

## Constitutionalism and Democracy: A Critical Perspective

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### Abstract

*A constitutional framework, built on a prudent regard for human beings, must enable the government to control the governed. No less important, however, is the auxiliary precaution of checking and balancing within government itself. If human law departs from the law of nature, it is no longer law but a perversion of the law. The general idea is captured in James Otis' Rights of British Colonies, Asserted and Proved (1764), wherein he stipulates: The Law of nature was not man's making, nor is it in his power to mend or alter its course. He can only perform and keep or disobey and break it. The last is never done with impunity, even in this life, if it is any punishment for a man to feel himself deprived, to find himself degraded by his own folly and wickedness from the rank of a virtuous and good man to that of a brute, or to be transformed from the friends, perhaps father, of his country to a devouring lion and tiger. Under constitutional theory, however, government must be just and reasonable, not only from the viewpoint of majority sentiment but also in conformity with higher law, what the Declaration of Independence Act of 1977 refers to as "Laws of Nature and of Nature's God". Constitutionalism means that the power of government and Leaders should be defined and Limited by the dictates of the body of the fundamental laws of the land known as the constitution. As a body of political and legal doctrine, it refers to government that is, in the first instance, devoted both to the good of the entire community and to the preservation of the rights of individual persons. Problems of constitutional governance in the 21<sup>st</sup> century will likely be problems within government recognized as democratic. The modern day phenomenon of "illiberal democracies" gains legitimacy, and thus strength, from the fact that these regimes seem reasonably democratic. Illiberal democracy, that is, nominally democratic government shorn of constitutional liberalism is not simply inadequate but dangerous, bringing within the erosion of liberty, the abuse of power, ethnic divisions, and even war. This paper examines the nexus of constitutionalism and democracy. It is argued that the spread of democracy around the world has not always been accompanied by a corresponding spread of constitutional liberty.*

**Keywords:** Constitutionalism, democracy, fundamental rights, good governance, sustainable development.

### 1. Introduction

Constitutional government, rooted in liberal political ideas, originated in Western Europe and the limited state as a defense of the individual's right to life and property, and to freedom of religion and speech. In order to secure these rights, constitutional architects emphasized checks on the power of each branch of government, impartial courts, and equality under the law. A number of democratically elected leaders have used their authority to justify restricting freedoms. A living tradition of political liberty contributes something even more than free and fair elections, or additional opportunities for political expression. Liberal democracy also provides a legal foundation for the separation of governmental powers so as to uphold basic freedoms of speech, assembly, religion, and property. Modern constitutionalism was born with the political requirement that representative government depended upon the consent of citizen subjects. Individual relinquishes certain natural rights to society if government is to have requisite power to act in order to secure the common good. As a result, participation as a citizen in a constitutional democracy carries with it the responsibility of abiding by the laws and decisions of the community in its public transactions, even when the individual disagrees. The 1979 Nigerian constitution, as consolidated in the 1999 constitution, clearly stated thus:

*“We the people of the Federal Republic of Nigeria have firmly adopted this document for the purpose of promoting the good governance and welfare of all persons in our country on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people”.*

This is the essential condition of civil society, without which it cannot exist. The laws and policies of constitutional government not only are limited in scope and grounded in consent. They are also bound to serve the well-being of the people of the society in general and of every single individual in it. Constitutionalism denotes the supremacy of the Laws and practices by which a society is governed.

## **2. Constitutionalism: Conceptual Discourse**

The term constitutionalism means that the power of leaders and government bodies is limited, and that these limits can be enforced through established procedures. As a body of political or legal doctrine, it refers to government that is, in the first instance, devoted both to the good of the entire community and to the preservation of the rights of individual persons. Constitutionalism is a concept in political theory that explains that a government does not derive its power from itself, but gain its power as the result of there being a set of written laws that give the governing body certain powers. This concept is in sharp opposition to monarchies, theocracies, and dictatorships, in which the power does not derive from a pre-drawn legal document. In a monarchy, the power is derived as an inalienable right of the king or queen. In a theocracy, all of the power of a governing party is derived from a set of religious beliefs, which are thought to exist as a result of the will of God, and in a dictatorship, the power is derived from the will of a single or group of people and their ideology, which does not necessarily represent the will of the people.

Constitutionalism therefore naturally prescribes a system of government in which the government's powers are limited. Government officials, whether elected or not, cannot act against their own constitutions. Constitutional law is the highest body of law in the land, which all citizens, including the government, are subjected to. Several nations around the world have adopted forms of constitutionalism in their governments. In the United States, not only does the constitution itself limit the power of the government, it prescribes that the three different branches of the government limit the powers of the other branches of government by imposing a system of checks and balances. For example, in the United States, the president, who is the chief of the executive branch of government, may not declare war on another nation without congressional approval. The United States constitution was set up in this way to limit the power of any one branch of its government. Another form of constitutionalism in the world exists in the United Kingdom, New Zealand, and Israel. These nations all have uncodified constitutions. An uncodified constitution is not a written constitution, but rather a system of unwritten laws, which depend heavily on legislative precedence and parliamentary procedure. Regardless of the lack of an actual physical document in which the supreme law of the land is used, the constitution may be referred to in court in these nations, to which the government themselves must also submit and cannot act against. Constitutionalism is a complex of ideas, attitudes, and patterns of behavior elaborating the principle that the authority of government derives from and is limited by a body of fundamental law. Therefore, a political organization is constitutional to the extent that it contains institutionalized mechanisms of power control for the protection of the interests and liberties of the citizenry, including those that may be in the minority (Davies, 1996).

Constitutionalism is descriptive of a complicated concept, deeply indebted in historical experience, governmental powers to the limitations of a higher law. Constitutionalism proclaims the desirability of the rule of law as opposed to rule by the arbitrary judgment. Constitutionalism is that in political life to do anything they please in any manner they choose; they are bound to observe both the limitations on power and the procedures which are set out in the supreme, constitutional law of the community. It may therefore be said that the touchstone of constitutionalism is the concept of limited government under a higher law. Constitutionalism has both descriptive and prescriptive connotations. Used descriptively, it refers chiefly to the historical struggle for constitutional recognition of the people's rights, freedoms, and privileges. For example, the 1999 Nigerian constitution, as amended in 2011, makes elaborate provisions for the promotion and protection of the fundamental human rights as contained in sections 33,35,36,37,38,39,40,41,42,43,44 and 45 among others. Similarly, the constitution, under its fundamental objectives and directive principles, makes elaborate provisions on government obligations to the people as contained in sections 13 through 21. Used prescriptively, its meaning incorporates those features of government seen as the essential elements of the constitution. This approach addresses what a constitution should be. The principle of constitutionalism is not constitution in itself but limits government and individual actions and activities according to constitutional restraint.

It states that nobody no matter how highly placed is above the law and that the law is no respecter of anybody. This principle of constitutionalism empowers the judiciary to declare any action that conflicts with the constitutional provision as null and void and ultra vires. It also grants individuals the chance to challenge any action of the government viewed as unconstitutional in the law court. Constitutionalism means adherence to the letter and spirit of the constitution. A constitution may be defined as the whole body of fundamental laws, customs, conventions, principles, rules and regulations according to which a particular government of a country or an organization operates. The constitution therefore specifies the working of a government or organization, the functions of its officials, the rights and duties of its citizens. As a result of the complex nature of modern day government, the use of constitution in order to spell out the functions and relationship among the branches of government has become a desideratum. By dividing the business of government among three independent branches, the constitutional framers ensured that the separation of powers of government legislative, executive and judiciary were not monopolized by any single branch or organ.

That is, the amount of governmental political powers that exist in a given state should not be rested or consolidated in one person or one organ of government. That if these powers are divided into three organs of government, that the chances of dictatorship or tyranny will be reduced to the barest minimum. It was a French political thinker and jurist Baron de Montesquieu who developed and popularized the principle of separation of powers in his book entitled "Espirit des Lois" which means the spirit of Laws published in 1748. Political Scientists like Locke, Jefferson, Rousseau, Bodin, Plato and Aristotle had earlier expressed their views on the principle of separation of powers Montesquieu argued inter alia that if rights, Liberty and freedom of citizens are to be maintained and guaranteed, then the three organs of government must be separated and entrusted to different people to administer. That there will be chaos, violence, dictatorship, tyranny and oppression if there is no separation of powers, that the functions of government of law making, execution and adjudication should be handled by different organs of government without interference. Allocating government authority among three separate organs or branches also prevented the formation of too strong a national government capable of overpowering individual state governments. Government powers and responsibilities intentionally overlap. One example is how congressional authority to make laws can be checked by a presidential veto.

This veto, in turn, can be overridden by a two-thirds vote in both house of congress. The president serves as Commander-in-chief, but only congress has the authority to raise and support an army, and formally to declare war. The president has the power to appoint all federal judges, ambassadors, and other high government officials, but all appointments must have the advice and consent of the senate. No law can go into effect unless it is passed by both houses of congress. The Supreme Court has the final authority to strike down both legislative and executive acts as unconstitutional. Under the Nigerian constitution, confederation was to give way to federation – a system in which power would be shared between one national and several state governments. The national government was to be supreme in certain areas, but the states were not to become mere administrative units of the central government. States rights were protected in a number of ways. First, the 2<sup>nd</sup> Amendment to the constitution made clear that a number of spheres of activity were to be reserved for the states. State governments, for instance, are largely responsible for managing their own budgets and making and enforcing laws in many areas that impact residents of the state. Second, states were also protected by their third; the amending procedure of the constitution itself also reflected states interests, for any amendment to the constitution requires approval by three-fourths of all state legislatures as well as two-thirds of the members of both houses of congress.

These protections were built into the constitution as well, to prevent the smaller states from being dominated by the power of the larger states. The sharing of power between states and the national government is one more structural check in an elaborate scheme of checks and balances. The preamble of the constitution looked to a new Nigerian political order based on the following principles: to form a more perfect union, to provide for the common defense, to establish justice, and secure the blessings of liberty for present and future generations. Liberty is the unrestrained enjoyment of natural or fundamental rights. It is freedom from constraint, captivity, slavery or tyranny; and to do as one pleases within the bounds of the law. Liberty involves personal liberty in areas of religion, expression, thought, liberty in the areas of voting and contesting elections, public opinion, press freedom and other forms of political activities; and economic liberty such as right to work in any part of the country, and to belong to any occupation, to earn responsible labour hours. The entrenchment reasonable labour hours. The entrenchment of liberty in the constitution is a common safeguard. The inclusion of these freedoms of limits to these freedoms makes it difficult for the government to effect a change in them. The violation of these freedoms means a violation of the provisions of the constitution.

### ***3. Democracy: Towards An Understanding***

The second variable in our discourse is democracy. In modern understanding, democracy is government of the people by the people and for the people. One of the political realities of our contemporary global system is democracy, a political process which focuses on the necessity and imperative of governments to rule only by the consent of the majority. The popular belief is that properly understood and practiced, democracy can remove the layers of national socio-economic and political darkness. Countries that have continue to insist that it will be absolutely difficult to get things done in pluralistic society with poor records of democratic values and practices. Democracy, adequately understood, is a theory that which a good government, whatever its form, must be run (Oluwole, 2003). Such principles include those of justice, equity, freedom, liberty, accountability, openness and transparency in government. In this regard, democracy not only prescribes how political power should be required but also what to do with it or how it should be exercised. Therefore, democracy specifies who constitutes the legitimate government and wields the authority inherent in the state (the elected representatives), how they acquire authority (free and fair elections, choice between parties) and how they are to exercise it (in board harmony with public good) (Parekh, 1993). This makes democracy amenable to moral and ethical justifications. Hence, constitutionalism forms the philosophical foundation upon which democracy and democratic theories are built.

With the way things are going politically in contemporary Nigeria, it is doubtful, whether Nigerians will ever realize the dreams of allowing democratic tenets to influence the country's political life. In this connection, democratic reality implies that all Nigerians must be willing to take difficult democratic decisions, and must see the benefits in supporting their country's democratic institutions. With the current state of democracy in the country, many Nigerians have openly wondered whether the struggle for political independence was a worthwhile exercise. Clearly, all is not well with democracy in Nigeria. Still, democracy remains the only viable and sustainable weapon for tackling national backwardness and for securing recognition and respect from the international community. No one will ever doubt the political fact that a strong democratic foundation will provide Nigerians with the opportunity to choose their own future. These are need for all Nigerians to work together democratically, and openly express, development of democracy. One of the democracy is that the Nigerian democracy is that the Nigerian elite have not demonstrated enough support for the country's democratic process, especially in times of increasing political uncertainties. The bulk of the Nigerian elite have virtually abandoned political involvement in government and governance. They have left the process of democratic development in the hands of the "politicians", which may well explain the low level of adherence to democratic procedures and values in the country.

One of the reasons why most of the highly developed states are experiencing stable democracy is the undiluted commitments of their elite to ensuring right political governance. It must be repeatedly stressed that Nigeria will find it hard to rise to the one of the world stable and progressive democracy, if the Nigerian elite choose as mere political spectators. Undoubtedly, the Nigerian elite can, just as their overseas counterparts have demonstrated, contribute to the growth of the Nigerian democracy. Greater elite participation in the country's democratic process must become the defining characteristics of Nigeria's political system. Despite making 14 years of democracy, the political attitude of the majority of the Nigerian elite has been predominantly negative. It thus appears that Nigeria's efforts to advance democratically will require a new shift in favour of greater elite involvement in the nation's politics. In Nigeria today, what we have is democracy without social, economic and political development (Ogundiya, 2010). There is no doubt that the degree of support for democracy is largely influenced by economic fortunes.

This means that the 71 percent of Nigerians living below the poverty line, by international estimates or the 54 percent poor Nigerians, by a 2005 central Bank of Nigeria (CBN) report, are not economically motivated to demonstrate sufficient and effective support for Nigeria's democracy. All the same, the less privileged classes in Nigeria can offer considerable support for achieving sustainable democracy in Nigeria, if they can be overtly organized into pro-democratic groups. The current economic and political reform efforts may well push less economically empowered Nigerians from their economic adversities right up to the middle class bracket. Economically and socially disadvantaged Nigerians may well discover in the long-run how support for democracy can widen opportunities for political influence and business. Since independence in Nigeria in 1960, it is reasonable to infer that the country has failed to enthrone a durable and sustainable democracy.

Nigeria's democracy has been violent ridden characterized with wanton destruction of lives and properties (Ogundiya, 2010). The Ekiti-rurun election and all other elections that have been flawed are pointers that transparency is seriously lacking in our democratic efforts in the last 14 years. The people's vote seems not to count in determining who governs as elections are rigged or its outcome determined before the poll and more importantly under age voting in the Northern part of the country during 2015 presidential election. Therefore, procedurally, democracy in Nigeria is lamed and in terms of its conceptual outcome has failed to meet the expectations of the people. Furthermore, Nigeria's democracy (if it could be so described) has tended to promote inequality rather than equality. Toyo's (1994) comment is also instructive; there can be no genuine democracy in a country where citizens are grossly unequal in wealth and the poor who are invariably the majority, are dependent on the wealthy.

Due to the fact that wealth is power, where such a cleavage and dependency exist, political power is inevitably in the hands of the wealthy. In this scenario, democracy ceases to be democracy in reality; in effect it is a plutocracy. By all standards, the path to democratic development in the country will require joint political effort between the ruling party, political parties and most importantly, the Nigerian electorate. Clearly, in a pluralistic society like Nigeria, democratic enthronement is possible, only if there are organizational unity at all levels of governance. The Nigeria elite, the electronic and the print media, have significant roles in the race of reach democratic maturity, by helping the people to understand the democratic process, guide them to appreciate what Nigerians want from the countries democratic as well as outline the structure of democratic opportunities the Nigerian political system can support. Democracy will remain an article of faith if the law is not supreme. The constitutionalism guarantees the foundational human rights, such as person, right to personal liberty, right to fair hearing, right to private family life, right to freedom of religion, right to vote and voted for in elections, right to freedom of expression, among others, yet if the law is not supreme the citizens will not enjoy these rights. Therefore, constitutionalism sustains democracy, which guarantees the fundamental human rights.

#### **4. *The Nexus of Constitutionalism and Democracy***

Democracy has become the political realities of our cotemporary global system, a political process which focuses on the necessity and imperative of governments to rule by the consent of the majority. In all societies of the world today, the issue is not which political system is appropriate but rather when will society become democratized or full democratic (Ogundiya, 2010). The democratization project is therefore, regarded as the age of civilization that every society should strive to attain rather than a political option among many others (Owolabi, 2001). Democracy has been recognized as the only moral and legitimate as the only moral and legitimate way through which a society can be administered. Democracy is a theory that sets some basic principles according to which a good government, whatever its form, must be run (Oluwole, 2003). Such principles include those of justice, equity, freedom, liberty, openness, accountability and transparency in government. Constitutionalism in the context of this paper provides guidance to democracy in terms of individual rights, limited welfare rights, checks and balances. Democratic consolidation is incomplete without the support of constitutional liberalism. Constitutionalism means adherence to the letter and spirit of the constitution. A constitution in the context of this paper is defined as the whole body of fundamental laws, customs, conventions, principles, rules and regulations according to which a particular government of a country or an organization operates. Meanwhile, it is not an overstatement to contend that constitutionalism provides the principles by which democratic government is governed. These principles are:

- **Equality before the law**

It stresses that fact that, nobody is above the law irrespective of the person's position or wealth. The law therefore should not be bent to favour any person whether rich or poor, young or old, king or servant, literate or illiterate, etc. The principle therefore states that all citizens of a country should enjoy equal access to law facilities, equal right to fair hearing, and legal advice in the court of law.

- **Limitation in the Exercise of functions**

This implies that the activities of those who govern should not be absolute. There is a constitutional limitation in the exercise of their functions.

- **Fundamental Human Rights**

Constitutionalism enhances the protection of the citizens' fundamental human rights. This principle contends that citizens of a country should enjoy certain basic inalienable rights and liberties, violation of which they have the right to seek redress in the law court. These fundamental human rights are specified in most written constitutions.

- **Popular Sovereignty**

Constitutionalism promotes the right of every adult to vote and be voted for at any political elections.

- **Judicial Independence**

Constitutionalism implies that only the constitutional courts can enforce the people's rights like high courts, appeal courts and the supreme courts. It also grants individuals the chance to challenge any action of government viewed as unconstitutional in the law court. The entrenchment of rights and liberties in the constitution is a common safeguard. The inclusion of these freedoms in a written and rigid constitution and the setting of limits to these freedoms make it difficult for the government to effect a change in them. The violation of these freedoms means a violation of the provisions of the constitution. Therefore, constitution guarantees the fundamental human rights, personal liberty, and freedom which are the essence of democracy. If the people cannot freely elect their representatives in government, disenfranchised for no genuine reason and prevented from active participation in the electoral process, as control well as control the government, then that government is not democratic. In addition to agreement is not democratic. In addition to agreement on rules for the competition of power, there must be fundamental and self-enforcing restraints on the exercise power.

One effect of over-emphasizing democracy as the ultimate given to creating imaginative constitutions for transitional countries. This is done not simply by scheduling frequent elections or writing up a list of rights, but by violate those rights. Constitutional government looks beyond the procedures for selecting a government to the kind of deliberative arrangements, to the kind of public passions that defend individual liberty and the rule of law. This requires a mutual commitment among elites through the coordinating mechanism of a constitution, related political institutions, and often through an elite pact or settlement as well, where governments maintain order by building coalitions among leading political parties and interest groups. The goal is to enforce limits on state authority, no matter which party or faction may control the state at any given time. Also, at the heart of the matter is the difference between constitutional government and democracy. The problem has been difficult to recognize since democracy has coincided with liberal democracy.

The mix of freedoms associated with constitutional liberalism is theoretically distinct from democracy. From the time of plato and Aristotle, democracy has meant rule by the people. The governments produced by elections may be inefficient, corrupt, shortsighted, irresponsible, dominated by special interests, and incapable of adopting policies demanded by the public good. While these qualities make such governments undesirable, they do not make them undemocratic. Democracy is one public virtue, not the only one, and the relation of democracy to other public virtues and vices can only be understood of democracy is clearly distinguished from the other characteristics of political systems. But elections and mass mobilization do not always vouchsafe liberal constitutional government. There is a growing unease at the rapid spread of multiparty elections across south-central Europe, Asia, Africa and Latin` America, perhaps because of what happens after the elections. Some elected popular leaders have bypassed their parliaments and ruled by presidential practices.

The doctrine of checks and balances advocates the use of one organ of government to check the activities of the other organs. This is where the powers of one organ are used to check the powers of other organs or branches. These constitutional acts of checks and balanced have to violation and naked use of powers by different organs of government. Constitutionalism is linked up to the idea of limited government through mechanisms such as mixed constitution (balancing several group in society), Separation of powers, checks and balances, human rights, etc. Constitutionalism thus contains an inherent tension as it simultaneously aims to constitute political power (and a political society) and tires to limit this power through legal means. The relation between constitutionalism and democracy is dialectic, there is an irresolvable tension between constitutionalism and democracy, yet the two also depend on each other. A constitutional framework, built on a prudent regard for human beings, must enable the government to control the governed.

## **5. Conclusion**

Democracy remains the only weapon for tackling national backwardness and for securing recognition and respect from the international community. A corner stone of democratic government is adherence to the letter and spirit of constitution, That is, those who govern should govern according to the dictates of the Law. The law stipulates the type, nature and scope of government, as well as the nature of relationship among the organs of government. It provides equal opportunities for all citizens and makes provisions on how the personal freedom and liberties of the people will be promoted and protected. Democracy will remain an article of faith if the law is not supreme. The constitutionalism guarantees the fundamental human rights, such as right to life, right to dignity of human person, right to personal liberty, right to fair hearing, right to private family life, right to freedom of religion, right to vote and be voted for in elections, right to freedom of expression, among others that are the essence of democracy, the inescapable sine qua non.

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