation in a written form. The former does not impose any limitations upon the government, and even if the legislature acts contrary to it, its act is not necessarily illegal.

In Liyanage v R<sup>4</sup>, the judicial committee of the privy council rejected emphatically the argument that a legislature is limited by the law of nature.

"Their Lordships cannot accept the view that the legislature, while removing a fetter of repugnancy to English law, left in existence a fetter of repugnancy to some vague unspecified law of natural justice<sup>5</sup>. . . It is clear that the joint<sup>effect</sup> of the Order in Council 1946 and the Act of 1947 was intended to and did have the result of giving to the Ceylon Parliament the full Legislative powers of a sovereign independent state" 6. /effect



The constitution is the instrument by which political action is limited, and at the same time, given form. The guarantee of basic rights and the separation of powers have served as such limits. The constitution is thus based on the self-limiting decision of the people when they adopt it.

The objects of a constitution therefore are to limit the arbitrary action of the government, to guarantee the rights of the governed, and to define the operation of the sovereign power.

X (b) The functions of a Constitution

Constitutions are used by numerous political systems to cater for a multitude of political needs. There are four general functions common to most, if not all constitutions.

(i) Transformation

Constitutions contain legal pronouncements or statements, intended to have binding effect on the persons to whom they are addressed. It is not easy to make out to whom constitutional provisions are directed. This is often compounded by the fact that the provisions are highly abstract and cannot be said to be directed to any particular persons or groups. People who frame, amend or uphold Constitutions are either politicians who have power to do so at a certain moment, or persons acting on their orders.

Constitutions can be said to effect a transformation in that they convert power into law. Pure power is checked and regularised with legal formality. It is transformed into legal power and called



competence. A particular power is given a legal shell, thus giving rise to other consequences of formalisation. By political power being transformed into legal power through incorporation in a constitution, it acquires a more secure foundation and becomes more stable. There is also a transformation of political convictions and wishes into norms and values having the force of law<sup>7</sup>.

The transformation aspect can also be seen to operate in the setting up and installation of state institutions or the reform of state institutions in accordance with the political views of the moment.

When politics are transformed into law in this way, it loses a part of its grip on the further development of the competences, legal rules and legal institutions. The constitutional transformation means that politics surrenders itself to law, and in doing so it loses some of its vagueness and reduces some degree of abstraction.<sup>8</sup>

(ii) Information

The constitution contains information, the content of which is determined by the transformation effected with the help of the constitution. The most important channel of information is that which runs from the political sub-system to society. Another channel of information connects the political sub-system, and the legal sub-system. Decisions taken in the political system are given legal effect and others taken autonomously in the legal sub-system. A third channel of information runs from the state



to the outside world, the international environment. The constitution here has a regulatory effect with regard to presentation<sup>9</sup>.

(iii) Regulation

Information has a regulation effect. It affects people's attitudes, conduct and expectations. The constitution regulates behaviour and decision making processes, and define legal powers. This could be called the normative effect of a constitution.

(iv) Canalisation<sup>11</sup>

Constitutions provide indications of how legal and political problems should be solved. e.g. they may indicate the procedures which can be followed if it is wished to bring problems and conflicts to an end. For instance, the constitution may indicate that problems should be solved by reference to certain aims, such as principles of equality, rule of law, or socialism. Channels are opened therefore by the constitution in a particular direction, problems are canalised, and an outlet provided from them. Canalisation means that the constitution creates or provides a certain structure within which political and legal developments can take place. Part of the structure consists of procedures which if followed, offer the advantage that the developments will be presumed legal and legitimate.<sup>12</sup>

Other than these four major functions, there are also other functions such as that of entailing a commitment to an ideology, servicing state nationalism, or the nationalism of particular groups.



within the state, structuring political expectation, expressing political wishes, aims and convictions, and also serving as a birth certificate. These are just some of the many other functions of the constitution<sup>13</sup>.

(c) The Nature of Constitutions

Historically, constitutions are closely connected with revolutions. The U.S.A. constitution of 1787, the first French constitution of 1791, the Mexican constitution of 1917, and the Russian constitution of 1918 were all products of revolutions. Upto today, revolutions result in constitutions.

The phenomenon of constitutions has become detached from its historical origin, and has taken on a different and topical meaning. Constitutions appear to have become a vital part of the politico-legal order of most states, and their importance has <sup>increased</sup> ~~grown~~ with time. Constitutions are being <sup>used</sup> more and more to introduce political change, sometimes of a revolutionary nature. This shows that they have become instruments of development, and have acquired a political function, different from what might have been expected in view of their historical origin.

As already seen, the text of a constitution sets out the framework of government, postulates how it ought to operate and makes declarations about the purposes of the state and society, and the rights and duties of citizens. Usually, no real sanctions are given against violation of particular provisions of the constitution.



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Constitutional documents usually have two characteristics in common. They are seen as the fundamental law of the land in that they designate the principle organs of government, and invest them with authority, and they are a kind of higher law in that they set out that the constitution is hierarchically superior to other law, and can only be altered (in most countries) by specially prescribed procedure for amendment<sup>14</sup>.

Constitutions are therefore concerned with the procedural as well as substantial matters. The form and content of a constitution will depend on the forces at work when it is established and amended, as well as the common sense considerations of practical convenience and precedents which are available to those who draw up the constitution. e.g. Ghana's independence constitution of 1957 was fundamentally different from its Republican constitution of 1960, the 1957 one being a Westminster model type of constitution which has been described as

"An agreed compromise package-deal embodying a parliamentary executive and various safeguards for individual and minority group interests."<sup>15</sup>

The 1960 one on the other hand was drafted in Ghana to suit Dr. Nkrumah's requirements, providing for a Presidential form of government and including no significant safeguards for individual and group interests which may have resisted the pretensions of the convention people's party.



(i) Classifications

Constitutions may be classified into various categories. They may be classified as flexible and rigid. A flexible constitution is one under which every law of every type can be legally changed with the same ease and in the same manner by one and the same body. In such a situation therefore, the legislature may amend the constitution just as it does any other law. An example of such constitutions is that of New Zealand <sup>and</sup> the United Kingdom.

A rigid constitution is one under which constitutional or fundamental law cannot be changed in the same manner as ordinary law. In the United States of America, Switzerland or Australia, parliament alone cannot amend the constitution, but requires the co-operation and consent of other bodies or of the people. Any bill for the alteration of the Kenyan constitution cannot be *passed by the National Assembly*

"Unless it has been supported on the second and third readings by the votes of not less than sixty-five per cent of all the members of the Assembly, (excluding the ex-officio members)"<sup>16</sup>

Just because a constitution is rigid however, it does not mean that it is hard to alter and is seldom altered or just because it is flexible, that no special process is required for its amendment and is easy to alter, and is often altered<sup>17</sup>.

Constitutions may also be classified as, those supreme over the legislature, and so not amendable by the legislature, and those which are not. Constitutions are supreme over the legislature when their process is not within the sole competence of the legis-



lature e.g. U.S., Australia, Switzerland, Eire and Denmark.

They may also be classified as federal and unitary<sup>18</sup>.

In a federal constitution the government powers are divided between a government for the whole country, and government for parts of the country, such that each government is legally independent within its own sphere. Both governments exercise their powers without controlling each other, and both legislatures have limited powers. In a unitary constitution, the legislature of the whole country is the supreme law making body in the country. All other legislatures are subordinate to it e.g. Kenya, France, Sweden etc. Examples of federal are U.S., Australia and Switzerland.

In the same classification is a confederate constitution. This is where the government of the whole country is subordinate to the government of the parts e.g. United Netherlands from 1799, North German Confederate 1867-71.

Constitutions may also be classified in the terms of method by which powers are distributed inside a government between the various organs making up that government, whether it is a government for the whole of the country or the government of a part only<sup>19</sup>. The classification here is those constitutions which embody the doctrine of the separation of powers and those which do not. The U.S. constitution is the leading example of a constitution embodying the doctrine of the separation of powers.

Constitutions have been classified into those that are written, and those that are not written. I shall deal with this classification in the next section.



(d) Constitutions that are not written

Taking into account the fact that most of what has been discussed in this chapter concerns written constitutions, there is need to discuss separately constitutions that are not written. Such a discussion will also help throw light on some of the things which will be discussed in the next chapters.

As already seen, a constitution is written when the basic and most important constitutional laws are enacted in one document or a series of documents referred to as the constitution.

Constitutions that are not written, on the other hand, are made up of both legal and non-legal rules. The legal rules are embodied in statutes, court decisions, orders and regulations, whereas the non-legal rules are found in customs and conventions.

The British constitution affords the best example of such a constitution. The truth about Britain can be stated, not by saying that she has an unwritten constitution, but by saying that she has no written constitution<sup>20</sup>. This is so because every aspect of the British Constitution has been written down somewhere, although no document can be pointed out as the British Constitution.

The classification of constitutions into written and unwritten should thus be discarded. The better distinction is that between countries that have a written constitution, and those that have no written constitution.

The British Constitution developed with the formulation of The Great Charter of 1215 A.D. It was a statement of the grievances



which the people had against the King and his government, and the remedies they sought from him. Among many of its contents, it included the liberty of the individual. The intention of those who formulated the Charter was to seek protection against the arbitrary actions of the King and his government. Having been established, the charter came to be recognised as part of the British constitution. ~~In~~

In 1688, came the Bill of Rights, following the revolution to curb the claims by the English King to rule by prerogative right. The Bill prohibited the King from making laws without parliamentary sanction. The intention here was to establish the sovereignty of Parliament as the representative body of the people. The contents of the Bill came to be regarded as part of the British constitution. The British constitution is therefore to be gathered from unrelated modern and ancient statutes, petitions, cases, customs and conventions.

A question which arises is why Britain has no written constitution.

In most countries, written constitutions have been adopted for a number of reasons, such as to mark stages in progression towards or regression from self-government, to establish the foundation of the machinery of government in a newly independent state [e.g. Kenya, U.S.A.] or a reconstituted state [e.g. Tanzania], to rebuild the government machinery due to wreckage caused by defeat in war, to start anew, due to revolution or disillusionment with the existing regime, or to signify a change with the ideological



attitudes [e.g. Uganda and Tanzania].

In Britain, none of the above forces were ever effectively at work. There however was a break in British history, and when it came, there was an attempt to make a fresh start. It came with the civil war in 1642, and the execution of Charles in 1649. Attempts were made to establish a constitution for the British Isles. Englishmen of that time were ready for a fresh start. They wanted to limit the government, and they had certain views on the proper relation of executive and legislature, and on the rights of the subject. These were inscribed in the various attempts at a constitution. They ended up not agreeing, and they failed to get enough support for their constitution. Charles II returned on the throne, and there was a restoration.

Countries may also need a constitution when they unite with others since they may wish to preserve certain powers to themselves, or safeguard certain terms.

Although England united with Scotland in 1707 and with Ireland in 1801, no constitution came of it because the unions were not federal unions. No legislative powers were to be reserved for Scottish or Irish parliaments which would need protection in a constitution. Also, certain guarantees were given at the time of the union, and were regarded as part of the bargain.

Therefore the sort of influences which led other countries to adopt written constitutions either did not apply to England, or operated too late, or were overborne by stronger contrary influences. After 1688, the development of the doctrine of the sovereign



parliament ruled out any possibility of a constitution which could control the legislature.

Among the statutes considered as forming the British constitution are:-

The Magna Carta of 1215. It sets out the rights of the various classes of the mediaeval community, according to their different needs. The observance of the charter/<sup>came</sup>to be regarded both by lawyers and politicians, as a synonym for constitutional government. The other statute, Petition of Right 1628, contained protests against taxation without consent of parliament, arbitrary imprisonment, the use of commission of martial law in time of peace, and the billeting of soldiers upon private persons.

The Bill of Rights and act of settlement<sup>21</sup> which are enactments arising from the 1688 revolution embodied the terms of the settlement which the Lords and remurants of Charles II's last parliament arranged with William III and Mary.

Other statutes are the act of Union with Scotland 1706, the Parliament Act 1911, the supreme court of judicature Act 1925, and the statute of Westminster 1931.

The constitution is also based on the decisions of courts of authority. This judiciary or judge made law is derived from the common law proper, or from the interpretation of statute law.

The common law consists of laws and customs of the realm which have received judicial recognition in the reasons given from the early times by the judges for their decisions in particular cases coming before them. The case of De Keyzers Royal Hotel Ltd.<sup>22</sup>



for instance decided how the royal prerogatives are limited by a statute conferring similar powers<sup>23</sup>.

In the interpretation of statute law, the task of the judge is in theory confined to an exposition of the meaning of enacted law, and in the case of subordinate legislation, also to an enquiry into the validity of the enactment. In practice however, judges make law by interpretation. In Cooper -vs- Wandsworth Board of Works<sup>24</sup>, a statutory power of demolition was qualified by the court asserting the right of the owner first to be heard in objection to the exercise of the statutory power.



## CHAPTER THREE

### THE CONCEPT OF A CONSTITUTIONAL DOCUMENT

#### (a) The History of Documentary Constitutions

From the earliest times, it has been thought necessary in some countries to write down in a document the fundamental principles upon which government should be established and conducted. Such a selection was not usually called "the constitution" until the time of the American and French revolutions. It is as a result of these two revolutions which occurred at the end of the eighteenth century, that documentary constitutions gained general acceptance.

The immediate cause of the American revolution was the attempted British reform programme, inaugurated at the close of the Seven Years' War, by which Britain sought to bring the colonies under more direct control. The British officials wanted to introduce a new conception of imperialism. This new policy as opposed to the older one of mercantilism, sought colonies primarily as a means to greater political, financial and military power, an end to be achieved through firmer and more efficient political and military control of the colonies, and through a programme of direct taxation. This British reform programme affected adversely the interests of nearly all classes of colonists. The colonists couched their objection very largely in constitutional and legal terms.

Colonial resistance to Britain was intensified by a growing American sense of independence, as well as an awareness of cultural



and economic divergence between America and England. Thus, one underlying cause of the revolution was the growth of a distinct and independent American culture, and a growing American awareness of that cultural difference. The quarrel with Britain brought to a climax longstanding social and class conflicts within the colonies. Eventually, the middle and lower classes came to identify their animosities towards the ruling groups with hatred for Britain, and after 1774, they formed the core of the revolutionary Partist Party. Though the great merchants and landed<sup>gentry</sup> had led the attack on British tax and commercial measures, they eventually drew back from the abyss of social revolution, and with some exceptions e.g. in Virginia, the colonial elite became supporters of Britain in the revolutionary war.

While the revolution was a conflict based on economic and social as well as political grounds, however, the constitutional crisis was of great significance in the American history. It brought colonial political ideas on natural rights, compact theory, legislative limitation and federalism to maturity and firmly fixed them in the American mind.

In 1776 therefore, the thirteen British colonies on the Atlantic coast of North America formally renounced their allegiance to Britain in the declaration of independence. During the war in which they established their claim and, for some years thereafter, they were linked in a loose confederacy in which their powers of central government were so inadequate as to threaten the survival of the new nation. Conscious of this danger, they began framing



in 1787, and in 1789 adopted the first seven articles of the U.S.A. constitution. This constitution established a government, providing for its main outlines, and stipulating certain rights reserved to the people. The revolutionists were much concerned with natural rights. They were familiar with English charters, notably Magna Carta, and the Bill of Rights Charter, granting certain rights to the people, and on breaking with Britain, they hastened to reaffirm in writing both traditionally recognised rights, as well as certain new ones<sup>1</sup>.

Having sought independence in protest against arbitrary government,

"The result is a constitution in which the idea of a nice balance between central government states and individuals is all pervasive, but in which, in so far as the balance may diverge from the true, it will incline in favour of the individual."<sup>2</sup>

The original seven articles are concerned with the machinery of government. In 1791, ten amendments known as the "Bill of Rights" were added.

The French revolution came about mainly as a result of the financial crisis facing the French government. The King who was the linchpin of the whole established social and political system in France was in desperate financial straits. For decades before, there had been an attempt to put royal finances on a sounder footing, but all had failed. There was an insistent demand for reform of certain abuses, a more efficient and equitable system of taxation and administration, a better system of government. People however did not want a violent and destructive



revolution. Louis XVI won fresh popularity when he made known his intention of summoning the Estates-General<sup>3</sup> yet this action of summoning the Estates General precipitated revolution. The ruling class composed of the clergy and nobility enjoyed many exemptions from taxation, so that the main burden of the expenses of state and church fell on the middle classes and the more prosperous peasants. The summoning of the Estates-General only gave them an opportunity to make their social and economic weight politically effective. The King and his ministers were in a dilemma, because they could not satisfy the demands of the middle class and peasants for a larger share of political power and a smaller share of taxation. They could not do this without challenging the whole social structure of France, in which their own authority was deeply embedded.

There was thus in 1789 an inherent constitutional crisis, if the term may be used, for a country which had no constitution in the American and British sense. The 1787 political crisis started the course of events that made the revolution.

The National Assembly by issuing a Declaration of the rights of man and of the citizen went on the opposite side from the King. The constitutional movement became more doctrinaire. The first consequence was the "Declaration of the Rights of man and of the citizen", which the assembly adopted on August 26. It echoed the American declaration of independence asserting that "men are born and remain free and equal in rights," that



"the aim of all political associations is to preserve the natural and imprescriptible rights of man" and that "these rights are liberty, prosperity and security and resistance to oppression"<sup>4</sup>.

In 1789, the assembly drew up a constitution. It set up a purely representative and parliamentary system of government. The constitutional document was saturated with dogmas of contractual origin of the state, of popular sovereignty and of individual rights.

The constitution which followed in 1791 did not last, because the legislative assembly to which it gave birth was unable to deal with the state of anarchy within France, and the state of war which prevailed abroad. However, this was the second great stage in the development of documentary constitutionalism the American revolution being the first<sup>5</sup>.

(b) Rationale for documentary Constitutions x cm

As we have already seen in earlier chapters, almost in every case in modern times, countries adopt a documentary constitution because for some reason, they want to start afresh, and so they put down in writing the main outlines of their proposed system of government<sup>6</sup>. This has been the practice ever since 1789 when the American constitution was drafted, and most countries have followed this trend.

The existence of a documentary constitution means that the constitutional law is more easily distinguished, since in the



document, all the constitutional laws of the country are emunciated, their limits fixed, and any peculiarity of its methods of development is recorded or otherwise accounted for.

*When one however is dealing with the U.K. constitution, there is a difficulty of commenting on it, since one is never completely sure of the extent of the constitutional law. There are therefore perplexities in the task of expounding the English constitutional law, since one is called upon to deal partly with <sup>(1)</sup> statute law and partly with <sup>(2)</sup> judge made law; to rely on parliamentary enactments, judicial decisions, as well as <sup>(3)</sup> authoratative data, and in <sup>(4)</sup> many instances, to rely on mere inferences drawn from judicial doctrines. There is also often a difficulty in discriminating between <sup>(5)</sup> prevalent custom and acknowledged right. The whole thing is ill-defined.*

On the other hand, documentary constitutions are a different thing altogether. Even a lecturer knows exactly what the subject of his teaching is; as well as the proper mode of dealing with it.

A written constitution is also advantageous in the sense that, being tangible, its provisions can be easily ascertained. Both the rulers and the ruled can know what is expected of them. The constitutions provide standards against which governors can measure their own performance, and also be measured by the governed. Where a country has a homogeneous population, and has almost a consensus of political opinion, a written will <sup>constitution</sup> guarantee against sudden changes.



A written constitution is also advantageous in that it provides within itself for a method for its own alteration. This encourages stability in the country since those wishing to change it will do so in the prescribed manner, and in a manner understood by the majority of the population. Also, this way, every part of the government machinery is protected against precipitate change, by the requirements on alteration of the constitution.

Most of the newly independent countries opt for documentary constitutions, and they rightly do, since to opt for a constitution that is not written would be the recipe for uncertainty in the matter of the character, and process of change in governmental institutions.

It should be understood that the British type of constitution is one evolving from custom, since, as we have already seen in the previous chapters, it has been there from the earliest times, and has therefore grown and developed within the framework <sup>of</sup> firmly-ingrained national ideas. Dicey<sup>7</sup> has described it as a sacred mystery of statesmanship, one that has not been made but has grown, and should therefore be seen as a fruit of instinct, and not one of abstract theory.

*I believe that any country that opts to adopt such a constitution is likely to experience difficulties of a kind they had not bargained for. This is so because, for any new nation, it is important that it has all its constitutional laws enunciated*



in a particular document, so that there can be clarity as to the extent of the Constitutional Law. This way, there will be no confusion as to what laws are being dealt with, and as a result there will be stability in the country, since the constitutional law of any country is of such great importance; on this law depends the whole prospect of effective government.

These perplexities associated with unwritten constitutions are particularly evident, as already remarked, in the case of the British constitution which does not take any definite documentary form. However, there's a difference in the British experience, because the constitution in that case has grown and developed with the people such that they have learnt, in the course of time, to deal with the problems arising from it. It has come to be accepted and understood by the people, and so the likelihood of instability arising from it is somewhat remote. Also, those who deal with it know how to go about it, and so misunderstandings rarely arise.

### (c) The U.S. experience

The U.S. constitution was the first documentary constitution deliberately designed for a large political system. According to Spiro<sup>8</sup>, it is the oldest written constitution in the world that still provides a framework for a political system in our own time.

The constitution was produced by the constitutional convention in 1787. The British constitution occupied a special



part in the reference material used in deliberations, so that, of all constitutional conventions borrowed from the past, more came from the British constitution than from any other single source, e.g. the separation of powers. Besides borrowed institutions and procedures, there was much in the constitution which was pure and original innovation, such as Article 5 which sets forth the procedure for amending the constitution<sup>9</sup>. This constitution is one of the most rigid in the world. This is mostly due to its federal character. Its history, since its inauguration illustrates the difficulty of amending it. It has survived for more than 170 years with only minor alterations. Only five of these changes affected procedures directly.

Having come into force in 1789, the first ten amendments to it were adopted in 1791, the eleventh and the twelfth in 1798, and 1804 respectively. After that 61 years elapsed before the adoption of the other three amendments in 1865, 1868, and 1870. Since then, only eight amendments have been made - the first two in 1913 and the last in 1961. Therefore, in 170 years, only twenty three constitutional amendments were carried out, and these repealed an earlier amendment.

In the U.S. the constitution alone is supreme. The constitution is designed to deal with the problem posed by James Madison<sup>10</sup> when he said:

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"In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself."

The constitution both grants and limits power. Article I lists the power of congress; article II vests executive power in the President; article III confers the judicial powers of the U.S. on one supreme court, and on such other courts as congress may establish. Article I section 9 sets limits on national power; Article I section 10 restricts the States. The constitution itself however, provides no definition of either powers or limitations.

In an obvious and subtle way, the constitution seems to be an instrument of rights of limitations, rather than of powers. The congress is expressly forbidden to do certain things, such as suspending the writ of habeas corpus, except in great emergencies, or taking exports from any state.

The Bill of Rights<sup>11</sup> contains a long list of things the national government is powerful to do. State governments are also forbidden to do certain things. They may not enact ex post facto laws, or enter into any treaty or alliance with a foreign state, to give but two examples.

Government is circumscribed in less specific ways. The principles of separation of powers and federalism, the "due process" clauses of the constitution, and the doctrine of judicial review, all manifest a determination to oblige government



to control itself. These limiting principles are not spelled out, but are either implicit in the organisation and structure of the constitution, or, as with judicial review, deducible from the accepted theory of government.

The fundamental law, even as it confers power, separates and limits it. Congress which is endowed with legislative power, may not (except as a result of a specific grant or by implication) exercise executive or judicial power. The same restrictions apply to other branches of the national government. In the exercise of their respective functions, neither congress, President, nor judiciary may encroach on fields allocated to other branches of the government.

Executive power is vested in the President. The so-called cabinet consists of the heads of the chief departments, each being personally responsible to the President alone, for his own department. Neither the President nor members of his cabinet can sit and vote in congress. In his message to the Congress, the President may recommend legislation, but he cannot compel congress to pay heed to his recommendations. Lawmaking is therefore shared by the President in his exercise of veto. The appointing authority is vested in the President but on certain appointments, the senate must give its advice and consent.

The authors of the American constitution have directed their attention to the invention of means by which the effect unconstitutional laws may be nullified. This has been achieved



by making it the duty of every judge in the U.S. to treat as void any enactment violating the constitution. This provides the only adequate safeguard which has been invented against unconstitutional legislation. The judiciary is therefore not only independent of the executive and the legislature, but it is also empowered to interpret the constitution and to declare invalid any executive or legislative acts which infringe on it.

In Marbury v. Madison<sup>12</sup> the supreme court ruled for the first time that a law of the congress was void. The facts of the case were that, towards the end of his term of office, President Adams nominated William Marbury to the office of justice of the peace in Columbia district. The senate signed the nomination, the President signed the commission, and the secretary of state affixed the U.S. seal. On the expiration of Adam's term of office, Marbury applied to James Madison, the state secretary under Jefferson, for delivery of his commission. Jefferson held that the appointment was not complete until the commission had been delivered, and directed Madison to withhold it. Marbury and others who found themselves in similar circumstances then moved the court for a rule to James Madison, to show cause why a writ of mandamus should not issue, ordering him to deliver the commission. No cause having been shown, there was a motion for a writ of mandamus.

In his decision, Chief Justice Marshall made two points:

(1) The President had no right to deny Marbury his commission.



(2) The judiciary act of 1789 which gave the supreme court the power to issue writs of mandamus was contrary to the constitution. The supreme court therefore declared the act of congress unconstitutional; thus void.

Chief Justice Marshall not only guaranteed the permanence of the constitution, but he also laid a foundation for the courts exclusive role as interpreter, adjuster, and expander of the constitution.

The other power-limiting principle, federalism, means a constitutional system in which two authorities, each having a complete governmental system, exist in the same territory, and act on the same people<sup>13</sup>. In its American manifestation, federalism is a complicated arrangement, whereby the National government exercises enumerated, implied and inherent powers, all others being reserved to the states respectively, or to the people. Each government is supreme within its own sphere. Federalism then, like separation of powers and checks and balances is a means of obliging government to control itself. The power surrendered by the people is first divided between two distinct governments - the national and states governments - and then the portion allotted to each sub divided among distinct and separate departments. A double safeguard therefore is given to rights of the people. The different governments control each other, and



at the same time, each is controlled by itself.

The fifth amendment limits the scope of the national government in depriving the individual of the rights to life, liberty or property, without due process of law. The fourth amendment controls the states.

The most distinct feature of the constitution is that it is law, paramount, supreme law, and subject to interpretation by the supreme court in cases properly before it. Judicial review is an implied, not a substantive power. It is implied from, and is incidental to the Court's judicial power - the power to interpret law and decide cases.

On examining the American constitutional document and its amendments as an integrated entity, according to Murphy<sup>14</sup>, one sees in it

"a statement of purposes, a web of overlapping grants of authority, assorted prohibitions against some sorts of governmental action, a catalogue of individual rights and descriptions of proper processes of policy making."

The purposes include providing for national integrity, obtaining domestic tranquility, securing the "blessing of liberty" and advancing justice.

(d) The African experience \*

On accepting the operating state machinery at independence, the Africans also accepted the basic institutions of public law on the basis of which their inheritance was organised and regulated. The former British colonies got their independence



within the framework of a westminster model constitution, while the francophone countries adopted the model of the Palais Bourbon. However, the problems of government and national development in the new states were destined to have many similarities.

In the ensuing discussion, attention will be focused on representative cases, rather than examine each and every country separately. I shall discuss both the English and French speaking sectors of the continent.

The French model remains dominated by the concept of "le parlementarisme rationalise", an innovation of the fifth republic designed to prevent the kind governmental instability which had characterised the third and fourth republics.

An executive structure is provided in which the President of the Republic appoints the Prime Minister, and upon the latter's advice, he elects the ministers.

Like other French colonies in Africa, the Ivory Coast underwent its phase of "le mimetisme juridique" within the framework of "Republique autonome", two years before full independence. The constitution of March 26 1959 provided for an executive authority consisting of a prime minister and a Council of ministers appointed by him. Government was responsible to the legislative assembly, and could be brought down by a vote of "no confidence". Although separation of powers was provided for and the executive sphere of decision making belonged



only to the government, some powers still vested in the French president. It is therefore arguable that a dual executive structure prevailed.

Unlike some countries like Kenya where the first year of independence was spent in imitation, the Ivory Coast entered upon independence with an advanced constitution, which incorporated the phase of experimentation and change.

Like in most of the other Francophone countries, the Ivory Coast constitution went further than the French one in its elevation of the President. The executive authority was made <sup>The</sup> single ~~the~~ President's powers are extremely wide including the appointment and dismissal in administration;<sup>15</sup> emergency powers<sup>16</sup>; prerogative of mercy,<sup>17</sup> etc.

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In Ivory Coast therefore, the President and his ministers work as the supreme administrative organ and are secured from the National assembly by the fifth Republican principle of incompatibility of certain functions.

The Westminster export model is based on a comprehensive document defining the government powers, and specifying the mutual relationship of the various government organs, often providing for safeguards to individual liberty.<sup>18</sup>

The characteristic feature of the organisation of executive power under the Westminster system, is its diffusion among various persons. Under the Nigerian independent constitution for instance, there was a head of state who was the President, but



he was not the head of government. Although the executive authority was vested in him he had no personal discretion in the exercise of it. With but few exceptions, the authority was exercised largely on his behalf by cabinet ministers, and when he acted directly, it had to be on the advice of the cabinet.

Furthermore, although the executive authority thus vested in him implied the vital function of policy formulation and co-ordination of many government processes, it conferred no actual power necessary for the execution of policies.

Another aspect of diffusion was that the exercise of executive functions and powers was collective. The responsibility for the cabinet business belonged to a cabinet of ministers, and to individual ministers acting under the general authority of the cabinet, headed by the Prime Minister, who in effect became the head of government. Whenever the President had to act directly, as we have already seen, he had to act on the cabinet's advice. It was on the cabinet and the individual ministers that powers were conferred by statute, and it was to them that those powers conferred upon, or inherited by the President were transferred. This diffusion of executive power had both the result of preventing the concentration of power in the hands of one man, thus guarding against autocracy and dictatorship, and also of rendering the government weak and unstable.

The President was supposed to maintain the constitution. At the same time, however, two provisions of the constitution



were being perverted by the government, contrary to the duty placed upon them by <sup>their</sup> own oath of office.

The Prime Minister's position gave him pre-eminence over his colleagues. A pre-eminence of real authority, the authority of a de-facto head of government.

The traditional cabinet system produced a concentration of all political power in the cabinet, making it the de-facto sovereign authority in the country. This resulted in two situations. The implication of the President being a constituent part of parliament was that his concurrence was necessary to law-making. For a bill to become law according to the constitution, it had to be duly assented to by the President. This prerogative of assenting imports a power, and a power to consent may also imply a power to withhold. The implication of requiring the President's concurrence to legislation, was the power given to the executive to veto any bill passed by the legislative houses, of which it did not approve. The concurrence of the executive in legislation, made it in law an equal partner with the legislative houses in the law making process. The executive predominance in legislation arose more from its control of legislative houses, from its ability to dictate when and how the legislative houses' concurrence was to be given, or withheld. The legislative houses therefore were mere rubber stamps of the executive <sup>19</sup>.

The westminster export model constitutions merely created the superior courts prescribed their constitutions and methods of



appointing and removing judges.

Most African countries after some years of independence decided to do away with the "borrowed" system, and adopt their own kind of system. As already seen, both the British and French colonies of Africa had adopted versions of the western models of public law. There has therefore been a search for a "native quality" suited to the post independent goals. In most of Africa, the plural character of the political organisation has been modified, and a one-party structure created instead, the justification being that, only the unified political organisation can foster national integration and facilitate development at the present state of political evolution. Most of the African countries also rejected the model of the executive Presidency which both English and French speaking African states had, up to that point, favoured and instead adopted a system of parliamentary Presidency, in which the President combined in his person the offices of both head of state and head of government.

However, this search for a "native quality" was not fully effected, since in many of these countries there were retained to quite a large extent some of the things in these "borrowed systems".

Subject to this consensus, various countries have taken different paths depending on their colonial background. In most African countries however, there has been a tendency towards power centralisation by the leaders, due to problems of economic



development, widespread disunity among the subjects as well as due to the unique problem of application of governmental institutions that are largely new and are of a foreign origin.



## CHAPTER FOUR

### EFFECTIVENESS OF A CONSTITUTIONAL DOCUMENT

In this chapter I shall discuss the extent to which a documentary constitution facilitates the course of constitutionalism.

As we have already seen in the preceding chapters, constitutionalism is the conduct of government, and the exercise of state power, limited according to certain established and enforceable rules. It deals with the degree to which the constitution functions as a limitation on the exercise of governmental powers. *It is also seen as emphasising the protection of certain individual rights from interference by the government, even popular government based on majority rule*<sup>1</sup>.

Restraints necessary for constitutionalism are that the government should be accountable to an organ distinct from itself, thus there should be separation of powers. Also, there should be free elections, frequently held and on a wide franchise; freedom of political groups to organise in opposition to the government in office, as well as effective legal guarantees of fundamental civil liberties, enforced by an independent judiciary<sup>2</sup>.

Emphasis is placed on the need for an independent judiciary.

[ Documentary constitutions have come to be identified with constitutionalism, but many regimes in the world today have constitutions without constitutionalism. What a constitution says may



be quite another. One must admit that, although almost all the countries in the world <sup>have</sup> ~~has~~ a constitution, in most of them, the constitution is treated with neglect or contempt.

"Tyrants. . . find constitutions are convenient screens being which they can dissimulate their despotism"<sup>3</sup>. Provisions that seem to be restraints can be employed to rationalise the arbitrary use of power. A constitution may also consist of nothing but lofty declarations of objectives and ~~a~~ descriptions of the government organs. Instead of being a restraint upon a government, such a constitution could facilitate or even legitimise the assumption of dictatorial powers by the government<sup>4</sup> X

Although the Soviet Union, for instance, has a constitution which apparently has a regularised system of restraints, the government provides a most glaring example of arbitrary power. The restraints are just a facade. "The constitution reads more like a political manifesto, than a legal charter"<sup>5</sup>. Individual rights are said to be granted under two formulae. In the case of social and economic rights, there is a statement that the U.S.S.R. citizens have a right to them. There is also a description of the means by which the right is ensured.

According to Article 118, the right to work is ensured by the socialist organisation of the national economy, the steady growth of the productive forces of Soviet society, the elimination of the possibility of economic crisis, and the abolition of unemployment. "Right" here refers to a political as opposed



to a justiciable legal right. The other formulae declare certain right as "indefeasible law" such as equality of rights of citizens<sup>6</sup>, or as "guaranteed and protected by law" e.g. freedom of speech, press and assembly<sup>7</sup>.

The guarantee of rights in the U.S.S.R. constitution is just a declaration of objectives - a statement of what the state will hopefully do for its citizen. There is no provision of a procedure for the enforcement of these rights, either by ordinary courts or otherwise. There are nullifying clauses for any provisions restraining the government. These enable rulers to escape from any such provisions.

Apart from these sham limitations, constitutions may also contribute to the stability of those regimes, and guide political action through the channels desired by the despots by explicit description of the machinery of government, that is, they may present the procedural forms of the state in a description manner rather than the directive, prescriptive manner of the true constitutionalist state, thus regularising and stabilising its comportment without articulating genuine restrictions.

[Constitutions rarely or never embrace all the constitutional principles. Constitutions and constitutionalism are not congruent on one side, where the principles extend beyond the document may outreach principles and perform other functions] X

Documentary constitutions are therefore both more and less than the documentary embodiment of constitutionalism in national government systems. Constitutionalism controls



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government by limiting its authority and establishing regular procedures for its operation. Constitutions are usually used as a means of articulating those limitations. The effectiveness of restrictions depends on the state of constitutional consensus, and conversely, limitations may be imposed by consensus and still not be inscribed in constitutions. On the other hand, Some constitutions manifest constitutionalism in appearance, and nearly all perform functions not integrally related to constitutionalism<sup>8</sup>

Constitutions therefore, should not be assigned too large a role in the establishment and maintenance of a constitutionalist government. "Even the best of them are no more than manifestations of constitutionalism and not its generators"<sup>9</sup>

The fact that there is a Constitutional document according to whose provisions a government is conducted, does not necessarily mean that the government is constitutionalist. Indeed, there is no constitution of any kind which is universally accepted as the most ideal in theoretical character or in practical application. Constitutionalism can therefore be practiced whether or not the constitution is written<sup>10</sup>.

Looking at the English system, we see the effectiveness of the government without a documentary constitution.

As a political entity, England's roots reach further back in history than those of any other European political system. Evidence of the uniqueness of the British constitution is seen



in the fact that British Procedures and institutions have become the most widely adopted in the world. The stability of their constitution has been adapted to ever changing problems.

The doctrine of separation of powers has played a prominent part in the theory and practice of constitution making and especially influenced the framers of the U.S. constitution. This doctrine of separation of powers which was first formulated by Montesquieu may mean any one of three different things.

- (a) That the same persons should not form part of or more than one of the three organs of government e.g. that ministers should not sit in Parliament.
- (b) That one organ of government should not control or interfere with the exercise of functions by another organ.
- (c) That one organ of government should not exercise the functions of another.

Convenient though it is to divide the main organs of government into three, the doctrine in its application to modern government does not mean that a rigid three fold classification of their functions is possible. Its value lies in the emphasis placed upon those checks and balances which are essential to prevent an abuse of the enormous powers which are in the hands of rulers. In many continental constitutions, separation of powers has meant an unhampered executive; in



England, it means little more than an independent judiciary.

Their form of constitution shows the King as head of the executive as well as an integral part of the legislature. There is no separation between the executive and the legislature. The House of Commons the executive. In truth, there is no separation of powers between the two organs, but rather a system which can only (and does) work, if there is co-operation between the legislature and the executive<sup>11</sup>. Also, parliamentary supremacy involves control of the executive.

In the field of the judiciary, separation of powers is strictly observed. In order to enjoy impartial administration of the law, it is desirable that judges enjoy a high degree of independence, especially vis-a-vis the legislature, the executive, and even the people.

Judicial independence of the executive in Britain relates primarily to appointment, as well as control and removal. Political considerations play no real part in the appointments, except with the office of the Lord Chancellor, who is recommended by the Prime Minister for appointment, and the Prime Minister here is not required to consult the House of Lords, and also to a certain extent lay justices of the peace (since advisory committees must ensure that each Bench is broadly representative). The puisne judges, county court judges (except in Lancashire) and stipendiary magistrates and justices of the peace, are all appointed by the Lord Chancellor. The latter he appoints on behalf of the crown.



Once appointed, members of the judiciary cannot be controlled by the executive or even required to implement its wishes. Conversely, the judiciary may exercise some control over the executive, in enforcing the law against government departments.

As regards removal, the Lord Chancellor, as a cabinet minister, changes with the government. Under the Judicial Persons Act 1959, superior judges can be removed only by the monarch on an address presented by both Houses of Parliament. Under the County Courts Act 1959 S. 8, county court judges may be removed by the Lord Chancellor for inability or misbehaviour. Justices of the Peace are removed by the Lord Chancellor if he thinks fit. Judicial independence of the legislative relaxes primarily to salaries, membership as well as control.

The judges salaries are paid as consolidated Fund Standing Services, so as to preclude parliamentary criticism or control. Any increases in their salaries are made by Order in Council, subject to approval by affirmative resolution of both Houses of parliament.

Judges, (but not justices of the Peace), are excluded from membership of the House of Commons.

The judiciary cannot question the validity of enactments, and its function is to interpret and apply laws made by the legislative. The latter can subsequently alter the decisions of the courts are contrary to its policy, and it can pass retroactive legislation (provided that parliament can not debate any matter



which is sub-judice).

Judicial independence of public influence relates to litigation. All judges of superior and inferior courts are completely immune from all proceedings, civil or criminal, in respect of acts done by them in the exercise of their judicial functions, and within the limits of their jurisdiction, even though they may have acted maliciously<sup>12</sup>.

In Britain, constitutionalism is further enhanced by the political freedom prevalent in the country. Political parties have got freedom to organise in opposition to the government which is in office, thus creating a healthy political climate.

Indeed, the concept of constitutionalism is highly developed in the British political practice, even though its application has not been articulated in a documentary constitution. All these values are to be found in the British type of constitution - what Amey<sup>13</sup> has described as

"a living structure, shaped by the interaction of individual purposes and collective instincts with changing external circumstances. It has followed the laws of its own growth, and not a preconceived intellectual plan designed to control and confine that growth."

The Practice of constitutionalism in the independent African countries has not been very encouraging. The general disrespect of the constitution has been something of concern.

In the context of constitutionalism, the role of the legislative as an institution of control is the making of laws, as well as



the power to criticise and control the performance of the government, and also involving the people in the political process. This applauds the idea of separation of powers. The democratic aspect of constitutionalism is that the legislature, in performing these functions should represent the will of the people, and should make laws within the limits of the constitution. Legislatures have to a large extent failed to perform this role, by playing only a limited role in law making. The legislative process, in many instances, comes into it only in its advanced state. Proposals for legislation originate from the government, which formulates its policy, sometimes after discussions with interests outside parliament, reduces it to a draft Bill which is presented to parliament for the first time. This is usually after months, when the government views have been crystallized<sup>14</sup>. Under such circumstances, Parliament's role is little more than rubber stamping the actions of the executive, which has become extremely powerful<sup>15</sup>.

*pity or smth?  
seriously*

The legislature is also meant to play the role of criticising and controlling the government. This has however not been the case. The government in most of the emergent states have failed to uphold criticism, and has resorted to jailing and detaining radical members of parliament. The legislative powers have greatly decreased, so that it plays a very passive role. The ideas of separation of powers and checks and balances have not made a mark<sup>16</sup>.



Freedom to form political organisation guaranteed by the constitution has been rendered almost negatory by the intolerance of the ruling parties.

What happened in most emergent states is that the dominant party, by virtue of being the first in the field of nationalist movement, had been able, by exploiting the emotional atmosphere of the anti-colonial struggle, to assume a monopoly of political power as the colonial government gradually moved out. With the attainment of independence which consummated its power, the ruling party proceeded to make it impossible for other political parties or even independent voluntary organisations to operate at all<sup>17</sup> the normal pattern of political development was that, at independence, the dominant party invariably had other parties to compete with. The usual style was to appeal to all the others to join hands with it in the task of nation-building. Once lured into the union, the weaker parties were sooner or later swallowed up, the dominant party emerging as the single party<sup>18</sup>. In some cases, steps were taken to eliminate opposition. This introduction of one party states, both de facto and de jure, as well as elimination of the opposition has destroyed the backbone of constitutionalism.

The judiciary under the constitution is to be interpreter of the constitution, and is also meant to guard against arbitrary use of power by the executive, as well as authoritarianism. According to Martin<sup>19</sup> independence of the judiciary means that



when the government formed by members of Party "X" is in power, it should not meddle with judges appointed by party "X" at an earlier time.

In most African countries, the judiciary at the outset is not isolated, since the Chief Justice is appointed by the President. The President in most instances, also appoints the High Court judges and Appeal judges.

The authoritarian nature of most African states had made a mockery of the independence of the judiciary. Judicial independence was put to the test in the Ghanaian case Awooner Williams -vs- Gbedemah Constitution<sup>20</sup> the constitution vested the judicial function exclusively in the courts. The respondent challenged the constitutional status of the commission of enquiry, and its powers to summon, investigate, and apply sanctions to anybody involved in bribery. The majority holding was that there are no functions inherently judicial in nature. This proved the fear the courts have of the executive.

Judicial powers are tampered with so much that judicial independence is a thing of the past. The judiciary is made to feel that they owe their office to the head of the executive, and so in the exercise of their powers, they tend to bend towards the will of the executive. In emergent states therefore, in practice, the judiciary is no more than an arm of the executive.

Something that has resulted and has become a common feature is the breakdown of constitutions. This has been exemplified



in the suspension of independent constitutions in countries such as Lesotho and Swaziland.

Another aspect leading to the breakdown of constitutions is coup detats. These have become widely prevalent. Benin has had four coups within the space of six years. In seven years, there have been twenty nine coups in Africa, exclusive of abortive ones.

Most of these problems being experienced in the African countries, and which have contributed to the erosion of constitutionalism, have resulted from the disrespect of the constitutional document, as well as the autocracy of the African leaders, who, having grown up under the colonial system where the colonial executive held all the power, on behalf of a metropolitan regime, they, too, demanded the same kind of power for what they considered to be an advancement of a different interest, the interest of their people.

The U.S. constitution has turned out to be perhaps the most successful example in the history of a legal instrument that has served both as a safeguard of individual freedom, as well as a ligament of national unity<sup>21</sup>. The constitution has remained vital largely because its provisions have proved adaptable to the changing needs of a developing society<sup>22</sup>. The structure of the constitution has been weighted towards constitutionalism. This is especially evident in the separation of powers which is strictly observed in the country, and which I have already discussed



in the preceding chapter. This is even more amply demonstrated by the fact that the President is not a constituent part of the legislature, all legislative powers being vested in the Congress alone. His role in the legislature is very limited. Normally, a bill passed by congress does not become law until it has been signed by the President, but if he refuses to sign, the bill becomes law without his signature, upon its being passed again by votes of  $\frac{2}{3}$  majority in both houses of Congress. If he fails to return a bill within ten days of its being presented to him, it becomes law as though he had signed it unless its return is prevented by the fact on congress being in adjournment. Even if the Presidents party has a majority in Congress, Congress enjoys, by virtue of the separation of the legislature from executive, almost complete independence from dictation by the President.

The constitutionalism prevailing in the U.S. is further demonstrated by the limitation of power by the Constitution, the independence of the judiciary, as well as the power granted to the judiciary to interpret the constitution and to declare invalid any executive or legislative acts which infringe on it<sup>23</sup>. All these were discussed in the third chapter.

The people are free to form political organisations in opposition to the government, Freedom of expression is also a right protected by the constitution which provides that people are free to criticize the government, or even the President.



The constitution is most explicit in the protection of the individual rights of the citizens. Among the protected rights is the right to citizenship. The U.S. supreme court recognises this right as absolute. An American citizen can freely renounce his citizenship, but the government cannot take it away, even for desertion in times of war<sup>24</sup>. This shows the limitations placed upon the government against the use of any arbitrary power.

The U.S. constitution, therefore, is not only a living document, meeting the needs of a self-governing republic. And on the basis of which authoratative interpreters can create new constitutional norms, it is also a document, carrying in it the concept of constitutionalism, which should be the envy of any nation.

### CONCLUSION

From what I have discussed in this chapter so far, it is evident that constitutionalism can be practised in countries that have a constitutional document, as in the U.S., or in countries that have no constitutional document as in Britain.

[ For a constitution to work satisfactorily as well as be an embodiment of constitutionalism, it ought to fulfil certain conditions. It ought to command the loyalty, obedience as well as the confidence of the people . A major cause of collapse of constitutionalist government in many states is the general lack of



respect for the constitution among the populace and even among the politicians themselves. The constitution ought to embody ideas that are part of the native cultural heritage of the people so that it can be understood by the people as well as be acceptable to them. This way, it can command the loyalty, respect as well as confidence of the people. There is also a need for the constitution to be put through a process of popularisation, with the view of generating public interest in it and fostering the attitude that everyone has a stake in it. The people must be made to identify themselves with it. Without this sense of identification the constitution would remain a remote, artificial object with no more real existence than the paper on which it is written<sup>25</sup>.

For a constitution to be understood as a basis of loyalty, confidence and obedience amongst the people, it must be of such length and couched in such a language as to make it readable and intelligible to the people. According to Wheare<sup>26</sup> an essential characteristic of the ideal form of constitution, is that it should be as short as possible. There is a marked difference here for instance between the constitutions of the ex-French and the ex-British territories. The former are relatively short and framed in simple language, while the latter are characterised by a technicality in expression, making them difficult to read and understand. The former run from between 39 articles<sup>27</sup> to 110 articles<sup>28</sup>. The latter have ran from 107<sup>29</sup> sections to



247<sup>30</sup> to 395<sup>31</sup> sections.

Also, the short articles of the constitutions of the Ex-French territories contrast strikingly with the over-long articles in the constitutions of the Ex-British territories. Both Morocco and Malawi have 110 articles, but whereas the articles of the Morocco constitution occupy twelve pages of print, the Malawi one covers fifty five pages. The Kenya independent constitution covered three hundred pages.

Although a constitutional document may be, and in quite a number of countries is just a facade behind which the anti-constitutionalist rulers can hide, for purposes both domestic and international, it is still a worthwhile concern, because, even though no more than a scrap of paper at first, it may later be used for replacing the non-constitutionalist regime.



CHAPTER ONEFOOTNOTES

- 1 De Smith, S.A. "Constitutionalism in the Commonwealth today" /1962/ 4 Malaya Law Review 205.
- 2 Andrews, W.G. Constitutions and Constitutionalism 2nd Ed. 1963.
- 3 Murphy, W.F. "An Ordering of Constitutional values" S. California L.R. Vol. 53:703 1980.
- 4 Charles Howard McIlwain Constitutionalism: ancient and modern. Cornell University Press Ithaca 1940 p. 37-8.
- 5 Andrews, W.G. Supra.
- 6 Waikenya, M.W. The Breakdown of Independent Constitutions and Constitutional government in Commonwealth Africa LL.B. Thesis 1976 /NRB/.
- 7 De Smith, S.A. Supra.
- 8 Nwabueze, O.B. Constitutionalism in the Emergent States (London, 1973) p. 1.
- 9 Ibid. p. 13.
- 10 Ibid. p. 20.
- 11 Friedrich, C.J. Limited Government 1974 p. 27.
- 12 Waikenya, M.W. Supra.



CHAPTER TWO

FOOTNOTES

- 1 Nwabueze, B.O. Constitutionalism in the Emergent States (1973) p. 2.
- 2 Kanyeihamba, G. Constitutional Law and Government in Uganda. p. 111.
- 3 Friedrich, C.J. Limited Government 1974 p. 106.
- 4 /1967/ 1 A.C. 259 (Ceylon).
- 5 Liyanage v. R p. 284 Paragraph G.
- 6 Ibid p. 286 Paragraph B.
- 7 Maarseveen, H.V. Written Constitutions New York Oceana Publications (1978) p. 275.
- 8 Ibid.
- 9 Ibid. p. 276.
- 10 Ibid. p. 278 .
- 11 This is a term used by political scientists to denote the creation by the constitution of a certain structure within which political and legal decisions take place.
- 12 Maarseveen, H.V. Supra. 279.
- 13 For a more detailed discussion, Ibid. p. 272-288.
- 14 Although in most countries, a special prescribed procedure is necessary for the amendment of constitutions, in some countries, the constitution may be amended in the same way as the ordinary law e.g. the U.K. S. 3 of the Kenyan constitution states that if any other law is inconsistent with the constitution, the constitution shall prevail, and the other law shall be void to the extent of the inconsistency In Okunda v. R 1970 E.A. 453 it was held in the fourth holding that the Laws of the E.A. community are "other laws" within the constitution S. 3, and are void to the extent of an inconsistency with the constitution.
- 15 Smith, S.A. de Constitutional and Administrative Law 2nd Ed. (London) Longman 1973 p. 21



- 16 The Kenya Constitution S. 47(2).
- 17 The Swiss Constitution which is rigid, has been altered more often and more easily than the constitution of France, the amendment which requires no more than a joint meeting of the two houses - Chamber of deputies and the Senate. On the other hand, the Australian constitution which has the same amending process as the Swiss one, has been amended only four times in twenty three attempts.
- 18 Wheare Modern Constitutions 1st Ed. reprinted 1962.
- 19 Ibid.
- 20 Wheare Supra p. 19.
- 21 These two statutes mark the victory of parliament.
- 22 /1920/ A.C. 508.
- 23 The facts of the case were that, in May 1916, the Crown, purporting to act under the Defence of the Realm Regulations, took possession of the hotel for purposes of housing the headquarters personell of the Royal Flying Corps, and denied the legal right of the owners to compensation. The owners yielded up possession under protest, and without prejudice to their rights and by a petition of right, they asked for a declaration that they were entitled to a rent for the use and occupation of the premises, or in the alternative, that they were entitled to compensation under the Defence act 1842. It was held that the Crown is not entitled as of right either by virtue of its prerogative or under any statute, to take possession of the land, or building of a subject for an administrative purposes in connection with the defence of the realm without paying compensation for their use and occupation.
- 24 /1863/ 14 C.B. (N.S.) 180; K & L 518.



CHAPTER THREE

FOOTNOTES

- 1 O. Kelly Alfred, H. The American Constitution.  
Copyright, 1948.
- 2 Stewart, M. Modern Forms of Government /London/, Allen  
and Unwin 1959 at p. 91.
- 3 This was an institution closest to a parliament representa-  
tive of the whole nation.
- 4 Thomson, D Europe since Napoleon Copyright, 1966.
- 5 Strong, C.F. Modern Political Constitutions 1966  
7th Revised Edition.
- 6 This need to make a fresh start may be seen in the U.S.A.,  
where some neighbouring communities wanted to unite  
under a new government, or in Hungary, Austria or  
Czechoslovakia after 1918, since the communities had been  
released from the empire due to war, and were now ready  
to govern themselves, or in France in 1789 or U.S.S.R. in  
1917, where a revolution had made a break with the past,  
and a new form of government was desired, or in Germany  
after 1918 or in France in 1875 and 1946, where there was  
a break in the continuity of government due to breaking  
out of war and a fresh start was needed.
- 7 Dicey, A.V. An introduction to the study of the Law of  
the Constitution. 10th Ed. p. 2.
- 8 Spiro, H.J. Government by Constitution /New York/  
Random House 1959.
- 9 This article provided the solution to the problem of  
combining stability and adaptability, permanence with  
flexibility. Both permanence and flexibility were  
further buttressed by another more famous invention of  
the founding fathers "the right of the courts to pronounce  
legislative acts void because they are contrary to the  
constitution."
- 10 James Madison The Federalist No. 51.
- 11 Amendments I-VIII.
- 12 1 Cranch 137, 2 L. Ed. 60/18037.
- 13 Mason, A.T. American Constitutional Law 4th Edition p.13
- 14 Marsh, W.P. "An orderly



- 14 Murphy, W.F. "An ordering of Constitutional values"  
South California Law Review Vol. 53  
1980 p. 747.
- 15 The Constitution of Ivory Coast Nov. 3 1960  
Article 17.
- 16 Ibid. Article 19.
- 17 Ibid. Article 20.
- 18 Ojwang, J.B. "Legislative Control of executive power  
in English and French speaking Africa: A  
comparative perspective"  
Public Law The British journal of administrative law.  
Winter 1981 p. 512.
- 19 Ghai and McAuslan, Public Law and Political Change in  
Kenya /1970/.



CHAPTER FOUR

FOOTNOTES

- 1 Murphy, W.F. "An ordering of constitutional values"  
S. California Law Review Vol. 53: 703 1980.
- 2 De Smith, S.A. "Constitutionalism in the Commonwealth  
today" /1962/ 4 Malaya Law Review.
- 3 Andrews, W.G. Constitutions and Constitutionalism  
2nd Edition 1963 p. 22-23.
- 4 Nwabueze, O.B. Constitutionalism in the Emergent States  
(London, 1973).
- 5 Nwabueze, O.B. Ibid. P. 2.
- 6 U.S.S.R. Constitution Article 123.
- 7 Ibid. Article 125.
- 8 Andrews, W.G. Supra.
- 9 Ibid. P. 26
- 10 Meshak, O.O. Constitutionalism and the role of the  
Judiciary in Uganda LL.B. Dissertation 1977.
- 11 Wade & Phillips Constitutional Law 4th Ed. 1950.
- 12 Jones, B. British Government Today. /Sweet & Maxwell Ltd./  
1972.
- 13 Amery, L.C. Thoughts on the Constitution 2nd Ed.
- 14 Ghai & McAuslan Public Law and Political Change in Kenya  
Oxford University Press 1970.
- 15 This kind of situation is especially prevalent in Kenya.
- 16 Mereka, D.M. Independent Kenya and Constitutionalism  
LL.B. Dissertation 1976.
- 17 This was especially so in Nigeria and Kenya. In Kenya,  
this happened at a later stage after independence.

LIBRARY



- 18 This is how the single party originated in Guinea, Mali, Senegal and Ivory Coast.
- 19 Martin, R. Personal Freedom and the Law in Tanzania Nairobi Oxford University Press 1974.
- 20 S.C. 1/69, digest /1970/ C.C. 18, S.C.
- 21 Saul, K.P. The Living U.S. Constitution. /1953/.
- 22 Stephen, R.M. and James, W.N. "Does the constitution mean what it always meant? 77 Columbia Law Review. 1029.
- 23 This was discussed in Marbury v. Madison 1 Cranch 137 2 L. Ed. 60 /1803/.
- 24 Afroyum v Rusk 387 U.S. 253 /1967/;  
Schneider v Rusk 377 U.S. 163 /1964/.
- 25 Nwabueze, B.O. Supra. p. 25.
- 26 Wheare Modern Constitutions 1st Ed. Reprinted 1962 p. 34.
- 27 Central African Republic.
- 28 Morocco.
- 29 Sierra Leone.
- 30 Kenya.
- 31 India - excluding its nine long schedules.



B I B L I O G R A P H Y

BOOKS

- Amery, L.C. Thoughts on the Constitution 2nd Ed.
- Andrews, W.G. Constitutions and Constitutionalism 2nd Ed. 1963.
- Dicey, A.V. An Introduction to the Study of the law of the Constitution 10th Ed.
- Friedrich, C.J. The Philosophy of Law in Historical Perspective 2nd Ed. University of Chicago Press.
- Friedrich, C.J. Limited Government 1974.
- Ghai and McAuslan Public Law and Political Change in Kenya 1970.
- Jones, B. British government today Sweet and Maxwell 1972.
- Kanyehamba, G. Constitutional law and Government in Uganda
- Kelly, A.H. The American Constitution Copy right 1948.
- Mitchel, J.D.B. Constitutional Law 2nd Ed.
- Maarseveen, H.V. Written Constitutions New York Oceana Publications (1978).
- Meshak, O.O. Constitutionalism and the role of the judiciary in Uganda LL.B. disseration 1977 (Nairobi).
- Mereka, D.M. Independent Kenya and Constitutionalism LL.B. dissertation 1976 (Nairobi).
- Mason, A.T. American Constitutional Law 4th Ed.
- Nwabueze, B.O. Constitutionalism in the emergent states (1973).
- Padover, S.K. The Living U.S. Constitution (1953).
- Spiro, H.J. Government by Constitution Random House (New York) 1959.
- Smith, S.A. de Constitutional and Administrative Law 2nd (London) Longman 1973.



- Stewart, M. Modern Forms of government (London)  
Allen and Unwin 1959.
- Strong, C.F. Modern Political Constitutions 1966 7th Ed. Revised.
- Themson, D. Europe since Napoleon Copyright 1966.
- Wheare Modern Constitutions 1st Ed. reprinted 1962.
- Wade, F.C.S. Constitutional Law 8th Ed. 1970.
- Wade, F.C.S. and Phillips G. Constitutional Law 4th Ed. 1950.
- Waikenyā The Breakdown of Independent Constitutions and  
Constitutional governments in Commonwealth Africa  
LL.B. dissertation ~~1976~~ 1976 (Nairobi).

ARTICLES

- Ojwang, J.B. "Legislative Control of executive power in English  
and French speaking Africa: A comparative perspective."  
"Public Law - The British journal of Administrative  
Law Winter 1981.
- Ojwang, J.B. "The Residue of legislative power in English and  
French speaking Africa: a comparative study of  
Kenya and the Ivory Coast 1980 I.C.L.Q.
- Munzer, S.R. & Nickel, J.W. "Does the Constitution mean what it  
always meant? 77 Columbia Law Review 1029.
- Murphy, W.F. An ordering of Constitutional values, South  
California Law Review Vol. 53: 703 1980.

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