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*The Word "Constitution": From Antiquity To Our Time**

SOLOMON O. UKHUEGBE**

The word "constitution" scarcely counts among the problematic issues in constitutional law; but that is only because almost everyone concerned with the subject within the Anglo-American system has managed to carry on with "hardly any discussion of this in the literature."[1] Almost all that there is is a bare meal of simple definition(s) spiced with some constitutional typology.

This gap in the textbooks could have long been addressed if anyone had bothered to respect the wish of the late *William Ivor Jennings* that a five volume treatise on constitutional law be written with the first thousand pages devoted to **general** constitutional law.[2] If that was the case, perhaps the early pages of those imaginary thousand pages could and ought to be devoted to an examination of the word "constitution" as a peculiar **juristic** concept, separate from others; even though jurists share with political writers, philosophers and others a responsibility for the evolution of "constitution" as a thorough homonym. Even in our time *Kelsen*, himself among the ablest constitutional lawyers, showed that the word was yet fertile. In the **General Theory of Law and State** and other works, he used the word "constitution" severally for the political constitution (in his words, the "positive-legal sense"), the basic norm (the "transcendental - logical sense") and indeed any norm whatsoever in relation to lower ones (the "narrowly specific sense").[2a]

I

Constitutions, and hence the word, remain important. We are possibly witnessing the fourth great age of constitution-making.[3] In Africa, as in Europe, we have seen almost overnight not merely the reconstitution of governments but indeed the State.[4] Many countries, in addition, have adopted new constitutions or are in the process of doing so[5] or at least are under pressure to call a national (constitutional) conference.[6]

These developments would seem to eclipse the source of the word "Constitution", in the sense of the **political** constitution. Several attempts have been made to provide the needed explanation. Among the best known

theories is that of the celebrated German jurisconsult *Georg Jellinek*. He linked the modern word with Roman usage, *rem publicam constituere.*[7] This has been supported by several European writers. For example, two able representatives of the old[7a] Soviet public law, *Grigoryan* and *Dolgopolov*, without citing *Jellinek*, or any other authority for that matter, were able to claim that:

> the word "constitution" (L. *constituere* - to set up, to establish) came into modern science and practice of state law from Roman jurisprudence, where it was used to designate the decrees and other acts of the supreme imperial power (in modern legal terminology, "acts" come closest in meaning to the word "constitution").[8]

This theory is not altogether satisfactory because "no historical continuity appears to exist between *constituere* and "Constitution."[9] Another item of Roman legal lexicon, *constitutio* (pl. *constitutiones*) could easily be confused with the modern word, but the Romans meant by their word something completely different. It was simply a form of legal instrument emanating from the Emperor. As *Gaius* explained, it is "that which the emperor ordains by decrees, by edict or by letter."[10]

Whatever the modern world may have received directly from Roman law (to be sure the debt is considerable), the word 'Constitution' probably does not count among them. So eminent a legal historian as *Lord Bryce* felt safe to conclude that:

> the Romans had no single word to convey what we mean by 'Constitution'. Even in the last days of the Republic Cicero had to use such phrases as *forma*, or *ratio*, or *genus rei publicae*, or *leges et instituta*, and what we call 'constitutional law' appears in the jurists of the Empire as *ius quod ad statum rei Romanae spectat.*[11]

The word "constitution" neither gained currency in England in the Roman sense of *constitutio* (or even *constituere*) nor was the political constitution described by the Roman word or a derivative. Indeed before the eighteenth century the word 'constitution' was still a "vacant term"[12] yet to be applied to the political constitution. There are some who give credit for the transformation, to the English statesman and political writer *Henry St. John, Viscount Bolingbroke.*[13] But the first comprehensive treatment of the modern concept was given to America and the world by *Thomas Paine;* and the United States, followed quickly by France, by adopting it confirmed the place of the word in modern political vocabulary.

A fact is one thing, the word for it is another. Constitutions existed before the word was applied to it. In other words, we knew constitutions before we knew the word we now call them. Afterall any community which

has attained the consciousness of a division between the laws and custom relating to government and those concerning individual relations *inter se* obviously has what could be called a "regular political constitution."[14] In any case, examples of formal (or "written") constitutions date from the Puritan revolution in England,[15] even though almost all of them were to apply elsewhere.[16] It is instructive of the modern origin of the word 'constitution' that these documents were called anything but "Constitutions." Rather they were "Charters", "Fundamental Orders"[17], "Agreement of the People",[18] "Instrument of Government"[19] and so on.

The transformation in usage was a fallout of the American Revolution, and for good reason because as *Bryce* observed, "it is doubtful whether there existed in A.D. 1776 any independent State the constitution of which the ruling authority could not have changed in the same way in which it changed its ordinary laws."[20]

II

Even in the sense of political constitution the word constitution is not a single, uniform concept but several. For example, there is an obvious division between the legal and political concepts, a division regarded by *Kelsen* as fundamental:

> the concept of the constitution, as understood in the theory of law, is, it is true, not quite the same as the corresponding concept of political theory. The former is ... the constitution in the material sense of the term, covering the norms which regulate the process of legislation. As used in political theory, the concept is made to embrace also those norms which regulate the creation and competence of the highest executive and judicial organs.[21]

On the other hand, *Carl Friedrich* contrasted the political with **three** non political concepts of the constitution: the philosophical, legal, and the historical.[22] Indeed, it is possible that "long lists of such 'meanings', historical, legal, and philosophical, can easily be compiled for the amusement of those who possess a botanical turn of mind."[23]

Surely the purpose of classifying the concepts of political constitutions must exceed mere amusement value. Constitutional lawyers, including the most eminent such as *Wheare*,[24] *Hood Phillips*,[25] and *Hogg*,[26] usually take for granted a simple dualism in the concept of constitution: formal and informal constitutions. Even sophisticated publicists, like *Kelsen*, are unable to avoid the trap of dualism, only that they create their own dualisms.[27]

But the use of the word in the books has more than two senses. The following list is unlikely to be exhaustive but it should reveal the complexity in usage:-

1. Among ancient writers especially, a constitution denotes the entire social order. It is no wonder then that the concept of *politeia* introduced by *Aristotle's* **Politics** is often confused with the modern concept of political constitutions. The most able authorities today agree that the traditional translation of *politeia* as constitution is misleading. Even as used by the greatest mind of antiquity, the word *politeia* is not free of ambiguity. Sometimes, it is in the descriptive sense of every political system and at other times it is used normatively for a particular type (in fact the best according to him), the mixed government or 'polity'[28].

2. Sometimes, 'constitution' is synonymous with the **entire** political system. This of course is a descriptive use of the word. Although this is more common with non legal usage, it is sometimes unavoidable in legal writing.

3. In contrast to the foregoing, lawyers are likely to use 'constitution' descriptively for only the basic frame of the political system. That is the sense it is applied, for example, in *Salmond's* **Jurisprudence:**

> the organisation of a modern state is of extraordinary complexity, and it is usual to regard it as divisible into two distinct parts. The first consists of its fundamental or essential elements; the second consists of its secondary elements - the details of state structure and state action. The first, essential, and basal portion is known as the *constitution* of the state. The second has no generic title. .... It is not possible to draw any hard and fast line between the constitution and the remaining portions of the state's organisation .... The distinction is one of degree, rather than one of kind, and is drawn for purposes of practical convenience, rather than in obedience to any logical requirement. The more important, fundamental, and far-reaching any principle or practice is, the more likely it is to be classed as constitutional.[29]

4. In the old books English legal writers (*e.g. Coke*) frequently used 'Constitution' in the narrow **normative** sense for the system of liberties.[30]

5. Since the seventeenth and eighteenth centuries 'constitution' has become synonymous **normatively** with fundamental, or overriding, law, and the formal, codified political constitution became the natural reference point for the word. This will not surprise anyone since this period was a great age of constitution-making. Some of its greatest thinkers thought that the formal constitution was the **proper** meaning of 'constitution'. As such, England clearly did not have any constitution. *Elle n'existe point* was how *Tocqueville* put it.[31]

It was *Paine* however who advanced the most rigorous denial of the

English Constitution:

> A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and *wherever it cannot be produced in a visible form, there is none* .... It is a body of elements, *to which you can refer* and *quote article by article.*[32]

He then posed the decisive question (in refuttal of *Edmund Burke's* praise of the English Constitution):

> Can Mr. Burke **produce** the English constitution? If he cannot, we may fairly conclude, that though it has been so much talked about, no such thing as a constitution exists, or ever did exist, and consequently that the people have yet a constitution to form.[33]

We may now justly describe *Tocqueville, Paine* and others of their kind as the **old** school. Their error lay in a verbal dispute, the assumption that the 'writtenness', or even codification, of a constitution was part of its essence when in fact a constitution is only the convictions and established conduct patterns which reflect the principles on which the relationship between power holders and power addressees is based whether or not they are formulated in a formal document.[34] The word ("constitution") that we have adopted to described these norms obscures the fact that it is the **fundamental law** that we are talking about. This difficulty is avoided in some other systems. For example, *Gesetz* is German for law and a constitution is simply *grundgesetz* or basic law. French usage is also clear enough. Sometimes a constitution is called *Loi Fondamentale.*

This misconception is not always obvious because the formal constitution, as *Paine* correctly perceived, is one of the most visible political symbols in the modern State. This is borne out by a famous passage from his pamphlet **Common Sense** (1776):

> But where, say some, is the king of America? Yet that we may not appear to be defective even in earthly honors, let a day be solemnly set apart for proclaiming the charter (constitution); let it be brought forth placed in the divine law, the word of God; let a crown be placed thereon, by which the world may know, that so far as we approve of monarchy, that in America the law is King.[34a]

Formal constitutions usually have (in English) the official title 'constitution.' But this is not necessarily so. They could be called "basic law" (*e.g.* Germany, 1949), "fundamental law" (*e.g.* USSR, 1977), or could be even in the form of an ordinary statute *e.g.* British North America Act 1867; South Africa Act 1909).

In a system like Germany's the word constitution *(Verfassung)* doc not apply to provisional constitutions, such as the 1949 Constitutio

which are simply basic or fundamental law *(grundgesetz)*. Actually, what is important, that is, the essential juristic quality of a constitution, is not what it is called rather it is the mental attitude of the power holders and addresses, which regards it as constitutive.[35]

6. Even in countries with constitutional codes, reference to the 'constitution' is seldom limited to the formal instrument. So considered, no constitution is completely 'written' (by which is usually meant a single document or a few closely related documents). The so called 'written' and 'unwritten' constitutions ("unhappy terms", as *Bryce* called them[35a]) are merely different points on the continuum of 'writtenness.' For example, in one of his early essays *Edward Corwin* argued that:

> the actual Constitution of the United States is much more than the formal written constitution. The former includes the latter - or much of it - but it also includes certain important statutes, for example, The Judiciary Act of 1789, as amended to date, The Presidential Succession Act of 1886, The Inter-State Commerce Act, or portions of it, and so forth. Also, it includes certain usages of government which have developed since the formal constitution first went into effect, and some of which, indeed have virtually repealed portions of the latter. In this connection the present role of the electoral colleges in the choice of President springs to the mind of everybody, but the rise of the committee system in Congress and the development of the President's Cabinet have done scarcely less violence to the intention - or more accurately the expectation of the framers of the constitution.[36]

In contrast, but very rarely, a constitution such as that of the United States may be "split" into two or more. The original constitution is regarded as separate from the amendments, and in fact even these may be broken into two "constitutions."[37] The problem, if it really exists at all, is peculiar to a system, adopted by the First United States Congress,[38] where amendments are not incorporated into the main text of the constitution but simply annexed to it. A different practice is found in the Soviet Union and some other countries where alterations are inserted directly into the constitutional text. An observer could detect these amendments only by comparing earlier versions of the constitution.[39]

7. As we have already noted 'constitution' may refer to a group of closely related documents. Only a few cases of multi-documentary constitutions remain today.[40] The most remarkable example from the past is the provisional constitution of the Third French Republic which was merely a series of constitutional laws adopted by National Assembly in 1875. It is interesting that this system lasted sixty-five years, in a country where the average life of a constitution hitherto was only twelve years.

A typical modern example is Isreal. The inability of the first

Knesset (parliament), which was in fact elected as a constituent assembly, to prepare a constitution has condemned that country to piecemeal constitution-making through basic laws. The effect is that the *Knesset* (though regularly re-elected) has became a permanent constituent assembly.[41]

III

We have managed so far without a definition of 'constitution'. Although the books are replete with definitions, it does not seem possible to separate the business of defining from particular conceptions of the term. The error common to almost all writers is that the neutrality of the word is taken for granted. It is far from being a neutral word, rather it is strongly laden with connotations. This by itself should not make the word too difficult for analysis since many words have **emotive** in addition to **cognitive** meaning.

The real problem is that public law writers have not always applied a distinction long recognised by philosophers, between the semantics and the pragmatics of words. The former is the relation of a word to its meaning, while the latter is the effect of a word upon its users, both speakers and hearers.[42]

This is a delicate subject, however, since the emotive meaning of a word could alter its cognitive meaning. Moreover, what is a cognitive meaning in, say, political science, could be regarded as emotive by jurists.

Still the distinction is very useful since certain connotations have little or no cognitive significance, at least for lawyers. As *Colin Munro* counselled, for a jurist, "definitions of a constitution which signal a particular ideology do not seem to be satisfactory."[43] A classic example is the claim by the revolutionary French National Assembly in Article 16 of *La Declaration Droits de l'Homme et du Citoyen* (1789):

> Any society ... in which the separation of powers is not defined, has no constitution.

There are several other instances which though less clear ought to be approached with some suspicion.

1. A definition that simply limits the idea of a constitution to the laws and custom which "determine the form and arrangements of the political system" of a country[44] or the "rules determining the creation and operation of government institutions"[45] does not accurately describe constitutions. For neither Article 25b is of the Swiss Constitution wh forbids the bleeding of "animals being slaughtered without stunning th beforehand" nor section 24(g) of Nigeria's Constitution of 1989, th

provides that "it shall be the duty of every citizen to ensure the proper upbringing of his children" has anything to do with the government of these countries.

The idea of certain matters being **by their nature** constitutional stuff while others are not is largely connotative. We have come to associate certain things with constitution; therefore we tend to think that that is all there is (or, at least should be) to constitutions. This is quite evident, for example, in *Dicey's* observation that the old constitutional requirement that the French Parliament must meet at *Versailles* is not what could otherwise be described as a constitutional matter. "Such an enactment, however practically important, would never in virtue of its own character have been termed constitutional; it was constitutional simply because it was included in the articles of the constitution."[46]

2. It was previously a respectable view among some political writers that a constitution was necessarily the act constituting the political order. In other words, if it is to be a constitution at all then it must be an original act of the people. As *Paine* put it "a constitution is not the act of a government, but of a *people constituting a government*"[47]

According to this view no legislation of an existing government could pass for a constitution, since it ought to be an act of the people antecedent to government. (To confuse these two processes "is to be fooled by words"[48].)

This distinction once exercised constitutional scholars to the extent that in French constitutional literature there was a dichotomy between *charte octroyee*, that is, constitutions given by the existing government (usually a Monarch) and *charte non-octroyee*, that is, a constitution which the nation gives itself. This is now obsolete. In any case, from the juristic point of view, there is scarcely any merit in the distinction.

3. Closely related to the foregoing is the claim of some jurists that *every* act by which a new State is *constituted* (*e.g.* by union) is necessarily a constitution, *i.e.* fundamental law. Leading Scottish jurists for example have made this claim for the Union with Scotland Act 1706 (6 Anne c.11).[49] "If a state has at some time been set up, 'constituted' by some deliberate act or acts", querried *MacCormick*, "can these constituent acts be other than constitutions?"[50].

This correlation cannot be rigidly demonstrated. For not only is the instrument, or whatever, which established Isreal not its constitution, the country was indeed able to waste "the psychological moment for Constitution-making"[51] without being worse for it.

4. There is a dominant movement in political science which regards the essence of constitution in the "strict, substantive meaning" as the *garantiste* (guarantee) element.[52] That is, the essence of a constitution is to limit and control power. Without it, no "constitution" could in fact be a constitution. This connotation is identified by men as widely separated as the great physical and cultural distance between America and India. In the former, *John Adams* would have us believe that "neither morals, nor riches, nor discipline of armies, nor all these together will do without a constitution",[53] and *E. K. Swamy* of India tells us that "the constitution of a country is the foundation on which its freedom is built."[54]

These accolades would seem almost thoughtless when we notice what we may call authoritarian constitutions, except that leading political scientists take the view that these are in fact no constitutions at all.[55] For example, because the Ethiopian Constitution of 1911 (Article 5) provides that "In the Ethiopian Empire **supreme power** rests with the Emperor", *Karl Loewenstain* argues that "it cannot claim to be genuine constitution in the substantive sense, since it fails to institutionalise shared and limited government."[56]

From this point of view, several constitutions of the last two hundred years are anything but constitutions. In fact many nineteenth century European constitutions contained virtually nothing outside institutional provisions.[57] Unlike the political scientists, jurists have, almost without exception, disregarded guarantees as the essence of constitutions. *Kelsen*[58], *Dicey*[59], *Jennings*[60], *Munro*[61] and many others maintain that a constitution can have any content whatsoever, and a constitution is no less one simply because it contains institutional provisions only.

5. However, some jurists have come round to the position in political science in (4). They argue that judicial review of legislation is essential to **formal** constitutions in the proper sense. For example, the absence of this forced *Dicey* to the conclusion that the "true character" of the French Constitution "is that of maxims of political morality."[62]

It is difficult to see how this element could affect the juristic concept of constitutions. As *Munro* observed, "judicial review of legislation exists in some countries which have (formal) constitutions but not in others, and might or might not exist in a country which lacks one."[63]

6. We may add to the above the connotation of brevity which many jurists associate with formal constitution.[64] The French, probably *Abbe Sieyes'*, invention that a constitution should be *breve et obscure* can at best be prescriptive.[65] It is certainly not a description of modern constitutions generally.

Even when we are able to exclude elements of emotive meaning, such as 1-6 above, it remains extremely difficult to generalise, and hence universalise, the defining characteristics of a constitution. *Colin Munro's* attempt, it seems, ended in failure. According to him, "the minimum content" of the concept of **formal** constitutions implies at least two elements:

> first, in order to be a constitution, it must be found in a single document or a group of associated documents, restricted in number. Secondly, constitutions consist of rules in fixed verbal form, so that they are akin to legislation, even if the constitution is not ordinary legislation.[66]

This tells us precious little about a constitution, yet "beyond certain formal features which are necessary conditions, there is little agreement about what other characteristics are necessary or sufficient."[67]

It is difficult to accept this, since fundamental to the concept of constitutions are rules relating to the structure and powers of government. Even though a constitution may contain more than these, virtually everything in it will relate directly or indirectly, in the sense of enabling or disabling, to the political authority. Hence a provision such as Article 53 of the Swiss Constitution which stipulates that every deceased person shall get a decent burial enables the government in effect, to regulate burials.

We therefore propose that the essence of the **juristic** concept of constitution is that *it is a body of the primary norms prescribing the behaviour of power holders with respect to the community and which is* ***generally*** *regarded, by the power holders and the power addressees alike, as obligatory.*

In juristic perception, a constitution is no less one simply because it is what *Karl Loewenstein*[68] and others[69] have called "nominal" or inefficacious, or because a particular segment of the population regard it as illegitimate.

Where there is a documentary constitution (to use a term invented probably by *Bryce*[70]) - whatever may be the official title, if any - it is easy to identify most, though hardly all, of these primary norms; where this form of constitution is absent, the class of these norms may enlarge or contract, almost arbitrarily, from one writer to another.[71] Even so, it is very doubtful whether it is of juristic essense to separate documentary from non documentary constitutions.

IV

The different usages of the word 'constitution' are confused even by leading public lawyers. The difficulty in identifying a *general* juristic concept of the term is compounded by the effort of some jurists to create

a peculiar concept for their own purpose. For example, 'constitution' was applied by *Kelsen* for the norm creating/validation process.

The need for a re-examination of the word in the light of juristic, as well as other, usages could understandably escape the author of a text on national constitutional law, but it is a first, vital step in transnational or general constitutional law.

Although largely ignored by the books, the word 'constitution' is more complex than the simple dualisms familiar in public law ("written"/"unwritten", "formal"/"material" and so on). Because of the difficulty which it presents one could be tempted to leave the matter of 'constitution' simply as anything recognised as such by *Blaustein & Flanz's* authoritative **Constitutions of the Countries of the World.** However, the matter is one of concept clarification, not merely defining. The lawyer's conception would remain a world apart from the political and sociological perspectives, for example. From these other points of view a constitution is not just what lawyers say it is. On the contrary, it looks simply like a "power map"[72] or "the autobiography of a power relationship."[73]

As we have seen there are many senses/concepts of the word constitution:

1. Basically there are distinct philosophical, political, historical and legal conceptions of 'constitution' (although this list is not exhaustive).

2. Adding up the different concepts, they are either descriptive or normative usages. The general normative usage by jurists is in the sense of fundamental or overriding law (in practice formal constitutions only fall within this specific usage).

3. Viewed differently there are cognitive and emotive senses of the word, although this division is not entirely clear cut since whether it is used in the cognitive or emotive sense in a particular instance may depend on the particular concept (philosophical, political, historical or legal) the user has in mind.

4. As a neutral word (in juristic usage) there is no necessary division between documentary and non documentary constitutions, and the juristic essence of a documentary constitution is independent of its contents.

NOTES

* This paper is an aspect of a large undertaking in the study of theory and methodology in constitutional law which, it is hoped, upon completion will appear in book form.

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1. *Colin Munro*, "What is a Constitution?" (1983) **Public Law** 563, 564. The puzzle of this gap in textbooks on constitutional law could be partly explained by the fact that even the large treatises on national constitutions such as *Tribe's* **American Constitutional Law** or *Seervai's* three-volume **Constitutional Law of India** avoid the subject because they have a specific object to examine. Whatever a 'constitution' is, the United States Constitution and the Indian Constitution are surely very good examples (the former "represents the best effort of its kind in the history of the world": **Tribe,** 2nd edn. preface, iii). This should in fact explain why any discussion of constitutions generally, if found at all in the books, is likely to be in works by British authors. Since the British 'constitution' is non specific, it is natural that these authors would at least attempt to justify the claim that Britain has a constitution by explaining, though usually skimpingly, what 'constitution' means.

2. See *Jennings*, **The Law and the Constitution** 4th edn. (London: London University Press, 1952) p.ix. He almost certainly had in mind something like *Duguit's* **Traite de Droit Constitutionnel.** The first three of the five volumes are devoted to general constitutional law. (He actually makes reference to this on p. 61n.)

2a. This paper is concerned with the use of the word 'constitution' for the *political constitution.* By *analogy* of political constitution, the same word is applied to governing instrument/practice, at the micro level, of associations/groups and, at the macro level, of international institutions (see for example, the "Preliminary Draft of a World Constitution" in **A Constitution for the World** published by the Centre for the Study of Democratic Institutions, Santa Barbara, Calif., 1965). By *metaphor* the word has also been applied to the law-generating process, especially by Kelsen.

3. The earlier phases are the periods after the America/French revolutions; after the first World War; and after the second World War respectively.

4. Notably Benin and Ethiopia.

5. Including Nigeria, Mauritania, Sierra-Leone, Togo, Zambia, Benin, Ethiopia and Ghana.

6. Notably in Cameroun, Madagascar, Zaire and South Africa.

7. **Allgemeine Staatslehre** Vol. 3, 3rd edn. (Berlin: Verlag von. O. Haring, 1914) ch. iv.

7a. This qualification is justified by the decline of communism and the Communist Party in the Soviet Union, events which are destined to create a new public law. However, since the paper was written, the U.S.S.R. has been succeeded by the Commonwealth of Independent States.

8. *L. Grigoryan & Y. Dolgopolov*, **Fundamentals of Soviet State Law,** ed. *B. Shchetinin* (Moscow: Progress Publishers 1971) p. 18. See also *C.J. Friedrich*, "Constitutions and Constitutionalism", in 3 **International Encyclopedia of the Social Sciences** 318.

9. *G. Sartori*, "Constitutionalism: A Preliminary Discussion" (1962) 56 **American Pol. Sci. Review** 853n.

10. Quoted in *Lee*, **The Elements of Roman Law** 4th edn. (London: Sweet & Maxwell, 1956) p. 18. See also *Sartori*, "Constitutionalism" (*supra*, n.9) p. 853.

11. *Bryce*, "Flexible and Rigid constitutions" *in* **Studies in History and Jurisprudence** Vol. 1 (Oxford: Clarendon Press, 1901) 145, 158. For the last part of the statement the author cites Ulpian's **Digest** 1.1.2.

12. *Sartori*, "Constitutionalism" (*Supra*, n.9) p. 853.

13. *Ibid.*, p. 859.

14. *Bryce*, **History and Jurisprudence** (*supra* n.11) p.161.

15. See *K. Loewenstein*, **Political Power and the Governmental Process** (Univ. of Chicago Press, 1965) p. 132.

16. Mainly the colonies in North America.

17. Fundamental Orders of Connecticut (1638).

18. The Agreement of the People (1647) put before the Long Parliament (England).

19. The Instrument of Government (1653) promulgated by Cromwell.

20. *Bryce*, **History and Jurisprudence** (*supra* n.11) p. 199. Cromwell's Constitution (*supra* n.19) could have been an exception, but Parliament did not recognise its supremacy.

21. *Kelsen*, **General Theory of Law and State** (Harvard Univ. Press, 1945) p. 119.

22. *Friedrich*, **Constitutional Government and Democracy** (Boston: Ginn & Co., 1964) p. 119. Long ago Dicey isolated the legal, historical and political conceptions of the constitution in his discussion of "the true nature of constitutional law." See *Dicey*, **An Introduction to the Study of the Law of the Constitution** (Macmillan, 1959) pp. 7 *et. seq.*

23. *Friedrich*, **Constitutional Government** (*supra* n.22) p. 120.

24. *Modern* **Constitutions** 2nd edn. (Oxford Univ. Press, 1966) pp. 1-4.

25. *Hood Phillips'* **Constitutional and Administrative Law** 7th edn. by Hood Phillips & Jackson (London: Sweet & Maxwell, 1987) pp. 5-6.

26. *Hogg*, **Constitutional Law of Canada** 1st edn. (Toronto: Carswell Co. 1977) pp. 1-2.

27. *Kelsen*, **General Theory** (*supra* n. 21) pp. 124, 125.

28. See glossary in *Sinclair's* translation of Aristotle's **Politics** (Penguin Books) p. 493.

29. 12th edn. by *P.J. Fitzgerald* (London: Sweet & Maxwell, 1966) p. 83 (emphasis original).

30. See *Friedrich*, **Constitutional Government** (*supra* n. 22) p. 119.

31. **Democracy in America** (1835) Vol. 1 ch.6.

32. **Rights of Man** p. 93 (emphasis added).

33. *Ibid.*, pp. 93-4.

34. See *Loewenstein*, **Political Power** (*supra* n.15) pp. 123 - 4.

34a. Quoted in *Corwin*, "The 'Higher Law' Background of American Constitutional Law" (1928) 42 **Harvard** *L.R.* 149.

35. See *Maarseveen & Tang*, **Written Constitutions. A Computerized Comparative Study** (Dobbs Ferry, N.Y. Oceana, 1978) pp. 39-40.

35a. *Bryce*, **History and Jurisprudence** (supra, n.11).

36. *Corwin*, "Constitution v. Constitutional Theory" (1925) 19 **American Pol. Sci. Review** 290, 291.

37. See *M. D. Forkosch*, **Constitutional Law** 2nd edn. (Mineola, N.Y.: The Foundation Press, 1969) p. 8.
38. *Ibid.*, p. 8 n.15.
39. See *R.C. Macridis & R.E. Ward*, **Modern Political Systems:** *Europe* 2nd edn. (Englewood Cliffs, N.J.: Prentice-Hall, 1968) p. 563.
40. See *Maarseveen & Tang*, **Written Constitutions** (*supra*, n.35) p. 40-41.
41. See *D.J. Elazar*, "Constitution-making: The Pre-eminently Political Act", in Banting & Simeon (ed.), **The Politics of Constitutional Change in Industrial Nations** (Macmillan, 1985) p. 232, 238.
42. See *J. Hospers*, **An Introduction to Philosophical Analysis** 2nd edn. (Englewood Cliffs, N.J.: Prentice-Hall, 1967) p. 49.
43. *Munro*, "What is a Constitution?" (*supra* n.1) p. 565.
44. *Bryce*, **History and Jurisprudence** (*supra* n.11) p. 150.
45. *Jennings*, **Law and Constitution** (*supra* n.2) p. 36.
46. *Dicey*, **Law of the Constitution** (*supra* n. 22) p. 128.
47. **Rights of Man** p. 207.
48. *Arendt*, **On Revolution** (Penguin Books, 1973) p. 154.
49. See *MacCormick*, "Does the United Kingdom Have a Constitution?" (1978) 29 N.I.L.Q.1; *T.B. Smith* "The Union of 1707 as Fundamental Law" (1957) **Public Law** 99. See also *Hood Phillips'* **Constitutional and Administrative Law** (*supra*, n. 25) pp. 63-66.
50. *Ibid.*, p. 1.
51. *B. Akzin*, "The Place of the Constitution in the Modern State", **2 Isreal Law Rev.** 1, 14n.
52. *Sartori*, "Constitutionalism" (*supra*, n. 9)857.
53. Quoted in *Arendt*, **On Revolution** (*supra*, n. 48) p. 142.
54. *Swamy*, **Glimpses of World Constitutions and Judiciaries** (Allahabad: Kitab Mahal, 1966) p. 1.
55. See *Sartori*, "Constitutionalism" (*supra*, n.9); *Loewenstein*, **Political Power** (*supra*, n. 15) ch. 5; *Friedrich*, **Constitutional Government** (*supra*, n.22) ch. 7.
56. *Loewenstein*, *ibid.*, p. 125.
57. See *Akzin*, "Constitution in the Modern State" (*supra*, n. 51) p.2.
58. **General Theory** (*supra*, n.21) p. 125.
59. **Law of the Constitution** (*supra*, n.22) p. 128.
60. **Law and Constitution** (*supra*, n.2) p. 34.
61. "Constitution" (*supra*, n.1).
62. **Law of the Constitution** (*supra*, n. 22) p. 135.
63. "Constitution" (*supra*, n. 1) p. 564.
64. The best known of this school are *Wheare* (*supra*, n. 24) and *M. McWhinney*, **Constitution-making: Principles, Process, Practice** (Univ. of Toronto Press, 1983).
65. The Prescriptive value was argued by *Nwabueze* in **Constitutionalism in the Emergent States** (London: Hurst & Co., 1973) pp. 30-34.
66. *Munro*, "Constitution" (*supra* n.1) p. 567.
67 *Ibid.*

68. **Political Power** (*supra*, n. 15) p. 147 *et seq.*

69. Including *B. Akzin*, "On the Stability and Reality of Constitutions", in *R. Bachi* ed. **Studies in Economic and Social Sciences,** (3 *Scripta Hierosolymitana*), (Jerusalem: Magnes Press, 1965) p. 313.

70. *Bryce*, **History and Jurisprudence** (*supra*, n.11) p. 205.

71. See *Jennings*, **Law and Constitution** (*supra*, n.2) p. 36.

72. *Duchacek*, **Power Maps: Comparative Politics of Constitutions** (Santa Barbara: ABC-Clio, 1973).

73. *H. Finer*, **The Theory and Practice of Modern Government** (London: Methuen & Co., 1965) p. 116.