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Can National Constitutions be Repealed and Enacted? An Appraisal of the Extensions or Limits of Legislative Powers

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ABSTRACT

A constitution is the fundamental law of a country. Government institutions, including the legislature, are created and assigned definite functions through it. A central function of the parliament is law-making, and with this function goes the power to unmake or repeal laws. A fundamental question in light of this is whether the law-making and unmaking functions of the legislature extend to or are exercisable in respect of national constitutions to make for their repeal and subsequent enactment. Against this background and relying on the doctrinal research method, this paper appraises the legislature's law-making function to ascertain its extensions or limits where national constitutions are concerned.

1. Introduction

One of the functions assigned to legislatures around the world is that of law-making. This function is pivotal to society's stability, progress, and survival, as the law rules over societies. In other words, laws build, groom, regulate, and sustain societies. The function of law-making naturally goes the function of uncoupling or unmaking laws. While the legislature has the express power to make laws, it equally has the express or implied power to unmake, uncouple, alter, or extinguish laws.

This accompanying function is of utmost importance because societies are dynamic, and the law must thus be constantly refined to take cognizance of and address contemporary aspirations, demands, and challenges of the citizenry and society. The power of repeal is an essential feature of legislatures worldwide. A law may be repealed for several reasons, one being that the law may be obsolete and thus unable to serve contemporary purposes. In such an instance, serial alterations may be unnecessary and would, in any case, be unable to salvage such law from obsolescence. In general terms, the act or process of repeal extinguishes laws, which may take the form of repeal without a replacement or repeal with replacement (repeal and (re)enactment). In respect to the former, a law is repealed or taken out of existence without a replacement; in the latter, there is a replacement.

In light of these facts, a significant question is whether a national constitution may be repealed like any law and replaced with a new one. Put differently, where a national constitution is perceived or ascertained to be of no use to the society any longer or is incapable of addressing contemporary issues in the country, or for whatever reason, can the legislature repeal such a constitution and replace it with another given its law-making and repealing powers?

This paper answers these questions by assessing legislatures' law-making and unmaking functions vis-à-vis the nature of national constitutions. Its objective is to properly determine the extensions or

limits of legislative powers concerning national constitutions. As a prelude, the paper examines terms germane to the paper and delves into the central discourse.

2. Method

The paper used primary and secondary data sources in its analysis, including Constitutions, Acts, case law, textbooks, journal articles, and law reports. Regarding the paper's methodological construct, the doctrinal legal research methodology (library-based research premised on legal doctrine and dealing with interpreting legal texts and facts based on legal principles) was adopted.

3. Discussion and Research Results

3.1 Terms of Discourse

3.1.1. Constitution

In lay terms, a constitution is "a set of rules which govern an organization."[1] Organizations are regulated internally and externally by definite rules or prescriptions. Internally, such rules outline the powers, rights, and duties of members of the organization, with the primary aim of regulating the internal workings and external relations of the organization and accomplishing set goals or objectives.[2] Externally, the rules are provided by superintending authorities or bodies that regulate different aspects of the organization and stipulate, among other things, how it may be composed and regulated and how it may carry out business. In the context of a legal system through which a state is administered, a constitution is defined 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; it is the written instrument embodying this fundamental law, together with any formal amendments."[3] It is "an aggregate of fundamental principles or established precedents that constitute the legal basis of a polity and commonly determine how that entity is to be governed."[4] It is thus the "ultimate source of legitimacy and authority for the practice of government."[5]

Constitutions are direct legislation by citizens of a country or state and represent the "highest form that statute law can assume."[6] Social contracts embody people's ideals, aspirations, yearnings, hopes, dreams, and intentions. They derive mainly from the people's social, economic, political, historical, and geographical experiences within the territory it superintends. Although a constitution is referred to as the primary or fundamental law of a country, it does not contain all the laws of a country. It sets the framework for the functioning of a country, serves as the fountain from which all other laws flow, and acts as the barometer against which the validity of all other laws is measured.

Bulmer posits that constitutions "balance and reconcile legal, political and social functions in different ways" and goes further to identify two broad constitutional archetypes: the procedural and the prescriptive, with remarks that the differences between these two types of constitutions relate to the nature and purposes of the document itself.[7] According to him, a procedural constitution defines the "legal and political structures of public institutions and sets out the legal limits of government power

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1 H. Barnett (2013). *Constitutional and Administrative Law* (10th ed.) Routledge, 6.
2 Barnett, *Constitutional and Administrative Law*, 6.
3 B. A. Garner (Ed.) (2009). *Black's Law Dictionary* (9th ed.) Thomson Reuters, 353.
4 E. McKean (Ed.) (2005). *The New Oxford American Dictionary* (2nd ed.) Oxford University Press, 2051.
5 A. Caroll (2007). *Constitutional and Administrative Law* (4th ed.) Pearson Education Limited, 4.
6 Garner, *Black's Law Dictionary*, 1543.
7 E. Bulmer (2017). *What is a Constitution? Principles and Concepts* (International IDEA Constitution-Building Primer 1). International IDEA, 9-10.

to protect democratic processes and fundamental human rights." A prescriptive constitution, on the other hand, "emphasizes the foundational function of the constitution as a basic charter of the state's identity, which plays a key role in representing the ultimate goals and shared values that underpin the state, and provides a collective vision of what might be considered a good society based on the common values and aspirations of a homogeneous community."[8]

Generally, constitutions mostly fall within two categories: codified (written), uncodified (unwritten), rigid, flexible, unitary, federal, confederal, autocratic, monarchical, democratic, and republican. Constitutions generally contain some, all, or more of the following provisions: a preamble; the identity of the state; a bill of rights; commitment to the rule of law; the roles, structure, and composition of the legislature, executive, and judiciary; electoral matters; the structure of the state; the economy and distribution of resources; the police and armed forces; emergency powers; and amendment or alteration.

3.1.2. Repeal

Repeal is "the abrogation of an existing law by legislative act."[9] It is an affirmative act of the legislature that ends a law that does not expire on its own accord; it ends the law's validity, operation, and existence. Thus, once a law is repealed, it stands abolished and no longer has any effect. As explained in Halsbury's Laws of England,[10] the term "repeal" means "revoking and abolishing an Act and all its effects which cause it to cease to be part of the statute book or body of law." Accordingly, two main things happen once an Act is repealed: (a) the life of the Act is terminated, and (b) the repealed Act is deleted from the statute book. Also, when a Principal Act is repealed, all its amendments stand repealed, and subsidiary legislations made pursuant to it may be affected. As held in *Abdu* v *State*,[11] "the legal consequence of the repeal of an enactment is that it ceases to exist from the date the repealing enactment comes into force." A repealed enactment cannot be the legal basis for anything done after it has been abolished;[12] It is treated as if it never existed. Generally, the repeal of an enactment cannot: (a) revive anything not in force or existing at the time when the repeal takes effect; (b) affect the previous operation of the enactment or anything duly done or suffered under the enactment; (c) affect any right, privilege, obligation or liability accrued or incurred under the enactment; (d) affect any penalty, forfeiture or punishment incurred in respect of any offense committed under the enactment; (e) affect any investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment; the investigation, legal proceeding or remedy may be instituted, continued or enforced, and penalty, forfeiture or punishment may be imposed as if the enactment had not been repealed.[13]

The target of a repeal depends on the instructions a legislative drafter receives, and those instructions are given expression in the repealing Act (the Act that repeals another Act). It could be to repeal an entire Act, a section, a subsection, a part, a paragraph, or a subparagraph. In Nigeria, "repeal" is used only to refer to abrogating an entire piece of legislation. Where specific provisions or other contents are removed from an existing legislation (by legislative act) without abolishing legislation, they are said to be 'deleted.' In general terms, repeals may be expressed or implied. An Act or legislation is said to be expressly repealed when a newly enacted legislation (called the repealing Act or legislation) explicitly provides that the earlier enacted Act or legislation ('the principal Act') is repealed. Implied

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8 H. Lerner (2011). *Making Constitutions in Deeply Divided Societies*. Cambridge University Press, 18.
9 Garner, *Black's Law Dictionary*, 1413.
10 Halsbury's Laws of England, *Statutes and Legislative Process* (Volume 96 (2018)) 298 Meaning of 'repeal'.
11 [2021] LPELR-55097(CA), per Talba, JCA (Court of Appeal, Nigeria).
12 Agim, JCA in *Sylvester & Ors* v *Ohiakwu & Ors* [2013] LPELR-21882(CA) (Court of Appeal, Nigeria).
13 Section 6 Nigerian Interpretation Act 1964; section 16 UK Interpretation Act 1978; section 43 Canadian Interpretation Act 1985.

repeal could occur where the provisions of a subsequent legislation are highly inconsistent and incompatible with those of an earlier legislation on the same subject matter, so much so that they cannot co-exist. The following legislation would then be said to have repealed the earlier legislation by implication. In most countries, repeals must be expressly done.

Repeals may be done with or without replacements. Repeal without replacement (or (re)enactment) is an absolute repeal that completely wipes out the existence of a law. Repeal with/and (re)enactment represents a situation where a law is replaced with a more suitable one. In most cases, the provisions of the repealed law are (re)enacted in the same or substantially the same terms by the repealing law. Where an enactment is repealed and substituted with another, the repealed enactment remains in force until the substituted enactment comes into force, and any reference to the repealed enactment after the substituted enactment comes into force is construed as a reference to the substituted enactment.[14] Subsidiary instruments made under a repealed enactment are by law allowed to continue in force as if they were made under the substituted enactment, except they are inconsistent with the substituted enactment.[15]

Laws to be repealed are usually selected on the grounds that they are no longer of practical utility or that they no longer have any legal effect on technical grounds because they are spent, unnecessary, or obsolete. They may also be selected because the purposes for which they were enacted no longer exist or have been met by some other laws or means. Repealing laws modernizes and simplifies the statute book, reducing its size, cutting costs, and retaining only relevant laws.

3.1.3. Powers of a legislature

As one of the three branches of a democratic government, the legislature is regarded as the cornerstone of democratic governance. Mezey defines a legislature as "a predominantly elected body of people that acts collegially and has at least the formal but not necessarily the exclusive power to enact laws binding on all members of a specific geopolitical entity."[16] As the sole institution of government that is legally tasked with representing the diverse interests of society in government, legislatures promote vertical accountability (to the public at large) and horizontal accountability (across and between other state and quasi-state institutions).[17]

Around the world, legislatures perform three central functions (statutorily assigned and defining their powers): representation, law-making, and oversight. Hague et al.,[18] however, expand these functions by asserting that democratic legislatures have six primary functions: (1) representation (which may be formalistically, symbolically, descriptively, substantively, or collectively); (2) deliberation (on the floor, via committees, or both); (3) legislation; (4) authorizing expenditure (the power of the purse); (5) making governments; and (6) oversight. Notwithstanding the expansion (which in any case is interrelated), the efficient and effective performance of the functions of representation, law-making, and oversight essentially define a legislature and speak to its influence and strength in governance. While representation involves articulating, promoting, defending, and

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14 Section 4(2) Nigerian Interpretation Act 1964; section 17 UK Interpretation Act 1978.

15 Section 4(2) Nigerian Interpretation Act 1964; section 17 UK Interpretation Act 1978.

16 M. Mezey (1979). *Comparative Legislatures*. Duke University Press, 6.

17 J. D. Barkan (2009). African Legislatures and the "Third Wave" of Democratization. In J. D. Barkan (Ed.), *Legislative Power in Emerging African Democracies*. Lynne Rienner Publishers, 1.

18 R. Hague, M. Harrop & J. McCormick (2017). *Political Science: A Comparative Introduction* (8th ed.) Red Globe Press, 128. Scholars such as Barkan however assert that legislatures perform four core functions: they represent, legislate, exercise oversight, and (legislators acting individually) perform the function of constituency service. See Barkan, African Legislatures, 6-7. These seemingly discrepant classifications and typologies notwithstanding, it is arguable that cumulatively, all the functions performed by legislatures and legislators flow centrally from the core functions of representation, law-making, and oversight.

actualizing constituents' interests, oversight is the mechanism through which government vertical and horizontal accountability is made possible. Law-making is regarded as the legislature's regime, province, or primary function. It is the power to make or enact laws through a structured and constitutionally empowered process and to alter or repeal laws. A fundamental requirement for law-making is that the subject matter to be legislated on must be within the legislative competence of the legislature as provided in the constitution or by law. This requirement also applies to such legislative processes as amendment and repeal.

3.2. Can a National Constitution be Repealed and Enacted?

Although constitutions are designed to endure for generations, they are not immutable; they need to be and are often altered to respond to changes in the political, economic, or social environment in which they operate. Constitutions may be changed by way of amendment, interpretation, or replacement. Amendment procedures prevent the need for constitutional replacement as they enable the adaptation of the provisions of an existing constitution to new circumstances "without affecting its legal continuity."[19] Constitutional replacement involves a complete switch from an old or existing constitution to a new one, which could be for such symbolic reasons as "signaling a transition to democracy; replacements constitute a clear case of legal discontinuity."[20] Because existing constitutions may be replaced with new ones, and given that legislatures are charged with law-making and unmaking, can legislatures repeal old constitutions and enact new ones? This question may be answered contextually. Two contexts germane to the question of constitutional repeal and enactment are (1) where there is an uncodified constitution and (2) where there is a codified constitution. These are analyzed below.

3.2.1. Where there is an uncodified constitution

The term 'uncodified constitution' refers to the absence of a single document that embodies the fundamental law of a country but the presence of basic rules which may take the form of "customs, usage, precedents and a variety of statutes and legal instruments."[21] In other words, the absence of an authoritative document of fundamental importance sets out the structure of government and its relationship with its citizens. It serves as the fountain of all other laws in a geographical entity. Except for the United Kingdom, New Zealand, and Israel, all modern states use "documentary or codified constitutions."[22] An uncodified constitution has such advantages as elasticity, adaptability, and resilience and is described by A. V. Dicey as "the most flexible polity in existence."[23]

Some scholars prefer the term 'uncodified' to 'unwritten' about constitutions that are not contained in a single document. This is mainly given the impression the latter term gives at first glance− that the fundamental principles are not written in any document but are possibly just customs and norms sustained through oral tradition and practice. However, fundamental principles contained in a document are viewed as *the* constitution rather than the document itself. As Preuss notes, "The Constitution is not identical with the written provisions of the constitutional document… Even concerning countries lacking a [sole] constitutional document, scholars assert the absence of a codified

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[19] G. L. Negretto (2008). *The Durability of Constitutions in Changing Environments: Explaining Constitutional Replacements in Latin America* (Working Paper #350). The Helen Kellogg Institute for International Studies, 2.

[20] Negretto, *The Durability of Constitutions*.

[21] J. C. Johari (2006). *New Comparative Government*. Lotus Press, 167-169.

[22] R. Blackburn (2015, 13 March). *Britain's Unwritten Constitution*. The British Library. https://www.bl.uk/magna-carta/articles/britains-unwritten-constitution

[23] A. V. Dicey (1885). *Introduction to the Study of the Law of the Constitution*. Macmillan & Co, 39.

constitution instead of denying the existence of a constitution."[24] This assertion justifies the fact that a constitution is more than a document. It is a constellation or cocktail of fundamental rules and principles relating to the overall governance of a geographical entity that ranks higher than other rules and principles. It is thus not the document itself, for without the presence of fundamental rules and principles, it would be just like any governance document, or any document for that matter. The document is thus a cover or container for the fundamental rules and principles; it contains them, shields them, and makes for ease of reference, but isn't them. Yet some argue that the "actual *soul* of a constitution may not be found in individual constitutional provisions."[25] This notwithstanding, the term or description 'uncodified' indicates the presence of some written fundamental rules and principles that are not contained in a single document but exist in separate documents.

Arte notes that a flexible constitution "has no special procedure for amendment, or has procedures which are relatively more flexible" and that "Great Britain has a flexible constitution because all of its constitutional institutions and rules can be abrogated or modified by an Act of Parliament."[26] In countries with uncodified constitutions, institutions, and processes are established by Acts of Parliament, some of which Acts are considered to be of highly significant value and importance. Such Acts are usually considered to be of constitutional value, importance, or status because they are central to and serve as the foundation for the organization and functioning of the country. Indeed, they are regarded as legislations of national interest and significance. Thus, they rank higher in status than other general or ordinary Acts and are usually described as "constitutional statutes." A constitutional statute is " of fundamental importance in the creation of the state and in determining the relationship between the state and the individuals within it."[27] Notwithstanding their constitutional status or significance, they remain Acts of Parliament and may thus be repealed and (re)enacted by the legislature or parliament. This view finds support in the submission of Elster, who, in distinguishing a constitution from other laws, posited thus:

> *"Three criteria offer themselves if we want to distinguish the Constitution from other legal texts. First, many countries collectively have a set of laws called "the constitution." Second, some laws may be deemed "constitutional" because they regulate matters that are in some sense more fundamental than others. Third, more stringent amendment procedures may distinguish the Constitution from ordinary legislation. New Zealand has a constitution based on the first and second criteria but not on the third. In that country, "only ordinary legislative efforts are required to supplement, modify or repeal the Constitution."*[28]

The import of Elster's position is that in countries such as the United Kingdom and New Zealand that lack codified constitutions, the Acts of Parliament, which establish fundamental rules for the functioning of the countries, may be repealed by the legislature or parliament. This is because although the citizenry may make significant inputs in the drafting and adopting those Acts, they nevertheless remain creations of the legislature and, by the same legislative act of law-making, may be repealed, although only in exceptional circumstances. The United Kingdom may serve as a case study.

In the United Kingdom, there are several constitutional statutes. They include the Human Rights Act of 1998, the Scotland Act of 1998, the Government of Wales Act of 1998, the Northern Ireland Act of 1998, the European Communities Act of 1972, the Bill of Rights 1689, Acts of Union 1800, Act of Settlement 1701; Acts of Union 1707; House of Lords Act 1999; and Reform Act 1832. These statutes, which are fundamental and are of constitutional value or significance, may be repealed by Parliament

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[24] K. Preuss (2017). *Expounding the Unwritten Constitution: Principles and Values in Constitutional Adjudication in Germany, France and Israel* [Unpublished LL.M. Short Thesis]. Central European University, Wien, Austria, 1.

[25] C. Schmitt (2008). *Constitutional Theory*. Duke University Press, 58.

[26] B. R. Arte (2011). *Legislative Drafting* (3rd ed.) Universal Law Publishing Inc., 168.

[27] Caroll, *Constitutional and Administrative Law*, 105.

[28] J. Elster (1995). Forces and Mechanisms in the Constitution-Making Process. *Duke Law Journal,* (45), 366.

if the need arises. However, because of the essential nature of such statutes, such repeals may be accompanied by instant enactments or replacements to preserve continuity and stability. Repeals of constitutional Acts are only by express repeals and not implied repeals. Laws LJ explained this point in *Thoburn* v *Sunderland City Council, Hunt* v *London Borough of Hackney, Harman & Dove* v *Cornwall County Council*, and *Collins* v *London Borough of Sutton*[29] (the 'Metric Martyrs' case) while distinguishing between ordinary statutes and constitutional statutes:

> *In the present state of its maturity, the common law has come to recognize that rights should be appropriately classified as constitutional or fundamental ... We should acknowledge a hierarchy of Acts of Parliament, as it were 'ordinary' statutes and 'constitutional' statutes ... In my opinion, a constitutional statute is one that (a) conditions the legal relationship between the citizen and the state in some general, overarching manner or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights ... The special status of constitutional statutes follows the constitutional status of constitutional rights. Examples are the Magna Carta, the Bill of Rights 1689, the Act of Union, the Reform Acts, which distributed and enlarged the franchise, the Human Rights Act 1998, the Scotland Act 1998, and the Government of Wales Act 1998. ...Ordinary statutes may be impliedly repealed. Constitutional statutes may not...*

To repeal an Act, the United Kingdom adopts the practice of enacting a Statute Law (Repeals) Act, which repeals specific Acts that are no longer of practical utility. Three examples of using the Statute Law (Repeals) Act may be cited. The Statute Law (Repeals) Act 1969, for instance, repealed several constitutional enactments, including Confirmation of Magna Carta (1297), except articles 1, 9, 29 and 37; The Lord Keeper Act 1562; The Ship Money Act 1640; The Parliament Act 1660; and the Queen Regent's Prerogative Act 1554. The Statute Law (Repeals) Act 1986 repealed the Representation of the People Act 1948 (the whole Act, except sections 1(1) and 81), and the Referendum Act 1975. The Statute Law (Repeals) Act 1993, on the other hand, repealed the following: the Civil List and Secret Service Money Act 1782; Parliamentary Elections Act 1868; Ministry of Pensions Act 1916; Civil List Act 1936; Northern Ireland (Financial Provisions) Act 1972; and the Ministry of Fuel and Power Act 1945 (the whole Act, except sections 1(1), 6(1) and 8). The preceding thus indicates, as earlier posited, that although constitutional statutes may be fundamental, they may be repealed and (re)enacted by the legislature that made them if they are found to be expired, spent, obsolete, or unnecessary.

3.2.2. Where there is a codified constitution

A codified constitution is "one which has been systematically and meticulously written down and embodied in a single document."[30] It is "a formal document which defines the nature of the constitutional settlement, the rules that govern the political system, and the rights of citizens and governments in a codified form."[31] A central difference between a codified and an uncodified constitution is that a codified constitution can easily be referred to; the fundamental rules that bind the country or state are not scattered across or found in several separate documents, customs, or conventions but instead in one authoritative document. Codified constitutions are generally rigid in terms of the process of amendment. Another distinction between a codified and an uncodified constitution, which speaks centrally to repealing and enacting constitutions, is how and how codified constitutions are made. "Constitutions neither fall from the sky nor grow naturally on the vine; they are human creations and products shaped by convention, historical context, choice, and political

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[29] [2002] EWHC 195 (Admin) (Supreme Court of Judicature, Queen's Bench Division Divisional Court, United Kingdom).

[30] Byjus (n.d.) *Difference between Written and Unwritten Constitution*. Byjus. https://byjus.com/free-ias-prep/difference-between-written-and-unwritten-constitution/

[31] Politics.co.uk staff (2022, 23 January). *Written Constitution*. Politics.co.uk. https://www.politics.co.uk/reference/written-constitution/

struggle."[32] Unlike uncodified constitutions, codified constitutions are products of a constituent assembly rather than legislators. As the legislature does not make them, they cannot be repealed and enacted by the legislature. This position is strengthened and explained through specific grounds (such as directness, superiority, laid down procedures, and extraordinary nature) consolidated and discussed below.

A constitution is the very foundation of national laws. It is generally described as the origin and source (*fons et origo*) of all other laws that operate in a legal clime. This makes it higher than all other laws, especially laws made by the legislature− a concept known as constitutional supremacy. This concept or principle is encapsulated in most codified constitutions as an affirmation or declaration of the constitution's supreme power, authority, and dominance.[33] A codified constitution's fundamental and superior nature derives from the fact that it draws its power and authority from the citizenry− the actual makers of the constitution− and not from any law or institution. Accordingly, constitutions derive their authority, validity, and legitimacy from the sovereignty of the citizenry, primarily through the active participation of the citizenry in the constitution-making process. Section 14(2)(a) of the Constitution of the Federal Republic of Nigeria 1999 echoes this point: "Sovereignty belongs to the people of Nigeria from whom government through this Constitution derives all its powers and authority."[34] The implication is that the government's existence and authority depend on and derive from the people− "all authority is derived from the people at large, held only during their pleasure, and exercised only for their benefit."[35] This marks a sharp distinction from ordinary laws and regulations, generally made by representatives of the people and not by the generality of the citizenry. As Dodd notes,

> *Our whole political system rests on the distinction between constitutional and other laws. The former are the solemn principles laid down by the people in its ultimate sovereignty; the latter are regulations made by its representatives within the limits of their authority, and the courts can hold unauthorized and void any act that exceeds those limits. The courts can do this because they are maintaining against the legislature the fundamental principles that the people themselves have determined to support, and they can do it only so long as the people feel that the constitution is something more sacred and enduring than ordinary laws, something that derives its force from a higher authority.*[36]

As a fundamental document the people make, a constitution is regarded as direct legislation. It is not made through representatives of the people (the legislature) but by the people themselves through an adequately constituted constituent assembly or any other desired means. It is the "avowed act of the people at large and remains the first and fundamental law of the state which prescribes the limits of all delegated power; it is paramount to all acts of the legislature, and "irrepealable" and unalterable by any authority but the express consent of a majority of the citizens."[37] As sovereign, the people "permanently maintain the power to alter or replace the constitution, and they can do this through the amendment mechanisms provided by the constitution, or by exercising their primal power as

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[32] C. Uteem (2011). Foreword. In W. Wahiu (Ed.), *A Practical Guide to Constitution Building: An Introduction*. International Institute for Democracy and Electoral Assistance, iii.

[33] See for example, Section 1(1) of the Constitution of the Federal Republic of Nigeria 1999; Article VI, Clause 2 of the Constitution of the United States of America; Section 109 of the Constitution of Australia; Chapter 1, section 2 of the Constitution of the Republic of South Africa; and Article 1(2) of the Constitution of the Republic of Ghana.

[34] See also Article 1.2 of the Spanish Constitution and Article 1(1) of the Constitution of the Republic of Ghana.

[35] T. T. Tucker, 'Conciliatory Hints, Attempting by a Fair State of Matters, to Remove Party Prejudice' quoted in G. S. Wood, *The Creation of the American Republic: 1776-1787* at 281, and cited in R. Ku (1995). Consensus of the Governed: The Legitimacy of Constitutional Change. *Fordham Law Review, 64*(2), 550.

[36] W. F Dodd (1910). *The Revision and Amendment of State Constitutions*. The Johns Hopkins Press, 253.

[37] Tucker, 'Conciliatory Hints' cited in Ku, Consensus of the Governed, 549.

sovereign."[38] As Francis Hopkinson posited, constitution-making involves "[a] whole people exercising its first and greatest power− performing an act of sovereignty, original, and unlimited."[39] This supreme power, which rests with the people and forms the philosophical underpinnings of government, clarifies the fundamental distinction between what Ackerman describes as "higher lawmaking" and "normal lawmaking."[40] While the former depicts the will of the people, the latter represents the will of the people's representatives.[41]

As the fundamental law by which the people of a country are governed, "a constitution is not a regular act of government legislation but the very genesis [and limit] of government."[42] To confine the ordinary actions of government, the constitution must be grounded in some fundamental source of authority, some "higher authority than the giving out of temporary laws."[43] This special authority could be gained only if the constitution is "created by "an act of all"− a creation of the people themselves distinct from regular legislative acts."[44] This quality sets a constitution far above the legislative competence of a legislature and thus makes it impossible for an ordinary legislature to proclaim the supreme law of a country. Jefferson[45] They believe it is absurd for a legislature to proclaim a law (or constitution) that superintends it, ostensibly because legislatures lack the power or competence to enact laws above their legislative powers. On this, he questions whether the following declaration does not expose the absurdity of such an attempt: *"We, the ordinary legislature, establish an act above the power of the ordinary legislature."*

"A constitution derives its fundamental, "higher law" status only when it represents the will of the supreme lawmaker− the people acting in their sovereign capacity."[46] A codified constitution, as the "direct and basic expression of the sovereign," is "the absolute rule of action and decision for all departments and offices of government concerning all matters covered by it, and must control as it is written until it is changed by the authority which established it."[47] Unlike ordinary legislation, constitutional alterations or amendments involve stringent procedures contained as provisions in the Constitution itself.[48] The stringent procedures speak to the superiority of constitutions in the law hierarchy and ensure that they are not to be frequently changed. As Raymond Ku[49] puts it,

> *Constitutional change should be rare because a constitution represents the fundamental law of government meant to endure for generations and made for "people of fundamentally differing views." Because the constitution represents fundamental law, the myth requires it to be established by extraordinary means, and these means are popularly understood as passage by a supermajority of either states or voters. If a constitution is easily changed, it loses its fundamental nature, and the distinction between constitutional law and legislation is obliterated. Justice Marshall stated, "A*

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38 Ku, Consensus of the Governed, 555.

39 Ku, Consensus of the Governed, 566.

40 B. Ackerman (1991). *We The People: Volume 1. Foundations*. Harvard University Press, 6-7.

41 Ku, Consensus of the Governed, 556. Ku states that as used in this context, "representative" means anyone to whom the people have delegated decision-making authority and this includes elected and appointed officials, and any portion of the people.

42 *Lance* v *The Board of Education of County of Roane*, 170 S.E.2d 783, 793 [W. Va. 1969] (Haymond, J., dissenting) (Supreme Court of Appeals of West Virginia, United States of America).

43 B. Bailyn (1967). *The Ideological Origins of the American Revolution*. Harvard University Press, 182-83.

44 Bailyn, *The Ideological Origins*, 183.

45 T. Jefferson, Writings 249 (The Library of America 1984), cited in Ku, Consensus of the Governed, 551.

46 Ku, Consensus of the Governed, 552.

47 *Lance* v *Board*, 794.

48 See for example, Section 9 of the Constitution of the Federal Republic of Nigeria; Chapter 25 of the Constitution of the Republic of Ghana; Part X of the Spanish Constitution; and Chapter 4, section 74 of the Constitution of the Republic of South Africa. The Ghanaian Constitution sets out separate processes for the amendment of "entrenched provisions" and "non-entrenched provisions" in the Constitution.

49 Ku, Consensus of the Governed, 538.

> *constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."*

This establishes a constitution as a document made through extraordinary means that requires extraordinary measures for its alteration and replacement. Scholars consider the ease or arduousness of constitutional change primarily as "a balance between various pragmatic, epistemic, and equitable concerns such as protecting the status quo, promoting deliberation, protecting minorities, and allowing government to adapt to changing circumstances."[50] While the alteration or replacement process must be stringent enough to provide continuity of social norms and political rights, it must still be flexible enough to meet new circumstances. Procedures for a constitutional amendment may thus be rigid, flexible, or hybrid.

3.3. A Brief Appraisal

Constitutions are *sui generis*; they are superior to ordinary legislation and are thus in a class of their own. They have been described with such terms as 'living,' 'breathing,' and 'evergreen' documents, amongst other descriptions, all of which point to their unique nature. They are made to endure for generations and not to be frequently altered or replaced. The analysis in the previous section has revealed that codified constitutions cannot be repealed and (re)enacted by legislatures. In contrast, uncodified constitutions (or constitutional statutes) may be repealed and (re)enacted. The analysis has also revealed further unique facts about codified and uncodified constitutions.

Where codified, a constitution assumes its natural or traditional role as a paramount law that ranks far above ordinary legislation enacted by the legislature. It is *sui generis* and cannot be classified or regarded as an ordinary Act of the legislature as it is not made by it. Although the parliament may alter or amend the Constitution, the process is stringent. It is only made possible through the procedure stipulated in the Constitution as fixed or encapsulated by the makers of the Constitution−the citizenry. The legislature is composed of elected representatives empowered through the ballot's power and the Constitution's provisions to alter or amend the Constitution. They cannot, however, do anything else to the Constitution, such as repealing or (re)enacting it. Thus, while the constitution-making process requires and indeed involves the direct participation of the people, the constitutional amendment or alteration process engages the people's representatives. Codified constitutions are thus "irrepealable" by the legislature.

Where uncodified, constitutional Acts or statutes, although of constitutional value and higher rank than other Acts, are nevertheless regarded as Acts of the legislature. The "irrepealable" and paramount nature, a fundamental characteristic of codified constitutions, cannot be adequately attributed to those constitutional Acts as they may be altered, amended, or repealed and (re)enacted by the legislature. In most parliamentary settings, the process of amending, altering, or repealing constitutional Acts is not materially different from that of ordinary legislation, nor is there a particular procedure. Notwithstanding that the citizenry might have substantially influenced their enactment, they remain. The legislature enacts Acts of the legislature and is capable of being changed with significant ease (and mostly without recourse to the citizenry) by the parliament.

The preceding answers questions on the limits or extensions of law-making and unmaking powers of legislatures concerning national constitutions. Regarding codified constitutions, legislative powers of making and unmaking laws are strictly limited to their usual terrain and to the alteration or amendment of constitutions, a process that requires and indeed involves significant input from the citizenry. Legislative powers are thus not exercisable concerning replacing the constitution. The

[50] L. Schlam (1994). State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation. *DePaul Law Review*, 43, 295-96.

position is different in respect of uncodified constitutions. Where uncodified constitutions are concerned, the constitutional Acts or statutes are creations of the legislature. They are alterable and "repealable" by them through the same process as ordinary Acts or through a slightly different method. Thus, legislative powers of law-making and unmaking are not limited in nature where uncodified constitutions are concerned but are fully exercisable.

4. Conclusion

Constitutions are *sui generis* and constitute the paramount law of a polity, ranking higher than all other laws. Through them, legislatures are established and empowered to make and unmake laws. This paper has explored the possibility of repealing and enacting national constitutions through legislative processes to appraise the extensions or limits of legislative powers. It has been shown that whether or not a national constitution can be repealed and enacted is one that may be answered contextually− where there is no codified constitution and where there is one. The paper found that in settings where there are uncodified constitutions, legislative acts or statutes of constitutional value may be repealed and enacted. Still, codified constitutions can never be abolished or promulgated by a legislature. Constitutions are not wired to be repealed but rather to endure for generations. As direct and superior documents, they rank higher than other laws and even the legislature, which makes and unmakes laws. It may thus be submitted that the tentacles of legislative powers (in terms of enacting and repealing laws) are not extendable to the province of codified constitutions, save where constitutional alteration is concerned.

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