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CONSTITUTIONAL DILEMMAS:

*The Omission Of Provisions On A
Defecting President Or An In-operative
Vice President*

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CONSTITUTIONAL DILEMMAS:

**The Omission Of Provisions On A
Defecting President Or An In-operative
Vice President**

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PREFACE

As part of a series of lectures on constitutional reforms, The Institute of Economic Affairs (IEA, Ghana) is pleased to publish the full text of a paper delivered by Dr. Vladimir Antwi Danso, a Senior Research Fellow of the Legon Centre For International Affairs (LECIA), entitled, “The Omission of Provisions On A Defecting President Or An In-operative Vice President”.

The author in his paper discusses the omissions of provisions on a defecting president in Ghana's Constitution, chief among these being the silence on the procedure in the event of the vice president's position becoming vacant either through death or if he or she should become incapacitated. The Constitution is also silent on what should happen should the sitting president and his vice fall out. The author proposes a number of recommendations to address this lacuna.

With the establishment of the Constitution Review Commission whose remit is to receive memoranda from the general public and institutions with a view to recommending amendments to the Constitution, it is hoped that this and other lapses in Ghana's Constitution will be addressed to avert any possible constitutional crises in future.

I invite you to read this publication. We hope you find it useful.

Mrs. Jean Mensa

Executive Director
The Institute of Economic Affairs

INTRODUCTION

The tragedy of democracy is the quest for a well-reasoned contract theory of government and society that satisfies “human aspiration and happiness”. Thus human aspiration and happiness consist, as Francis Wayland held, “In the gratification of our desires within the limits assigned to them by our Creator.... And hence the greatest happiness, of which man is, in his present state, capable, is to be attained by conforming his whole conduct to the laws of virtue that is, to the will of God”.¹ If Wayland found the well-reasoned contract between government and society in man's conforming to Divine will, which he equates to the laws of virtue, then today, those laws of virtue that act as the denominator of the 'well-reasoned contract' are found usually in a document called the 'Constitution'.

Constitution

A constitution is therefore a set of rules, often codified as a written document which defines the framework for organizing a socio-political community (usually states). In that sense a constitution defines the fundamental

¹Wayland Francis, **The Elements of Moral Scene**, 2nd Edition, (orig, 1835; Boston: Gould and Lincoln, 1872) p.103.

principles; it establishes the structure, procedures, powers and duties of a government and thus lays the foundation upon which society is structured.

History is replete with various forms of codified laws. Perhaps the earliest known prototype of a constitution was that issued by the Sumerian King, Urukagina of Lagash ca 2300 BC. In 621 BC the infamous 'Draconian' Laws were codified by Draco for Athens; In 594 BC the Solonian Constitution replaced the Draconian rules. In his famous works "Constitution of Athens, Politics, and Nicomachean Ethics, Aristotle explores the various constitutions of his day, including those of Sparta, Athens, and Carthage, concluding that the best constitution codifies elements or a mixture of the monarchy, aristocracy, and democracy.

The Romans codified their constitution in 449 BC as the Twelve Tables. The Edict of Ashoka established constitutional principles for the 3rd Century BC Maurya King's rule in ancient India. The Visigothic Code of Euric (471) was the first of a series of Constitutions for the Germanic peoples in the early middle ages. Japan's seventeen-article constitution, written in 604, reportedly by Prince Shotoku, is an early example of a constitution in Asian political history. The Constitution of Medina,

generally believed to have been drafted by Prophet Mohammed in 622, is reported to have established the basic rules for rights, judicial processes, warfare, taxes and civil disputes. In Kievan Rus, the Pravda Yaroslava, compiled by Yaroslav The Wise (the Grand Prince of Kiev) in 1017 for the people of Novgorod formed the basis for Ruskaya Pravda (1054) that became the constitution of all Kievan Rus. King Henry I's proclamation of the Charter of Liberties in 1100 bound the King for the first time in his treatment of the clergy and nobility. It was this idea that was extended by the English barony when they forced King John to sign the Magna Carta, the most important article of which relates to 'habeas corpus'. In 1236, Sundiata Keita decreed an oral constitution called the Kouroukan Fonga, federating the Mali Empire. The Fetha Negest remained the supreme law of 'Ethiopia' until 1931, when a modern-style constitution was granted by Emperor Haile Selassie I. In 1349 and 1351 the Emperor of Serbs and Greeks, Stefan Dwan, created and enforced the Dusan Code. The Ancestral Injunctions 2 of the Honguru Emperor in China shaped people and society for about 250 years.

²The Ancestral Injunctions were first published in 375 and served later, in a real sense, as the Constitution of the Ming Dynasty for 250 years

Modern Constitutions

In all these historical documents, the need for re-crafting portions was often felt, especially at times of 'dilemmas'. The earliest written constitution still governing a sovereign state today may be that of San Marino. The first North American Constitution is acknowledged to be that of the Colony of Connecticut, 'The Fundamental Orders', adopted in 1639. England had two short-lived written constitutions during Cromwell's rule, known as the Instrument of Government (1653), and Humble Petition and Article (1657). Constitutions are amended, changed or rewritten based on historical experience.

The 1992 Constitution

Ghana's 1992 Constitution has 26 Chapters and two schedules spanning 226 pages. In spite of its volume, there still are grey areas. It is clear from the articles that our past experiences have informed the platform of the Constitution. One such example is Chapter Six: The Directive Principles of State Policy. In my candid estimation, this is to do away with ideological differences and set a canvass for Ghana's development (that would not be ideologically biased).

Again, we may say that the 1992 Constitution is a hybrid constitution that took into account the pitfalls of the purely Westminster-type 1969 Constitution and the hybrid presidential system of 1979. In the former, the Westminster prime ministerial system, when a minister was appointed from among the Members of Parliament, a bye-election was to be held. The Head of State (President) was only a ceremonial head. The Prime Minister was the leader of the largest party in Parliament, but who must have also won his seat. In fact, executive power rested with the Prime Minister. These were found to be costly, divisive, and unsatisfactory.

The 1979 Constitution was a hybrid constitution of a peculiar kind. We ushered in a presidential system which also allowed ministers to be appointed from outside parliament. Perhaps this was to avoid the costly luxury of bye-elections that characterized the previous era. But this was not without its own problems. MPs would rebel – the whip system was not effective. Reference here is to the rejection of the PNP's (under Dr. Hilla Limann) 1981 budget, widely acknowledged as having been orchestrated by frustrated Majority-side MPs.

Notice that the 1992 Constitution may have wisely avoided any such scenario by the “procurement” of Art 78(i) which states as follows:

Ministers of State shall be appointed by the President with the prior approval of Parliament from among members of Parliament or persons qualified to be elected as members of Parliament, except that the majority of Ministers of State shall be appointed from among members of Parliament.³

In effect each constitution tries to avoid the mistakes or problems of the past. This notwithstanding, no constitution is able to satisfy all conditions in the absolute. It is against this background that room is often given for amendments to the constitution to be made.

Amendments

Currently in Ghana, the debate and/or discourse is out there for the amendment of portions of the Constitution considered either as obsolete or an impediment to progress

³Constitution of the Republic of Ghana, 1992 p.63

or simply an omission. Already, by a Legislative Instrument, a Constitutional Review Commission has been set up with a remit to receive memoranda from the general public and institutions etc., with the view to recommending amendments to the Constitution.

In 1980 much pressure was put on the Limann administration to initiate moves to abolish the Transitional Provisions of the 1979 Constitution. In the writing of the 1992 Constitution, same positions were declared: to ensure that no Transitional Provisions were entrenched.

Within a few years of experimenting with the 1992 Constitution, some contradictions have been observed. Indeed, the Constitution was put to test before it became operational. The opposition parties boycotted the 1992 parliamentary elections after complaining of irregularities in the earlier presidential elections. A constitutional crisis emerged since only the NDC (supported by surrogate parties of the NCP and EGLE) had put up a presidential candidate. Various attempts were made to abandon the parliamentary elections, under an arrangement, where the victorious NDC candidate (Jerry John Rawlings) would be allowed to rule as President with a non-partisan parliament. Actual contestation would be employed in 1996.

Incidentally, all the political parties seemed to have bought into this idea until Mr. B.J. Da-Rocha intoned: “You would not need a JSS graduate to send you to court, saying all that you have done is unconstitutional”. So the coalition parties in the Progressive Alliance went their separate ways in order to give constitutionality to the December 1992 election.

Along the line again the position of Mr. Arkaah was challenged. The Constitution had been silent on a number of issues. Can a party loan to another party its flag bearer to become the Vice-Presidential running mate of the latter? The Electoral Commission came to the rescue: Until candidates are registered with the EC, there would be nothing on the books of the EC called Candidate. (Ref, to Art. 63 (a) (b) and (d).) Yet again there was a problem over which the Constitution was silent. The incompatibility of such a hybrid team (the Vice-President coming from another party). When the Jerry-Arkaah honeymoon was over, it was clear we were going to have another constitutional crisis. Both the NCP (Arkaah's party) and the NDC demanded Arkaah's resignation, obviously for different reasons. The NCP thought their candidate was being bullied and it was time to assert their independence. The marriage had been unprofitable. The NDC, on the

other hand, felt that Arkaah was being obstructive. If Arkaah had indeed resigned we would have had a constitutional crisis for where-as Art. 60 (6 – 10) directs what in the absence of a President a Vice-President, acting in his stead, could do, there is nothing in the Constitution to tell us what the opposite is. Not even Art. 69 takes care of this. To resolve some of the issues, some of the un-entrenched clauses were amended by Parliament to make the Vice-President virtually redundant. Arkaah could not be sacked. Another crisis loomed when in 1996 Arkaah moved back to lead the Peoples Convention Party (still not having resigned as Vice-President). And what does the constitution say about that? Nothing!

We seem to be aware of these issues, hence the current discourse. This discourse has been further enlivened by the situation in neighboring Nigeria, where for months president Yar'Adua has been unable to perform his duties as president and had not also formally handed over power to his vice. Somehow, Nigerians used the constitutional order to ameliorate the situation. Unlike Ghana's 1992 Constitution, the Nigerian 1999 Constitution is explicit on a number of issues.

Comparing Nigeria and Ghana

ISSUE	NIGERIA'S CONSTITUTION	GHANA'S CONSTITUTION
Tenure of office of President	Article 135	Article 66
Removal of President from office	Article 143	Article 69
Permanent incapacity of the President or Vice President	Article 144	Article 60? None of the clauses here is explicit enough
Acting President during temporary absence of President	Article 145	Article 60
Death of the President-elect before oath of office	Article 136	Nothing. We may resort to Art. 60

What remains is the boldness to declare Yar'Adua unfit to continue as President.

Ghana's Situation

In Ghana's situation, there are clearly no provisions, explicitly made in our Constitution on a 'Defecting

President' or a vacant or inoperative Vice-President. However it seems to me that there are enough provisions to address the former and not the latter. Arts. 59, 60 (6), (7), (8), (10) and (11) deal specifically and adequately with the absence and in-operativeness (incapacity) of the President. Indeed Art. 60 (11) deals with the absence of both the President and the Vice-President. If both the President and his Vice, according to Art. 60 (11) "are unable to perform the functions of President, the Speaker of Parliament..." is entitled to perform those functions. But the snag here is, what if all three are unable to perform the functions of a President. Well, the Constitution is silent, but could otherwise also not go on ad-infinitum, specifying at every turn in the chain of command what is to be done. The Constitution perhaps assumes that such a situation is remote.

Art. 60

(6) Whenever the President dies, resigns or is removed from office, the Vice-President shall assume office as President with effect from the date of the death, resignation or removal of the President.

(7) Where the unexpired term served by the Vice-President under Clause (6) of this article exceeds half the term of a President, the Vice-President is subsequently only eligible to serve one full term as President.

(8) Whenever the President is absent from Ghana or is for any other reason unable to perform the functions of his office, the Vice-President shall perform the functions of the President until the President returns or is able to perform his functions.

(9) The Vice-President shall, before commencing to perform the functions of the President under clause (6) of this article, take and subscribe the oath set out in the Second schedule to this Constitution in relation to the office of President.

(10) The Vice-President shall, upon assuming office as President under clause (6) of this article, nominate a person to the office of Vice-President subject to approval by Parliament.

(11) Where the President and Vice-president are both unable to perform the functions of the president, the Speaker of Parliament shall perform those functions until the President or Vice-President is able to perform those functions or a new President assumes office, as the case may be.

As already indicated, whereas the Constitution may be said to deal adequately with the absence or incapacitation (including even removal of office, (Art. 69) of the President, there seems to be inadequate provisions on the Vice-President in similar situations. Most of the provisions relating to the President are explicitly stated to also relate to the Vice-President. Eg. Art. 60 (3) notifying that the provisions of Art. 62 apply to a candidate for election as Vice-President. But Art. 60 clauses 6 – 10 are explicit on what the Vice does in the absence of the President. But what does the President or Parliament do in the absence of a Vice-President, either through vacation, removal from office or death? Consideration may therefore be given on this in our deliberations.

A Word about Amendments.

It must be noted that ours is a codified constitution. Of course, most states in the world have codified constitutions. Codified constitutions are often the product of some dramatic political change, such as a revolution. The process by which a country adopts a constitution is closely tied to the historical and political context driving this fundamental change. The legitimacy (and often the longevity) of codified constitutions has often been tied to the process by which they are initially adopted. Naturally therefore, our constitution must have had a history. And we have stated so.

The framers of the Constitution were aware that changes would be necessary if the Constitution was to endure as the nation grew. However, they were also conscious that such changes should not be easy, lest they permit ill-conceived and hastily passed amendments. On the other hand, they also wanted to ensure that a rigid requirement of unanimity would not block action desired by the vast majority of the population, hence, the recourse to referendum, where the entrenched clauses are concerned.

Let us note that The US Constitution has twenty-seven amendments. The first ten, collectively known as the Bill of Rights, were ratified simultaneously by 1791. The following seventeen were ratified separately over the next two centuries.

The amendments that became the Bill of Rights were the last ten of the twelve amendments proposed in 1789. The second of the twelve proposed amendments, regarding the compensation of members of Congress, remained unratified until 1992, when the legislatures of enough states finally approved it; as a result, after pending for two centuries, it became the Twenty-seventh Amendment.

Yes, there are several gray areas in our Constitution. We have tested the Constitution enough and we can now afford to make those changes, necessary to allow for smooth development. But we must hasten slowly. Where the issue under discussion is concerned, few clauses may be added to Art. 60, to take care of the omissions. My personal view about codified constitutions is that, the more verbose they are, the more it makes the development process slow and cumbersome.

CONCLUSION

Finally, the exercise we are embarking upon requires meticulous use of caution. In this country of ours where politics tends to intrude into decision-making of any kind, we need to be extra cautious. Between the text and practice of every constitution, there is always a gap to be filled not by many amendments, but by true knowledge and understanding of that fundamental document called The Constitution. I wonder how many people understand what is going on; how many people know that the Constitution is the fountain from which every aspect of their daily lives draws water. I believe that more attention should also be drawn to this, lest we have a constitution, perfect in text but warped under political contours in practice.