

COMPARATIVE CONSTITUTIONALISM: A CATALYST TO STABLE WORLD ORDER*

Abstract

Comparative Constitutionalism as an order creating mechanism in societies around the world, as it relates to the title under consideration dates back to what is usually referred to as “the state of nature”. In that society, the predominant practice was the survival of the fittest or “the rule by might.” Thus, the need to transpose from the state of nature to state of society became imperative. The state of society is naturally a regulated environment that ensures law and order. While in the exercise of the common sovereignty belonging to the community, the central power also became egregious in time with the donated power; thereby denying the freedoms of the people, hence the quest for Comparative Constitutionalism. This paper therefore, examines how the concept of Comparative Constitutionalism has brought about relative peace, order and stability to once chaotic and primitive world? In achieving this goal, this paper depends on the doctrinal approach for its research methodology, taking into account both primary and secondary sources. Concluding, this article recommends that both the ruled and the ruler should be bound by the limits stipulated in the constitution and laws of the land for order, peace and tranquillity.

Key Words: *Constitutionalism, Law and Order, Rule of Law*

1. Introduction

The instrument of comparative constitutionalism as catalyst of global order seems to suggest two aspects; first, that it is an order creating norm that has received global embrace. Secondly, constitutionalism in its comparative form underscores stability of nations across the world, given its inherent limiting powers. The former appears to support the concept as any instrument including international laws that serve as check to those that are reposed with powers both at the international and national levels. The later on the other hand, seems to reflect the conquering or limiting factor of the doctrine as a safeguard to the exercise of governmental powers in its absolute and or totalitarian terms within an independent sovereign state; which serves primarily, as an instrument to curtail the arbitrary use of power by the executive whether monarchical or presidential, and subsequently, the legislature and every other aspect of the exercise of governmental powers, tracing its roots to the then Great Britain, yet to the United States of America and to the uttermost parts of the world. The concept no doubt is a global “stabilizer” thereby randomly creating a peaceful world order from one state to another, thus greatly contributing to world peace and order. This paper, although holds nothing against the first position but in fact gives it support, however, agrees more with the second limb of what the title appears to suggest. For a fuller comprehension, it is expedient to begin this discourse by defining what a constitution means. Though definitions are not necessarily definite, they are however expedient, because they help to explain an idea or concept in concise terms. They are not definite in that they can be controversial or contentious. Such definitions are usually taken to serve the interests of the user and to be restricted to the context and circumstances in which they were propounded. As such, the definition of a country’s constitution is of no exception.

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2. The Concept and Meaning of Constitution

The Black's Law Dictionary, defines Constitution as: *The fundamental and organic law of a nation or state that establishes The institutions and apparatus of government, defines the scope of governmental sovereign powers, and guarantees individual civil rights and civil liberties.*¹ A nation's history of government and institutional development.² Prof. Wheare in his book titled Modern Constitutions as quoted by Timothy Amerit in his article³ introduces yet another definition of a Constitution when he stated that: *The Constitution then for most countries in the world is a selection of the legal rules which govern the government of that country and which have been embodied in a document.*⁴ The key element introduced is the legal character of the Constitution, as a body of legal rules or laws embedded in a document. This legal aspect or status of a constitution is an important characteristic of a modern Constitution which distinguishes it from a mere political charter. Timothy Amerit again in his article cited the duo, Professors Wade and Philips in their text book on Constitutional law, that: *Normally, a constitution is a document having a special legal sanctity which sets out the framework and principal organs of the government of a State and declares the principles governing the operation of those organs.*⁵ In a similar vein, Prof. Kanyeihamba, further defines Constitution as:

*A Constitution of a State consists of the basic and fundamental laws which the inhabitants of a State consider to be essential for their governance and wellbeing. The Constitution lays down political and other State institutions and distributes powers among them and puts limitations on the exercise of those powers.*⁶

From the combined effect of the above scholarly definitions, we can define a Constitution as a set of basic principles and laws upon which the State is organized and which establishes the major organs of government. It further defines their functions and powers and relationship amongst them, and sets out the rights and duties of the citizens, including putting limitations on the exercise of those powers and in most cases embedded in a documented form. Again, on the strength of the forgoing, a national Constitution may have both political and legal dimensions. In political terms, a Constitution is the basic decision of a people on how they want to live. It may be described as a socio-political frame-work through which the polity agree on who gets what, when and how. It has been described as a social contract or covenant between the State and its subjects on the manner of governance and exercise of State power. Conversely, in legal terms, a Constitution is the fundamental and supreme law of the country. It is the basic law from which all laws derive their life. It deserves the highest respect and obedience from the leaders and the people alike. It follows therefore that a Constitution represents the deepest norms and ideals by which the people govern their political life. However, this is not the case everywhere. As a matter of fact, a good Constitution should be a home-grown Constitution that is socially relevant and tailored to the people's needs and interests, all determined by the people themselves. However, this is not the case in many British former colonies. The independence Constitution of Nigeria, 1960 is a case in point, such that upon independence the Queen of

¹ B. Gardener (Ed.), "*Black's Law Dictionary*" (8th edn.) part 1.

² Ibid, part 3. This was the standard definition before the United States produced the first written constitution. It remains current in Great Britain and other nations that have unwritten constitutions.

³ <<http://timothyamerit.blogspot.com.ng/2014/08/constitutionalism-is-more-important.htm>>1. accessed 10/02/2018.

⁴ T. Amerit, *ibid*.

⁵ *Ibid*.

⁶ *Constitutional Law and Government in Uganda*.

England yet held forth as Head of State of Nigeria. Another example is the Uganda Constitution of 1962, which was bestowed on Uganda by an Act of the British Parliament. In making a case for the humiliating position, Jim Paul aptly describes the process of Constitutional promulgation throughout Anglophone Africa in the following terms:

*Independence Constitutions were like negotiated treaties. They were often more the product of ad hoc bargaining in London than the reflection of popular demands and manifestations of indigenous political culture. They were also often extraordinarily complex. But by accepting a Constitutional document worked out in London on the eve of independence, a regime in Africa could hasten the attainment of national sovereignty and the entrenchment of its own power. Once independent, the regime could change the Constitution to suit local needs, and not surprisingly, to tighten its own control over the political system.*⁷

In affirmation of the above quote, Julius Nyerere explained in an article on the constitutional proposal of Tanganyika, thus:

*Our Constitution differs from the American system in that it avoids any blurring of the lines of responsibility, and enables the executives to function without being checked at every turn. For we recognize that the system of checks and balances is an admirable way of applying the social change. Our need is not for breaks – our lack of trained manpower and capital resources, and even our climate, act too effectively already. We need accelerators powerful enough to overcome the inertia bred of poverty, and the resistances which are inherent in all societies.*⁸

The above excerpt by Julius Nyerere by all intent and purpose smacks of “strongmanism” as against strong institutions in the world, particularly in most of Africa. His statement simply suggests a replacement of an external colonialism with that of an internal one in the most egocentric manner. It is a recipe for chaos, violence, corruption and in extreme cases war. This in like manner takes us to the importance of comparative constitutionalism as an acceptable phenomenon and as a catalyst for law and order in the world over. Nevertheless, in order to have a comprehensive understanding of the concept of constitutionalism, it is yet important that some scholarly definitions may suffice.

3. The Concept and Meaning of Constitutionalism

According to Fehrenbacher, Constitutionalism is “*a complex of ideas, attitudes, and patterns of behaviour elaborating the principle that the authority of government derives from and is limited by a body of fundamental law.*”⁹ Fellman David, in a more elaborate and indebted fashion puts it thus:

Constitutionalism is descriptive of a complicated concept, deeply embedded in historical experience, which subjects the officials who exercise 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 or mere fiat of public officials ... Throughout the literature dealing with modern public law and the foundations of statecraft the central element of the concept of constitutionalism is that in political society government officials are not free to do anything they please in any manner they choose; they are bound to observe both the

⁷ J. Paul, ‘Some Observations on Constitutionalism, Judicial Review and the Rule of Law in Africa’, (1974) (5) *Ohio State Law Journal*

⁸ J. Nyerere, “How much power for Leader,” (1962) (7) (7) *African Report*, 7

⁹ D. Fehrenbacher, ‘*Constitutions and Constitutionalism in the Slaveholding South*’ (University of Georgia: 1989)

*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.*¹⁰

From the forgoing, the scholars in their divergent positions on what constitutes constitutionalism agree and have in common that it entails as a basic law, a law of the constitution or a law duly brought forth from the womb of the common will of the people with binding force which serves as a source as well as a limiting factor to the exercise of governmental powers within a state, but that is not all that it is, of what a constitution is about. We shall make this plane in the course of this work. Thus, no government, president or monarch, no institution of law or enforcement, should be created or be allowed to exist and to function without a constitution. No one should have power over others, unless and until that power and the conditions of its use have been strictly defined. In the words of Thomas Paine, "*government without a constitution is power without right*".¹¹ While the notion of constitution is coterminous with government itself, constitutional government or constitutionalism is not.¹² It connotes a government defined, regulated and limited by a constitution, written or unwritten and limited not just in a conventional or political sense but as a matter of a law, with all its coercive force.¹³ In view of the above and the topic under consideration therefore, we summarize Comparative Constitutionalism as the study, comparison and exchange of essentially the constitutional experiences of countries around the world, their internal legal mechanisms, and political, legal and even social institutions. It is also the study of differences and similarities among the constitutions and laws of nations. But what is even more paramount is, how the concept of Comparative Constitutionalism has been imbibed and enforced as an order and tranquillity creating instrument around the globe, particularly from the prism of the "recipient states" i.e. states that have the need to learn of the concept. Example is the case of Nigeria adopting comparative mechanism as it concerns the Constitutional regime of the United States of America. However, the question is does Nigeria as a people and governments past and present depicts anything the practice of constitutionalism, same as it has been projected by the American community? Another was the obvious quest for the entrenching of the concept in the spirit of Comparative Constitutionalism by the peoples of the Middle East, which refusal and resistance by the "sit tight" autocrats is no doubt the unending war in Syria and Yemen. The no lost love situation between the people and their rulers, as it is apparent in Egypt, Iran, Tunisia and others. In Africa the story is not different, from Zimbabwe to the Democratic Republic of Congo, where in fact no such thing as democracy. Others are Uganda, Benin Republic and still counting. Such

¹⁰ (David Fellman, 'Constitutionalism' in P. Wiener, (ed.) "*Dictionary of the History of Ideas: Studies of Selected Pivotal Ideas*", vol. 1, pp. 485, 491–92 (1973–74). "Whatever particular form of government a constitution delineates, however, it serves as the keystone of the arch of constitutionalism, except in those countries whose written constitutions are mere sham. Constitutionalism as a theory and in practice stands for the principle that there are - in a properly governed state - limitations upon those who exercise the powers of government, and that these limitations are spelled out in a body of higher law which is enforceable in a variety of ways, political and judicial. This is by no means a modern idea, for the concept of a higher law which spells out the basic norms of a political society is as old as Western civilization. That there are standards of rightness which transcend and control public officials, even current popular majorities, represent a critically significant element of man's endless quest for the good life."

¹¹ Cited in Blaustein and Sigler (eds.), "*Constitutions that have made History*" (Paragon, NY: 1988), 1

¹² B. Nwabueze, "Ideas and Facts in Constitution Making;" *The Morohundiya Lectures*, Faculty of Law, Ibadan. First Series, p. 2.

¹³ *Ibid.*

that there is no full-blown war in most of these countries, is perhaps the semblance of practice of the concept of Comparative Constitutionalism.

4. A Compendium of the Emergence of the Concept of Constitutionalism

This research work considers two views as to the emergence of constitution as an instrument in paper that limits both the led and leader in a defined territory as is provided for in the law of the Constitution. As has been noted elsewhere that, though constitutionalism, the spirit of constitution, had been alive and practiced for many years, England's Magna Carta, the Great Charter, has been widely accepted by history as the world's first major constitutional document.¹⁴ However, Prof. B.O Nwabueze, in his book the *Idea and Facts of Constitution Making* states that the first attempt at a written frame, was by which Oliver Cromwell in England was made the Lord Protector of the Commonwealth, upon the proclamation made by the republic after the execution of Charles 1, which was titled simply as an Instrument of Government.¹⁵ In defence of his position, he maintained that, England's Magna Carta (1215) although has been described as charter, was not of popular liberty, but of feudal reaction and as tending to the restoration of feudal privileges and feudal jurisdiction, which by all intent was inimical to the Crown and to the growth of really popular liberties.¹⁶ Nor was its Bill of Rights of 1689, a bill of rights strictly so called, both because it was concerned essentially to assert and secure, also not the rights of the individual, but the supremacy of Parliament over the Crown and a few individual rights protected such as – the right to bear arms, the prohibition of excessive bail, the right to jury trial and the prohibition of forfeiture before conviction- were not legally binding upon parliament. The notion of constitutional government only became firmly entrenched as an unquestioned principle of government in England following revolutions that took place in the nation, which includes: the civil war that culminates into the restoration of Charles II in 1660 upon certain conditions, the Glorious Revolution of 1688 that led to offer to William of Orange and his wife Mary, the throne of England, after the flight of Mary's father to France, James II.¹⁷ A part of the offer was what was known as a Bill of Rights, which contained thirteen stipulations. Flowing from the above, this paper argues that, British Constitution is regarded unwritten not because it is not cast on stone but that the binding force of the document is not directly derivable from the document itself in abstraction as in the case with a written constitution. In converse, the British constitution re-allocates the inherent coercive content associated with the law of the constitution wholesale to the parliament, thereby making the parliament sovereign. Thus, the idea of constitutionalism is older than the existence of written constitutions.¹⁸ As such:

[T]he triumph of parliamentary government, with a bill of rights, over monarchical absolutism in England, established constitutional government as an undisputed principle of government.¹⁹ The principle having been firmly established in England, subsequently, moved across the seas and became yet strongly accepted on the continent of Europe – France, Italy, Germany, Scandinavia, Poland, Hungary and in North America.²⁰ This has been rightly described as England's pre-eminent

¹⁴ Blaustein and Sigler, op. cit.

¹⁵ B. Nwabueze, p. 1.

¹⁶ M. Mckechnie, Magna Carta (1905), p. 449.

¹⁷ Ibid, p. 3.

¹⁸ Ibid.

¹⁹ Ibid, p. 4.

²⁰ D. Treadgold, *Freedom: A History* (1990), p. 187-227.

contribution to the history of Western freedom²¹ vis-à-vis global peace and order, vide colonialism, international relations or the likes to the rest of the world.

5. A Written Constitution

The thought of a written constitution as a law binding on both executive and the legislature owes its origin to the United States.²² This was followed with the establishment of the Constitution in 1787. The inspiring idea was born and popularized as a formal document possessing the force of law and as a supreme, overriding law. From the United States (US), the notion has yet been transmitted to most countries of the world today. What is even more innovative and inspirational was the idea of a written constitution as something separate from and external to government; something antecedent to government and connoting a system of fundamental principles according to which a nation, state, corporation or the document embodying these principles.²³ Accordingly, in this sense, a constitution embraces not only a frame of government but also the relations of the government to the individuals that compose the state or other associations as well as the fundamental objectives of the association. In the same vein, affirming the constitution as a single, written document of American Innovation, Wheare states as follows:

Until the time of the American and French Revolutions, a selection or collection of fundamental principles were not usually called 'the Constitution... since that time the practice of having a written document containing the principles of government organization has become well established and Constitution has come to have this meaning.'²⁴

In the words of Chief Justice John Marshall while aligning his thoughts in the American innovation on the constitution opined in the popular case of *Marbury v Madison*,²⁵ that it is, “the greatest improvement on political institutions.” The constitution in its written form, from the United States was exported to Poland on 3, May 1791, France on 3, September 1791, Sweden 1809, Venezuela 1811, Ecuador 1812, Spain 1812, Norway 1814, Mexico 1824, Central American Federation 1825, Argentina 1826 and Liberia’s Constitution of 1847, which was likely the first of its kind in Africa, until its overthrow in the year 1980.²⁶ In admiration of the effectual nature of written constitution in the administration of the human community, Mark states as follows:

[W]ord magic'-a reverence for things written. The Constitution is a tangible and visible symbol of the things (i.e. ideas and values) that people hold dear... By having a written document, the seems less mutable, less vulnerable to the whims of individuals. The Constitutions thus symbolizes the idea of the rule of law.'²⁷

McIlwain, while eulogizing the acceptance of the concept the world over, given its pre-eminence in the attainment of world peace and order. States thus: *The precedent for this, first developed in North America, was naturalized in France and from there transmitted to most of*

²¹ H. Muller, *Freedom in the Western World: From the Dark Ages to the Rise of Democracy* (1963), p.290.

²² B. Nwabueze, p. 15.

²³ Ibid, p. 5.

²⁴ K. Wheare, *Modern Constitution* (1966).

²⁵ 1 Cranch 137 (1803).

²⁶ B. Nwabueze, p. 5.

²⁷ M. Cannon, 'Why celebrate the Constitution?' in National Forum, (1984) (LXIV) (4), *Phikappa Phi Journal*, 3

the continent of Europe, from which it has spread in our own day to much of the orient. This development since Professor McIlwain wrote in the 1940s, has enjoyed a new boost by the emergence from colonialism of a number of nations across Africa and Asia which needed written constitutions to launch themselves into the new dawn of their independent existence and impose checks against the abuse of majority power in the interest of tribal, racial and or religious minorities. So much has the development encompassed the world that only 5 countries are today without a written constitution as against over 180 with written constitution?²⁸ Thus, Constitutionalism places limits upon government, proscribing the means by which official power may be exercised. Constitutionalism establishes boundaries between the state and the individual, forbidding the state to trespass into certain areas reserved for private action.²⁹ Having adumbrated what a Comparative Constitutionalism is about on reasonable basis, we shall proceed further to give an overview of doctrines, concepts and or institutions that guarantee constitutionalism in a state as well as the world at large for a stable, orderly and peaceful society. However, before we go on to shed light on them, a glimpse should be had on instances and situations of how societies or nations survived, and in fact, are surviving without a functional operation and implementation of the concept of constitutionalism, put it differently, a government that is unlimited, total, authoritarian or the like, without the presence of limiting laws on the exercise of powers by those that are charged with it and the people over which the power is being prescribed for. One example of this is the exercise of absolute power usually by the monarch after the transition of man from the rule of men to that of law and state of nature to state of society.

6. Absolute or Unlimited Power

A government of absolute or unlimited, putting it differently, a government without the presence of a law of the constitution or legislation is intrinsically bad, being inherently incapable of nurturing and promoting the best qualities in the people.³⁰ An absolute government neither desires nor asks for the people's assistance in governing the state; its desire is that they should not aspire to govern it themselves.³¹ An absolute or unlimited government creates other far worse evil traits and propensities according to B. O Nwabueze, among the people. Firstly, it divides, rather than unites, them. "Divide and rule" is an old and familiar tactic by which absolute governments everywhere seek to maintain themselves in power and to perpetuate their rule for an indefinite length of time and it is no less beloved of an indigenous absolute ruler than a colonial.³² Various barriers are erected to keep the people divided and their attention and interest diverted from the conduct of public affairs.³³ In affirming this position, Alexis noted thus: "*A despot it has been said, easily forgives his subjects for not loving him, provided they do not love each other.*"³⁴ Conversely, Alexis puts it succinctly that:

When the public govern, there is no man who does not feel the value of public goodwill, or who does not endeavour to court it by drawing to himself the esteem and affection of those amongst whom he is to live... under a free government, as most public offices are elective, the whose elevated minds or aspiring hopes are too

²⁸ <https://www.worldatlas.com/articles/countries-with-uncodified-constitutions.html>, accessed, 20/02/2018.

²⁹ Blaustein and Sigler, *ibid.*

³⁰ B. Nwabueze, "Ideas and Facts in Constitution Making;" *The Morohundiya Lectures*, Faculty of Law, Ibadan. First Series, p. 53.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ A. Tocqueville, "*Democracy in America*" (1835) ed., Richard Heffner (1956) p. 194.

*closely circumscribed in private life constantly feel that they cannot do without the people who surround them.*³⁵

Prof. Nwabueze, while pointing out the mark of a good government, evincing compassion, limitations and or boundaries for self-restraint; states that, in nurturing and promoting the best qualities in the people - the show of characters of obedience to government as the constituted authority, its laws and its disposition in the settlement of private quarrels and redress of grievances; the habit of integrity, probity, fairness, self - restraint in the conduct of social relations and public affairs and the quality of public - spiritedness and patriotism in matters affecting the interest of the community. According to him, that form of government is the best which has a tendency to foster such qualities in the people.³⁶ It is the view of this paper that these aforementioned qualities and more are quickly eroded in a society where absolute power holds sway. In so doing, Nwabueze further implied that, a worse evil is the capacity of absolute power to corrupt. Echoing the famous saying of Lord Acton, "power corrupts but absolute power corrupts absolutely,"³⁷ Nwabueze in his book, *Ideas and Facts in Constitution Making* quips that this represents a universal political truth, founded upon experience. Its wielder is quite the first to be corrupted. No ruler in all history has been known to be above the corruptive influence of absolute power.³⁸ It transforms a person's natural disposition; the wielder becomes a quite different person after some years in the enjoyment of absolute powers. Yet another evil is that, the values of the society are corrupted. As everyone tends to take moral and service tone from the absolute ruler's standard of integrity, probity, it generally filters down the entire body of the society.³⁹

The notion of the state as a distinct corporate entity is corrupted and perverted; the absolute ruler is usually treated as though it is synonymous with the state. The state's financial resources are disbursed by him as he would disburse his own private wealth, with no restriction whatsoever or obligations of accountability. It is safe to conclude in the circumstance that, the absolute ruler is indeed the state, given that "*the same individual was the author and interpreter of the laws and the representatives of the nation at home and abroad, he was justified in asserting that he constituted the state.*"⁴⁰ In which case, repression of individual liberty is inseparable from a dictatorship. Every expression of opinion, association and political activity, which are critical of its rules are viewed as hostile to the interest and dangerous to its security, which must therefore be repressed.⁴¹ Nwabueze, while enunciating the evils of the exercise of absolute powers, opined that, apart from other numerous monster sides of absolute powers, it also has a natural and inexorable tendency to be exercised autocratically. A typical example of this was when Nigeria was in military rule. During the first era of military rule from 15th January, 1966 to 30th September, 1979, there were 50 decrees and between 1st January, 1984 and 15th May, 1985, a period less than one year, 14 decrees were promulgated, which explicitly made the constitutional guarantee of fundamental rights inapplicable in relation to any matter arising from those decrees. The most disturbing of all was that no court was to enquire into the question whether a guaranteed right had been or was being or was likely to be contravened by anything

³⁵ A. Tocqueville, *ibid*, p. 195.

³⁶ B. Nwabueze, p. 52.

³⁷ *Ibid*, 54.

³⁸ *Ibid*.

³⁹ *Ibid*.

⁴⁰ A. Tocqueville, *ibid*. 63

done or purported to be done thereunder.⁴² Following the decrees, thousands of people were detained without trial, political parties and tribal unions proscribed, the publication and circulation of some newspapers and magazines prohibited, criticism of government and political discussions were severely restricted, public assemblies and processions proscribed and property or assets of citizens were inadvertently expropriated without due process of law.

Another clear instance of the evils of unlimited or authoritarian powers in the absence of an entrenched or practicable constitutionalism is the One-Party experience of most African states. A good example is the Ghanaian Preventive Detention Act, 1958. According to Nwabueze, from July, 1958 when the Preventive Detention Act came into force, it was estimated that over 1,000 persons were incarcerated in preventive detention facility in Ghana for periods ranging up to ten years, “in conditions of severity worse than those laid down by law and accorded to convict prisoners,”⁴³ as quoted by Busia in Nwabueze’s *Ideas and Facts of Constitution Making*.⁴⁴ Further, the International Commission of Jurists in a report in 1961 had commented adversely on some characteristics replete with the Ghana Preventive Detention Act, notably the long duration of detention without making such subject to regular review. The fact that detainees were neither told the reasons neither for their detention nor given opportunity to face their accusers, the inadequate, often flimsy grounds for detention and above all, the ousting of the court’s jurisdiction to inquire into the propriety of detention in individual cases.⁴⁵ In most cases the detainees were members of the opposition. Similar to that of Ghana was Tanzania, the minister of home affairs is empowered to detain anyone at any time and for any period of time, irrespective of whether a state of emergency has been proclaimed or not. Another variable of the Tanzania Preventive Detention Act is that it requires an annual review by an advisory Committee but the minister is not bound to accept or act upon it, nor can an order of detention be inquired into by any court of law.⁴⁶ The bane of the absence of the law of the constitution as an instrument of governance which serves as safe net to both rulers and the ruled is not necessarily the absence of a constitutional document, but that even in cases where a constitution is in place it will not have the effect of constitutionalism, the spirit of the constitution, because either the constitution in some cases is a legitimizing authority and nothing more, other times it is just expressed in the preamble of the constitution which is absolutely lacking the force of law. For instance, in an action impugning the Preventive Detention Act, 1958 on the basis that it was repugnant to the fundamental principles embodied in the presidential declaration, the Supreme Court of Ghana held that the declaration did not “constitute a Bill of Rights”,⁴⁷ that it created no “legal obligations enforceable by a court of law,” and that no right was accruable to the citizen. According to the court, the declaration had no more effect than the Queen’s coronation oath. The Court further stated that, “in our view”, the declaration merely represents the goals to which every President must pledge himself to attempt to achieve.⁴⁸ The idea of a preamble according to Nwabueze, is that it forms no part of a statute, and as such cannot create legal rights or obligation. Civil rights purportedly guaranteed in a preamble can therefore have no more than a moral force, serving merely as an exhortation to government to respect the rights in its action. In a situation as this, even though the constitution is written it will not have a binding force on those that exercise governmental powers, thereby magnifying the person(s)

⁴² B. Nwabueze, *ibid.* 55.

⁴³ Busia, “*Africa in Search of Democracy*” (1967), p. 129.

⁴⁴ B. Nwabueze, *ibid.*, 89.

⁴⁵ (1961) (3)(2) *Journal of the International Commission of Jurists*, [65-81]; B. Nwabueze, *ibid.*, 88-89.

⁴⁶ B. Nwabueze, *ibid.*, 89

⁴⁷ Article, 1

⁴⁸ *Re Akoto*, (1961) G.L.R. 523

occupying the office far and above the people and state, actions are taken solely within the whims and caprices of a “figurehead” ruler, thus making strongmen out of it rather than strong institutions which essentially the concept of constitutionalism can adequately guarantee.

A far worse evil the world has avoided thus relatively, crystallizing stability and order, is the presence of constitutionalism embedded in the constitutions of nearly all states around the world thereby curtailing and or eliminating communism in its extreme (total) form and its attendant consequences. In highlighting the aforementioned, Nwabueze, Max and Eskstein respectively stated thus:

The evils of total rule of the socialist/communist type go far beyond those of authoritarian or absolute, unlimited power.⁴⁹It is a despotism with a vengeance, an extreme form of despotism worse than fascism, because “more ruthless, barbarous, unjust, immoral, antidemocratic, unredeemed by any hope or scruple.”⁵⁰ Totalitarianism simply magnifies the elements of autocracy to their farthest limits.⁵¹

Going forward, Nwabueze says socialist/communist rule does not only curtail individual liberty as would be the case of authoritarian and absolute rule, but it destroys it in its entirety and with its individuality. Respect for human rights and man as man, his personality, his impulse and emotions, is almost totally destroyed.⁵² Man is treated as a disposable property, his life is subordinate to the state, and may be taken at the arbitrary whim of the state. A regime of terror and total arbitrariness is unleashed on the society, a terror in which travel bans, internal exile, constant surveillance, terrorist like secret police and other instruments of coercion, the concentration camp, executions and frequent use of armed forces against the population are all extensively employed by the state.⁵³ The sheer brutality of the socialist/communist regimes, often involving torture is simply inhuman and degrading to the human person. Yet a depressing experience of the absence of the spirit of the constitution, in a case of the unrestrained use of power, example, total power, is the abolition of private property ownership with the intent to totally destroy the individual liberty of action, this is unjustifiable, for it is the desire for private acquisitions that provides the motif force, for most of our actions.⁵⁴

In a society where totalitarian government holds sway, under the constitution, the socialist government has full authority to implement the socialist socio-economic order by way of a central direction of all economic activities, which means in effect that its actions in this behalf are legal, that is, socialist legality, but since the power, by its nature, does not admit of being circumscribed by predetermined rules of law, total arbitrariness is built into the system. The position becomes as if the government authorizes to act in all matters just as it pleases. The rule of law, in communist thinking, makes the state “unfree”, a “prisoner of the law”. In order, therefore, to be able to act justly, the state has to be “released from the fetters of abstract rules. A free state was to be one that could treat its subjects as it pleased.”⁵⁵ This paper is of the view that, the manifest inhumanity perpetrated by rulers across societies and generations past, and in few occasions as currently practiced in countries such as North Korea, in an atmosphere devoid of Comparative Constitutionalism or constitutional government, is a recipe for global quagmire, because the crises that will emanate from individual countries around the world would

⁴⁹ B. Nwabueze, *ibid*, p. 62

⁵⁰ M. Eastman, “*Stalin’s Russia and the crises of socialism*” (1940) 82

⁵¹ Eskstein and Apter, (eds.), “*Comparative Politics*”, (1965), 433

⁵² B. Nwabueze, *ibid*, p. 62.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ F. Hayek, “*The Road to Serfdom*” (1944), pp. 70-71.

eventually metamorphose into an international catastrophe, since the world has been reduced into a global village by several international instruments; the issue of refugees alone will throw the world into a perpetual dilemma. According to Nwabueze, the almost, destruction of man's individuality and human liberty under socialism/communism suggest two consequences. Firstly, it renders the regime so susceptible that popular resistance and violent uprisings become inevitable and order of the day, since individuals, deprived of liberty of action and forced into a common mould and a regimented existence, would always try to break free of it.⁵⁶ Ralf, while describing the state affairs in a nation without the presence of constitutionalism embedded had this to say:

*Revolts and uprisings are endemic to societies in which those at the bottom of social hierarchies including labour are no better of anywhere else, the place of capital is taken by a new class of political bureaucrats, and that of wage disputes and strikes, or elections and changes of government by procedures of unwilling adaptation which are always liable to break down.*⁵⁷

To further appreciate the role of Comparative Constitutionalism as catalyst to world order, a summary of one of the reasons that precipitated the Second World War will be instructive. It was no doubt the total absence of the law of the constitution, which led to the Fascist and Nazism regimes in Italy and Germany respectively that subsequently metamorphosed into the Second World War. Flowing from the above, an individual ruler's ability to exhibit and or exercise of total, authoritarian, absolute or unlimited powers within a country in which he presides with the possibility that it may metamorphose into a global chaos or catastrophe, is no longer a thing of dispute, given the instances below. Among other reasons the following narrative about the very origin of the Second World War, marks a strong point.

7. Rise of Fascism and the Nazi Party

In 1922, Benito Mussolini and the Fascist Party rose to power in Italy. Believing in a strong central government and strict control of industry and the people, Fascism was a reaction to the perceived failure of free market economics and a deep fear of communism.⁵⁸ Highly militaristic, Fascism also was driven by a sense of belligerent nationalism that encouraged conflict as a means of social improvement. By 1935, Mussolini was able to make himself the dictator of Italy and transformed the country into a police state.⁵⁹ To the north in Germany, Fascism was embraced by the National Socialist German Workers Party, also known as the Nazis. Swiftly rising to power in the late 1920s, the Nazis and their charismatic leader, Adolf Hitler, followed the central tenets of fascism while advocating for the racial purity of the German people and additional German *Lebensraum* (living space). Playing on the economic distress in Weimar Germany and backed by their "Brown Shirts" militia, the Nazis became a political force. On January 30, 1933, Hitler was placed in position to take power when he was appointed Reich Chancellor by President Paul von Hindenburg.⁶⁰

8. The Nazis Assume Power

A month after Hitler assumed the Chancellorship, the Reichstag building got burned. Blaming the fire on the Communist Party of Germany, he used the incident as an excuse to ban those political parties that opposed Nazi policies. On March 23, 1933, the Nazis essentially took

⁵⁶ N. Nwabueze, p. 68.

⁵⁷ R. Dahrendorf, 'Reflections on the Revolution in Europe' (1990), p.80.

⁵⁸ <<https://www.thoughtco.com/world-war-ii-road-to-war-2361456/>>. accessed 22/02/2018.

⁵⁹ Ibid.

⁶⁰ Ibid.

control of the government by passing the Enabling Acts. Meant to be an emergency measure, the acts gave the cabinet and Hitler the power to pass legislation without the approval of the Reichstag. Hitler next moved to consolidate his power and executed a purge of the party (The Night of the Long Knives) to eliminate those who could threaten his position. With his internal foes in check, Hitler began the persecution of those who were deemed racial enemies of the state.⁶¹ In September 1935, he passed the Nuremberg Laws which stripped Jews of their citizenship and forbade marriage or sexual relations between a Jew and an "Aryan." Three years later the first pogrom began (Night of Broken Glass) in which over one hundred Jews were killed and 30,000 arrested and sent to concentration camps.⁶² The important point to note from the brief narrative above, about the genesis of the Second World War, was that it was apparently orchestrated by the duo, Mussolini and Hitler (allies) in their respective countries of Italy and Germany, and that it was tilted towards expropriating maximum powers for themselves, enough to completely curtail and stifle individual and corporate liberty without any form of restraint whatsoever. First, it was nurtured and perfected in their domains, same which was extended to other territories, before culminating it into the Second World War. Thus, this paper argues that there is no disagreement that all of the world problems have been tackled in their entirety because of the presence of Comparative Constitutionalism in most of the constitutions of countries around the world. However, the place of Comparative Constitutionalism as a precursor to world peace and order is not in dispute. Such norms that are usually associated with the concept of Constitutionalism are, Rule of Law, the People, and Separation of Powers and more have greatly brought about that tranquility and order the world has not known before its emergence. We undertake to discuss one of them in a nutshell.

9. The Rule of Law

One of the norms that have sustained and popularized the concept of constitutionalism across the globe is no less than the rule of law. One meaning of the rule of law is that, it is the idea of law based on respect for the supreme value of human personality and all power in the State being derived and exercised in accordance with the law.⁶³ Also, it may be understood as the safeguards offered by principles, institutions and procedures with different weight being apportioned in different parts of the world.⁶⁴ The rule of law as placed side by side with the "rule by law", there is such concept called the rule by law, as viewed by this paper. The difference between "rule by law" and "rule of law" is important. Under the rule "by" law, law is an instrument of the government, and the government is above the law. In contrast, under the rule "of" law, no one is above the law, not even the government. The core of "rule of law" is an autonomous legal order.⁶⁵ Under the rule of law, the authority of law does not depend so much on law's instrumental capabilities, but on its degree of autonomy, that is, the degree to which law is distinct and separate from other normative structures such as politics and religion. As an autonomous legal order, rule of law has at least three meanings. First, rule of law is a regulator of government power. Second, rule of law means equality before law. Third, rule of law means procedural and formal justice.⁶⁶ In the heart of rule of law is the supremacy of the constitution.

⁶¹ Ibid.

⁶² Ibid.

⁶³ H. Seervai, 'The Supreme Court of India and the Shadow of Dicey' in the *Position of the Judiciary under the Constitution of India*, pp. 83-96 (1970).

⁶⁴ Ibid, p. 196-197.

⁶⁵ T. Amerit,ibid.

⁶⁶ Ibid.

In Nigeria, section 1 (1) (2) and (3) of the 1999 Constitution as amended captured the supremacy of the constitution, which is as follows:

*This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria. The Federal Republic of Nigeria shall not be governed, nor shall any person or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution. If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.*⁶⁷

In South Africa it is stated as follows: “*This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.*”⁶⁸ Article vi(2) of the Constitution of the United States of America, states thus:

*This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*⁶⁹

Relying on Article 2 of the Ugandan Constitution, Manyindo DCJ (as he then was) in *Major General David Tinyefuza v. Attorney General*⁷⁰ observed on the supremacy of the constitution thus:

“ ... once a polity has enacted a Constitution then the rule of law, that is the Constitution becomes the cornerstone of all laws and regulates the structure of the principal organs of government and their relationships with one another and to the citizens, and determines their main functions. Needless to emphasize, all laws must conform to the Constitution as the supreme law of the land. It is the Constitution, and not the Executive, Legislature or Judiciary, which is supreme. Under Article 2 (I) and 2 of the Constitution it has binding force on all authorities and persons throughout Uganda.”⁷¹ *The supremacy of rule of law has been, since the middle ages, a principle of the Constitution. It means that the exercise of powers of government shall be conditioned by law and that the subject shall not be exposed to the arbitrary will of his ruler.*⁷²

The rule of law as mildly explained above amongst other norms of Comparative Constitutionalism, such as Separation of Powers, Democracy, Supremacy of the Constitution vis-a-vis the laws - which was dealt with briefly above and many more. However, in all, the most worrisome aspect is the attitude of governments. Particularly, the executive with regards to obedience to court orders as touching the court’s powers of review is pertinent. This, in the opinion of this paper, stands out as the cornerstone of the rest of the other norms.

10. Conclusion

Concluding, this research work is of the view that the world today may have nothing less than total disarray, but for Comparative Constitutionalism or the culture and Spirit of the

⁶⁷ The Constitution of the Federal Republic of Nigeria, 1999 (as amended).

⁶⁸ Constitution of the Republic of South Africa, 1996.

⁶⁹ The Constitution of the United States of America (as amended).

⁷⁰ Constitutional Petition No. 1 of 1996 p. 69

⁷¹ *Major General David Tinyefuza v. AG* Constitutional Petition No. 1 of 1996 p.69.

⁷² E.C.S. Wade and Godfrey Phillips, in *Constitutional Law*, (8th ed.) 62

Constitution embedded in nearly all of the constitutions of countries across the globe. This, for instance, has helped vide the courts in the enthronement of the rule of law rather than the rule of men, which portends a life of hopelessness, lawlessness, chaos and horrendous society, with no respect for the liberty of the individual as well as in the corporate sense. To live those days were regrets and pains without end. It turns society from its primordial status to attaining a civil and orderly one. The courts from one continent to another where constitutionalism is entrenched have reviewed both the executive and legislative actions that are found to be ultra- vires their powers, null and void. The courts themselves have been conspicuously excluded from certain actions of the executive and legislature, such as matters of impeachment of the President or his Vice and Governor or his Deputy, save and except due process of law were jettisoned. The people are significant when it comes to the realization of the concept of Constitutionalism in a country. The people's concerted and systematic opposition to arbitrary and selfish exercise of powers by those that are entrusted with it has eased out many draconian and tyrannical rulers. Thus, this paper recommends that a proactive and vibrant judiciary is quintessential for the effective utilization of the concept of Comparative Constitutionalism. The various arms of government must ensure that upholding the rule of law is the basis for a peaceful and orderly society. That citizen must ensure that they participate in the political process at all times so as to hold their leaders accountable. Government must treat all segments of society on non-discriminatory basis in order to avoid wide spread violence and other matters incidental thereof.

