UNIVERSITY OF DODOMA

CONSTITUTIONAL LAW

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PUNGE, I.S

Lecturer in Law

Advocate

TOPIC TWO

TYPES/CLASSIFICATIONS OF CONSTITUTIONS

Written vs. Unwritten

- A Constitution is referred to as written when the most important constitutional Laws are specifically enacted. By this, a specific legislative enactment on the organization of a state and administration of justice, as well as other national constitutional issues are provided for. This usually produces a single document with a limited number of sections which may be amended from time to time to suit the prevailing circumstances

More Definitions

- A special document or group of documents that sets out what are regarded as the most fundamental principles relating to government

- Where there is a written constitution, such document is taken to be an organic instrument which claims superiority over and above any other document in the state. The constitution thus formed establishes a framework and principles of government in broad and general terms with a view to applying to varying conditions in the several communities in the state

- The clearest characteristic of all written constitutions is that it is possible to point to one document or a combination of documents, as the Constitution
- Written constitutions are now widespread in the world. Such constitutions invariably spell out the three arms of government namely, the Legislative, the Executive and the Judiciary.
- The most fundamental attribute of written constitution is that it cannot be changed, amended or repeated like an ordinary enactment

Unwritten

- In Britain, it is difficult to point at a single document as the constitution of the country. This does not mean that the British people are not guided by political philosophies which exist under a constitution. They are only obtained in various documents.
- Examples ; Magna Carta of 1215 which resulted from successful efforts by the medieval landowners to wrench some rights, the 1688, progenitor of Fundamental Human Rights provisions in written constitutions, the Act of Settlement of 1700, the Act of Union with Scotland of 1706, the Statute of West Minister, the Supreme Court of Judicature Act, 1925

- If all these pieces of legislation and others are put together, in the words of Professor Mitchell; “by the use of scissors and paste, it would be possible to produce out of the Statute Book a ‘Constitution’ which would be very nearly complete”

- The Laws of the unwritten British Constitution comprise of three kinds of rules; statute, common law and custom. In view of contemporary development, it is necessary to include international conventions. Treaties are not themselves part of the British Laws except they are so transformed
- For custom to be accepted as part of the Constitutional Law in England, it need not have been adjudicated upon by the court, but it must be judicially recognized. To be recognized, it must be certain, reasonable, obligatory to the subjects, as well as possessing continuous existence

- The sources of the constitution of the U.K. may be divided into two categories:
  1) The legal rules of the constitution, as found in case law, statute and subordinate legislation,
  2) The non-legal rules of the constitution, informal rules or Constitutional. These non-legal rules can be sub-classified as :-i) Constitutional Conventions, ii) customs ; and iii) usages

Distinction

- A written constitution sums up in one instrument the whole of what is considered to belong to the constitution of the state; whereas, in the case of an unwritten constitution, its various parts are to be sought in diverse connections, and are partly statutory and partly customary

- A written constitution is either granted by the ruler or ordained by the people at one and the same time; while an unwritten constitution is gradually developed, and is contributed to not only by the executive and legislative branches of government, but also by the courts, and by the recognition, by rulers and people, of usages and theories gradually acquiring the force of law

- A written constitution is a creation or product, while an unwritten constitution is a growth. The one may be influenced, in its essentials, by history, but is newly made and set forth. The other is not only defined by history, but, in a measure, is history

- A written constitution, in its letter, if not in its spirit, is incapable of further growth or expansion. It is fixed and final. An unwritten constitution, on the other hand, will expand and develop, of itself, to meet new exigencies or changing conditions of public opinion or political theory

- A written constitution, at least in a free country, is a supreme and paramount law, which all must obey, and to which all statutes, all institutions, and all governmental activities must bend, and which cannot be abrogated except by the people who created it

- An unwritten constitution may be altered or abolished, at any time or in any of its details, by the lawmaking power

- The weakness of an unwritten constitution consists in this: that it is subject to perpetual change at the will of the lawmaking power, and there can be no security against such change except in the conservatism of the lawmaking authority, and its political responsibility to the people; or, if no such responsibility exists, then in the fear of resistance by force

- The weaknesses of a written constitution are that it establishes iron rules, which, when found inconvenient, are difficult of change; that it is often construed on technical principles of verbal criticism, rather than in the light of great principles; and that it is likely to invade the domain of ordinary legislation, instead of being restricted to fundamental rules, and thereby to invite demoralizing evasions

Presidential vs. Parliamentary

Presidential System

The three organs are sharply separated by observing the doctrine of separation of powers which keeps each organ in its own sphere or responsibility. Thus the President and his Ministers are not members of Parliament. The President is normally elected nationally and is generally accountable to the people. E.g. USA

- A presidential system of government is a government where all

  executive powers are vested in a president who is the head of state and head of government. The president may exercise the executive powers of government either directly by himself or through the vice-president, ministers or other officers in the public service of the federation

  The powers of the president is to maintain the constitution and to apply all the laws made by the legislature for the time being in force and to implement party programmes and generally uphold the interest of the nation and the welfare of the people at all times

- The President is elected directly by the people or indirectly through an electoral college
- The President and the cabinet of ministers appointed by him are not members of the legislature
- The President is free to choose his ministers from within and outside his party subject to confirmation by the Legislature
- The President is a member of the ruling party
- The party advises and supports him and he implements the programmes of the party

- The ministers are first responsible to the president who appointed them and he is primarily responsible to discipline the ministers or otherwise call them to order

- The legislature and the executive may be controlled by different political parties

- The president is responsible to the legislature which may investigate and impeach him for gross misconduct
- He is also responsible to the people who are the sovereign power in a country and who may not renew his mandate at election
- Examples: TZ, USA, Nigeria, Ghana, Kenya, South Africa, etc.

Parliamentary system or "the West Minister Model"

The Chief Executive, the Prime Minister is a Member of Parliament, and so are his Ministers and are all collectively responsible to Parliament. e.g. India

- All the executive powers of government are vested in a Prime Minister who is the head of government and head of the majority party or ruling party, but is not the head of state

- In this system of government, the head of state who exercises only ceremonial functions may be a monarch or president who is the figure head

- The prime minister and the entire ministers in his cabinet are all
- members of the same party or coalition of parties

- In a cabinet system of government, there is no complete separation of powers, nor a complete fusion of powers. Though the executive and the legislature are completely fused, there is no over-lapping of powers because the same people constitute both arms

- Apart from the minister of justice, the judiciary is completely separate from the legislature and the executive

- Apart from the doctrine of collective ministerial responsibility and the doctrine of individual ministerial responsibility to parliament, the prime minister as head of the government or executive arm has the power to dismiss any minister and he is primarily responsible for the discipline of his cabinet

- The stability of the government depends a lot on the ruling party controlling a reasonable majority in the parliament or being able to form a coalition government with another party or parties

- There is an official opposition party in the parliament, which is usually the party having the highest number of votes next to the ruling party in the parliament

- The members of the parliament and the executive arm are one

- The prime minister is subject to his party and is controlled by the party. He remains in office a long as his party has the majority of members in the parliament. However when a vote of “no confidence” is passed on him and his cabinet by parliament, the Prime Minister and his entire cabinet is obliged to resign

- The UK is the origin and home of this system of government. Other countries operating a parliamentary system of government include: Canada, Jamaica, Israel, India, Australia, Lesotho, Ethiopia, etc.

Republican vs. Monarchial

- **Republicanism**
- Rejects rule by divine right or by monarchy or king, and advocates that sovereignty lies with the people who have the right to choose their leaders. Most countries are now republics; e.g. USA, France, West Germany, Kenya, Tanzania, etc.

- All citizens deserve equal concern and respect and that the government of the state should be self government by citizens

Monarchial

Monarchy = Rule by one person

Aristocracy = Rule by a group of the best people – people with wisdom. Its defect is oligarchy – rule by a selfish group

Democracy = Rule by many or the people as a whole. Its defect is instability leading to mob tyranny

- Constitution recognizes kings or hereditary rulers as national leaders, in most cases as heads of states, e.g. in Britain, Malaysia, Scandinavian countries, etc.

- Monarchy is usually inherited within a family so that the holder’s power is not developed on temporary political forces

- The main merit of this system is its authority and independence since monarchs have a quasi-godlike status

- The corresponding defect is its despositism (absolute power/tyranny

Federal vs. Unitary

Federal

The powers of government are divided between the central government and the constituent governments or states in such a way that each constituent part is legally independent within its own sphere.

- Generally, the concept of federalism relates to the division of power between national government, and other regional or state governments and sometimes local governments. Such powers may however be shared in various ways, sometimes with a stronger center or with weaker center which is often referred to as co-federalism

Definition by Ben Nwabueze

- An arrangement whereby powers of government within a country are shared between a national country-wide government and a number of regionalized (i.e. territorially localized) governments in such a way that each exists as a government separately and independently from the others, operating directly on persons and property within its territorial area, with a will of its own and its own apparatus for the conduct of its affairs, and with an authority in some matters exclusive of all others

- The legislatures of the federal and state governments have powers to pass laws in specified limited areas. But each is sovereign in its own areas, though their powers are limited. But neither is subordinate to the other; both are coordinate

Five different principles and issues

1) Government rather than geographical entities or people as the basis of the federal arrangement
2) Separateness and independence of each government
3) Equality between regional governments
4) Number of regional governments between whom a federal arrangement can meaningfully exist
5) Techniques for the division of powers underlying objective of the federal arrangements

Lord Haldane in Attorney General for Commonwealth of Australia V Colonial Sugar Refinery Co.

- “…….the natural and literal interpretations of the word ‘federal’ confines its appellation to cases in which states while agreeing in a measure of delegation of powers to a common government yet in the main continue to preserve their regional constitution. The word could only be used loosely, to describe states which agree to delegate their powers with a view to entirely new constitution even of the states themselves”. This definition presupposes a voluntary act on the part of the federating states in keeping with the theory of the social contract
- and perhaps does not contemplate a situation of federal state coming about as a result of coercion or the mechanical drawing of borders, which was the case in Nigeria’’

Unitary

The state is organized as a single unified government and constituent districts hold power at the discretion of the central government. The central government is therefore supreme and there are no subsidiary sovereign bodies. But the country is normally divided into local units which are given some functions to carry out on matters affecting the people directly

- The ultimate power is held by the central government

- However, there may be subordinate units, e.g Scotland & Wales

- A Unitary government is a government where all powers are concentrated in a single central government, which does not share power with any other body in the country, but delegates powers to regional and local governments and other subordinate bodies

- All government powers are concentrated in the central or national government as the only source of authority from which power emanates. A country operating a unitary system of government usually adopts a unitary constitution

- Usually there is no constitutional conflict between the central
- government and its subordinate regional or local district authorities, which are created for administrative purposes and are an extension of the national government. The national government can alter the powers and boundaries of the various constituent parts of the country and there may be no need for separate parliaments in the constituent parts of the country

- The central parliament often has parliamentary supremacy to make laws for the country. A unitary system usually has a strong and powerful central government. The people usually owe allegiance to only one government, that is, the central government
- Examples of countries operating a unitary system of government are the URT, UK, France, Belgium, Italy, Gambia, Liberia, Cameroon, Ethiopia, etc.

Rigid vs. Flexible

- Provisions for amendment may be rigid or flexible
- This distinction has a strong bearing on the mode of amendment of the constitution
- A flexible constitution is that under which every description can legally be changed with the same ease and in the same manner and same body
- Constitution itself provides for modes of altering it

- Whether a written constitution is flexible or rigid depends on how easy or otherwise it is to amend

- It is however a common saying that the main fundamental attribute of a written constitution is rigidity, that is, it cannot be changed, amended or repealed like an ordinary enactment

- How the Constitution adopts to changing conditions of a given society. Normally, this is taken care of by making provisions for amendment of the Constitution by the legislature

- A rigid constitution is “one under which certain laws generally known as Constitutional or fundamental laws cannot be changed in the same manner as ordinary laws”

- They are rigid if it is difficult to amend the constitution e.g. by requiring 2/3 majority or referendum.

- It is flexible if the method of amendment is easy by requiring a simple majority.

- A Constitution may contain both flexible and rigid method of amendment depending on the importance attached to the provision. In this way stability and change are harmonized, and the Constitution retains its basic structure, ideals and authority while recognizing and embracing change and development for its own preservation and for the good of the society it serves

- It contains a set of basic principles and laws upon which the state is organized and which establishes the major organs of government, defines their functions and powers and relationship amongst them, and sets out the rights and duties of the citizens

Conclusion

- Unwritten Constitutions are in practice flexible, but written constitutions are not necessarily rigid….”

END

