

The Weaknesses of Constitution and What a Constitution is Meant to Perform

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ABSTRACT

This is purely a qualitative research based article that uses secondary sources of information. This article generally posits succinctly some obvious weaknesses of constitution and what constitution is meant to perform. The article reinforces the assertion held by many people that constitution success and its longevity as an instrument of governance could be a result of the weaknesses contain in the constitution. It also recognizes that different country's constitution is different from one another which may be due to different environmental factors and type of political structure adopted by a country and also the type of constitution that a country adopts, whether it is unitary, federal or parliamentary. The author's aim is however to show that generally constitution exhibits many weaknesses and also strengths, which could be a function to its workability and would help one to understand how constitution operates in the real sense and this would allow the worth of a constitution such as the Nigerian Constitution, to be measured against these functions and weaknesses. It is hoped that anyone contemplating a constitutional review would be able to measure these weaknesses against the strengths of their constitution for a better constitution.

Keywords: Constitution, Nigerian Constitution, Nigeria, parliament, political structure.

1. INTRODUCTION

The value of a constitution is often taken for granted. The assumption is that a constitution benefits: such as political stability, limited government, and guaranteed rights and liberties. However, constitution has many weaknesses, which are either specific or general depending of course on the nature of political structure, whether a government is federal, unitary, monarchical or republican. However the weaknesses of a constitution can be discerned in general form to apply to all forms of constitutions. The weaknesses can be found within the constitutions (internal) and also can also come from outside (external).

There are wide differences between constitutions; consequently one country's constitution is not the same as the other. Some have to provide for a federal or confederation structure; others are unitary; and some (like take over), that rules may have different degrees of specificity or generality. The manner in which the constitutions are expressed may also differ; some may be written down, whereas some may be discernible only through observation of actual conduct. A few are contained in no given text or texts. Some are never meant to be taken seriously. These distinctions are both evident and indispensable, but it will be seen that the motivations, which underlie them fall into distinct categories. That a federal document should contain material absent from a unitary one reflects a mechanical consideration. Therefore the type and structure of a constitution determine the inherent weaknesses, and strengths contain in any constitution.

2. WEAKNESSES

a. The Constitution is irrelevant in a changing political circumstance

No constitution reflects political realities and few set out specifically to do so. Generally, successful constitutions are sufficiently flexible to accommodate change within a broad end enduringly relevant framework. Those that are infinitely flexible are, strictly speaking, not constitutions at all. The USA's Constitution is an interesting constitution in this area. Its 'genius' has been its concentration on broad principles and the scope, which allows it to rectify its deficiencies, such ability to evolve and respond to new changes over the years. In recent years

constitutional amendments such as the separation of powers, federalism and individual liberty have continued to be respected albeit in renewed form. In contrast the constitution of the 4th French republic proved unworkable, became the emphasis is placed upon national assembly tended to produce a succession of weak and unstable government. In Nigeria, the constitution is flexible to amendment in some areas, but it is very inflexible or rigid in other areas, such as: a state having a state's religion and also the creation of state out of the existing states, yet this is an area of increasing political demands and sensitivity in the country's constitutional political setting. Constitution is seriously weak in area of political culture especially in a rigid constitution that is difficult to change. Culture and value are connotations that change with time but people political orientation does not change as events around them change, but constitution does not take this into consideration. For example the fact that a government is unpopular (simple survey) or (opinion poll) does not alter the stipulation of the constitution for a five years term in office. Instead the unpopular government would cling on to power until it sees its popularity improves in order to give him a chance of winning another term.

b. Constitution is incomplete

The documents referred to, as constitution is very much often incomplete, if not misleading, guides to actual practice that is what is often called the 'working constitution' or the 'governance' of a country. It would be serious error, for instance, to contrast art. III(2) of the US constitution with art. 6 of the French, and then conclude without more ado that the American President is not elected by the people. Also, it demonstrably the case that the rules included in one constitution may be omitted from others, so that each may be pro tanto incomplete. For example, so far as legal protection of social rights is concerned a starting point is provided by international law.

There are now a number of texts, which make provision for social protection. These include the international convention on social, economic and cultural rights in its preamble that "the idea of free human being enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights. The Covenant is wide ranging in its application, recognizing the right to work (Article 6) the right to just and favourable condition of work" (Art 7) the right to trade Unions and the right to strike (Article 8), the right to social security and social insurance (Article 9), the need for protection and assistance for the family and working mothers(Article10) , the right of everyone to an adequate standard of living "including adequate food, clothing and housing (Article 11) , the right of every one to enjoy the highest attainable standard of physical and mental health" (Article 12), and the right of everyone to education (Article 13). But economic and social and cultural rights are protected in international law not only by the ICESCR. Also important are the specialist agencies such as the ILO (International Labour organization) and regional treaties such as the Council of Europe's Social Charter, now a specialist agency of the UN (United Nations). According to Lee (1994) the principles of the ILO were re-affirmed and developed in the Declaration of Philadelphia in 1944 where those who care to look are reminded that " all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity"

There are other bodies such as the European social charter. The social charter is designed to improve the standard of living” and to promote “social well-being.” These provisions made constitution interesting, yet many countries do not feel obliged to adopt these provisions, and when they feel compelled to adopt some or all of them do qualify it in an adjective of subjectivity such as fundamental rights and directive principles. In most cases most of these provisions are not justiciable in the court of justice and of course subject to the adjective used in the constitution; “when the government economic and social resources are right”. This is a grave weakness of the constitution.

c. Constitutions are often the meaning ascribed to it by the courts

In countries where the law is respected, the constitutional text frequently becomes permeated with the interpretation given by the courts. This process enthuses Famworth (1983) is demonstrated in the statement of a standard introductory work that “the study of constitutional law, as that term is used in the United States, is chiefly the study of those decisions of the supreme Court of the United States that have interpreted the constitution. (p. 131). And even in France which has along history of hostility of judges towards the government, it is certainly the case that the 1958 constitution must be read in the light of the decisions of that body which it calls a mere council but which has become in effect a constitutional court.

Therefore the judges are the ones that give the constitution the force of law. The interpretation may not be what the people expect it to be, but the judges have performed their duties at the expense of the real intention of the constitution. In Nigeria opined Joseph (1995) the Presidential election of 1979 was the subject of constitutional interpretation by the judges. The constitution had stipulated that in order to win the executive presidential election, a candidate must win in two thirds of all the nineteen states in the federation, which mathematically was 12 two-thirds. As a state cannot be fractionalized it was hoped by most Nigerians that twelve two-thirds would be interpreted as thirteen. But the learned judges in their interpretation of what the constitution meant on the issue thought otherwise contrary to what the majority of Nigerians had thought the constitution meant.

d. The constitution is full of false claims

Very often Constitutions are susceptible to the needs and aspirations of the society it is written for. Constitutional rules guaranteeing individual rights and political competition may be irrelevant in societies with deeply entrenched collectivist values and social development. An example is the USSR Constitution before its collapse enshrined socialist values in its constitution that were unpopular with the masses but also failed to genre popular support for such value system. Also the USA enactment of voting rights for all black (American) after the civil War, according to Haywood (1997) was not upheld in the southern states of the USA until the 1960’s. A lot of what is written on constitutions can be simply promises. The two fundamental principles of a constitution opined Hepple (1955) are: first, the principal of liberty and the second is the principle of equality.

Marshall (1967) sees the first principle as political rights: our freedom to contract and own property on the one hand: and our freedom of association and expressions. For example, there is an increasing realization of these rights as the 20th Centaury wore on, and according to Marshall political democracy needed “Educated electorate” as a first decisive step on the road to the re-establishment of the social rights of citizenship in the twentieth century.

This doesn't tell us why it is necessary to meet citizens' basic needs but does give us an insight or the relationship between social and political rights. Below a certain level of the material and social well - being and of training and of education, people simply cannot take part as citizens. Those without an income, home, adequate health care according to Waldron (1993) are unlikely to have interest in polity and what happens in their environments, if they are unsure about food and shelter in the coming days for themselves and families. Yet constitutions of some countries make for these social and economic provisions but only of hallow promises.

This provisions on paper is good for the souls and minds of the people but one of false delusions which usually raises the hope of great majority of the people especially those of the developing countries, which to their surprise soon to find out that their basic rights as proclaimed by the constitution is nothing but an optical illusion- this can and does result in conflict between the oppressed, who have seen their basic rights denied and the government who are supposed to provide or deliver the basic needs. In the advanced world, social security is used effectively to allay disruption amongst the poor and destitute. Social security acts as a pre-condition of legal and political liberty, if constitutional rights are not to be empty promises.

e. Constitution is often enacted only with the interest of the majority

Usually, constitutions are enacted with the interests and values of the dominant groups. This in effect is good for the ethics of democracy, which works well when the majority group respect and recognizes the importance of the minorities people in their midst. Also very often, majority in their quest to consolidate what they see as their rights, can in the process of doing this caused anger and resentment in minorities, which can and do lead to friction and conflict of interest amongst the people in the society. Equally important is whether or not rulers and accords with the interest and value of the dominant groups respect a constitution. Germany's Weimar constitution, for example, despite the fact that it enshrined an impressive array of rights and liberties, was easily set-aside in the 1930's as Hitler constructed his Nazi dictatorship.

The UK's un-codified constitution is often said to prove unusual scope for abuse because it relies so heavily on the self-restraint of the government of the day. This became particularly apparent as the Conservative Government of the 1980-1990's exploited the flexibility inherent in Parliamentary sovereignty to alter the constitutional roles of institutions such as the civil service, local government and trade unions and some have argued substantially undermined civil liberties. In Nigeria the military can at will through a military coup tear up the constitution and start ruling by decree and edict. This is also through of any praetorian society where incidences of military take over and rebellions are common.

f. Constitution is clothed or written in legal jargon

The way constitutions are drafted or written is often beyond the average human comprehension. Usually judges and scholars carry out interpretations of the constitution, and the meaning depends on what scholars or judges have made of this test. Hence American behaviourists, such as Hepple (1955) stressed that the constitutional Law of the Law books might conceal more political reality than it reveals. Some of the weaknesses inherent in constitution is

that it is not clear whether constitution is a legal document or legitimate document and as a result it is often the case that both legality and legitimacy are often misunderstood, this makes constitution very awkward indeed. It is clumsy and messy both in interpretation and comprehension.

In a country with low literacy level this is a big problem. This is often the case in countries of feeble political institutions and weak political culture. Ghana, Pakistan, Kenyan, Uganda, and other third world countries fall within this problem. The members of these society may actually be acting ultra vires their constitution without them actually knowing that they are doing so. Respect for Law is not found in all societies and it is precisely this that explains the difference between the realistic constitution and the fictive constitution. Some societies notably those of the West are generally Law abiding hence the European Union court insists that the EU Treaty creates a community based on the rule of law. (less vent vs Parliament)

In society such as Western society the law affects in foro interno and not just by reason of their sanction. In society's such as these, the provisions such as constitution do effectively constrain the organs of government and empower large sections of the public. This simple example can take us further, as indicated earlier, they may well be dispute about the precise meaning of any particular constitutional provisions and for centuries they have been different schools of interpretation. Some aver that one can say 'what the text means'. Some cleave to what 'the drafters meant', some to 'what the reader understands' while there is a long common Law reverence for 'what the judges say it means'. The uncommitted observer at such debates would occasionally suspect that the method of interpretations selected is to some extent determined by the outcome sort to be achieved. But the main point is that all contestants believed that their view of a particular test is correct and their opponents are mistaken about the very same test. In neither the USA, Germany, France nor Russia etc does a knowledge of the constitutional test alone equate, even nearly to an understanding of political reality, and certainly not in other countries.

g. Constitution written and enacted by selected elites

Perhaps the greatest weakness of any constitution is the way the constitution is developed and enacted. In America (USA) America Constitution is revered by the Americans, because they regard their constitution as the act of the people, and in Britain people believe in parliamentary sovereignty of the constitution because of the respect in which the constitution is clothed. The same cannot be said of many countries, especially the developing countries, such as Nigeria, Ghana, Pakistan, etc because very often constitution is imposed on the people, without them having any say on the process or promulgation of it. Both the written and the enactment of the constitution is the preserve of some educated elites, very often the learned judges, academicians and politicians, who very often are handpicked by those in authority.

This lack of legitimacy and authorship of the constitution by its people attracts external destabilization agents such as the military take over, and abuses and flaunting of the constitution by the masses and politicians in general. In spite of the weaknesses inherent in constitution, the constitution is a supreme instrument in relation to other forms of law or regulatory instrument of any country and many societies regard it as such even though it is often flaunted and manipulated.

3. WHAT A CONSTITUTION MEANT TO DO

In its entirety constitution performs important functions, which are similar but somewhat different from its role. Some of the functions have already been discussed and from the (late twentieth century vantage point) intuitively regard as the most important functions a constitution should perform are: empowering of states, establish values and goals, provides government stability, protects freedom, and to legitimise regime. A detailed explanation of these functions is necessary here.

i. Empowering of State

Although the popular image of constitutions is that they limit government power, generally term as constitutionalism. Thus Nwanbueze (1973) calls this antithesis of government rule, the opposite is despotic government, which is the government of will, instead of law but a more basic function is that they set out the existence of states and make claims concerning their sphere of independent authority. The creation of new states whether through coup de tat, civil war, the fragmentation of larger states, or an amalgamation of smaller ones is invariably accompanied by the enactment of a constitution. Indeed it can be argued that such a state can only exist once they have a constitution, since without one they lack formal jurisdiction to which to lay claim over a particular territory or a governing apparatus that can effectively exercise that jurisdiction. Thus the State of Nigeria can be said to have come into existence between the period it gained her independence in 1960 and a republic in 1963 when it adopted a federal constitution, also India between 1947 and 1950, also the famous American Declaration of Independence in 1776 initiated the process through the USA achieved statehood. The need for empowerment applies to both supranational and substantial bodies, for example in the USA, India, Germany and many other countries of the world that operate a federal system, constituent provinces or states have their own constitutions in order to guarantee their sphere of authority relative to that of central government.

ii. Establishing values and goals

In addition to the function of laying down a framework for government as already posited, constitutions invariably embody a broader set of political values, ideals and goals. This explains why constitution cannot be neutral. They are usually entangled, more or less explicitly in ideological priorities. The creators of constitution hence seek to invest their regime with a set of unifying values, a sense of ideological purpose, and a vocabulary that can be used in the conduct of politics and this normally begins in the preamble of constitutional documents, which usually function as statements of national ideals.

Hence Haywood (1997) opined that the ideal can vary from commitment to democracy, communism, freedom or welfare state, to a belief in socialism, federalism, or Islam etc. According to Haywood (1997) the German's Basic Law states a determination to 'serve the peace of the world', and in doing this to eliminate the possibility of Nazi-style absolutism, and to correct any possible faults in the Weimar Constitution which might have contributed to its rise, while American (USA) Constitution stresses 'democracy, equality and liberty'. The former Soviet Constitution enthused (Haywood (1977) thus proclaimed the USSR to be 'a developed socialist society' (p.23).

In many cases these values are explicit and hence Beard argues that economic interests essentially shaped the provisions of the US Constitution, in particular the desire to protect the rising powers of the property less masses of the American population. Also the thirteenth and fourteenth Amendment of the American constitution recognizes the significance of racial division. In Nigeria, the constitution, Article 8, recognizes the importance of religion in a society and subsequently allows freedom to practice any religion but the constitution effectively conceals divisions that arise from religious divide.

iii. Providing government stability

Constitutions are organizational charts in that it allocates duties, powers and functions among the various institutions of government. Haywood (1977) calls this acts as ‘organization chart’, definitional guide or institutional blueprints’(p.365)

As such, they formulate and regulate the relationships between political bodies and provide a mechanism through which conflicts can be adjudicated and resolved. Thus the Indian constitution contains 400 articles of detailed and elaborate description of the powers and relationship between different organs of government and their functions. Although constitutions vary in their specificity and effectiveness, all constitutions fulfil the vital function of introducing measure of stability, order and predictability to the working of government.

iv. Protecting freedom

In liberal democracies, it is taken for granted that constitutionalism of the constitution is a right of the people, that curtailing the excesses of government is a recipe to protecting individual liberty. This is why constitutions tend to be viewed as devices for establishing and maintaining limited government. Invariably, constitutions lay down the relationship between the state and the individual, marking out the respective spheres of government authority and individual freedom. They do this largely by defining civil rights and liberties, often through the means of Bill of rights. The impact of liberal constitutionalism has ensured that in many cases civil liberties such as freedom of expression, freedom of speech, freedom of religious worship, freedom of assembly and freedom of movement, are recognized as ‘fundamental’ in that they are constitutionally guaranteed.

A growing number of states have also, entrenched in their constitutions a range of economic and social and cultural rights, such as the right to health care, the right to education and the right to work, these however have caused controversy in that it is mainly dependent on the economic and social resources available to the government in question. In the Indian Constitution this acknowledge through the qualification that the right to work, for example, is secured ‘within the limits of economic capacity and development, and in Nigeria, the right to education can be seen in article 18 and it provides that the state shall direct its policy towards ensuring equal and adequate educational opportunities at all levels. And it also declares that the government shall eradicate illiteracy and to that end shall endeavour whenever practicable provide for free education at all level.

v. Legitimizing regimes

Perhaps the last phase in the jigsaw of constitutions functions is the fact that it helps build legitimacy for a country. This explains the wide spread use of constitutions, even for minimal states or façade states. Iraq recently wrote and

enacted a new constitution after its previous constitution was abruptly brought to ruin through conquest. The adoption of a new constitution was to give her a new beginning and also to gain international recognition as an independent country. The existence of a constitution is almost a prerequisite for a state's membership of the international community and its recognition by other states, but more significantly, can build a sense of legality, respect and belonging in the mind of domestic population. This is possible because a constitution both symbolizes and dominates the values of the ruling elite, and invests the governmental system with a cloak of legality. This is usually propagated by the creator as a document of historical importance, or as a symbol of national purpose and identity. If these are the functions a constitution is meant to perform, we can then measure the worth of the Nigerian Constitution against these functions to ascertain whether the constitution is failing or working properly as a constitution. There is no doubt that Nigeria like any other country of the world has a constitution if only on paper. It exhibits every characteristic a constitution should have. It is a federal constitution and this is spell out in the constitution and denotes a federal characteristics. The fact that it has been marred by many trajectories of disturbing consequences does not make it less of a constitution than any other constitutions of the world. The Nigeria constitution is more voluminous and better written than most constitutions. It covers almost 300 pages of rules and guidance of meanings and magnitudes but has very much often been abused by its custodians!

The question the writer will attempt to answer in his next writing is whether this constitution has failed its people or it is the people that have failed the constitution. The contextual characteristics of the constitution would be conceptualized and analyzed to ascertain area of weaknesses and strengths that allows political manipulation, which has given the constitution a cry of failure.

4. CONCLUSION

The weaknesses inherent in constitutions are profound reasons for drafting a new instrument of government at all times in many countries especially the developing countries, which may be reacting to what goes on in their societies. Most constitutions fall between the extremes of fictive or decorative passages as well as omitting many of the powers and processes met within real life. But why constitution generally performs the same functions and generally contains general weaknesses, it is important to recognize that the weaknesses inherent in one constitution may be different from that of another country's because of different socio-economic, political and cultural differences that exist in various countries. Thus the weaknesses inherent in the Ghana Constitution will be similar in some areas to that of the USA, Nigeria, Germany, Ireland, India, or Canada, but will be significantly different from those countries because of differences in environmental variable under which these countries operate. Therefore constitution as an act of the people must be carried out within the environment of those to be governed by it and in doing so must put into consideration the cultural dimension of the people.

5. SUMMARY

There are wide differences between constitutions; consequently one country's constitution is not the same as the other. Some have to provide for a federal or confederation structure; others are unitary; and some (like take over), that rules may have different degrees of specificity or generality. The manner in which the constitutions are expressed may also differ; some may be written down, whereas some may be discernible only through observation

of actual conduct. And thus it with the constitution of state, and in particular, that of the British include quite different legal systems within the one state. Some have to handle serious internal ethnic, linguistic, and religious differences, while others contain manifesto – like proclamations and show a tendency to the picturesque by, for instance, the adoption of a national animal (always attractive, but rarely edible). A few are contained in no given text or texts. Some are never meant to be taken seriously.

These distinctions are both evident and indispensable, but it will be seen that the motivations, which underlie them fall into distinct categories. That a federal document should contain material absent from a unitary one reflects a mechanical consideration, whereas whether the constitution should include manifesto- like pronouncements or a Bill of Rights reflects value preferences.

In addition to the function of defining powers and duties and relationships with other bodies, a constitution fulfils two related purposes - those of definition and evaluation. In its defining function, the constitution is both descriptive (and normative).

Differently expressed, the constitution will both define the manner in which the rules in fact operate and dictate what ought to happen in a given situation. As such, the rule or normative statement in question sets standard of conduct or behaviour which is regarded as correct and which is expected to be adhered, to by those to whom the rules are addressed. These constitutional rules –whether written or unwritten – facilitates the stability and predictability of behaviour.

Further, when such normative rules exist, they provide a standard against which actual conduct can be judged or evaluated. If the accusation is made that a member of an organization has acted ‘unconstitutional’, the speaker is claiming that those accused have acted in a manner which breaches the required standards of behaviour as laid down in the body of generally accepted pre-determined normative rules. In this sense, a constitutional rule, in addition to being descriptive, normative and predictive, is evaluative and judgmental.

REFERENCES

- 1) Farmworth, A. (1983). Introduction to the Legal System of the United Kingdom, 2nd ed. London Oceania.
- 2) Haywood, A.P. (1997). Foundation of Politics. Hampshire: Macmillan.
- 3) Hepple, B. (1995). Social Values in European Law, CLP p.51.
- 4) Joseph, I. (1995). Shadow of a Great Nation. Bubeo Publishing Ltd.
- 5) Lee, E. (1994). The Development of Philadelphia; Restropect and Prospect. International Labour Review 467.
- 6) Les Vent vs Parliament 1986 ECR1365.
- 7) Nwanbueze, B.O. (1973). Constitutionalism in the Emergent States. London and Enugu, C. Hurst and Company and Nwamife Publishers Ltd.
- 8) Waldron, J (1993). Liberty Rights, CLP. P.281: Case 294 slice 83, Patti Ecologiste.