

**CATHOLIC UMINIVERSITY OF  
EASTERN AFRICA**

**CUEA CLS 103**

**PRINCIPLES OF CONSTITUTIONAL  
LAW**

**LECTURE NOTES**

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## **1. The province of constitutional law**

Constitutional law is the body of law which defines the relationship of different entities within a state, namely, the executive, the legislature, and the judiciary. ... Constitutional law deals with the fundamental principles by which the government exercises its authority.

## **2. What, then, is a constitution?**

A 'constitution', is a systematized, codified and orderly set of core constitutional rules

- It is usually embodied in a document specifically referred to as the "constitution",
- It is a normative system, 'a way of life,'
- It may have written and unwritten components, concrete and abstract components,
- It embodies core legal, cultural, economic, political and social values of the society,

'A constitution is a document having a special legal sanctity which sets out the framework and the principle functions of the organs of government within a state and declares the principles by which those organs must operate'<sup>1</sup>

'It is the principles or rules whether written or unwritten whether legal or non-legal, that seeks to sufficiently define the duties, functions and powers of Government and the relationship between the Government and its citizens which form the constitution of a state. (Kanyeihamba)

## **3. The concept of Constitutionalism**

### **Statutes**

Preamble to the CoK 2010

Article 249(1)(c)

### **Case Law**

- Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others [2012] eKLR

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<sup>1</sup> AW Bradley & EK Ewing (eds) Constitutional & Administrative Law (1994) 4

- Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others [2015] eKLR
- Teachers Service Commission v Kenya National Union of Teachers & 2 others [2015] eKLR at para 58 p13

Constitutionalism is the theory of limited government. A principle object of constitutional theory and practice is to determine the agreed principles and rules that determine the structure, powers and limitations of Government. This principle object is achieved by institutionalising and entrenching certain limitations on government power in the constitution. The principle is related to the Rule of Law but is not identical to it.<sup>2</sup> It finds its most potent expression in articles 2<sup>3</sup> and 3<sup>4</sup> of the constitution. The constitution is an original act of the people that predates government and is superior to it. Government must be according to the constitution.<sup>5</sup> In Njoya & Others v Attorney General [2004] 1 KLR 261, 277 at para. 15 Justice Ringera observed that constitutionalism was one of the most important values and principles of the Constitution. According to the learned judge, constitutionalism betokens limited government under the rule of law

In written constitutions the competence of the different arms of government are usually laid down and circumscribed. Because of this, constitutionalism, to a large extent, presupposes the existence of a written constitution. Constitutionalism recognises the necessity of government. But inherent in Government is a tendency towards arbitrariness. Constitutionalism therefore insists on limitations in the exercise of Government power

#### **4. Constitutionalism and constitutions: Constitutionality and democracy**

What is the relationship between-?

- Constitutionalism and democracy.
- Constitutionalism and the constitution.

#### **5. Constitutionalism and Democracy**

Democracy, according to the most quoted definition, is a government of the people, for the people and by the people. This underlies the popular concept of government. It is distinguished from a

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<sup>2</sup> Per Anyara Emukule J in Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others MOMBASA PETITION NO. 19 OF 2015 [2015] eKLR at p 26

<sup>3</sup> The supremacy of the constitution

<sup>4</sup> Defence of the constitution

<sup>5</sup> Again put differently, the constitutionalism principles require that all government action must comply with the law, including the Constitution .Per Anyara Emukule J in Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others MOMBASA PETITION NO. 19 OF 2015 [2015] eKLR at p 26

monarchy, an autocracy or a dictatorship. It is a government elected by free, regular and periodic elections based on universal adult suffrage.

But democracies can also support absolute and unlimited governments, so democracy is not necessarily synonymous with constitutionalism. Fascism and Nazism were all supported by overwhelming majorities and had written constitutions. They were however 'unlimited' governments and therefore incompatible with constitutionalism. A distinction is now being made between electoral democracy, which is considered deficient and liberal democracy which is perceived to be a better guarantor of individual rights, Constitutionalism is counter majoritarian. It starts by enunciating a zone of autonomy for the individual which even popularly elected governments cannot abridge. It then protects this zone of autonomy through a system of judicial review. It puts break on the tyranny of numbers.

As Justice Emukule correctly states 'Constitutionalism facilitates, indeed makes it possible for a democratic political system by creating an orderly framework within which people make political decisions. Constitutionalism and the rule of law are not in conflict with democracy; rather they are essential to it (democracy)'<sup>6</sup>.

## **6. Constitutionalism and constitutions**

A government can be established by and indeed govern according to the constitution, even a written one. That does not of itself make it a government based on constitutionalism. Constitutions can be used for purposes other than restraints on government. Some constitutions are known to facilitate, rather than restrain, the exercise of absolute power. The constitutions of the Nazi fascist apartheid and many communist regimes fall in this category.

## **7. Constitutions without 'constitutionalism.'**

The key word in the study of the concept of constitutionalism is 'limitation'. There is, as the late HWO Okoth-Ogendo would say, a constitutions without constitutionalism. The key characteristic of constitutionalism is limitation whatever the structure of government. A democratic government is not necessarily a government based on constitutionalism. A government according to a constitution is not necessarily a government based on constitutionalism. Monarchies,

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<sup>6</sup> Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others MOMBASA PETITION NO. 19 OF 2015 [2015] eKLR at p 27

oligarchies or aristocracies are not necessarily incompatible with constitutionalism. Unlimited government is the antithesis of constitutionalism.

## 8. The nature and form of the limitations

How and in what form are the restraints to be administered? Must the restraints be legal rules or can tradition usage and conventions suffice. What is the nature of restraints to be placed on government? Are there some minimum restraints that must exist?

In a written constitution the restraints are usually contained in the constitution itself. In an unwritten constitution the restraints can only be in the form of tradition convention or usage. The restraint here is political rather than legal

Legal restraints do not necessarily work better than non-legal ones. The UK constitution does not place any legal restraints on legislative power but such is the strength of the force of tradition that there are some things that parliament can simply not dream of doing.

‘An understanding of the scope and importance of the principles of the rule of law and Constitutionalism is critical from three aspects. **Firstly, the Constitution provides for fundamental human rights and individual freedoms**, which could be susceptible to Government interference. Although democratic governments are usually solicitous of those rights there are occasions when the majority is tempted to ignore fundamental rights in order to accomplish collective goals more easily and effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. **Secondly, a Constitution may seek to ensure that vulnerable minority identities are protected against assimilative pressures of the majority. Thirdly, a Constitution may provide for division of political power that allocates political power amongst different levels of government.** That purpose would be defeated if one of these democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally...**The fourth underlying constitutional principle concerns the protection of minorities.** This is an independent principle set out in Article 56 (minorities and marginalized groups). The protection of minority rights reflects an important underlying constitutional value<sup>7</sup>

## 9. Some types of limitations

The nature and contents of the restraints include and are not limited to;

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<sup>7</sup> Muslims for Human Rights (MUHURI) & another v Inspector-General of Police & 5 others MOMBASA PETITION NO. 19 OF 2015 [2015] eKLR at p 27

- Guarantees of civil liberties, (Chapter 4 CoK 2010)
- Fundamental rights and freedoms (Chapter 4 CoK 2010)
- An independent judiciary to enforce the guarantees (Chapter 8 CoK 2010)
- Political accountability(Article 10(2)(c ) CoK 2010
- Separation of powers and rule of law ( Preamble, Article 10
- Judicial review of administrative action Articles 23 & 47
- Judicial review to determine constitutionality of government action Article 165

## **10. How to recognise the presence or absence of constitutionalism**

‘A contemporary liberal democrat, if asked to lay down a set of minimum standards, may well be very willing to concede that constitutionalism is practiced where the government is genuinely accountable to an entity which is distinct from itself, where elections are freely held on a wide franchise at frequent intervals, where political groups are free to organize in opposition to the government in office and where effective legal guarantees of fundamental civil liberties enforced by an independent judiciary: and he may not be easily persuaded to identify constitutionalism in a country where any of these conditions is lacking’ (Quoted in Nwabueze at p 10)

## **11. Why must power be limited?**

It is a consequence of the inherent tension between constitutionalism and democracy. Democracy is about majority wishes, even if it leads to the dictatorship of the majority. Constitutionalism is about limiting government even if government is democratically elected. It is counter-majoritarian. Electoral democracy is considered insufficient and inferior to liberal democracy.

## **12. Constitutionalism and written constitutions**

In written constitutions the competence of the different arms of government are usually laid down and circumscribed. Because of this constitutionalism to a large extent presupposes the existence of a written constitution. The constitution is an original act that predates government and is superior to it. It need not be promulgated by a law making process but there is nothing to stop the constitution thus made from prescribing that it will only come into force upon formal enactment. Parliament will then be exercising a delegated rather than a principal power to make a constitution



## 13. Constitutionalism in the CoK 2010

### Article 3

#### Defend this Constitution.

3. (1) Every person has an obligation to respect, uphold and defend this Constitution.

(2) Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful

Article 249 (1) the objects of the commissions and the independent offices

To— (a) protect the sovereignty of the people; (b) secure the observance by all State organs of democratic values and principles; and (c) promote **constitutionalism**.

### Promulgation

AND WHEREAS for the last two decades, the people of Kenya have yearned for a new Constitution which— (a) guarantees peace, national unity and integrity of the Republic of Kenya in order to safeguard the well-being of the people of Kenya; (b) establishes a free and democratic system of Government that ensures good governance, **constitutionalism**, and the rule of law, human rights and gender equity

## 14. Functions of the constitution (adapted from Ben Sihanya)

The purpose of a constitution is to structure distribute and allocate government power. According to Professor Ben Sihanya, the functions of a constitution are as follows;

- It constitutes the state and defines its sovereignty
- It reconstructs reconstitutes or restructures the state
- It defines, creates and produces public power
- It allocates and distributes power to the different organs of the state
- It regulates the exercise of public power
- It defines stipulates and guarantees fundamental rights and freedoms of the individual
- It provides a framework for dispute resolution
- It provides for and regulates the amendment of constitutional values and provisions

## **15. 'Written' vs 'unwritten' constitutions**

In most legal systems, the structure, powers functions and duties of government as well as its relationship with the citizens is embodied in a single document referred to as the 'constitution'. However, in the United Kingdom of Great Britain and Northern Ireland, due to historical and political reasons, such a written document does not exist.

## **16. The 'Unwritten' UK Constitution**

The UK has an unwritten constitution— the 'constitution' is found in various statutes enacted at vastly different times, places and contexts such as the Magna Carta, (see Holt, J.C., Magna Carta, 2nd edition 1992), the Petition of Right, the Bill of Rights, The Act of Settlement 1700, and the Parliament Act 1911, and Parliament Act 1949. The 'constitution' is also found in case-law, such as the historical decision in *Entick v. Carrington* (1765) 19 St Tr 1030, and the landmark decision of *M v. Home Office* (1994) 1 AC 377; (1992) QB 270.

## **17. The distinction between 'written' and 'unwritten' 'constitutions'**

. A 'constitution' is a legal expression which identifies all the elements of how a country is governed, whether or not those elements are reduced to writing.

The distinction is therefore one of form not rather than substance. 'Unwritten' does not mean 'not in writing'. It simply means that there is no single document or series of documents that are specifically referred to as the constitution.

## **18. Constitutional moments**

So far there is only one surviving constitution that answers to the technical description- 'unwritten'. The usual form of constitution is the written one. Constitutions are generally written when:

- There is transfer and attainment of power.

- There is need for a cease fire document or upon settlement of a civil strife.
- Upon secession or amalgamation of states.

These occasions are sometimes referred to as the “constitutional moments”

## **19. The importance of the constitution**

Constitutions are generally regarded as the supreme law of the land- cf Article 2 constitution of Kenya. It is a sacred covenant between ‘the governors’ and ‘the governed’. Constitutions are intended to be enduring documents. It is not to be tampered with except on grounds of utmost necessity. Frequent changes tend to reduce the constitution into a sham and rob it of its ‘sacred’ value.

## **20. Contents of a good constitution**

There is no hard and fast rule about what should and what should not go into a constitution. The contents length and complexity of a constitution are country –specific. But the general rule appears to be that a good constitution consists of only the basic and fundamental laws which the inhabitants consider to be essential for their governance or well-being. Other laws are best left to other forms of legal instruments

## **21. Essential feature of a good constitution**

An essential feature of every good constitution is how well it defines describes and delimits the functions and powers of government, in other words, how well it entrenches constitutionalism. Constitutions are country-specific. There is no ‘one-size-fits-all’ constitution. Often they are compromise, negotiated documents that may be far from ideal. But there are some fundamental characteristics that no good constitution can ever do without. A good constitution;

- Must express the beliefs needs and aspirations of the people
- Should be flexible- Flexibility should not facilitate haphazard amendments. Good constitutions move with the times without seeming to be destroyed by the times. Too rigid a constitutions that does not move with the times risks being overthrown by revolution
- Must be designed to ensure that it attracts the right kind of leadership

## **22. Safeguarding the constitution**

Constitutions need political will to thrive but cannot depend on politicians to thrive. The judiciary and citizenry are the ultimate defenders of any constitution. An independent judiciary and a politically sensitized citizenry are considered the best guarantors of the constitution

## **23. Types of constitutions**

The type and content of any constitution depends on the history, environment, and character of the community it is intended to serve. It follows that there are different constitutions in the world since states differ in many respects. The 'donors' of the Westminster model constitutions did not appreciate this important fact leading to disastrous constitutional experiments in Africa. There is no 'one- type -fit- all- situations.'

## **24. Typology by form**

### **a) Written and unwritten**

In a vast majority of modern states or political societies it should be possible to find an identifiable document or group of documents called the constitution which should embody a selection of the most important rules about the government of the country. The most notable exceptions are the UK and to a limited extent at some stage of their constitutional development, Israel and New Zealand which have since moved on.

### **b) 'Written' and 'unwritten'**

'Unwritten' does not mean 'not in writing'. It means that there is no document or series of documents that can be specifically identified as 'the constitution' of the state. Unwritten constitutions can consist of written laws, customs and traditions, conventions 'practices that have acquired the force of law through interpretations by judicial organs legislative organs commentators and general acceptance. It means an authoritative and reasonably comprehensive document that can be specifically referred to as 'the constitution' is lacking.

The constitution is to be found in written laws, conventions, customs, traditions and practices that have acquired the force of law by general acceptance or authoritative interpretation. The best example of an 'unwritten' constitution is the UK constitution

### **c) Characteristics of written constitutions**

A 'written' constitution can be flexible, rigid, republican, monarchical, presidential, parliamentary, unitary, federal or Diarchical or a combination of the foregoing. There is a single document or series of documents that can be specifically referred to as 'the constitution'. Written constitutions contain what is referred to as the fundamental laws. They generally enjoy hierarchical superiority. They usually have a provision for judicial review of executive and legislative acts to ensure compatibility with the constitution. Written constitutions tend to be rigid; 'Written' constitutions usually have special procedures for amendments. They have entrenched provisions, may outlaw the amendment of certain provisions. They may have different provisions for amending specific provisions. Examples of written constitutions are the US and Kenyan Constitutions. They are the product of a conscious act of political will at a 'constitutional moment'

### **d) The unwritten UK constitution**

The unwritten UK Constitution is made up of several written statutes

- The Magna Carta 1215
- The Bill of Rights 1688
- The Act of Union 1701
- The Acts of Parliament 1916 and 1949

The EAP had its constitutions in the

- The Zanzibar Order in Council 1884
- The African Order in Council 1889
- The EA order in Councils 1897 1899 1902 1905 1907 and;
- The KC order in Council 1920

### **e) Advantages of written constitutions**

- It is tangible and its provisions are easily ascertainable
- Can provide for a method of its own alteration or repeal

- Can encourage stability by providing for a mechanism for change
- Can be used to emphasize the importance of a major change in political direction
- It is the only way to design a system of federalism

#### **f) Disadvantages of written constitutions**

- They tend to incorporate current issues at the expense of the future
- Have a tendency to be rigid and may not move with the times
- They are less adaptable to change
- The mechanism for judicial review, which is a common characteristic of written constitutions, may endanger the separation of powers is inevitable
- They can be changed or even abolished with ease since they are not the product of collective wisdom that have stood the test of time and assumed a status of inalterability e.g. some conventions of the British Constitution

### **25. Typology by substance**

In this typology, we consider the actual provisions of the constitution and characterise it by the kind of government structure it creates

There are many different types of constitutions. The major ones are

- Autochthonous and super imposed
- Permanent and temporary
- Supreme and not supreme
- Detailed and not detailed
- Rigid and flexible
- Monarchical and republican
- Unitary and Federal
- Presidential and parliamentary
- Diarchical and other constitutions

#### **a) Autochthonous and imposed constitutions**

A constitution is autochthonous if it is indigenous and home-grown. Good examples of autochthonous constitution are the US or the UK Constitution and CoK 2010. It is superimposed if it is sourced externally like most independence constitutions in the commonwealth (such as

the 1963 constitution) which were products of the UK parliaments and annexed as schedules thereto. The preamble to the constitution of Kenya and the promulgation clause (LN 133/2010) and a schedule to the CoK 2010) are emphatic that the constitution of Kenya is home-grown. The promulgation clause reads as follows

WHEREAS **the people of Kenya, in exercise of their sovereign right to replace the Constitution, ratified the proposed New Constitution of Kenya through a referendum held on the 4th August, 2010**, in accordance with the provisions of section 47A of the Constitution of Kenya and Part V of the Constitution of Kenya Review Act, 2008;

AND WHEREAS the Constitution of Kenya (Amendment) Act, 2008 and the Constitution of Kenya Review Acts of 1997 and 2008, as variously amended, provided a legal framework for the comprehensive review and replacement of the current Constitution by the people of Kenya  
And in the preamble it is declared that;

**We, the people of Kenya—** EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution: **ADOPT, ENACT and give this Constitution to ourselves and to our future** generations

## **b) Permanent and Temporary constitutions**

As the typology implies constitutions may be intended to endure or to serve for only a transition period. If not intended to endure they are classified as ‘temporary’, ‘transitory’ or ‘interim’. If intended to endure they are classified as ‘permanent’. ‘Permanent’ does not mean ‘unalterable’.

## **c) Supreme vs Not Supreme**

A constitution may be ranked higher than other laws of the land and may take precedence over all other laws. Sometimes the special status of the constitution is specifically provided for e.g. Article 2 CoK 2010. Sometimes it is a matter of judicial interpretation e.g. the US constitution; such a constitution is classified as Supreme. Others rank in pari pasu, at par, with other laws; E.g. the constitutions of the UK, Israel and New Zealand .. These are not supreme.

#### **d) Rigid and Flexible Constitution**

'Rigid' has two meanings. The first meaning refers to the procedure for amendment- that there are or there are special procedures for amending the constitution. In flexible constitutions the constitution can be amended like any other law. In Rigid constitutions there are special procedures e.g. special majorities, special procedural rules, referendum requirements etc The second meaning refers to the inherent resistance to change, like some UK conventions or some principles of the US or Australian Constitution. Usually these are the products of generations of collective wisdom and changing them becomes unthinkable even if theoretically possible. A flexible constitution is not necessarily easier to amend than a rigid one. The UK constitution is clearly flexible yet there are rare changes to the basic constitutional structure of the UK Govt. Some supposedly rigid constitutions like the Kenyan constitution have been amended with consummate ease, 38 times since 1963 and mainly to increase executive power. By contrast the US constitution has been amended 24 times since 1789 and the Australian constitution has been amended only 5 times since 1901.

But rigidity does reduce and temptations to amend unnecessarily e.g. the current situation in Kenya where the Government is unable to amend the constitution to entrench a tribunal to try post-election violence offenders. Examples of rigid constitutions include Kenya the US Germany India. In Kenya amendments need the support of two thirds of the MPs in the national assembly and two thirds of the members of the senate entitled to attend and vote. Some provisions can only be amended by referendum. In the US proposals for amendments to the constitution must be supported by two thirds majority in both houses and ratification by 75% of the states. The US constitution has been amended only 24 times since 1789 and even then, mainly to increase democratic space. In Germany and India certain provisions cannot be amended. The 'Wako Draft' outlawed amendment for at least five years after its commencement.

The CoK 2010 is rigid in theory and practice. Some provisions are entrenched and cannot be amended without a referendum. All amendments require a special majority, two third of the membership of both senate and the national assembly

#### **e) Presidential and parliamentary**

In presidential systems, the president is not a member of the legislature. He is head of state and head of government. His Government cannot be dismissed by the legislature. He has no power to summon prorogue or dissolve the legislature. In a pure presidential system his ministers are



not members of the legislature. It is an attempt to push outwards the frontiers of the separation of powers doctrine. Best example is the US system

In a parliamentary system the president and his cabinet are a member of the legislature. The government is collectively responsible to the legislature. The legislature can dismiss the government. The head of state or government has power to summon, prorogue or dissolve the legislature subject to certain constitutional limitations. The head of state is usually not the head of Government.

There are countries that seek to combine the presidential and parliamentary systems. In Tanzania the president is the head of state and head of government. He is not a member of the legislature but his ministers are. . In France there is a presidential and parliamentary system. Experience suggests that these hybrids rarely work well.

Kenya now has a presidential system unlike in the 1963 constitution which created a parliamentary system of government. The president is head of state and the head of government. Neither the president nor his ministers are members of parliament

## **f) Federal and Unitary**

There are two principle forms of state organization

- The federal state
- The unitary state

The basic characteristic of a unitary state is that it 'displays one supreme ultimate and unified center of authority'. The federal arrangement is associated with a more delegated form of authority with greater territorial divisions. Sometimes the difference is clear-cut, e.g. the US Germany Switzerland, Australia, and Canada. Often times it is not and can be outright misleading. The defining characteristic is the degree of autonomy enjoyed by the component regions.

The relationship between the UK and Northern Ireland under the Act of 1920 is clearly non-federal but the degree of autonomy belies the constitutional structures. The Soviet Republics in the former Soviet Union were theoretically in a federal state but central control was overwhelming. Tanzania is theoretically a unitary state but in practice Zanzibar enjoys considerable autonomy which qualifies the relationship as federal.

In a federal system governmental powers whether legislative executive or judicial are devolved to the regions that make the state. The center and the region enjoy exclusive competences in specified areas. The residuum of undistributed power usually goes to the regions

Federalism is a constitutional devise for the sharing of governmental power. Federal constitutions tend to be rigid since there is a strong resistance against surrendering autonomy

at regional level. Unitary constitutions emphasises oneness and unity of purpose and central direction of policies. It implies a trust in the government. Federal constitutions express a distrust of centralized government and seek to preserve regional autonomy. Federal structures are designed to encourage compromise and consensus on critical issues.

The unitary state is associated with a stronger central government. Greater emphasis is laid on unity and central government authority. It is more amenable to central control of socio-economic and even legal-political affairs. It aims at achieving a greater homogeneity in a country. There can still be delegation of power but is largely for administrative convenience. The powers of the central government remain unaffected. The local units cannot impose restrictions on the central government. The purpose of delegation is to achieve administrative efficiency.

Federalism is essentially a constitutional arrangement that allows greater territorial diversity in the organizational structure of government. There is a national government and a territorial government simultaneously ruling over the same territory. Each level of government operates within a defined sphere, co-ordinate and independent and there is no subordination. In classical federal models there are clear no-go zones for the central authority. The residuum of power may vest in the center as in RSA or at the federal unit as in the USA. The federal arrangement implicates more compromise and consensus in decision making

It operates on the principle of 'anti-majoritarianism'. The federal units act as a break on the exercise of power by the central authority. It calls for more bargaining and compromises. It is generally associated with weak central governments.

### **a) Choice of federal or unitary**

There should be objective and rational reasons for the adoption of either arrangement. A lot depends on the past, prevailing and foreseeable circumstances of a country. A unitary state is to be more conducive to central planning and tend to be better suited for countries faced with major social economic or natural crises. A unitary system can be less costly because there is no duplication of government structures at different levels. It is said to be administratively and economically more efficient.

### **b) Advantages of federalism**

The reasons put forward for federalism are more contentious. It is associated with freedom and liberty. It minimizes tyranny by dispersing power. Dispersal of power is seen as the best framework for individual freedom to flourish. The trade-offs in greater democratic space compensate for any administrative and economic inefficiency. It is in fact argued that

decentralization promotes efficiency by reducing bureaucracy. Devolved governments can be more responsive to local needs and concerns and is better placed to provide solutions tailored to local conditions.

Federalism allows greater experimentation in the individual units and can limit the effects of poorly designed or poorly executed policies to a locality. It is argued that it is better suited for heterogeneous societies characterized by cultural, linguistic, nationalist or religious diversity. It allows better autonomy and self-determination. According to World Bank statistics more than 95% of the countries have adopted some form of decentralization. The guiding philosophy in decentralization and federalism is the twin principles of 'subsidiarity' and 'proportionality'- 'as high as necessary but as low as possible.'

It encourages participatory decision making. It reduces bureaucracy. It preserves ethnic regional and cultural identities. Its structures are more responsive to diversity needs. Federalism is recommended for states with no common heritage and where leaders are prone to abuse power.

### **c) Disadvantages of federalism**

It is built on the foundations of distrust. Federalism may fuel temptations to balkanize. Federalism may promote ethnic and regional tensions. It may slow down the execution of important and urgent policies. It can be expensive to implement. Require rigid constitutional structures. Federal constitutions tend to be rigid

### **d) Monarchical and Republican constitutions**

In a constitutional monarchy government is limited. The head of state may or may not be the head of government. Leadership is hereditary. A good example is the United Kingdom. In a Republic leadership is elective. The head of state may or may not be the head of government. An example of a Republic is the Republic of Kenya. The Kenya constitution is a Republican constitution.

Article 2, provides 'This Constitution is the supreme law of the Republic'.

Chapter 2 is titled 'The Republic'.

Article 4(1) provides Kenya is a sovereign Republic. Article 4 (2) is more emphatic. 'The Republic of Kenya shall be a multi-party democratic State founded on the national values and principles of governance referred to in Article 10' Leadership in Kenya is elective, not hereditary (The practice sometimes seems to tell a different story though).

Article refers to the languages of the 'Republic'. Article 9 refers to the National symbols of the 'Republic'. Article 58(6) (2) ii) the legislation is consistent with the **Republic's** obligations under international law applicable to a state of emergency; Article 59 91) provides that one of the

functions of the Kenya National Human Rights and Equality Commission is to promote respect for human rights and develop a culture of human rights in the Republic . Similar references to the Republic can be found in article 59(2) d, article 76 ( financial probity of state officers), article 94(1) and (4) (role of parliament), article 130( the national executive) article 131(2)(b) ( executive authority of the president) 131(2)(c)(iii) ( annual report by the president) 134(4)(c)( conferring of national honours) 135(5) ( duty of the president to ensure all international obligations are fulfilled., article 152(4)(a)( oath of office by cabinet secretaries, article 186(4) ( power of parliament to legislate for the Republic on any matter , article 201( principles of public finance, article 234(3)(b) functions and powers of the public service commission, article 240(6)(b)(national security council), article 241(3)(a)( responsibility of the Kenya Defence Forces) article 260 ( “Republic” means the Republic of Kenya). Third Schedule (the forms for the various oaths), Sixth schedule section 6(existing laws) section 8(existing land holdings), promulgation by the president of the ‘Republic Of Kenya’

### **e) General and detailed**

A general constitution merely lays down the fundamental principles without going into the details. A detailed constitution tends to cover every detail however minute. General constitutions are flexible and easier to interpret liberally.

The political history of a country will determine the preference for general or detailed constitutions. The US constitution is federal but very general. Some unitary states have very detailed constitutions. The modern trend is for detailed as they tend to represent a clean break with the past

#### **Exercise**

- Using the forgoing typology, how would you describe the constitution of Kenya?
- Discuss the advantages and disadvantages of;
  1. A written and unwritten constitution
  2. A federal and a unitary constitution
  3. A detailed and a not detailed constitution
  4. A flexible and a rigid constitution
- Which type of constitution would you recommend for Kenya?
- Can you identify the letter and spirit of the Kenya Constitution?
- Can you find constitutionalism in the constitution of Kenya?