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NOTES CORNER

CONSTITUTIONALISM

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Meaning of Constitutionalism

Today, constitutionalism has become as important an issue as that of good governance. In ordinary parlance, constitutionalism may be defined as a 'belief in constitutional government.' But what does constitutional government refer to? Does is it refer to a government with a constitution or government established according to a constitution, or a government acting according to a constitution? The concept seems to lack clarity.

Constitutionalism can be defined as the doctrine that governs the legitimacy of government action, and it implies something far more important than the idea of legality that requires official conduct to be in accordance with pre-fixed legal rules.[1] In other words, constitutionalism checks whether the act of a government is legitimate and whether officials conduct their public duties in accordance with laws pre-fixed/ pre-determined in advance.

The latter definition shows that having a constitution alone does not secure or bring about constitutionalism. Except for a few states which have unwritten constitutions, today almost all the nations/states in the world have constitutions. This does not, however, mean that all these states practice constitutionalism. That is why constitutionalism is far more important than a constitution.

Features (Characteristics) of Constitutionalism

According to Barnett, constitutionalism embraces limitation of power (limited government), separation of powers (checks and balances) and responsible and accountable government.[2] Henkin[3] identifies popular sovereignty, rule of law, limited government, separation of powers (checks and balances), civilian control of the military, police governed by law and judicial control, an

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[1] Hilaire Barnett, Constitutional and Administrative Law 5 (London: Cavendish Publishing Limited, 3rd edi., 2000(1995)

[2] *Ibid*

[3] Michael Rosenfield ed., Constitutionalism, Identity, Difference and legitimacy, Theoretical Perspectives 4042 (Durham: Duke University Press, 1994)

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independent judiciary, respect for individual rights and the right to self-determination as essential features (characteristics) of constitutionalism.

We shall thus focus on the following basic elements:

1. Popular sovereignty
2. Separation of Powers (checks and balances)
3. Responsible and accountable government
4. Rule of law
5. An independent judiciary
6. Respect for individual rights
7. Respect to self-determination
8. Civilian control of the military
9. Police governed by law and judicial control

1- Popular Sovereignty

Popular sovereignty envisages the fact that the public is the source or fountain of all governmental authority. The legitimacy of any governmental power is derived from the consent of the public. In other words, the government acquires its mandate from the people.

The source of all sovereignty lies essentially in the nation. No corporate body, no individual may exercise any authority that does not expressly emanate from it.[4] Even though there is a certain sovereign entity which is empowered to govern, ultimate sovereignty resides in the nation. The power of such sovereign entity emanates from the public.

In other words, the public is involved in the decision making process which may take different forms. The most obvious one is election of representatives. The public is entitled to elect representatives who represent it. However, such election should be free, open (transparent) and fair. When the public loses confidence in its representatives and where the latter fail to represent the interest of the public, representatives may be recalled before the expiry of their term of office.

Referendum is the other mechanism by which the sovereignty of the public is manifested or expressed. Before a government makes a decision or takes any action which affects the interest of the public, constitutionalism requires it to consult the public and listen to what the public says. The case of France is worth mentioning. The President of the Republic may (on the basis of a proposal from the government when parliament is in session or on a joint motion of the two assemblies) submit to a referendum any government bill

[4] Article 3, 1789 French Declaration of Human Rights

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which deals with the organization of the public authorities or with reforms relating to the economic or social policy of the nation or which provides for authorization to ratify a treaty although not contrary to the constitution.[5] The bill is promulgated by the President of the Republic provided that the referendum is in favor of such government bill.[6] However, if the outcome is otherwise, it may not be promulgated.

In some liberal democratic countries like USA, Uk, France, Federal Republic of Germany etc, the principal role of the public is to control the activities of the government and to exercise a sort of veto power which goes beyond mere participation.[7]

2-Separation of Powers (Checks and balances)

Under constitutionalism, power is not concentrated in any one organ of the state. It is diffused (divided) among the three organs of the state i.e., the legislature, the executive and the judiciary. If power is monopolized by any one organ of the state there could be abuse of power, tyranny and dictatorship. Nor can there be liberty. For example, the legislature, in addition to its law-making power is not allowed to exercise the roles of the executive; and the judiciary is not allowed to execute the laws which it interprets. These two powers are reserved to the respective organs i.e. the executive and the judiciary, respectively. Here-below, a comparative overview of four legal systems including Ethiopia is made on the basis of law making power and judicial review.

a) USA

In the United States of America, the three organs of state and their respective powers and duties are enshrined in the constitution. Similarly the system of checks and balances is embodied in the constitution. According to the US Constitution, Congress (i.e., the House of Representatives) and the Senate are the sole law making power. Any bill which is initiated in and passed by the House of Representatives shall be submitted to the Senate. The Senate shall deliberate on the bill. If the bill is accepted by the Senate, it shall be submitted to the President for approval. If the President approves such Bill or fails to make his objections within 10 days (excluding Sundays), the draft bill shall become law. However, if the President objects to the draft bill, he shall return the bill to the House where it originated together with his objection. This shows that the President is exercising his veto power on bills passed by

[5] French Constitution (1958) Article 11
[6] *Id*
[7] Finer, S.E, Comparative Government, (Penguin, 1970) pp 30-40

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Congress. This clearly shows the system of checks and balances at work. However, even though the bill is returned to Congress, if two-thirds of the members of each house sitting separately pass the bill, it shall become a law despite the objection of the President. So Congress can override the veto power exercised by the President.[8]

After the bill becomes law, it can still be subject to the scrutiny of courts. Even though no inherent or express power is given to the courts by the Constitution, courts are empowered to check the constitutionality of such law. If it is found contrary to the constitution, it shall be declared null and void. Therefore, courts in USA are endowed with the power of judicial review.

The principal feature of the US Constitution is that it does not allow an individual to exercise different powers or act in different capacities at the same time. For example, members of Congress are not allowed to become members of the Executive or the Judiciary and the vice-versa except when the Vice-President chairs the senate and the Chief Justice presides over the Senate at the time when the Us President faces impeachment.[9]

b) France

France is another example where the three organs of the state are identified in the constitution. An Act passed by the parliament, before becoming law, shall be submitted to the President of the Republic. The latter shall promulgate the Act within 15 days. However, if the president has any objection, he may ask the parliament to reconsider the act or a section within the act.[10] Once the act is promulgated, it is not reviewable by ordinary courts, but it shall be subject to judicial or constitutional review. There is an "autonomous institution" called Constitutional Council. It is this institution which is empowered to check the constitutionality of acts passed by the legislature. The institution is composed of nine judges. Three of the judges are appointed by the President of the Republic. The other three are appointed by the President of the National Assembly and the remaining three are appointed by the President of the Senate.[11] The appointments seem purely political. Even the respective Presidents may appoint their own friends or those who match their political colour.

An act of Parliament may be referred to the Constitutional Council before promulgation so that its compatibility with the constitution can be

[8] USA Constitution, Article 3 Section 7
[9] *Id*
[10] *Supra*, note 5, Article 10
[11] *Id*

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checked. It is the Constitutional Council which is entrusted with the power of judicial or constitutional review. The decision of the Constitutional Council is final and non-reviewable. The persons who are entitled to refer an Act to the Constitutional Council for review are the President of the Republic, the Prime Minister, the Presidents of the two houses and 60 (sixty) Deputies or Senators.[12] Ordinary citizens are not allowed to refer an act to the Constitutional Council. One of the reasons why the Constitutional Council was introduced is to protect the executive from encroachment by the parliament.

c) Germany

In the Federal Republic of Germany, the parliament is composed of the Bundestag which is directly elected by the constituency and the Bundesrat which represents the different Landers. Federal laws adopted by the Bundestag shall be submitted to the Bundesrat for its consent. It shall become law when the Bundesrat consents or fails to make a demand for a joint committee within three weeks (Articles 77(2) or fails to enter an objection within two weeks (Article 77(3) or withdraws its objection or if the objection is overridden by the Bundestag. [13]

The laws passed by the parliament after counter-signature by the federal Chancellor shall be certified by the president and are promulgated.[14] After promulgation, the law may be subject to constitutional/judicial review. The Federal Constitutional Court is empowered to check the compatibility of such laws with the Basic law. According to Article 93 of the Basic Law, even individuals are allowed to lodge their complaint to the Constitutional Court.

d) Ethiopia

In the three legal systems highlighted above, both houses are involved in the lawmaking process and laws passed by the parliament are subject to constitutional or judicial review. In Ethiopia, the FDRE Constitution identifies and states the respective powers and duties of the three organs of the state, i.e., the legislature, the executive and the judiciary. Compared to the aforementioned legal systems, the House of Federation does not have any role in the lawmaking process. The lawmaking process is absolutely unicameral. Moreover, once a draft law is discussed and passed by the House of People's Representatives, it shall be submitted to the President for signature. However, if the President fails to sign the draft law within 15 days, it shall become a

[12] *Id*
[13] German Basic Law, Article 78
[14] *Id*

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law.[15] The provision does not allow the President to forward his objection to the House of People's Representatives.

Although laws adopted by the House of People's Representatives are subject to review, such review does not fall within the jurisdiction of ordinary courts. Our ordinary courts are eviscerated of the power of checking or reviewing the constitutionality of laws passed by the house. Such power is already reserved to the second chamber i.e., the House of Federation. The House of Federation is assisted by a technical group called Constitutional Inquiry.

Members of the House of Representatives are also members of the Executive. An individual is allowed to have two different capacities at the same time. These are thus some of the instances where the system of separation of powers or checks and balances are blurred under constitutions which pursue parliamentary form of governments as can be observed in the FDRE constitution. Such legal regimes (as in the case of UK) put in place the legal and institutional framework which ensures that the *origin* of appointment to executive offices does not allow members of the executive branch of the government to have legislative *functions* after they assume executive responsibilities.

3- Responsible and Accountable Government

> "If an American or English were asked what the first indispensable requirement of his government is, it is ten to one that would reply that his government was the servant of the people."[16]

In the democratic nations (countries) people perceive their government as their own servant. The government is there to serve their interest or act as the steward of their interest. The governments assume office in the name and on behalf of the public for the benefit of the public. Article 15 of the French Declaration of the Human Rights recognizes the right of the society to ask a public official to account for his/her administration. In the opinion of the writer, the relationship between the government and the public/ the citizen is analogous to the relationship between a principal and an agent. The agent is there to act in the name and on behalf of the principal. He is expected to act diligently in the best interest of the principal until such time that the period of authorization expires. When the agent fails to act in the best interest of the

[15] The FDRE Constitution, Article 57
[16] *Supra*, note 7

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principal or fails to account for his performance or fails to act diligently, the principal may revoke the authorization

The same applies in the relationship between a government and the public. As a government assumes office in the name and on behalf of the public, it is directly accountable or responsible to the public. When a government (i.e., the agent) fails to act in the best interest of the public (i.e., the principal), the latter revokes authorization through the ballot box.

4- Rule of Law

Rule of law denotes a government of laws and not of men. Individuals working within the state machinery are expected to exercise their official duties and responsibilities in accordance with the law. In other words, rule of law represents the supremacy of law.

According to Dicey, [17] rule of law envisages the following:-

- No one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land;
- No person is above the law;
- Courts play a vital role in protecting the rights of individuals.

A- *No one is punishable except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land*:-

The first component of rule of law is related to the principle of legality. If a certain behavior is not categorized as a criminal act by the constitutionally mandated lawmaking organ, it is not treated as a criminal act and is not punishable. It is treated as an innocent act.

Secondly for an act to be punishable, the act must be classified or identified as a criminal act by the legislature through the law-making process enshrined in a constitution and other laws. Finally, once a certain behavior is classified as a criminal act, the accused should be tried and punished by the ordinary courts. Ordinary courts refer to courts established in accordance with a country's constitution. It may not include any extra-judicial or extra-ordinary court not recognized by the constitution of the land.

B- No one is above the law

These words express the absolute supremacy of law over arbitrary power including widespread discretionary power of government. We are all human

[17] Albert Venn Dicey, Introduction to the Study of Law of Constitution 188 (London and New York, Macmillan, 1995)

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beings created in the image of God, and we should be treated equally before or under the law without discrimination on the basis of status, wealth, race, nationality, gender, sex, etc. Every person from a president down to a shoe-shiner should equally become subject to the law.

Similarly, even though avoidance of discretionary power is totally impossible, the manner in which such power is to be exercised is strictly monitored. Discretionary power is one of the reasons for the prevalence of corruption. According to Professor Klitgaard, corruption is defined as monopoly of power plus discretion minus accountability.

C- Rights are based on the actual decision of courts

According to Dicey, the mere recognition of rights in a constitution alone does not secure or ensure the rights of an individual. The rights recognized by a constitution and other laws are to be protected or defended through the medium of courts whenever these rights are infringed.

5- An Independent Judiciary

In liberal democracy the individual is at the center, and "Judicial independence is the hallmark of liberal democracy".[18] The rights of individuals are ensured and respected. Courts play a vital role in ensuring and respecting the rights of individuals. An independent judiciary is the cornerstone of a free society and rule of law.[19] As it is already discussed hereinabove, rule of law envisages a government of laws. A government is obliged to act according to laws set by the legislature. However, if there is failure to adhere to the laws, an independent judiciary shall check such events.

An independent judiciary is also necessary to maintain the supremacy of a constitution. If the legislature comes up with a law which is contrary to the constitution, an independent judiciary, through the principle of judicial or constitutional review, has the power to declare it null and void. Hamilton in Federalist 78 stressed the role of courts in reviewing the constitutionality of laws passed by the legislative organ as follows;-

> Limitation of this kind can be preserved in …no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void.

[18] Robert A.Goldin and William A. Schambra ed., The Constitution, the Courts and the Quest for Justice 25(Washington DC, American Enterprise Institute Press, 1999)

[19] Peter H. Russel &David M.O'Brien ed., Judicial Independence in the Age of Democracy 25(Charlottesvile, The University Press of Virginia, 2001)

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As Hamilton expounded, although checking the constitutionality of laws passed by the legislative organ is not the only role or function of courts, courts are bound to review whether laws passed by the legislature are constitutional. The whole purpose of judicial or constitutional review is not to snatch the powers given to other organs or to create judicial despotism, but to maintain the supremacy of the constitution i.e., the supreme law of the land.

In addition, judicial independence helps judges to discharge their judicial functions without fear or favor. Bhagwati stated that Justice can become fearless and free only if institutional immunity and autonomy are granted.[20] Bhagwati stressed the autonomy of the judiciary as an institution; yet, the independence of the institution is inseparable from the independence of individual judges.

Moreover, the decision or judgment rendered by courts must be executed. If decisions are overturned by other organs of the state, the independence of the judiciary shall be at a risk. It is a threat to the very independence of the judiciary. The judiciary shall become like a lion without teeth.

Furthermore, the sitting of judges in particular benches should be handled by the courts themselves. Any external entity must not be allowed to order a court in the assignment of judges to cases.

6- Ensure and Respect Individual Rights

The incorporation of the rights of individuals in a constitution and other laws is essential, but not an end by itself. It is a means to an end. It must be seen that these rights are duly respected and protected.

Article 1 of the UN Charter included the promotion and encouragement of respect for human rights and fundamental freedoms for all without distinction as to race, sex, language or religion. Similarly Article 55 of the UN Charter states that the United nations shall promote universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. In addition Article 56 of the Charter imposes obligation on member states to ensure the observance of Article 55 of the Charter.

A similar provision is enshrined in the International Covenant on Civil and Political Rights. Article 2 of the Covenant stipulates that "each state party

[20] H.M. Seervai, Constitutional law of India, 2617(Delhi:N.M Tripathi Private Ltd. Bombay, 4th edi., 1996)

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to the present covenant undertakes to respect and to ensure to all individuals within its territory and subjects to its jurisdiction the rights recognized in the present covenant without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

There are certain basic rights which may not be derogated from even at the time of state of emergency. According to Article 4 (2) of the Covenant, the Articles dealing with the right to life, the right not to be subject to torture or cruel or inhuman or degrading treatment or punishment, not to be held in slavery and servitude, not to be imprisoned due to non performance of contractual obligation, not to be held guilty or convicted for any criminal offence which is not criminalized at the time of the commission of the crime and omission or imposing heavier penalty, the right to be recognized as a person and the freedom of thought, conscience and religion may not be derogated in time of public emergency.

By virtue of Article 4(1) of the Covenant, a state of public emergency must be officially proclaimed. Since it says proclaimed, it must be proclaimed by the legitimate organ or authority authorized to do so by the constitution. Secondly, the emergency must threaten the life of a nation as a whole. During a state of emergency, derogation from the obligations imposed by the Covenant is possible except as regards the aforementioned rights which are absolutely non-derogable. The derogation should be to the extent required by the exigencies of the situation. Such derogation shall not violate other international obligations imposed on the state concerned and would not be implemented by discriminating on the basis of race, colour, sex, language, religion or social origin.

Furthermore, pursuant to Article 4(3) of the Covenant, the state exercising state of public emergency is obliged to notify other state parties to the Covenant the provision which is derogated from and the time when such state of emergency is to cease.

7- Respect for Self-determination

Self-determination refers to the right of a people living in a territory to determine the political and legal status of the territory, for example, by setting up a state of their own or by choosing to become part of another state.[21]

[21] Akehurst's Modern Introduction to International Law, 326(London and New York: 7th edi., 1997)

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However, this right is granted to colonies and dependent states. This is clearly stated under Article 1(2) and 55 of the UN Charter.[22]

The right to self-determination is also recognized under Article 1(1) of the International Covenant on Civil and Political Rights. It reads as follows:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In the 1918 Soviet Union Constitution, the right of self-determination was recognized although it was not practicable until the Soviet Union broke up into different autonomous republics after the introduction of perestroika. According to Viladmir Lenin, self-determination in the sense of secession or forming an independent state is possible only for culturally distinct groups.[23]

8- Civilian Control of the Military

> "Our principle is the party commands the gun, and the gun must never be allowed to govern the party."[24] Mao Zedong.

According to the above statement, the party is sovereign or autonomous. It is the party which governs the gun (the military). To some extent the theme of Mao Zedong's statement seems to hold true in the contemporary world as well. In democratic countries, it is the democratically elected officials who are allowed to govern or control the military, although technical affairs are left to the military personnel.

Instead, if full autonomy or sovereignty is granted to the military leaders, they might divert the democratic decision-making process and may use force which may go the extent of coup or military dictatorship. The military may also crush democratic political opposition, through intimidation and use of physical force and interfere with domestic elections. Samuel Adams stated that even when there is a necessity of the military power, wise and prudent people will always have a watchful and jealous eye over it.[25] Elbridge Gerry, a delegate to the American Convention also stated that standing armies in time of peace are inconsistent with the principles of Republican Government, dangerous to the liberties of a free people and generally converted into destructive engines for establishing despotism.[26]

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[22] *Id*
[23] Wikipedia, the free encyclopedia
[24] *Id*
[25] *Id*
[26] *Id*

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9- Police Governed by Law and Judicial Control

The prime responsibility of ensuring peace and order is borne by the police. It shoulders the duty of bringing wrong-doers to justice. However, when the police discharge such duties, constitutionalism requires them to honor and respect the rights, dignity and freedoms of individuals including wrong-doers and persons suspected of offences. It is to be noted that a suspect has the right to be presumed innocent until proved guilty by the competent court.

The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights prohibit torture, cruel, inhuman and degrading treatment and arbitrary arrest and/or detention. Similar provisions are incorporated in the FDRE constitution:-

- Every person is to be protected from cruel, inhuman and degrading treatment(Article 18(1);
- Persons arrested are entitled to be notified promptly in the language they understood the reason for their arrest (Article 19(1);
- Persons arrested must be informed promptly of their rights to remain silent (Article 19(2);
- Persons arrested must be brought to court within 48 hours (Article 19(3).

In order to check whether the police adhere to and respect the above fundamental principles and rights of arrested persons, courts should keep an eye on the police. If, for example, any evidence is obtained through torture, the evidence is considered illegal and courts /reject the evidence.

In general, the police are expected to act according to the law. When, instead, the police violate the laws they are entrusted to enforce, the result turns out to be not only an assault on human dignity and the law itself, but the creation of barriers to effective policing.[27]

The practical effects of police violations are multifold :[28]

- Public confidence is eroded;
- Civil unrest is exacerbated;
- Effective prosecution in courts is hampered;
- The police is isolated from the community; and
- Results in the guilty going free and the innocent being punished. ■

[27] A manual on Human Rights Training for the Police, United Nations, New York and Geneva, 1997

[28] *Id*

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