Antieau

Constitutional Construction

CONSTITUTIONAL CONSTRUCTION

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1982
Oceana Publications, Inc.
London • Rome • New York

ACKNOWLEDGMENT

The author gratefully acknowledges the contribution of Chief Akin Delano, a practicing barrister and former Attorney-General of Ogun State, Nigeria, who furnished a recent Nigerian case that is noted and referred to in the text.

Library of Congress Cataloging in Publication Data

Antieau, Chester James.
Constitutional construction.

Includes index.
1. United States—Constitutional law—Interpretation and construction. I. Title.

KF4550.A734	342.73	82-1250
ISBN 0-379-20682-X	347.302	AACR2

Manufactured in the United States of America

TO

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former Justice of the Constitutional Court of Germany, and

Hon. Lionel Murphy
Justice of the High Court of Australia

who have illuminated the way for jurists everywhere.

PREFACE

The subject-matter of this book is of special interest to constitutional lawyers and to the courts which are invariably called upon from time to time to apply the provisions of written constitutions. Written constitutions are not a new phenomenon but they have acquired much greater predominance since decolonisation commenced soon after the last World War. Invariably the launching of each state in Africa into nationhood has been under a written constitution. Most of the constitutions were fashioned after the "Westminster" model; but many of these have been overthrown and replaced with the United States model. Nigeria and Ghana are two important countries in Africa which have taken that step. The present book is directed not only to countries which based their constitutions on the United States model, but also to countries with other types of constitutions.

The analysis by the author of the classifications of the different approaches of the courts of the United States to constitutional construction is quite profound and reflects an extraordinary mastery of the subject. The style is very clear and extremely simple. The author does not confine himself to the decisions of the United States Supreme Court only but has made journeys of exploration, quite successfully, into the undergrowth of the jungle of decisions of the other courts of the United States which can be found in the thousands of Law Reports. These Reports are not easily available to practitioners outside the United States, mainly because of the cost of procuring them; and herein lies one of the greatest assets of this book outside the United States. It contains such a wealth of judicial authorities that it will in due course become the first place of refuge for a practitioner in the field of Constitutional Law bombarded by problems of the construction or interpretation of provisions of written constitutions.

The American judicial approaches to the interpretation of statutes and the construction of constitutional provisions may differ somehow from the approaches by courts of the Commonwealth, yet there are large areas in which these other courts, particularly those of Commonwealth Africa, may derive enormous benefit from the United States experience. After all some of these countries have constitutions basically similar to that of the United States in that they are premised upon the separation of powers with an elective executive president, a congress, however called, with legislative powers, and a judiciary basically independent of the other two arms of government. Nigeria and Ghana are good examples, and Nigeria, like the United States, has, in addition, a federal constitution. In spite of these

similarities Commonwealth African countries have not embraced the American approaches to constitutional construction so clearly set out by the author in Chapters 2 and 3. I have in mind, in particular, the approach that permits the courts to make reference to and, if need be, place reliance on congressional and other debates antecedent to the enactment of the constitutional provision which calls for construction. It may well be that in due course this approach will commend itself to these other courts. Since the constitutions of these countries are quite new, the United States experience spanning over two centuries may provide a useful guide to their courts; and may, in like manner, provide a guide to the executive arm of the government in carrying out and performing duties under the constitutions. In Nigeria the question of executive practice in the determination of what amounts to two-thirds of nineteen was obliquely raised in the first-ever presidential election case before the Supreme Court in September 1979, *Chief Obafemi Awolowo* v. *Alhaji Shehu Shagari and others*, (1979) 6-9 S.C.51, but was in effect rejected. It may well be that, helped by the American experience, a time may come when that approach may receive the approval of the Supreme Court of Nigeria.

In the area of Fundamental Rights (otherwise referred to as the Bill of Rights), constitutions of Nigeria and of other Commonwealth African countries with provisions guaranteeing fundamental rights have placed much reliance on United States judicial decisions. Here I have in mind Ghana, Zimbabwe, Kenya, Botswana and others whose courts continue to rely on the interpretations and constructions put by the United States Courts, especially the Supreme Court, upon similar constitutional guarantees of these rights.

The author (in Chapter 7) has invited Commonwealth jurists and courts to consider the importation of "sociological jurisprudence" to the business of constitutional construction. On the whole, Chapter 7 is very refreshing, and I think that it will be found not only educational but certainly very fascinating by jurists from the Commonwealth. Oliver Wendell Holmes, Dean Roscoe Pound, Benjamin Cardozo are as much house-hold names among jurists in the Commonwealth countries as they are in the United States. It is in this Chapter, more than in any others, that the author has projected, very successfully, his personality and thoughts into this book; and if I may say so, with respect to my personal admiration.

Finally, on the whole this book is a mine of information in regard to the different approaches employed by the courts of the United States to constitutional construction. The author has carefully analyzed these

different approaches and, in so doing, has provided a useful tool to guide constitutional lawyers of other countries. The simplicity and clarity of the language employed by the author and his detailed and analytical approach to the subject in hand should commend the book to any scholar or practitioner, including the courts, in the field covered. I think it should have a ready market, not only in the United States, but also in Commonwealth countries, especially African countries.

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November, 1980

INTRODUCTION

Courts at times speak of the need for "interpretation" of constitutions, professedly being concerned only with the "meaning" of the words employed in the organic laws. This has been most prevalent in countries whose constitutions are legislative acts given to the nation by the British Parliament. In these countries the courts in constitutional adjudication have customarily said they will limit themselves to ascertaining what that Parliament meant by the words utilized. Even courts in the United States have at times said that their task in determining constitutional controversies is one of "interpreting" the Constitution. In almost all constitutions there are terms such as "Letters of Marque and Reprisal" or "Bill of Attainder" (used in the Constitution of the United States) that can be said to require "interpretation" according to the intent of those responsible for the use of such language. However, the far greater task of constitutional adjudication is one requiring "construction" of the fundamental law. This term is of broader scope than "interpretation" and properly refers to that legal significance which is to be given to constitutional clauses and words. "Construction" embraces "interpretation" and courts in all countries having written constitutions must inevitably, because of the breadth of language customarily used in the documents (such as "liberty," "due process of law," "freedom of religion," etc.), concern themselves with construction rather than interpretation. Fearful at times of acknowledging the legitimate scope of judicial review in a constitutional society, courts have alleged that they were only engaged in "interpretation," assertions that should be seen as both fanciful and deceptive. Here, as in the leading work on statutory construction,[1] the term "construction" is used to embrace both the task of ascertaining meaning of words employed by those responsible for the constitutions, and the far larger and more important duty of assigning the appropriate legal significances to clauses and words used in the basic laws.

Approaches of the courts to constitutional construction can be categorised as (a) historical, (b) philosophical, and (c) sociological. At one time or another, constitutional courts have looked to historical materials in construing their basic laws. They have looked at what "the framers" meant, at the common law existing at the time a clause was adopted on the theory this was to be perpetuated, at the known evils of the time a clause was

[1]Sutherland, *Statutory Construction* (4th ed., 1972) vol. 2A, p. 15.

adopted, on the theory they were to be forever repudiated, at constitutional precedents of the courts, the executive and the legislatures. They have even attempted to ascertain how "the framers" would resolve current constitutional issues if they were alive today.

The prevailing philosophy when the United States Constitution was adopted was that of natural law and natural right and the impact of such doctrine upon construction of the Constitution is very evident. Economic laissez-faire was in vogue for many years in most countries with written constitutions, and constitutional clauses protecting such things as "liberty" have been construed to accord with this philosophy.

Today in some of the countries having written constitutions the courts will still profess to be guided by historical and philosophical materials in construction of the organic laws, but increasingly construction is seen as "sociological" in the sense that courts openly investigate the social utility of proposed rulings and consciously weigh competing societal interests and balance the same to accord with the community consensus of values.

There are a halfhundred guides to construction (customarily referred to as "the canons of construction") which are regularly utilized by the courts of most of the world in dealing with constitutional language, and these guides are treated at length in the second chapter. Succeeding chapters investigate fully the historical and philosophical materials used by the courts in constitutional construction, as well as the methodology of *interessenjurisprudenz* or the jurisprudence of interests in adjudicating constitutional controversies.

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