

**THE CONSTITUTIONAL REGULATION
OF THE FOREIGN AFFAIRS POWER;
The Kenyan Experience in a Comparative
Perspective //**

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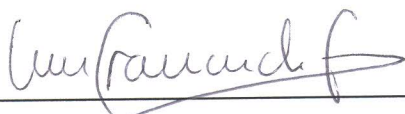
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I, Luis G. Franceschi F., declare that: this Thesis is my original work and has not been presented for a degree in any other University.

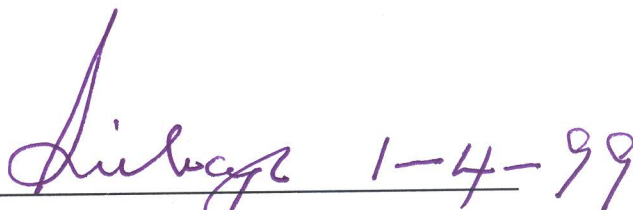


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This Thesis has been submitted for examination with my approval as University supervisor.



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The history of the making of Kenya is one of the most exciting of Africa. It is a story of struggle and success inspired by ideals more than weapons, by deeds more than words. It is a *harambee* story.

As years go by, new challenges are met. It would be naïve to say that all targets have been successfully accomplished. As Julius Nyerere said: "*We have a cause for great satisfaction in our achievements. But we have no cause at all for complacency. We have done quite well; but with effort, and more intelligent effort, we could do better... We must build on what we have achieved. We must increase our discipline, our efficiency, our self-reliance. In particular we must put more effort into looking always to see what we can do for ourselves, out of our own resources - and then doing it.*"ⁱ

Part of those efforts for the betterment of Kenya must be focused on a proper and fair legal system which provides and ensures justice for all. This is only possible within a proper and dynamic constitutional framework, for the Constitution is the pillar and foundation of any legal system.

ⁱ Julius Nyerere, *The Arusha Declaration: Ten Years After*, January 1977

In constitution-making, the work of constitutional review commissions plays an essential role. These commissions have a twofold task: on the one hand, they must ensure open participation so as to gather the views of all sectors of society; on the other, they must ensure technical expertise so that ideas, once conceived, are written down in an organised manner under the guidance of law-drafting experts.

The present dissertation is concerned with one of these legal-technical aspects, namely the regulation of the foreign affairs power according to constitutional law. This power is made up of the following elements: *treaty making, diplomatic relations, recognition of states and governments, and war and peace*. This study has been focused on the Kenyan experience.

The Constitution of Kenya does not seem to regulate the exercise of the foreign affairs power in a comprehensive fashion. The Constitution makes no mention of treaties, recognition of states and governments, or war and peace. It only grants the President "*the power to appoint a person to hold or act in the office of Ambassador, High Commissioner or other principal representative of Kenya in another country, and to remove from office any person holding or acting in any*

such office."ⁱⁱ This implies that the President has the power to conduct diplomatic relations and the primary responsibility for the conduct of foreign affairs. It is also recognised that being an executive function the foundation of such power is to be found in s. 23(1) of the Constitution which provides that:

"The executive authority of the Government of Kenya shall vest in the President and, subject to this Constitution, may be exercised by him either directly or through officers subordinate to him."

Our discussion, therefore, focuses on whether the Constitution should regulate the exercise of the foreign affairs power. If so, how should this be done? Should the constitution consider separately each of the elements of the foreign affairs power? Should this power be vested in the President alone or should Parliament intervene at any stage?

It seems clear that the conduct of the foreign affairs power is vested in the President; it is however unclear whether such power should be exclusive or unlimited. According to Nwabueze, *"the Africanness of the Presidency in Africa refers to the fact that it is largely free from such limiting constitutional devices, particularly those of a rigid separation of powers and federalism. It is the universal absence of such restraint mechanisms that is implied in the qualifying*

ⁱⁱ The Constitution of Kenya, Section 111.

between the government and its peoples.^{vii} The challenge is how to enlarge this area of confidence without jeopardising administrative effectiveness in decision-making processes.

The subject is broad and abstract. Throughout this study we have attempted to give an answer to each of the main questions, and we have tried to draw practical conclusions by suggesting some amendments and additions to the current Constitution of the Republic of Kenya. It is our hope that this study may profit the work of the ongoing constitutional review commission and help to streamline an important technical-legal aspect, namely the constitutional regulation of the foreign affairs power.

Luis G. Franceschi F.
Nairobi, December 1998.

^{vii} Sir Edward Grey expresses himself in the following terms when referring to the aim of diplomacy: '[It is] to enlarge the area of confidence between governments.' (See Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 American Journal of International Law (1983), at 257.) However, this view may be widened and applied to international relations in general.